17-157

IN THE

United States Courtuf Apeals

CORPORATE DISCLOSURE STATEMENT

The American Civil Liberties Union and the American Civil Liberties Union Foundation are affiliated non-profit membership corporations. They have no stock and no parent corporations.

TABLE OF AUTHORITIES

Cases

INTRODUCTION

Over the past seven years, in an effort to inform the Amer

closed doors. The ruling at issue is hidden behind redactions, as are the

Cou perhaps even without

deciding whether the information at issue is actually a secret.

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government designates individuals or groups for targeted killing; (3) before-the-fact and after-action assessments of civilian or bystander casualties; and (4) the number, identities, and legal status of those killed or injured.[1] Joint Appendix JA) 4. The Request sought information from the Department of Justice , the DOJ Office of Legal Counsel

II. District Court Proceedings

A. Initial District Court Litigation

After exhausting administrative appeals, the ACLU filed suit on March 16, 2015. JA 12. The government claimed that most of the responsive records fell within the narrow exemptions to FOIA, specifically invoking 5 U.S.C. § 552(b)(1) 52(b)(3) , among others not relevant here. The parties filed cross-motions for summary judgment.

[1] The district court stayed litigation concerning prongs (3) and (4) of the Request *ACLU v. CIA*, 109 F. Supp. 3d 220 (D.D.C. 2015), *aff'd sub nom. ACLU v. DOJ*, 640 (D.C. Cir. 2016). On September 9, 2016, the parties filed a proposed Joint Stipulation and Order of Dismissal of Complaint, dismissing prongs (3) and (4) of the Request with prejudice, which the district court signed on September 12, 2016. *See* Joint Stipulation and Order of Dismissal of Compl., *ACLU v. DOJ*, No. 15 Civ. 1954 (Sept. 9, 2016), ECF No. 92; Joint Stipulation and Order of Dismissal of Compl., *ACLU v. DOJ*, No. 15 Civ. 1954 (Sept. 12, 2016), ECF No. 93.

cheduling orders, the ACLU limited

otherwise-applicable FOIA exemptions. *See* Mem. of Law in Support of Pls. Mot. for Partial Summ. J. at 4, *ACLU v. DOJ*, No. 15 Civ. 1954 (Aug. 28, 2015), ECF No. 33; Order Modifying Scheduling Order ¶ 2, *ACLU v. DOJ*, No. 15 Civ. 1954 (July 9, 2015), ECF No. 25. Together with its brief, the ACLU submitted a table listing specific public statements in which government officials acknowledged -killing program. JA 23 63. In the waiver table, the ACLU included public statements from government officials establishing that the U.S. government conducts targeted killings in Pakistan. JA 48 50. Specifically, the ACLU listed:

(1) an August 2013 statement by then Secretary of State John Kerry;

(2) a June 2012 statement by then Press Secretary Jay Carney;

(3) a May 2009 speech by then CIA Director Leon Panetta; and

(4) a June 2010 interview with then CIA Director Leon Panetta.

JA 48 50 (waiver table); *see* JA 902 05 (Kerry interview); JA 400 28 (Carney statement); JA 138 51 (May 2009 Panetta speech); JA 173 87 (June 2010 Panetta interview).

Most relevant to this appeal is the disclosure made by Secretary of State Kerry on August 1, 2013, while on a diplomatic mission to Pakistan. Secretary Kerry was interviewed on Pakistan TV by a journalist who specifically asked:

> There has been a lot of tension between the United States and Pakistan, especially vis-à-vis the subject of drones. People in Pakistan feel that not only has it been causing human casualty in Pakistan, but also it has been kind of a blatant disregard of the territorial sovereignty of Pakistan. Can we expect a cessation in these drone strikes, which are causing and mobilizing a lot of sentiment against the Pakistani Government and the United States?

JA 903. In response, Secretary Kerry stated:

> Well, President Obama is very, very sensitive and very concerned about any kind of reaction to any kind of counterterrorism activities, whatever they may be. And the President has spoken very directly, very transparently, and very accountably to our to all of our efforts. We want to work with the Government of Pakistan, not against it.
>
> This is a program in many parts of the world where the President has really narrowed, whatever it might be doing, to live up to the highest standards with respect to any kind of counterterrorism activities. And nk the program will end as we have eliminated most of the threat and continue to eliminate it.

JA 903. The journalist then asked Secretary Kerry

JA 903. , I

Pakistan, including through the use of drones. The government disputed this

See

appeal brief, but it is clear that the issue on appeal involves official acknowledgment of a fact. *See* 9 (was based [REDACTED]. On the basis of [REDACTED], the district court made the following ruling: [REDACTED]. The district court found, however, that [REDACTED]. Based upon this reasoning, the district court found that the United States had officially acknowledged [REDACTED].); *see also* Addendum (partial

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claims of potential harm that might result from disclosure have no bearing on the official-acknowledgment question, or are otherwise baseless.

A. [redacted] is an official acknowledgment.

In its redacted brief, the government appears to advocate for a rigid application of the three-pronged test for official acknowledgment laid out in *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009) (explaining that: (1) the

Court was required to analyze the OLC DOD Memorandum, even if those statements did not amount to official acknowledgments themselves. *N.Y. Times I*, 756 F.3d at 115; *see Florez*, 829 F.3d at 186

must be wholly

disclosures . . . may well shift the factual groundwork upon which a district court

Here, though, the outcome is the same regardless of how rigidly the Court applies the official-acknowledgement test: Secretary Kerry officially acknowledged that the United States uses drones in Pakistan

ecretary Kerry

This is a program in many parts of the world where the President has really narrowed, whatever it might be doing, to live up to the highest standards with respect to any kind of counterterrorism activities. And *the program* will end as we have eliminated most of the threat and continue to eliminate it.

government provides this Court

Br. 32, but the cases it cites have no bearing here.[11] The government apparently

error, *see* *Mobley v. CIA*, 806 F.3d 568, 584 (D.C. Cir. 2015); *Wilson v. McConnell*, 501 F. Supp. 2d 545, 556 n.24 (S.D.N.Y. 2007)). But the comparison is absurd, both on the facts and the law. In *Mobley*, the D.C. Circuit held that when a lower-

response. 806 F.3d at 584. In *Wilson*, a district court concluded that the

representing his government in a public setting disclosed information and the government then sought to retract his acknowledgment in litigation arising years later.

Behind its redactions, th

Wilson, 586 F.3d at 186 As

> [ing] the Congress and American
>
> *Secretary of State*, U.S. D

State, https://www.state.gov/secretary/2017/index.htm (last visited July 14, 2017). He was the quintessential person officially, and the public is entitled to take his comments to be the true and accurate positions of the U.S. government. *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990) (quoting *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1370 (4th Cir. 1975) hing may be so or even, quoting undisclosed sources, to say that it is so; it is quite

The public and foreign governments were not left in doubt about whether Secretary

See, e.g., *Afshar*, 702 F.2d at 1134 (explaining that official, as opposed to unofficial,

context, [t]here comes a point where . . . Court[s] should not be ignorant as *ACLU v. CIA*, 710 F.3d at 431 (Garland, J.) (quoting *Watts v. Indiana*, 338 U.S. 49, 52 (1949) (Frankfurter, J.)).

B.

plans, intelligence activities, sources and methods, ; *see also id.* at 118 Apparently not disputing that this fact has been common knowledge for some time, the Government asserts the importance of concealing any offi identity [as the second agency involved in the killing of al-Aulaqi]. The argument comes too late.

confuses cause and effect, suggesting that it is the district cou *ruling* that may cause harm to national security, rather than the acknowledgment itself. *See, e.g.*

drones in Pakistan would cause foreign partners and adversaries to react negatively comments did not.

easily cast a blind eye on official disclosures made by the [U.S. government]

(alteration in original) (quoting *Wilson*, 586 F.3d at 186). But that argument is conclusively undercut by the fact that

U.S. drone program in Pakistan it has already, and for years before the district court issued its opinion, publicly excoriated that program.

releases officially and publicly condemning U.S. drone strikes in Pakistan no fewer than four times in 2012,[12] twenty times in 2013,[13] eleven times in 2014,[14] seven times in 2015,[15] and three times in 2016.[16] In these statements, the Pakistani

[12] *See* Pakistan Ministry of Foreign Affairs Press Releases of April 29, 2012; May 5, 2012; August 23, 2012; and October 11, 2012.

[13] *See* Pakistan Ministry of Foreign Affairs Press Releases of April 15, 2013; May 29, 2013; July 3, 2013; July 15, 2013; July 29, 2013; August 31, 2013; September 6, 2013; September 22, 2013; September 28, 2013; September 29, 2013; September 30, 2013; October 31, 2013; November 1, 2013; November 2, 2013; November 21, 2013; November 22, 2013; December 3, 2013; December 9, 2013; December 19, 2013; and December 26, 2013.

[14] *See* Pakistan Ministry of Foreign Affairs Press Releases of June 12, 2014; June 18, 2014; July 11, 2014; July 19, 2014; August 7, 2014; September 24, 2014; September 28, 2014; November 11, 2014; November 26, 2014; December 4, 2014; and December 23, 2014.

[15] *See* Pakistan Ministry of Foreign Affairs Press Releases of January 5, 2015; January 15, 2015; January 19, 2015; May 18, 2015; May 19, 2015; August 7, 2015; and September 2, 2015.

[16] *See* Pakistan Ministry of Foreign Affairs Press Releases of May 23, 2016; June 2, 2016; and June 10, 2016.

government specifically condemns the U.S. targeted killings as a violation of

See, e.g., Press Release,

Concerns over Drone Strikes (Nov. 2, 2013), http://mofa.gov.pk/pr-details.php?mm=MTUxOA. Echoing the sentiments expressed by Ms. Chaudhry in her questions to Secretary Kerry, these official Pakistani statements emphasize the human and political costs of U.S. drone strikes, stating that they result in civilian casualties *See, e.g.*, Press

Drone Strike (May 19, 2015), http://mofa.gov.pk/pr-details.php?mm=Mjc5Nw. Time and

See, e.g., *id.*

Additionally, the Pakistani government has raised and then publicly

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ation of

[18] The Prime Minister informed the General

[19] In addition, Pakistan sponsored a resolution on the use of armed drones, which was adopted by the United Nations Human Rights Council in March 2014.[20]

-killing program in Pakistan, lodged through high-level meetings with U.S. officials,

Conveyed Concerns over Drone Strikes (Nov. 2, 2013), http://mofa.gov.pk/pr-details.php?mm=MTUxOA

speeches at the United Nations, and at least forty-five press releases, it clearly has U.S. strikes. Instead, it has reacted to the reality of the U.S. drone program. When the government of Pakistan has recognized that U.S. targeted killings using drones are carried out on its soil, the alternative fiction of an official the government seeks to perpetuate would apply only with respect to U.S. courts and the American public. This Court should reject the gove extraordinary appeal and l-acknowledgment ruling.

II. The district c ruling was appropriate under FOIA.

The government also contends that the ruling should be vacated for an independent reason: that it is unnecessary and under FOIA for the court to assess first the validity of official acknowledgment as applicable to one or more of exemption claims if a specific document may be withheld on alternative grounds. 38. In making that argument, the government asserts that this Court should not even consider whether the ruling was correct as a matter of law. . 35 n.9. The is extreme, would subvert the purposes of FOIA, and would waste judicial resources. District courts often assess the validity of all of the cross-cutting claims of FOIA exemptions, even if not all of the rulings ultimately prove to be That approach reflects common sense because it is consistent with the purposes and

Id. But these arguments are

was tethered to agency records. As

acknowledgment in question. *Id.* at 36. The government invoked various FOIA exemptions, and the ACLU countered that the information in question had been officially acknowledged such that the government could not rely on that information to justify those exemptions. The district court proceeded exactly as the statute contemplates: Under the statute, when the parties disagree about the

reviews the dispute *de novo* to determine whether the claimed exemptions apply. *See* 5 U.S.C. § 552(a)(4)(B). In evaluating the merits of the official-acknowledgment argument, the district court acted entirely in line with its mandate.

Moreover uling on official acknowledgment was consistent with the purposes underlying FOIA

extraordinary vacatur remedy would pervert those purposes.

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withholding of any info-0.0as1(o)-3(f -3(f an04 Tf1 0 0 1 485.26 159.86 Tm 0.00624 5c-0.0031

Cir. 1993)

Dep't of Air Force v. Rose

process from public view makes the ensuing decision look more like fiat, which

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In FOIA cases, when the government invokes multiple exemptions to withhold a single document, district courts frequently choose to rule on the validity of each of the asserted exemptions regardless of whether it ultimately determines the case. *See, e.g.*, *Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 517 (S.D.N.Y. 2010) (concluding that although certain documents could not be withheld under Exemption 5, they could nonetheless be withheld under Exemptions 1 and 3); *N.Y. Times Co. v. DOJ*, 872 F. Supp. 2d 309, 316 17 (S.D.N.Y. 2012) (first concluding that a disputed record was withholdable under Exemption 1, and then separately concluding that the record was also withholdable under Exemption 3); *ACLU v. DOJ*, No. 15 Civ. 9002, 2017 WL 213812, *3 (S.D.N.Y. Jan. 18, 2017) (same); *N.Y. Times Co. v. DOJ*, No. 14 Civ. 3777, 2017 WL 713560, *11 (S.D.N.Y. Feb. 21, 2017) on 3 provides an alternative basis [to

Although courts are not required to rule on each of the asserted exemptions if a FOIA case may be resolved without doing so, *see Wilner v. NSA*, 592 F.3d 60, 72 (2d Cir. 2009), that practice makes good sense. As this Court has remarked, judicial analysis of each of the government s exemption claims is often interrelated and overlapping. *See, e.g.*, *N.Y. Times I*, 756 F.3d at 119

discussion concerning loss of Exemption 5 is applicable to loss of Ex

Critically, consideration of all claimed exemptions may facilitate the district

segregability mandate

establishes an exemption, it must nonetheless disclose all reasonably segregable,

none *Assassination Archives &*

Research Ctr. v. CIA, 334 F.3d 55, 58 (D.C. Cir. 2003). It is a better u.27 Tm[(e.).0055o1 0 0 1 2

(or go back to eliminate) their analysis of particular or overarching legal issues after concluding that the government could withhold a document under an enumerated exemption. However, if the plaintiff appealed, the court of appeals would be left to review only one explained legal ruling. If the court of appeals disagreed with that legal ruling, it would likely

consideration in the first instance of any other exemption that the government had invoked. This process has the potential to add years of litigation to even straightforward FOIA cases.

Given the good sense in the course the district court pursued here, and the practice of courts in FOIA cases more generally, it is unsurprising that the government has provided no examples of cases in which a court of appeals vacated a district court ruling as to any particular FOIA dispute solely because the ruling

e outcome of the case. The only case the government cites to support its proposition is *ACLU v. DOJ*, 844 F.3d 126 (2d Cir. 2016); *see*

9, which was in an entirely different pos- 40038;

2015 WL 4470192, at *5 6. On appeal, this Court declined to rule whether the additional fact had been officially acknowledged but more telling is the Court approach to the other six facts that the district court ruled *had been* officially acknowledged. After holding that no documents should be ordered released, the Court

acknowledged facts or otherwise strip them from the district court opinion. Instead, the Court explained that it agreed with the distri

ACLU

v. DOJ, 844 F.3d at 132; *cf. Assassination Archives & Research Ctr.*, 334 F.3d at 56 & n.1 (affirming the district court ruling on the basis of Exemption 3 and declining to rule on the Exemption 1 claim, even though the district court had concluded that the document was withholdable under both Exemptions 1 and 3).

approach and ruling were consistent with standard court practice, efficient, and in accord with the purposes and design of FOIA. The government has not come close to justifying the extraordinary remedy it seeks, and its request should be denied.

III. The Court should order additional briefing if it would be useful.

The ACLU has

comprehensively as possible. However, almost 60% of the publicly filed version of

opening brief is redacted, and the government has eliminated

every reference to the district court ruling that it challenges from its brief and the opinion itself.[23] It is therefore possible that the ACLU misconstrued or failed to

Extraordinary and extensive redactions like those in this case undermine the adversarial process, prejudicing the ACLU,

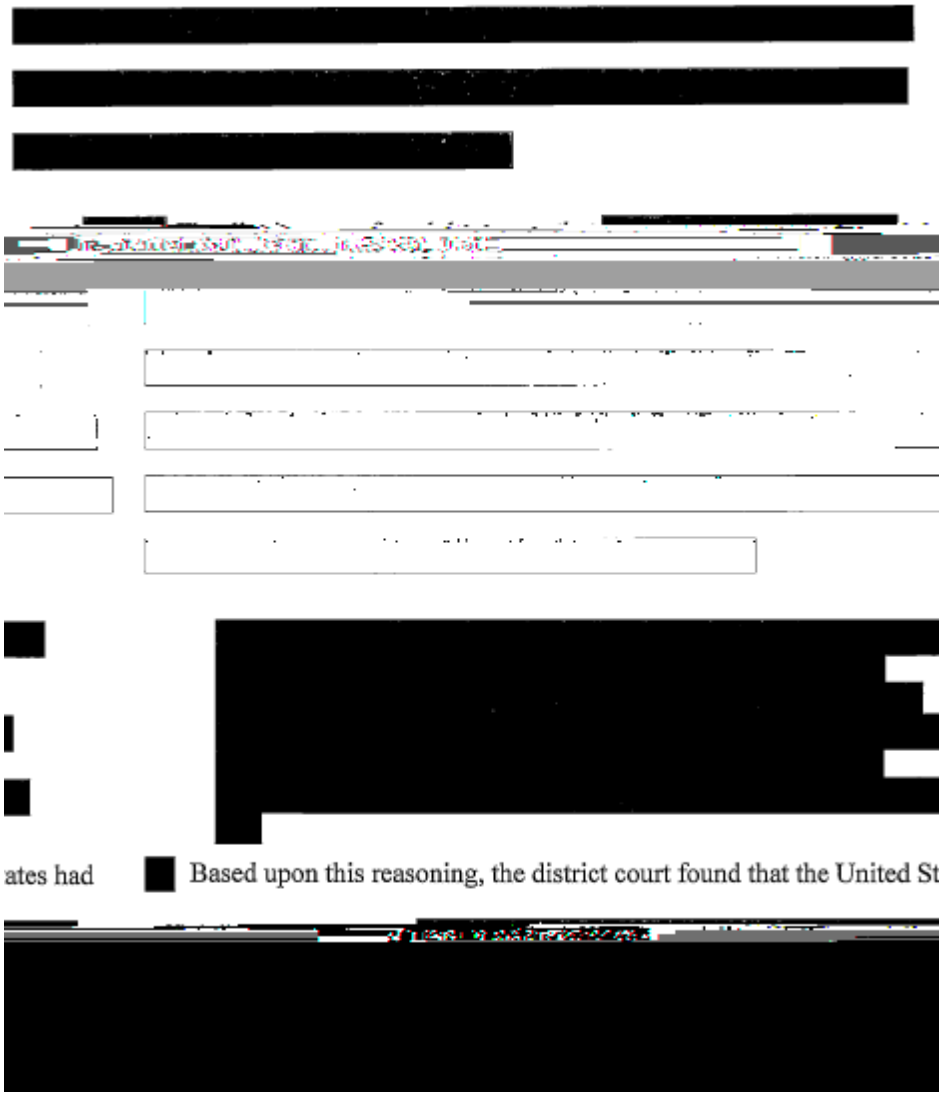
decision-making process. *See Penson v. Ohio*, 488 U.S. 75, 84 (1988)

The ACLU seeks to litigate this case fairly, and to be as helpful as possible to the Court in adjudicating it. To that end, the ACLU asked the government to review again the overnment filed its appellate brief so that the parties could meaningfully address the relevant issues on appeal. In response, the government asserted that no further information (fo)-4(rm-3(e

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

I hereby certify that this brief complies with Fed. R. App. P. 32(a)(7)(B) because it contains 10,720 words, excluding the portions of the brief exempted by Rule 32(f), according to the count of Microsoft Word.

ADDENDUM



ates had Based upon this reasoning, the district court found that the United St

CERTIFICATE OF SERVICE

On July 14, 2017, I filed and served the forgoing BRIEF FOR PLAINTIFFS APPELLEES via this Court s electronic-filing system.

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/s/ Hina Shamsi
Hina Shamsi
Counsel for Plaintiffs–Appellees