14-4432-cv(L), 14-4764-cv(CON)

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. –

UNITED STATES DEPARTMENT OF JUSTICE, 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.

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

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS THE NEW YORK TIMES COMPANY, CHARLIE SAVAGE AND SCOTT SHANE

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This case exists because the United States government, acting pursuant to legal memoranda provided by the Department of Justice ("DOJ"), authorized the targeted killing of suspected terrorists, including American citizens abroad. In its brief, the Government at no point disputes that the targeted killing program was undertaken in accordance with the OLC opinions. The New York Times and two of its reporters, Charlie Savage and Scott Shane (together, "The Times"), sought access via the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to the legal analysis contained in those memoranda to further the ongoing public debate over the legality of targeted killings. As set forth in our initial brief, disclosure is required here for three reasons: (1) The Government waived its right to invoke any FOIA exemptions because, as this Court has already said, the Government engaged in an "'extensive public relations campaign to convince the public that [the Administration's] conclusions [about the lawfulness of killing Anwar al Awlaki] are correct'"; (2) pure legal analysis is not classified information and cannot be withheld under FOIA Exemptions 1 and 3; and (3) the analysis at issue here constitutes the working law of the agency or express adoption and therefore Exemption 5 does not apply. *See N.Y. Times v. Dep't of Justice*, No. 13-422-cv (2d

[1] Subsequent to the filing of The Times's initial brief, this case was consolidated with a similar appeal filed by The American Civil Liberties Union and the American Civil Liberties Union Foundation (together, "ACLU"). *See* Docket No. 42.

Cir. June 23, 2014) (the "Second Circuit Decision"), Special Appendix ("SPA") 115 (quoting *N.Y. Times Co. v. Dep't of Justice* and *American Civil Liberties Union v. Dep't of Justice*, Nos. 11 Civ. 9336 & 12 Civ. 794 (S.D.N.Y. Jan. 3, 2013) (the "Initial District Court Decision"), SPA17).

DOJ offers nothing that calls into question the need for disclosure. While The Times finds itself shadowboxing against the Government's almost entirely redacted waiver arguments, it is evident that the Government continues to rigidly misapply the applicable law and fails to show that any *material* difference could exist between the legal analysis already officially acknowledged and the analysis presumably contained in the remaining Office of Legal Counsel ("OLC") memoranda. As to the cited FOIA exemptions themselves, DOJ simply avoids the discussion of whether pure legal analysis can be classified, instead opting to confuse the issue by noting that analysis is sometimes intertwined with other, properly classifiable information. And rather than engage on the question of whether the OLC memoranda were followed as agency working law or expressly adopted, DOJ instead retreats to an abstract academic claim that OLC memoranda are not, *ipso facto*, operative law the moment they are written. What matters is that *these* memoranda were agency working law *in this case*.

Separately, DOJ attempts to subvert the protections of the First Amendment by arguing that the judicial branch must completely abdicate its independent

obligations to determine whether the public has a right to view judicial documents, including court opinions, any time the executive branch declares something classified. This is not the law, and such arguments upend the basic protections of the separation of powers that forms the bedrock of our democratic system.

ARGUMENT

I.
THE GOVERNMENT HAS WAIVED ITS RIGHT TO INVOKE FOIA EXEMPTIONS

As both The Times and the ACLU have previously argued, the extensive public statements and official disclosures made by high-ranking government officials constitute waiver of any privileges that might have applied to the legal analysis in the various DOJ OLC memoranda. *See* The Times's Appellant Brief ("Times Br."), Docket No. 39, at 28-30; ACLU's Appellant Brief ("ACLU Br."), Docket No. 45, at 13-22. The Government's arguments are nearly entirely redacted, and The Times therefore has little ability to respond meaningfully. Two points, however, merit further discussion.

First, the Government appears to argue that the release of the of the OLC memorandum (the "OLC DOD Memorandum") ordered by this Court last year is not an official release that can be considered in the waiver analysis. *See* DOJ Brief ("DOJ Br."), Docket No. 89, at 47 n. 10. In DOJ's view, that court-ordered

disclosure does not constitute "independent official disclosure or waiver." *Id*. Such a claim badly misconstrues what this Court held – and the role of the judiciary in our federal system. The Court decided that the contents of the OLC DOD Memorandum had been officially disclosed. *See* Second Circuit Decision, SPA120. The Government cannot now pretend either that the official disclosures never occurred or that the release of the OLC DOD Memorandum never happened. To credit the Government's argument would be to treat an order of this Court properly disclosing a document under FOIA as the equivalent of an unauthorized and illegal leak by an agency employee.

Second, the Government attempts to reapply the overly rigid "matching test" for official disclosure that this Court questioned and effectively eschewed in its initial opinion. *See* Second Circuit Decision, SPA132-33 n. 20 (noting that the three-part test for official disclosure outlined in *Wilson v. CIA*, 586 F.3d 171 (2d Cir. 2009) was of "questionable provenance" and that "rigid application" of the case's "matching test" "may not be warranted"). This Court pointedly rejected a requirement of "absolute identity" between the officially acknowledged information and the withheld document as making "little sense" because "[a] FOIA requester would have little need for undisclosed information if it had to match precisely information previously disclosed."). Second Circuit Decision, SPA132.

In its brief, the Government simply replaces "absolute identity" from the matching test with the phrase "virtually parallels," which the Government extracted from this Court's review of the evidence that the Court relied upon to conclude that there had been official disclosure of the OLC DOD Memorandum. *See* DOJ Br. at 46; Second Circuit Decision, SPA120. The term was not an announcement of some new disclosure standard; it was simply part of the Court's factual analysis. It is plain that this Court has not set a "virtual parallel" standard, as the Court released a legal discussion concerning 18 U.S.C. § 956(a) that *was not mentioned at all* in the administration's prior public statements about the legality of targeted killings. *See* Second Circuit Decision, SPA120 ("Even though the DOJ White Paper does not discuss 18 U.S.C. § 956(a), which the OLC-DOD Memorandum considers, the substantial overlap in the legal analyses in the two documents fully establishes that the Government may no longer validly claim that the legal analysis in the Memorandum is a secret."). That result is entirely consistent with this Court's justified skepticism about the "matching" doctrine. *See* Second Circuit Decision, SPA132-33 n.20 (pointing out that the case that is the "ultimate source of the three-part [disclosure] test," *Afshar v. Dep't of State*, 702 F.2d 1125 (D.C. Cir. 1983), does not mention a matching requirement at all).

It is the test of material difference – that is, does a material difference exist between what has been acknowledged and what is being withheld – that should

guide this Court's waiver analysis. *See Afshar*, 702 F.2d at 1132; *see also* ACLU Br. at 13-22. Consider the one substantive area of OLC legal analysis discussed in unredacted form in the Government's brief: analysis of Executive Order 12333. The Government claims that no "match" exists between the disclosed discussions of this executive order and the withheld OLC memoranda, despite the fact that the DOJ White Paper and other official public materials specifically discuss this order. *See* DOJ Br. at 41. What matters is the relation of the withheld information to the analysis that has already been officially disclosed, not some artificial measurement of length or the number of paragraphs, just as the Court did in ordering that the section of the OLC DOD Memorandum discussing 18 U.S.C. § 956(a) be released. *See* Second Circuit Decision, SPA120.

II.

PURE LEGAL ANALYSIS CANNOT BE CLASSIFIED AND EXEMPTIONS 1 AND 3 THEREFORE DO NOT JUSTIFY WITHHOLDING THE REMAINING MEMORANDA

The Government makes little attempt to challenge The Times's argument that Exemptions 1 and 3 are simply inapplicable to the information sought here by The Times – pure legal analysis. Such analysis, standing alone, is not the proper subject of classification because it does not disclose sources, methods, operations, or other properly classified information. Instead, the Government in its cursory discussion reiterates what The Times expressly conceded in its opening brief, that

"for certain documents, legal analysis may be 'inextricably intertwined' with properly classifiable information, making redaction of the classified information impossible." Times Br. at 24.[2] Because the District Court erroneously held that legal analysis, standing alone, could be classified, it could not have correctly performed the necessary analysis of whether legal opinion could be redacted from properly classified data. Initial District Court Decision, SPA37.

The Government never explains how, as it must, that disclosure of pure legal analysis could "reasonably be expected to cause identifiable or describable damage to national security," and how it reveals any intelligence sources or methods, as required to invoke Exemptions 1 and 3. *See* E.O. 13526 (75 Fed. Reg. 707 (Dec. 29, 2009)); 50 U.S.C. § 403; 50 U.S.C. § 403g; Times Br. at 18-28.

[2] The Government also apparently seems to argue that classification is possible here because this Court has held that "in some circumstances the very fact that legal analysis was given concerning a planned operation would risk disclosure of the likelihood of that operation." Second Circuit Decision, SPA130. However, this Court already explicitly disposed of that argument here. *See* Second Circuit Decision, SPA130 ("[T]hat is not the situation here where drone strikes and targeted killings have been publically acknowledged at the highest levels of the Government.").

III.

EXEMPTION 5 DOES NOT PROVIDE A BASIS FOR WITHHOLDING THE MEMORANDA BECAUSE THEY ARE AGENCY WORKING LAW OR HAVE BEEN EXPRESSLY ADOPTED

The Government also fails in its attempt to show that the OLC memoranda are not agency "working law" that must be disclosed. *See Brennan Ctr. For Justice at N.Y. Univ. Sch. of Law v. Dep't of Justice*, 697 F.3d 184, 199 (2d Cir. 2012) ("If an agency's memorandum or other document has become its 'effective law and policy,' it will be subject to disclosure as the 'working law' of the agency" (quoting *NLRB v. Sears, Roebuck, & Co.*, 421 U.S. 132, 153 (1975)). The working law doctrine is designed to ensure that the government cannot make decisions based on secret criteria immune from oversight. *See Sears*, 421 U.S. at 152 ("the public is vitally concerned with the reasons which did supply the basis for an agency policy actually" implemented.). It is this fundamental democratic purpose that animates the doctrine, not some mechanistic reliance on the talismanic utterance of the words "official policy" by an agency official. Indeed, "[T]he 'working law' analysis is animated by the affirmative provisions of FOIA … and documents must be disclosed if more akin to that which is required by the Act to be disclosed than that which may be withheld under Exemption 5." *Brennan*, 697 F.3d. at 200.

The Government rests its entire argument on the theory that an OLC memorandum only advises an agency on the legal parameters of what it can do, but does not set policy without additional action by the agency itself. DOJ Br. at 51 (citing *Electronic Frontier Foundation v. Dep't of Justice*, 739 F.3d 1, 8-10 (D.C. Cir 2014). As discussed in our opening brief, the working law doctrine does not turn on such technical formalism.[3] Quite tellingly, DOJ submits no evidence whatsoever attempting to show that the agency disregarded or modified these memoranda. Nor could it. Lives were ended because of decisions that were taken in accordance with the legal processes and analyses provided by OLC, as senior government leaders said in their official statements.

The Government cites *Electronic Frontier Foundation*, 739 F.3d 1, as support for its claim that because the executive branch is "free to decline" the OLC advice, such advice cannot constitute working law. DOJ Br. at 51-52. In that case, however, there was direct proof that the FBI *actively declined* the OLC advice. *Electronic Frontier Foundation*, 739 F.3d at 10 ("the OIG's report acknowledged that the FBI had 'declined, for the time being, to rely on the authority discussed in the OLC opinion.'"). Rather than confront the evidence that the OLC memoranda constituted the executive branch's working law in this case, the Government clings to its formalistic assertion that OLC memoranda can be rejected by an agency –

[3] *See* Times Br. at 35-41 for a fuller explanation of the critical, non-advisory role OLC memoranda truly play in government agencies.

even though there is no evidence of that here. The Court is therefore left with the straightforward task of asking whether these memoranda are "more akin to [a final agency decision] which is required by the Act to be disclosed than [deliberative communication] which may be withheld under Exemption 5." *Brennan*, 697 F.3d. at 200. The record in this case shows they are the former and not the latter. [4]

The same public acknowledgements also require disclosure under a separate doctrine recognized in the Exemption 5 FOIA caselaw: express adoption or incorporation by reference. *See Brennan*, 697 F.3d at 194; *Nat'l Counsel of La Raza v. Dep't of Justice*, 411 F.3d 350, 355 (2d Cir. 2005). Under that doctrine, where agencies publicly rely on an analysis to justify a decision, that underlying analysis must be disclosed in its entirety, not merely the part publicly mentioned. *Niemeier v. Watergate Special Prosecution Force*, 565 F.2d 967, 973 (7th Cir. 1977); *see also Brennan*, 697 F.2d at 204-05. In *Brennan*, two passing references to the underlying analysis of an OLC memorandum – with no elaboration of the

[4] The Government also raises in a footnote the possibility that one memorandum at issue in this case is subject to the presidential communications privilege. *See* DOJ Br. at 41 n. 9. As an initial matter, The Times notes that the same analysis of issues of waiver applies to the presidential communications privilege. *See In re Sealed Case*, 121 F.3d 729, 740 (D.C. Cir. 1997) ("We turn first to the OIC's contention that the White House has waived its privilege claims; if we find that waiver has occurred, we need not proceed further."); *Samahon v. Dep't of Justice*, No. 13-cv-6462, 2015 U.S. Dist. LEXIS 23813, *41 (E.D. Pa. Feb. 27, 2015). Moreover, The Times has no way of assessing if this privilege was properly asserted in the first instance or if the communications were shared with an official close enough to the President, and not distributed too widely, for the privilege to apply. DOJ should be held to its burden.

actual rationale – were enough to require disclosure of the memorandum. *Id.* Here, public statements showing reliance on the OLC analyses are both more numerous and more detailed than those outlined in *Brennan*, and disclosure is similarly required.

IV.

THERE IS NO EXCEPTION TO THE FIRST AMENDMENT FOR CLASSIFIED INFORMATION

Finally, the Government takes issue with The Times's argument that the District Court violated its First Amendment obligations by failing to make specific, on-the-record findings that the redactions made to its opinion were narrowly tailored to further a compelling government interest. *See* Times Br. at 41-45.

Incredibly, the Government states, as a categorical matter, that no right of access under the First Amendment exists where the executive branch has decreed that parts of a judicial opinion or other court document are classified. *See* DOJ Br. at 54. Such an argument wildly mischaracterizes the fundamental protections of public access to the courts offered by the First Amendment – and effectively strips the judiciary of its power to serve as a check on overclassification by the executive branch.

It is beyond dispute that the public's right of access to judicial proceedings in general, and to judicial opinions in particular, is protected by the First

Amendment. *See United States v. Erie Cnty.*, 763 F.3d 235, 239 (2d Cir. 2014) ("[O]ur Constitution, and specifically the First Amendment to the Constitution … protects the public's right to have access to judicial documents."); *Prod. Res. Grp. v. Martin Prof'l*, 907 F.Supp.2d 401, 417 (S.D.N.Y. 2012) ("The qualified First Amendment right attaches to judicial opinions such as this one."). And it is axiomatic that the Constitution is the supreme law of the land, and necessarily supersedes any contrary law, rule, or regulation, including Executive Orders. *See, e.g., In re N.Y. Times*, 828 F.2d 110, 115 (2d Cir. 1987) (stating that confidentiality provisions in the Wiretap Act "cannot override" constitutional access right). "Once a First Amendment right of access to judicial documents is found, the documents 'may be sealed [only] if specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest.' And '[b]road and general findings by the trial court are not sufficient to justify disclosure.'" *Erie Cnty.*, 763 F.3d at 239 (quoting *Lugosch v. Pyramid Co.*, 435 F.3d 110, 121 (2d Cir. 2006)).

Moreover, the Supreme Court has stated that the "higher values" asserted to justify sealing must weigh the countervailing public interest in access to the underlying information by requiring that a court find a "substantial probability" of harm to that compelling interest before any sealing takes place. *See Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 14-15 (1986) ("Press-Enterprise II");

see also, e.g., *In re Wash. Post Co.*, 807 F.2d 383, 192-93 (4th Cir. 1982) (requiring "substantial probability" of harm to national security to close a hearing). This "substantial probability" standard is notably more rigorous than the classification standard used by the executive branch. *See* E.O. 13526 (providing that information can be classified only if it "reasonably could be expected to cause damage to national security.").

These protections are essential to preserving the democratic integrity of the judicial branch:

> The presumption of access is based on the need for federal courts, although independent – indeed, particularly because they are independent – to have a measure of accountability and for the public to have confidence in the administration of justice. Federal courts exercise powers under Article III that impact upon virtually all citizens, but judges, once nominated and confirmed, serve for life unless impeached through a process that is politically and practically inconvenient to invoke. Although courts have a number of internal checks, such as appellate review by multi-judge tribunals, professional and public monitoring is an essential feature of democratic control. Monitoring both provides judges with critical views of their work and deters arbitrary judicial behavior. Without monitoring, moreover, the public could have no confidence in the conscientiousness, reasonableness, or honesty of judicial proceedings. Such monitoring is not possible without access to testimony and documents that are used in the performance of Article III functions.

United States v. Amodeo ("Amodeo II"), 71 F.3d 1044, 1048 (2d Cir. 1995). Because of this critical principle, "It is the court, not the Government, that has discretion to seal a judicial record." *Bismullah v. Gates*, 501 F.3d 178, 188 (D.C. Cir. 2007).

There is simply no exception to this rule when the government claims that classified information must be kept secret in judicial documents. *See Dhiab v. Obama*, No. 05-cv-1457 (GK), 2014 U.S. Dist. LEXIS 140684, *14 (D.D.C. Oct. 3, 2014) ("[I]t is the judiciary's responsibility, when ruling on an issue as overwhelmingly important as diminution of our precious First Amendment rights, to ensure that classification of the items in question … is proper."). To find otherwise would result in a breathtaking expansion of government power: the ability to excise from judicial opinions information as solely the Executive Branch sees fit. Courts have taken a strong stance against such a power grab. As the Fourth Circuit long ago explained:

> [T]roubled as we are by the risk that disclosure of classified information could endanger the lives of both Americans and their foreign informants, *we are equally troubled by the notion that the judiciary should abdicate its decisionmaking responsibility to the executive branch whenever national security concerns are present.* History teaches us how easily the spectre of a threat to "national security" may be used to justify a wide variety of repressive government actions.

Wash. Post, 807 F.2d at 391 (emphasis added). And, indeed, courts do not shy away from assessing whether national security claims justify secrecy when considering the First Amendment. *See, e.g., McGehee v. Casey*, 718 F.2d 1137, 1148-49 (D.C. Cir. 1983) (considering a CIA directive issued to a former employee to remove classified information from a forthcoming book by conducting a *de novo* review of the classification decision and explaining that judges "must … satisfy

themselves … that the [government] in fact had good reason to classify"); *Stillman v. CIA*, 319 F.3d 546, 548-49 (D.C. Cir. 2003) (courts have duty to review classification claim used to censor former CIA employee). Courts must also independently assess the agency's stated need for secrecy in the FOIA context, where the standard is concededly lower than in situations where, as here, the First Amendment applies. *See, e.g., Ctr. for Const'l Rights v. CIA*, 765 F.3d 161, 167 (2d Cir. 2014).

The Government is not helped by its argument that while the First Amendment may apply to judicial documents in general, it does not apply to classified information because there is no history of access to such information. *See* DOJ Br. at 54-55. This argument misreads the foundational case that establishes when a First Amendment right of access applies, *Press-Enterprise II*.

Press-Enterprise II establishes a two-part test for determining whether the First Amendment applies: an assessment of the "history" of access and the "logic" of whether public access would play a significant positive role in the functioning of a particular process. *See Erie Cnty.*, 763 F.3d at 239. But critically, "Courts must consider the history and virtues of access to particular *proceedings*, not the information that may arise during those proceedings." *Dhiab*, 2014 U.S. Dist. LEXIS 140684 at *16 (rejecting government argument that First Amendment does

not apply to classified information in habeas proceedings) (citing *Press-Enterprise II*, 478 U.S. at 8-9) (emphasis added).

Because judicial opinions unquestionably enjoy a long and unbroken history of public access based on the public's need to monitor judicial power, the District Court could seal parts of its opinion only if it made specific, on-the-record findings that the redactions were narrowly tailored to further a compelling government interest. *Erie Cnty.*, 763 F.3d at 239. The Times does not dispute that national security concerns often will provide such a compelling government interest, but that possibility does not excuse a court from making the necessary on-the-record findings that disclosing the information would create a "substantial probability" of harm, and assuring that any redactions are narrowly tailored.[5]

[5] Additionally, there is the specific access issue relating to the sealed information on page 9 of the District Court opinion, which the district court itself did not believe merited sealing. *See N.Y. Times Co. v. U.S. Dep't of Justice* and *American Civil Liberties Union v. U.S. Dep't of Justice*, Nos. 11 Civ. 9336 & 12 Civ. 794 (S.D.N.Y. Oct. 31, 2014) ("Sealing Order"), SPA176-77. While the court could have temporarily sealed the material and required the Government to take a prompt appeal if the Government so chose, it instead improperly shifted the burden to The Times and the public to seek confirmation from this Court that the sealing was inappropriate.

CONCLUSION

For each of these reasons, The Times respectfully asks this Court to (i) reverse the judgment below granting DOJ summary judgment and denying partial summary judgment to The Times; (ii) declare that the legal analysis contained in the OLC Memoranda is public under 5 U.S.C. § 552 and order DOJ to provide the memoranda, in full or in part, to The Times within 20 business days; (iii) unseal the Remand District Court Decision to the full extent required by the First Amendment; (iv) award The Times the costs of these proceedings, including reasonable attorney's fees, as expressly permitted by 5 U.S.C. § 552(a)(4)(E); and (iv) grant such other and further relief as the Court deems just and proper.

Dated: New York, NY
April 16, 2015

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Rule 32(a)(7)(B)(ii) of the Federal Rules of Appellate Procedure because it contains 4,285 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: April 16, 2015

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