

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

1 At a Stated Term of the United States Court of Appeals
2 for the Second Circuit, held at the Thurgood Marshall United
3 States Courthouse, 40 Foley Square, in the City of New York,
4 on the 21st day of October, two thousand and sixteen.

5
6 Before: Jon O. Newman,
7 José A. Cabranes,
8 Rosemary S. Pooler,
9 *Circuit Judges.*

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American Civil Liberties Union,
13 American Civil Liberties Union
14 Foundation,

15
16 *Plaintiffs - Appellants -*
17 *Cross - Appellees,*

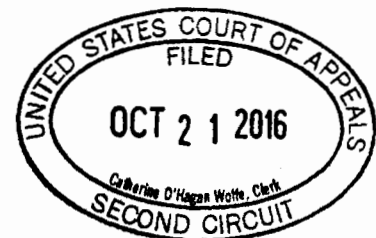
ORDER

18
19 v.

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21 United States Department of Justice,
22 including its component the Office
23 of Legal Counsel, United States
24 Department of Defense, including its
25 component U.S. Special Operations
26 Command, Central Intelligence Agency,

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

27
28 *Defendants - Appellees -*
29 *Cross - Appellants.*



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33 The District Court entered an Order on October 20, 2016,
34 in its docket number 1:12-cv-00794-CM, endeavoring to respond
35 to this Court's limited remand Order entered August 16, 2016.
36 We deem the District Court's October 20, 2016, Order
37 sufficient to restore jurisdiction to this Court of our

1 docket numbers 15-2956 and 15-3122(XAP), pursuant to the
2 terms of our August 16, 2016, Order. With our jurisdiction
3 restored, we rule as follows in an attempt to clarify our
4 October 20, 2016, order:

5 1. On July 16, 2015, the District Court entered on its
6 docket a Memorandum Decision and Order, dated June 23, 2015.
7 That decision is docket number 128 on the District Court's
8 docket. A redacted version of that decision is reprinted in
9 the Special Appendix ("SPA") filed by the parties in this
10 Court in our docket nos. 15-2956 and 15-3122 (XAP) on March
11 11, 2016. See SPA 1-160. On page 9 of the District Court's
12 July 16, 2015, decision, the District Court stated, referring
13 to six facts (numbers 1-5 and 7) listed on page 8 of that
14 decision (SPA 8), "Therefore, to the extent that these
15 specific facts appear in documents on the agencies' Vaughn
16 Indices, and can be segregated from other, properly exempt
17 information, those portions of all documents on the OLC, CIA
18 and DoD Vaughn Indices must be disclosed." SPA 9.

19 2. On June 29, 2015, the Government filed in the District
20 Court *in camera* and *ex parte* a classified document captioned
21 "Fifth Classified Declaration of John E. Bies." See docket
22 number 125 of the District Court's docket ("NOTICE of Lodging
23 of Classified Documents"). The Bies Declaration is set forth

1 in the Classified Supplemental Appendix ("CSA") filed in this
2 Court on June 10, 2016. CSA 492-515. The Bies Declaration
3 apparently responds to the District Court's sentence, quoted
4 above, a version of which was set forth in unredacted
5 versions of what became the District Court's July 16, 2015,
6 decision. The Bies Declaration states on page 2, "As directed
7 by the Court, I have conducted the line-by-line review of
8 each withheld document" CSA 493. The Bies Declaration
9 then states on page 2, "I have determined that no reasonably
10 segregable, non-exempt information can be provided, apart
11 from the unredacted portions already provided to the
12 Plaintiffs from Documents 4, 5, and 9." *Id.*

13 3. On July 16, 2015, the District Court entered an Order
14 captioned "Order with Respect to the Government's Submission
15 of July 1, 2015." That Order is docket number 129 on the
16 District Court's docket. That Order is set forth in volume 3
17 of the Joint Appendix ("JA") filed in this Court on March 11,
18 2016. See JA 620-621. The District Court's July 16, 2015,
19 Order states, "The court has received and reviewed classified
20 supplemental declarations from representatives of the
21 Defendants OLC, CIA and DoD (collectively, the Agencies)
22 concerning the segregability, in certain documents on their
23 respective Vaughn Indices, of certain 'officially

1 acknowledged material' (as found by this court in its yet-to-
2 be-officially released decision of June 23, 2015) from other
3 material as to which FOIA privileges continue to attach." JA
4 620. The District Court's July 16, 2015, Order also states,
5 "Not surprisingly, as to each document, the Agencies either
6 (1) indicate that any 'officially acknowledged material'
7 cannot be segregated from the rest of the document, or in
8 some cases (2) indicate that the document does not in fact
9 contain 'official acknowledged material." *Id.* The District
10 Court's July 16, 2015, Order explicitly refers to "the Fifth
11 Classified Bies Declaration." *Id.* 621. The District Court's
12 July 16, 2015, Order also states, "As far as this court is
13 concerned, this completes the record with respect to the
14 documents listed on the Vaughn Indices that were provided to
15 this court following remand from the United States Court of
16 Appeals for the Second Circuit." *Id.*

17 4. In light of the foregoing, the Court of Appeals would
18 appreciate having answers from the District Court to the
19 following two questions:

20 (a) Did the District Court intend its July 16, 2015,
21 Order to rule on whether in its opinion the six facts
22 identified in paragraph 1 above can be segregated from the
23 documents in which they are contained?

1 (b) If the District Court intended to rule on the issue
2 of segregability, did the Court's July 16, 2015, Order rule
3 that the six facts can be segregated?

4 By posing these two questions we do not intend to impose
5 any burden on the District Court nor require consideration or
6 reconsideration of any documents. We anticipate that each
7 question can be answered simply "yes" or "no." We require no
8 explanations. A response to these two questions at the
9 earliest convenience of the District Court will be
10 appreciated.

11 5. A mandate shall issue forthwith remanding the appeal
12 and cross-appeal to the District Court for the limited
13 purpose of responding to the two questions posed in this
14 Order. Upon the District Court's entry of a responsive Order,
15 jurisdiction of this appeal and cross-appeal will be
16 automatically restored to this Court.

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18 FOR THE COURT:
19 Catherine O'Hagan Wolfe,
20 Clerk of Court
21

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Catherine O'Hagan Wolfe
