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1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

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4 THE NEW YORK TIMES COMPANY, CHARLIE SAVAGE, SCOTT SHANE,
5 AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION
6 FOUNDATION,

6 Plaintiffs-Appellants,

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

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

9 Defendants-Appellees,

10 -----x

11 New York, N.Y.
12 OCTOBER 1, 2013
13 2 :20 p.m.

14 Before:

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

18 Circuit Judges

19 APPEARANCES

20 JAMEEL JAFFER
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23 DAVID McCRAW
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1 JUDGE CABRANES: As counsel are aware, the record in
2 this case concerns sealed, classified information, and the
3 Court has permitted the government to submit classified inserts
4 to its brief.

5 In a letter to the Court and to opposing counsel,
6 dated September 19, 2013, the government represented that it
7 was prepared to argue this case in open court, without
8 reference to any of the classified information in the record.
9 The Court fully anticipates taking that course, and plans to
10 limit its questioning to publicly-filed, unclassified
11 materials.

12 If, however, the government's answers to the Court's
13 questions would risk disclosing sealed material, the government
14 counsel should notify us immediately by any appropriate gesture
15 or comment. We will then conduct just that portion of the
16 argument in a closed secured courtroom.

17 So let's proceed with argument in *The New York Times*,
18 *et al. v. Department of Justice*.

19 MR. McCRAW: May it please the Court, my name is David
20 McCraw. I'm here on behalf of the plaintiffs in *The New York*

21 Times action, The New York Times Company, Scott Shane, and
22 Charlie Savage, two New York Times reporters.

23 At one level, this case involves a fundamental
24 question of democracy and transparency. That is whether the
25 American public has a right to know whether and how government

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1 officials are taking account of the rule of law when they
2 target individuals, including American citizens, for death.

3 As Attorney General Holder said, the American people
4 deserve to be assured that the actions taken in their name are
5 consistent with their values and their laws.

6 But for our purposes today, your Honors, there is a
7 narrow question, two narrow questions in The New York Times
8 case. First, it is our position the government should be
9 required to disclose whether DoJ possesses or does not possess
10 legal memoranda setting out the legal justifications for
11 targeted killings.

12 The government has responded with a Glomar response.
13 We believe this is inappropriate. We do not say that these
14 legal memoranda should be disclosed. We say only that the
15 Glomar response is not justified under the law, and a Vaughn
16 index listing the documents is required.

17 Our second argument deals with the one document that
18 has been disclosed, the so-called OLC DoD memorandum to the

19 Department of Defense. The government, in our view, has
20 improperly withheld this document to the extent it contains
21 abstract legal analysis underlying the government's standard
22 and processes for reviewing and approving operations.

23 We believe that in deciding that case, that it will
24 also set the template for other documents which may be on the
25 Vaughn index, were we to get it, that set forth abstract legal

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1 analysis underlying standards and processes for reviewing these
2 operations.

3 JUDGE CABRANES: What you want at this point is two
4 memoranda?

5 MR. McCRAW: Your Honor, there is one memorandum in
6 our case.

7 JUDGE CABRANES: How do you know that?

8 MR. McCRAW: The government has indicated there was
9 one that they could disclose.

10 JUDGE CABRANES: It was not accurate to say they had
11 not confirmed the existence of the memorandum.

12 MR. McCRAW: That's right. Your Honor, I correct
13 myself. They have given a Glomar response to everything but
14 one.

15 JUDGE CABRANES: You're interested in this OLC DoD
16 memorandum, and the other?

17 MR. McCRAW: We are looking for a Vaughn index, a list
18 of the documents, as to anything else that DoJ has.

19 JUDGE CABRANES: Has our Court ever adopted the idea
20 of a Vaughn index? Do we have authority from the Court of
21 Appeals for the Second Circuit for the use of a Vaughn index?

22 MR. McCRAW: I am unaware of that case in the Second
23 Circuit. Obviously in the District Courts they have been used,
24 and obviously Vaughn itself from the D.C. Circuit.

25 Whatever we call it, though, it is in effect the

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1 government has used a Vaughn index here. I think it has become
2 standard operating procedure as a way to thread the needle when
3 the government chooses not to reveal the actual contents of
4 documents.

5 In terms of the Glomar response, I'd like to focus on
6 what I think is the first step in the analysis, which is, is it
7 logical and plausible that giving us an index of the documents,
8 giving us a list of the documents, would actually disclose a
9 secret.

10 The government concedes that it is no longer secret
11 that the U.S. government has an interest and involvement in
12 targeted killings. That's not a secret. The government
13 concedes that the CIA has an interest in targeted killings.
14 Not a secret.

15 The sole secret that is put forth in the government's

16 brief is whether or not the CIA is involved in targeted

17 killings or authorized to undertake them. That is why they say

18 they cannot give us a list of the documents.

19 JUDGE POOLER: Yet you are asking for a document that

20 does not have the CIA as one of the parties. It is OLC DoD.

21 MR. McCRAW: That's correct. This request has gone to

22 the Office of Legal Counsel and DoJ. They, on behalf of the

23 CIA, have asserted that a Glomar response, a response that they

24 will not confirm or deny the presence of documents, is

25 appropriate.

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1 Before we ever get to whether that is actually a

2 secret, the CIA's involvement, or whether we get to the

3 question of whether it has ever been officially acknowledged,

4 this Court has made clear there is a first step. That is what

5 I think as the logical and plausible test. Is it in fact

6 logical and plausible to think that supplying a list of

7 documents will reveal the secret claimed, the CIA's

8 involvement. That set forth in Wilner, clearly set forth --

9 JUDGE NEWMAN: When you say will reveal the secret

10 claim of involvement, is that the only alleged secret that

11 would be disclosed by a full Vaughn index?

12 MR. McCRAW: In our case, in The New York Times case,

13 that is the only thing I see in the brief that the government

14 alleges is a secret that would be disclosed.

15 JUDGE NEWMAN: You say in the brief. How about their

16 response?

17 MR. McCRAW: Same thing in their declarations.

18 JUDGE NEWMAN: One secret?

19 MR. McCRAW: In terms of the Glomar response we

20 received, yes.

21 JUDGE NEWMAN: That secret is whether a particular

22 agency is involved or has an interest?

23 MR. McCRAW: Your Honor, it is whether the CIA is

24 involved. The government concedes the CIA has an interest.

25 JUDGE NEWMAN: Whether they are involved in an entire

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1 range of activity or something more specific?

2 MR. McCRAW: They have conceded in their declarations

3 that the CIA was involved in the killing of Osama bin Laden.

4 They are asserting a secret as to everything else.

5 JUDGE NEWMAN: How do you describe "everything else"?

6 That's pretty broad scope.

7 MR. McCRAW: Any other targeted killings that have

8 taken place. I should limit that to targeted killings or away

9 from the field of battle.

10 JUDGE NEWMAN: As to those, the defense is disclosing

11 whether they exist at all reveals something that is protected.

12 MR. McCRAW: That's correct, your Honor.

13 JUDGE NEWMAN: What is the "something"?

14 MR. McCRAW: Sorry?

15 JUDGE NEWMAN: What's the "something"? If you can
16 describe it generically that you understand they are trying to
17 protect.

18 MR. McCRAW: My understanding is that their argument,
19 that the government's argument is, if they are forced to
20 disclose the documents --

21 JUDGE NEWMAN: We are not at the point of disclosing
22 the documents.

23 MR. McCRAW: If they disclose that there is the
24 existence of documents, that would disclose whether the CIA had
25 involvement in any targeted killings beyond the Osama bin

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1 Laden, which they've acknowledged.

2 JUDGE NEWMAN: Would the quantity of documents reveal
3 more than, quote, involvement? Wouldn't a quantity of
4 documents bear as to the degree of involvement?

5 MR. McCRAW: Your Honor, I don't think that's
6 necessarily the case without knowing the content of the
7 documents. And obviously we are not asking for the content of
8 the documents. It is impossible to say from a list whether

9 that means that it is a new request, whether it is a request

10 that is asking for refinement of what was received. It's

11 impossible to say.

12 JUDGE NEWMAN: Your claim is revealing whether or not

13 they exist would reveal perhaps extent of operation. And how

14 are you in a position to know that's not so?

15 MR. McCRAW: I'm not really in a position to know that

16 fully. And it may be covered in some part of the classified

17 argument. But, our point here is that even if there were a lot

18 of documents, that doesn't necessarily mean that they were

19 acted upon. That doesn't necessarily mean they led to any

20 particular targeted killing.

21 Without knowing more about the content, it is

22 impossible to say the number alone triggers that there is

23 anything more than interest. They've conceded there is

24 interest.

25 JUDGE NEWMAN: If they have one response, they have to

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1 identify the document, don't they?

2 MR. McCRAW: They have to identify the document in a

3 non-disclosing way. Does that mean that there may be

4 redaction? That's very possible. Completely consistent with

5 how these indexes are created.

6 JUDGE NEWMAN: If there were a document that described

7 a particular operation, by any agency, how do you propose they
8 identify it without disclosing that it's a document about an
9 operation?

10 MR. McCRAW: They are free to redact specifics that
11 would give that away.

12 JUDGE NEWMAN: That's the specifics of the document.
13 How do they identify it in a Vaughn index? What do they say,
14 "We have a document that's interesting"?

15 MR. McCRAW: No. I think the document would say legal
16 analysis and perhaps had a date, unless that was disclosing.

17 JUDGE NEWMAN: Legal analysis.

18 MR. McCRAW: Correct.

19 JUDGE NEWMAN: I can understand that. But your
20 request goes far beyond legal analysis.

21 MR. McCRAW: No.

22 JUDGE NEWMAN: Just legal analysis?

23 MR. McCRAW: Yes. The two requests at issue, one asks
24 for opinions or memoranda addressed to the legal status of
25 targeted killings. The second one asks for OLC memos analyzing

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1 the circumstances under which it would be lawful. We're
2 strictly focused in our request on legal analysis.

3 JUDGE NEWMAN: The circumstances under which it would
4 be lawful, I am not sure that's the same as legal analysis, is

5 it?

6 MR. McCRAW: We certainly have tried to make that
7 clear to the government.

8 JUDGE NEWMAN: The circumstances might lead, for
9 example, if we got an intercept from a certain secret location
10 with the cooperation of a certain country, telling us a certain
11 fact, then we would do something. That's a lot more than legal
12 reasoning.

13 MR. McCRAW: These requests, of course, have gone just
14 to OLC. Hasn't gone to CIA, hasn't gone to DoD. And I think,
15 your Honor, that within that context, we aren't talking about
16 operational detail. We are talking about legal analysis. In
17 particular --

18 JUDGE NEWMAN: The analysis has to analyze something.

19 MR. McCRAW: Your Honor, I think when we speak of
20 legal analysis, what we are talking about is legal principles
21 derived from international or domestic law that can be applied
22 to a variety of circumstances and situations. That is our
23 understanding of what legal analysis is.

24 JUDGE CABRANES: How can you have a legal analysis
25 that's totally unconnected to context, factual context. I

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1 thought we, at least 50 to 60 years ago in legal education,
2 reached the conclusion they were inextricably intertwined. You

3 don't want a memorandum that simply recites five, six, 10, 20
4 principles of law from Grotius to the present.

5 MR. McCRAW: Your Honor, I would start with that. The
6 answer is I think given by what we've seen publicly disclosed
7 in this case, the White Paper, now disclosed. Legal analysis,
8 unrelated to circumstance.

9 JUDGE NEWMAN: You have seen that.

10 MR. McCRAW: The Attorney General's speech at
11 Northwestern.

12 JUSTICE POOLER: What else don't you know?

13 MR. McCRAW: What we don't know is what underlies
14 those. As the Attorney General said, we think that is in
15 effect the tip of the iceberg. What we are looking for is the
16 full-throated legal analysis, and that follows from what we've
17 seen in La Raza and in Brennan and cases like that, where the
18 government has said, if it is working law, or if it is being
19 expressly adopted, that the public has a right to the
20 underlying legal analysis that provides the rationale.

21 JUDGE NEWMAN: You start out, it is legal advice
22 normally privileged to the extent it reflects information from
23 the client.

24 MR. McCRAW: That's correct.

25 JUDGE NEWMAN: So you have to say why it is an

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1 exception to normal attorney-client privilege.

2 MR. McCRAW: Right. Again, we turn to cases like the
3 La Raza, where once law is now being used in a different
4 purpose than legal advice, when it is being used to be the
5 guiding principles, working law, or is being used to promote
6 the lawfulness publicly, it ceases to have the same bearing as
7 legal advice.

8 JUSTICE POOLER: In other words, if it was adopted as
9 a policy?

10 MR. McCRAW: That's one way. It also loses that
11 status if in fact it is not only adopted publicly, but is
12 actually used by the government to set the policy and
13 guidelines.

14 JUSTICE POOLER: You don't make that claim about the
15 OLC DoD memorandum, do you?

16 MR. McCRAW: Yes, we do.

17 JUSTICE POOLER: It was adopted as a policy?

18 MR. McCRAW: It is our view, under either analysis,
19 under Brennan, where it's working law or it's adopted, that it
20 is subject to disclosure.

21 The adoption case here really comes down to the many
22 times the government has said that these operations are legal,
23 and that the Department of Justice has provided the legal
24 framework for that.

25 I concede there is not a specific reference to that

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1 memo. I don't think the doctrine is that narrow. My view that
2 what La Raza was attempting to get at is what it saw as the
3 policy of adopting a legal position while shielding from public
4 view the analysis that yielded it, is offensive to FOIA.

5 Here, and Judge Sack said this in Brennan, if the
6 government decides to make the political decision to promote
7 the legality of something, that that opens the door to the
8 underlying rationale being public.

9 JUDGE CABRANES: Maybe you can help us. If you can
10 tell us exactly what you want. That is, what is the decree of
11 this Court that you want. You want us to direct the District
12 Court to order the preparation of a Vaughn index, right?

13 MR. McCRAW: Yes, as to the documents that have not
14 been acknowledged.

15 JUDGE CABRANES: Is that the full scope of the relief
16 you seek?

17 MR. McCRAW: No. In terms of my second part of the
18 argument deals with the DoD memo. We believe that memo is
19 subject to disclosure under FOIA, and this Court is in a
20 position to order it. It is being withheld under Exemption 1
21 and Exemption 5. 5 is either the working law doctrine or
22 expressed adoption and incorporation leads to its disclosure.

23 JUDGE CABRANES: Let's just stick to the Vaughn index
24 for a moment. I want to get a sense from you as to what that
25 relief would look like. What is it you think you would get or

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1 what do you envision in the form of relief?

2 MR. McCRAW: What I envision in the form of relief is
3 that the Department of Justice would be directed to identify
4 whether it has memoranda or other documents that respond to the
5 two requests.

6 JUDGE CABRANES: To follow up on Judge Newman's
7 initial line of questions. Assuming for the argument there are
8 10 memoranda. Whatever the number may be. You want the
9 so-called index which enumerates those 10 memoranda. Is that
10 right?

11 MR. McCRAW: That's correct, your Honor.

12 JUDGE CABRANES: What if the index identified them as
13 memorandum number one, number two, number four, or memorandum
14 by date. Would that be adequate?

15 MR. McCRAW: I believe that more is required. I don't
16 think there is a set standard for a Vaughn index. We see them
17 in a variety of ways. The government has provided some here
18 for unclassified documents.

19 I think in most cases you begin with the ideal being
20 like what you would see in a privilege log in civil litigation.
21 Date, author, heading, nature of the privilege being asserted.
22 If in that heading there were things that would constitute
23 exempt material under Exemption 1 or 3, we would expect that to

24 be redacted.

25 JUDGE CABRANES: If we required the government to

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1 submit a Vaughn index, then what would happen? That is, what
2 further relief would you seek from the District Court or from
3 us?

4 MR. McCRAW: At that point we would be back in front
5 of the District Court arguing, or not, that some of those
6 documents should be released, that they can't be withheld under
7 the exemptions asserted.

8 JUDGE CABRANES: I know this is somewhat abstract, but
9 how would you be able to make such a claim from the sort of
10 summary identification of the documents that you would have?

11 MR. McCRAW: It may be that in some cases we will have
12 to make an argument that's essentially abstract. That
13 essentially repeats legal principles in the abstract. We're
14 hopeful what we get as to some of these will be more specific,
15 and we will know more about when it was written, something
16 about the topic, and where it ended up.

17 On that basis, we can make many of the same arguments
18 that we've made here in terms of the DoD memo. At this point,
19 it makes no sense to make those DoD memo like arguments when we
20 don't know if there are any documents at all.

21 JUDGE CABRANES: Let me go back. Forgive me for being

22 so concrete. But so we have this index, this Vaughn index, and
23 this is a list, at a minimum, from what you say, a list of the
24 opinions of the OLC on this broad subject, right?

25 MR. McCRAW: That's correct.

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1 JUDGE CABRANES: Are these formal opinions of the OLC?
2 What kind of opinions of the OLC are we speaking about?

3 MR. McCRAW: I think for the purposes of the index, we
4 would look at that broadly. That if it is a draft, it would be
5 on the list but it may be withheld for other reasons. If it is
6 internal, it may be withheld for yet other reasons. If it was
7 passed on to another agency, again other reasons may apply.

8 JUDGE CABRANES: You're of course familiar with one of
9 the amici briefs filed by seven organizations, and they seem to
10 argue -- and you can correct me if I'm wrong -- they seem to
11 argue that no so-called formal opinion of the Office of Legal
12 Counsel can ever be secret.

13 Do you recall the section in that brief on so-called
14 secret law?

15 MR. McCRAW: Yes, I do.

16 JUDGE CABRANES: That's your understanding of the
17 position of the amici, right?

18 MR. McCRAW: It is.

19 JUDGE CABRANES: Do you agree with that position?

20 MR. McCRAW: We agree with it as it applies here. I

21 hesitate to say that in every single case ever that a formal

22 opinion can't be withheld.

23 The point they make and we make is those documents

24 begin to have the force of law.

25 JUDGE CABRANES: We've read the briefs. What about

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1 the proposition under the Freedom of Information Act some

2 opinions of the OLC may be withheld from the public. You don't

3 dispute that.

4 MR. McCRAW: I think in virtually every FOIA case it

5 will be a fact specific inquiry. I think they're right

6 directionally and I think they are right on the facts here.

7 JUDGE CABRANES: You are not seeking any information

8 regarding what we might call informal or oral advice from the

9 OLC?

10 MR. McCRAW: If it's oral, it's not covered by FOIA.

11 I see my time is at an end.

12 JUDGE CABRANES: Do you know whether, do you have any

13 sense from whether the OLC -- I am going to ask opposing

14 counsel in due course -- whether there is such things as

15 informal OLC opinions and whether there are any that are

16 relevant to this.

17 MR. McCRAW: I do not know. I know in other FOIA

18 cases there have been OLC memos that were termed draft.

19 Whether that constitutes informal or not.

20 JUDGE CABRANES: You are not seeking any of those?

21 MR. McCRAW: I think for the purposes of the response
22 to the FOIA, they should list those.

23 JUDGE CABRANES: Including drafts?

24 MR. McCRAW: Yes. They may have a basis for
25 withholding, but for an initial accounting they should be on

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1 the list.

2 JUDGE CABRANES: Would they have to disclose any of
3 these informal or draft opinions were the basis of oral advice
4 rendered by phone or otherwise?

5 MR. McCRAW: That sort of fact would not come up
6 unless they volunteered it.

7 JUDGE NEWMAN: I want to ask you about how you get it
8 out of the attorney-client privilege. And I think one of your
9 arguments is if it is adopted as policy. You take that from
10 the Brennan Center case.

11 Brennan Center case concerned the AID agency doing
12 something. And the question was whether they adopted a policy
13 with respect to what they're doing.

14 As I get it, you're not so much asking whether any
15 particular agency has decided to do something. You want the

16 legal reasoning that supports the lawfulness of what they may

17 or may not be doing. Right?

18 MR. McCRAW: Yes, that is correct.

19 JUDGE NEWMAN: How is that the adoption of a policy?

20 MR. McCRAW: If in fact it becomes the guidance under

21 which the agency is to act, the courts have repeatedly held

22 that that in fact is like working law. The cases I referred

23 to, Public Citizen, Coastal Gas, Tax Analysts 2, all in --

24 JUDGE NEWMAN: Working law line is different from the

25 adoption as policy line, isn't it?

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1 MR. McCRAW: Yes.

2 JUDGE NEWMAN: That's what I was asking about. How

3 can this be adoption of policy if it is legal reasoning?

4 MR. McCRAW: The answer, as I understand from the La

5 Raza is that once the government has chosen to take advice and

6 turn it into something else, Brennan talks about political or

7 public relations advantage, it ceases to have the same -- it

8 ceases to have the characteristic of legal advice shared

9 privately between attorney and client. It's now being used as

10 an attempt for moral suasion or other kind of suasion with the

11 public. That is I think consistent with waiver of

12 attorney-client privilege, certainly consistent with the

13 limitation on government attorney-client privilege, which the

14 cases have held is different than in the private context.

15 JUDGE NEWMAN: You would never say that in the private
16 context. A lawyer advises his client and the client takes the
17 stand or doesn't take the stand based on that advice. We
18 wouldn't say, well, you followed his advice, therefore you have
19 to show us your memorandum.

20 MR. McCRAW: That's correct. In this context, though,
21 what La Raza and Brennan and other cases are talking about is a
22 government entity using that advice in order to make a
23 political and public relations advantage. Trying to have a
24 political or public advantage.

25 JUDGE NEWMAN: It's more than that they're following

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1 the advice. It is that senior officials of the government have
2 said this is lawful, which in turn you believe is based on OLC
3 advice.

4 MR. McCRAW: Right. That, right. What I see in
5 Brennan Center is the Court saying, if in fact the government
6 simply wants to act on the advice, it can. There is no waiver
7 there. There is no adoption, expressed adoption. There is no
8 incorporation.

9 But once they make that political or public relations
10 choice and decide they are going to use the reference to it as
11 a way to sell a public policy, that's different.

12 JUDGE NEWMAN: You got the so-called White Paper.

13 That's a public document. It discusses legal authority.

14 Right?

15 MR. McCRAW: Yes, it does.

16 JUDGE NEWMAN: Why isn't that sufficient?

17 MR. McCRAW: By its very terms, it talks about it
18 being a document that is limited. Underlying it is other
19 documents. We believe in many ways the White Paper is no
20 different than the disclosure that you saw in Brennan or the
21 disclosure you saw in La Raza or the disclosures you saw in
22 Public Citizen and other cases. It is the articulation that
23 there is a legal basis and a reference to other documents.

24 JUSTICE POOLER: It has a legal analysis, doesn't it?

25 MR. McCRAW: It does.

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1 JUSTICE POOLER: So I guess I missed the difference
2 between legal analysis that you are seeking and the White
3 Paper.

4 MR. McCRAW: I think it is a difference of scope.
5 That in all of these cases where there has been adoption or
6 incorporation, there has been some discussion of the legal
7 framework. There is always been a shortened, more succinct
8 expression of the legal analysis.

9 What gets released in these cases is the underlying

10 rationale. And the White Paper itself expresses its limits.

11 Attorney General Holder has said that the White Paper needed to
12 be read in conjunction with other OLC memos to give it meaning.

13 I think he said the same thing or implied the same thing in
14 terms of the Northwestern speech. That these disclosures
15 actually beg that question what is the underlying fuller extent
16 of the legal analysis.

17 JUDGE NEWMAN: One last thing. You identified the two
18 things. The Vaughn index and the actual disclosure of the OLC
19 document.

20 MR. McCRAW: That's correct.

21 JUDGE NEWMAN: You also talked about disclosure of a
22 fact of a particular agency doing a particular thing, right?

23 MR. McCRAW: The government's argument is that the
24 CIA's involvement would be disclosed if they had to produce an
25 index. Our view is that fact will not be exposed. Our view is

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1 that --

2 JUDGE NEWMAN: I thought your point is it's already
3 been disclosed.

4 MR. McCRAW: That's another way to look at it. The
5 disclosure of a list of documents would simply show that the
6 government was concerned about the lawfulness of an operation.
7 Whoever did it, wherever it was done. It simply signals to the

8 world that DoJ's interest in lawfulness, and the government's
9 interested in lawfulness. That's not a secret.

10 I also think there is a good question about whether in
11 fact the CIA's involvement is a secret. We have the
12 acknowledgment that they were involved in Osama bin laden. We
13 have Secretary Panetta, we cite twice, where he makes
14 statements which indicate that he, when he was at the CIA, was
15 involved with operations involving Predator drones. We have
16 the chairs of both committees, select committees on
17 intelligence in the House and in the Senate saying that the CIA
18 is involved.

19 So I think whether you analyze the secret as it
20 doesn't exist at all, or it won't be disclosed, we get to the
21 same place. There should be a Vaughn index.

22 JUDGE CABRANES: Let me ask you if I may about -- what
23 you are looking for is a list of documents. You're familiar
24 with Seventh Circuit decision in Bassiouni v. The Central
25 Intelligence Agency.

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1 MR. McCRAW: Yes.

2 JUDGE CABRANES: You may recall that the opinion of
3 the Court indicated as follows: Because lists of documents
4 could assist foreign intelligence services, the CIA refuses to
5 reveal its holdings. In a parenthetical, the Court said those

6 lists could assist foreign intelligence services whose powers
7 of inference and deduction rise with their own stock of
8 information which helps them to identify patterns that
9 professors, newspaper reporters, and judges may miss.

10 Do you think there is any validity to this idea, that
11 the mere list could pose problems?

12 MR. McCRAW: I think there are times when that could
13 be true. Especially if our request had been made to an
14 operational unit of the government.

15 In this case, though, I think the answer is no. In
16 part because the earlier ACLU case directed the CIA -- the D.C.
17 Circuit directed that there be a list made, just as we are
18 asking here. It seems to me if that list can be made in terms
19 of the CIA, certainly it can be made in terms of Department of
20 Justice.

21 Are there cases where that would be true? I'm not
22 going to deny it. I don't see it here, though.

23 JUDGE CABRANES: What is the interplay between the
24 D.C. Circuit case and this one? They were quite aware of this
25 case as it evolved in the District Court. Does it have any

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1 practical effect on the matters being litigated here?

2 MR. McCRAW: I think there are two. One is that case
3 shows very clearly the analytic pattern that I think should be

4 followed. One is, is it logical and plausible that the
5 disclosure of the list of documents would actually disclose a
6 secret. And then second goes to official acknowledgment.
7 Those are two separate tests, and I think that's the proper
8 procedure.

9 First has to be logical and plausible that an
10 exemption applies. Then you go to the question -- if that's
11 not so, then you go to whether there is official
12 acknowledgment.

13 The second thing is I think it makes clear that the
14 Court said that it was going to look at reality. That the
15 CIA's interest in that case had become clear. And that the
16 idea that the government was going to assert that was a secret
17 did not have to be accepted, that the Court could look behind
18 the government's declarations and make a decision about whether
19 in fact any national security secret would be disclosed.

20 JUDGE CABRANES: Maybe this is a question best asked
21 of the ACLU. But are the plaintiffs in that case seeking the
22 same materials that are being sought here?

23 MR. McCRAW: They are seeking the same and more, I
24 think is the answer. But you should ask them as well.

25 JUDGE CABRANES: I will.

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1 JUDGE NEWMAN: One procedural point. This was summary

2 judgment, yes?

3 MR. McCRAW: That's correct.

4 JUDGE NEWMAN: Prior to summary judgment, was there
5 any discovery?

6 MR. McCRAW: No.

7 JUDGE NEWMAN: None? Was there a reason for that?

8 MR. McCRAW: It was raised at our scheduling
9 conference with Judge McMahon. And the ACLU raised it. I
10 believe the answer was very clearly no, that discovery wasn't
11 to be taken. That's not unusual in a FOIA case.

12 JUDGE NEWMAN: Wasn't to be taken because somebody,
13 either the Court or the department was opposing it, or because
14 it wasn't sought by the plaintiffs?

15 MR. McCRAW: The ACLU sought it, and I will defer to
16 them to explain more about the ruling.

17 JUDGE NEWMAN: They did seek it. And it was denied?

18 MR. McCRAW: They made the request informally. There
19 was no motion. Informally, my understanding was that --

20 JUDGE NEWMAN: We have nothing in our record then
21 about that?

22 MR. McCRAW: That's correct.

23 JUSTICE POOLER: We have the affidavits.

24 MR. McCRAW: Nothing about the record of what happened
25 with the discovery request? Yes, that was at an informal

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1 conference at the beginning of the case.

2 JUSTICE POOLER: Wasn't there an agreement that the
3 affidavits would be the discovery? The affidavits from the
4 department officers?

5 MR. McCRAW: Ultimately that's what happened. I
6 believe the ACLU will tell you in fact they requested
7 discovery.

8 JUDGE NEWMAN: Just as an example, why I'm surprised,
9 there is a statement that's much debated in the papers where a
10 senior official says "we." I would think somebody would want
11 to ask who did you mean by "we"?

12 MR. McCRAW: We would like to ask that.

13 JUDGE NEWMAN: Were you denied a chance to ask that?

14 MR. McCRAW: No. Could we have made a motion for
15 discovery? Yes, we could have.

16 JUDGE NEWMAN: But didn't.

17 MR. McCRAW: The New York Times didn't make a motion.

18 JUDGE CABRANES: Did the ACLU make a motion?

19 MR. McCRAW: They made a request prior to seeing the
20 declarations.

21 Thank you.

22 MR. JAFFER: May it please the Court. My name is
23 Jameel Jaffer. I represent the ACLU. I'd like to address two
24 points. The first is the no number no list response.

25 JUDGE CABRANES: Before you do that, I'm sorry, but it

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1 is a natural flow from the earlier argument. Can you follow up
2 on Judge Newman's questions about discovery. Could you
3 describe to us one what opportunities you had for discovery and
4 what exactly was involved.

5 MR. JAFFER: Judge Cabranes, I wish I remembered the
6 specific details. I remember we had a court conference with
7 Judge McMahon where we raised the possibility of discovery, and
8 Judge McMahon discouraged us from seeking discovery. I can't
9 remember whether she denied us the opportunity. But we didn't
10 go any further with it.

11 JUDGE CABRANES: You didn't file any discovery
12 materials or motions?

13 MR. JAFFER: We did not. As you know, in FOIA cases
14 it is rare that discovery is allowed.

15 JUDGE NEWMAN: In any event, it is not an issue on
16 appeal. Is it?

17 MR. JAFFER: It is not. Judge Newman, the specific
18 statement you referenced, the "we," I think that that has been
19 in some ways overtaken by events. There were some disputes in
20 the District Court about the meaning of specific Executive
21 Branch statements.

22 Now the Executive Branch, since the District Court
23 decision, has made a number of other disclosures that resolve
24 any ambiguity that existed prior to the District Court's

25 decision. Even if there was an ambiguity at one point, I don't

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1 think it exists now.

2 Maybe that's a good segue into the no number no list.

3 With the Court's permission I'll then address the withholding
4 of the memos, including the OLC DoD memo, but not limited to
5 that memo.

6 With respect to the no number no list response, the
7 District Court held that the agencies had justified that
8 response because information that would be included in the
9 Vaughn index would be protected by the exemptions; in other
10 words, the government wouldn't be able to produce a Vaughn
11 index without disclosing protected information. We think that
12 was wrong.

13 To the extent the Vaughn indices would have disclosed
14 information or would disclose information that at one time was
15 protected, that information, or at least a great deal of it,
16 has already been disclosed. And when I say that, I'm thinking
17 of a few things.

18 First, the government has acknowledged --

19 JUDGE CABRANES: Can I just ask you for advice about
20 the no number no list response from the government. That's
21 really a response that they don't want to do a Vaughn index.
22 Is that your understanding?

23 MR. JAFFER: It is.

24 JUSTICE POOLER: It comes after the Glomar response.

25 MR. JAFFER: It comes after the Glomar.

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1 JUSTICE POOLER: So it is a continuum?

2 MR. JAFFER: I think that's right. It is a continuum,

3 and in a way a no number no list response is a radically

4 minimalist Vaughn index.

5 JUSTICE POOLER: It's next up on the continuum.

6 MR. JAFFER: That's right. Our view is that a no

7 number no list response can't be justified here, because a lot

8 of the information that the government says would be disclosed

9 on the Vaughn has already been disclosed.

10 The government has disclosed that the U.S. carries out

11 targeted killings using drones. It's disclosed that among

12 those killed have been four American citizens. They're named

13 in the Attorney General's letter. The government's

14 acknowledged that it has developed a legal analysis or legal

15 analyses relating to targeted killings, and they have described

16 that legal analysis in some detail. They've acknowledged that

17 the legal analysis is set out in OLC memos.

18 As the D.C. Circuit held in the Drones FOIA case, the

19 government has acknowledged that the CIA has an intelligence

20 interest in the drone program, and it's acknowledged that the

21 CIA has an operational role in the program as well.

22 And maybe it is worth spending a minute on the
23 operational role, because it seemed like there may have been
24 some question whether about whether the CIA disclosed that.

25 Mr. Panetta, speaking to the troops in Italy said,

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1 "Having moved from the CIA to the Pentagon, obviously I have a
2 hell of a lot more weapons available to me in this job than I
3 had at the CIA, although the Predators aren't bad."

4 I don't think there is any ambiguity in that
5 statement. But if there had been ambiguity in that statement,
6 over the last couple months, the chairs of the Intelligence
7 Committees, both in the House and in the Senate, have discussed
8 their oversight of the CIA's use of drones.

9 And I understand there are a lot of cases out there in
10 which the courts have refused to see the disclosures of
11 coordinate branches as official disclosures. But none of those
12 cases involve disclosures by the chairs of the committees
13 tasked with overseeing the agency in question. None of them
14 involved the kind of sustained public relations campaign that
15 is part of the landscape here.

16 Here we have the President, cabinet officials, over a
17 period of three years making multiple disclosures to the public
18 about the drone program. About the use of drones to carry out

19 targeted killings with the purpose of convincing the public,
20 presumably, that the program is lawful and wise and effective.

21 The government can't do that. It can't speak to the
22 public in that way, and then come to court and pretend that all
23 this is a secret.

24 Just with respect to the no number no list response, I
25 think it is important to remember what the government's burden

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1 is here. It is not enough for the government to show, and I
2 think it could probably show this, but it is not enough for the
3 government to show that disclosing some information, some
4 documents that could not be described on a Vaughn index without
5 disclosing protected information.

6 In order to justify a no number no list response, the
7 government has to show that there is no document that can be
8 described on the Vaughn. No document that can be listed or
9 described in any way on a Vaughn index without disclosing
10 protected information.

11 JUSTICE POOLER: Would you be satisfied with a partial
12 no numbers no list response if you say some documents are good?

13 MR. JAFFER: We would be. Obviously, the devil is in
14 the details. It depends how partial. But it wouldn't shock me
15 if there were documents that the government couldn't plausibly
16 describe on a Vaughn index without disclosing properly withheld

17 information.

18 But it's not credible that there is no document that
19 can be described, that no documents can be described on a
20 Vaughn. And it is a heavy burden on the government if the
21 government has to show what I just described. I think that the
22 D.C. Circuit's opinion is consistent with what I just said.
23 The D.C. Circuit's opinion in Drone FOIA.

24 JUDGE POOLER: Although that was a response to the
25 Glomar.

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1 MR. JAFFER: It was. But at the end of the opinion,
2 Judge Pooler, there is that discussion.

3 JUDGE POOLER: Yes, and it is remanded to the District
4 Court to look further after Glomar, after Glomar is rejected.

5 MR. JAFFER: That's right.

6 JUDGE NEWMAN: Once you get past the OLC document,
7 which everyone, even though they haven't seen it, they all talk
8 about it as legal reasoning, that's one document.

9 But you want things like the process -- this is your
10 number two -- the process by which U.S. citizens can be
11 designated for targeted killing.

12 I haven't seen the documents that might be responsive
13 to that, but I can imagine it covers a lot of ground. It may
14 be what foreign countries are talked to, and what intelligence

15 is reviewed and who reviews it.

16 MR. JAFFER: Those would be good justifications for
17 withholding those parts of the documents.

18 JUDGE NEWMAN: They can't even list that. Supposing
19 we said, you know, no number no list is no good. They said
20 okay, we'll fill in a few blanks. So we're now going to tell
21 you we have 33 documents that list top secret information
22 material, including sources of information and how we got it.
23 What good does that do you?

24 MR. JAFFER: It doesn't do any good. We wouldn't
25 think that that's a sufficient explanation.

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1 JUDGE NEWMAN: If they go further, aren't they
2 revealing secrets?

3 MR. JAFFER: Not at all, your Honor. The Attorney
4 General and the President have both said that there is a
5 process in place to determine which U.S. citizens can be
6 targeted and under which circumstances.

7 JUDGE NEWMAN: That may be. If part of that process
8 is, for example, to talk to a foreign government's secret
9 service, or whatever they call it, are you entitled to that?

10 MR. JAFFER: Probably not, but that's not the question
11 before the Court, your Honor. The question right now is can
12 they describe it.

13 JUDGE NEWMAN: They can't say that in a document, can
14 they?

15 MR. JAFFER: What they can say on a Vaughn is imagine
16 a Vaughn entry that said memo re process under which American
17 citizens can or cannot be killed.

18 What does that disclose that hasn't already been
19 disclosed?

20 JUDGE NEWMAN: What's the point? You've described
21 that as a request, they've said no. If they just say your
22 request in haec verba is denied, what does that mean?

23 MR. JAFFER: I think it makes a big difference, Judge
24 Newman, because with the kind of document we are discussing
25 now, the document about the process by which American citizens

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1 are determined to be targetable. And they haven't identified
2 the document like that to us, but just imagine that they did.

3 We might argue that parts of that document should be
4 released to the public. And one of our arguments would be that
5 the President and the Attorney General have already
6 acknowledged the existence of the process and have described
7 the process in some way.

8 To the extent the government has described that
9 process publicly, why can't the government or what legitimate
10 justification does the government have for withholding the

11 document in its entirety. I agree with you, that there are

12 parts of it --

13 JUDGE NEWMAN: Where have they described the process,
14 as you just put it?

15 MR. JAFFER: Well, I think that in the --

16 JUDGE NEWMAN: You said the President makes the final
17 call. Is that enough of a process?

18 MR. JAFFER: Well, depends what you mean by "process."

19 JUDGE NEWMAN: You're asking for the process, not my
20 word.

21 MR. JAFFER: The President has explained how careful
22 the process is that they use to determine which American
23 citizens are targetable. I think that the Attorney General
24 used similar language, I don't have the language in front of
25 me, in his letter that predated by one day the President's

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1 speech.

2 JUDGE NEWMAN: If the President has already said it is
3 a very careful process, you don't gain much if they do come up
4 with a Vaughn index that says we have a document that describes
5 the process.

6 MR. JAFFER: But then the government would have to
7 explain why describing the process publicly or disclosing the
8 process publicly would jeopardize some interest protected by

9 FOIA.

10 JUDGE NEWMAN: How would they describe that without
11 revealing the secrets?

12 MR. JAFFER: I don't see why it is a legitimate
13 secret, for example, that it is the CIA director who makes the
14 recommendation to the President. Even if it were a legitimate
15 secret, that's something that's been disclosed.

16 JUDGE NEWMAN: You already have documents that you say
17 show that.

18 MR. JAFFER: Right, that's why I'm focused on that
19 one.

20 JUDGE NEWMAN: Give me an example of something you
21 don't already have that would be part of the process that you
22 think you are entitled to.

23 MR. JAFFER: Okay. So, how about a document that
24 explained the standard under which -- the legal standard under
25 which, or the evidentiary standard by which the government

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1 determined whether a particular U.S. citizen was targetable or
2 not.

3 JUDGE NEWMAN: Now we are back to the OLC memorandum.

4 MR. JAFFER: The evidentiary standard. Is it clear
5 and convincing evidence, or is it a preponderance of the
6 evidence. For example, something like that. Why wouldn't that

7 be disclosable?

8 It is very hard for us to argue this in the abstract
9 though, which is why we are asking for the Vaughn, which gives
10 us a little more information to work with.

11 Judge Newman, I don't mean to -- I agree with you
12 there is a lot of information in these documents that probably
13 ought to stay secret. And when we say we want a Vaughn index
14 that describes all the documents, we're not saying that all of
15 those documents should be made public. But we need something
16 to work with so we can decide which documents we believe should
17 be public and which ones we believe --

18 JUDGE NEWMAN: I understand you need it so you can
19 work with it and ask for more. I understand from your
20 standpoint. It doesn't quite answer their argument that the
21 mere description of them reveals secret information. The fact
22 that it would help you isn't a reason it gets disclosed.

23 MR. JAFFER: I thought that we were in agreement,
24 Judge Newman, that a description at the level of "document
25 relating to the process under which American citizens are

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1 deemed targetable," that a description of that kind wouldn't
2 compromise any protected -- but that's our view.

3 JUDGE NEWMAN: It wouldn't do you any good. It's too
4 vague. It just says the thing you want we are not going to

5 give you.

6 MR. JAFFER: I guess I disagree with you on that,
7 Judge Newman. I think it would do us a degree of good. It
8 would help us understand which documents we wanted to focus our
9 energies on, which ones we thought the public was most entitled
10 to. We would compare that description to what had already been
11 disclosed, and make a judgment about whether the government's
12 interest had already been compromised.

13 JUDGE NEWMAN: They could come up with a document and
14 say "Document number 343 describes in great detail the entire
15 process we go through when we decide." That's the name of the
16 document.

17 MR. JAFFER: I think we would probably pursue that
18 document in litigation.

19 JUDGE NEWMAN: Of course you would. And they'll say
20 that document contains secrets.

21 MR. JAFFER: It probably does contain secrets. What
22 we would end up contesting in court is the degree to which the
23 secrets were segregable from things that are not protected by
24 FOIA.

25 JUDGE NEWMAN: It is hard for me to imagine how that

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1 would yield for disclosure anything other than legal reasoning
2 in the abstract. That's why it seems to me this case is really

3 about the OLC memorandum.

4 MR. JAFFER: Your Honor, I think that -- I am not sure
5 I have an answer to that that will satisfy you, so maybe I
6 should move on, and if I come up with something I'll come back
7 to it.

8 But I think that we should be afforded, I think FOIA
9 is supposed to afford us the opportunity to make a judgment.
10 FOIA is about transparency at one level. But it also gives the
11 public a right to know why withheld information is being
12 withheld. And when the government doesn't provide a Vaughn
13 index at all, we have no idea, not just what the government's
14 withholding, but why they're withholding it. One of the
15 interests --

16 JUDGE NEWMAN: The affidavits give you the why. You
17 may not find them persuasive. That's a different question.
18 But the government has purported to give you the why. Namely,
19 listing them would disclose secrets.

20 MR. JAFFER: Right. But the why has been given to us
21 at a level of generality, with respect to the index, not with
22 respect to individual documents. And the explanation that FOIA
23 entitles the public to is an explanation with respect to
24 individual documents. That's what Vaughn says, Vaughn v.
25 Rosen.

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1 And to answer Judge Cabranes's question from earlier,
2 I am not sure there is a Second Circuit case that addresses
3 that question head on, whether Vaughn is the law of this
4 circuit. But it is certainly implicit in many cases, and in
5 Brennan, Judge Sack's opinion, the Court's opinion, includes a
6 sentence that begins with "As required by Vaughn v. Rosen, the
7 defendants provided a Vaughn."

8 So, I think that all I want to say about the memos --

9 JUDGE CABRANES: You apparently think, unlike the
10 Seventh Circuit, your view is that there is substantial
11 difference between a Glomar response and a Vaughn index
12 production.

13 JUDGE NEWMAN: Or between no list and the Glomar.

14 MR. JAFFER: I think there is a difference. Yes.
15 There is a difference. Only in the obvious sense that with a
16 Glomar response, the government is arguing that it can't
17 disclose even the existence of the records or the
18 non-existence. And with a no number no list, the government
19 has disclosed that fact and is just saying --

20 JUDGE CABRANES: What fact has it disclosed with a no
21 number no list response?

22 MR. JAFFER: Well, one of the facts it's disclosed
23 here is that documents responsive to our request exist. Which
24 I think distinguishes this case, our case, from the Glomar
25 case.

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1 JUDGE NEWMAN: Do you care about that? I understand
2 you can articulate differences between Glomar and no number no
3 list. But, do you care?

4 If we were to say, no, their Glomar response is too
5 vague when they said we can't even tell you if they exist.
6 But, we order you to tell them -- we sustain your position that
7 you can't tell them how many there are. You acknowledge you
8 have some, but your no number no list is good.

9 MR. JAFFER: We're certainly not happy with either of
10 those responses.

11 JUDGE NEWMAN: I'm trying to get at should we worry
12 about the distinction?

13 MR. JAFFER: I think more fundamentally, our concern
14 here -- this is probably obvious. Our concern is there is this
15 conversation going on in the public sphere. Senior government
16 officials have been talking about this program for three years.
17 They've been trying to convince the public that it is, as I
18 said earlier, it's lawful and it's effective and it's wise, and
19 they've disclosed all sorts of things about the program in
20 doing that, including there is this OLC memo or set of OLC
21 memos that form the parameters of their decision making. And
22 they've referenced those things in part to reassure the public
23 about the lawfulness of their activities. And at the same
24 time, they are denying the public access to the documents that
25 would allow the public to evaluate all those things for

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1 themselves.

2 JUDGE CABRANES: There is an important speech to the
3 American Society of International Law by Dean Koh on the matter
4 which obviously is rooted in law.

5 Why isn't that adequate to give you a sense of what
6 the legal concerns are regarding this whole area?

7 MR. JAFFER: Well, the analysis that's public now and
8 the facts that are public now may be incomplete, they may be
9 misleading, they may be selectively disclosed. When Congress
10 enacted --

11 JUDGE CABRANES: You want to know, not just the legal
12 theory, you want to know all the facts that are being
13 considered by the writers of these memorandum.

14 MR. JAFFER: Consistent with the government's
15 legitimate interest in protecting intelligence sources and
16 methods. We don't want everything to be released.

17 JUDGE CABRANES: Give us an idea of what, in your
18 view, you would deem appropriate not to be released. Or, on
19 the other hand, what in your view can be released?

20 What facts in your view can be released and which
21 cannot be?

22 MR. JAFFER: Well, at a minimum, the government's
23 memos about the factual basis for the killing of Anwar

24 al-Awlaki, those should be disclosed in part. I say that for a
25 couple of reasons. One is that the government has introduced

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1 some of those facts into the public sphere through the Attorney
2 General's letter, for example. Through an affidavit filed in
3 an appendix with the sentencing report in Abdulmutallab
4 prosecution. There is a long discussion.

5 JUDGE CABRANES: Why isn't that adequate for your
6 purposes? You want to be able to contest the facts on which a
7 particular opinion rested, is that it?

8 MR. JAFFER: It is not adequate for the same reasons
9 that Congress thought it wasn't adequate when it enacted the
10 FOIA in the first place.

11 Congress's concern was not just with transparency. It
12 was with -- Congress wanted to end the practice of selective
13 disclosure. It saw selective disclosure as a particular evil.
14 And in many contexts, selective disclosure is worse than no
15 disclosure at all, because it can be misleading.

16 JUDGE CABRANES: Doesn't this lead inevitably to a
17 disclosure of the entire memorandum? Can you give us an idea
18 what sort of things would exist in an OLC memorandum which you
19 think the government can legitimate withhold?

20 MR. JAFFER: Sure. Information about human
21 intelligence sources, for example. If there is a paragraph

22 about here's how we know this particular fact, I think it is

23 quite legitimate for the government to protect that. Also --

24 JUDGE NEWMAN: Not just how we know it, if they say we

25 know it.

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1 MR. JAFFER: Right. Depending on the context, I think

2 you're right. There may be situations -- I'm sure there are

3 situations in which the government's disclosing that it knew a

4 particular thing would have the effect of disclosing its

5 source. And in that instance, the government could protect it.

6 But not everything could be protected on that argument.

7 JUDGE NEWMAN: I just have trouble seeing once you get

8 past pure legal reasoning and you get into facts --

9 MR. JAFFER: Judge Newman, I guess my only request is

10 you give us the opportunity to get to that point in the case.

11 If you're right, the District Court will throw us out and say

12 you get nothing more than the Vaughn. We should be given the

13 opportunity to contest the government's withholding of those

14 documents, at least in part.

15 JUDGE NEWMAN: You've got affidavits from very senior

16 people who say doing that very thing will compromise security.

17 MR. JAFFER: They do say that. In one instance, for

18 example, they say -- this is in the CIA's affidavit, it will

19 compromise security because it will lead people to think that

20 the U.S. government was involved -- that we were involved in
21 the killing of these four U.S. citizens. And of course the
22 government has now disclosed that. Or the ODNI declaration
23 says it will lead people to think that the CIA has an
24 intelligence interest in the program. And that too has been
25 disclosed.

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1 JUDGE NEWMAN: You've picked out, fair argument,
2 perhaps the vulnerable paragraphs of the affidavit.

3 MR. JAFFER: In my view, they're all vulnerable.

4 JUDGE NEWMAN: There are other allegations there that
5 I don't think are as vulnerable.

6 MR. JAFFER: Another one they relied on quite
7 extensively is the argument that even if the CIA's intelligence
8 interest in the program has been disclosed, the extent of that
9 interest will be disclosed if we provide a list.

10 First, I think the D.C. Circuit's reasoning in the
11 Drones FOIA case was exactly right, that disclosing a list of
12 documents possessed by the CIA about targeted killing tells you
13 nothing at all about what the CIA is doing on targeted killing.
14 It may be that the CIA has a lot of documents.

15 JUDGE CABRANES: The Seventh Circuit wouldn't agree
16 with the D.C. Circuit on that. I quote the language: That the
17 government might fear that inferences from Vaughn indices or

18 selective disclosure could reveal classified sources or methods
19 of obtaining foreign intelligence.

20 Is that utterly implausible?

21 MR. JAFFER: I think that Bassiouni might have been
22 rightly decided on those facts. I think that analysis goes too
23 far. It proves too much. If you accept that any agency can
24 withhold innocuous details because of the possibility that
25 somebody else might find a way to make them other than

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1 innocuous, you've effectively given the agency a categorical
2 exemption from the FOIA. That's something Congress explicitly
3 considered and rejected the idea. It considered it later on,
4 about 15 years later, rejected the idea again.

5 The CIA is supposed to comply with the FOIA, which
6 means the CIA is supposed to provide Vaughn indices in response
7 to requests like ours.

8 JUDGE CABRANES: Let me ask you a question, the
9 question I asked your colleague representing The New York Times
10 about the character of these opinions. What exactly you're
11 seeking. You're seeking for certain so-called formal opinions.
12 Right? The so-called binding opinions of the OLC.

13 MR. JAFFER: That's right. We've actually carved out
14 drafts from our request.

15 JUDGE CABRANES: And oral comments or interactions are

16 beyond your interest?

17 MR. JAFFER: Beyond our interest, and I think beyond
18 the reach of the FOIA.

19 We are asking for the OLC memos because senior
20 officials have said that the OLC memos set binding parameters
21 for the government's activities in this particular context.

22 That's a paraphrase, but that's essentially what Mr. Brennan
23 said in his confirmation hearing. That's essentially what the
24 Attorney General told Congress in testimony.

25 Given that they reference the OLC memos in that way,

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1 we think that the OLC memos are working law. Or at least some
2 of these OLC memos are working law.

3 The Brennan Center opinion I think gives a good map of
4 how to analyze a working law argument. But I think that the
5 other case that's worth noting is the Supreme Court's decision
6 in Sears, which notes that Congress enacted the FOIA in part
7 because of a particular concern about secret law.

8 And in fact, 552(a)(2) of FOIA, which is the
9 affirmative provisions of FOIA, require government agencies to
10 disclose, even in the absence of any FOIA request, require them
11 to disclose final opinions or interpretations.

12 And in our view, these kinds of OLC memos should have
13 been disclosed under that provision, even before a FOIA request

14 was filed.

15 JUDGE CABRANES: In this putative Vaughn index that
16 you are seeking, you indicate at some point here, page 50,
17 there are at least 11 OLC memoranda regarding targeted
18 killings. Is that right?

19 MR. JAFFER: That's right.

20 JUDGE CABRANES: That's more or less the universe that
21 you are talking about?

22 MR. JAFFER: Right. We are basing that on statements
23 from the Chair of the Senate Intelligence Committee. Obviously
24 we haven't -- that number, if that number is wrong, the
25 government will presumably correct it.

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1 JUDGE POOLER: Or not.

2 MR. JAFFER: Or not.

3 JUDGE NEWMAN: There have been documents released
4 since the District Court opinion, correct?

5 MR. JAFFER: Yes. That's right. That's right. In
6 connection with the President's speech, there were some
7 documents released.

8 JUDGE NEWMAN: It's that limited? I thought it was
9 more than that.

10 MR. JAFFER: Oh, the White Paper as well. The White
11 Paper was released in February.

12 JUDGE NEWMAN: Since part of your argument is the
13 extent of disclosure undermines the government's arguments for
14 protection, should we send it back to the District Court to
15 reconsider in light of the post-judgment disclosures?

16 MR. JAFFER: I don't think that would serve judicial
17 economy, Judge Newman. I think --

18 JUDGE NEWMAN: That's a very high value in our
19 business. That's not the only value. Orderly decision making
20 is also pretty big.

21 MR. JAFFER: Well, in public and official
22 acknowledgment cases like this, the truth is that there are new
23 disclosures every two weeks. If the Appeals Court is going to
24 send a case back every time there is a new disclosure, we'll
25 never get an Appeals Court decision.

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1 JUDGE POOLER: In addition to the disclosures, the
2 District Court opinion was written before the D.C. Circuit
3 opinion, and the District Court here relied regularly on the
4 District Court opinion in the District of Columbia. And said
5 she agrees with everything that was said.

6 Since that's been partially reversed, maybe she should
7 get a chance to look at it again, to look at those issues
8 again.

9 MR. JAFFER: I think that the only issues here are

10 legal issues. This Court's review is de novo. I think that
11 sending the case back without resolving this question of
12 whether the no number no list response is legitimate, sending
13 it back without resolving that issue, would only, respectfully,
14 needlessly delay.

15 JUDGE NEWMAN: That may be. I'm thinking more about
16 the relevance of the White Paper to the withholding OLC
17 memorandum.

18 MR. JAFFER: Well --

19 JUDGE NEWMAN: They go pretty far in the White Paper
20 in giving legal reasoning.

21 MR. JAFFER: I think ultimately, if you accept our
22 working law argument, which we think is quite strong. If you
23 accept the working law argument, then this question of what
24 they disclosed already is largely besides the point.

25 If it is working law, they have an obligation to

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1 disclose it, even if they haven't disclosed any of it
2 previously. Obviously, they would be able to withhold
3 legitimate sources and methods from the OLC memo, but they
4 would no longer be able to rely on Exemption 5 in order to do
5 it.

6 JUDGE POOLER: Counsel, is it your argument it is
7 working law because the targeted killings have taken place?

8 MR. JAFFER: No. Even if no targeted killings had
9 taken place, I think we would still argue it is working law to
10 the extent the government regarded that memo or those memos as
11 setting the parameters for Executive action. Setting the
12 parameters within which the Executive could or could not act.

13 I think that's the way that the Courts have
14 described -- those kinds of memos have been found to be working
15 law in cases like Coastal States and Tax Analyst, and I think
16 that's consistent with the Court's discussion in Brennan Center
17 as well.

18 I have no time to reserve, but I will reserve whatever
19 time you allow me to.

20 MS. SWINGLE: Your Honors, Sharon Swingle from the
21 Department of Justice for the government.

22 If I may begin where the ACLU left off with the
23 working law theory. I think it is critical for this Court to
24 understand that their theory of working law is that when the
25 government obtains and follows legal advice, that that becomes

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1 working law, which can never be withheld under the FOIA.

2 I think that theory would have dramatic implications
3 for the government's ability to obtain legal advice, and is
4 simply not consistent with FOIA or Congress's intent or this
5 Court's prior decision.

6 The purpose of the working law doctrine is to prevent
7 the government from having secret rules, regulations that it
8 applies qua law. It is not to prevent the use of legal advice.
9 In making policy decisions, I think this Court in the Brennan
10 Center drew precisely that kind of distinction, and I would
11 remind the Court that exactly the same kind of working law
12 arguments were made in that case, in which the OLC had provided
13 legal advice that an agency could not constitutionally apply a
14 statute to domestic organizations, and then the agency had
15 acted in accordance with that legal advice. And this Court
16 said nevertheless that it was not working law. It used a very
17 different adoption theory to find that the material could not
18 be withheld.

19 JUDGE NEWMAN: Why hasn't there been adoption here?

20 MS. SWINGLE: I think to the extent there have been
21 any public references to OLC memoranda here or OLC advice, they
22 have been extremely cursory, extremely vague, and very, very
23 different from the kind of circumstance we see as in La Raza
24 where, for example, the Attorney General stands up, holds a
25 press conference and says "OLC wrote an opinion, let me

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1 describe to you what it says. That opinion is the government's
2 policy." We have nothing like that here.

3 JUDGE NEWMAN: You have less than that, but the

4 President says what they are doing is entirely lawful.

5 MS. SWINGLE: Absolutely.

6 THE COURT: Why wouldn't the government want to
7 release an analysis that shows it is lawful?

8 MS. SWINGLE: Your Honor, let me say a few things if I
9 may. We absolutely --

10 JUDGE NEWMAN: That's why you're here.

11 MS. SWINGLE: The President stood up, the Attorney
12 General has made public statements, John Brennan has made
13 public statements. What they said is we, the United States
14 government, acknowledge that in some circumstances our
15 government uses targeted lethal force. We want to provide, to
16 the extent we can on the public record, an explanation about
17 why we do that, why we think it's permissible for us to do
18 that.

19 That surely cannot mean that the government, acting in
20 the interest of transparency to provide for the public's
21 interest some explanation of what we do, means that we lose the
22 ability to protect highly sensitive classified information.

23 JUDGE NEWMAN: Wait a minute. I'm not at all
24 suggesting that you need to release, as you just put it, highly
25 sensitive classified information.

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1 But if the OLC people write a memorandum, that sort of

2 almost tracks the White Paper and supports the President, and
3 the President didn't just say it is important in the national
4 interest. He said it's lawful. And you've got a document that
5 purports to explain why it's lawful.

6 Why don't you want to share that with the public?

7 MS. SWINGLE: Your Honor, I will say a couple of
8 things. One, we did want to share, and we have released the
9 White Paper. The White Paper, as this Court may be aware from
10 the public record, from its voluntarily disclosure --

11 JUDGE POOLER: Did you release it and or was it
12 leaked?

13 MS. SWINGLE: It was leaked and we subsequently
14 voluntarily disclosed it.

15 JUDGE CABRANES: The White Paper was leaked?

16 MS. SWINGLE: It was.

17 JUDGE CABRANES: Why would you create a document
18 called a White Paper if it wasn't meant to be leaked?

19 MS. SWINGLE: As the cover letter with the disclosure
20 explained, it was prepared in draft form in an effort to
21 provide an explanation that could be shared with the public.

22 JUDGE POOLER: Wasn't it provided for Congress?

23 MS. SWINGLE: It was subsequently provided, your
24 Honor. It was never finalized, because in lieu of that
25 release, the Attorney General gave the March 2012 speech in

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1 which he set out kind of a similar, albeit shorter, explanation
2 for the government's reasoning.

3 JUDGE NEWMAN: You're not suggesting that because it
4 was originally leaked, it doesn't have a bearing on the
5 propriety of further disclosures, are you?

6 MS. SWINGLE: I am not, your Honor. But I am saying
7 that it surely cannot be enough that if the government provides
8 some public explanation for its answer, that that would be a
9 basis to compromise the privilege for any kind of classified
10 and/or privileged legal advice that had been provided on the
11 same subject. In this sense, I think it is no different than
12 if the --

13 JUDGE NEWMAN: That may be that releasing document A
14 doesn't mean everything else comes out. I'm not suggesting
15 that. I want to know why you don't want the public to have the
16 benefit of the OLC's purely legal arguments, redacting that
17 document for any word or phrase that you think is a secret.
18 But has legal -- the sources cited there, I studied them in law
19 school, long before al Qaeda. So I don't understand why with
20 the White Paper out there, going a good way on legal reasoning,
21 you don't want to say, yes, and the extent of the legal
22 reasoning without any operational fact, any government secret,
23 why not?

24 MS. SWINGLE: Your Honor, first, I do think it
25 blinkers reality a little bit to think that there can be purely

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1 legal reasoning in a classified document that wouldn't be
2 protectable. I think obviously the White Paper was an attempt
3 to create a purely legal non-classified explanation, but
4 obviously the OLC memorandum was not --

5 JUDGE NEWMAN: Why is that so hard to understand?
6 Blinkers what? Reality?

7 MS. SWINGLE: The OLC memorandum was not created for
8 that purpose. It was created before a decision was taking
9 place.

10 JUDGE POOLER: It can't be redacted?

11 MS. SWINGLE: But in addition, your Honor, we still
12 retain the ability to withhold even non-classified,
13 non-sensitive parts of that document, because they are
14 privileged.

15 JUDGE CABRANES: We understand where you are going
16 with the privileges, but why don't you go back to Judge
17 Pooler's question about whether you can redact.

18 Are you suggesting in response to Judge Newman and to
19 Judge Pooler that there is no way in which -- let us take the
20 OLC memorandum. That there is no way to be redacted and
21 accomplish the purposes of national security?

22 MS. SWINGLE: I will say that issue was not resolved
23 by the District Court. It found it unnecessary to reach that.
24 Because we had an independent basis for withholding, because

25 the document was attorney-client and deliberative process

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1 privilege. So it did not engage in that segregability
2 analysis.

3 JUDGE NEWMAN: My question was the why question.
4 Since you already got the White Paper out there, and, sure,
5 leaked originally, but a lot of times the government refuses to
6 confirm or deny a leaked fact. That didn't happen here. After
7 it was leaked, you did disclose that, so it is out on the
8 public record. It talks about legal reasoning for targeted
9 killings, right?

10 MS. SWINGLE: It does.

11 JUDGE NEWMAN: I'm still asking why you don't want a
12 redacted version of the rest of the legal reasoning out there.
13 So that when the President says take it from me it's lawful,
14 you can point to a carefully prepared document that shows it.

15 MS. SWINGLE: With respect, your Honor, I think we
16 retain the ability, notwithstanding a voluntary disclosure, to
17 say we have a significant interest in protecting the
18 confidentiality of the legal advice that the OLC gives to its
19 Executive Branch clients.

20 Without the promise of that confidentiality, our
21 Executive Branch clients won't seek OLC's advice. In a sense
22 here, I think basic principles of good governance would urge

23 this Court -- the Court in County of Erie emphasized the need

24 for the government to have the attorney-client privilege.

25 JUDGE NEWMAN: The usual rule on attorney-client,

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1 although greatly misunderstood, is that it doesn't protect what
2 the lawyer says to the client. It protects what the client
3 says to the lawyer. And it protects what the lawyer says, only
4 to the extent that that would reveal what the client said to
5 the lawyer.

6 There is stuff in that OLC document that doesn't come
7 near what anyone in the government agency said to OLC. And it
8 doesn't have to. You can just talk in the abstract. Is it
9 lawful to target an American citizen who is believed to be very
10 dangerous. You can talk about that without revealing any
11 secret.

12 MS. SWINGLE: Well, if I may, your Honor, and
13 obviously I'm not in a position to talk about the contents of
14 the actual OLC DoD memorandum which remains classified in this
15 public setting. I want to make clear for the Court we do not
16 agree with the idea that purely legal reasoning cannot be
17 highly telling about the content of documents.

18 Imagine, for example, an OLC memo about targeted
19 lethal force that contains citations to a particular treaty
20 between the United States and a foreign government. Obviously

21 that would be highly telling about information.

22 JUDGE NEWMAN: Of course you can do that. You can
23 tell me 400 things that could be in it that could be a
24 protectable secret. And if it turns out that's what is going
25 to happen, you would redact it. And we uphold you. I'm

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1 talking about the things that are not sensitive.

2 MS. SWINGLE: I guess my response to that, Judge
3 Newman, is that the fact that we have publicly released as a
4 matter of discretion the White Paper, which was prepared
5 specifically so that it could be public, does not mean we lose
6 the ability to withhold confidential legal advice, which may or
7 may not be comparable. There is no way on the public record to
8 know. It is pure speculation on the part of the plaintiffs
9 here that the OLC DoD memorandum is comparable in its content.
10 Simply because we have made a voluntary disclosure.

11 JUDGE NEWMAN: Is the answer to my question then the
12 reason you don't want to release it is because you think you
13 don't have to?

14 MS. SWINGLE: No.

15 JUDGE NEWMAN: Is there more to it than that?

16 MS. SWINGLE: Ultimately it is confidential legal
17 advice.

18 JUDGE NEWMAN: That's a reason why you think you don't

19 have to.

20 MS. SWINGLE: We have a duty of confidence to our
21 clients in part, and also we have provided this --

22 JUDGE NEWMAN: There are things in that document that
23 don't begin to reach what the client may have told you.

24 MS. SWINGLE: Your Honor, again, we are invoking not
25 only the attorney-client privilege here, although that is at

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1 the core of Exemption 5, but also the predecisional
2 deliberative process privilege. It is absolutely the case that
3 that document is a document that gives advice about a
4 contemplated military action, gives advice to a superior
5 officer.

6 JUDGE NEWMAN: You're telling me grounds of
7 protection, which isn't what I was really asking you. I've got
8 your whole brief that gives me your grounds of protection. I
9 am asking you the why question. Why don't you release it.

10 MS. SWINGLE: I'm not the policy maker here, so
11 obviously I am here to defend our position in this litigation.

12 I will say that I think this administration has worked
13 very, very hard to make public a quite extensive amount of
14 information about the use of targeted lethal force. We've
15 obviously done so in stages, including some substantial
16 information that postdates the District Court litigation at

17 issue before this Court.

18 I do not think, however, the government should be
19 penalized for providing substantial information, including
20 information that was properly classified previously, by saying
21 that we then lose the ability to protect anything.

22 JUDGE POOLER: Counsel, you said that you prepared the
23 White Paper for release.

24 MS. SWINGLE: Yes.

25 JUDGE POOLER: I thought you prepared it for the

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1 Senate Intelligence Committee and the House Permanent Committee
2 on Intelligence. Didn't you?

3 MS. SWINGLE: That is not correct, your Honor. There
4 is a limit to how much I can talk about this in a public
5 session. I would suggest the Court might wish to look in
6 particular at the District Court classified decision on this
7 record which makes clear I think the precise point your Honor
8 is asking about.

9 JUDGE NEWMAN: I'm surprised to hear you say the
10 government should be penalized. You are aware with the
11 attorney-client privilege comes the waiver doctrine and the
12 privilege is waived in cases all over America. Lawyers don't
13 get up and say we should be penalized. If there is a waiver,
14 there is a waiver. And sometimes the waiver arises because of

15 a significant disclosure. So no one is talking about

16 penalizing you.

17 The question is, having gone so far, should you be
18 protected. And my ultimate question is why should you be
19 protected. You say, well, that's a policy decision. Seems to
20 me it is rather wrapped up with law. You're from the
21 Department of Justice. This is an OLC document. So the
22 Department must have a position on why they don't want to
23 release this.

24 MS. SWINGLE: Absolutely, your Honor. It is
25 classified.

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1 JUDGE NEWMAN: Those are the legal reasons.

2 MS. SWINGLE: Again, your Honor, we are attempting to
3 make clear --

4 JUDGE NEWMAN: Is that the government's position, that
5 with respect to this program, any piece of paper that we can
6 lawfully withhold, we want to withhold?

7 MS. SWINGLE: Absolutely not, your Honor.

8 JUDGE NEWMAN: No, that's not your position?

9 MS. SWINGLE: If I can talk about some of the specific
10 reasons why, and as this Court is aware, what is at issue here
11 is not only the specific document that we have acknowledged the
12 existence of, the OLC DoD memorandum, but also the potential

13 existence of other documents that are responsive either to
14 OLC's request or to the ACLU request.

15 Of course no one here has pointed to any official
16 Executive Branch statement that would give any operational
17 details about what parts of the U.S. government are engaged in
18 any particular lethal force operations. I think we have set
19 out in some length both in the public declarations and the
20 classified ones why disclosure of that information would
21 pose --

22 JUDGE NEWMAN: Let me turn to that part of it. Are
23 you still claiming that Mr. Panetta's statements, which are in
24 the public documents, do not reveal what they want to know
25 about what agency is doing what?

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1 MS. SWINGLE: Which? If you could help me, which
2 statements in particular? The passing reference to the use of
3 drones, absolutely not. The drones and Predators have multiple
4 uses. They are used for intelligence surveillance.

5 JUDGE NEWMAN: Well, how about --

6 JUDGE CABRANES: Wasn't his statement made on the very
7 day that Mr. al-Awlaki was killed? I thought it was a direct
8 response to that particular hit.

9 MS. SWINGLE: Yes, but he doesn't make clear -- there
10 is not any discussion about which particular agency or agencies

11 in the U.S. government were involved operationally on that, and
12 we have never disclosed operational details.

13 JUDGE NEWMAN: No statement about which agency.
14 Mr. Panetta. What was he then when he made the statement at
15 628 of the joint appendix?

16 JUDGE POOLER: What about the 60 Minutes interview?

17 MS. SWINGLE: I believe in the 60 Minutes interview,
18 what the plaintiffs have relied on is a nod of the head.

19 JUDGE NEWMAN: It says they interview CIA Director
20 Leon Panetta. Can we agree on that?

21 MS. SWINGLE: If we are at 628.

22 JUDGE NEWMAN: It begins on 626. Then, at the bottom
23 of 628, he says, "We just took down number three in their
24 leadership a few weeks ago."

25 JUDGE CABRANES: Where on that page?

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1 MS. SWINGLE: Very near the bottom, your Honor.
2 I guess I would encourage the Court, and we point to
3 the relevant parts in our brief. But that reference to "we"
4 comes after two pages in which Mr. Panetta is discussing the
5 hundreds of thousands of U.S. military troops in that region of
6 the world, is talking about action in Afghanistan, is talking
7 about winning in Afghanistan, where clearly he is referencing
8 the use of military efforts there.

9 JUDGE NEWMAN: What it comes immediately after is
10 saying "We are engaged in the most aggressive operations in the
11 history of the CIA." He doesn't say in the history of the
12 whole government. He says in the history of the CIA. Next
13 sentence. "We have taken down more than half of their
14 leadership." Next sentence. "We just took down number three."

15 You mean to say that's not a statement that the CIA
16 did it?

17 MS. SWINGLE: I really don't know how to interpret
18 that in context, your Honor.

19 JUDGE NEWMAN: Oh, please. Are you really serious?

20 MS. SWINGLE: To be honest, your Honor, I would point
21 the Court to the quite strict test for official disclosure,
22 which requires the specific information that is being sought
23 here be disclosed. And of course I don't think, no, it is
24 appropriate to take from ambiguous statements, stray remarks in
25 interviews or in Congressional testimony, what would be

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1 disclosure of a significant classified fact.

2 JUDGE NEWMAN: If they had sent an interrogatory
3 addressed to Mr. Panetta and asked who did you mean by "we,"
4 what would you say?

5 MS. SWINGLE: I would say it would be quite remarkable
6 to order discovery in a FOIA case. It would be contrary to

7 what FOIA and the Congress envisioned, which was that
8 withholdings of classified or otherwise protected
9 information --

10 JUDGE NEWMAN: Maybe in general that's right. But
11 when the head of the agency says on public television, says
12 even in a secret hearing of the Congress, going to the public
13 on television, telling how we're engaged in the biggest in the
14 history of the CIA. We just took down number three.

15 And you're telling the Court, gee, we can't tell if
16 that means the CIA. It could mean something else.

17 MS. SWINGLE: Respectfully, your Honor, I would
18 suggest the very need to ask for discovery on that issue to
19 clarify the --

20 JUDGE NEWMAN: I don't think you need it. I think the
21 inference is irresistible.

22 JUDGE CABRANES: Let's assume from the argument, I
23 know it is difficult to deal with hypotheticals in cases of
24 this sort. Let us assume that Judge Newman's inferences are
25 correct. This is the hypothetical. I am asking you to deal

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1 with a hypothetical. That we know for certain on the basis of
2 these various documents, including from the President's
3 appearance on The Tonight Show, we know for certain that the
4 CIA is involved in this. That's the hypothetical. That's the

5 premise.

6 Is it still nevertheless your position that under the
7 statute you would be entitled to not disclose the documents in
8 question?

9 MS. SWINGLE: It is, your Honor. I would just point
10 the Court to the --

11 JUDGE CABRANES: Why is that?

12 MS. SWINGLE: The very significant number of harms
13 we've identified. One is, even if we might have hypothetically
14 disclosed involvement in a single operation, it says nothing
15 about whether the CIA or the FBI or the defense intelligence
16 agency might have been involved in another operation. Whether
17 there would be responsive documents related to those. It would
18 obviously strongly suggest either an actual or contemplated
19 operation by agencies. It says nothing about the depth of
20 intelligence interest, whether by the CIA or another agency.
21 It says nothing about the U.S. government's extensive
22 involvement or minimal involvement, the depth of that
23 involvement in targeted lethal force.

24 Obviously the existence of one OLC document that is
25 responsive to The New York Times' request gives a piece of

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1 information. That's very different from acknowledging the
2 existence of 50 OLC opinions or 100 OLC opinions. And even in

3 the hypothetical where a single CIA operation had been
4 disclosed, that surely cannot mean we don't retain the ability
5 to protect that other very sensitive information.

6 JUDGE CABRANES: Let me reframe the hypothetical a
7 little bit, which is based on Judge Newman's comments. Assume
8 there has been as a matter of law a waiver of attorney-client
9 privilege. Does that end the story?

10 MS. SWINGLE: No, your Honor. I want to be clear
11 about this. This Court can affirm the District Court without a
12 remand, absolutely. But we do not believe that the Court can
13 rule against us without a remand, because to the extent that
14 what is being relied on by the plaintiffs here are statements
15 that postdate the District Court's decision, first
16 fundamentally, we don't think they are properly considered by
17 this Court. Obviously, this is a review of agency action.

18 JUDGE CABRANES: Which were those that came after the
19 decision?

20 MS. SWINGLE: The President's most recent speech, the
21 Attorney General five-page letter to Congress, and the release
22 of the White Paper, all postdate the District Court decisions
23 here. And obviously significantly postdate the declarations
24 submitted by the agencies and the agencies' initial response to
25 the FOIA request.

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1 JUDGE CABRANES: But not the President's appearance on
2 The Tonight Show with Jay Leno.

3 MS. SWINGLE: No, that's correct.

4 JUDGE CABRANES: And not the other matters that Judge
5 Newman averted to. Those all predated it.

6 MS. SWINGLE: So I believe that Mr. Panetta's
7 statements predated the District Court decision, and of course
8 the District Court specifically addressed this.

9 JUDGE CABRANES: Let's assume for the argument that
10 the President's statements, Mr. Panetta's statements, had the
11 effect as a matter of law of waiving the attorney-client
12 privilege. That's the hypothetical.

13 Does that end the matter?

14 MS. SWINGLE: It would not, your Honor. I think we
15 would still need to determine whether all or part of the
16 documents retained --

17 JUDGE POOLER: Redact them.

18 MS. SWINGLE: What the District Court did not find
19 necessary to do was to engage in any kind of segregability
20 analysis. In fact, the agencies for the most part didn't do
21 that either, because of the overlapping protection afforded by
22 the different exemptions.

23 So even if 5 did not apply, even if we were found to
24 have lost the protections of both the attorney-client and the
25 deliberative process privilege. We would still have the

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1 opportunity to examine whether, because they were classified or
2 otherwise protected from disclosure, all or part of them would
3 still remain held back.

4 I just want to be clear this would apply, as I
5 understand it, only to the single document that we have
6 identified. Part of the problem with this case and how the
7 plaintiffs have approached this case is that any reference in
8 their view to anything relating to OLC, or the Department of
9 Justice, somehow entitles them to some undefined and complete
10 number of documents that might conceivably fall into the
11 category of legal advice.

12 So, as I was saying before, it is really as though the
13 President stood up and said "I consulted with my top advisors
14 who gave me their advice, and I'm following it." The idea that
15 that would entitle you to somehow obtain every potentially
16 advisory communication would be quite extraordinary.

17 But that really is what we have at issue here, because
18 they're simply guessing about how many OLC opinions there are.
19 That's not something we have or can disclose.

20 JUDGE CABRANES: I read, you will recall from page 50
21 of the ACLU's brief which referred to, quote, at least 13
22 opinions.

23 Do you know where in the record that's from or this is
24 not something that you've acknowledged or conceded?

25 MS. SWINGLE: It absolutely is not, your Honor. I

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1 believe they are referring to statements by various members of
2 Congress in connection with various oversight hearings. And
3 obviously we have set out our position about that in our
4 briefs. No Court has ever held that a statement by a member of
5 Congress or a disclosure by a Congressional committee would
6 constitute official disclosure. And I would urge this Court
7 not to be the first.

8 I think there are substantial problems with the notion
9 that when the Executive Branch gives classified information to
10 Congress in the conduct of its oversight duties, that they
11 would then be able to waive classification on the part of the
12 Executive Branch. I think that's not consistent with the FOIA,
13 which expressly acknowledges that the standards for providing
14 information to Congress are different from the standards for
15 withholding, and I think it would really pose serious
16 constitutional --

17 JUDGE POOLER: This is something that has touched a
18 nerve in this country about the targeted killing and lethal
19 action of American citizens. There is great interest.

20 MS. SWINGLE: Absolutely. And I would just point the
21 Court, obviously we don't think it is properly part of this
22 Court's review of what the District Court did, but we did
23 obviously make substantial additional disclosures. We have

24 disclosed previously classified information in the interest of
25 transparency. The President has spoken at length about both

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1 the factual and legal bases for targeting of Anwar al-Awlaki,
2 and the Attorney General has provided substantial information.

3 I want to urge the Court to remember that this
4 administration has sought very hard to be transparent. What I
5 would discourage the Court from doing is using that interest
6 and transparency, that effort to provide information in a very
7 difficult, highly classified national security information as a
8 weapon. It is a no good deed goes unpunished approach.

9 JUDGE POOLER: Going back to where we started this
10 colloquy, what Judge Newman did. Why wouldn't the government
11 be interested in redacting this so-called OLC DoD memorandum to
12 support its view that it wants to convey to the public that you
13 have a perfect right to do this? Why wouldn't you want to do
14 that? Assuming you can redact it to your satisfaction.

15 MS. SWINGLE: I think in the government's view we have
16 provided the extent of legal analysis that we are able to do
17 without compromising both our national security interests and
18 the U.S. government's interest in maintaining the
19 confidentiality of the OLC advice process. And that is a
20 critical --

21 JUDGE NEWMAN: That answer -- go ahead. Finish your

22 answer.

23 MS. SWINGLE: I would just return to my initial point
24 which is that this idea that OLC or a general counsel provides
25 legal advice, an agency acts as it is expected to do in

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1 accordance with the rule of law, and the way our federal system
2 is set up, an agency complies with that advice and acts in
3 accordance with advice from its best legal advisors, and that
4 somehow strips the federal government of the ability to
5 maintain the confidentiality of that advice.

6 JUDGE NEWMAN: Your first part of your answer, you
7 said, as I understood you, you said you really believe that you
8 can't release the OLC DoD memo with proper redaction without
9 inevitably releasing highly sensitive classified information.
10 Is that your position?

11 MS. SWINGLE: It is not. I don't believe that
12 determination has been made. I think at a very high level --

13 JUDGE NEWMAN: She was asking you, we're all curious.

14 MS. SWINGLE: I think the U.S. government has to the
15 extent it has seen fit to balance these competing interests,
16 has released a public explanation about the legal basis for the
17 use of targeted lethal force, and the judgment has been made
18 that what has been released is what we feel can be released
19 without compromising either classified information or, or

20 pre-decisional deliberative attorney-client privileged
21 information that needs to be protected to protect our OLC
22 advice giving process.

23 I'm not taking the position that there is only
24 classified information that has been withheld. I am saying we
25 do have interests that extend beyond simply protecting

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1 classified or otherwise protected information.

2 JUDGE NEWMAN: This goes back to your argument, the
3 agencies won't ask OLC for advice if they know it will be
4 released.

5 MS. SWINGLE: Absolutely.

6 JUDGE NEWMAN: You are really worried about that.

7 MS. SWINGLE: We are extremely concerned about that.

8 JUDGE POOLER: The heads of those agencies released
9 some of this information themselves.

10 MS. SWINGLE: Yes. Obviously the President has
11 released some.

12 JUDGE POOLER: He is head of an agency, right?

13 MS. SWINGLE: Yes. But I want to point the Court by
14 way of example to the reply brief filed by The New York Times,
15 at page six what they say "If an agency decides to follow that
16 legal guidance from OLC, OLC's advice becomes the working law
17 of the government and presumably could no longer be withheld."

18 That, in our view, is an extremely troubling and problematic
19 theory. It would really strip us of our ability to maintain
20 confidential attorney advice.

21 That's page six of the last sentence of The New York
22 Times reply brief.

23 JUDGE NEWMAN: Do you have the joint appendix handy?

24 MS. SWINGLE: I do, yes.

25 JUDGE NEWMAN: In volume one, on page 149. Bottom of

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1 the President's first block of type. Can we agree there is a
2 typo in that last line? I can't believe --

3 MS. SWINGLE: Yes. We assume that is Yemenis, but I'm
4 not able to concede that, your Honor. I don't know.

5 JUDGE NEWMAN: It has to be.

6 MS. SWINGLE: I don't know, your Honor.

7 JUDGE POOLER: What line are you talking about?

8 JUDGE NEWMAN: The last line of the first full block
9 quote. It is about seven lines of block quote from the
10 President of the United States. And the transcript reads "It
11 was important that working with the enemies we were able to do
12 something."

13 MS. SWINGLE: I assume that is Yemenis.

14 JUDGE NEWMAN: He said Yemenis, and the transcriber
15 got it wrong.

16 In one of your sealed excerpts from your briefs, I am
17 not going to disclose a secret. There is a statutory reference
18 from Title 50. You're probably familiar with it. It has to do
19 with whether affidavits are sufficient. It's Title 50. I
20 think it's Section 430(f)(2).

21 Does that ring a bell at all?

22 MS. SWINGLE: I believe so, your Honor.

23 JUDGE NEWMAN: Is that a correct citation? Because I
24 couldn't find it.

25 MS. SWINGLE: I can check and provide the information

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1 for your Honor. Off the top of my head, I can't say that I
2 know either.

3 JUDGE NEWMAN: Do they have it there?

4 MS. SWINGLE: Again, your Honor, that would be
5 information we could provide separately to the Court, to the
6 extent it is something that's only in the classified part.

7 JUDGE NEWMAN: Just the statutory reference. Is it
8 the right statute? That's all I want to know.

9 JUDGE CABRANES: Can I draw your attention to the ACLU
10 v. CIA case.

11 MS. SWINGLE: The D.C. Circuit decision.

12 JUDGE CABRANES: Were you involved in that case?

13 MS. SWINGLE: At the end. Your Honor, and I'm glad

14 you asked about it because that obviously has been raised a
15 number of times today, and of course it is critically different
16 from this case in a couple of ways. If I might just have a
17 minute.

18 JUDGE CABRANES: Everybody else has gotten a few
19 minutes extra, so go ahead. I'm anxious to know exactly where
20 you're headed. Namely, how is this case different from that
21 case.

22 MS. SWINGLE: Sure. If the Court looks at the precise
23 terms of the request in that case, and I must urge the Court,
24 we think that the precise terms of the request here are
25 incredibly important. But the precise request there was to the

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1 CIA, but it asked for any documents pertaining to the use of
2 targeted lethal force. It was not limited to the CIA's use.
3 It was pertaining to anyone's use of targeted lethal force.

4 And initially, the government's response declined to
5 acknowledge the existence of responsive documents because we
6 explained that either the CIA's interest in or its involvement
7 in the use of targeted lethal force remained classified.

8 Ultimately, after a number of public disclosures were
9 made, including in this very litigation, the government itself
10 affirmatively moved to remand in that case while it was pending
11 in the D.C. Circuit, because we acknowledged that we could

12 acknowledge the existence of responsive documents.

13 Ultimately what the D.C. Circuit held was it was no
14 longer plausible to conclude that CIA had no intelligence
15 interest in the U.S. government's use of targeted lethal force.
16 It actually held, in fact, that the specific public references,
17 many of which are relied on here, like Panetta's statements,
18 did not disclose whether or not the CIA uses targeted lethal
19 force. But because we had officially acknowledged CIA interest
20 in targeted lethal force, it sent the case back.

21 All it decided, Judge Pooler, to one of your earlier
22 question was the Glomar issue. The Court specifically
23 envisioned that the agency might be able to impose a no number
24 no list response on remand or something like it.

25 JUDGE CABRANES: Tell me why in this case a no number

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1 no list response would not be appropriate.

2 MS. SWINGLE: As to which request, your Honor?

3 JUDGE CABRANES: Well, taking one by one.

4 MS. SWINGLE: So, yes. We believe that a no number no
5 list response is appropriate to the ACLU's request. It is what
6 we've provided, and it's what we are seeking to defend in this
7 Court.

8 I think the difference is the specific terms of the
9 request. If one looks at the OLC request, what it asks for is

10 an OLC opinion or memoranda, so an OLC legal advice document,
11 that addresses the legal status of targeted killing
12 encompassing legal advice to the Central Intelligence Agency.
13 It specifically envisions that it will be an OLC advice
14 document giving advice to an agency on the use of targeted
15 lethal force.

16 As we've explained at some length in our declarations,
17 OLC does not provide hypothetical legal advice. It provides
18 legal advice when an agency is seriously contemplating or
19 undertaking a course of conduct. For OLC to have provided such
20 an advice document to the CIA or the FBI or the NSA, or any
21 entity, means that agency was either engaging in or
22 contemplating specific operations.

23 JUDGE NEWMAN: Right on that point, why couldn't you
24 have a Vaughn index that took that very item you just described
25 and redact the word "CIA," and say "document that describes the

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1 legal justification for a targeted killing in answer to a
2 request from" blacked out.

3 MS. SWINGLE: Because, your Honor, we also, in
4 addition to not disclosing what agency or agencies of the U.S.
5 government may have been contemplating such operation, have not
6 disclosed how many operations might have been contemplated, how
7 many might have been attempted.

8 JUDGE NEWMAN: Quantity was nowhere in my title. My

9 title was "A document describing legal reasoning about targeted

10 killings." Why can't you give that in a Vaughn index?

11 MS. SWINGLE: I think the very number of responsive

12 documents is itself classified. So I'm struggling to

13 understand what more we could say.

14 I would just add we have acknowledged that there is a

15 single responsive document relating to DoD. So to acknowledge

16 the existence of any other documents suggests that some other

17 part of the U.S. government was also using targeted lethal

18 force.

19 JUDGE CABRANES: Are you now producing a Vaughn index

20 in the D.C. litigation?

21 MS. SWINGLE: We have not yet gotten to the point --

22 JUDGE CABRANES: You've been directed by the Court of

23 Appeals to produce one.

24 MS. SWINGLE: We have not, your Honor. All the Court

25 directed us to do is go back and see what more we could

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1 disclose. And the Court I think is very clear that it is not

2 directing disclosure of any particular set of information.

3 They leave open the possibility the Court would simply give a

4 no number no list response.

5 JUDGE CABRANES: It has not yet made the decision.

6 JUDGE NEWMAN: Is the problem with the Vaughn index
7 that they've requested, they've directed their request to
8 specific departments? And so if you say the documents we have,
9 30 documents or whatever, it implicates that department?

10 Is that the problem?

11 MS. SWINGLE: I think there are several problems. I
12 think that's one of them. Because we have acknowledged there
13 is one responsive DoD document. To acknowledge the existence
14 of more suggests --

15 JUDGE NEWMAN: Suppose we get rid of that problem by
16 making your Vaughn index more general. It simply says "A
17 document respecting legal advice to the government. Or to an
18 agency of the government." Why can't you say that?

19 MS. SWINGLE: With respect, your Honor, I think it is
20 a little too late for that. The public record is what the
21 public record now is. Any disclosures would have to take place
22 against that backdrop.

23 JUDGE NEWMAN: Why is it too late? We've got the case
24 here. We're trying to figure out whether to sustain a no list
25 no number response. And it may be that a modified version

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1 heading towards a Vaughn index is the right answer. So I don't
2 think it is too late.

3 MS. SWINGLE: I think having officially disclosed that

4 there is a single responsive OLC memorandum to DoD, that
5 suggests any additional disclosures we make about additional
6 documents discloses the potential involvement of other
7 agencies.

8 I think as well, as we set out in the declarations,
9 both classified and unclassified declarations, the more
10 information we give, for example, about the number of OLC
11 documents, the more information that becomes public, which is
12 currently classified, about the extent of the U.S. government's
13 involvement in targeted operations, about the depth of
14 intelligence interests.

15 JUDGE NEWMAN: I am not anywhere near disclosing
16 documents. I'm talking about a partial heavily redacted Vaughn
17 index.

18 MS. SWINGLE: The very number of responsive documents
19 is still currently classified. I think that is my point.

20 JUDGE CABRANES: I suppose you mean to say by that
21 phrase that it could have some significance affecting national
22 security.

23 MS. SWINGLE: Yes. And the reason it's classified is
24 that disclosure of that information would tell you things about
25 intelligence activities, foreign activities of the U.S.

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1 government.

2 JUDGE NEWMAN: Why? If your Vaughn index says in part
3 we have 10 legal opinions that give legal reasoning, does that
4 alert the enemy, oh, they've got 10 lawyers working on it, not
5 just five. Come on. That's not a secret, is it?

6 MS. SWINGLE: I will tell you a couple things, your
7 Honor. It tells us there are nine additional instances, in
8 which the OLC opines on the lawfulness of a particular
9 operation or course of conduct.

10 JUDGE NEWMAN: No, I am not talking about an opinion
11 on a specific operation. I don't know if they are. What I am
12 trying to press you on is legal reasoning for the authority to
13 do targeted killings. Not the number of them, not who they
14 are, not where they are, not when they are. No detail at all.

15 JUDGE CABRANES: And not even the date of the opinion.

16 MS. SWINGLE: Well, again, your Honor, we have
17 acknowledged the existence of one responsive document. The
18 idea we can put the genie back in the bottle and somehow start
19 from scratch is not available.

20 JUDGE NEWMAN: We want to take a few things out of the
21 bottle.

22 MS. SWINGLE: To acknowledge the existence of
23 responsive documents to the OLC request immediately alerts how
24 many there are. If you are not going to give the number but
25 you give an answer that's different from what has already been

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1 given, that is additional information.

2 And I guess I would just urge the Court to ask the
3 same questions that were being asked previously about what that
4 information gets them. What they want is not did OLC provide
5 legal advice about the use of targeted lethal force. They know
6 that we did. We have formally acknowledged what they did.
7 What they want to know is when was that information provided,
8 to what agency was it provided.

9 JUDGE NEWMAN: Look, I understand that. I've asked
10 them what good it does them and I've asked you why you don't.
11 There is a bit of a standoff here.

12 The fact that some of your responses may not help
13 them, I don't think is a legal -- you won't answer the question
14 why you won't. So you've given us legal reasons why you won't.
15 And the fact that it might not do them any good is really not a
16 legal reason, I don't think. Is it? Nothing in FOIA says
17 there is a separate exemption for things that don't really help
18 the guy who wants them.

19 MS. SWINGLE: No.

20 JUDGE NEWMAN: I come back to saying, why can't you
21 have a redacted Vaughn index, at least on legal reasoning.
22 Because I don't understand your argument that if we say there
23 are five of them, that somehow tells people more information.
24 What does it tell them? It says five lawyers were working.

25 MS. SWINGLE: With respect, your Honor, it says that

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1 OLC on five separate instances wrote advice memoranda about the
2 use of targeted lethal force. It now tells us, and I do think
3 this is critical, that on four of those instances, it did not
4 involve the Department of Defense. Because we have
5 acknowledged there is a single responsive document as to the
6 Department of Defense. I think that is really significant
7 information. And it is not information that has been made
8 public by the U.S. government.

9 JUDGE NEWMAN: That's a secret.

10 MS. SWINGLE: It is.

11 JUDGE NEWMAN: Despite Mr. Panetta's statement, that's
12 a secret.

13 MS. SWINGLE: We have never disclosed operational
14 details as to what part of the U.S. government conducts lethal
15 force.

16 JUDGE NEWMAN: No one is asking for that.

17 MS. SWINGLE: I would urge the Court to look at the
18 classified declaration that discusses the need for this, in
19 part because we do have real interest in maintaining our
20 ability not to talk about what parts of our government do any
21 kind of operations and where.

22 JUDGE POOLER: You're being pressed, not just by us,
23 but by the Congress to release more and more information,
24 Senator Wyden has been asking about these documents. Have any

25 of those been turned over to the Congress?

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1 MS. SWINGLE: Yes, my understanding is that there have
2 certainly been public statements by various members of Congress
3 that the U.S. government should make a voluntary disclosure of
4 classified information.

5 JUDGE POOLER: Has the government made a voluntarily
6 disclosure?

7 MS. SWINGLE: As we've explained, the President did
8 disclose in part the previously classified fact --

9 JUDGE POOLER: Do you call the Jay Leno Show a
10 disclosure or was it a more formal disclosure?

11 MS. SWINGLE: To be clear, your Honor, the only
12 disclosure of previously classified information that we would
13 point the Court to is the President's recent statement that the
14 U.S. government conducted the operation that led to the death
15 of Anwar al-Awlaki and provided some additional information
16 about three additional individuals who were killed.

17 But that obviously postdates all of the relevant
18 litigation here, and I think is not properly considered by the
19 Court.

20 But certainly if the Court were to think it couldn't
21 decide the case without reference to that, our position would
22 be that the Court would have to remand to give us the chance to

23 address that more specifically in declarations.

24 JUDGE CABRANES: Are we to assume that the Vaughn case

25 is the law of this circuit or is this now a nationally

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1 recognized device that is used in all circuits?

2 MS. SWINGLE: About the Vaughn?

3 JUDGE CABRANES: Yes.

4 MS. SWINGLE: No. I just want to be quite clear.

5 Vaughn is a judge-made set of formal standards. But even the

6 D.C. Circuit, which first adopted that set of standards, has

7 been clear in case after case that there is nothing sacrosanct

8 about Vaughn, and that in any particular case you might not be

9 able to provide the kind of information that Vaughn would call

10 for. If it is information that is itself exempt from

11 disclosure under one of the FOIA exemptions.

12 JUDGE CABRANES: This Court has never formally adopted

13 or applied the Vaughn rule?

14 MS. SWINGLE: I don't believe so, your Honor. I would

15 say that the Court has really acknowledged that there could be

16 times when you can't provide that kind of information. I think

17 we've cited some of the older cases in our brief.

18 JUDGE CABRANES: From a litigation point of view, is

19 the Vaughn index a universal tool or device? Is it applied in

20 most circuits?

21 MS. SWINGLE: My understanding is that it is. Where

22 it can be applied consonant with the other exemptions, of

23 course.

24 JUDGE POOLER: It takes many forms.

25 MS. SWINGLE: It does, your Honor. It is a very

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1 flexible tool. Obviously, court after court has recognized
2 that where you can't provide a particular piece of information
3 or set of information, you can invoke the exemption to withhold
4 it. As Bassiouni discusses, there may be a case in which
5 really what you're left with is a no number no list.

6 If I might just clarify for the Court, my very kind
7 counsel who are also the trial court counsel in this and the
8 D.C. Circuit case have clarified that we did move for and
9 assert a no number no list response on remand in the D.C.
10 Circuit case.

11 JUDGE POOLER: That's still pending?

12 MS. SWINGLE: It is.

13 JUDGE POOLER: Before you go, counsel for the ACLU
14 said a new document was released every two weeks. I know he
15 meant it colloquially. Is this still happening that things get
16 released when there is pressure in informal or non-traditional
17 forums?

18 MS. SWINGLE: I would just urge the Court to remember

19 that the great bulk of disclosures every two weeks that they
20 have relied on, the virtual majority of them, if not most of
21 them, are unauthorized leaks. And there is obviously a very
22 real limit to the Executive Branch's ability to prevent
23 impermissible leaking by people who might be authorized to have
24 classified information but only with the understanding that
25 they --

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1 JUDGE POOLER: You haven't talked about the NSA leaks
2 in this case. Does that impact this case?

3 MS. SWINGLE: It does not.

4 JUDGE POOLER: That was quick. Had you thought about
5 it before this moment?

6 MS. SWINGLE: I hadn't, but I don't think they've
7 appropriately preserved it. To the extent they might have
8 argued it, they've waived it.

9 JUDGE CABRANES: What about the sequester?

10 MS. SWINGLE: It means I get paid today and today
11 only. Unless the Court wants some supplemental briefing, which
12 I might want to volunteer for.

13 JUDGE NEWMAN: One thing about a statement in your
14 brief. In the middle of page 47, there's a long sentence, "The
15 DoJ has now determined that it can provide some limited
16 additional information about classified documents," skipping a

17 word, "specifically DoJ can now disclose there are a
18 significant number of responsive classified records consisting
19 of legal advice."

20 Are you familiar with that?

21 MS. SWINGLE: That's right, your Honor.

22 JUDGE NEWMAN: Does that refer to things you did
23 release after the District Court judgment or you can now
24 release someday in the future?

25 MS. SWINGLE: So, I want to be clear. Our position is

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1 that to the extent the President and the Attorney General have,
2 after the District Court litigation here, and obviously after
3 the declarations were filed in this case, in very recent
4 months, released some previously classified information.
5 Namely, the disclosures that were made about Anwar al-Awlaki
6 and the three additional individuals, we are now in a position
7 to acknowledge, not because we are required to under FOIA, but
8 just in the interest of public disclosure, that OLC does and
9 could, were the requests filed today, and processed in the due
10 course, acknowledge the existence of some responsive documents.

11 JUDGE NEWMAN: So this is not a reference to anything
12 that has been released.

13 MS. SWINGLE: No, your Honor. This is simply --

14 JUDGE NEWMAN: This is a willingness to release more

15 things upon a proper FOIA request.

16 MS. SWINGLE: It is a willingness to try and respond
17 to these most recent public disclosures by explaining what the
18 government's position would be.

19 JUDGE NEWMAN: Don't any of their requests in this
20 litigation seek what you now say the government can provide?

21 MS. SWINGLE: I think to the extent, obviously we feel
22 there is no obligation to have this kind of ongoing running
23 obligation to re-review one's responses.

24 JUDGE NEWMAN: You come to us with a brief and urge us
25 to affirm by giving us this comfort and assurance that DoJ has

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1 now determined it can provide additional information consisting
2 of legal advice. You are now in a position to do that.
3 They're here seeking it. And you want us to affirm a judgment
4 that says don't give it to them. I don't understand.

5 MS. SWINGLE: I want to be clear. The extent of what
6 we would be in a position to acknowledge in response to a
7 proper request now would be this description. Not the
8 underlying documents themselves, not information about the
9 underlying number of documents or the number of each category
10 of documents.

11 JUDGE NEWMAN: You say you can tell them there is a
12 significant number. You can tell them that without any secret

13 being revealed.

14 MS. SWINGLE: That's correct, your Honor.

15 JUDGE NEWMAN: So why not tell them?

16 MS. SWINGLE: I think the purpose of putting this in
17 the brief was to tell them. Not because we feel there is an
18 obligation, but in the interest of public transparency.

19 JUDGE NEWMAN: They would need a new FOIA request to
20 get a Vaughn index that covers this.

21 MS. SWINGLE: To be clear, your Honor, no. What we
22 are not saying is we would produce a Vaughn index that provided
23 information about the number or dates or identity of the
24 authors and recipients of these documents.

25 What we would provide is a declaration that would

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1 explain we couldn't provide this information. We would be
2 limited to providing the information that's in the brief.

3 JUDGE NEWMAN: This says DoJ has determined it can
4 provide additional information.

5 MS. SWINGLE: And that we do so, your Honor.

6 JUDGE NEWMAN: What?

7 MS. SWINGLE: We do so. I think the information is
8 the brief is the additional information that we could and can
9 provide and have provided.

10 JUDGE NEWMAN: It is in the brief.

11 MS. SWINGLE: Right. That's not -- and I apologize

12 for any confusion. It was simply an effort to provide a little

13 more information in light of the subsequent --

14 JUDGE NEWMAN: I didn't find any legal advice in the

15 brief.

16 MS. SWINGLE: I don't think we would be disclosing

17 legal advice.

18 JUDGE NEWMAN: It says you're in a position to do it,

19 that's what you are telling us.

20 MS. SWINGLE: What we are acknowledging is the

21 existence of responsive documents.

22 JUDGE NEWMAN: No, this doesn't say that. This says

23 you've determined it can provide additional information

24 specifically consisting of records consisting of legal advice.

25 MS. SWINGLE: If I may, your Honor. Obviously, our

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1 prior no number no list response to the ACLU's request

2 acknowledged the existence of responsive documents, but it gave

3 no additional information about the nature of those responsive

4 documents.

5 In light of the most recent public disclosures, and

6 again, all of which predate the litigation in this case, what

7 we are now disclosing is the existence -- not only the

8 existence of responsive documents, but some descriptive

9 information about the nature of those responsive documents. We
10 are not suggesting that we would disclose the actual documents,
11 nor are we disclosing any additional information such as the
12 dates, the authors, the identities.

13 JUDGE CABRANES: Let me suggest this on this very long
14 sentence on page 47. Perhaps if you can submit a supplemental
15 letter brief from you by next Monday, a week from today.

16 MS. SWINGLE: Today is Tuesday, your Honor.

17 JUDGE CABRANES: Sorry.

18 JUDGE POOLER: Are you allowed to do it?

19 MS. SWINGLE: It is illegal for me to volunteer my
20 time.

21 JUDGE CABRANES: Go for it. Nobody's going to come
22 and drag you out in chains.

23 Let's aim for what's a reasonable time. Maybe the end
24 of next week. The 11th. Friday, the 11th. If you could give
25 us no more than four pages double spaced, maybe you can reframe

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1 this or explain what you had in mind in response to Judge
2 Newman's inquiries, because I think it is important.

3 MS. SWINGLE: Absolutely. I want to reiterate our
4 point that this is not properly before the Court on its review
5 of the District Court's judgment.

6 JUDGE CABRANES: That's fine. Tell us that in your

7 supplemental memoranda. It wasn't clear from our reading of

8 it. It is an extremely long sentence.

9 MS. SWINGLE: Yes, your Honor.

10 JUDGE CABRANES: Then we will give opposing counsel

11 until October 18, a week after that, to respond to anything you

12 may have submitted to us.

13 JUDGE POOLER: Meanwhile, since that's about two

14 weeks, maybe there will be some more disclosures.

15 JUDGE CABRANES: On the same schedule, could you just

16 give us your view of any additional information or whatever

17 information you think appropriate regarding the ACLU litigation

18 in the District of Columbia, just what the relevance is or is

19 not.

20 MS. SWINGLE: Yes, your Honor.

21 JUDGE CABRANES: Just focusing on that.

22 MS. SWINGLE: Absolutely.

23 JUDGE CABRANES: Do my colleagues have any questions?

24 MS. SWINGLE: Can I just ask, will the Court be

25 issuing an order?

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1 JUDGE CABRANES: So ordered. That's an order. Is

2 that okay?

3 MS. SWINGLE: Yes, I wasn't sure if the Court would

4 reduce the order to writing.

5 JUDGE CABRANES: No, that's okay. It is a common law

6 tradition. We issue opinions from the bench.

7 Finally, if you'll take two minutes, maximum, to

8 answer anything that you think has been unanswered in your

9 adversary's arguments because we've driven around a bit. You

10 may feel something requires your attention.

11 MS. SWINGLE: No, except I guess I would urge the

12 Court, obviously we have sought to present argument on the open

13 record here. And because of that, there is a limit to what we

14 can say in response to the Court's questions. Obviously the

15 District Court found the classified record here to be

16 important. The District Court issued a classified decision

17 that discussed and relied on the classified declarations. We

18 would encourage the Court to also look at that classified

19 material before deciding the case, and should the Court have

20 questions about that, we would be happy to answer them in a

21 closed session.

22 JUDGE CABRANES: All right. Plaintiffs' counsel have

23 reserved three minutes each.

24 MR. McCRAW: Thank you, your Honor. I will limit

25 myself to three points I want to make. The government

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1 expresses great horror in this idea that legal advice can

2 become final policy. That somehow the government will no

3 longer be able to give advice.

4 This is not new. This is basic Exemption 5 under
5 FOIA. That to be under 5, it has to be a deliberative and
6 pre-decisional. And the cases are clear that when something
7 ceases to be that kind of advice -- the government clearly has
8 the right to give advice. But if it becomes policy, it is no
9 longer pre-decisional.

10 JUDGE POOLER: Isn't it still attorney-client
11 privilege that they're worried about losing their clients
12 because they had to disclose it?

13 MR. McCRAW: I separate that, your Honor, into two
14 pieces. One is it also ceases to be attorney-client for the
15 reason that we stated our brief.

16 In terms of its practical effect, that's not new law.
17 That's been the law for years under FOIA. Whether it has that
18 effect or not, I don't know. All I know is that the Courts
19 have repeatedly said that. As was said in Public Citizen, a
20 document that is nothing more than explaining existing policy
21 cannot be considered deliberative. There is nothing radical
22 about that. If it becomes a policy, it's not deliberative.

23 In Tax Analyst 2 if the Office of Chief Counsel's
24 final legal position concerning the Internal Revenue Code, if
25 the position is the final legal position of the chief counsel

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1 about the meaning of the Internal Revenue Code, it no longer is
2 protected by 5.

3 Now, second, if I might move on, we're repeatedly
4 criticized for speculating on what the DoD memo is. The reason
5 we are forced to speculate is the government has simply failed
6 to do an explanation that Brennan Center requires. And that is
7 to explain the circumstances under which it was developed.

8 In Brennan, important point, OLC walks in and says,
9 and the Court relies on this, that OLC was merely advising. No
10 statement here about OLC's role in the development of policy
11 and standards for targeted killing. What was their role? That
12 can't be a classified secret. They should be telling us so we
13 don't have to speculate on what the memo means.

14 Finally, because I see my time is up, there has been
15 discussion about the adequacy. Why aren't we satisfied with
16 the White Paper. The answer in one sense is this. FOIA
17 creates a presumption of openness. The government has the
18 obligation to cite an exemption and say that is not public.
19 The presumption is overcome. It is not a question of is it
20 adequate. It is a question of whether they have shown that
21 more documents can't be release in accordance with the law.

22 We saw in terms of the White Paper that afterwards
23 much, much criticism of how inadequate it was. That that
24 couldn't really be the legal basis for these operations.

25 The burden here is on the government to show that FOIA

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1 allows them to withhold, not on us to show that we need more.

2 Thank you, your Honors.

3 MR. JAFFER: Just a few quick points. First, maybe a
4 better answer to the question asked earlier about why we want
5 the memos, given that so much of the legal analysis has already
6 been released. I think that the simple answer to that question
7 is that the details matter.

8 During the last administration there were officials
9 who told the public that the country didn't engage in torture,
10 and it turned out that OLC memos defined torture in a
11 particular way that turned out to be important. It is possible
12 that terms that the government has used in its public, legal
13 justifications for the program are defined in unusual ways in
14 the memos. We would like to know that. We think the public
15 has a right to know that.

16 Second, the argument about working law. I just wanted
17 to point the Court to one argument that the government makes in
18 its brief. That these memos aren't working law because they
19 don't have a legal effect on private parties.

20 That to us is a difficult argument to understand. Our
21 understanding of these memos is that they set out the
22 circumstances in which the government can carry out targeted
23 killings of American citizens. It is hard to think of any
24 memos that could have a more direct effect on the right of
25 private citizens.

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1 JUDGE NEWMAN: I took that argument in your brief. I
2 thought those cases meant affect on the public in the sense
3 that the agency rule obliged the public to conform its conduct
4 to certain things. So the agency had to be clear what the
5 public obligation was. And that's why I thought your
6 argument -- it is a good rhetorical argument. I appreciate
7 that Mr. al-Awlaki had a very big interest in what was going
8 on. But I thought those cases meant the public's obligation to
9 conform its conduct. Which is quite a different matter from
10 being the victim of a killing.

11 MR. JAFFER: We have a broader reading of those cases,
12 Judge Newman. But I think ultimately the Brennan Center case
13 lays out the circumstances in which memos like these can become
14 working law, and one of the ways in which they become working
15 law is to be effectively binding on the agency. Maybe
16 ultimately it doesn't matter whether they become working law
17 through this other channel or become working law because --

18 JUDGE NEWMAN: You take those cases to mean anything
19 that affects a member of the public.

20 MR. JAFFER: It is an argument in response to the
21 government's argument that these memos had no affect on the
22 public. I think that argument is wrong. Because these memos,
23 I think more than probably any other OLC memos that have been

24 written over the last decade, have a direct affect on members
25 of the public.

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1 Then if I could just take 10 seconds to respond to the
2 question you were raising earlier, Judge Cabranes, about the
3 Vaughn requirements.

4 Vaughn ultimately is just a way of operationalizing
5 FOIA. It is a way of allowing the courts to deal with what
6 Congress has asked the courts to do. I think if Vaughn didn't
7 exist, you would have to invent it or invent something very
8 similar. Thank you.

9 JUDGE CABRANES: Thank you very much. We'll reserve
10 decision and we are adjourned.

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