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# 17-157

# United States Court of Appeals

**FOR THE SECOND CIRCUIT**
**Docket No. 17-157**

AMERICAN CIVIL LIBERTIES UNION,
AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

*Plaintiffs-Appellees*,

—v.—

DEPARTMENT OF JUSTICE, including its components THE OFFICE OF LEGAL COUNSEL AND OFFICE OF INFORMATION POLICY, DEPARTMENT OF DEFENSE, DEPARTMENT OF STATE, CENTRAL INTELLIGENCE AGENCY,

*Defendants-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

## REPLY BRIEF FOR DEFENDANTS-APPELLANTS


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## (U) Preliminary Statement

(U) The Freedom of Information Act ("FOIA") gives district courts authority to determine whether "agency records" are subject to public disclosure. 5 U.S.C. § 552(a)(4)(B). It does not give courts authority to determine whether freestanding alleged "facts" have been officially acknowledged, and in the process compel the disclosure of classified information. Plaintiffs-appellees (the "ACLU") cite no precedent for the district court's extraordinary approach in this case, and the government is aware of none. The district court should be directed to remove its erroneous and unnecessary ruling from its decision.

(U) Defendants-appellants (the "government") share the ACLU's frustration that the substance of this appeal must be litigated largely in secret. The government sought to avoid that result by asking the district court to reconsider its ruling, or alternatively to remove the unnecessary finding from its decision. But the district court adhered to its ruling, leaving the government no recourse but to seek relief from this Court. Because the government cannot reveal the nature of the district court's ruling without compromising the classified information it seeks to protect, we sought and obtained leave of the Court to file classified briefs for the Court's *ex parte* review and redacted versions on public docket (*see* ECF No. 35).

(U) In its opposition brief, the ACLU speculates that the district court ruling at issue pertains to then-Secretary of State John Kerry's statements to a Pakistani

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journalist in August 2013, and the ACLU renews its argument that those statements constitute an official disclosure that "the United States conducts targeted killings in Pakistan, including through the use of drones." The government neither confirms nor denies the ACLU's speculation as to the subject of the district court's ruling at issue in this appeal. The ACLU's official acknowledgment claim, however, is both legally flawed and factually wrong.

(U) The official acknowledgment doctrine is designed to determine whether classified information contained in a document requested under FOIA is no longer protected from public disclosure because of a prior official disclosure of the same information. It is not a mechanism for litigants to obtain judicial pronouncements about particular alleged facts that, even if found to be officially acknowledged, would not result in the disclosure of any document. And when a court is called upon to determine whether a prior statement by a government official serves as an official acknowledgment of information in a document, the statement must "match" and be "as specific as" as the information in question in order to constitute an official acknowledgment.

(U) Here, the ACLU incorrectly invokes the official acknowledgment doctrine not as to information contained in a document, but to establish a broad factual proposition posited by the ACLU that "the United States conducts targeted killings in Pakistan, including through the use of drones." The doctrine

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simply has no application in this context. Even if it did, Secretary Kerry's statements to the Pakistani journalist in August 2013 do not "match," nor are they "as specific as," the proposition the ACLU advances. The Secretary never mentioned "targeted killings," "drone strikes," or even the word "drone," and he repeatedly emphasized that his comments pertained to "any kind of counterterrorism efforts, whatever they may be." His statements therefore do not officially acknowledge the ACLU's proposition that "the United States conducts targeted killings in Pakistan, including through the use of drones," even if the doctrine could properly be applied in this context.

## (U) ARGUMENT

### I. (U) The District Court's Ruling Was Unnecessary and Inappropriate

(U) As the government's opening brief demonstrated, *see* ECF No. 33 ("Gov't Br.") at 34-38, the district court's ruling that the United States has "officially acknowledged" certain classified information, and the resulting disclosure of that information in its decision, were inappropriate under FOIA because the court's ruling was not tethered to the disclosure of any document responsive to the ACLU's FOIA request. The ACLU's response—that "the district court's approach and ruling were consistent with standard court practice, efficient, and in accord with the purposes and design of FOIA," ECF No. 47 ("ACLU Br.") at 42 is wrong on every count.

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(U) "FOIA was enacted 'to facilitate public access to Government *documents*.'" *Associated Press v. DOD*, 554 F.3d 274, 283 (2d Cir. 2009) (quoting *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991)) (emphasis added). By its terms, the statute grants district courts "jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B). Thus, "under FOIA, 'federal jurisdiction is dependent on a showing that an agency has (1) 'improperly' (2) 'withheld' (3) 'agency records.'" *Grand Central P'ship v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999) (quoting *U.S. DOJ v. Tax Analysts*, 492 U.S. 136, 142 (1989)). Nothing in the statute's purpose or design gives courts authority to make rulings as to classified information that are independent of the requested agency records. *See Associated Press*, 554 F.3d at 283 (describing "FOIA's purpose and design" in relation to the agency's burden to justify withholding of requested records).

(U) The approach adopted by the district court here, moreover, is hardly "common practice among the district courts." ACLU Br. at 35. Indeed, the ACLU fails to cite a single case—aside from this one and the related ACLU FOIA case—in which a district court made freestanding findings of official acknowledgment that were not necessary to determine whether particular records (or portions of records) were subject to disclosure under FOIA. The ACLU's attempted analogy

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to district court decisions that "assess the validity of all of the government's cross-cutting claims of FOIA exemptions, even if not all of the rulings ultimately prove to be 'necessary' to the outcome of the case," ACLU Br. at 34, is unavailing. In all of those cases, the courts were considering whether particular *agency records* were exempt from disclosure in whole or in part under one or more of FOIA's exemptions. *See id.* at 39 (citing cases). That is fully consistent with FOIA—and very different from what the district court did here, in finding that the United States had officially acknowledged certain classified information separate and apart from any agency record.

(U) The ACLU selectively quotes the D.C. Circuit's statement in *Krikorian v. Department of State*, 984 F.2d 461, 466-67 (D.C. Cir. 1993), that "the focus in the FOIA is information, not documents." ACLU Br. at 37-38. But as the full quotation makes clear, that statement specifically referred to information contained *within documents requested under FOIA*. *See Krikorian*, 984 F.2d at 467 ("We criticized the NLRB because its *Vaughn* index and affidavits discussed withheld memoranda without correlating the claimed exemptions to particular passages in the memos. In other words, the index and affidavit were written in terms of documents, not information, but the focus in the FOIA is information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material." (internal quotation marks and

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alterations omitted)). *Krikorian* provides no support for the district court's extraordinary determination to make a finding that the United States has officially acknowledged certain classified information that does not correspond to information contained in a document requested under FOIA.

(U) Just as FOIA cannot be used to answer questions or require the government to conduct research, Gov't Br. at 35, it is inconsistent with the statutory scheme for a court to consider and make findings as to whether particular alleged "facts" posited by a FOIA requestor that are not tied to any requested records are nevertheless subject to disclosure. The official acknowledgment doctrine, which "was developed in the FOIA context," *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009), is about whether the government can withhold information in a requested document because the government has officially released the same information in another context. "Classified information that a party seeks to obtain [under FOIA] or publish [in the context of prepublication review] is deemed to have been officially disclosed only if it (1) is as specific as the information previously released, (2) matches the information previously disclosed, and (3) was made public through an official and documented disclosure" *Id.* (citing *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007), and *Hudson River Sloop Clearwater, Inc. v. Dep't of Navy*, 891 F.2d 414, 421 (2d Cir. 1989)) (internal quotation marks and alterations omitted). The doctrine is not designed to

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allow courts to make rulings as to whether the government has waived its ability to protect alleged "facts" apart from particular documents requested under FOIA—as the district court did here. *See, e.g.*, SPA 19-40 (making findings as to purported "fact waivers" proposed by the ACLU).

(U) Nor can the district court's approach be justified on grounds of efficiency. A district court may not exceed its statutory mandate simply because it may be efficient. Furthermore, as a practical matter, the district court's approach was not efficient. The district court devoted several pages of its decision to addressing the ACLU's contentions that purported "facts" had been officially acknowledged by the United States—none of which ultimately proved necessary to resolve whether the particular records requested by the ACLU were subject to disclosure under FOIA. *See* SPA 19-41. And the court's inclusion of an erroneous and unnecessary finding regarding classified information—even after the government sought reconsideration—has resulted in an appeal that could have been avoided had the district court simply removed the finding from its decision.

(U) Contrary to the ACLU's claim, ACLU Br. at 34, there is nothing "extreme" about the government's suggestion that the Court could resolve this appeal narrowly, by vacating the district court's ruling as unnecessary and inappropriate without deciding whether the ruling is correct. Gov't Br. at 35 n.9. The Court need not address the merits of the district court's ruling to conclude that

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the district court strayed beyond its authority to decide whether "agency records" have been "improperly withheld." 5 U.S.C. § 552(a)(4)(B); *cf. ACLU v. DOJ*, 681 F.3d 61, 71 (2d Cir. 2012) (district court exceeded its authority in ordering substitution of purportedly neutral phrase for redacted classified information). Indeed, in the last appeal in the ACLU's related FOIA case, this Court declined to review the district court's rulings as to certain purportedly "acknowledged facts," finding such review unnecessary because the district court's rulings did not require the disclosure of any documents. *ACLU v. DOJ*, 844 F.3d 126, 132 (2d Cir. 2016).[1] Similarly here, the district court correctly held (and the ACLU has not challenged) that the agency records at issue are exempt from disclosure in full, regardless of its ruling that certain facts had been officially acknowledged. It would therefore be well within this Court's discretion to direct the district court to remove its unnecessary ruling from its decision without addressing the merits of that ruling.

[1] (U) That the Court did not vacate the district court's official acknowledgement rulings in the prior appeal, *see* ACLU Br. at 41-42, is immaterial. There was no need to do so, as (unlike here) the district court's rulings did not have the effect of compelling the disclosure of classified information.

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## II. (U) The ACLU's Speculative Argument Mischaracterizes Then-Secretary of State John Kerry's Statements to a Pakistani Journalist in August 2013

(U) The ACLU speculates that the district court ruling at issue in this appeal concerns their argument below that then-Secretary of State Kerry officially acknowledged that "the United States conducts targeted killings in Pakistan, including through the use of drones." ACLU Br. at 14; *see id.* (acknowledging that "the ACLU cannot know for sure what ruling the government is appealing"). The United States can neither confirm nor deny the ACLU's speculation as to the content of the district court ruling at issue in this appeal.[2]

(U) We note, however, that the ACLU's renewed claim that Secretary Kerry's statements to a Pakistani journalist in August 2013 constituted an official

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acknowledgment that "the United States conducts targeted killings in Pakistan, including through the use of drones," is inconsistent with the law of official acknowledgment. As explained above, the official acknowledgment doctrine is not applied to determine whether a freestanding factual proposition posited by a plaintiff has been acknowledged by the government, but rather to determine whether information in a document responsive to a FOIA request matches and is as specific as information that has been officially disclosed. However, even if there were some legal basis for an untethered official acknowledgement inquiry of the sort the ACLU proposes, the ACLU's argument is meritless. Despite devoting twenty pages of its brief to this point, the ACLU omits the actual text of Secretary Kerry's statements, and instead strings together cherry-picked excerpts in an effort to put the reporter's words in Secretary Kerry's mouth. Under this Court's precedents, that effort falls well short of establishing an official acknowledgment of the facts posited by the ACLU.

### A. (U) The Transcript of Secretary Kerry's Statements Refutes the ACLU's Claim of Official Acknowledgment

(U) Any analysis of whether a statement constitutes an official acknowledgment of particular facts must be based on what the relevant United States government official actually said. The transcript of the full interview is

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contained in the Joint Appendix at pages 902-05, and the relevant exchange reads as follows:

> **QUESTION:** . . . . But just to speak a little bit more on this terrorism issue, Pakistan has been facing a grievous scenario vis-à-vis internal security. There has been a lot of tension between the United States and Pakistan, especially vis-à-vis the subject of drones. People in Pakistan feel that not only has it been causing human casualty in Pakistan, but also it has been kind of a blatant disregard of the territorial sovereignty of Pakistan. Can we expect a cessation in these drone strikes, which are causing and mobilizing a lot of sentiment against the Pakistani Government and the United States?
>
> **SECRETARY KERRY:** Well, President Obama is very, very sensitive and very concerned about any kind of reaction to *any kind of counterterrorism activities, whatever they may be*. And the President has spoken very directly, very transparently, and very accountably to our – to *all of our efforts*. We want to work with the Government of Pakistan, not against it.
>
> This is a program in many parts of the world where the President has really narrowed, *whatever it might be doing*, to live up to the highest standards with respect to *any kind of counterterrorism activities*. And I believe that we're on a good track. I think the program will end as we have eliminated most of the threat and continue to eliminate it.
>
> **QUESTION:** And there is no timeline that you envisage for ending this strike?
>
> **SECRETARY KERRY:** Well, I do. And I think the President has a very real timeline and we hope it's going to be very, very soon.
>
> **QUESTION:** And you don't care to share that at the moment?
>
> **SECRETARY KERRY:** I think it depends really on a number of factors, and we're working with your government with respect to that.

JA 903-04 (emphases added).

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(U) The transcript makes clear that while the journalist *asked* about drone strikes, Secretary Kerry never referred to "drones" or "drone strikes," and he also never said anything about "targeted killings." To the contrary, the transcript reflects that Secretary Kerry repeatedly made clear that his statements referred to "any kind of counterterrorism activities, whatever they may be." JA 903; *see id.* (also referring to "all of our efforts," "whatever [the U.S. government] might be doing," and again to "any kind of counterterrorism activities").

(U) The ACLU inexplicably claims that when the Secretary used the term "program," he was referring to "the subject of drone strikes." ACLU Br. at 19. The transcript directly refutes this claim. In the very excerpt quoted by the ACLU, Secretary Kerry specifically stated, "*This is a program* in many parts of the world where the President has really narrowed, *whatever it might be doing*, to live up to the highest standards *with respect to any kind of counterterrorism activities*. And I believe that we're on a good track. I think the program will end as we have eliminated most of the threat and continue to eliminate it." JA 903 (emphases added). While the ACLU focuses on Secretary Kerry's use of the word "program," *see* ACLU Br. at 19, one need only read to the end of the sentence to understand that the "program" he was referring to was not a "drone program," but "whatever [the government] might be doing" "with respect to any kind of counterterrorism activities," JA 903.

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(U) The ACLU also seizes on the fact that Secretary Kerry "answered" the reporter's follow-up question, ACLU Br. at 21, which confusingly asked about a "timeline" for "ending this strike." JA 903. But it is clear from Secretary Kerry's earlier statements that that answer, too, referred to counterterrorism activities generally rather than drone strikes in particular. Having clarified multiple times that his answers to the reporter's questions pertained not to drones specifically but rather to counterterrorism activities generally, it was not necessary to repeat that clarification yet again in response to the reporter's follow-up question.

(U) For all these reasons, Secretary Kerry's statements do not acknowledge that "the United States conducts targeted killings in Pakistan, including through the use of drones," as the ACLU contends. ACLU Br. at 14. These alleged "facts" posited by the ACLU simply do not "match" what Secretary Kerry actually said, under any reasonable interpretation of that term, as his statements were not "specific" to any purported drone strikes. *Wilson*, 586 F.3d at 186 (to constitute an official acknowledgment, information must "match" and be "as specific as" the information previously disclosed); *New York Times Co. v. DOJ*, 756 F.3d 100, 120 & n.19 (2d Cir. 2014) ("*NYT I*") (applying *Wilson* test, and noting that it "remains the law of this Circuit").[3]

[3] (U) While the *NYT I* Court stated that it did not "understand the 'matching' aspect of the *Wilson* test to require absolute identity," 756 F.3d at 120, that was in the [redacted]

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(U) Secretary Kerry's remarks, with his repeated statements that he was referring generally to "any kind of counterterrorism activities, whatever they may be," cannot reasonably be construed as an official acknowledgment that "the United States conducts targeted killings in Pakistan, including through the use of drones"—that is, the specific information that the ACLU argues has been disclosed.[4] At the very least, Secretary Kerry's answer was ambiguous, leaving

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context of evaluating whether the government had officially acknowledged certain legal analysis contained in an Office of Legal Counsel advice memorandum, where the government had publicly released a white paper that "virtually parallel[ed] the [OLC memorandum] in its analysis of the lawfulness of targeted killings." *Id.* at 116. But the Court applied a more stringent test to the factual portions of the memorandum, redacting "the entire section of the [OLC memorandum] that includes any mention of intelligence gathering activities." *Id.* at 119. The *Wilson* test therefore should continue to be applied "strict[ly]," 586 F.3d at 186, in the context of classified facts. Even if the standard the Court used to evaluate official acknowledgment in the context of legal analysis were applicable, it cannot be said that the statements of Secretary Kerry at issue "virtually parallel" the factual proposition that the ACLU argues has been officially acknowledged.

[4] (U) As the district court recognized in analyzing statements by other government officials, a finding of official acknowledgment in this context would "require the reader to assume that the speaker adopted his questioner's premise – an old trial lawyer's trick that is even less persuasive in this context than I find it to be in a court of law." SPA 28; *see* SPA 22, 25-27 (ruling that statements by CIA Director did not acknowledge that the United States "conducts targeted killings in Pakistan, including through the use of drones," where reporter asked about "remote drone strikes" in Pakistan's tribal regions, and Director responded "that he could 'not go into particulars,'" and "thereafter referred only to unspecified 'operations'"); SPA 25 (same for White House Press Secretary's response to reporter's question that "assumed the use of drones inside Pakistan"; "[q]uestions that assume answers do not become acknowledgments when the person being questioned repeatedly refuses to play along with the questioner's assumptions").

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ample "lingering doubts" to preclude a finding of official acknowledgement. *Wilson*, 586 F.3d at 195, *cited in* ACLU Br. at 26.

**B. (U) The ACLU's Remaining Arguments Lack Merit**

(U) The ACLU's remaining arguments are equally meritless. The ACLU relies on media reports, ACLU Br. at 20 & n.8, and statements by foreign governments, *id.* at 31-34 & nn.12-20, to buttress its claim that Secretary Kerry's statements referred to purported drone strikes. But as this Court made clear in *Wilson*, even widespread press reports cannot constitute official acknowledgment. 586 F.3d at 187. Nor do the statements of foreign governments have any place in the official acknowledgment inquiry. *See Mobley v. CIA*, 806 F.3d 568, 583 (D.C. Cir. 2015).[5]

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(U) The ACLU's argument that the classified declaration submitted by the government is "irrelevant" to the Court's analysis of official acknowledgment, ACLU Br. at 27, is also baseless. This Court has recognized that it is entirely appropriate in FOIA cases for courts to review classified materials *ex parte*, where, as here, a public explanation would disclose the very information the government seeks to protect. *See New York Times Co. v. DOJ*, 758 F.3d 436, 440 (2d Cir. 2014) (citing with approval *Hayden v. NSA*, 608 F.2d 1381, 1384 (D.C. Cir. 1979)). The ACLU cites no authority for the proposition that a district court may properly disregard a classified declaration when evaluating whether information has been officially acknowledged. Indeed, the ACLU itself concedes that official statements "should not be analyzed in a vacuum," and that "the context" of such statements "is critical to the official-acknowledgment analysis." ACLU Br. at 21 n.10. The classified declaration submitted to the district court in this case provides important context that the district court erroneously disregarded. *See* Gov't Br. at 26-29.

(U) The ACLU is also wrong to suggest that the potential harm from disclosure is immaterial to the official disclosure analysis. ACLU Br. at 27-29. In concluding that the government had officially acknowledged certain legal analysis in the OLC memorandum at issue in *NYT I*, this Court specifically found that disclosure of legal analysis pertaining to an additional statute not addressed in a

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previously disclosed white paper "add[ed] nothing to the risk." 756 F.3d at 120. The classified declaration submitted to the district court in this case shows that the opposite is true with regard to the information the district court erroneously found to be officially acknowledged and effectively ordered disclosed in its decision. *See* Gov't Br. at 26-28.[6]

(U) Finally, the ACLU misunderstands the government's position in noting that a State Department spokesperson did not retract Secretary Kerry's statements, *see* ACLU Br. at 24, and that his statements as Secretary of State are "official," *id.* at 25. What is missing from the Secretary's statements—and what dooms the ACLU's official acknowledgment claim—is any clear and unambiguous expression by the Secretary that he was speaking about drone strikes as opposed to counterterrorism activities generally. By the ACLU's lights, courts could find official acknowledgment simply by putting a reporter's words into a government official's mouth—even where, as here, it is readily apparent that the official went out of his way *not* to adopt the reporter's words. The ACLU's approach is not consistent with the law of official acknowledgment, and it would make it far more

[6] (U) Indeed, the ACLU's argument on this point is internally inconsistent. The ACLU contends on one hand that potential harm from disclosure is irrelevant to whether a particular fact has been officially acknowledged, ACLU Br. at 27, while at the same time arguing that no harm could plausibly result from disclosure, *id.* at 30-31. The ACLU cannot have it both ways.

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difficult for government officials to provide information to the press and public while protecting sensitive national security information.

## (U) CONCLUSION

[redacted] For the foregoing reasons, and the reasons stated in the government's principal brief, this Court should vacate the district court's ruling that [redacted] and direct that the ruling be removed from the district court's decision.

Respectfully submitted,


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## CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDRUE 32(a)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionately spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4411 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

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