[ORAL ARGUMENT SCHEDULED FOR FEBRUARY 17, 2016]
No. 15-5217

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN CIVIL LIBERTIES UNION and
AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs–Appellants,

v.

CENTRAL INTELLIGENCE AGENCY,

Defendant–Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR PLAINTIFFS–APPELLANTS

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INTRODUCTION

The CIA contends it can classify legal analysis—indeed, that it can classify anything at all—so long as it relates in some way to drone strikes. This Court and the Second Circuit have compelled the agency to acknowledge that it possesses records relating to drone strikes, but the CIA argues—extending the "fiction of deniability"[1] it advanced two years ago—that it should not be required to describe the records or explain on the public record why they are being withheld. The agency argues that this Court should defer, as the district court did, to the agency's judgment that nothing in the withheld records can be released without compromising properly classified information. It contends that it would be inappropriate for this Court to do otherwise.

This Court should reject these arguments. Congress enacted FOIA to ensure that the public would have access to official records—and particularly to agency law and policy—because it believed that such access was a prerequisite to a functioning democracy. Congress was concerned especially about secrecy and selective disclosure relating to national-security policy—about cases in which overbroad secrecy might be paired with patterns of "strategic and selective leaks at

[1] *ACLU v. CIA*, 710 F.3d 422, 431 (D.C. Cir. 2013).

very high levels of the Government."[2] In other words, the statute was enacted for cases precisely like this one. To give the CIA what it asks for here—essentially, a categorical exemption from FOIA—would defeat the statute's core purpose.

SUMMARY OF ARGUMENT

The CIA reads FOIA's narrow exemptions too broadly, and it fails to appreciate the consequences of the government's previous disclosures.

The CIA has not justified the withholding of the legal memoranda under Exemption 1. The agency is authorized to withhold legal analysis under Exemption 1 only to the extent the analysis is inextricably intertwined with properly classified facts. The CIA's sweeping construction of the phrase "pertains to" in Executive Order 13,526 is inconsistent with the structure of the Executive Order, and with the text and purposes of FOIA. Even if the CIA's construction were correct, the agency's Exemption 1 argument would still fail because it is not plausible that the disclosure of pure legal analysis—that is, legal analysis not intertwined with properly classified facts—would harm national security.

Nor has the CIA justified its withholding of the legal memoranda under Exemption 5. The agency's public declarations are legally insufficient to establish the application of any of the common-law privileges the agency invokes.

[2] Tr. of Oral Argument at 12:19–21 (question of Griffith, J.), *ACLU v. CIA*, No. 11-5320 (D.C. Cir. Sept. 20, 2012).

Moreover, the CIA's invocation of the presidential-communications privilege is deficient because the President has not personally invoked the privilege, and because the privilege does not apply to records that regulate agency conduct. Even if one of the common-law privileges invoked by the CIA applied here, the agency would still be required to disclose the withheld legal memoranda to the extent they contain the agency's effective law and policy. The working-law doctrine, which overcomes all of the Exemption 5 privileges the CIA invokes, forecloses the CIA from withholding the legal framework for the drone program.

Even if the legal memoranda were once protected in their entirety under Exemptions 1 and 5, the CIA cannot lawfully withhold them in their entirety if they contain legal analysis or facts that the government has officially disclosed—and there is good reason to believe that some of the memoranda do. The CIA's argument relies on an overly rigid reading of this Court's official-acknowledgement test.

Finally, the CIA has not established that all of the summary strike data is protected by Exemption 1. The facts and statistics Plaintiffs seek are not themselves intelligence activities, sources, or methods protected by Exemption 1, and the disclosure of these facts and statistics would not have the effect of revealing intelligence activities, sources, or methods. In any event, it is not

plausible that the disclosure of the information Plaintiffs seek, with appropriate redactions, would cause harm to national security.

ARGUMENT

I. The CIA has not justified withholding the legal memoranda under Exemptions 1, 3, or 5.[3]

A. The CIA has not established that the legal memoranda are protected by Exemption 1.

There is no dispute that the requirement of section 1.4 of Executive Order 13,526—the "category" requirement—is satisfied where information "pertains to" one of the classification categories. The dispute is about what that standard means. As Plaintiffs have explained, to read "pertains to" as broadly as the CIA does would give no significance to the fact that the Executive Order uses specific and relatively narrow terms to describe the kinds of records that can be classified. Pl. Br. 15–16. Reading the phrase so broadly would also allow the CIA to develop a body of secret law. Pl. Br. 18–19.[4] And reading it so broadly would render the category requirement nearly meaningless. After all, what information relating to

[3] Plaintiffs use "legal memoranda" to reference the eleven CIA memoranda and the May 2011 White Paper that have been withheld in whole or part. Pl. Br. 7 & n.5.

[4] Contrary to the CIA's claim, CIA Br. 36, Plaintiffs do not contend that the "working law" doctrine—a doctrine that relates to Exemption 5—"defeat[s]" Exemption 1. Plaintiffs' argument is simply that Exemption 1 should not be given such a broad scope that it defeats the core purposes of FOIA, one of which was the elimination of secret law.

the CIA would not relate, in *some* way, to "intelligence activities" or "foreign activities of the United States"? If the CIA is correct, then the carefully drafted classification categories are wasted words, because they could all be replaced by the phrase "relates in some way to national security."[5]

Importantly, the phrase "pertains to" was inserted into the Executive Order as part of an effort to *limit* classification and *increase* government transparency; it replaced the word "concerns." *Compare* Exec. Order 13,526 § 1.4, *with* Exec. Order 13,292 § 1.4; *see* Presidential Memorandum, Implementation of the Executive Order, "Classified National Security Information," 75 Fed. Reg. 733 (Dec. 29, 2009). It is ironic that the CIA uses this phrase as the lever for an argument that would make anything that the CIA touches eligible for classification. Pl. Br. 17–18.

Responding to Plaintiffs' category-requirement argument, the CIA points to the Executive Order's requirement that the government establish that disclosure

[5] The CIA's claim that Plaintiffs "did not contest" that the withheld legal analysis pertains to the "foreign relations and foreign activities of the United States," CIA Br. 29, is incorrect. *See* Pls.' Opp'n & Cross-Mot. for S.J. 26 n.32 (D.D.C. Dec. 19, 2014), ECF No. 69 (contesting CIA's reliance on section 1.4(d) of the Executive Order). Moreover, the CIA invoked section 1.4(d) only with respect to the May 2011 White Paper, and not with respect to the remainder of the legal analysis at issue here. *Compare* Lutz Decl. ¶ 23 (JA 91–92) (invoking both sections 1.4(c) and (d) to withhold the May 2011 White Paper (JA 148–69)), *with id.* ¶ 24 (JA 92–93) (invoking only section 1.4(c) "with respect to the other legal memoranda at issue").

would cause identifiable harm to national security. CIA Br. 31. As Plaintiffs have explained, however, the Executive Order was plainly meant to impose two distinct substantive limitations on the classification power. Pl. Br. 16–17. The CIA's argument that the harm requirement will continue to limit the classification power even if the category requirement is rendered a nullity misses that point. And, significantly, the category requirement the CIA seeks to eliminate here is one that courts are well equipped to enforce, *see, e.g.*, *CIA v. Sims*, 471 U.S. 159, 169–70 (1985) (adopting a limited definition of "intelligence sources and methods"); *Weissman v. CIA*, 565 F.2d 692, 694–96 (D.C. Cir. 1977) (same), whereas courts often defer to the CIA's assertions regarding potential harm, CIA Br. 26, 31. Eliminating the category requirement as a meaningful limitation on classification would eliminate the only significant external check on overclassification.

The relevant question is not whether the withheld legal analysis "relates to" a classification category but whether its disclosure would reveal information described in one of those categories—put another way, whether the legal analysis is inextricably intertwined with such information. *See* Pl. Br. 19–23. There is good reason to believe that at least some of the legal analysis at issue here can be disentangled from properly classified facts. Pl. Br. 19–20.

Moreover, the CIA's position would be untenable even if it were true that

legal analysis could be classified whenever it (merely) related to a classification category. This is because the disclosure of "pure" legal analysis would not "cause identifiable or describable damage to the national security," Exec. Order 13,526 § 1.4.[6] To be sure, the disclosure of legal analysis might sometimes cause harm, but only where it would disclose independently classified facts. Thus, whether one approaches the issue under the category requirement or the harm requirement, the question is essentially the same: Can the withheld legal analysis be disentangled from properly classified facts?[7]

This is a question the district court did not seriously engage. The court did not even examine the withheld analysis *in camera*; instead, it deferred to the CIA's classified affidavit, and it accepted the agency's assertions that segregation was impossible and that "any isolated words or phrase that might not be redacted for release would be meaningless." JA 222. The CIA observes that district courts are not obliged to review classified records *in camera*. CIA Br. 32. But Plaintiffs'

[6] The government says Plaintiffs have waived this argument, CIA Br. 28 n.4, but Plaintiffs devoted an entire section of their district court brief to the argument that the court should not defer to the agency's claims of harm. Pls.' Opp'n & Cross-Mot. for S.J. 17–19 , ECF No. 69.

[7] As noted above, courts often defer to executive's predictions of harm on the theory that the executive is best situated to make the predictions. *See, e.g.*, *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981). But the CIA is not well situated to answer the question of whether disclosure of "pure" legal analysis will cause harm.

argument below was not that district courts are obliged to review classified records *in camera* but that the district court was obliged to do so *in the unusual circumstances presented here*. Pl. Br. 20–23.[8]

Even if the district court did not abuse its discretion in declining to review the records *in camera*, this Court should now conduct the review that the district court did not.[9]

B. The CIA has not established that the legal memoranda are protected by Exemption 5.

1. The district court erred in holding that the CIA was not required to justify its Exemption 5 withholdings on the public record.

The CIA concedes that its public declarations do not establish the

[8] The CIA appears to contend that legal analysis is withholdable under Exemption 3 as well as Exemption 1, but it does not explain why. CIA Br. 45–46. The phrase "pertains to" does not appear in Exemption 3 or in the withholding statutes the agency invokes in reliance on Exemption 3, and there is no serious argument that legal analysis is itself an intelligence source or method, *see N.Y. Times Co. v. DOJ*, 756 F.3d 100, 119 (2d Cir. 2014).

[9] Notably, courts that have actually reviewed legal analysis relating to the targeted-killing program concluded that some analysis had been unlawfully withheld. *See N.Y. Times*, 756 F.3d 100 (publishing July 2010 OLC Memorandum); Mem. Decision and Order, *ACLU v. DOJ*, No. 12 Civ. 794, 2015 WL 4470192 (S.D.N.Y. July 16, 2015) (ordering full or partial release of seven records—three of which belonged to the CIA—related to targeted killing), ECF. No. 128, *appeals docketed*, Nos. 15-2956 (2d Cir. Sept. 18, 2015) & 15-3122 (2d Cir. Oct. 2, 2015); *Leopold v. DOJ*, No. 14-cv-168, 2015 WL 5297254 (D.D.C. Aug. 12, 2015) (ordering disclosure of passages of May 2011 White Paper, a record that is also at issue in this appeal), *appeal docketed*, No. 15-5281 (D.C. Cir. Oct. 20, 2015).

applicability of the privileges it invokes, CIA Br. 35, but it contends that its classified affidavit was sufficient to carry its burden. It was not.

While in rare circumstances it may be impossible for an agency to justify its withholdings with public affidavits, it is settled in this Circuit—and has been since *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973)—that an agency cannot satisfy its burden under FOIA merely by citing an exemption and providing other material *ex parte*. *See Mead Data Cent., Inc. v. Dep't of Air Force*, 566 F.2d 242, 250–51 (D.C. Cir. 1977) (explaining that the government cannot prevail in a FOIA action where the plaintiff is "deprived of the opportunity to effectively present its case to the court because of the agency's inadequate description of the information withheld and exemptions claimed"); *see also Oglesby v. Dep't of Army*, 79 F.3d 1172, 1184 (D.C. Cir. 1996); *PHE, Inc. v. DOJ*, 983 F.2d 248, 250 (D.C. Cir. 1993); *King v. DOJ*, 830 F.2d 210, 224 (D.C. Cir. 1987). It is settled law that an agency invoking a FOIA exemption must "provide a public affidavit explaining in as much detail as is possible the basis for its claim." *Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976).

The CIA contends that requiring it to justify its withholdings on the public record would compromise the interests the exemptions were meant to protect, CIA Br. 35–36, but that is not plausible. While it is possible that the CIA cannot

provide a *full* justification for its withholdings on the public record, here it has hardly provided any justification at all. It has withheld eleven responsive memoranda on the basis of Exemption 5, but it has refused to say who wrote them, when they were written, when they were sent, to whom they were sent, what topics they address, how long they are, or anything at all about the circumstances in which they were written. *Cf. Oglesby*, 79 F.3d at 1184 ("The affidavits offer no functional description of the documents; [The National Security Agency] has failed to disclose the types of documents, dates, authors, number of pages, or any other identifying information for the records it has withheld."). The CIA invokes the attorney–client, deliberative-process, and presidential-communications privileges, but it has refused to say which privileges attach to which memoranda. At one point, it says the memoranda "might describe the legal parameters of what an agency is permitted to do," CIA Br. 23—a description that only calls further into question whether the privileges the agency invokes actually apply—but it supplies no information beyond that.

The CIA's disregard for the public-justification requirement is particularly remarkable because the last time these parties were before this Court, the Court expressly caution the CIA that it would view a response of the kind the agency has offered here—only barely distinguishable from a "no-number no-list" response—

with extreme skepticism. *ACLU v. CIA*, 710 F.3d 422, 433 (D.C. Cir. 2013) (stating that a "radically minimalist" *Vaughn* index could be justified only with a "particularly persuasive affidavit"). Despite that warning, the parties are back before this Court in almost the same posture. Two years later, the CIA has disclosed virtually nothing—no released documents, no description of withheld records, and no public justification for its claims of exemption. In light of the CIA's intransigence, affording the agency yet another opportunity to justify its withholdings on the public record would only give the agency opportunities for further delay. The agency's failure to comply with the public-justification requirement, however, supplies another reason why this Court should review at least a sample of the withheld records *in camera*.

2. The CIA has not justified its reliance on the presidential-communications privilege.

The CIA invokes the presidential-communications privilege to justify its withholding of the legal memoranda, or some subset of them. The agency has not established that the privilege applies.

First, only the President himself can invoke the presidential-communications privilege, and he has not done so here. *See Ctr. on Corp. Responsibility, Inc. v. Shultz*, 368 F. Supp. 863, 873 (D.D.C. 1973). In *United States v. Reynolds*, 345 U.S. 1 (1953), the Supreme Court held that the closely related state-secrets

privilege may be lodged only by the "head of the department which has control over the matter." *Id.* at 8. It reasoned that this procedural requirement, which places the formal responsibility for invoking a weighty privilege in the hands of the individual best situated to ensure that the invocation is legitimate, was a crucial safeguard against the privilege being "lightly invoked." *Id.* at 7; *see also id.* at 8 n.20; *United States v. Burr*, 25 F. Cas. 187, 192 (1807); *Dellums v. Powell*, 561 F.2d 242, 247 (D.C. Cir. 1977).

This Court has said that it is an open question whether the privilege may be invoked by anyone other than the president, *In re Sealed Case*, 121 F.3d 729, 744 n.16 (D.C. Cir. 1997), but *Reynolds*'s logic applies just as forcefully here. The state-secrets and presidential-communications privileges are closely related, as both involve exceptional and consequential interventions into the regular processes of public litigation and the administration of justice. *See Dellums*, 561 F.2d at 248; *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 326 n.33 (D.D.C. 1966), *aff'd sub nom., V.E.B. Carl Zeiss, Jena v. Clark*, 384 F.2d 979 (D.C. Cir. 1967). Moreover, only the president (and perhaps his closest advisors) are in a position to know what role any particular record played in the decision-making process that the privilege is meant to protect. *See Burr*, 25 F. Cas. at 192; *Dellums*, 561 F.2d at 247; *see also In re Sealed Case*, 121 F.3d at 744 n.16 (reviewing

personal invocations of the privilege by Presidents Nixon and Clinton).

Second, the presidential-communications privilege does not extend to documents that limit or regulate agency conduct, as at least some of the withheld memoranda seem to do, *see infra* § I.B.3. The privilege reflects "the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking." *United States v. Nixon*, 418 U.S. 683, 708 (1974); *Loving v. DOD*, 550 F.3d 32, 37 (D.C. Cir. 2008) (explaining that the privilege "preserves the President's ability to obtain candid and informed opinions from his advisors and to make decisions confidentially"). In light of that purpose, courts construe its scope "as narrowly as is consistent with ensuring that the confidentiality of the President's decisionmaking process is adequately protected." *In re Sealed Case*, 121 F.3d at 752; *Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108, 1115 (D.C. Cir. 2004) (remarking upon the "dangers of expanding [the privilege] too far"); *Ctr. for Effective Gov't v. DOS*, 7 F. Supp. 3d 16, 27 (D.D.C. 2013) (explaining that the privilege does not apply to documents that "do not implicate the goals of candor, opinion-gathering, and effective decision-making that confidentiality under the privilege is meant to protect").

Extending the presidential-communications privilege to legal memoranda regulating the CIA's authority to engage in targeted killings would require

radically expanding a privilege that other courts—including the Supreme Court—have been careful to cabin. While the privilege shields closely held documents forming an integral part of a deliberative process between the President and his closest advisors, legal memoranda that limit or regulate agency conduct are of a very different character. Plaintiffs are not aware of any case holding that a final statement of law or policy or a document regulating agency conduct is protectable under this privilege, and the government cites none. *Compare, e.g.*, *Ctr. for Effective Gov't v. DOS*, 7 F. Supp. at 27 (rejecting application of the privilege to a presidential policy directive), *with, e.g.*, *Nixon*, 418 U.S. at 688 (applying the privilege to tapes and papers related to presidential meetings); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 449 (1977) (similar); *Loving*, 550 F.3d at 39–40 (recommendations to the President concerning presidential review of a service member's capital sentence); *In re Sealed Case*, 121 F.3d at 752 (documents relating to the presidential appointment and removal power); *Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 522 (S.D.N.Y. 2010) (communications of senior presidential advisors).

3. Exemption 5 cannot be invoked to shield an agency's working law.

The CIA contends that the withheld memoranda do not constitute "working law" because they do not dictate specific policy decisions or establish "rules

governing relationships with private parties." CIA Br. 36–41 (quotation marks omitted). This analysis is misguided.

There is good reason to believe that at least some of the withheld memoranda set out, explain, and interpret the legal standards that govern the CIA's operational role in the drone program. That program has been active for more than a decade. As Plaintiffs have explained, it is not plausible that the CIA has not memorialized the legal framework within which its program operates. Pl. Br. 28–29. One former CIA General Counsel has acknowledged that his office conducted a thorough legal review of the program's legality, and another has identified and discussed one of its foundational sources of authority. Pl. Br. 29 nn.10–11. In its brief, the CIA concedes that some of the memoranda "might describe the legal parameters of what an agency is permitted to do." CIA Br. 23.[10]

The agency's argument that legal analysis cannot constitute working law unless it dictates a specific policy decision is wrong. Legal analysis constitutes working law when it establishes a framework within which policy decisions are

[10] The CIA protests that the government did not concede, in related litigation, that such memoranda would constitute agency working law. CIA Br. 39–40. But it did. Pl. Br. 30–31; *see* Gov't Br. 50–51, *N.Y. Times Co. v. DOJ*, No. 14-4432 (2d Cir. Apr. 4, 2015), ECF No. 89 (contrasting Office of Legal Counsel memoranda that the government argued merely set out legal advice with agency memoranda that have "precedential effect within [an] agency" or that "set[] out [an] agency's final legal position" (emphasis and quotation marks omitted)).

made. *See, e.g.*, *NLRB v. Sears, Roebuck, & Co.*, 421 U.S. 132, 153 (1975) (explaining that final agency memoranda that have "the force and effect of law" are working law (quotation marks omitted)); *Jordan v. DOJ*, 591 F.2d 753, 774 (D.C. Cir. 1978) (stating that memoranda qualify as working law if they contain "positive rules that create definite standards" for agency action); *Tax Analysts v. IRS*, 294 F.3d 71, 81 (D.C. Cir. 2002) (holding that memoranda qualify as working law if they "represent [an agency's] final *legal* position" even if they do not "reflect the final *programmatic* decisions of . . . program officers"); *Schlefer v. United States*, 702 F.2d 233, 243 (D.C. Cir. 1983) ("The question is not whether prior opinions are rigidly followed, but whether they provide important guidance."); *Nat'l Council of La Raza v. DOJ*, 411 F.3d 350, 360 (2d Cir. 2005) (holding that an agency's assertion "that it may adopt a legal position while shielding from public view the analysis that yielded that position is offensive to FOIA").

It makes little sense to say that legal analysis can constitute working law only if it directs a specific policy decision, because legal analysis—like law itself—almost always gives decision-makers a range of options. To say that legal analysis constitutes working law only when it dictates a specific policy decision, *see* CIA Br. 40, is to say that legal analysis, as such, can never be working law—a

proposition irreconcilable with the precedent cited above.

The CIA's reliance on *EFF v. DOJ*, 739 F.3d 1 (D.C. Cir. 2014), is misplaced. While that case concluded that a particular Office of Legal Counsel ("OLC") opinion did not constitute the working law of the FBI, the opinion in question was prepared four years *after* the FBI discontinued the "flawed practice" to which the opinion related. *Id*. at 5. Perhaps more importantly, the opinion had been expressly disavowed by the FBI. *Id*. at 10. The CIA has not disavowed the memoranda at issue here. To the contrary, it seems to concede that some of the memoranda delineate the scope of the agency's authority. CIA Br. 23.[11]

The CIA also errs in arguing that the working-law doctrine extends only to "rules governing [an agency's] relationships with private parties" and to "policies or rules, and the interpretations thereof, that either create or determine the extent of substantive rights and liabilities of a person," CIA Br. 37 (quotation marks and citations omitted). The working-law doctrine is meant to ensure that the public knows what the law is, *see Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 713 (D.C. Cir. 1971) (Bazelon, J., concurring in part and dissenting in part) ("For at the same time that Congress sought to enhance the process of policy formulation, it

[11] The CIA relies on two other cases that are inapposite here because they turned on factual determinations that specific legal memoranda were merely advisory rather than binding. *See* CIA Br. 38–39; *Murphy v. Dep't of Army*, 613 F.2d 1151, 1154 n.9 (D.C. Cir. 1979); *Brinton v. DOS*, 636 F.2d 600, 604 (D.C. Cir. 1980).

indicated unequivocally that the purpose of the Act was to forbid secret *law*. And substantive declarations of policy are clearly 'law' within the meaning of that prohibition." (footnote omitted)), and there is no principled reason to limit the doctrine as the government proposes. While the public has a strong interest in knowing the rules that directly regulate private conduct, the public has an equally strong interest in knowing what authority the government claims—at least where that authority implicates individual rights. *See Public Citizen, Inc. v. OMB*, 598 F.3d 865, 875 (D.C. Cir. 2009) ("Documents reflecting [an agency's] formal or informal policy on how it carries out its responsibilities fit comfortably within the working law framework."). To Plaintiffs' knowledge, no court has limited the working-law doctrine in the arbitrary and illogical way the CIA proposes here.[12] And even if working law were as limited as the CIA says, an analysis that sets out, explains, or interprets the legal framework governing drone strikes would still meet the test. Analysis of the circumstances in which the CIA can lawfully carry out

[12] The CIA contends that all of the sources cited by the Supreme Court in *Sears*, the case that held that "working law is not protected by Exemption 5," were focused on records that "created or determined the extent of substantive rights or liabilities of a person." CIA Br. 37 (quotation marks omitted). But the one case the CIA cites by name involved a FOIA request that was limited by its terms to portions of memoranda that "create or determine the extent of the substantive rights and liabilities of a person." *Cuneo v. Schlesinger*, 484 F.2d 1086, 1090 (D.C. Cir. 1973). This Court held that the requested portions of the memoranda were working law; it had no occasion to reach the question as to other kinds of legal analysis.

targeted killings—including of Americans—surely bears on the "substantive rights and liabilities" of individuals. *See* November 2011 White Paper at 2 (JA 172) ("[T]here is no private interest more weighty than a person's interest in his life").

Finally, the CIA errs in contending that the working-law doctrine does not overcome the attorney–client and presidential-communications privileges. CIA Br. 40. *Sears* held that working law could overcome both the deliberative-process and work-product privileges. 421 U.S. at 154–55; *see Mead*, 566 F.2d at 252; *Niemeier v. Watergate Special Prosecution Force*, 565 F.2d 967, 974 n.23 (7th Cir. 1977). And *Sears*'s logic—which relied principally on the legislative purposes underlying FOIA and on the statute's affirmative-disclosure provisions—applies with the same force to other common-law privileges incorporated by Exemption 5. *See Sears*, 421 U.S. at 153 (explaining that the conclusion that "working law" is not protected by Exemption 5 is "powerfully supported" by the requirements of 5 U.S.C. § 552(a)(2)); *Afshar v. DOS*, 702 F.2d 1125, 1142 n.21 (D.C. Cir. 1983) ("[T]he affirmative obligations of the Act [in § 552(a)(2)] are supposed to prevent the creation of 'secret law,' while the disclosure requirements of § 552(a)(3) are intended to serve the broader purpose of informing the citizenry about the operations of its government."). Nothing in *Sears* suggests that the Supreme Court believed that its analysis would apply differently with respect to the Exemption 5

privileges the CIA invokes here.[13]

Other courts have recognized that the working-law doctrine renders inapplicable other common-law privileges incorporated by Exemption 5. For example, the Second Circuit explained that "the attorney–client privilege may not be invoked to protect a document adopted as, or incorporated by reference into, an agency's policy" because "the principal rationale behind the attorney–client privilege—to promote open communication between attorneys and their clients so that fully informed legal advice may be given—like the principal rationale behind the deliberative-process privilege, evaporates." *La Raza*, 411 F.3d at 360 (citing *Sears*, 421 U.S. at 161); *accord Brennan Ctr. for Justice v. DOJ*, 697 F.3d 184, 207 (2d Cir. 2012); *N.Y. Times Co. v. DOJ*, No. 14 Civ. 3777, 2015 WL 5729976, at *8 (S.D.N.Y. Sept. 30, 2015) (extending the rationale of *La Raza* and *Brennan Center* to the work-product privilege). For the same reasons discussed in *Sears* and *La Raza*, the CIA may not withhold the government's working law under any of the privileges it claims here.

[13] In *Federal Open Market Committee of the Federal Reserve System v. Merrill*, 443 U.S. 340, 360 n.23 (1979), *see* CIA Br. 41, the Court wrestled with the effect of *Sears* and 5 U.S.C. § 552(a)(2) on Exemption 5's "confidential commercial information" privilege—a privilege whose substance and justification are far afield from those of the privileges at issue here.

C. The government has officially acknowledged at least some of the analysis and facts in the legal memoranda.

There is good reason to believe that the government has officially acknowledged some of the legal analysis and facts in the records it now seeks to withhold. Pl. Br. 43–52. The CIA's contrary argument appears to be based largely on the theory that the official-acknowledgement doctrine applies only where the withheld information is identical to information already disclosed. This theory is wrong, but even if it were correct, the district court would still have erred in declining to examine the withheld memoranda *in camera*.

As Plaintiffs have explained, the official-acknowledgement doctrine applies where withheld information does not differ in any *material* way from information that has been officially acknowledged. Pl. Br. 39–43. The CIA complains that Plaintiffs are asking the Court to abandon its "longstanding test for official disclosure," CIA Br. 47, but this is not true. In *Afshar*, the seminal case, this Court explained that the relevant question was whether the withheld information differs "in some *material* respect" from information being withheld. 702 F.2d at 1132 (emphasis added). Plaintiffs do not ask this Court to depart from this precedent; they ask the Court to apply it.

The Second Circuit's reasoning in *N.Y. Times* provides a useful guidepost. There, the government also sought to withhold legal analysis relating to the

targeted-killing program. Expressly applying this Court's official-acknowledgment test, 756 F.3d at 120 n.19, the Second Circuit held that much of the analysis should be disclosed. Most significantly for present purposes, it required the government to disclose its analysis of 18 U.S.C. § 956(a) even though it concluded that the government had not previously disclosed analysis relating to that statute. It did so because it found that the analysis was closely related to analysis the government had disclosed, and because it determined that any harm that might otherwise have resulted from disclosure had already resulted from previous disclosures. *See N.Y. Times*, 756 F.3d at 116 ("[T]he substantial overlap in the legal analyses in the two documents fully establishes that the Government may no longer validly claim that the legal analysis . . . is a secret."); *id.* at 120 ("The additional discussion of 18 U.S.C. § 956(a) . . . adds nothing to the risk.").

The CIA's cases do not support the proposition that the test should be applied more rigidly. The plaintiff in *Public Citizen v. DOS*, 11 F.3d 198 (D.C. Cir. 1993), "concede[d] that it [could not] meet *Afshar*'s requirement." *Id.* at 203.[14] Plaintiffs make no such concession here; to the contrary, they have provided a lengthy list of specific disclosures that they believe satisfy the official-acknowledgment test. Pl. Br. 43–52. Likewise, in *Assassination Archives &*

[14] Despite this, the court in *Public Citizen* reviewed the documents *in camera*. 11 F.3d at 200.

Research Center v. CIA, 334 F.3d 55 (D.C. Cir. 2003), the plaintiffs had proffered only the most generalized "acknowledgments"—for example, that the CIA had disclosed many pages of records and that a "very high percentage" concerned, in some vague way, the information the plaintiffs were requesting. *Id.* at 60 (quotation marks omitted). And in *Military Audit Project v. Casey*, 656 F.2d 724 (D.C. Cir. 1981), the Court held that the plaintiff had failed to offer any reason calling into question the government's affidavits, *see id.* at 753—a far cry from this case. Pl. Br. 43–52.

However the official-acknowledgment test is applied, the Court should review at least a sample of the withheld records itself. It is unclear from the Lutz Declaration what sources or facts the CIA actually reviewed before summarily declaring that nothing in the withheld records had been officially acknowledged. *See* Lutz Decl. ¶ 31 (JA 76). But Plaintiffs have done far more than any previous plaintiff in an official-acknowledgment case to identify specific disclosures worthy of the Court's *in camera* review—and the CIA has done far, far less to justify its withholdings.

II. The CIA has not justified withholding the summary strike data under Exemption 1.

The CIA has withheld all of the summary strike data on the ground that disclosure would reveal properly classified information. As Plaintiffs have

explained, however, the facts and statistics they seek are not themselves intelligence activities, sources, or methods protected by Exemption 1. Pl. Br. 32. Nor would the disclosure of these facts and statistics—properly segregated—have the effect of *revealing* such information. Pl. Br. 32–29. And even if the CIA is correct that the disclosure of the summary strike data would reveal such information, it is not plausible that the disclosure of this information would cause harm.[15]

The CIA's contrary argument does not withstand scrutiny because the CIA fails to grapple with the government's past disclosures about the drone campaign. It contends that "the withheld information is wholly different from any information that has been publicly disclosed," CIA Br. 44, but Plaintiffs' argument is not that the CIA has already disclosed the summary strike data, but that given the government's past disclosures, it is not logical or plausible that the disclosure of

[15] The CIA's argument that the summary strike data is alternatively withholdable under Exemption 3—an issue the district court did not reach, Pl. Br. 8 n.6—is misguided because the facts and statistics that Plaintiffs seek are not sources and methods within the meaning of the National Security Act, 50 U.S.C. § 3024(i)(1), or functions within the meaning of the CIA Act, 50 U.S.C. § 403a. *See, e.g.*, *Military Audit Project v. Casey*, 656 F.2d 724, 736 n.39 (D.C. Cir. 1981) (National Security Act protects only the "sources and methods" protected by Exemption 1); *Maynard v. CIA*, 986 F.2d 547, 555 (1st Cir. 1993) (same).

the summary strike data would cause harm.[16] The CIA's argument must also be evaluated alongside the fact that drone strikes are not secret. Yemenis, Somalis, and Pakistanis know about drone strikes because they see drones hovering overhead, witness drone strikes, and know people who were killed or injured. A drone strike is self-disclosing. Any assessment of the harms that might result from the disclosure of summary strike data must take into account that many facts about individual drone strikes are already known to many, if not to Americans.

The CIA argues that the disclosure of summary strike data would reveal the extent of its information-gathering capabilities and the way those capabilities may have changed over time, CIA Br. 42, but this, too, is implausible. Plaintiffs have not asked the CIA to disclose *how* it gathers information about drone strikes; they have asked only for the information itself—and only for narrow categories of it. And the disclosure of the summary strike data would not reveal the extent of the CIA's information-gathering capabilities, or the way those capabilities have changed over time, because the CIA has made clear that the records at issue here are merely a *subset* of the records it keeps concerning drone strikes. CIA Br. 13 ("[T]he CIA possesse[s] additional materials about U.S. Government strikes that

[16] Pl. Br. 34–38, 43–52. After the ACLU filed its opening brief, Leon Panetta acknowledged that the CIA conducted drone strikes in Pakistan during his tenure at the head of the agency. *See* Chris Whipple, *'The Attacks Will Be Spectacular'*, Politico, Nov. 12, 2015, http://politi.co/1XD6YG6.

[are] *not* routinely compiled by the CIA for analytical purposes."). Relatedly, while the summary strike data come from records "compiled" by the CIA, the disclosure of the summary strike data would not reveal which information was gathered by the CIA and which was gathered by other agencies.[17]

Of course, the CIA is correct that the disclosure of the summary strike data will reveal *something*. The whole point of this suit is to compel the CIA to disclose more than it has disclosed. It bears emphasis—since the CIA confuses the issue, CIA Br. 42—that the CIA cannot lawfully withhold records merely because it believes their disclosure would reveal information that has not already been revealed. Nor can the CIA justify its withholdings by arguing—as it does, CIA Br. 44—that Plaintiffs have failed to demonstrate that national security would *not* be harmed by disclosure. It is the CIA's burden to demonstrate both that the withheld information is of a type that the Executive Order permits it to classify *and* that disclosure would cause identifiable harm. Further, it is the CIA's burden to

[17] The government's argument that it invoked section 1.4(d) of the Executive Order ("foreign relations and foreign activities") in addition to section 1.4(c) ("intelligence sources and methods") is incorrect. As Plaintiffs explained, the CIA's declarations with respect to the summary strike data focus solely on whether disclosure would reveal "sources and methods of underlying intelligence collection." *See* Pl. Br. at 33 n.14; Lutz Decl. ¶ 25 (JA 93). The government's brief in the district court included a single, cursory assertion that the data "would also implicate . . . foreign relations or foreign activities," Mem. of Points and Authorities in Supp. of Def. CIA's Mot. for S.J. 18 (D.D.C. Nov. 25, 2014), ECF 67-1, but this proposition is not supported by statements in the CIA's declaration.

demonstrate that no segregable material can be disclosed without causing harm. Pl. Br. 37–38. Given all of the factors at play, it is not obvious that anyone would be able to use the kind of information sought by Plaintiffs here to draw conclusions about changes in the CIA's intelligence abilities over time. And even if it would be possible to do so, it is not at all obvious that their ability to draw those conclusions would cause harm.

At its essence, the CIA's position is that it should enjoy a categorical exemption from FOIA—a position Congress rejected decades ago. The Congress that enacted FOIA was particularly concerned about secrecy in the national-security context, and one of its chief aims was to ensure that the American public would have the information it needed to hold political leaders accountable for decisions relating to the use of military force in foreign lands. Pl. Br. 40. When it concluded that FOIA was being interpreted too narrowly, Congress amended the statute to make clear that courts had the authority and obligation to ensure—including through *in camera* review—that agencies were not withholding information improperly. *See* H.R. Rep. No. 93-1380, at 11–12 (1974) (Conf. Rep.) (describing intent to override a Supreme Court decision and allow *in camera* examination of classification justifications and classified records). Plaintiffs respectfully ask the Court to give the statute the teeth it was intended to have.

CONCLUSION

For the reasons stated above and in Plaintiffs' opening brief, the decision below should be vacated and the case remanded for further proceedings. To guide those proceedings, the Court should examine a sample of the legal memoranda *in camera* to assess whether and to what extent they consist of legal analysis that can be extricated from properly classified facts, of working law, or of analysis or facts that have been officially acknowledged. It should also examine a sample of the records containing summary strike data to assess whether and to what extent the data can be disclosed without revealing properly classified facts. Plaintiffs recognize that this Court ordinarily leaves review of withheld records to the district court, but *in camera* review by this Court is warranted because of the extraordinary public interest in the withheld information, the fact that this case has already been remanded once, and the considerable delay that would inevitably result from another remand.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,921 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

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Date: December 17, 2015

CERTIFICATE OF SERVICE

On December 17, 2015, I served upon the following counsel for Defendant–Appellee one copy of Plaintiffs–Appellants' REPLY BRIEF FOR PLAINTIFFS–APPELLANTS via this Court's electronic-filing system:

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