13-0422-cv(L), 13-0445-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, CENTRAL INTELLIGENCE AGENCY,

Defendants-Appellees.

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

BRIEF OF *AMICI CURIAE* ELECTRONIC PRIVACY INFORMATION CENTER AND SEVEN OPEN GOVERNMENT ORGANIZATIONS IN SUPPORT OF APPELLANTS AND URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(c) for Case No. 13-422 *amicus curiae* Electronic Privacy Information Center ("EPIC") states that it is a District of Columbia corporation with no parent corporation or publicly-held company with a 10 percent or greater ownership interest. EPIC is a non-profit, non-partisan corporation, organized under section 501(c)(3) of the Internal Revenue Code.

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Pursuant to Fed. R. App. P. 26.1, amicus curiae Government Accountability Project submits the following identification of corporate parents, subsidiaries and affiliates: NONE.

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Project on Government Oversight ("POGO") does not have a parent company, and is not a publicly-held company with a 10 percent or greater

ownership interest. POGO is a non-profit, non-partisan corporation, organized under section 501(c)(3) of the Internal Revenue Code.

The Sunlight Foundation does not have a parent company, and is not a publicly-held company with a 10 percent or greater ownership interest. The Sunlight Foundaiton is a non-profit, non-partisan corporation, organized under section 501(c)(3) of the Internal Revenue Code.

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INTEREST OF AMICI CURIAE[1]

Amici are public interest organizations dedicated to promoting government transparency and accountability. They are experts in policy and litigation under the Freedom of Information Act ("FOIA") and are well-positioned to provide insight into the government accountability process. *Amici* are actively engaged in important public discourse that depends upon the release of documents under the FOIA. Secret legal opinions that carry the force of law deprive *amici*, lawmakers, and the public the opportunity to engage in meaningful public debate and are directly contrary to the purpose of the Freedom of Information Act.

The Electronic Privacy Information Center ("EPIC") is a public interest research center in Washington, D.C. established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other constitutional values. EPIC promotes open government, publishes a leading FOIA litigation manual, and provides information to the public obtained as a result of FOIA litigation.

[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.

The Brennan Center for Justice advocates for national security policies that respect constitutional values and the rule of law, with a particular focus on transparency and accountability. The Brennan Center is affiliated with New York University School of Law, but does not purport to present the school's institutional views, if any.

Citizens for Responsibility and Ethics in Washington ("CREW") non-profit, non-partisan organization that seeks to protect the rights of citizens to be informed about the activities and integrity of government officials. CREW frequently files and litigates FOIA requests to publicize government documents and actions.

The Government Accountability Project ("GAP") is a nonpartisan, nonprofit organization that promotes corporate and government accountability and advances occupational free speech. GAP defends whistleblowers, offers legal assistance in instances where disclosures affect the public interest, and pursues FOIA requests for information in the public interest.

The National Security Archive is an independent public interest research institute, library, and publisher based at George Washington University. The Archive's mission is to open governments at home and abroad by challenging national security secrecy, advocating for freedom of information, and publishing previously secret documents. The Archive has published over one million pages of information received through more than 50,000 FOIA requests.

OpenTheGovernment.org is a non-partisan coalition of journalists, consumers, good- and limited-government groups, environmentalists, librarians, unions, and others whose mission is to increase government transparency to ensure that policies affecting our health, safety, security, and freedoms place the public good above the influence of special interests.

The Project on Government Oversight ("POGO"), founded in 1981, is a non-partisan independent watchdog that champions good government reforms. POGO investigates corruption, misconduct, and conflicts of interest in the federal government, frequently in reliance on the FOIA.

The Sunlight Foundation is a non-partisan, non-profit organization whose mission is to use cutting-edge technology to make government transparent and accountable. It takes inspiration from Justice Brandeis' famous adage, "Sunlight is said to be the best of disinfectants."

SUMMARY OF THE ARGUMENT

The Department of Justice's efforts to withhold, in their entirety, legal memos prepared by the Office of Legal Counsel ("OLC") are contrary to the Freedom of Information Act ("FOIA") and the Department's own guidance, as well as the views of former heads of OLC. By withholding these legal opinions, which direct the actions of the government and impact private parties, the Department is establishing secret law that is antithetical to democratic governance. Because OLC opinions are binding legal authority, they do not fall within FOIA Exemption 5. Because legal analysis does not meet the strict requirements for classification, OLC opinions may not be withheld in their entirety under Exemption 1.

The case for disclosure is clear. The publication of OLC opinions has promoted public discourse, fostered government oversight, and led to well-informed policy decisions. Given our democratic heritage, constitutional values, and statutory rights, the Government should not be permitted to issue law in the shadows.

ARGUMENT

I. According to the Department of Justice and Former Heads of OLC, Final OLC Opinions Are Controlling Law and Should Be Disclosed

A. Formal OLC Opinions Are the Law of the Executive Branch

Formal opinions of the Office of Legal Counsel create legal authority. "[A]ny opinion or ruling by the Attorney General upon any question of law arising in any Department, executive bureau, agency or office shall be treated as binding upon all departments, bureaus, agencies or offices therewith concerned." Exec. Order No. 2877 (1918).[2] This power of the Attorney General to "render opinions on questions of law" under the Judiciary Act of 1789, 28 U.S.C. §§ 510-13, was subsequently delegated to the OLC in the mid-twentieth century. *See* 28 C.F.R. § 0.25 (2012).[3]

The Office of Legal Counsel "provides authoritative legal advice to the President and all the Executive Branch agencies." U.S. Dep't of Justice, *Office of*

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[2] Despite being almost one hundred years old, this Executive Order has not been revoked. *See also* Douglas W. Kmiec, *OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 Cardozo L. Rev. 337, 368-69 (1993) (discussing how Exec. Order No. 2877 expanded the DOJ's legal authority). The author is a former Assistant Attorney General, Office of Legal Counsel.

[3] The Office of Legal Counsel is subordinate to the Attorney General and the President, either of whom could overrule an OLC opinion. However, this is extraordinarily rare. *See* Dawn Johnsen, *Guidelines for the President's Legal Advisors*, 81 Ind. L.J. 1345, 1345 (2006). The author is a former Assistant Attorney General, Office of Legal Counsel.

Legal Counsel (March 2013).[4] The OLC drafts the legal opinions of the Attorney General, responds to Presidential inquiries, resolves legal disputes between agencies, and reviews the constitutionality of executive actions and pending legislation. "OLC's core function, pursuant to the Attorney General's delegation, is to provide *controlling* advice to Executive Branch officials on questions of law that are centrally important to the functioning of the Federal Government." Memorandum from David Barron, Acting Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice, for Attorneys of the Office 1 (July 16, 2010) (hereinafter "*OLC Best Practices*") (emphasis added).[5]

Executive agencies do not simply consult the OLC when they desire advice; agency legal counsels must operate "under the supervision and control" of the Department of Justice. Exec. Order No. 2877 (1918). When a legal dispute arises between two or more agencies, those agencies must seek adjudication from the OLC. Exec. Order No. 12,146 § 1-4, 3 C.F.R. § 409 (1979).

As explained by the OLC, formal opinions are more than merely advisory. These opinions can "constrain the Administration's or an agency's pursuit of desired practices" and "may effectively be the final word on controlling law." *OLC Best Practices* at 1. OLC opinions define the metes and bounds of lawful agency action. "The formality of the process and the product also allows the Office to

[4] http://www.justice.gov/olc.
[5] *Available at* http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf.

appear to be more than simply another legal office within the government, but rather *the* oracle of executive branch legal interpretations." John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 Cardozo L. Rev. 375, 428 (1993) (emphasis in original).[6]

The Office of Legal Counsel writes "quasi-judicial" opinions that serve as legal precedent. *See* Samuel A. Alito Jr., *Change in Continuity at the Office of Legal Counsel*, 15 Cardozo L. Rev. 507, 510-11 (1993).[7] Just like judicial opinions, previous OLC opinions are entitled to *stare decisis*. *See OLC Best Practices* at 2. OLC's legal opinions "cite executive branch precedents (including Attorney General and OLC opinions) as often as court opinions. . . . [T]hese executive branch precedents are 'law' for the executive branch even though they are never scrutinized or approved by courts." Jack Goldsmith, *The Terror Presidency* (2007).[8] Because "the vast majority" of Executive Branch legal issues never reach a court, the OLC is the administration's arbiter of the law. Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of*

[6] The author is a former Deputy Assistant Attorney General, Office of Legal Counsel.
[7] Justice Alito is a former Deputy Assistant Attorney General, Office of Legal Counsel.
[8] The author is a former Assistant Attorney General, Office of Legal Counsel.

Legal Counsel, 52 Admin. L. Rev. 1303 (2000).[9] "In these situations, the executive branch determines for itself what the law requires, and whether its actions are legal." Goldsmith at 32.

The bedrock principle that an OLC formal opinion is controlling law has a long history. In 1854, Attorney General Caleb Cushing established that the DOJ's duty to interpret the law "is quasi-judicial. [The Attorney General's] opinions officially define the law, in a multitude of cases, where his decision is in practice final and conclusive." Office and Duties of the Attorney General, 6 Op. Att'y Gen. 326, 334 (1854). In 1918, Executive Order No. 2877 enshrined this principle and generations of OLC lawyers have adhered to it. During the confirmation of the Virginia Seitz, the current head of OLC, twenty-five former OLC attorneys, spanning over thirty years and five presidential administrations, reiterated the authority of OLC's opinions: "OLC's principal function is to provide controlling advice to Executive Branch officials . . . [and its] determinations are often effectively the final word on the controlling law." Letter from Former OLC Attorneys to Sens. Patrick J. Leahy and Charles E. Grassley, U.S. Senate Committee on the Judiciary (March 15, 2011).[10] In 2004, nineteen former OLC

[9] The author is a former Assistant Attorney General, Office of Legal Counsel.

[10] *Reprinted in Confirmation Hearing on Donald B. Verrilli, Jr., of Connecticut, Nominee to be Solicitor General of the United States; Virginia A. Seitz, of Virginia, Nominee to be Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice; and Denise E. O'Donnell, of New York, Nominee to be*

attorneys, including four former Assistant Attorneys General, stated that "OLC's legal determinations are considered binding on the executive branch. . . . [This principle is] based in large part on the longstanding practices of the Attorney General and the Office of Legal Counsel, across time and administrations." *Principles to Guide the Office of Legal Counsel*, *reprinted in* 81 Ind. L.J. 1345, 1348 (2006) [hereinafter *OLC Principles*].[11]

An OLC opinion is not equivalent to an attorney-client communication or an agency deliberation. While the OLC also gives informal advice, "these activities are quite different from the task of writing formal opinions." Alito at 509. Theodore Olson, a former head of OLC, describes the Office as the "legal conscience" of the Executive Branch, where "[t]he assistant attorney general for OLC is, more often than not, cast in the role of judge rather than advocate." *Judge Wilkey and the Office of Legal Counsel*, 1985 BYU L. Rev. 607, 609 (1985). As former Assistant Attorney General Randolph Moss explains:

> That role is distinct from that of the typical private attorney because, at least in practice, the Attorney General and the Office of Legal Counsel define, through their opinions, the meaning of the law for an

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Director, Bureau of Justice Assistance, U.S. Department of Justice: Hearing Before the S. Comm. on the Jud., 112th Cong. 448-51 (2011). The signatories of the letter include eight former heads of OLC from both Democratic and Republican administrations.

[11] The authors of this memo include four former Assistant Attorneys General: Walter E. Dellinger, Dawn Johnsen, Randolph Moss, and Christopher Schroeder. Future Assistant Attorney General David Barron was also an author.

> entire branch of government, and that branch of government has an obligation to get the law right.

Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel, 52 Admin. L. Rev. 1303, 1321 (2000). When the OLC enshrines "controlling legal advice" in a formal written opinion it provides "its best understanding of what the law requires − not simply an advocate's defense." *OLC Best Practices* at 1.

The Office of Legal Counsel is the legal adjudicator of the Executive Branch. When it writes a formal opinion, that legal document binds the actions of every executive agency and serves as precedent for future OLC opinions. That opinion alters the rights and responsibilities of both government officials and private citizens. It is the law of the United States government.

B. Current OLC Policy and Past Heads of OLC Recommend Public Release of OLC Memos

The OLC routinely publishes many of its formal opinions. Because they are the law of the Executive Branch, disclosure of these opinions is necessary to inform the public, the Congress, and other Executive Branch agencies as to their rights and responsibilities. The OLC "operates from the presumption that it should make its significant opinions fully and promptly available to the public." *OLC Best Practices* at 5. OLC's best practices stem from Executive Order No. 12,146, which encourages agencies to make their legal opinions and policies "available for public

inspection." Exec. Order No. 12,146 § 1-501, 44 FR 42657 (1979); *see also OLC Best Practices* at 5. The publication of formal OLC opinions "furthers the interests of Executive Branch transparency, thereby contributing to accountability and effective government, and promoting public confidence in the legality of government action." *OLC Best Practices* at 5. Indeed, according to OLC's policies it is especially important to publish opinions "so that the public can be assured that Executive action is based on sound legal judgment and in furtherance of the President's obligation to take care that the laws, including the Constitution, are faithfully executed." *Id*.

Past leaders of OLC support the publication of formal opinions, particularly those that define the scope of executive power: "OLC should follow a presumption in favor of timely publication of its written legal opinions. Such disclosure helps to ensure executive branch adherence to the rule of law and guard against excessive claims of executive authority. Transparency also promotes confidence in the lawfulness of governmental action." *OLC Principles* at 1352. Former Assistant Attorney General Dawn Johnsen adds that the publication of OLC formal opinions promotes high-quality, principled legal analysis, while helping to explain a President's constitutional views. "Public disclosure is especially warranted when the executive branch takes official action premised on independent constitutional views, rather than application of judicial precedent." *Functional Departmentalism*

and Nonjudicial Interpretation: Who Determines Constitutional Meaning?, 67 L. & Contemp. Probs. 105, 131-32 (2004).

Publication reinforces the integrity of OLC as an institution and helps to ensure that government acts lawfully. When it discloses the details of its opinions, OLC prevents administration officials from overstepping the bounds of legality and subsequently using OLC as a shield. A published OLC opinion preempts an official "from stripping a carefully nuanced opinion of all its subtleties and thereby reducing it to the simplistic conclusion that 'OLC says we can do it.'" Harold Hongju Koh, *Protecting the Office of Legal Counsel from Itself*, 15 Cardozo L. Rev. 513, 517 (1993).[12] Publication of the Office's legal rationale can also assuage a public or Congress leery of a change in administration policy. "[A]ttack the problem of opacity by ensuring prompt and full publication of OLC opinions, particularly those that either wholly or partially overrule past published OLC opinions." *Id*. at 523.

II. Secret Law is Antithetical to the Democratic Principles of Republican Government and Separation of Powers

In a republic the government is an agent of the people, appointed by the people in a democratic process to govern as their representative and in accordance with the people's wishes and interests. When the government conceals the law from the people, it undermines its own authority by inhibiting its accountability to

[12] The author is a former Attorney Advisor, Office of Legal Counsel.

the electorate. "All actions relating to the right of other men are unjust if their maxim is not consistent with publicity." Immanuel Kant, *Perpetual Peace*, app. II, para. 2 (1795). Secret law does not just subvert the public's ability to hold its representatives accountable, it undercuts the very legitimacy of the law itself. Promulgation of the law is a central requirement of democracy; the failure to promulgate results in a "fail[ure] to make law." Lon L. Fuller, *The Morality of Law* 43-44 (1964).

The Framers understood that the legitimacy of the government depended on the people's knowledge of the government's actions. "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps, both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." Letter from James Madison to W.T. Barry (Aug. 4, 1822), in *The Writings of James Madison* vol. 9 (Gaillard Hunt ed. 1910). To this end, the drafters of the Constitution inserted the Journal Clause to keep the people informed of the laws Congress enacts. U.S. Const., art. I, sec. 5, cl. 3.[13] As Justice Story explains:

[13] "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal."

> The object of the whole clause is to insure publicity to the proceedings of the legislatures, and a correspondent responsibility of the members to their respective constituents. And it is founded on sound policy and deep political foresight. Intrigue and cabal are thus deprived of some of their main resources, by plotting and devising measures in secrecy.

Joseph Story, *Commentaries on the Constitution of the United States*, vol. II, § 840 (1833).[14] Constitutional and common law doctrines dating back to the Magna Carta are predicated on the notion that "[t]hat a law may be obeyed, it is necessary that it should be known; that it may be known, it is necessary that it be promulgated." Jeremy Bentham, *Of Promulgation of the Laws*, *in* The Complete Works, vol. I (J. Bowring ed. 1843).

The prohibition on secret law is not simply an Enlightenment ideal, but a modern legal imperative as well. "The idea of secret laws is repugnant. People cannot comply with laws the existence of which is concealed." *Torres v. I.N.S.*, 144 F.3d 472, 474 (7th Cir. 1998) (opinion by Posner, J.). Government accountability is especially important in the national security context in order to prevent executive overreach and preserve constitutional rights. "If civil rights are to be curtailed during wartime, it must be done openly and democratically . . ." *Hamdi v. Rumsfeld*, 542 U.S. 407, 578 (2004) (Scalia, J., dissenting). While there may be a need to classify facts, operations, techniques, or capabilities related to national security, these are not laws. Among all products of government, the law is

[14] Had the administrative state existed in the 18th century, no doubt the Framers would have called for the publication of administrative law as well.

unique and supreme. It is the voice of the people. Secret law undermines our system of checks and balances by disabling the democratic oversight by which the public governs its government.

III. The FOIA Does Not Allow for Secret Law

The Freedom of Information Act does not permit the withholding of legal authority. The purpose of the FOIA is to make known the actions of government so that they can be properly scrutinized. No action is greater than the ability to create legal authority. "FOIA is often explained as a means for citizens to know 'what the Government is up to.' This phrase should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171-72 (2004) (internal citation omitted).

A. FOIA Exemption 5 Safeguards Deliberative Communications, Not Legal Authority

Exemption 5 protects "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) (2000). By differentiating the agency's working process from the agency's final product, Exemption 5 allows agencies to engage in robust and candid discussion while ensuring that the outcomes produced are available to the public.

Formal OLC opinions, as binding law of the Executive Branch, cannot be withheld in their entirety under Exemption 5. Appellants argue, and *amici* agree,

that when an agency's legal analysis has been adopted as the Government's legal position it must be disclosed in response to FOIA requests. Br. of Appellant N.Y. Times at 45-49; Br. of Appellant ACLU at 51-55. *See Brennan Center for Justice at N.Y. Univ. Sch. Of Law v. DOJ*, 697 F.3d 184, 194-95 (2d Cir. 2012). In some circumstances, doctrines of waiver, incorporation, and adoption may be used to establish whether an agency's particular statutory interpretation has become law. However, since formal OLC opinions are by definition the law of the Executive Branch, and not predecisional interpretations, the court need not determine whether the Justice Department "incorporated" or "adopted" them. "[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). Because the very nature of OLC opinions is "formal," "binding," and "final," these documents are not deliberative or predecisional. Once a legal analysis "becomes agency law, the agency is then responsible for defending that policy" and it must be disclosed. *Nat'l Council of La Raza v. DOJ*, 411 F.3d 350, 360-61 (2d. Cir. 2005).

Exemption 5 "represents a strong congressional aversion to 'secret (agency) law,' and an affirmative congressional purpose to require disclosure of documents

which have 'the force and effect of law.'" *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975) (internal citations omitted). Consequently, Exemption 5 does not allow the withholding of orders, decisions, interpretations, instructions, regulations, binding law, or guidelines that have precedential weight or affect the public. *See, e.g. Public Citizen v. OMB*, 598 F.3d 865, 872 (D.C. Cir. 2009); *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"). Similarly, the an agency may not withhold a document that "sets forth or clarifies an agency's substantive or procedural law," due to the risk of that document becoming "secret law." *Caplan v. ATF*, 587 F.2d 544, 548 (2d Cir. 1978).

Disclosure of formal OLC opinions will not harm the deliberative interests protected by Exemption 5. While it is asserted that publication of OLC memos will "chill" the deliberative process, this assertion is groundless for three reasons. First, statutory law and executive orders require agencies to consult with OLC who then issues opinions; OLC written opinions are not informal advice. Second, OLC routinely publishes its opinions on matters both mundane and controversial. A change in administration can result in the publication of even the most sensitive OLC opinions. Officials contacting OLC have no guarantee that their consultations will remain confidential. Third, and most importantly, when OLC writes a formal

opinion, that document is not deliberative or predecisional. That document is a decision and law of the Executive Branch.

B. FOIA Exemption 1 Protects National Security, Not Secret Law

FOIA Exemption 1 allows agencies to withhold "properly classified information." 5 U.S.C. § 552(b)(1). Executive Order 13,526 defines what information can be properly classified. Exec. Order No. 13,526, 3 C.F.R. § 298 (2009). In order to be classifiable, withheld information must pose an identifiable, describable, and reasonable threat to national security. *Id*. §1.1. In addition, the information must fall into one of the enumerated categories. *Id*. § 1.4. Information that reveals illegality or is merely embarrassing cannot be classified. *Id*. §1.7 If materials cannot meet these requirements they cannot be classified, cannot be withheld under Exemption 1, and must be disclosed under the FOIA.

While OLC opinions may contain particular properly classified terms and references, the opinion *in toto* cannot meet the requirements of either Section 1.1 or Section 1.4, and therefore cannot withheld in their entirety under Exemption 1. The FOIA makes clear that agencies are obligated to segregate information that the agency seeks to withhold from that information that must be disclosed to the requester. "[N]on-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions." *Mead Data Central v. U.S. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977). *See also Inner City Press/Cmty.*

on the Move v. Bd. of Governors of the Fed. Reserve Sys., 463 F.3d 239, 249 n.10 (2d. Cir. 2006).

Under Section 1.1, the original classification authority must be "able to identify or describe" the damage to national security reasonably "expected to result" from the unauthorized disclosure of classified information. Exec. Order No. 13,526 §1.1(a)(4). A formal OLC opinion contains distinct pieces of information routinely contained in legal articles, judicial opinions, congressional reports, and other executive branch materials without harm to national security (*e.g.* legal citations, summaries of cases, analysis of prior legal authorities, and logical argumentation). There is nothing special about a discussion of *The Prize Cases* in an OLC opinion[15] versus a journal article[16] as far as national security is concerned. Furthermore, the Executive Order dictates that "[i]f there is significant doubt about the need to classify information, it shall not be classified." Exec. Order No. 13,526 §1.1(b). A legal analysis from OLC, divorced from properly classifiable facts, poses no more threat than a national security law casebook.

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[15] *See* Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice, for the Deputy Counsel to The President (Sept. 25, 2001) (discussing *The Prize Cases* in the context of executive authority to conduct military operations against terrorists and nations supporting them).

[16] *See, e.g.,* Louis Fisher, *Basic Principles of the War Power*, 5 J. Nat'l Sec. L. & Pol'y 319 (2011) (criticizing John Yoo's reliance on the "sole organ doctrine" and offering a different interpretation of *The Prize Cases*).

Formal OLC opinions are declarations of what is and is not legal in the United States. A legal analysis itself does not endanger the national security, and creating a universe of "secret law" only serves to damage, rather than to protect, the nation. *See* Jeffrey Rosen, *Conscience of a Conservative*, N.Y. Times Magazine, Sept. 9, 2007, at 40, 42, 45. Congress and the President have both considered the importance of secrecy for certain national security information, yet neither included "legal analysis" in the FOIA or Executive Order when defining the scope of permissible agency classifications and withholdings. To the contrary, Congress specified that judges applying the FOIA would determine whether a record had been "properly classified." 5 U.S.C. § 552(b)(1).

Agencies must segregate and disclose all materials that are not "inextricably intertwined" with properly classified information. *Mead* 566 F.2d at 260. All nonclassifiable information in a document, even a handful of interspersed sentences, must be segregated and disclosed. *See*, *e.g.*, Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice, for the Deputy Counsel to the President (Sept. 25, 2001). The withholding of information that threatens national security is an exception to the general rule of disclosure. Facts may threaten national security. But a reasonably segregated legal analysis or statement of law does not.

IV. The Disclosure of OLC Opinions Promotes Public Debate

A. The Purpose of the FOIA Is to Promote Government Transparency and Accountability, a Priority of the Current Administration

Congress enacted the FOIA to establish a presumption of agency disclosure and to facilitate transparency in government. The President has expressed clear support for these goals. The day after his first inauguration, President Obama announced his commitment to open government.

> My Administration is committed to creating an unprecedented level of openness in Government. We will work together to ensure the public trust and establish a system of transparency, public participation, and collaboration. Openness will strengthen our democracy and promote efficiency and effectiveness in Government."

Memorandum on Transparency and Open Government, 2009 Daily Comp. Pres. Doc. 10 (Jan. 21, 2009).[17] "We will achieve our goal of making this administration the most open and transparent administration in history not only by opening the doors of the White House to more Americans, but by shining a light on the business conducted inside it." Statement from the President on the First Time Disclosure Policy for White House Visitor Logs (Sept. 4, 2009).[18]

Attorney General Eric Holder issued new guidelines establishing a "presumption of openness" governing federal records. "The Freedom of

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[17] *Available at* http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment.

[18] *Available at* http://www.whitehouse.gov/the_press_office/Statement-from-the-President-on-the-First-Time-Disclosure-Policy-for-White-House-Visitor-Logs

Information Act (FOIA), 5 U.S.C. § 552, reflects our fundamental commitment to open government. This memorandum is meant to underscore that commitment and to ensure it is realized in practice." Memorandum from Attorney General Eric Holder for Heads of Executive Departments and Agencies (Mar. 19, 2009).[19] Congress likewise expressed renewed support for open government. Senator Patrick Leahy, Chairman of the Senate Judiciary Committee, stated that the Committee "will continue to do its part to advance freedom of information, so that the right to know is preserved for future generations." *Advancing Freedom of Information in the New Era of Responsibility: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 66 (2009) (Statement of Sen. Patrick Leahy, Chairman, Committee on the Judiciary).

Just two months ago, in the State of the Union address, the President reiterated his commitment to transparency and accountability in executive decision making – specifically on the issue of targeted killing.

> I recognize that in our democracy, no one should just take my word that we're doing things the right way. So, in the months ahead, I will continue to engage with Congress to ensure not only that our targeting, detention, and prosecution of terrorists remains consistent with our laws and system of checks and balances, but that our efforts are even more transparent to the American people and to the world.

[19] *Available at* http://www.justice.gov/ag/foia-memo-march2009.pdf.

Address Before a Joint Session of Congress on the State of the Union, 2013 Daily Comp. Pres. Doc. 90 (Feb. 12, 2013). The President's statement embodies the principles of open government enshrined in the FOIA nearly fifty years ago.

In 1966 Congress enacted the FOIA to reverse the Administrative Procedure Act's presumption of non-disclosure. The Senate Judiciary Committee explained the many problems of government secrecy:

> [T]he Administrative Procedure Act . . . is full of loopholes which allow agencies to deny legitimate information to the public. It has been shown innumerable times that withheld information is often withheld only to cover up embarrassing mistakes or irregularities . . .

S. Rep. No. 88-1219, 8 (1964). FOIA was designed to be "not a withholding statute, but a disclosure statute." *Id.* at 11. "A democratic society requires an informed, intelligent electorate and the intelligence of the electorate varies as the quantity and quality of its information varies." H. Rep. No. 89-1497, 12 (1966). Congress acknowledged that exemptions must balance the interest of transparency against national security and privacy. S. Rep. No. 88-1219, 8-9 (1964). But Congress stressed the exemptions' "emphasis on the fullest responsible disclosure." *Id*. In particular, Congress was concerned about the imbalance of power created by secret law:

> This change will prevent a citizen from losing a controversy with an agency because of some obscure and hidden order or opinion which the agency knows about but which has been unavailable to the citizen simply because he had no way in which to discover it.

S. Rep. No. 89-813, 7 (1965).

The administration has repeatedly made clear the importance of open government, in particular on the matter at issue in this case. The DOJ's position is inconsistent with administration policy.

B. Past Disclosures of OLC Opinions Have Informed Congress and the Public, Contributed to Effective Oversight, and Promoted Democratic Self-Governance

The publication of OLC opinions has played a key role in facilitating discourse and oversight, both by Congress and the public. In several recent examples, the release of OLC legal authority contributed to informed decision-making. Other examples show the failure to release OLC memos has frustrated public debate and diminished the authority of democratic governance.

After September 11, 2001, Congress authorized the use of military force in response to the terrorist attacks. Authorization for Use of Military Force (AUMF), 115 Stat. 224, note following 50 U.S.C. § 1541 (2000 ed., Supp. III). *See also Hamdan v. Rumsfeld*, 548 U.S. 557, 568 (2006). Following the authorization, the President ordered the U.S. Armed Forces to invade Afghanistan, capturing and detaining hundreds of individuals. *Hamdan*, 548 U.S. at 568. Opinions issued by OLC from 2001-2003 addressed the legality of military commissions, indefinite detention of prisoners, use of harsh interrogation techniques, and domestic military operations. *See* Nat'l Sec. Archive, *Torturing Democracy: Documents* (2008)

(providing a chronology of OLC legal opinions related to the interrogation of prisoners from the war on terror).[20]

In the summer of 2004, White House Counsel Alberto Gonzales released a series of memos related to the President's legal authority and his resulting military orders. Alberto Gonzales, White House Counsel, *et. al.,* Remarks at Press Briefing (Jun. 22, 2004).[21] These opinions revealed the administration's position that Geneva Convention protections for prisoners of war did not bind the actions of the United States. Douglas Jehl, *The Reach of War Detainee Treatment; U.S. Rules on Prisoners Seen as a Back and Forth of Mixed Messages to G.I.s*, N.Y. Times, June 22, 2004.[22] The release led to vigorous public debate, Congressional oversight, and executive review of interrogation and detention practices. *See*, *e.g.*, Dahlia Lithwick, *Getting Away with Torture: Dick Cheney's Memoir Shows the Importance of the Law, Not of Torture*, Slate (Aug. 30, 2011);[23] Mark Mazzetti & Scott Shane, *C.I.A. Internal Inquiry Troubling, Lawmakers Say*, N.Y. Times, Oct.

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[20] http://www.gwu.edu/~nsarchiv/torturingdemocracy/documents/.
[21] *Available at* http://georgewbush-whitehouse.archives.gov/news/releases/2004/06/20040622-14.html.
[22] *Available at* http://www.nytimes.com/2004/06/22/world/reach-war-detainee-treatment-us-rules-prisoners-seen-back-forth-mixed-messages.html?pagewanted=all&src=pm.
[23]http://www.slate.com/articles/news_and_politics/jurisprudence/2011/08/getting_away_with_torture.html.

12, 2007;[24] *Lawmakers Demand Secret Department of Justice Interrogation Memos from Administration*, Associated Press, Oct. 4, 2007; John Yoo, *War by Other Means: An Insider's Account of the War on Terror* (2006).[25] Congress subsequently passed the Detainee Treatment Act of 2005, 42 U.S.C. § 2000dd (2005), affirming that the protections of the Geneva Conventions *do* apply to the Government's detainees. Former OLC head Jack Goldsmith credits this chain of events with ending the CIA's enhanced interrogation program. Jack Goldsmith, *Power and Constraint* 118-20 (2012). The Obama Administration subsequently released additional memos related to the program. Scott Shane, *Documents Laid Out Interrogation Procedures*, N.Y. Times, Jul. 25, 2008, at A19.

In contrast with the slow-but-steady release of OLC opinions related to the detention and interrogation programs, the legal opinions underlying the post-9/11 surveillance programs have been withheld by the administration during critical periods of public oversight. The warrantless wiretapping program itself was revealed in a December 2005 New York Times story based on interviews with current and former officials who were concerned with the program's legality. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y.

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[24] *Available at* http://www.nytimes.com/2007/10/12/washington/12cnd-cia.html?hp&_r=0.

[25] *See also* PBS Frontline, *Cheney's Law* (Oct. 16, 2007), *available at* http://www.pbs.org/wgbh/pages/frontline/cheney/etc/synopsis.html. *See also* Jose A. Rodriguez, Jr., *Hard Measures: How Aggressive CIA Actions After 9/11 Saved American Lives* (2012); Dick Cheney, *In My Time* (2012).

Times, Dec. 16, 2005, at A1.[26] Shortly thereafter, the administration outlined its legal justification to Congress, but refused to release the OLC analysis. Letter from William E. Moschella, Assistant Attorney General, Office of Legislative Affairs, Dep't of Justice, to Sen. Pat Roberts, Sen. John D. Rockefeller, Rep. Peter Hoekstra, and Rep. Jane Harman (Dec. 22, 2005).[27] In *EPIC v. Department of Justice*, the District Court for the District of Columbia ruled that DOJ had failed to "describe with sufficient detail" its justification for withholding these legal opinions. 584 F. Supp. 2d 65, 77 (D.D.C. 2008).

In response to *EPIC v. Department of Justice*, two of the OLC memos were released in spring 2011. *See* Jack Goldsmith, *DOJ Releases Redacted Version of the 2004 Surveillance Opinion*, Lawfare (Mar. 18, 2011).[28] By then a comprehensive Inspectors General Report[29] had already reviewed the controversial 2001 warrantless wiretapping memo[30] and it was officially withdrawn by the OLC.

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[26] This followed a period of "rebellion" within the DOJ to proposed surveillance that Attorney General Ashcroft, Deputy Attorney General James Comey, and others refused to authorize. *See generally* Barton Gellman, Angler: The Cheney Vice Presidency (2009).

[27] *Available at* http://www.justice.gov/ag/readingroom/surveillance6.pdf.

[28] http://www.lawfareblog.com/2011/03/doj-releases-redacted-version-of-2004-surveillance-opinion/.

[29] Offices of Inspectors General, Dep't of Defense, Dep't of Justice, Central Int. Agency, Nat'l Sec. Agency, & Office of the Dir. of Nat'l Int., *Unclassified Report on the President's Surveillance Program* (Jul. 10, 2009), *available at* http://www.fas.org/irp/eprint/psp.pdf.

[30] Memorandum of John C. Yoo, Deputy Assistant Attorney General, Dep't of Justice, Office of Legal Counsel, U.S. Dep't of Justice, for the Attorney General

Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice, for the Files 6-8 (Jan. 15, 2009) (noting that "[a] number of classified OLC opinions issued in 2001-2002 relied upon a doubtful interpretation of the Foreign Intelligence Surveillance Act" and "[a]ll but one of these opinions have been withdrawn or superseded by later opinions of this Office."). As the Bradbury memo illustrated, Yoo did not adequately support broad presidential surveillance powers and his analysis of the Foreign Intelligence Surveillance Act ("FISA"), in particular, was "problematic and questionable." *Id*.

The administration's delay in releasing the legal opinions denied Congress and the public important information during a critical period of public debate regarding proposed amendments to the FISA. *See* Glenn Greenwald, *"Trust Us" Government*, Salon (Jan. 29, 2008).[31] If Congress found the OLC's analysis to be "problematic and questionable" as Steven Bradbury did, knowing exactly how OLC had interpreted FISA would have allowed lawmakers to better assess the legislative proposal. It also might have affected Congress's willingness to trust the executive branch with expansive new powers. However, Congress passed the FISA Amendments Act of 2008 before the legal authorities for the controversial

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(Nov. 2, 2001), *available at* http://www.aclu.org/files/assets/NSA_Wiretapping_OLC_Memo_Nov_2_2001_Yoo.pdf.

[31] http://www.salon.com/2008/01/30/fisa_7/.

surveillance program were known. *Senate Sends No-Warrant Wiretapping Bill to Bush*, CNN, Jul. 8, 2008.[32]

A group of attorneys, journalists, and non-profits later challenged the Act. The plaintiffs frequently communicated with clients and sources abroad on intelligence-related matters. Because of the secrecy surrounding the Act, the Supreme Court held that plaintiffs did not have sufficient information about the wiretapping program to establish their standing to sue. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013). Meanwhile, Congress asked the President to clarify the interpretation and application of the FISA Amendments Act, but received no answers. Letter from Sens. Ron Wyden, Mark Udall, Tom Udall, and Jeffrey Merkley to James R. Clapper, Jr., Director of Nat'l Intelligence (Nov. 5, 2012).[33] The administration has repeatedly failed to disclose the interpretation of its warrantless wiretapping authorities, which has thwarted attempts at judicial and Congressional oversight. Its authority remains intact, but its legitimacy is increasingly in question.

When OLC opinions have been promptly released following military engagements abroad, the disclosure contributed to public oversight and understanding of executive branch war powers. In 2011, American and European

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[32] *Available at* http://www.cnn.com/2008/POLITICS/07/09/senate.fisa/.
[33] *Available at* http://www.wyden.senate.gov/download/letter-to-clapper-regarding-fisa-amdts.

forces began a broad campaign against Muammar el-Qaddafi in Libya. Several weeks later, the OLC published its final opinion affirming the President's constitutional authority to launch military strikes in Libya without permission from Congress. Charlie Savage, *Justice Memo Upholds Libya Strikes*, N.Y. Times, Apr. 7, 2011.[34] The release of the OLC's legal analysis facilitated the important debate over the scope of executive power to initiate military actions abroad. *See Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations* 112th Cong. 7-40 (2011) (statement of Harold Hongju Koh, Legal Adviser, Department of State);[35] Jack Goldsmith, *Is the Obama Administration's Original Legal Rational for the Libya Intervention Still Valid?* Lawfare (Jun. 9, 2011).[36]

The OLC has published its legal opinions even to clarify the scope of executive privilege applicable to internal DOJ documents. In the recent "Operation Fast and Furious" matter involving the Bureau of Alcohol, Tobacco, and Firearms (ATF), Congress conducted an extensive investigation of alleged misconduct and mismanagement. Sara Horwitz, *A Gunrunning Sting Gone Fatally Wrong*, Wash. Post, Jul. 25, 2011.[37] In response to a subpoena to the Attorney General,[38] the

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[34] *Available at* http://thecaucus.blogs.nytimes.com/2011/04/07/justice-memo-upholds-libya-strikes/.
[35] *Available at* http://www.state.gov/documents/organization/167452.pdf.
[36] *Available at* http://www.lawfareblog.com/2011/06/is-the-obama-administrations-original-legal-rationale-for-the-libya-intervention-still-valid/
[37] http://www.washingtonpost.com/investigations/us-anti-gunrunning-effort-turns-fatally-wrong/2011/07/14/gIQAH5d6YI_story.html.

President asserted executive privilege to prevent disclosure of certain DOJ documents. Richard A. Serrano, *Obama Invokes Executive Privilege Over Fast and Furious Documents*, L.A. Times, June 20, 2012.[39] The OLC subsequently released a formal opinion clarifying the legal boundaries of executive privilege. Assertion of Executive Privilege Over Documents Generated in Response to Congressional Investigation Into Operation Fast and Furious, 36 Op. OLC 1 (2012). Although executive officials asserted the privilege as to a subset of the documents, the administration still recognized the importance of explaining the law by disclosing the relevant OLC opinion.

These examples demonstrate that secret law is inconsistent with our form of government. They frustrate public oversight and diminish the legitimacy of government. The Office of Legal Counsel may not issue opinions that carry the force of law in the shadows.

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[38] *See* Memorandum from Rep. Darrell Issa, Chairman, to Members, Committee on Oversight and Government Reform, U.S. House of Representatives (May 3, 2012) *available at* http://oversight.house.gov/wp-content/uploads/2012/05/Update-on-Fast-and-Furious-with-attachment-FINAL.pdf.

[39] *Available at* http://articles.latimes.com/2012/jun/20/news/la-pn-obama-invokes-executive-privilege-over-fast-and-furious-documents-20120620.

CONCLUSION

Amici curiae EPIC et al. respectfully request that this Court rule in favor of the Appellants and reverse the decision of the lower court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of 7,000 words of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B). This brief contains 6,922 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word Mac in 14 point Times New Roman style.

Dated: April 22, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April, 2013, the foregoing Brief of *Amici Curiae* was electronically filed with the Clerk of the Court, and thereby served upon counsel for the parties *via* electronic delivery.

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