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. 13-422(L), 13-445(Con)

UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES DEPARTMENT OF DEFENSE, CENTRAL INTELLIGENCE AGENCY,

Defendants-Appellees,

New York, N.Y.
JUNE 23, 2015
4:35 p.m.

Before:

HON. JOSE A. CABRANES,
HON. ROSEMARY S. POOLER,
HON. JON O. NEWMAN,

Circuit Judges

APPEARANCES

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JUDGE CABRANES: We'll resume now in open court. New York Times Company, Charlie Savage, Scott Shane, ACLU, et al. v. The United States Department of Justice.

MR. JAFFER: Good afternoon, your Honors. I'm Jameel Jaffer. I represent the ACLU.

The central question in this appeal is whether the government can keep secret the law of the drone program. The government has now carried out hundreds of drone strikes, and those strikes have killed militants, but they have also killed civilians. And there is immense public interest in knowing what law governs those strikes, in knowing what limitations the government recognizes on its own authority to use legal force.

Those limitations are set out not in the U.S. code, but in Office of Legal Counsel memoranda, one of which this court published last year after concluding that it had been withheld unlawfully.

As you know, on remand, the District Court held that nine other memos were lawfully withheld. That conclusion was wrong for three reasons.

The first is that legal analysis in the memos constitutes the government's working law. It can't lawfully be held under Exemption 5.

The second is that legal analysis can't lawfully be withheld under Exemption 1 unless it is inextricably intertwined with properly classified facts. And we don't

believe that's the case here.

The third is that even if the government could otherwise --

JUDGE NEWMAN: You're at a distinct advantage in making that argument because you haven't seen them to know whether it is intertwined.

MR. JAFFER: That's correct.

JUDGE NEWMAN: You believe. You're really saying you hope it is not.

MR. JAFFER: We are basing our conclusion on the unredacted opinions of the Court's opinion. But you are right, we have not seen unredacted portions of the Court's opinion. We haven't seen the memos themselves, we haven't seen the government's justifications for withholding the memos, we haven't seen the District Court's reasoning accepting the government's justification.

So, as you say, we are at a distinct disadvantage.

I guess I should have said at the beginning, with the Court's permission I will cover the working law issue as well as the waiver issue, and counsel for The New York Times will cover the Exemption 1 and 3 issue, the legal analysis under Exemption 1 and 3, as well as the issues relating to redactions in the District Court's opinion. That said, we're both of course prepared to answer any questions the Court may have.

On working law, your Honors, as the Supreme Court said

in Sears, FOIA requires the disclosure of opinions and interpretations that embody the agency's effective law. The memos at issue here are the government's effective law. We know that because the government itself has said so.

JUDGE POOLER: They start out as advice from a lawyer to a client, and when do they lose their character as advice and become working law?

MR. JAFFER: So, I think that the law is fairly clear on that point, your Honor, that when the advice becomes the agency's the controlling law of an agency, it can no longer be protected under the attorney-client privilege.

The Supreme Court says that in Sears, this Court said it in La Raza. La Raza was an adoption case, not a working law case, but I think the logic is the same. The D.C. Circuit said it in the 1997 version of Tax Analysts.

There comes a point, you're right, it begins or it may begin with an attorney seeking legal advice. But at the moment, the legal advice becomes controlling law.

JUDGE POOLER: When it is adopted, you mean by the client?

MR. JAFFER: That's one way it can happen. I think there are two paths. One is through adoption, the other is the working law doctrine itself. And with respect to OLC memos in particular, I think that there is a strong argument that those memos should be seen presumptively as controlling law.

The main function of the OLC is to establish working law, controlling law for the Executive Branch. The OLC itself in its best practices memo which is posted on its website and we which cite in our brief, including in the reply brief at page seven, that memo says three times, a very short document, but it says three times that the OLC's final memos are controlling law. In fact the memo goes on to say when there is some doubt about whether the agency will accept the OLC's memo as working law, the OLC doesn't provide the memo until the agency provides in writing an assurance it will accept the memo as working law.

JUDGE POOLER: That principle doesn't trump the exemptions to FOIA, does it?

MR. JAFFER: Not at all. I think the question always comes back to whether the particular memo in question is working law or has been adopted.

Our principal argument or our argument here isn't that every OLC memo is working law, but rather that these OLC memos are working law. Again, I say that because the government itself has said it.

John Brennan, who at his confirmation hearing for CIA director, said these memos establish the boundaries within which the government operates on the drone program. The Attorney General said something similar, that the memo set the circumstances in which the government can use lethal force. He

said that in a May 22 letter to the Chairman of the Senate Judiciary Committee.

Senator Feinstein, who of course chairs the Senate Intelligence Committee that oversees the CIA has issued press releases, including one that we cite in our brief, that characterized these nine memos as essentially the government's working law on the drone program.

There is an amicus brief that's been submitted in this case by four senators, two of whom are on the Intelligence Committee, which also characterizes these memos as the government's controlling law.

So this case is very different from some of the other cases that the government cites in its brief.

JUDGE CABRANES: What is the basis for the statement that they are controlling law?

MR. JAFFER: Well, two things, your Honor.

JUDGE CABRANES: Is there a statute that says that OLC decisions are controlling?

MR. JAFFER: I don't know if there is a statute that says that, your Honor. I think that is the practice of the Executive Branch. I don't think -- we've said that a number of times in our brief, the government has never contested it, and we do point to this memo that is on the OLC's website that's called the best practices memo. It was actually signed on July 16, 2010, which is the same date that the memo that this

Court published last summer was signed, and it was signed by the same lawyer, David Barron, who was then the acting head of the office.

So I don't think it is unreasonable to view the targeted killing memos through the prism of the best practices memo. That's one response to your question, Judge Cabranes.

The other response is what the government has said about these specific memos, because again, our argument is not, I don't think the Court has to reach this question about whether OLC memos in every case are controlling law or whether even final OLC memos in every case are controlling law. Our argument here is these OLC memos, given what the government has said, both the Executive Branch officials and legislative officials who oversee the CIA, given what they've said, I think it is clear these memos are the controlling law.

JUDGE NEWMAN: I must say to you, I have trouble understanding what this litigation is all about. You come to us saying you think these memos have sort of controlling law argument analysis in them. You have gotten a 16-page single spaced document laying out the government's legal position for drone strikes that kill people.

MR. JAFFER: Yes.

JUDGE NEWMAN: You then were successful in getting a 41-page single spaced document that elaborated the legal reasoning.

Why are we here?

MR. JAFFER: So, your Honor, you're right that we do have -- I would say that the clouds have parted to some extent on this policy. That the government has now, because of this Court's previous ruling, acknowledged certain things about its legal analysis and made public certain things about its legal analysis.

But the documents we have don't address some very significant issues. They don't address, for example, the implications of the assassination ban in Executive Order 12333. They don't address self-defense under Article 51 of the U.N. Charter. These are issues that officials have spoken publicly about on multiple occasions, but we don't have the official legal analysis from the OLC.

We accept that there are circumstances in which legal analysis is going to be so intertwined with properly classified facts that even though the public has a presumptive right to know what the law is in a particular situation, it may not be feasible. And my colleague Mr. McCraw will address that at more length.

But, under Exemption 5, the question to be asked is whether these memos establish the boundaries within which the government operates. And again, the government itself has used essentially those words or exactly those words to describe these memos.

JUDGE NEWMAN: You don't think the 41-page document spells out the boundaries in considerable detail?

MR. JAFFER: It does spell out the boundaries in considerable detail, your Honor.

JUDGE NEWMAN: Has exposure of that led to anything? Has anyone cared? Has anyone analyzed it? Has anyone submitted it to scholars to discuss it? I just wondered what this is all about.

MR. JAFFER: Actually, your Honor, I think a lot of people do care about it, and it has been discussed at length both in shorter pieces by law professors and by policy analysts, but also in law review articles. There is actually a lot of analysis out there.

I also think that the question of will anybody care about this, I don't think that's an appropriate question to -- I don't think that's the right question to ask plaintiffs who are FOIA requesters. The presumption under FOIA is information should be public. Now, if the public doesn't care about it -- I don't accept that the public doesn't care about this, but if the public doesn't care about the information, I don't think that is relevant.

JUDGE NEWMAN: I'm not suggesting they don't care. I'm suggesting what they want has already been given.

MR. JAFFER: So, on that, Judge Newman, I think all I can say is the memos that we already have, the memos and the

white papers we already have address certain issues in considerable detail. They don't address other issues that are equally important, including the assassination ban, Article 51 of the U.N. Charter, the government's reliance on Article 2 of the Constitution. The commander-in-chief's authority to carry out some of these strikes. None of that is addressed in these memos. To the extent it is addressed in memos that are still withheld, we believe those are the working law of the Executive Branch and should therefore be disclosed, barring some Exemption 1 or 3 reason.

JUDGE NEWMAN: You are saying no reference to the assassination ban?

MR. JAFFER: There are two references. One is a paragraph long in I believe the July 2010 memo. And there is another reference in one of the white papers which is shorter. I believe those are the only references to the assassination ban memo.

JUDGE NEWMAN: So it has been discussed.

MR. JAFFER: Discussed in a very summary fashion, yes. Yes.

JUDGE NEWMAN: You think there is more to be said.

MR. JAFFER: I know there is more to be said, because there is at the very least this March 2002 memo that the government has acknowledged for the first time in its reply, I believe in its reply brief on this appeal, that addresses the

assassination ban at length. And the government itself says that memo address the assassination ban.

JUDGE NEWMAN: Is that your word or theirs, "at length"?

MR. JAFFER: I believe that the government states that memo discusses the assassination ban at more length than the July 2010 memo does. Although I would defer to the government's characterization of their own argument.

JUDGE NEWMAN: Where do we find that reference?

MR. JAFFER: I will find it for you, Judge Newman.

JUDGE POOLER: It is in the redacted version of the brief?

MR. JAFFER: That's the only one we have, your Honor. Yes.

The only other point I would like to make about working law, I realize I'm already over time. Can I go on and make this point?

JUDGE NEWMAN: Yes, please.

MR. JAFFER: The only other point I want to make is the government relies on a whole series of cases, well, two cases in particular, EFF from the D.C. Circuit and Brennan from this circuit, for the proposition that OLC memos can't be or these OLC memos can't be working law because they leave discretion to a decisionmaker to do something once the law has been adopted.

So there is a memo that says you can operate within these particular boundaries, but then a decisionmaker, an Executive decisionmaker has to decide whether any particular strike is a good idea or justified or lawful in any particular instance.

But that was true of every single case I believe decided by the D.C. Circuit under the working law doctrine, certainly true of Coastal States, it was true of Tax Analysts, it was true of Public Citizens. Those were legal memos that left discretion in the final -- left discretion to another decisionmaker.

I think that's true of legal advice generally. If you accept the principle that legal advice must be disclosed only when it binds the decisionmaker's hands in the sense of leaving the decisionmaker with only one possible course of action, what you're really holding is legal analysis need never be disclosed as working law. Thank you, your Honors.

JUDGE CABRANES: You reserve some time.

MR. McCRAW: May it please the Court. David McCraw for appellants New York Times Company and Charlie Savage and Scott Shane.

I'd like to begin by addressing Judge Newman's question, why we continue on. And perhaps this is my background as a commercial litigator. To me this is like discovery. I don't know what is in those documents. It may be

that they are in effect a repeat of what we've seen. But I think the public has a right to know even that. And the burden is on the government to show that they are exempt. Not on us to show there is some need for them.

I think they were important. I think they were important for Judge Barron's confirmation. The legal research he did and that memo he did, and we applaud the Court for getting that released, I think are fine exemplary legal analysis. And think that was important for people to know.

The thing that concerns us here, and I think the reason that we're making this argument about whether -- I would go on one other point. That is, we think it is important to establish as a principle of law that legal analysis is not subject to Exemption 1 and Exemption 3. That I think we're all more or less in agreement that is the government, the appellants and the Court, that if it is intertwined with classified information, or if it would by its very nature indicate a classified operation, it can be withheld.

But there is an important point that legal analysis, pure legal analysis, is not subject to classification. I think that's very fundamental to democracy that we shouldn't have secret law.

Why we're here, because I agree with your Honor, we don't know what's in those memos. What concerns us is that we find it hard to believe these nine memos are written so

differently from the one that this Court released and the one that the government released subsequently. They were able in that subsequent release to segregate the legal analysis, as was this Court. And we believe the same is true with those nine.

Let me, if I might, your Honors, move to a separate point which is the redactions in the District Court opinion. Immediately before the Court is an issue, and that is the redaction of three paragraphs, page nine of the District Court's decision.

Just to remind your Honors, the District Court says on page nine in the redacted version, has a single sentence. It says "The issue raised by the government's objection to disclosure is potentially fascinating and incredibly complicated." Two pages before that are redacted, the page after that is redacted. So, we're left to guess what is potentially fascinating and incredibly complicated. But we note the District Court said those three paragraphs should not have been redacted. The government insisted. Judge McMahon thought not, but redacted them anyway subject to your Honors' decision on this.

The government responds with an argument which is simply contrary to law. That is that the First Amendment right of public access does not apply. That is the law as articulated in Richmond Newspapers and Press-Enterprise, by this Court in Lugosch, does not apply when classified

information is involved. That simply can't be the law. It in effect puts an executive order, that's what allows classification, executive order above the Constitution. That can't be the way the system works. It can't be that the Court does not have the power to control access to its own docket.

In effect, the government comes here as a litigant, not as an official censor, and the District Court has the power and the right under the Constitution to review and make a determination of whether the constitutional right has been honored.

This was spelled out most recently in the District Court in D.C. in Dhiab. It's been talked about in In Re Washington Post in the Fourth Circuit, it was even talked about in this court in a case called United States v. Aref in 2008 where in fact there was a decision that was largely redacted for classification reasons. And this Court analyzed it under Press-Enterprise, the constitutional standard, and found it was properly withheld.

But the important thing is not the outcome but the process, that the withholding of information in judicial opinion is subject to the constitutional analysis of Press-Enterprise. There is a long history of access to judicial opinions. That's what triggers the First Amendment right.

What concerns us here is the larger issue of the rest

of the opinion. Nearly half of this opinion is redacted. And it is our concern that the Press-Enterprise standard was not applied.

First, I point out that the prior decision by the District Court and the decision by this Court, both of those decisions gave us a full meaningful explanation of what the Court was thinking. We think the same thing should have applied here. We're concerned that the proper standard wasn't applied.

JUDGE CABRANES: I may have misunderstood your earlier argument. But you seem to be suggesting that it was for the courts to determine what parts of any opinion ought to be made public.

MR. McCRAW: Ultimately, yes, that is my argument. Yes. And our concern here is that in looking at the District Court's decision, there is no indication that the standard Press-Enterprise analysis, which would look at whether there is an overriding interest and then make a decision about is it narrowly tailored was used.

Instead, if you look at the judge's discussion of the three paragraphs, it is essentially the government says it should be classified, I don't think it should be classified, I don't have any classified information, and but I'm not going to remove it until the Second Circuit has a chance to look at it. Again, shifting the burden to us. We think Press-Enterprise

applies, and it should be applied to the entire decision.

The last point I'd make --

JUDGE NEWMAN: I didn't follow that. You're faulting her for expressing a view that a part of it should be disclosed, but maintaining confidentiality pending further review? You're faulting that?

MR. McCRAW: I'm not faulting the decision, I'm faulting the process that was set up. I think the process should have been to put the government to the test of coming to this Court and making the case it should be classified.

JUDGE NEWMAN: Isn't that what she did?

MR. McCRAW: There was no indication of how that motion should be made.

JUDGE NEWMAN: She indicated it should be released.

MR. McCRAW: That's correct.

JUDGE NEWMAN: She then classified it, and here we are. And you're saying the burden is on the government to tell us her disclosure decision should be honored.

MR. McCRAW: That's correct.

JUDGE NEWMAN: I don't understand what she did wrong on that point.

MR. McCRAW: On that point, fair comment. It is simply a matter of, in our view, the government should have been under some pressure to make the application, not to simply wait for us to make it. That proper allocation burden, it

should be public at some point unless the government made a motion.

JUDGE NEWMAN: You think they don't realize when a District Court says some paragraphs should be disclosed but I'm holding them pending appeal that they're going to have to come here and give us an argument why the district judge was wrong?

MR. McCRAW: I certainly think that's so and I hope that's so.

JUDGE NEWMAN: Indeed, isn't that exactly what we did in our opinion a year ago? Saying we're going to order these disclosed but not delivered pending further appeal?

MR. McCRAW: Yes, that's right, your Honor. I only think she's wrong on the process set up. It would be more appropriate to have a stay of the order.

JUDGE NEWMAN: Your brief says, footnote nine on page 14, "It is not clear if there is a document need." Do you still remain in the dark whether there is a document need?

MR. McCRAW: I believe that's now been satisfied by the e-mail that was sent by the District Court to this Court.

JUDGE NEWMAN: It is no secret what that is, right?

MR. McCRAW: That's correct. We would now line it up.

JUDGE CABRANES: You reserve time.

Ms. Normand.

MS. NORMAND: Thank you, your Honor. Sarah Normand on behalf of the government. I will address the points as they

were raised by the plaintiffs.

First of all, the OLC memoranda that are at issue in this appeal are not working law. This Court has decided this issue in Brennan Center and the D.C. Circuit has agreed. OLC advice to a client is fundamentally different than the types of working law that the D.C. Circuit has found to be working law, disclosable as such in the cases that Mr. Jaffer identified. Indeed, it is D.C. Circuit law that OLC's advice memos are in fact of a different character.

In the EFF decision that's discussed in the government's brief, the D.C. Circuit looked at the question of OLC memoranda, and explicitly distinguished them from the types of documents that that Court had deemed to be disclosable and subject to a disclosure mandate as working law. So, plaintiffs' reliance on that line of cases from the D.C. Circuit is really unavailing.

As this Court said in Brennan Center, OLC's advice is just that. It is advice. It doesn't require that the decisionmaker take any particular step. In fact, OLC's advice, and any lawyer's advice, often will leave the recipient, the client, with a range of options to take. It may say that a particular action would be lawful, would be unlawful. But would, again, leave the ultimate determination as to what, if any, action to take to the client. And that was in fact the case in Brennan Center. In Brennan Center you had an OLC memo

that advised the agency that the enforcement of a particular statutory provision would be unlawful. The agency acted in accordance with that advice, in the sense that the agency didn't enforce the requirement. But the Court nevertheless determined that that was not working law.

I would add that these arguments were made in the prior appeal. This Court did not make a determination based on working law. Rather, it made a determination based on the notion of waiver through official disclosure. If the Court had determined that these types of documents or that the OLC DoD memo it was working law, it wouldn't have been necessary to look so carefully at the actual substance of the legal analysis in the two documents. That enterprise would not have been necessary.

JUDGE CABRANES: What do you understand to be the meaning of working law?

MS. NORMAND: Your Honor, it is not entirely clear, but as the Court indicated in Brennan Center, it arises from the affirmative provisions of FOIA. The affirmative disclosure provisions which require an agency to make public affirmatively certain types of final opinions, adjudicatory opinions, statements of policy, and the like.

However, those affirmative provisions of FOIA do not trump the exemptions. So when a document is subject to an exemption, including Exemption 5, which would cover the

attorney-client privilege, the deliberative process privilege, that document retains privilege if the requirements of the privilege are met.

The types of documents that the D.C. Circuit has found to be working law are documents that were prepared and distributed downward to agency staff, routinely relied upon by agency staff in their dealings with the public. This is a very different type of document all together.

JUDGE CABRANES: Agency rules memoranda.

MS. NORMAND: Precisely, your Honor. For example, I believe the Coastal States case had to do with the agency's interpretations of Department of Energy regulations along the lines of what your Honor is describing.

This is a very different type of document all together. Nothing that Mr. Brennan said converts OLC advice into working law. All that Mr. Brennan said was that OLC advice may identify the legal boundary in the sense that it might tell us that a particular contemplated action was lawful or unlawful. But as Mr. Brennan himself said in the same set of comments, we don't always operate at that boundary. It remains entirely up to the policymaker as to what action to take, and a policymaker might take actions for a number of reasons, one of which is that the action is lawful. But there are policy reasons that would support the taking of any particular action.

So, really, legal advice is one, but not the only one input into the decision that the policymaker makes. It isn't dispositive as to the ultimate policy decision that is made. That's the conclusion of the Court in Brennan Center.

JUDGE POOLER: Does it say on your website it is working law?

MS. NORMAND: No, your Honor.

JUDGE POOLER: As Mr. Jaffer suggested?

MS. NORMAND: Mr. Jaffer was referring to the best practices memo by Mr. Barron. What I can say about that is the memo -- a few things. First of all, the memo talks about controlling legal advice, and there was a question as to whether there is any statute. There is no legal requirement that any agency follow OLC's advice. By custom and practice of the Executive Branch, it is typically treated as controlling to the extent that if OLC advises that a contemplated action is unlawful, then the agency will not take that action. That's as one would expect and would be hoped for.

I would urge the Court to read the entire memo and not just the snippets that are quoted in the brief. I would note that on the last page of the memo, Mr. Barron makes the point of emphasizing the importance of confidential OLC advice to Executive Branch decisionmakers, and also makes the point that it's crucial that where areas of the law are uncertain, that policymakers are able to rely on confidential legal advice.

And as a result, oftentimes when such deliberations are at issue, OLC will not publish its opinions, notwithstanding that it might otherwise do so in other scenarios.

That memo very much underscores the points that we make in our brief about the importance of maintaining the confidentiality of OLC advice.

JUDGE POOLER: Counsel, if there weren't issues of national security at stake, as there are in this case, if a different agency asked for your advice, and that agency took it, and adopted it as its policy, that would be public, wouldn't it?

MS. NORMAND: I'd like to emphasize the word "adopted," your Honor, in your question.

JUDGE POOLER: They released a press release that says we have received advice from OLC and we are going to act on it and do the following things.

MS. NORMAND: Yes, your Honor. That wouldn't be working law. That would be adoption. The Court in Brennan Center made clear that there are two ways that an Exemption 5 privilege could be vitiated. One is a working law doctrine. The other is adoption, expressed adoption. That occurs when a policymaker of an agency expressly adopts a predecisional document which could include an OLC opinion, that's what occurred in La Raza, for example, and says that this is OLC's advice, but it is now the policy of the agency.

JUDGE POOLER: What if they don't say that and just let it be the policy?

MS. NORMAND: Then it is not adopted.

JUDGE POOLER: Doesn't it become working law then?

MS. NORMAND: It does not, your Honor. No, no, it doesn't. It is still legal advice. The policymaker is permitted to act in conformity with it. It is also permitted to take --

JUDGE POOLER: "We just got this opinion letter hot off the press from OLC. This is what we're going to do in the future." But that's not made public. Doesn't that become working law then?

MS. NORMAND: There are circumstances in which legal advice could be distributed in the manner that you're describing. That would be closer to what you have in the Tax Analysts and Coastal States type cases in the D.C. Circuit.

That's not what happened in this case. In this case you have confidential legal advice that's being provided by OLC to its superior, either to the Attorney General or to the President or the White House counsel or to agency general counsels or other individuals who are clients. These are not advice documents that are being distributed downward to staff to be routinely relied upon as agency law. These are advice documents.

JUDGE NEWMAN: Ms. Normand, I want to ask you about

the so-called matching requirement which has been referred to in the papers.

MS. NORMAND: Yes.

JUDGE NEWMAN: Is it the government's position that a document is not to be disclosed in light of some other disclosure unless it is an exact match with the disclosed document?

MS. NORMAND: Your Honor, that is the standard that the Court articulated in Wilson. That's the standard that the D.C. Circuit applies in a number of cases. We understand --

JUDGE NEWMAN: Tell me how that works. If the test is an exact match, then what is the point of the disclosure?

MS. NORMAND: Your Honor, I think that respectfully is not the way to look at the question. That's because the inquiry here is whether the official disclosure of the first piece of information results effectively in an inability to withhold the second. The question is not whether you need to make a FOIA request in order to obtain it.

The point of the official disclosure doctrine is that there is no point in insisting upon a protection because the information has already been made public. If the information has not been made public, then there has been no official acknowledgment. So, the matching test --

JUDGE NEWMAN: Why would there ever be a successful FOIA request that encountered a matching obstacle if you're

right that the two documents have to match precisely?

MS. NORMAND: There have been cases, your Honor, in the D.C. Circuit, for example, where courts have found that they were a precise match. So it does happen.

JUDGE NEWMAN: What do you mean by "precise"? We don't mean a carbon. I guess "carbon" dates me, doesn't it. We don't need a carbon copy or perhaps a Xerographic copy. We don't need that exact, do we?

MS. NORMAND: No.

JUDGE NEWMAN: What does the government mean by it must be either an exact match or a precise match?

MS. NORMAND: Your Honor, I would defer to how the D.C. Circuit has described it in the Afshar case, which is the case that essentially announced the doctrine in the D.C. Circuit.

JUDGE NEWMAN: We had a good bit to say, albeit in a footnote, about the Afshar case. It was not, it's fair to say, entirely complimentary.

MS. NORMAND: That's true. Although I understood the Court's analysis of the Afshar case to be focused on the fact that in that case the D.C. Circuit didn't use the word "match," which is certainly true. The D.C. Circuit did, however, the use the words "appear to duplicate." The D.C. Circuit adopted a standard whereby the information that's withheld must appear to duplicate the information that's previously been disclosed.

The D.C. Circuit subsequently in the Assassination Archives case repeated that "appears to duplicate" language. There have been many, many cases that have insisted in fact on match.

JUDGE NEWMAN: What sense does that make? If the only time you give a document is if another document is the same. Why?

MS. NORMAND: That's the point, respectfully, your Honor. The point is the government no longer has the ability to rely on Exemption 1, for example, because the government has already disclosed the same information. If it is different information, that rationale wouldn't apply.

JUDGE NEWMAN: I understand why you say it gets disclosed if it is an exact match. I'm asking why that should be the law that the test should be an exact match. What sense does that make that a requester gets a document only if its exact match is already in its hands.

MS. NORMAND: The reason, your Honor, is because the classification of national security information is a task that is constitutionally within the power of the Executive Branch. It is left to the Executive Branch to make determinations about what information can appropriately be made public and what information cannot be appropriately be made public. That's necessarily a predictive judgment about the likely harms that may result in national security release of a specific piece of information. And the reason that's important --

JUDGE NEWMAN: I can follow you completely if the government came in with an affidavit as to a withheld document and said although this withheld document is somewhat similar to the one that's out there, it has in it at line six, nine and 11 some facts that have not been previously disclosed and they are very sensitive. I fully understand that argument.

But I don't understand the government to be making anything nearly that precise. You're just saying it's got to be an exact match.

MS. NORMAND: Your Honor, the government does typically make the showing that's required under FOIA, and must do so, to demonstrate that the information that is withheld qualifies for protection under Exemption 1, Exemption 3.

JUDGE NEWMAN: I can assure you with respect to the documents at issue in this case, I will be reviewing them very carefully to see if the government has in its classified materials pointed me to specific facts that are in the withheld documents but not in the disclosed documents.

MS. NORMAND: We certainly have made every effort to do that, and I would argue that the District Court in the redacted portions of its decision addressed that issue at some length, identifying very material differences between --

JUDGE NEWMAN: That's very different from an exact match requirement. That premise is that they are indeed not an exact match. That there are articulable facts in the withheld

document that have not been previously disclosed. So that's a different case.

I've been asking you about the exact match argument.

MS. NORMAND: I understand.

JUDGE NEWMAN: There are no other facts.

MS. NORMAND: I understand, your Honor. I'd like to make the point that the Court doesn't need to address that question of whether it must be an exact match because in this case, based on the material that's been put in the record and the District Court's own analysis of that material, there is really no serious question that there are material and significant differences between the information that's been disclosed and the information that's been withheld.

JUDGE NEWMAN: You use the word "differences." By differences do you mean different facts?

MS. NORMAND: Yes. In many cases, yes, yes. But I would like to finish by answering the question of what is the point of an exact match requirement. I think the point is that the Executive Branch needs to make a determination, it is the Executive Branch's authority to make a determination as to what types of information can be made public and what kinds of information cannot as to national security.

Those determinations are made, and then the purpose of the match and the specificity requirements is that they defer, as the Court frequently and historically has, to the executive

judgment about what information can be made public without causing harm to national security.

It would, as courts have recognized, be quite a disincentive to the Executive Branch to adopt a very broad view of the official disclosure document doctrine. Rather, such that information that is related --

JUDGE NEWMAN: There may be some room between exact match and very broad disclosure.

MS. NORMAND: Fair enough, your Honor. I would also note that the Court itself, when it looked at the question of match, it did apply a matching requirement. And in the Court's words it requires a virtual parallel in substantial overlap between the legal analysis and the two documents.

So even while we certainly appreciate that the Court did not view that requirement rigidly, the Court in application did require a very substantial overlap in legal analysis.

JUDGE NEWMAN: I think we said it met the test. Not that it necessarily had to.

MS. NORMAND: Yes. My understanding, your Honor, is that the Court applied the test and recognized that it is the law of the circuit.

I'll move on to the legal analysis question raised by Mr. McCraw. There really is no support in the statute, in the case law, in the executive order for any type of exclusion of legal analysis from classification. Material can be properly

classified if it pertains to the criteria in the executive order and if the other components of the executive order are met.

This Court itself identified a number of circumstances where legal advice could be properly classified, and that's certainly the case, and there is no legal authority for any contrary ruling.

Finally, with regard to the redactions in the District Court's opinion, the District Court did not violate the First Amendment by filing on the public record a redacted version of its decision, but redacted information that the government had identified as classified and privileged in some cases. There is historically a practice by courts in this circuit and others to discuss information that may be classified in decisions. And for the purpose of facilitating appellate review and then to offer the government an opportunity to review the decision and to provide redactions of classified information, that's something this Court has previously done. The District Court has done. And the plaintiffs have not cited any case finding that practice is contrary to the First Amendment.

I would just add that what the District Court did here is effectively what we understand The New York Times to want, which is the District Court looked carefully at the redactions that the government proposed and which were supported by an explanation that's in the classified appendix, and the District

Court adopted the government's redactions and identified a specific instance where it disagreed with the government's redaction.

We indicated in our ex parte papers why that redaction is necessary. But the District Court effectively made a finding that it disagreed as to that one item, and that seems to us to be effectively what the plaintiffs are asking for.

JUDGE CABRANES: Thank you. Mr. Jaffer, you can reserve two minutes.

MR. JAFFER: Thank you, just a few quick points. First, Judge Newman, you asked me for a cite on the assassination memo. On page 41 of the government's redacted brief, the government characterizes the March 2002 assassination memo as far broader in scope and substantially different than the analysis that it gesture towards in the July 2010 memo.

Second, just to respond to the government's points on Brennan Center and EFF. I don't think those cases have anything to do with this one. And that's because in EFF, the OLC memo at issue was written four years after the practice, which involved issuing national security letters, after that practice had been discontinued. And the agency there affirmatively disclaimed the authority that the OLC had said that the agency had. That's not a situation where the decisionmakers are affirmatively relying on the authority to

assure the public of the lawfulness of their conduct.

In Brennan Center, which involved three OLC memos, it's true that the Court found that two of those memos were neither working law nor adopted, but those memos were drafts, the government characterized them as drafts, and also pointed to the final memo with which the drafts were associated. It is not a situation, as here, where the memos are indisputably final. These are carved out draft memos from the scope of our request. That's at joint appendix 445.

And even in Brennan which again involved draft OLC memos, or three draft OLC memos, the Court had found one of the memos had been adopted as policy because it had been referenced twice. Once in a footnote. So the argument in this case -- I think Brennan is relevant here only because of Brennan's adoption analysis, which I think applies even more forcefully in the Brennan context.

I think finally, your Honors, the government says that these OLC memos, I believe if I'm understanding correctly, the government's argument is OLC memos are categorically excluded from the scope of the working law doctrine. If that is the government's argument, I think that EFF and Brennan Center would be much shorter cases. There would be no need for a 40-page opinion in Brennan Center if OLC opinions were categorically excluded.

Then finally, Judge Newman, just to go back to your

question of why all this matters. From our perspective, this is a immensely consequential policy under which hundreds of people, whatever you think of the merits of the policy, hundreds of people in multiple countries have been killed by drone strikes. Our view is that the public has a right to know what the government's legal analysis is, both to understand the policy itself, and to the extent that the public believes it is necessary and appropriate to hold decisionmakers accountable.

JUDGE CABRANES: Thank you.

MR. JAFFER: Thank you, your Honor.

MR. McCRAW: Your Honors, I'd like to speak briefly to two points. One is Judge Pooler asked the question of the difference between expressed adoption and working law. And I believe the question anticipated the right answer, which is if it is adopted and not discussed, it is working law. It is the law that guides the decision making within an agency.

Expressed adoption is when there are those statements made that show that the agency is using some analysis, some legal opinion, some policy statement to be the law or to justify their actions.

Brennan, I would ask you and encourage you to look at actually the facts in Brennan where expressed adoption were found. Brennan held an agency faces a political or public relations calculation in deciding whether to say nothing or say anything. When an agency decides to try to justify itself and

refers to analysis, then that analysis becomes subject to disclosure.

In Brennan Center, there was no reference to a particular document in one of two references. The two references that led to the finding expressed adoption. One was a reference in a footnote to a draft opinion OLC determined. The other one was a statement to Congress by an agency official. OLC provided some tentative advice. No reference to a particular document.

Our point is, you get expressed adoption when the government goes out and tries to sell a policy, it doesn't have to do that, but when it does, the underlying analysis becomes disclosable.

Finally on waiver, I simply wanted to underscore I believe this Court took the proper approach to waiver in its first decision. And it was dealing with legal analysis, not facts. In part our request asked only for legal analysis. I would note that the Court released sections dealing with Section 956, even though 956 was not mentioned in either the White Paper or in the 41-page memo. In the White Paper or any other disclosures. That seemed to me to be the right analysis the Court looked at whether there will be any greater harm.

JUDGE CABRANES: Thank you very much. We'll reserve decision. We are adjourned.

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