

[ORAL ARGUMENT HELD FEBRUARY 17, 2016]IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN CIVIL LIBERTIES UNION, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF
JUSTICE, et al.,

Defendants-Appellees.

No. 15-5217

**DEFENDANTS-APPELLEES' MOTION TO
PUBLISH THE COURT'S APRIL 21, 2016 DECISION**Defendants-appellees the United States Department of Justice *et al.*

respectfully move this Court to publish its April 21, 2016 decision in this case.

The government believes that, in the unique circumstances of this case and related litigation pending in district court, as described in more detail below, the Court's decision warrants publication. In support of this motion, counsel states as follows:

1. In this Freedom of Information Act (FOIA) action, the plaintiffs-appellants sought records from the Central Intelligence Agency related to the United States' use of unmanned aerial vehicles (commonly referred to as "drones") for targeted lethal force. One of the documents at issue in the litigation was a May 2011 classified white paper prepared by the Department of Justice. The

government produced a redacted version of the May 2011 white paper to the plaintiffs-appellants, but asserted that the withheld portions of the white paper were protected by FOIA Exemptions 1 and 5 because they were classified and privileged.

2. The district court upheld the government's withholding of the redacted portions of the May 2011 white paper under FOIA Exemptions 1 and 3. (The district court also upheld the withholding in their entirety of additional responsive documents, a ruling that is not relevant for purposes of this motion.)

3. This Court affirmed the district court's decision on April 21, 2016. The Court rejected the ACLU's argument that legal analysis could not be classified and accordingly exempt under FOIA Exemption 1, reasoning that information may be classified under Executive Order 13,526 if it "pertains to" one or more specified categories of information and if an original classification authority has determined that the unauthorized disclosure of the information reasonably could be expected to result in identifiable or describable damage to the national security. Order, at 2, 4.. The Court also rejected the ACLU's argument that the government had officially disclosed withheld information, ruling that "the agency has satisfied its burden to show that the records are properly classified" and that "the ACLU has failed to point to any officially acknowledged information that appears to duplicate or match that being withheld." Order, at 3. Finally, the Court rejected the ACLU's

invitation to remand the case for further consideration in light of recent government disclosures, cautioning that “courts must be wary of creating ‘an endless cycle of judicially mandated reprocessing’ of FOIA requests.” Order, at 4-5 (quoting *Bonner v. Department of States*, 928 F.2d 1148, 1152 (D.C. Cir. 1991)). The Court’s *per curiam* decision was unpublished.

4. While this litigation was pending, a different FOIA requester, Jason Leopold, brought a separate action in the U.S. District Court for the District of Columbia seeking disclosure of documents in the possession of the Department of Justice relating to the United States’ lethal use of drones against terrorist targets. *Leopold v. Dep’t of Justice*, No. 14-cv-00168 (APM) (D.D.C.). The Department of Justice produced some documents to Leopold, including the same redacted version of the May 2011 white paper produced in this litigation, but the Department of Justice refused to produce the redacted portions of the May 2011 white paper.

5. On August 25, 2015, the district court in *Leopold* ruled that the Department of Justice was ordered to produce additional portions of the May 2011 white paper to Leopold. *Leopold v. Dep’t of Justice*, No. 14-cv-00168 (APM) (D.D.C. Aug. 12, 2015), ECF No. 27. The Department of Justice appealed that ruling. *Leopold v. Dep’t of Justice*, No. 15-5281 (D.C. Cir.). The Department of Justice also filed a motion in district court asking that court to reconsider its ruling. *Leopold v. Dep’t of Justice*, No. 14-cv-00168 (APM), Motion for Reconsideration

(D.D.C. filed Sep. 14, 2015).¹ This Court placed the *Leopold* appeal in abeyance, apparently to permit the district court to consider and act on the government's motion for reconsideration. *Leopold v. Dep't of Justice*, No. 15-5281, Order (D.C. Cir. Oct. 20, 2015).

6. Following this Court's ruling in this case, the district court in *Leopold* issued a decision granting the government's motion for reconsideration and upholding the government's withholding of portions of the May 2011 white paper. *Leopold v. Dep't of Justice*, No. 14-cv-00168 (APM), Mem. Op. & Order (APM) (D.D.C. Apr. 25, 2016). The district court reasoned that reconsideration was appropriate in light of this Court's decision affirming in their entirety the government's withholding of redacted portions of the white paper.

7. Because the government's appeal was pending in *Leopold* at the time of the district court's ruling on the reconsideration motion, the government understands that decision to function as an indicative ruling under Fed. R. App. P. 12.1(a). The government accordingly moved in this Court for remand of the case to the district court, in order to permit entry of judgment for the government. The plaintiff-appellee in *Leopold* has opposed the motion to remand, however.

¹ Because the government's motion for reconsideration was not filed within 28 days of the district court's order, it did not toll the time for appeal of the order under Fed. R. App. P. 4(a)(4)(A)(vi).

8. The plaintiff-appellee in *Leopold* also filed a motion in district court asking the court to vacate its April 25, 2016 decision on reconsideration and to permit full briefing and argument on the reconsideration motion. The plaintiff's memorandum in support of his motion states: "[W]hile courts will reconsider previously decided questions in such exceptional cases as those in which there has been an intervening change of *controlling* law, * * * it is far from clear that the unpublished (and therefore non-binding) decision of the D.C. Circuit in *ACLU* constitutes an intervening change in 'controlling' law." *Leopold v. Dep't of Justice*, No. 14-cv-00168 (APM), Memorandum of Points and Authorities (D.D.C. filed Apr. 26, 2016) (quotation marks and internal citation omitted) (copy attached as Exhibit 1). The district court in *Leopold* denied the motion on May 9, 2016, ruling that its earlier order would be modified to make explicit that it was an indicative ruling under Federal Rule of 62.1(a). *Leopold v. Dep't of Justice*, No. 14-cv-00168 (APM), Mem. Op. & Order (D.D.C. May 9, 2016).

9. Publication of this Court's decision would avoid wasteful and duplicative litigation in *Leopold*, by establishing this Court's decision in this case as binding precedent. Although this Court affirmed the district court's decision in this action, it reached a contrary conclusion from the district court in *Leopold* on precisely the same legal and factual issues. Under D.C. Circuit Rule 36(c)(2)(F), this Court will publish its decision if "it reverses a published agency or district court decision, or

affirms a decision of the district court upon grounds different from those set forth in the district court's published opinion." Although this case does not come within the precise terms of that rule, the government respectfully suggests that the fact that this Court's decision would also govern any subsequent appeal in *Leopold* demonstrates that the decision "warrants publication in light of other factors that give it general public interest," D.C. Circuit Rule 36(c)(2)(G).

10. We have consulted with counsel for the plaintiffs-appellants, who oppose the relief sought in this motion.

Respectfully submitted,

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MAY 2016

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2016, I filed and served the foregoing with the Clerk of the Court by causing a copy to be electronically filed via the appellate CM/ECF system. I also hereby certify that the participants in the case are registered CM/ECF users and will be served via the CM/ECF system.

/s/ Sharon Swingle

Sharon Swingle