

CIA AIMS TO HIDE ITS SEKRIT FILES AT SECOND CIRCUIT AGAIN

Roughly four years ago, then National Security Advisor James Jones submitted a nearly unprecedented sealed declaration to the Second Circuit in the ACLU's torture FOIA lawsuit. In it he argued the government needed to keep secret a short reference making it clear the torture program operated under Presidential authorization.

The following May – perhaps not coincidentally just months after America's first attempt to execute Anwar al-Awlaki by drone strike and as OLC was scrambling to come up with some justification for doing so – the Second Circuit granted the government's request, deeming the language an intelligence source or method, and giving the request particular weight because the language pertained to intelligence activities unrelated to torture.

On October 1, the Second Circuit heard the ACLU and NYT's appeal of Colleen McMahon's decision to dismiss their FOIA on documents relating to the Awlaki killing.

At the hearing, this exchange occurred.

JUDGE NEWMAN: In one of your sealed excerpts from your briefs, I am not going to disclose a secret. There is a statutory reference from Title 50. You're probably familiar with it. It has to do with whether affidavits are sufficient. It's Title 50. I think it's Section 430(f)(2). Does that ring a bell at all?

MS. SWINGLE: I believe so, your Honor.

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

MS. SWINGLE: I can check and provide the

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

JUDGE NEWMAN: Do they have it there?

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

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

Citing this passage, on Thursday the government asked to submit an ex parte filing clarifying both the answer Swingle gave, as well as the answer to an unidentified question raised in the hearing.

During the oral argument on October 1, 2013, a member of the panel asked the government to clarify a citation contained in a classified declaration in the record. See Tr. 73-74. The government's proposed supplemental classified submission provides the clarification requested by the Court. The proposed supplemental classified submission also provides an additional answer to a question posed during oral argument that could not be adequately and completely answered in a public setting.

Both the NYT and the ACLU objected to this ex parte clarification of the answer (the NYT doesn't object to such a filing pertaining to the citation), given that the Court didn't ask for any further clarification.

The Government's motion does not at any point include information about the nature of the "additional answer" that the Government is providing to the Court

or the question to which it is addressed. The Court did not request such a supplemental answer, and there is no basis for a party to unilaterally provide itself with a further opportunity to extend argument – especially in secret – after the conclusion of oral argument.

Now, it's entirely unclear what the erroneous citation in the classified government brief is. Though 50 USC 431(f) may describe this section of the National Security Act on to CIA files being FOIAed (though 50 USC 403 includes definitions and roles of CIA).

(f) Whenever any person who has requested agency records under section 552 of title 5, United States Code (Freedom of Information Act), alleges that the Central Intelligence Agency has improperly withheld records because of failure to comply with any provision of this section, judicial review shall be available under the terms set forth in section 552(a)(4)(B) of title 5, United States Code, except that–

(2) the court shall, to the fullest extent practicable, determine issues of fact based on sworn written submissions of the parties;

In which case, surprise surprise, this is about hiding CIA files.

But we already knew that.

And unsurprisingly, the two questions that DOJ's Sharon Swingle referred back to the classified documents to answer also pertained to the CIA's SEKRIT role in drone killing Americans.

One – which gets repeated several times – pertains to why DOJ's prior disclosure that OLC wrote one drone killing memo for DOD forces DOJ to use a No Number No List response because

admitting there were other OLC memos would also entail admitting an Other Government Agency carries out those drone killings.

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

MS. SWINGLE: With respect, your Honor, it says that OLC on five separate instances wrote advice memoranda about the use of targeted lethal force. It now tells us, and I do think this is critical, that on four of those instances, it did not involve the Department of Defense. Because we have acknowledged there is a single responsive document as to the Department of Defense. I think that is really significant information. And it is not information that has been made public by the U.S. government.

JUDGE NEWMAN: That's a secret.

MS. SWINGLE: It is.

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

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

JUDGE NEWMAN: No one is asking for that.

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

emphasis]

I know I – and I suspect, many of the others who have been following this suit – had no idea that the disclosure of a single DOD OLC memo ruled out there being other DOD memos. Thanks to Swingle for making it crystal clear that is the case. And Sharon? If you ever want to play poker, I'm game.

The other instance where Swingle refers to classified documents in an answer to the Court is closely related, though more interesting. In correcting Judge Rosemary Pooler's assertion that DOJ prepared the drone killing White Paper for the Intelligence Committees, Swingle pointed to the District Court decision.

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

MS. SWINGLE: Yes.

JUDGE POOLER: I thought you prepared it for the Senate Intelligence Committee and the House Permanent Committee on Intelligence. Didn't you?

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

JUDGE NEWMAN: I'm surprised to hear you say the government should be penalized. You are aware with the attorney-client privilege comes the waiver doctrine and the privilege is waived in cases all over America. Lawyers don't get up and say we should be penalized. If there is a waiver, there is a waiver. And sometimes the waiver arises because of a significant disclosure. So no one is talking about penalizing you. The

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

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

It's odd that Swingle refers to the District Court decision seemingly to answer a question about the White Paper, since the White Paper was not publicly released until several weeks after McMahon released her opinion. If McMahon addressed it, it would suggest the government provided her a copy.

But recall that the White Paper is dated November 8, 2011, during precisely the period when White House Counsel Kathryn Ruemmler was arguing in a situation room meeting they couldn't release the Awlaki memo because doing so would weaken the government stance in FOIA lawsuits fighting against releasing that same memo (?!). And the White House stalled the White Paper release to the Judiciary – not Intelligence – Committees until the day after DOJ had responded to ACLU's FOIA.

I highly doubt the government told McMahon they had written a White Paper so as to gain advantage in the very lawsuit by ACLU she was presiding over. But I also doubt the timing is coincidental. And I wouldn't be surprised if they provided some excuse for how ACLU lawsuits are so dangerous they make transparency itself dangerous – more so even than drone assassinations in a democracy!

In any case, Swingle points to the classified District opinion to explain why they could release the White Paper but not an OLC memo, or something like that.

Again, these are very closely related, which makes me suspect that's the secret mulligan DOJ is trying to win for itself: another opportunity to explain how it can release the White Paper under FOIA to Jason Leopold but not release the OLC memo it is based off of.

For the record, I don't think this is another case where the government argues that the existence of a Presidential Finding authorizing torture or killing – actually, the same Glove Come Off Memorandum of Notification – is itself a source or method (the government brief, which marks its classified sections, seems to have more interesting things to say about its Exemption 3 claims than its Exemption 1 claims).

But it does seem to be arguing that even acknowledged covert programs are immune from FOIA, as if covert status is not about secrecy but about deniability and nothing more.