

MANDATE

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 16th day of August, two thousand sixteen.

Present:

Jon O. Newman,
José A. Cabranes,
Rosemary S. Pooler,
Circuit Judges.

American Civil Liberties Union, American Civil Liberties
Union Foundation,

Plaintiffs-Appellants-Cross-Appellees,

v.

ORDER

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

United States Department of Justice, including its component
the Office of Legal Counsel, United States Department of
Defense, including its component U.S. Special Operations
Command, Central Intelligence Agency,

Defendants-Appellees-Cross-Appellants.

Upon consideration of the pending appeal, the Court has encountered an uncertainty concerning the six facts, identified at SPA 8, which the District Court has ordered to be disclosed “to the extent that these specific facts can be segregated from other, properly exempt information.” SPA 9. The Appellees submitted a classified affidavit arguing that no segregation was possible. Classified Supplemental Appendix 492-515. The District Court’s Order filed July 16, 2016, states, “To the extent the Government disagrees with my finding as to official acknowledgement of these facts, it can take the matter up with the Circuit – with the full participation of the ACLU.” JA 621. It would be helpful if the District Court would indicate whether it agrees or disagrees with the Government’s contention that segregation of the six facts cannot be made.

If the District Court concludes that segregation can be made, it would also be helpful if the

District Court indicates what further disclosure or use of the six facts the District Court wants the Government to make. The District Court's redacted opinion states, with respect to many of the documents ordered withheld, that the withholding is "subject to the ruling concerning officially acknowledged facts that is applicable to all documents." See, e.g., SPA 32 (ruling on OLC 2). Perhaps the District Court could illustrate, with respect to a withheld document, the further use of one or more of the six facts that the Court expects the Government to make.

A mandate shall issue forthwith remanding the appeal to the District Court for the limited purpose of making the clarification requested in this Order. Upon the District Court's entry of a responsive order, jurisdiction of this appeal will be automatically restored to this Court.

FOR THE COURT:

Catherine O'Hagan Wolfe,
Clerk of Court

 

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

 