



**U.S. Department of Justice**

*United States Attorney  
Southern District of New York*

*86 Chambers Street  
New York, New York 10007*

July 6, 2015

**BY ECF**

Hon. Catherine O'Hagan Wolfe  
Clerk of the Court  
United States Court of Appeals for the Second Circuit  
Thurgood Marshall United States Courthouse  
40 Foley Square  
New York, NY 10007

Re: *The New York Times Co. v. United States Dep't of Justice*,  
14-4432(Lead), 14-4764(Con) (2d Cir.)

Dear Ms. Wolfe:

On June 23, 2015, the Court (Cabrane, Newman and Pooler, JJ.) heard argument in the above-referenced appeals, in both a public session and a closed, *ex parte* session. We enclose for filing on the public docket a redacted version of the closed, *ex parte* session, with classified and privileged information redacted.

We thank the Court for its consideration of this matter.

Respectfully,

BENJAMIN C. MIZER  
Acting Assistant Attorney General

PREET BHARARA  
United States Attorney for the  
Southern District of New York

MATTHEW M. COLLETTE  
SHARON SWINGLE  
THOMAS PULHAM  
U.S. Department of Justice  
Civil Division, Appellate Staff

By: /s/ Sarah S. Normand  
SARAH S. NORMAND  
Assistant United States Attorney  
Telephone: (212) 637-2709  
sarah.normand@usdoj.gov

Encl.

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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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,  
-----x

New York, N.Y.  
JUNE 23, 2015  
3:40 p.m.

Before:

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

Circuit Judges

APPEARANCES

U.S. DEPARTMENT OF JUSTICE  
Attorneys for Defendant-Appellee

BY: SHARON SWINGLE  
ELIZABETH SHAPIRO

-and-

PREET BHARARA  
United States Attorney for the  
Southern District of New York

SARAH S. NORMAND  
BENJAMIN H. TORRANCE  
Assistant United States Attorneys

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1 (In the robing room)

2 JUDGE CABRANES: Let's go on the record. It is  
3 3:39 p.m. on June 23. We are in the robing room of 17th floor  
4 courtroom, United States Courthouse, Foley Square, New York.  
5 Why don't we have the appearances of record stated for the  
6 record.

7 MS. NORMAND: Good afternoon, your Honor. Sarah  
8 Normand from the United States Attorney's Office for the  
9 Southern District of New York.

10 MS. SWINGLE: Sharon Swingle from the Department of  
11 Justice.

12 MS. SHAPIRO: Elizabeth Shapiro from the Department of  
13 Justice.

14 MR. TORRANCE: Benjamin Torrance from the United  
15 States Attorney's Office for the Southern District of New York.

16 MR. BIES: John Bies, Department of Justice.

17  
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19 MR. MACISSO: Michael Macisso. I am the classified  
20 information security officer.

21 JUDGE CABRANES: Ms. Lucille Carr from the clerk's  
22 office, chief deputy clerk is present with us, and my law clerk  
23 Michael Krouse. All of these other persons and functionaries  
24 have the required clearances.

25 I guess the first question is why do you wish to see

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1 us in closed session.

2 MS. NORMAND: Well, we want to thank the Court for the  
3 opportunity to present argument to you ex parte. The reason  
4 for our request was because many of the bases for the  
5 withholding of the 10 memoranda at issue are classified or  
6 statutorily protected. The Court had previously granted our  
7 motion to file a brief that was redacted on a public record and  
8 to present classified information in support of our argument.  
9 We wanted to ensure we could engage with the Court and answer  
10 any of the Court's questions with regard to the material that  
11 was redacted from the classified brief, as well as addressing  
12 questions in a public setting.

13 JUDGE NEWMAN: Is there something about this phase of  
14 litigation that makes in camera oral argument more necessary  
15 than it was at the first phase when we did not have it?

16 MS. NORMAND: Only the fact that such a large portion  
17 of the District Court's decision is redacted. A very  
18 substantial majority of the District Court's reasoning for  
19 affirming the government's withholdings in this case has been  
20 redacted as classified and in some cases privileged. As a  
21 result, a very substantial portion of our brief was also  
22 redacted as classified and in some cases privileged.

23 We wanted to ensure that we could put before the Court  
24 all of our arguments, in many cases our principal argument for  
25 withholding is one of classification, but something that we

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1 couldn't state publicly on the public record. And therefore,  
2 as I said, we want to make sure that we can answer any  
3 questions that the Court has with regard to those portions of  
4 our argument.

5 JUDGE NEWMAN: It is more to give you a chance to  
6 answer questions than to give you a chance to present what is  
7 in your classified unredacted brief. Is that it?

8 MS. NORMAND: I certainly would welcome the  
9 opportunity to present some of our points. Of course we've  
10 covered them in our brief. If the Court doesn't wish to hear  
11 ex parte argument as to those points, we can certainly forgo  
12 that.

13 JUDGE NEWMAN: You are the one who requested it, so I  
14 assumed there was some special reason why you wanted it at this  
15 stage of the litigation when we've never had it before, and  
16 that's why I asked.

17 MS. NORMAND: The reason is simply, your Honor, that  
18 such a substantial majority of the District Court's decision is  
19 classified here. That wasn't the case the first time around.

20 JUDGE NEWMAN: It seems little counterintuitive. The  
21 more they agree with you to redact, the more you need to talk  
22 with us ex parte.

23 MS. NORMAND: In this case, many of the bases for the  
24 government's withholding do in fact implicate classified --

25 JUDGE NEWMAN: As you told us in your classified

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1 submission.

2 MS. NORMAND: Yes, your Honor.

3 JUDGE CABRANES: I have a couple of questions. And

4 before I turn there, I want the record to reflect that we are  
5 having this ex parte hearing on notice to opposing counsel who  
6 have indicated on the record their awareness of the hearing and  
7 stated also that they have no view on the matter.

8 So let me ask this, if you would, to focus on the  
9 legal analysis in Exhibit E, specifically the legal analysis [REDACTED]

10 [REDACTED]  
11 in the al-Awlaki memorandum when it was released, the White  
12 Paper, and in several public statements of administration  
13 officials.

14 My question is whether [REDACTED] in  
15 Exhibit E would [REDACTED]

16 MS. NORMAND: Your Honor, Exhibit E is a March 2002  
17 memorandum [REDACTED] from OLC. It was  
18 prepared many years before the analysis in the OLC DoD memo  
19 that the Court previously ordered released. It addresses [REDACTED]  
20 [REDACTED] but is a far broader  
21 interpretation and treatment of that issue than appears in  
22 either the White Paper or the OLC DoD memo.

23 I would also like to make the broader point that we  
24 understand the Court's waiver ruling in its prior decision to  
25 be limited of course to legal analysis, but also to be tied

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1 very much to the concept and the context, rather, of the  
2 acknowledged strike against Anwar al-Awlaki. That was very  
3 much the factual context in which the Court undertook its  
4 waiver analysis. The Court referred repeatedly to public  
5 statements by the President, by the Attorney General, in which  
6 it was acknowledged officially that the United States  
7 government had targeted Anwar al-Awlaki. He was, of course,  
8 the subject of the contemplated operation that was addressed in  
9 the OLC DoD memo as well as in the White Paper. Although the  
10 White Paper didn't mention him by name, the Court interpreted  
11 the White Paper as describing the reasons why it was lawful to  
12 target him. As a result, that was the context in which the  
13 waiver ruling was expressed.

14 JUDGE POOLER: The waiver was not just on legal  
15 reasoning, it was also on working law.

16 MS. NORMAND: We don't understand that to be the basis  
17 for the Court's waiver ruling at all, your Honor. We  
18 understood that the court had ruled based on what the Court  
19 viewed to be a match or a substantial overlap, in this Court's  
20 words, between the legal reasoning in the White Paper and the  
21 legal reasoning in the OLC DoD memo. That is, a waiver by  
22 prior disclosure of information that the Court viewed to be, I  
23 think the word was "a virtual parallel."

24 JUDGE POOLER: Didn't we talk about working law? I  
25 think we did.

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1 MS. NORMAND: Your Honor, there was a reference in the  
2 opinion to some case law on working law, but we do not at all  
3 interpret the Court's fundamental basis of the Court's holding  
4 to be a working law determination.

5 In fact, this Court previously in the Brennan Center  
6 case made very clear that OLC advice of the sort that we have  
7 here and OLC advice generally is not working law.

8 JUDGE POOLER: Until it becomes working law.

9 MS. NORMAND: No, your Honor. I think the notion of a  
10 document becoming the policy of the agency refers more to the  
11 doctrine of expressed adoption.

12 Working law has to do, as the Court identified in  
13 Brennan Center case, with information that is effective law and  
14 policy of the agency. This is very different from that as the  
15 Court said in Brennan Center. This is OLC advice to a client.

16 JUDGE POOLER: Right. And advice certainly is exempt.  
17 But once the advice is taken, and it becomes the adopted policy  
18 of the government, then it is no longer exempt.

19 MS. NORMAND: Your Honor, we respectfully disagree  
20 with that view. It cannot be the case that legal advice that  
21 is adopted by or that the client follows is no longer  
22 privileged. If that would be true, that would be problematic  
23 for any lawyer-client relationship. And in fact the D.C.  
24 Circuit has explicitly determined that that is not the case.  
25 The D.C. Circuit in the EFF case that's cited in our brief



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1 makes clear that if the agency follows legal advice, that  
2 doesn't make it working law. That simply means that the agency  
3 has elected to take whatever policy steps it has elected that  
4 is consistent with the advice.

5           Again, in Brennan Center, that was also the case in  
6 Brennan Center. You had legal advice to an agency that a  
7 particular statutory requirement would be unconstitutional as  
8 applied in a particular situation. The agency followed that  
9 advice insofar as it did not apply the pledge requirement in  
10 that situation, and the Court said that's not working law  
11 simply because the agency acted consistently with legal advice.  
12 The Court went on to an adoption rationale in that particular  
13 instance.

14           But I would add the Court doesn't need to reach the  
15 working law question as to the vast majority of these documents  
16 because they're also withheld under the Exemptions 1 and 3.

17           JUDGE POOLER: Whose writing is on this document?

18           MS. NORMAND: I don't believe we know exactly whose  
19 writing is on the document, but I'm glad you asked that  
20 question, your Honor. It is addressed in the declaration of  
21 John Bies who is the Deputy Assistant Attorney General.

22           JUDGE NEWMAN: It is DoJ personnel? Can we assume  
23 that?

24           MS. NORMAND: Yes, exactly.

25           JUDGE NEWMAN: We don't need the name.

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1 MS. NORMAND: It is OLC personnel.

2 JUDGE NEWMAN: Fine.

3 JUDGE POOLER: You didn't have one clean copy?

4 MS. NORMAND: They were not able to identify --

5 JUDGE CABRANES: This is the only copy.

6 MS. NORMAND: This is the only copy that OLC was able

7 to locate.

8 I did want to make that point, your Honor, because it

9 of course has handwritten notes, as the declaration of John

10 Bies makes clear.

11 JUDGE NEWMAN: Your point is to the extent legal

12 analysis was disclosed in the prior round of litigation, you

13 take it that that was limited to legal analysis that related to

14 al-Awlaki, is that it?

15 MS. NORMAND: Yes, and it should be so limited.

16 JUDGE NEWMAN: When the White Paper was released and

17 you agree it contains some legal analysis.

18 MS. NORMAND: Yes, of course, your Honor.

19 JUDGE NEWMAN: Did that legal analysis relate only to

20 al-Awlaki?

21 MS. NORMAND: No, but the Court interpreted or

22 described it as such in its decision.

23 JUDGE NEWMAN: Described it as what?

24 MS. NORMAND: As a document that expressed the

25 government's reasons for why that operation was lawful. In

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1 other words it was considered as we understand --

2 JUDGE NEWMAN: Mr. Brennan spoke on September 11. Did

3 [REDACTED] relate to a particular person?

4 MS. NORMAND: I'm sorry, which?

5 JUDGE NEWMAN: September 11 of 2011.

6 JUDGE CABRANES: That was at Harvard, right?

7 JUDGE NEWMAN: Yes.

8 JUDGE CABRANES: He likes to go to academic places.

9 MS. NORMAND: No, I think he was speaking --

10 JUDGE NEWMAN: He was talking about [REDACTED]

11 [REDACTED] drone strikes.

12 MS. NORMAND: Yes.

13 JUDGE NEWMAN: But not a particular person.

14 MS. NORMAND: No, he was not talking about a

15 particular person.

16 JUDGE NEWMAN: When the Attorney General spoke on

17 March 5, 2012, at Northwestern and [REDACTED] was he

18 talking only about a particular person?

19 MS. NORMAND: No, your Honor, he was expressing --

20 JUDGE NEWMAN: If they're pretty senior, right? The

21 Attorney General and the advisor for national security?

22 MS. NORMAND: Yes, of course.

23 JUDGE NEWMAN: When they explain [REDACTED]

24 [REDACTED] a drone strike, then what is it in Exhibit E

25 that you're concerned about?

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1 MS. NORMAND: We're concerned because this is a  
2 privileged document, that was a privileged piece of legal  
3 advice that was provided to [REDACTED]

4 JUDGE NEWMAN: I can understand that if no one in the  
5 government had ever said [REDACTED]

6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED] Why do you come in here and say, oh, but we can only  
10 talk about particular people when these other disclosures  
11 didn't talk about particular people.

12 What is it you're worried about?

13 MS. NORMAND: We're worried about protecting executive  
14 branch officials' ability to seek legal advice on issues as  
15 they arise.

16 JUDGE NEWMAN: That covers the waterfront. On that  
17 theory, you would have a stock response to every FOIA request.  
18 Don't reveal it because it will inhibit us from seeking legal  
19 advice. You made that argument to us before. We dealt with  
20 it.

21 What I want to know is, what do you claim is in  
22 Exhibit E specifically on the subject of [REDACTED]

23 [REDACTED]  
24 [REDACTED]

25 MS. NORMAND: Two responses, your Honor. First of

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1 all, I believe that that reference to [REDACTED]  
2 [REDACTED] in the two examples you provided was very brief.  
3 This is a far more elaborate treatment of the question, and it  
4 may very well be.

5 JUDGE NEWMAN: I could count the lines. But the White  
6 Paper's [REDACTED] Mr. Brennan looks like [REDACTED]  
7 [REDACTED] It is not a snippet.

8 MS. NORMAND: Yes.

9 JUDGE NEWMAN: He explains what he means [REDACTED]

10 MS. NORMAND: Your Honor, I believe this is a 15 or 16  
11 page document.

12 JUDGE NEWMAN: I'm only talking about the part that  
13 [REDACTED] I'm not talking about all 15 pages.  
14 Just the portions that [REDACTED]

15 MS. NORMAND: Your Honor, the implication of the rule  
16 that you're suggesting would have very detrimental effects on  
17 the government's ability to seek confidential legal advice.  
18 This was a request for legal advice and the provision of legal  
19 advice in 2002 provided to the President's close advisor about  
20 the executive order 12333.

21 The fact that the same subject, executive order 12333  
22 [REDACTED] may have been addressed in a  
23 memorandum that was written eight years later in a very  
24 different factual context, different client effectively --

25 JUDGE NEWMAN: A different client?

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MS. NORMAND: Yes.

JUDGE NEWMAN: Who is the different client?

JUDGE CABRANES: Eight years earlier?

JUDGE POOLER: You mean the person is different?

MS. NORMAND: What I mean to say, this document was drafted in 2002. The fact that the same legal authority was addressed in a separate privileged communication eight years later with different individuals in a different factual context doesn't withdraw --

JUDGE NEWMAN: There is no factual context in the document at all. It just talks about [REDACTED]

[REDACTED]

MS. NORMAND: But it just can't be, your Honor, that because the government has waived a privilege with regard to a particular piece of legal advice about the application of a statute or an executive order with regard to one confidential communication, that every other confidential communication, attorney-client privilege communication that touches on that executive order or statute is then --

JUDGE NEWMAN: I'm not talking about anything that touches on it. I'm only querying you about paragraphs of a document that [REDACTED]

[REDACTED]

[REDACTED] That's all.

MS. NORMAND: Your Honor, what the senior officials

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1 have said in the public domain is of course fair game for  
2 discussion. But that --

3 JUDGE NEWMAN: Then tell me what in Exhibit E in [REDACTED]

4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]

7 MS. NORMAND: The entire discussion needs protection.  
8 And the entire discussion needs protection because there is a  
9 fundamental difference between what a policy maker says is the  
10 view of the United States and what he is told, the advice he  
11 receives from his lawyers. And it may be that he reads --

12 JUDGE NEWMAN: When you say there is a fundamental  
13 difference, you mean there is a substantive difference or a  
14 conceptual difference?

15 MS. NORMAND: A conceptual difference and an important  
16 one.

17 JUDGE NEWMAN: Not a substantive difference.

18 MS. NORMAND: I have to admit I haven't compared the  
19 two paragraphs. Even if they were overlapping, even if they  
20 were the same, it would not -- there would be no waiver here,  
21 your Honor.

22 JUDGE NEWMAN: The secret has been that [REDACTED]

23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]

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1 MS. NORMAND: It doesn't matter for purposes of our  
2 argument whether [REDACTED] What  
3 matters is --

4 JUDGE NEWMAN: To be clear, your proposition is  
5 Mr. Brennan goes public and [REDACTED]

6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]

9 [REDACTED] You want that protected.

10 MS. NORMAND: We want it protected, your Honor, if it  
11 appears in the context of confidential legal advice that's  
12 provided to a policy maker, absolutely.

13 JUDGE NEWMAN: That's conclusory. It is just saying  
14 it's protected if it is protected. The question is why should  
15 it be in light of what you've already gone public with?

16 MS. NORMAND: It should be, your Honor, because of the  
17 reasons that the Court identified and highlighted in the County  
18 of Erie case, that we want policy makers to be encouraged to  
19 seek legal advice, to make sure that their policy choices,  
20 their actions are within the bounds of the law.

21 JUDGE NEWMAN: Your clients can be encouraged all they  
22 want, and you can tell your senior officials don't run around  
23 the country at law schools or public evening television talking  
24 about secrets. You can tell them that, and I assume they'll  
25 obey. But once they go and do that, what is the basis to come



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1 here and say, [REDACTED] has  
2 to stay private?

3 MS. NORMAND: Your Honor, a rule that would not allow  
4 the government to speak publicly about its legal views of  
5 particular statutes and executive orders --

6 JUDGE NEWMAN: I'm not suggesting you forbid them.  
7 I'm just questioning whether you can have it both ways. They  
8 can go to the public and say [REDACTED]

9 [REDACTED]  
10 [REDACTED]

11 MS. NORMAND: Your Honor, the Court has recognized  
12 that it is crucial that executive branch officials be able to  
13 seek legal advice. [REDACTED]  
14 [REDACTED] shouldn't be the deciding test.

15 The other thing is that --

16 JUDGE NEWMAN: Why not? If they go public, why  
17 shouldn't it be decisive that they go public? You sound like,  
18 oh, that doesn't matter. They just went public. As if that's  
19 a detail that hardly matters.

20 Why shouldn't that matter greatly?

21 MS. NORMAND: There is a fundamental difference  
22 between what a decision maker or policy maker says publicly and  
23 announces as the policy of the agency, and legal advice that he  
24 or she receives confidentially.

25 JUDGE NEWMAN: [REDACTED] what is the

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1 difference?

2 MS. NORMAND: The difference is the same difference,  
3 your Honor, that the Court identified in Brennan Center. Which  
4 is that it's the policy maker who has the authority to make  
5 determinations about what the policy of the agency is. It is  
6 not the OLC or the lawyer.

7 JUDGE NEWMAN: How is this argument that you are  
8 making now any different than what you made a year ago when you  
9 said, oh yes, the White Paper is public, but the OLC DoD  
10 memorandum can't be public.

11 Aren't you just saying the same thing you said to us a  
12 year ago?

13 MS. NORMAND: It is not just the same thing. We do --  
14 there are aspects that are similar. But here we have a  
15 fundamentally different document than what you had before you  
16 with the White Paper. With the white paper, you had a document  
17 that, as the Court appreciated and indicated in its decision,  
18 was an effort by the United States to explain what the reasons  
19 were why it believed that the strike against al-Awlaki was  
20 lawful. So there was a nexus at least between the White Paper  
21 and the OLC DoD memo.

22 In fact, the Court relied on the fact that the  
23 Attorney General, when he was testifying before a Congressional  
24 committee, indicated that there was a connection between the  
25 two pieces.

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1 JUDGE NEWMAN: That's what we relied on. What you  
2 told us is don't release it because even though it covers the  
3 same ground, we ought to be able to get advice without making  
4 our legal opinions public, which is just what you are saying  
5 today.

6 MS. NORMAND: We still believe that's right, your  
7 Honor.

8 JUDGE NEWMAN: That argument that you've got to keep  
9 it secret even though you've released most of it, and sometimes  
10 the same language, we rejected that.

11 Now you're telling us to keep it secret again here as  
12 to an even smaller snippet of a document.

13 MS. NORMAND: Although here, your Honor, if you were  
14 to extend that holding or that waiver finding to this document,  
15 you would be extending it.

16 JUDGE NEWMAN: Not to the document. [REDACTED]

17 [REDACTED]

18 [REDACTED] So I'm asking you about it.

19 MS. NORMAND: Fair enough. If you were to extend the  
20 holding to the portions of the document that [REDACTED]  
21 [REDACTED] you would be dramatically expanding the  
22 waiver that you identified in your prior decision. It would be  
23 significant. There is no connection factually between this  
24 document and the OLC DoD memo. It is an entirely different  
25 temporal time.

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1 JUDGE NEWMAN: Once these officials have gone to the  
2 public and said [REDACTED]

3 [REDACTED]  
4 [REDACTED]

5 What's wrong with the public knowing that?

6 MS. NORMAND: Your Honor, I think the premise of your  
7 question is that the discussion that is in the 2002 memo does  
8 in fact represent the current view of the United States with  
9 regard to those principles.

10 JUDGE NEWMAN: You think there is a difference?

11 MS. NORMAND: We don't know one way or the other, your  
12 Honor.

13 JUDGE NEWMAN: Have you read it and compared it?

14 MS. NORMAND: As I said, I haven't side by side  
15 compared those paragraphs.

16 JUDGE NEWMAN: Then it is a little surprising to say  
17 you know they are the same if you haven't read them together.

18 MS. NORMAND: The point I'm trying to make, your  
19 Honor, is you can't assume that simply because a policy maker  
20 is provided with legal advice and then articulates the position  
21 of the agency, that it is necessarily agreeing with all of the  
22 legal advice that's been provided.

23 JUDGE NEWMAN: I certainly wouldn't assume it's the  
24 same [REDACTED]

25 And then I ask you what is the problem, and all I get is the

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1 generalized argument, well, it is legal advice and we don't  
2 have to disclose it.

3 MS. NORMAND: Your Honor, the privilege applies to the  
4 communication. It doesn't apply to the particular fact in  
5 question.

6 JUDGE NEWMAN: I'm not talking about facts at all.  
7 I'm talking about legal analysis, and a ton of law that even if  
8 the document starts out being privileged, if it can be redacted  
9 such that non-protected material only is disclosed, it should  
10 be redacted. That's hornbook law.

11 MS. NORMAND: That is. But this information is very  
12 much privileged so it can't be redacted.

13 JUDGE NEWMAN: The only reason you are giving me is it  
14 is legal advice to a client and we dare not inhibit clients  
15 from seeking legal advice.

16 MS. NORMAND: Let me try to make the point a different  
17 way. The fact that a factor or a principle or a point has been  
18 communicated by a client to a lawyer or a lawyer to a client  
19 isn't what is privileged. What is privileged is the  
20 communication. What is privileged is the fact that this  
21 information was provided at this time in this context.

22 So it is very common in a corporate setting, for  
23 example, for a lawyer to give advice time after time after time  
24 to different corporate employees or executives. It might be  
25 the same advice, it might refer to the same types of

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1 authorities. It might even really be the same advice.

2 JUDGE NEWMAN: Leaving aside for a moment what I think  
3 is your core argument, that disclosure will inhibit the client  
4 seeking advice. Is there any fact in the few lines that  
5 [REDACTED] in Exhibit E that ought not to  
6 be disclosed because they are sensitive facts? Are there any?

7 MS. NORMAND: We don't assert Exemption 1 as to any  
8 of --

9 JUDGE NEWMAN: I'm not asking about legal grounds now.  
10 Just are there any facts?

11 JUDGE CABRANES: Let me ask --

12 JUDGE POOLER: Should we give the government an  
13 opportunity to respond to those sections of Exhibit E that  
14 [REDACTED] ?

15 JUDGE CABRANES: I think so.

16 JUDGE POOLER: Ex parte?

17 MS. NORMAND: Certainly. Yes, it would be helpful,  
18 your Honor, if you could identify the specific parts that  
19 you're referring to.

20 JUDGE POOLER: They begin on page eight.

21 JUDGE CABRANES: Exhibit E is what we're talking about  
22 and we're talking about material on pages eight, nine and 10.  
23 Is that right?

24 JUDGE POOLER: Yes.

25 MS. NORMAND: Very well, your Honor. We will --

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1 JUDGE CABRANES: I just want to make sure we have the  
2 terms of reference. We're talking about the same thing.  
3 That's what we're talking about. Is that right?

4 JUDGE POOLER: Well, starting in the middle of page  
5 eight.

6 JUDGE CABRANES: Yes. What I'm trying to get is  
7 something very pedestrian. Namely, Exhibit E, there is a whole  
8 letter of March 29, 2002. You have no objection to the release  
9 of everything other than those paragraphs at pages eight, nine  
10 and 10?

11 MS. NORMAND: No, your Honor. The whole document has  
12 been withheld in its entirety.

13 JUDGE CABRANES: Right. So you're talking about the  
14 whole, the whole --

15 MS. NORMAND: That's right.

16 JUDGE CABRANES: Not just what we're talking about  
17 Exhibit E.

18 MS. NORMAND: We're talking about the March 29, 2002  
19 OLC memo [REDACTED]

20 JUDGE POOLER: What we're telling you is the pages  
21 from the middle of page eight to 10, the middle of 10, [REDACTED]  
22 [REDACTED] and Judge Newman  
23 has asked what is there in those two pages --

24 JUDGE NEWMAN: Two and a half.

25 JUDGE POOLER: Two and a half pages that is exempted

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1 from disclosure. And why don't you give the government a week,  
2 five days, 10 days?

3 JUDGE NEWMAN: There is another way to handle this.  
4 With the prior opinion, before we issued it, we submitted it to  
5 the government for classification review. And I think that  
6 would probably be appropriate the next round of litigation.

7 JUDGE CABRANES: It may be advisable to give them an  
8 opportunity before we reduce anything to writing.

9 MS. NORMAND: We would certainly welcome the  
10 opportunity to undertake the analysis that the Court is asking,  
11 whether there is anything specific in those paragraphs that  
12 differs from the prior statement.

13 JUDGE POOLER: The public statements.

14 MS. NORMAND: And the public statements. I would  
15 welcome the opportunity to do that.

16 JUDGE NEWMAN: Be careful when you say is there  
17 anything different. If there is a subtle nuance of legal  
18 reasoning that some law professors might say is different,  
19 that's another point all together. I hope you're not just  
20 going to say, oh, it differs and therefore it is protected.  
21 You're going to have to be a lot more precise than that.

22 MS. NORMAND: I'll certainly endeavor to, your Honor.  
23 But it would seem be significant if there were nuances here  
24 that are different. I understood the Court's prior question to  
25 be if the analysis is exactly the same.



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JUDGE NEWMAN: I'm sure I didn't use the word

"exactly."

JUDGE POOLER: No, you did not.

MS. NORMAND: I'm sorry, your Honor. I didn't mean to mischaracterize your point. But we certainly will look at that point.

JUDGE CABRANES: I gather --

MS. NORMAND: I would note the very beginning of the discussion refers to the [REDACTED] which is a classified aspect of this document.

JUDGE POOLER: We didn't start at the very beginning. We started at page eight.

MS. NORMAND: I'm sorry. The very beginning of the area that your Honor had indicated at the middle of page eight it says [REDACTED]

[REDACTED] and it goes on.

JUDGE NEWMAN: Any reason not to redact a reference to [REDACTED]?

MS. NORMAND: It should be redacted. But I was trying to respond to your earlier question were there any facts. That would be one just looking at that.

JUDGE NEWMAN: Take the sentence with that redacted as an example. [REDACTED]

[REDACTED]

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1 Is that a secret?

2 MS. NORMAND: Your Honor, it's certainly a discussion  
3 that has not been made public that this advice was provided to  
4 [REDACTED] in 2002.

5 JUDGE POOLER: But the point is it has been made  
6 public.

7 MS. NORMAND: Your Honor is referring to the OLC DoD  
8 memo?

9 JUDGE POOLER: And to Brennan's talk. Let me find the  
10 language.

11 MS. NORMAND: Your Honor, there is a fundamental  
12 difference between the principles that are articulated by  
13 Mr. Brennan or the Attorney General and the analysis that they  
14 received from their lawyers.

15 JUDGE CABRANES: Is it fair to say that your view is  
16 that there is a difference between general legal analysis, that  
17 is legal analysis in an abstract level, and language which  
18 suggests with greater particularity that attacks against other  
19 U.S. citizens or U.S. persons may be involved? Is that a  
20 concern?

21 In other words, these speeches made by Mr. Brennan and  
22 Mr. Holder are quite general. But your concern is beyond the  
23 general advice here. You're obviously disagreeing with Judge  
24 Newman's sense that we're dealing with essentially the same  
25 material.

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1 What exactly makes it different?

2 MS. NORMAND: A few things, your Honor. First of all,  
3 I've already identified that the fact that it arises in an  
4 entirely different time and place from the later advice.

5 JUDGE CABRANES: Why is that of any significance?

6 MS. NORMAND: It is significant because, as I said, a  
7 lawyer can give advice over and over on a subject even to the  
8 same client or to different clients within an organization.  
9 And each of those communications is independently privileged.  
10 The disclosure of one communication wouldn't result in a waiver  
11 even as to the same advice provided at a later date in response  
12 to a different request.

13 JUDGE NEWMAN: If that proposition were correct, we  
14 should not have released the OLC DoD memo as you urged us not  
15 to. But we did. So how can you make that same argument again  
16 a year later?

17 MS. NORMAND: Because --

18 JUDGE NEWMAN: Other than to perhaps reserve your  
19 rights for appeal, if that's all you're doing. That's a  
20 different point.

21 MS. NORMAND: It is quite different. Because what the  
22 Court was looking at previously was a White Paper that was in  
23 the Court's own words addressing a particular operation against  
24 a United States person that had been officially acknowledged by  
25 the United States. And the Court was looking to determine

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1 whether the release of that document or the acknowledgment of  
2 that document effectively resulted in a waiver of advice about  
3 an operation about the same person.

4 Now we're talking about a completely different  
5 deliberation. These are presidential policy decisions that are  
6 being made in 2001 and 2002. And yes, they do address --

7 JUDGE POOLER: We're talking about [REDACTED]

8 [REDACTED] don't change according to the year it's given. A  
9 [REDACTED]

10 MS. NORMAND: Well, as I said, a lawyer's advice may  
11 be the same. A lawyer may say here are the legal authorities,  
12 here is my view about what they mean. And I'm going to tell  
13 you, I am going to provide this advice now and I'm going to  
14 provide it in response to the factual scenario that you've put  
15 before me. And then you might ask me again five years later in  
16 a different context. And I do think --

17 JUDGE POOLER: But the [REDACTED]  
18 wouldn't change five years later.

19 MS. NORMAND: Your Honor, that's just the lawyer's  
20 view of [REDACTED] It is the lawyer's advice as  
21 to what the legal authority means. It doesn't make it [REDACTED]  
22 [REDACTED] It is not itself law. It is advice about what the  
23 interpretation of executive order 12333 is.

24 JUDGE POOLER: As Judge Newman pointed out, [REDACTED]  
25 [REDACTED]

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MS. NORMAND: [REDACTED]

[REDACTED] But that, again, wouldn't be a basis to waive the privilege as to a separate deliberation that occurred years earlier. The fact is OLC -- and this is addressed I believe in the declaration of John Bies again in the classified appendix, OLC has a practice of reviewing, when it is to issue an opinion, of reviewing prior advice to determine whether it has previously treated an issue and considering that advice again. In fact, you can tell if that's happened with regard to this very document because someone at OLC made notes on it in connection with a subsequent request for legal advice.

JUDGE POOLER: That's what the notes are.

MS. NORMAND: That's what the declaration refers to of Mr. Bies in the earlier part of the classified appendix. So, essentially what a rule that would say, let's say OLC published one of its opinions. A rule that would suggest that if OLC publishes an opinion, which it does have a right to do, would then result in a waiver as to any similar analysis that appears in prior opinions, understanding that you can still redact information, would very much discourage OLC from publishing information, it would certainly discourage policy makers --

JUDGE CABRANES: Because you're dealing with a different factual situation or different targets? Is that what you're saying? That is, you're dealing with the same legal principles presumably.

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MS. NORMAND: Yes.

JUDGE CABRANES: But the concern is that later opinions are being made in the context of or being elaborated in the context of the different factual situation or different targets?

MS. NORMAND: That's one scenario, yes.

JUDGE NEWMAN: Did the Brennan statement, was that made with reference to any target?

MS. NORMAND: I don't believe the one you're referring to was.

JUDGE NEWMAN: Was the Holder statement made with reference to any target?

MS. NORMAND: Well, Attorney General Holder made a number of statements.

JUDGE NEWMAN: The one I'm talking about is Northwestern.

MS. NORMAND: . Was not referring to any particular --

JUDGE NEWMAN: It was a general statement that said [REDACTED] Right? That's all it was.

MS. NORMAND: I believe he was talking in that context, if I'm not mistaken, about the circumstances in which -- we are talking now about Attorney General Holder -- the circumstances in which it would be lawful for a United States citizen who was a senior operational leader of al Qaeda

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1 to be targeted. There is no indication that this memo of 2002,  
2 March 2002 arose at all in that circumstance. [REDACTED]

3 [REDACTED]  
4 JUDGE NEWMAN: What he meant [REDACTED]

5 MS. NORMAND: Yes, yes, he did.

6 JUDGE NEWMAN: That's what Exhibit E talks to.

7 MS. NORMAND: Your Honor, a rule that would find a  
8 waiver simply because a legal authority was discussed [REDACTED]

9 [REDACTED] would have very detrimental effects  
10 on the ability of policy makers to seek and obtain confidential  
11 legal advice. Because it's of course common that OLC and other  
12 lawyers would address the same legal issues over and over, and  
13 may even use parts of their analysis again.

14 JUDGE NEWMAN: You told us that before. Now it's many  
15 years since we released the OLC DoD memo. Have you noticed any  
16 decline in agency requests to OLC?

17 MS. NORMAND: Actually, Mr. Bies' declaration  
18 addresses that. Addresses the question of the impact of a  
19 finding of waiver.

20 JUDGE NEWMAN: The feared impact.

21 MS. NORMAND: No, I think it is quite a concrete  
22 impact. What happens is --

23 JUDGE NEWMAN: OLC is sort of not very busy these  
24 days? Is that the implication?

25 MS. NORMAND: Your Honor, there is very much a

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1 chilling effect, and there is a factual record before you.

2 JUDGE NEWMAN: Has it been manifested is what I'm  
3 trying to find out.

4 MS. NORMAND: Yes. Yes. I think there is the concern  
5 about a finding of waiver through publication or through a  
6 court ordered release very much has a chilling effect, and it  
7 includes willingness of policy makers to seek advice early in  
8 the process and a willingness --

9 JUDGE NEWMAN: I'm asking has it happened.

10 MS. SWINGLE: I believe it has affected OLC's process  
11 in terms of when it will provide written advice. I think one  
12 of the --

13 JUDGE NEWMAN: Is there anything in your ex parte  
14 record where an OLC official says or implies we would have  
15 responded to an agency but we were inhibited from doing it  
16 because of that decision of the Second Circuit?

17 MS. NORMAND: Because of the decision of the Second  
18 Circuit, no. That is not --

19 JUDGE NEWMAN: That's the argument you made to us a  
20 year ago that if we did it, it would inhibit. Just as you're  
21 saying now it would inhibit.

22 MS. NORMAND: It does inhibit, your Honor. It does  
23 inhibit.

24 JUDGE NEWMAN: I just asked you a minute ago has it,  
25 and you said no, I can't say it has.



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1 MS. NORMAND: It was put in within a month or two of  
2 the Court's decision.

3 JUDGE NEWMAN: That was a prediction. I'm asking you  
4 now, the year has gone by. Has there been any inhibition? You  
5 can't point to any.

6 MS. NORMAND: I believe we could point to some. Yes.  
7 If that were a criteria. I do believe that.

8 JUDGE NEWMAN: It would be helpful if you are going to  
9 make the argument that we did a terrible thing and we inhibited  
10 agencies from seeking advice to come up with at least a couple  
11 of examples of an agency that said, gee, we would have asked  
12 but we're inhibited. Or an example or two from OLC that says  
13 we were asked and we would have been glad to answer, but we  
14 dare not answer because of the fear of disclosure.

15 MS. NORMAND: Your Honor, there is a factual record  
16 before you that it is in fact a great concern to OLC that --

17 JUDGE NEWMAN: A concern is a legal argument. That's  
18 just an argument. We're concerned. To say an agency didn't  
19 ask who otherwise would have, or an agency didn't give advice  
20 that otherwise would have, those are facts. And it seems to  
21 me, with all respect, you're long on argument but a little shy  
22 on facts.

23 MS. NORMAND: I respectfully disagree, your Honor.

24 JUDGE NEWMAN: Then give us the facts.

25 JUDGE CABRANES: How would we know that? That's a

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1 question for my colleague Judge Newman. How would anyone know  
2 that? How would they know if anyone has been inhibited?

3 MS. NORMAND: That's a concern, your Honor, and I  
4 also --

5 JUDGE NEWMAN: When you say it is a concern, you mean  
6 it is unknowable?

7 MS. NORMAND: I think it OLC may not be aware if a  
8 client has not sought legal advice because --

9 JUDGE NEWMAN: Then the client would know. Then the  
10 two pertinent agencies surely could tell you under oath if it  
11 is true. We intended to seek advice on a certain date on a  
12 certain matter, but we decided not to because we were worried  
13 the answer would become public.

14 MS. NORMAND: Your Honor, one of the concrete facts  
15 that is in the record before you is that OLC has a great  
16 concern about reducing to writing advice, and it will in fact  
17 have a chilling effect on --

18 JUDGE NEWMAN: You tell us they have a concern. There  
19 is a chilling effect. So far, I've heard nothing of an  
20 instance when some official didn't render an opinion because of  
21 the concern you're talking about. Either it happened or it  
22 didn't. So far I haven't heard that it did.

23 JUDGE CABRANES: Let me just interject a second  
24 because one of Mr. Barron's memorandums begins, as I recall, by  
25 stating that this was a confirmation of oral advice given by

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1 OLC.

2 JUDGE POOLER: What page is that?

3 JUDGE CABRANES: I have no idea.

4 MS. NORMAND: That's right, your Honor.

5 JUDGE CABRANES: It is my recollection. Is this a  
6 common occurrence in OLC, that OLC will give oral advice and  
7 then reduce the advice to an opinion in writing? I assume it  
8 is.

9 MS. NORMAND: I do believe that's happened on  
10 occasion, certainly, yes. It is not usual.

11 JUDGE CABRANES: I think it was true since World War  
12 II. Oscar Cox was assistant attorney general. He was speaking  
13 on the phone, and maybe he would give oral advice that was  
14 thought to be significant.

15 Does that happen today?

16 MS. NORMAND: It does, your Honor.

17 JUDGE CABRANES: It happens that someone calls from  
18 the CIA or elsewhere and they ask for advice on a matter and  
19 they get the advice orally?

20 MS. NORMAND: That's right.

21 JUDGE CABRANES: Is that right?

22 MS. NORMAND: That's right, your Honor.

23 JUDGE CABRANES: Does it happen that they don't ask  
24 for this in writing or that the OLC decides not to reduce it to  
25 writing from time to time? I assume so.

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1 MS. NORMAND: I assume so. That is exactly the type  
2 of scenario that's addressed in Mr. Bies' declaration.

3 JUDGE NEWMAN: Is there an example, to follow up with  
4 a question, where the OLC can say under oath after we gave  
5 legal or oral advice on such-and-such a date, to such-and-such  
6 a person, we would have put it in writing, but we withheld the  
7 written follow up because we were afraid of disclosure under  
8 the Second Circuit opinion?

9 MS. NORMAND: Your Honor, the procedural posture of  
10 this case did not --

11 JUDGE NEWMAN: Nobody could say that with a straight  
12 face. Isn't that fair?

13 MS. NORMAND: No, I don't think that's fair.

14 JUDGE NEWMAN: You think somebody could say it with a  
15 straight face?

16 MS. NORMAND: I think it's possible.

17 Your Honor, the way the procedural posture of this  
18 case proceeded, immediately after this Court's partial mandate  
19 was issued, within a day or two, Judge McMahon ordered the  
20 submission of these OLC memoranda, just as the Court had  
21 ordered, along with ex parte materials. And at that point we  
22 put in the Bies declaration among other declarations.

23 JUDGE NEWMAN: It doesn't have any examples of  
24 specific declination of a follow-up written opinion. Not a  
25 one.

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1 MS. NORMAND: There wouldn't be any time, your Honor,  
2 to identify specific examples within the very short period  
3 after the Court had issued its decision.

4 JUDGE NEWMAN: How about now? You've got an appellant  
5 sitting out there, I guess patiently.

6 JUDGE POOLER: We should go in.

7 JUDGE NEWMAN: Hoping to argue to us that the District  
8 Court should have released at least some, some, of what was  
9 withheld. So you have a year to support the argument you're  
10 now making to us. Not just days, but a year.

11 MS. NORMAND: Your Honor, the District Court affirmed  
12 the government's withholdings at the end of September. There  
13 would have been no reason to supplement the record.

14 JUDGE NEWMAN: We released the OLC document in April  
15 of last year.

16 MS. NORMAND: It was in June I believe, once it was  
17 actually released. That's when partial mandate issued.

18 JUDGE NEWMAN: A year ago. We are in June of 2015.

19 MS. NORMAND: But this matter was fully briefed in  
20 August.

21 JUDGE NEWMAN: The government is never reluctant to  
22 supplement. Indeed, you supplement regularly. And here you  
23 are making this argument about inhibition, and all I'm  
24 suggesting is if you've got some facts, let's see them.

25 MS. NORMAND: Your Honor, we do believe we have

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1 submitted facts. I just want to draw the Court's attention to  
2 classified appendix page 222 at which this issue is addressed  
3 again. It was shortly after the Court had issued its decision.

4 But --

5 JUDGE NEWMAN: 222.

6 MS. NORMAND: Of the classified appendix. Mr. Bies  
7 states "based on my experience." Paragraph 20. I'm actually  
8 reading from the middle of the paragraph --

9 JUDGE NEWMAN: That's a prediction. It would chill,  
10 it would inhibit, we're very worried. I've been asking you for  
11 a couple of examples, and my thought is, well, I know you don't  
12 have them now. If you could get them, that would be different.  
13 But to just make a prediction, oh, yes, it would be chilling,  
14 we're terribly worried, that's argument. That's rhetorical  
15 argument. That's not a fact.

16 MS. NORMAND: I respectfully disagree. It is not  
17 rhetorical argument. It is based on declarations from a deputy  
18 assistant attorney general for OLC who has indicated that based  
19 on his experience, a contrary rule would have a substantial --

20 JUDGE NEWMAN: You told us that a year ago and you  
21 relied on it and we weren't impressed with it then. Maybe we  
22 were wrong. You obviously think we were. I understand that.  
23 But that's the same argument. It will be chilled you said.  
24 The clients won't come. And we said we were not really fearful  
25 the clients wouldn't come.

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1 MS. NORMAND: The concern about legal advice not being  
2 reduced to writing, particularly if the Court were to broaden  
3 its waiver finding to include documents that were issued on the  
4 same general topic years earlier, in a different factual  
5 context, that would have an extraordinarily chilling effect,  
6 and we would welcome the opportunity if the Court thinks that  
7 we haven't built a sufficient record to affirm that, we would  
8 welcome the opportunity to supplement the record on that issue.

9 JUDGE CABRANES: I think that would be useful.

10 JUDGE NEWMAN: I don't mind your supplementing. If  
11 all it's going to be is many pages by many more people saying  
12 what they fear would happen, I can tell you that's not going to  
13 be responsive to my request for a factual showing.

14 JUDGE CABRANES: What would a factual showing? What  
15 would be satisfactory?

16 JUDGE NEWMAN: An agency from such-and-such a date as  
17 to such-and-such a topic, we were planning to go to OLC, but we  
18 decided not to because of the feared chilling effect. Or,  
19 reciprocally OLC saying we got a request for information for a  
20 legal opinion, and we thought about giving it, but we decided  
21 not to for fear that some court would require it to be  
22 disclosed.

23 Those would be facts. Something that actually  
24 happened.

25 JUDGE CABRANES: No one will give you an affidavit of

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1 that sort.

2 JUDGE NEWMAN: I am quite confident of that.

3 JUDGE CABRANES: It virtually suggests some sort of  
4 misfeasance or misbehavior. They had a serious concern, but we  
5 don't want to get advice because we'll get the wrong advice.

6 JUDGE NEWMAN: No, I'm not suggesting wrong advice at  
7 all. Not at all. Perhaps I didn't make it clear.

8 It is suggesting that they're reluctant to put their  
9 correct advice in writing because the government has  
10 successfully argued that it would then become disclosed, and so  
11 they don't want to be in that position. It has nothing to do  
12 with the correctness of the advice.

13 JUDGE POOLER: To sum up, you're going to give the  
14 government how much time? A week? 10 days?

15 JUDGE CABRANES: How much time do you need?

16 MS. NORMAND: I would say 10 days at least, your  
17 Honor. I'm being reminded that the Fourth of July -- if we  
18 could make it after the holiday.

19 JUDGE CABRANES: Two weeks.

20 JUDGE POOLER: That is to compare the sections of  
21 Exhibit E with the previous statements [REDACTED] and that  
22 can be ex parte which means Mike will have to bring it to  
23 Syracuse I guess if it is secret.

24 MS. NORMAND: It may not be secret if it only relates  
25 to the portions that relate [REDACTED] Of course the



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1 matters relating to the [REDACTED] --

2 JUDGE NEWMAN: Would it simplify your task if we  
3 showed you specific lines redacted from E that we think are at  
4 least potentially available for disclosure?

5 MS. NORMAND: Your Honor, we want to be as responsive  
6 to the Court's questions as possible. So of course whatever  
7 information you can provide and what you're considering, we're  
8 happy to respond.

9 JUDGE CABRANES: Why don't you wait to hear from us,  
10 and two weeks from whenever you hear from us, whenever we  
11 identify whatever it is we are going to identify. We'll be  
12 more specific in the form of an order or statement indicating  
13 exactly what we would want in response to that material and  
14 when.

15 MS. NORMAND: Very good.

16 JUDGE CABRANES: Roughly we are talking about two  
17 weeks after, the ball is in your court.

18 MS. NORMAND: Thank you, your Honor.

19 JUDGE NEWMAN: Aren't you at least somewhat relieved  
20 that on an appeal concerning 10 documents, we're only talking  
21 about two and a half pages of one document?

22 MS. NORMAND: I don't know if relieved would be the  
23 word I would use, your Honor, but I appreciate the point you're  
24 making.

25 JUDGE POOLER: Thank you.