

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE NEW YORK TIMES COMPANY, :
CHARLIE SAVAGE, SCOTT SHANE, :
AMERICAN CIVIL LIBERTIES UNION, :

FOUNDATION, :
:
Plaintiffs-Appellants, :
v. :
:
UNITED STATES DEPARTMENT OF :

Docket Nos.
13-422(L), 455(Con)

TOP SECRET [REDACTED]

[U] Defendants-appellees the Department of Justice (DOJ), the Department of Defense (DOD), and the Central Intelligence Agency (CIA), respectfully petition for rehearing of this Court's April 21, 2014 decision with respect to three distinct, limited categories of classified and privileged information.

[REDACTED]

[U] The Court should (a) permit further redactions to the Court-redacted version of the OLC-DOD Memorandum to protect this information from compelled disclosure; (b) make modifications to its decision to correct certain isolated factual errors identified below (in notes 1 and 2) before unsealing that

[REDACTED]

[U] The public version of the panel's April 21 decision contained certain redactions made at the request of the government, including to preserve its opportunities for further review. *See* slip op. 2 n.1. The Court indicated that, if its decision is not altered in the course of any further review, the opinion will be filed

TOP SECRET [REDACTED]

Compelled disclosure of that information, which is classified, protected by statute, and/or privileged, reasonably could be expected to cause exceptionally grave damage to national security and to significantly undermine the government's ability to engage in confidential deliberations and to seek legal advice.

[REDACTED] 1. The Court's decision explicitly upholds the withholding of information about [REDACTED], which is classified at the highest levels. *See slip op.* 40. The Court explains that "[w]e will

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[Redacted]

[Redacted]

The Director of the CIA's National

Classified declaration filed in the district court

[Redacted]

TOP SECRET [REDACTED]

III. 2. The panel's decision reverses the district court's holding that the

[REDACTED]

OLC-DOD Memorandum may be withheld in full under Exemption 5. Rather than following the usual practice of remanding to the district court for admission of the Memorandum into the record and to permit the government to propose specific line-by-line redactions and to submit declarations supporting them, however, this Court took the unusual step of attaching the OLC-DOD Memorandum to its decision and making its own redactions. But the Court's legal rulings—that the government has officially disclosed that the Agency had a role in the operation that killed Anwar al-Awlaki, and that the government waived privilege for legal analysis in the OLC-DOD Memorandum—do not encompass other, discrete information in that Memorandum that remains classified and privileged and thus

[REDACTED]

* the citation to and description of an OLC memorandum cited at pages [REDACTED];

* a citation to a memorandum to OLC at page [REDACTED]; and

* the citation and description of a memorandum at page [REDACTED].

* the phrase immediately following "airplane attack, and" through the end of the sentence at page 32, lines 10-11 (which discloses information from classified sources and methods);

* the phrase [REDACTED];

* the phrase [REDACTED];

* the phrase [REDACTED].

* a classified code word at the end of [REDACTED]. The Court redacted these classification markings from the rest of the document, but appears to have inadvertently left this partial classification marking unredacted.

* the citation at page 25 n.31 to information regarding certain operations.

* the citation to and description of an OLC memorandum at pages 16 nn. 14 & 16.

* the carryover paragraph at pages 31-32. The contents of this paragraph, which cites to and discusses [REDACTED], are privileged. For the same reasons, redactions must be made at in the carryover paragraph at pages 38-39; and page 41 in three places (one of which, in context, is also classified;

[U] The Court's decision does not address these discrete items of information or the exemptions that apply to them. The identified information should be redacted from the version of the OLC-DOD Memorandum that is

permitted in "cases implicating national security interests"), *rev'd*, 493 U.S. 146 (1989).

refuse to confirm or deny the existence of certain responsive documents, or to
disclose information about the number or nature of any such responsive

~~TOP SECRET~~ [REDACTED]

[REDACTED] [REDACTED] to national security and to damage the government's

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

ability to engage in confidential deliberations and to seek confidential legal advice.

[REDACTED] [REDACTED] [REDACTED] [REDACTED] the Court classified in its May 28

[REDACTED]

[REDACTED]. None of the public statements referenced in the Court's decision concerns [REDACTED]. It thus appears that the proposed disclosure of these listings

Other information in the *Vaughn* index that the Court has

~~TOP SECRET~~ [REDACTED]

[REDACTED] comprehensive analysis of

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] of this petition these examples

[REDACTED]

TOP SECRET [REDACTED]

Respectfully submitted,

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