# 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

**REPLY BRIEF FOR PLAINTIFFS-APPELLANTS AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION FOUNDATION**

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## INTRODUCTION

The government's opposition brief is the latest installment in its ongoing effort inside U.S. courtrooms to obscure truths known outside of them. Over and over again, the government has asked the Judiciary to endorse its aggressive extension of the concept of official secrecy to unprecedented lengths. The Freedom of Information Act's very existence owes to legislators' concerns about the public's access to national-security information in particular, and those legislators explicitly warned about the dangers inherent in campaigns of selective disclosure in the context of foreign policy. It is no overstatement to say that the FOIA was enacted to grant the public rights to information about precisely the kinds of matters now before this Court. The Court should not—indeed, under the FOIA, cannot—allow itself to be enlisted in the government's effort here.

## ARGUMENT

### I. The Government's Official Acknowledgments About The Targeted-Killing Program Defeat Its "No Number No List" Responses

As Plaintiffs have explained, the government's "no number no list" responses were not justified when they were first provided or when the district court issued its summary-judgment ruling. *See* ACLU Br. 37–49. But even if they had been, official disclosures since the district court's ruling have dissipated whatever force the government's arguments once had.

government to conclude that the killing would be appropriate and lawful. *See* Barack Obama, Remarks by the President at the National Defense University (May 23, 2013), http://wh.gov/hrTq ("Obama NDU Speech").

Over the past six months, Members of Congress—including, most notably, the chairpersons of the Senate and House Select Committees on Intelligence—have acknowledged the United States' killing of Anwar al-Aulaqi, the CIA's operational role in that killing, the CIA's ongoing operational role in targeted killings more generally, the military's ongoing operational role in targeted killings, the existence of OLC memoranda setting out the government's purported legal authority to kill U.S. citizens suspected of terrorism, and the government's reliance on the White Paper's legal analysis in its killing of Mr. al-

provide *Vaughn* declarations explaining its withholdings. *See* ACLU Br. 45–46 (discussing the importance of the *Vaughn* requirement in FOIA cases).

To be fair, it is not entirely lost on the government that its disclosures over the last six months are in tension with its "no number no list" responses. *See* Opp. 48 n.13 (addressing the possibility that the Court might find the disclosures to be relevant). But rather than seriously grapple with the implications of the disclosures, the government proposes that the Court should simply disregard them—because the disclosures were made too recently, *see* Opp. 46; because they were made by officials of the wrong branch of government, *see* Opp. 34–36, 36 n.10; or because

disclosures are always and categorically insufficient. Plaintiffs know of no court that has endorsed that sweeping proposition, and the D.C. Circuit, whose jurisprudence this Court has often looked to in FOIA cases, has explicitly eschewed it. *See*

specific to constitute official acknowledgments, not on the question whether the person disclosing the information was capable, given his or her position, of effecting an official acknowledgement.[1] One of the cases the government cites involved an entirely distinct question and explicitly left open the possibility that disclosures by Members of Congress could render otherwise-applicable FOIA exemptions inapplicable.[2] Others did not discuss official acknowledgments at all.[3]

[1] *See Moore v. CIA*, 666 F.3d 1330, 1333 n.4 (D.C. Cir. 2011) (holding that FBI agent's declaration did not constitute an official acknowledgment because it did not "identify *specific* records or dispatches *matching* [a] FOIA request" directed at the CIA (emphases added)); *Wilson v. CIA*, 586 F.3d 171, 195–96 (2d Cir. 2009) (determining that "bureaucratic transmittal" of a letter acknowledging

While the identity of the source of a disclosure is certainly relevant to the question whether the disclosure constitutes an official acknowledgment, and while it is generally true that statements made by legislators and former agency officials are insufficient to effect official acknowledgement, *see, e.g.*, *Frugone v. CIA*, 169 F.3d 772, 774 (D.C. Cir. 1999),[4] the categorical rule suggested by the government is not the law. The D.C. Circuit's recent decision in *Ameziane v. Obama*, 699 F.3d 488 (D.C. Cir. 2012), is instructive. In that case, counsel for a Guantánamo detainee sought permission to disclose that the government had approved the transfer of his client from Guantánamo—information contained in a sealed district-court order. *Id.* at 493. The district court granted the request, but the D.C. Circuit reversed. In considering the detainee's argument that the government's appeal was moot due to the alleged knowledge of the detainee's status by third parties, the circuit court observed that the detainee's attorney was "an officer of the court, subject to the serious ethical obligations inherent in that position," and consequently that representations made by him "would be tantamount to, and a

[4] In *Frugone*, the court held that a letter from the Office of Personnel Management ("OPM") acknowledging a prior relationship between the CIA and former CIA employee did not defeat an exemption claim by the CIA because compelled disclosure of the requested records through the FOIA "could cause greater diplomatic tension" than "the informal, and possibly erroneous, statements Id. at

sufficient substitute for, official acknowledgment by the U.S. government." *Id.*; *see id.* ("Although foreign governments would be unlikely to rely on a claim by a third party—or even by [the detainee] himself—that [the detainee] has been cleared

2007); *accord Am. Civil Liberties Union v. Dep't of Def.*, 628 F.3d 612, 621 – 622 (D.C. Cir. 2011); *Fitzgibbon*, 911 F.2d at 765. "It is one thing for a reporter or author to speculate or guess that a thing may be so or even, quoting undisclosed sources, to say that it is so; it is quite another thing for one in a position to know of it officially to say that it is so." *Alfred A. Knopf*, 509 F.2d at 1370; *accord Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982); *Alfred A. Knopf*, 509 F.2d at 1370 ("The reading public is accustomed to treating reports from uncertain sources as being of uncertain reliability, but it would not be inclined to discredit reports of sensitive information revealed by an official of the United States in a position to know of what he spoke."); *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972) ("Rumor and speculation are not the equivalent of prior disclosure, however, and the presence of that kind of surmise should be no reason for avoidance of restraints upon confirmation from one in a position to know officially."); *see Military Audit Project v. Casey*, 656 F.2d 724, 745 (D.C. Cir. 1981) (rejecting official acknowledgment effect of a congressional report where the "CIA still has something to hide" or could credibly "hide from our adversaries the fact that it has nothing to hide").

The relevant issue, then, is whether the disclosure in question leaves "some increment of doubt," *Wilson v. CIA*

person who disclosed the information was an official of the relevant agency at the time is surely relevant to the inquiry—even highly relevant—but it is not determinative.[5]

There can be no serious question that the disclosures made by the leaders of the congressional intelligence committees have been understood as official by the general public. Senator Feinstein and Representative Rogers are the chairpersons of the congressional committees that oversee the CIA, *see* 50 U.S.C. § 413b, and they have made clear that they have first-hand information about the CIA's involvement in targeted killings. *See* ACLU Br. 15–17 (detailing the committee chairpersons' disclosures concerning their oversight of targeted killings by the CIA). It would be fatuous to suggest that their disclosures about the CIA's role in the targeted-killing program would be understood as anything other than official. Notably, the government does not contend that Senator Feinstein and Representative Rogers lack credibility with the public, or that they are uninformed, or that they are perceived by the public to be uninformed. Nor does it contend that the public is likely to disregard their statements until and unless those statements are confirmed by Executive Branch officials. The government's argument is

[5] Indeed, courts have held that even *private* actors may make official acknowledgments of "state secrets" if they have been afforded privileged access to the information at issue. *See Terkel v. AT & T Corp.*, 441 F. Supp. 2d 899, 913 (N.D. Ill. 2006) (citing *Hepting v. AT & T Corp.*

insupportably formalistic. It is an argument that divorces the rule entirely from its rationale.

The government's effort to dismiss the relevance of certain Executive Branch disclosures, Opp. 36–37, depends on the same rigidity. In essence, the government argues that Mr. Panetta's explicit and unambiguous statements about the CIA's role in targeted killings must be disregarded simply because, at the time he made them, Mr. Panetta had begun to occupy a different chair during Cabinet meetings. This argument defies both common sense and case law. If a private attorney can effect an official acknowledgement, as in *Ameziane*, 699 F.3d at 492–93, surely a Cabinet official can effect one, too. Moreover, not even the government maintains that Mr. Panetta's statements about the CIA's role in the targeted-killing program have been understood by the general public to be uninformed or speculative. Instead, the government's argument is (once again) entirely formalistic. The same is true of the government's attempt to disqualify Mr. Brennan's statements as the President's chief counterterrorism advisor. The government does not contend that Mr. Brennan was speaking on the basis of second-hand knowledge, that he was speculating about facts unknown to him, or that his statements were (or should have been) understood by the general public as anything other than official. The government's argument is simply that the Court

should transform a general rule into a categorical one without troubling to consider the rule's rationale.

Accepting the government's argument would create a perverse situation in which details about the targeted-killing program could be discussed and debated openly in Congress by members of the congressional committees tasked with overseeing the program—as they have been[6]—but still be considered secrets in the nation's courts. It would mean that some of the Executive Branch officials with most knowledge of controversial programs could promote and defend those programs to the public, and selectively disclose information about them, without ever triggering disclosure obligations under the FOIA. And it would mean that the courts would routinely declare to be "secret" information that the entire world already regards as plainly true and officially confirmed. Precedent does not require this absurd result, and this Court should not abide it. To borrow the words of the D.C. Circuit, the Court should not give its "imprimatur to a fiction of deniability that no reasonable person would regard as plausible," *Drones FOIA*, 710 F.3d at 431.

The government's argument that it cannot provide a *Vaughn* declaration without disclosing still-secret information is based on the unsuston( und)-8shB

the public does not yet know for certain "whether lethal targeting operations are being conducted by . . . agencies of the United States Government [other than DOJ] and, if so, which agencies," Opp. 44. As Plaintiffs have explained, however, the government has already officially acknowledged—repeatedly, and through multiple agents—that lethal targeting operations are being conducted by the CIA and the Department of Defense ("DOD"). *See* ACLU Br. 13–23 (citing statements by Mr. Panetta, Mr. Brennan, DOD General Counsel Jeh Johnson, Senator Feinstein, and Representative Rogers, among other government officials), 38–39 (collecting CIA and DOD acknowledgments).[7] The Court should order the government to finally provide the *Vaughn* declaration that the FOIA required it to provide nearly two years ago.

[7] Additionally, the "nature, depth, and breadth" of DOJ's withholdings are no longer secrets. *Compare* JA193–94 ("[W]ere DOJ to acknowledge that it located a *large volume* of classified records responsive to the ACLU request, that would tend to indicate that an entity of the U.S. Government was involved in the lethal targeting activities that are the subject of the request, since if a U.S. Government entity had been granted the authority to carry out lethal operations against U.S. citizens it would be logical that the legal issues related to such operations would be extensively documented." (emphasis added)), *with* Opp. 47 eD8(de)12gpha

To the extent the government's argument is that a *Vaughn* declaration will disclose more information than has already been officially acknowledged, the government misunderstands its burden. It will always be true that releasing more information will release more information. But what would be the purpose of the FOIA if the only information requesters could obtain under the statute was information the government had already released? *See*

question of which disclosures are obligatory sometimes turns, at least in part, on which disclosures the government has already made. *See* ACLU Br. 44–49. There is nothing novel about this. Second, one of the FOIA's purposes was to end the practice of *selective* disclosure—the practice of disclosing information that paints government policy in the most favorable possible light, while denying the public access to additional information required to assess the validity of the government's claims. *See, e.g.*, Republican Policy Committee Statement on Freedom of Information Legislation, S. 1160, 112 Cong. Rec. 13020 (1966) ("In this period of selective disclosures, managed news, half-truths, and admitted distortions, the need for this legislation is abundantly clear."), *reprinted in* Subcomm. on Admin. Practice, S. Comm. on the Judiciary, 93d Cong., Freedom of Information Act Source Book: Legislative Materials, Cases, Articles, at 59 (1974). That the government has made selective disclosures about the targeted-killing program is not a reason to relax the FOIA's requirements. It is a reason to enforce them.

## II. The Agencies' Withholding of the OLC–DOD Memo, the Unclassified Memos, and Any Other Responsive OLC Memoranda is Unlawful abu04 Tc 5(w)8(hi

citizens. The government released the White Paper, which Mr. Holder informed the Senate was based on OLC memoranda. In addition, Mr. Brennan stated in testimony before Congress that OLC memoranda set forth the legal limits within which the government's targeted-killing program operates. The government has consequently waived any privilege that might otherwise apply to the memoranda under Exemption 5 to the FOIA, under both the doctrines of adoption or incorporation and "working law." In addition, the government's attempts to shield the memoranda from disclosure under Exemptions 1 and 3 ar

statements requires some 'explicit reference' to a specific document." Opp. 52 (citing *Brennan Center*, 697 F.3d at 204). But in that case, this Court used the quoted term but once—when it concluded that an "explicit reference" was sufficient, but by no means necessary, to agency adoption. *See Brennan Center*, 697 F.3d at 204. In addition, the government inaccurately cites *La Raza* for the proposition that "adoption must still be 'express' and 'explicit,'" Opp. 53. Rather, in *La Raza* this Court explicitly *rejected* the government's position that adoption should require "specific, explicit language of adoption or incorporation," for the reason that "courts must examine *all* the relevant facts and circumstances in determining whether express adoption or incorporation by reference has occurred." *La Raza*, 411 F.3d at 357, n.5.

Like the district court did, the government asks the wrong question: "The relevant question is not . . . whether the government's public statements evidence the 'specific[]' adoption of a withheld *document*; rather, it is whether those statements demonstrate that the government has adopted the *legal reasoning* in that document as 'effective law and policy.'" ACLU Br. 54 (alteration in original) (quoting *Brennan Center*, 697 F.3d at 195); *see Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) ("[E]ven if the document is predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on an issue or is used by the agency

in its dealings with the public."). The government warns that Plaintiffs' "proposed" rule would have the "perverse effect of deterring agencies from describing the legal basis for their conduct publicly out of concern that such explanations would risk removing the protection of the deliberative process and attorney–client privileges for any arguably related predecisional advice." Opp. 54. But that argument turns the law of adoption on its head: The doctrine's purpose is to *prevent* the withholding of law adopted in public, not to *protect* the withholding of law adopted in private.

The district court's construction of the "adoption" doctrine was indefensibly narrow. The district court concluded that it did not need to examine the OLC–DOD Memo *in camera* because even if the OLC–DOD Memo "contains language *identical* to that uttered by the Attorney General and others . . . , that would still not necessarily constitute proof that the Government had adopted *this document in particular*." SPA 61 (quoted at Opp. 54). But while the adoption doctrine requires plaintiffs to show that the government has adopted a document's legal reasoning, an otherwise valid adoption argument is not defeated simply because the government has set out its legal analysis in multiple documents rather than just one. The important point is that the government has told the public, multiple times, that its targeted-killing program is governed by legal analysis set out in specific documents authored by the OLC. The adoption doctrine requires no more.

And there is no question that the Executive Branch *has* explicitly adopted the legal reasoning and conclusion of the withheld memoranda. *See* ALCU Br. 24–25. At a Senate hearing, the Attorney General discussed the relationship between the White Paper and OLC opinions concerning targeted killing. *Oversight of the U.S. Department of Justice Before the S. Comm. on the Judiciary* at 1:51:36–1:52:24, 113th Cong. (Mar. 6, 2013), http://1.usa.gov/14pKfSc. Mr. Holder explained that the White Paper's discussion of imminence would be "more clear" if it were read together with the "underlying OLC advice." *Id.*[8] White House Press Secretary Jay Carney made a similar reference linking the documents. *See* White House, Press Gaggle by Press Secretary Jay Carney (Feb. 7, 2013), http://1.usa.gov/TQ3MLw. And Mr. Brennan cited OLC advice as defining the limits of the Executive Branch's targeted-killing authority against U.S. citizens. *See* Brennan Hearing Tr. at 57:14–15.

Nor are the OLC memoranda at issue in this case predecisional legal advice. *See Pub. Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 875 (D.C. Cir. 2010) ("To the extent the documents at issue in this case neither make recommendations for policy change nor reflect internal deliberations on the advisability of any particular course of action, they are not predecisional and

[8] The government is mistaken to represent that "no Executive Branch official has made any . . . statement" acknowledging that the White Paper was "'drawn from one or more of the OLC memoranda.'" Opp. 54 n.16 (quoting ACLU Br. 24).

deliberative despite having been produced by an agency that generally has an advisory role."). As the OLC itself has recognized, when the OLC is asked to opine on matters that may not be resolved by courts, "OLC's advice may effectively be the final word on the controlling law." Memorandum from David Barron, Acting Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice, for Attorneys of the Office (July 16, 2010), http://1.usa.gov/ZWlpuo; *see* Br. of *Amici Curiae* Elec. Privacy Info. Ctr. at 5–10. The government's targeted-killing program presents the quintessential example of this scenario, as there is no opportunity for judicial review before the government carries out a targeted killing. *See Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010). As Mr. Brennan candidly stated during his confirmation hearing, the OLC "advice establishes the legal boundaries within which [the government] can operate." Brennan Hearing Tr. at 57:14–15. The OLC memoranda are not merely legal advice, but establish the operative law and policy for the government's targeted-killing program. The public knows this to be true, because the government continues to say it.

The government also argues that the withheld legal memoranda, including the OLC–DOD Memo and the Unclassified Memos, are not "working law" because they do not constitute "rules used by agencies to determine the rights and obligations of the public." Opp. 56. This contention misunderstands the law. Courts have repeatedly held that documents "reflecting [an agency's] formal or

program may be classified because they would "pertain to" an intelligence source and method, Opp. 31. *See* ACLU Br. 56

5 U.S.C. §552(b). Therefore, any classified or statutorily protected portions of the documents should be redacted so that the non-protected portions can be disclosed. Of course, in some circumstances legal analysis might be "inextricably intertwined" with properly classifiable information, and therefore properly withheld. *See, e.g., N.Y. Times Co. v. U.S. Dep't of Justice*, 872 F. Supp. 2d 309, 318 (S.D.N.Y. 2012). But that is plainly not the case here. Mr. Holder's speech, as well as the White Paper, detailed almost every aspect of the relevant law. *See* ACLU Br. 53. As to the question whether the withheld memoranda contain reasonably segregable legal analysis that can be produced in this litigation, the government's own r7.248 0c -0.001 Tw 3.496[(h12(p)89(c52(s )(t)1( r1( )]TJaa)1d)1(  a)4(5( 1(

**III.**

**CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)**

I hereby certify that this brief complies with Rule 32(a)(7)(B) because it contains 6,792 words, excluding the portions of the brief exempted by Rule 32(a)(7)(B)(iii), and that it complies with typeface and type style requirements of Rule 32(a)(5)-(6) because it is printed in a proportionally spaced 14-point font, Times New Roman.

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