

15-2956-cv(L)

American Civil Liberties Union v. United States Department of Justice

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 2016

Argued: October 25, 2016

Decided: December 20, 2016

Docket Nos. 15-2956(L), 15-3122(XAP)

1 AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL
2 LIBERTIES UNION FOUNDATION,

3
4 Plaintiffs-Appellants-Cross-Appellees,

5
6 v.

7
8 UNITED STATES DEPARTMENT OF JUSTICE, including
9 its component the Office of Legal Counsel, UNITED
10 STATES DEPARTMENT OF DEFENSE, including its
11 component U.S. Special Operations Command, CENTRAL
12 INTELLIGENCE AGENCY,

13
14 Defendants-Appellees-Cross-Appellants.

15
16 Before: NEWMAN, CABRANES, and POOLER, Circuit Judges.

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18 Appeal and cross-appeal from the July 23, 2015,
19 judgment of the District Court for the Southern District of
20 New York (Colleen McMahon, now-Chief Judge) in a case
21 brought under the Freedom of Information Act. The judgment
22 granted in part and denied in part disclosure of documents
23 sought from the Office of Legal Counsel of the Department

1 of Justice, the Central Intelligence Agency, and the
2 Department of Defense concerning drone strikes.

3 Affirmed on the appeal, reversed on the cross-appeal,
4 and remanded for entry of a revised judgment.

5
6 Brett Max Kaufman, New York, NY
7 (Jameel Jaffer, Hina Shamsi,
8 Matthew Spurlock, American Civil
9 Liberties Union Foundation, New
10 York, NY, Colin Wicker, Dorsey &
11 Whitney LLP, Minneapolis, MN, on
12 the brief), for Plaintiffs-
13 Appellants-Cross-Appellees.

14
15 Sarah S. Normand, Asst. U.S. Atty.,
16 New York, NY (Preet Bharara,
17 U.S. Atty., New York, NY,
18 Benjamin C. Mizer, Principal
19 Deputy Asst. Atty. General,
20 Matthew M. Collette, Sharon
21 Swingle, Civil Division, U.S.
22 Dep't of Justice, Washington,
23 DC, on the brief), for
24 Defendants-Appellees-Cross-
25 Appellants.

26
27 JON O. NEWMAN, Circuit Judge:

28 This is the third appellate round of a case brought
29 under the Freedom of Information Act ("FOIA"). The case
30 began in February 2012 to challenge responses to FOIA
31 requests made in October 2011 to the Office of Legal
32 Counsel ("OLC") of the Department of Justice ("DOJ"), the
33 Central Intelligence Agency ("CIA"), and the Department of

1 Defense ("DOD"). The requests were made by the American
2 Civil Liberties Union and the American Civil Liberties
3 Foundation (collectively "ACLU"). The requests were also
4 made by *The New York Times* and two of its reporters, but
5 they are not parties in the pending appeal.

6 ACLU appeals and DOJ cross-appeals from the July 23,
7 2015, judgment of the District Court for the Southern
8 District of New York (Colleen McMahon, now-Chief Judge).
9 That judgment ruled that OLC, CIA, and DOD were entitled to
10 withhold from disclosure a number of documents concerning
11 drone strikes -- lethal attacks by unmanned aircraft. The
12 judgment also ruled that OLC must disclose all or portions
13 of four documents¹ and CIA must disclose all or portions of
14 three documents² concerning such strikes. ACLU has narrowed
15 its request to 59 documents,³ including the seven documents
16 ordered disclosed in full or in part. ACLU's appeal
17 challenges the District Court's ruling to the extent it
18 upheld nondisclosure of 52 documents, and the Government's

¹ OLC 46, 50, 144, and 145.

² CIA 59 tab C, 109, and 113.

³ OLC 1, 2, 8, 9, 46, 50, 64, 65, 66, 70, 71, 73, 75, 76,
83, 84, 90, 91, 95, 144, and 145; CIA 2, 3, 12, 15, 33, 34, 35,
36, 45, 59 tab C, 61, 62, 78, 94, 95, 96, 105, 106, 107, 109,
110, 111, 112, 113, 117, 118, 119, 120, 123, 124, 140, and 142;
DOD 1, 31, 38, 39, 46, and 55.

1 cross-appeal challenges the ruling to the extent it ordered
2 disclosure, in whole or in part, of seven documents.

3 We conclude that none of the 52 withheld documents must
4 be disclosed, and that the seven documents ordered
5 disclosed may also be withheld. We therefore affirm on the
6 appeal, reverse on the cross-appeal, and remand for entry
7 of a revised judgment.

8 *Litigation history.* Our first encounter with this
9 litigation concerned consolidated appeals from the January
10 24, 2013, judgment of the District Court, dismissing on
11 motion for summary judgment two consolidated suits, one
12 brought by *The New York Times* and two of its reporters and
13 another brought by ACLU. See *New York Times Co. v. U.S.*
14 *Dep't of Justice*, 915 F. Supp. 2d 508 (S.D.N.Y. 2013),
15 *modified by* 2013 WL 238928 (S.D.N.Y. Jan. 22, 2013). On
16 those consolidated appeals, we ordered disclosure of a
17 redacted version of the "OLC-DOD Memorandum," a 41-page
18 document, prepared by OLC, arguing the legal justification
19 for the drone strikes that killed Anwar al-Awlaki, Samir
20 Khan, and al-Awlaki's son, Abdulrahman al-Awlaki. See *New*
21 *York Times Co. v. U.S. Dep't of Justice*, 756 F.3d 100, 124
22 (Conclusion ¶ 1) (2d Cir. 2014) (revised opinion) ("*NYTimes*

1 I"). All three victims were United States citizens, either
2 by birth or naturalization. Pertinent to the pending
3 appeal, *NYTimes I* also ordered:

4 • OLC to disclose some of the titles and descriptions
5 of documents listed on its *Vaughn* index,⁴ *id.* (Conclusion
6 ¶ 2);

7 • OLC to submit various legal memoranda to the District
8 Court for "*in camera* inspection and determination of waiver
9 of privileges and appropriate redaction," *id.* (Conclusion
10 ¶3) (*italics added*); and

11 • CIA and DOD to submit *Vaughn* indices to the District
12 Court for "*in camera* inspection and determination of
13 appropriate disclosure and appropriate redaction," *id.*
14 (Conclusion ¶ 5).

15 In response to the Government's petition for rehearing
16 of *NYTimes I*, we made a slight revision of that opinion,
17 made slight further redactions of the OLC-DOD Memorandum,
18 and permitted the Government to withhold from disclosure

⁴ A *Vaughn* index is a list of documents, identified by number, title, and description, that a Government agency determines are responsive to an FOIA request. The index states the one or more FOIA exemptions that the agency claims justify withholding each document. The term derives from *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

1 the titles and descriptions of some documents listed on the
2 OLC *Vaughn* index, confirming a withholding authorized by an
3 order issued May 28, 2014. See *New York Times Co. v. U.S.*
4 *Dep't of Justice*, 756 F.3d 97, 99 (2d Cir. 2014) (first
5 opinion on Government's petition for rehearing of *NYTimes*
6 *I*). We also bifurcated for later decision the Government's
7 request for permission to withhold from disclosure
8 additional titles and descriptions of documents listed on
9 the OLC *Vaughn* index. See *id.* at 98-99.

10 Later, completing our ruling on the Government's
11 petition for rehearing, we permitted the Government to
12 withhold from disclosure the titles and descriptions of
13 additional documents listed on the OLC *Vaughn* index and the
14 titles of other documents listed on that index. See *New*
15 *York Times Co. v. U.S. Dep't of Justice*, 758 F.3d 436, 441
16 (2d Cir. 2014) (second opinion on Government's petition for
17 rehearing of *NYTimes I*). We also ordered DOJ to make public
18 its previously classified OLC *Vaughn* index, as permissibly
19 redacted. See *id.* With the Government's petition for
20 rehearing completely adjudicated, the District Court was
21 left with the task, as directed in *NYTimes I*, to consider
22 *in camera* whether several undisclosed OLC documents, sought

1 in the original FOIA requests, should be disclosed. See
2 *NYTimes I*, 756 F.3d at 124 (Conclusion ¶ 3).

3 On remand, the District Court ruled that ten of eleven
4 OLC documents, identified in an affidavit of an OLC
5 official, could be withheld from disclosure. See No. 1:11-
6 cv-09336-CM, Dkt. No. 52 (Oct. 31, 2014). The District
7 Court rejected the Government's request to redact three
8 paragraphs from its opinion. See *id.*, Dkt. No. 51. The
9 Court certified its rulings for immediate appeal under Rule
10 54(b) of the Federal Rules of Civil Procedure. See *id.* Dkt.
11 No. 52.

12 Those rulings precipitated the second appellate round
13 of this litigation. We ruled that the ten identified
14 documents could be withheld. See *New York Times Co. v. U.S.*
15 *Dep't of Justice*, 806 F.3d 682, 690-91 (2d Cir. 2015)
16 ("*NYTimes II*"). We also ruled that the District Court could
17 make public, except for a few words, the three paragraphs
18 of its opinion the Government had sought to keep
19 undisclosed. See *id.* Finally, we upheld the Government's
20 request to redact a small portion of the transcript of the
21 Government's *ex parte* and *in camera* oral argument before
22 this Court. See *id.*

1 *NYTimes II* left for the District Court the laborious
2 task of examining the numerous OLC, CIA, and DOD documents
3 that the Government claimed were exempt from disclosure.
4 The Government had identified the OLC documents in its OLC
5 *Vaughn* index, which was originally classified. *NYTimes I*
6 ordered a redacted version of that index disclosed. 756
7 F.3d at 124 (Conclusion ¶ 2). The Government had identified
8 the CIA and DOD documents in its classified CIA and DOD
9 *Vaughn* indices. *NYTimes I* had ordered preparation of those
10 indices and their consideration by the District Court *in*
11 *camera* for determination of appropriate disclosure and
12 redaction. *Id.* (Conclusion ¶ 5).

13 Undertaking this task, the District Court examined the
14 documents listed on the OLC, CIA, and DOD *Vaughn* indices.
15 In a sealed unredacted draft opinion filed on May 13, 2015,
16 and superseded by a sealed unredacted final opinion filed
17 on June 23, 2015,⁵ the District Court required disclosure of
18 redacted versions of three OLC documents, OLC 46, OLC 144,

⁵ The District Court explained in its July 17, 2015, order concluding the litigation that the June 23, 2015, opinion "completely superseded" the Court's May 13, 2015, draft opinion. The July 17, 2015, order slightly amended the June 23, 2015, unredacted opinion and also reported that a redacted version of the June 23, 2015, opinion had been filed "yesterday," *i.e.*, July 16, 2015. SPA 162-64.

1 and OLC 145; the complete text of OLC 50;⁶ the complete text
2 of Tab C to CIA 59; and redacted versions of CIA 109 and
3 CIA 113. See *ACLU v. U.S. Dep't of Justice*, No. 12 Civ.
4 794(CM), 2015 WL 4470192, at *13-14, *23, *27, *39, *42-43,
5 *45 (S.D.N.Y. July 16, 2015) (redacted opinion).

6 In its redacted opinion, the District Court identified
7 six facts, Nos. 1-5 and 7, that it ruled (with one slight
8 qualification of No. 7 not material to this appeal) had
9 been officially acknowledged. See *id.* *4-5. The Court also
10 identified a seventh fact (No. 6), see *id.* at *5, for
11 consideration by this Court as to whether it had been
12 officially acknowledged, see *id.* at *6. The District Court
13 ruled that the six acknowledged facts must be disclosed "to
14 the extent that these specific facts appear in documents on
15 the Agencies' *Vaughn* Indices and can be segregated from
16 other, properly exempt information." *Id.* at *5. The Court

⁶ Both the District Court's June 23, 2015, draft opinion and its July 16, 2015, revised opinion identified this OLC document as No. 50. See SPA 58, 59. However, the District Court's July 17, 2015, order, recapitulating its rulings, see SPA 164, and the judgment, see SPA 166, identified the document as No. 150. The Government's brief identified the document as No. 50. See Br. for Government at 60-62.

We are satisfied that 50 is the correct number and that 150 is a typographical error. This is clear from the description of the document in the District Court's draft and revised opinion and the fact that there is no OLC No. 150.

1 stated that disclosure of these six facts is “[a]pplicable
2 to [a]ll [d]ocuments,” *id.* at *2, but qualified that
3 statement to make clear that the disclosure requirement
4 does not apply to any document reviewed by the Court *in*
5 *camera*, “because the [C]ourt took those facts into account
6 when reviewing the document,” *id.* at *15. With the
7 exception of the seven documents ordered to be disclosed,
8 the District Court ruled that all other requested documents
9 need not be disclosed.

10 With respect to the six facts, the District Court
11 ordered OLC, CIA, and DOD to make a “segregability review”
12 of each document that the Court had not reviewed *in camera*
13 and then represent either that the six facts had not been
14 officially acknowledged, or, if so acknowledged, that the
15 facts cannot reasonably be segregated from information
16 exempt from disclosure. *See id.* at *6-7. The Government
17 responded with classified declarations from OLC, CIA, and
18 DOD, which contended that segregation of all six facts
19 could not be made. **[CSA 492, 516, 544]** On July 16, 2015,
20 the District Court issued an order agreeing with the

1 agencies' contention. See No. 1:12-cv-00794-CM, Dkt. No.
2 129 (July 16, 2015).⁷

3 Uncertain as to the status of three documents -- CIA
4 61, CIA 96, and DOD 1, this Court requested the Government
5 to produce them *ex parte* for our *in camera* inspection. No.
6 15-2956, Dkt. No. 166 (2d Cir. Oct. 21, 2016). We have
7 examined them.

8 The District Court's ruling that 52 documents should be
9 withheld and that all or part of seven documents should be
10 disclosed is now fully submitted for our review.

11 Discussion

12 Although the history of this litigation is regrettably
13 complicated, disposition of the pending appeal and cross-
14 appeal is fairly straightforward. In general, continued
15 withholding of documents challenged on ACLU's appeal and
16 reversal of the District Court's disclosure rulings
17 challenged on the Government's cross-appeal are warranted
18 either because disclosure would reveal information that

⁷ After an inquiry from this Court, see No. 15-2956, Dkt. 136 (2d Cir. Aug. 30, 2016), a response from the District Court, see No. 1:12-cv-00794-CM, Dkt. No. 142 (Oct. 20, 2016), and a further inquiry from this Court, see No. 15-2956, Dkt. No. 168 (2d Cir. Oct. 21, 2016), the District Court confirmed this conclusion, see No. 1:12-cv-00794-CM, Dkt. No. 144 (Oct. 21, 2016).

1 should remain secret or because the documents are
2 predecisional drafts protected by FOIA Exemption 5. See
3 *Brennan Center for Justice v. U.S. Dep't of Justice*, 697
4 F.3d 184, 206-07 (2d Cir. 2012); *Lahr v. National*
5 *Transportation Safety Board*, 569 F.3d 964, 981-84 (9th Cir.
6 2009); *Abdelfattah v. U.S. Dep't of Homeland Security*, 488
7 F.3d 178, 183-84 (3d Cir. 2007).

8 *ACLU's appeal*. We appreciate the difficulty ACLU
9 encounters in challenging the District Court's decision to
10 withhold from disclosure 52 documents. ACLU has not seen
11 either the documents or the redacted portions of the
12 District Court's opinion explaining the Court's reasons.

13 Having carefully considered each of these documents, we
14 conclude that each of the District Court's withholding
15 decisions was correct. The documents are protected by one
16 or more FOIA exemptions and no waiver of secrecy has
17 occurred with respect to any of them. Our ruling does not
18 turn on the issue of so-called "working law," an issue
19 contested by ACLU.

20 *The seven facts*. At oral argument, it became clear that
21 the issue as to the seven facts identified by the District
22 Court in its July 16, 2015 opinion was whether the

1 Government was asserting the right to withhold any
2 documents because these facts were contained in them. To
3 assist in resolving that issue the District Court directed
4 the relevant agencies to make a segregability review to
5 determine if the six acknowledged facts could be segregated
6 from protected portions of the documents in which they are
7 contained. As explained above, the District Court ruled
8 that the agencies' submissions persuasively showed that
9 segregation could not be made. We agree with that ruling.
10 No further consideration of these six facts is needed.

11 With regard to the seventh fact, which the District
12 Court left for our consideration, we conclude that it is
13 unnecessary for the resolution of this appeal to determine
14 whether it has been officially acknowledged. The Government
15 did not assert the right to withhold any of the documents
16 at issue in this appeal on the ground that those documents
17 contained the seventh fact. Accordingly, even if we were to
18 conclude that the Government publicly acknowledged the
19 seventh fact, we would not order disclosure of any document
20 on that basis. No further consideration of the seventh fact
21 is required.

1 *Government's cross-appeal*. The seven documents ordered
2 disclosed by the District Court require individual
3 consideration.

4 OLC 46: This document, ordered disclosed in redacted
5 form, is an informal memo, attempting to summarize a
6 meeting at which legal advice was discussed. Indicating the
7 preliminary nature of the memo, the agency staff member who
8 prepared it asked the recipients to correct anything that
9 the writer had tried to summarize. The document is
10 predecisional under Exemption 5 and therefore need not be
11 disclosed.

12 OLC 50: This document is a draft of two paragraphs that
13 the document preparer suggested might be included in the
14 DOJ White Paper, the document, first leaked and then
15 officially disclosed, which provided a brief legal
16 justification for drone strikes. See *NYTimes I*, 756 F.3d at
17 110. Ultimately, the two paragraphs were not included in
18 the White Paper. The District Court considered the two
19 paragraphs similar to the legal advice contained in the
20 White Paper and the OLC-DOD Memorandum, as to which
21 privileges had been waived by disclosure. We acknowledge
22 some similarities, but agree with the Government that the

1 document is demonstrably a draft. ACLU previously explained
2 that it is not seeking "drafts in this litigation," and
3 stated that "[i]f the Court determines that [the
4 description of OLC 50 as a draft is] accurate, [then it] no
5 longer seeks th[at] document." Reply Br. for ACLU at 17
6 n.11. Accordingly, because OLC is a draft protected by
7 Exemption 5 as predecisional and no longer sought by ACLU,
8 OLC 50 need not be disclosed.

9 OLC 144: This document, ordered disclosed in part, is a
10 set of suggested talking points concerning the legal basis
11 for drone strikes. We agree with the Government that the
12 document is predecisional and need not be disclosed.
13 Government officials do not lose the protection of
14 Exemption 5 by considering informally how to present a
15 legal analysis.

16 OLC 145: This is an internal outline of classified
17 facts and some fragmentary discussion of legal advice,
18 prepared in connection with the drafting of legal advice.
19 Although the District Court properly redacted portions of
20 the document, the remainder is also entitled to remain
21 protected as predecisional under Exemption 5. The document
22 need not be disclosed.

1 CIA 59 tab C: This is a draft of a proposed op-ed
2 article that suggested some ways of explaining the
3 Government's legal reasoning in support of drone strikes.
4 It was never published. Although it reveals some of the
5 unnamed writer's thinking about legal justification for
6 drone strikes, it is a draft and for that reason
7 predecisional. It need not be disclosed.

8 CIA 109 and CIA 113: These documents, which the
9 District Court disclosed in part, are informal and
10 preliminary. The second is unsigned and undated. Despite
11 the redactions, some phrases entitled to secrecy remain.
12 Although both appear to have been written after the action
13 they comment on, they are nonetheless predecisional with
14 respect to the formulation of a policy or a clear legal
15 position. Neither document need be disclosed.

16 Conclusion

17 Chief Judge McMahon ably performed the burdensome task
18 of examining scores of documents in this protracted
19 litigation, which now appears to be concluded. Despite our
20 slight disagreement with her assessment of a few of these
21 documents, we appreciate her diligence and the helpful
22 explanations in her sealed opinion.

1 On ACLU's appeal, the judgment is affirmed; on the
2 Government's cross-appeal, the judgment is reversed; the
3 case is remanded for entry of a revised judgment.