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1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3 -----x
4 AMERICAN CIVIL LIBERTIES
5 UNION,
6 AMERICAN CIVIL LIBERTIES UNION
7 FOUNDATION,

8 Plaintiffs-Appellees,

9 v.

10 18-2265-cv

11 CENTRAL INTELLIGENCE AGENCY,

12 Defendant-Appellant,

13 UNITED STATES DEPARTMENT OF
14 DEFENSE, UNITED STATES
15 DEPARTMENT OF STATE, UNITED
16 STATES DEPARTMENT OF JUSTICE,
17 INCLUDING ITS COMPONENTS THE
18 OFFICE OF LEGAL COUNSEL AND
19 OFFICE OF INFORMATION POLICY,

20 Defendants,

21 -----x
22 New York, N.Y.
23 June 13, 2019
24 11:45 a.m.

25 Before:

HON. ROSEMARY S. POOLER,
HON. DENNY CHIN,
HON. PIERRE N. LEVAL,

Circuit Judges

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APPEARANCES

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ALSO PRESENT: CAROLINE SMITH, CIA

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1 (Case called)

2 JUDGE POOLER: Good afternoon. Please, sit down.

3 Thank you.

4 Now I will call the last case on the calendar, a
5 portion of which we will hear in open court and that case is
6 American Civil Liberties Union v. the Central Intelligence
7 Agency. We will hear from the ACLU as appellees but they will
8 do this here in open Court.

9 MR. LADIN: Thank you, your Honor. Dror Ladin here
10 for the American Civil Liberties Union.

11 JUDGE POOLER: I know.

12 MR. LADIN: This is unusual so I'm going to do my best
13 without the benefit of what the government is offering. I
14 think in order to do that I would like to begin with just a
15 couple legal points on Exemptions 1 and 3, and then maybe offer
16 our view as to how the *ex parte* proceeding should take place.

17 So, first of all, your Honor, we would submit that the
18 most relevant case for considering the Exemption 1 issue in
19 this case is *New York Times v. Department of Justice* which it
20 is in both briefs, obviously. There the key piece of
21 information that this Court was analyzing was an undisclosed
22 discussion of a statutory authority that the government was
23 analyzing as part of a drone mission and the government's
24 argument there was that Exemption 1 covered the statutory
25 analysis notwithstanding the fact that the statutory analysis

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1 would ordinarily not be an intelligence source or method, the
2 idea was that in some contexts this public information could be
3 properly withheld because this disclosure would tend to reveal
4 a classified fact or increase the risk of such revelation.

5 This Court evaluated that claim and it said, given everything
6 else that has been disclosed in this document, which is to say
7 the facts that were disclosed, the other statutory analysis
8 that had been disclosed, this additional statute, which both
9 sides agreed was not public, could be disclosed without any
10 further risk to any properly classified facts. And that's
11 highly relevant here because a large part of what the parties
12 have been discussing, again to the extent that we know what we
13 are discussing which is limited under the circumstances, is the
14 redaction of public newspaper articles from this retrospective
15 account and those public newspaper articles, both sides would
16 agree, are not ordinarily classified, they are in fact public.

17 Under certain circumstances, and we don't take issue
18 with it, public materials may be properly withheld as part of a
19 classified document but there has to be a logical and plausible
20 reason why. So, in *New York Times* this Court made precisely
21 the kind of *can he novo* judgment as to whether it was still
22 logical and plausible to hold this undisclosed public
23 discussion -- or excuse me, undisclosed discussion of public
24 materials and decided that this could be disclosed.

25 The second sort of exemption arena we are discussing

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1 is Exemption 3 and there I think, if I am reading the
2 government's briefs correctly, they're stretching Exemption 3
3 far beyond what the Supreme Court contemplated in *CIA v. Sims*,
4 or what the D.C. Circuit was talking about in *Fitzgibbons*.

5 I think some of the government's arguments about
6 Exemption 3 suggest that in a way it swallows Exemption 1, that
7 there is no document that this Court could review de novo as to
8 Exemption 1 that it could nonetheless order release under
9 Exemption 3. And I think that's problematic in this case and
10 out of step with *CIA v. Sims*.

11 So, in *Sims* what was being discussed by Court and the
12 analysis the Court was rejecting was the lower Court's decision
13 that certain identities of acknowledged CIA sources could be
14 disclosed without threat to national security and the Court
15 said simply under Exemption 1 we do a threat analysis, we did
16 say does it meet the prong that this is properly classified.
17 Under Exemption 3, that's baked into the analysis. Congress
18 has passed a law that says you withhold the identities of
19 sources and identities. We don't second guess whether the
20 release of these specific sources is dangerous or not. That's
21 it.

22 In *Fitzgibbons* there is one additional wrinkle added
23 which is that Congress also permitted, under Exemption 1, some
24 analysis of whether the passage of time has obviated whatever
25 risk existed and, here again, the D.C. Circuit said well, *Sims*

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1 told us we don't do that for Exemption 3. The Exemption 3
2 statute doesn't include anything about a passage of time, we
3 are not going to read that into the statute, Courts don't have
4 a free wheeling engagement with it.

5 We don't disagree with any of that, that's not as far
6 as we can tell, at issue and at least a majority of what the
7 government is challenging that the District Court did.

8 So, turning just to what the -- or sorry, if I may
9 close that out? I think what is dangerous is to read
10 Exemption 3 to say so long as this document touches on or
11 relates to intelligence sources or methods, it may be withheld
12 in full under Exemption 3, that's the end of the analysis,
13 because if that were true, then obviously virtually everything
14 the CIA does is related to intelligence, it would be withheld
15 under Exemption 3 and that would contradict, entirely,
16 Congress' repeated legislation in this arena both to force
17 de novo review of Exemption 1 and also to specifically refuse
18 consistent legislative efforts to exempt the CIA entirely from
19 FOIA.

20 JUDGE LEVAL: Are you contending that the mere fact
21 that something has been published previously negates or
22 overcomes the CIA's argument?

23 MR. LADIN: Not at all, your Honor.

24 I just want to be clear about what we are arguing. We
25 don't take issue with the general idea that sometimes public

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1 materials can be classified within CIA files. The government
2 pointed to one case in the Seventh Circuit in which people's
3 CIA intelligence files were kept classified in their entirety.
4 And the idea was no one knows what is these files. No one
5 knows what the CIA's intelligence gathering was doing as
6 regarding a particular person or topic. And so, if you were to
7 get a list of every single thing in that file or if you were to
8 get a list of every single thing in that file with all the
9 classified information scrubbed and just a list of every public
10 material the CIA had collected about someone or something, you
11 would then possibly be able to infer what the CIA was
12 interested in.

13 That is an example of -- I mean, I am not saying the
14 Seventh Circuit necessarily decided that specific case
15 correctly, but that's at least an example of a logical and
16 plausible reason where the CIA said these are intelligence
17 gathering files, they contain the results of our intelligence
18 gathering. If we disclose what is in those files, then you may
19 be able to infer our intelligence interests. That's something.

20 On the other hand what we have here, as far as we are
21 aware, is a retrospective document written by the Chief of the
22 Office of Medical Services looking back at his office's role in
23 the CIA's torture program. It is a historical document, it is
24 an intelligence --

25 JUDGE CHIN: Much of it has already been disclosed.

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1 MR. LADIN: Yes, your Honor. Absolutely. And we
2 think that bears very greatly on the analysis.

3 Just as in *New York Times v. DOJ*, the fact that so
4 much else had been disclosed about that document meant that
5 this additional statutory analysis added nothing to the risk.

6 Here, too, as we describe in our brief, this is a
7 document the government acknowledges discusses news reports --
8 publicly available news reports and takes issue with various
9 parts of their description and other times just summarizes the
10 contents of those news reports. The topic is known, it is the
11 CIA's role in the torture program and specifically the medical
12 official's role. And it goes through chronologically and
13 different topics and discusses them.

14 Now, the government has allowed the disclosure of
15 certain articles and denied others. We, of course, don't know
16 the basis. The only thing that the government points to in
17 their brief is originally this public declaration that says if
18 you comment on the accuracy of what's in the articles, that
19 could tend to disclose a classified fact.

20 JUDGE POOLER: And even the selection of what is in
21 this report gives some indication to the thinking of the
22 author. That's the other argument they make.

23 MR. LADIN: Well, your Honor, sure they make that
24 argument but I want to distinguish those two very strongly
25 because the first one they say is made by the CIA's declarant.

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1 The CIA's declarant says commenting on accuracy can disclose or
2 not a classified fact. We can understand that, we don't argue
3 with it. We didn't make the argument that -- and the District
4 Court critically didn't either.

5 Now, they might say the District Court actually let
6 through some description of accuracy even though he ordered
7 otherwise. That's fine. The Court can correct that.
8 Obviously. But they're making a far broader argument here.
9 They're not saying -- well actually whatever articles he
10 selected are independently entitled and I think there the key
11 question is well, why? Have they provided a reason for that?
12 Because if you are talking about, say, an unknown CIA file in
13 which we don't know what the topic is, we don't know when it
14 was generated, we don't know what it is about, then perhaps
15 seeing the selection might reveal something. Here we know this
16 is an author going through, step by step, taking different
17 articles that describe the torture program and his office's
18 role in it and so they have to meaningfully describe how it is
19 that the selection actually reveals anything.

20 JUDGE POOLER: Would you explain a little of the
21 history of this case to me?

22 This document was referred to in the Senate Select
23 Committee report; is that correct?

24 MR. LADIN: Yes, your Honor.

25 JUDGE POOLER: That's where you heard of it; and you

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1 asked for just this document or other things as well?

2 MR. LADIN: So, this was originally a case involving,
3 I believe, 66 either documents or slightly broader categories
4 of documents but it was documents that were largely
5 specifically referenced in the report. The government
6 originally argued that this document was withholdable in
7 full --

8 JUDGE POOLER: This is called document 66 but did you
9 ask for other things besides this when the case began?

10 MR. LADIN: Yes, your Honor. There were a whole
11 series of cables, investigator general reports --

12 JUDGE POOLER: And you have received none of those?
13 Or you received all of them?

14 MR. LADIN: I would say it's -- I would say we
15 received the vast majority of them, your Honor, subject to
16 various withholdings. This document was the subject of the
17 most specific litigation.

18 JUDGE POOLER: Correct. And now we are dealing with
19 the redactions that Judge Hellerstein allowed and the CIA is
20 objecting to some of the redactions that he didn't allow.
21 That's where we stand now, right? Is that your understanding?
22 And that's the CIA's understanding?

23 MR. LADIN: Yes, your Honor.

24 JUDGE POOLER: So, you have you have the redacted
25 version of the document?

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1 MR. LADIN: Yes, your Honor.

2 JUDGE POOLER: Document 66?

3 MR. LADIN: Yes.

4 JUDGE POOLER: And you want more of the redactions
5 removed?

6 MR. LADIN: We are not actually here appealing
7 anything, your Honor, so we are here --

8 JUDGE POOLER: You won below.

9 MR. LADIN: Yes.

10 No, your Honor, we weren't given the opportunity to
11 brief or argue about the specific redactions below. The
12 government, as you have seen, is not making whatever arguments
13 it is making on the public record and so there were a series of
14 *ex parte* reconsideration motions and otherwise. We didn't
15 argue that these specific pieces of information had to or
16 didn't have to be disclosed. Under FOIA it is the government's
17 burden, once the District Court orders disclosure, to justify
18 whatever they seek to protect. They offered, the first time
19 around, an incredibly conclusory boiler plate description of
20 the document. Judge Hellerstein said, okay, I don't accept
21 that, and then they took several reconsideration opportunities
22 to try to really explain why it is that these specific passages
23 needed to be withheld. Over the course of the litigation
24 below, several passages that they claimed and several citations
25 that they claimed had to be withheld on national security

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1 grounds were, in fact, disclosed, because the government ended
2 up agreeing with the District Court that they had erred.

3 We are suggesting that we are not necessarily at the
4 end of that road. The District Court made further
5 disagreements with the government as to whether additional
6 public materials, shorn of characterizations of accuracy, can
7 be disclosed. The government might tell you in chambers right
8 now, *well, that article says CIA secret prison in Afghanistan*
9 *and so we can't release that, or that article says CIA prison*
10 *in Thailand, which is a category that we can't release.* And
11 what we submitted to you in our opposition brief is that that
12 doesn't logically or plausibly make sense given that they have
13 already permitted other articles, in this very document that
14 contain descriptions of facts that the CIA believes are
15 classified. The CIA doesn't believe that they have waived
16 classification over those facts through disclosure of those
17 articles. It does not make sense that additional public
18 articles, again shorn of characterizations of accuracy,
19 themselves reveal classified information.

20 JUDGE POOLER: I understand. Well, all right.

21 JUDGE LEVAL: That doesn't seem to me implausible, the
22 argument doesn't seem to be implausible that foreign agents,
23 studying the records of this case and studying whatever is made
24 available to them in the public record to study, could draw
25 valuable intelligence information simply from the

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1 identification of the fact that the CIA discussed a particular
2 article in a secret memo while not discussing other articles
3 that the revelation of the one that is discussed and the
4 comparison of it with others that were not discussed. I don't
5 see anything improbable about the argument that that could
6 reveal -- that could reveal valuable secret information to
7 foreign agents as to who to focus on.

8 Why would they have talked about this public article
9 in their confidential secret memorandum while not talking about
10 one that seems very similar that was published elsewhere?
11 Let's compare the two and see and try to understand why this
12 would have been the focus of discussion while another was not.

13 That doesn't seem to me an improbable argument.

14 MR. LADIN: Your Honor, this is where I think context
15 is critical because this is not a document that's a black box,
16 that we don't know what it is about, that we don't know what
17 the author is discussing. The author lays out his or her
18 reason for writing it in the first place which is this was an
19 extraordinary moment in American history where medical
20 professionals engaged in what certainly many people, including
21 many courts have described as torture. And so, it's not that
22 this is some sort of black box file where the discussion of
23 what its contents might be would be revelatory.

24 That also, I think, the second piece of it that is
25 contextual is that in *CIA v. Sims*, for example, when you are

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1 talking about otherwise sort of seemingly innocuous information
2 that a foreign adversary could piece together, there is at
3 least some logical way -- it is not just that the Court accepts
4 on faith from the government that some super foreign
5 intelligence agency might draw some conclusions that are not
6 apparent to any judge. There was a logical explanation given.
7 They said if you disclose the names of the research
8 institutions where people are affiliated who conducted CIA
9 research, that would be enough for people who are knowledgeable
10 about the type of research the CIA is conducting to try to
11 figure out the identities of those people. If you gave the
12 journals they it publish in, they would know the subject
13 matter.

14 Here, again, the subject matter is no secret. We are
15 talking about the CIA's torture program, and obviously you know
16 more than I do and will be looking in chambers at it, but I
17 urge you not to accept as plausible the basic premise that
18 foreign adversaries have the wherewithal to discover any number
19 of things but, instead, to require a logical description of how
20 these specific articles might lead to that revelation because
21 that's the government's burden.

22 And finally, on that point, I think here the amicus
23 brief filed by I think 22 different media organizations is
24 useful background because it shows over and over and over and
25 over that we receive, as a society from the intelligence

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1 agencies, blanket statements about how important these secrets
2 are to keep and they, over and over, when those people testify
3 in front of Congress, they say, actually, we overclassified
4 very badly and even provide what I thought was a useful example
5 in there of a public article in which the CIA simultaneously
6 said one element of the public articles couldn't be released
7 for national security reasons and in the same release released
8 it, and the entire time it was of course a public article, the
9 sentence that was redacted didn't add anything to any possible
10 harm that existed but there was, you know, a human error and
11 overclassification impulse that has been well documented.

12 All of these things are the reasons why Congress
13 overrode a presidential veto and a Supreme Court decision to
14 give Article III courts the power to look and demand logical
15 and plausible explanations that hold up under some scrutiny.

16 JUDGE POOLER: Thank you.

17 MR. LADIN: Thank you, your Honors.

18 JUDGE POOLER: We will confer in the robing room and
19 invite the CIA and any other persons allowed, to be there in 10
20 minutes. We are going to take 10 minutes to confer. Thank
21 you.

22 (Recess)

23 (Pages 16-52 CLASSIFIED and EX PARTE by order of the
24 Court)

25

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argument

1 (Open session; in robing room)

2 JUDGE POOLER: Counsel, I know you aren't supposed to
3 be here but we concluded you should be able to hear the CIA's
4 arguments in response to your legal arguments.

5 MR. LADIN: Thank you, your Honor.

6 JUDGE POOLER: I hope it wasn't inconvenient.

7 MR. LADIN: Not at all.

8 JUDGE POOLER: And, counsel will respond to the
9 arguments you made in open court.

10 MR. LADIN: Thank you, your Honor. I appreciate the
11 opportunity.

12 MR. NORMAND: Thank you, your Honor. I will be brief.
13 I would like to make a couple of legal points and then refer to
14 some of the more factual points.

15 My colleague identified New York Times as the most
16 relevant case here. The government doesn't believe that New
17 York Times is relevant here except insofar as it agrees with
18 the standard of review identified in many of the Court's cases,
19 a standard that requires the Court to give substantial weight
20 to the logical and plausible justifications of the Central
21 Intelligence Agency with regard to both when information
22 relates to an intelligence source and methods protected under
23 the National Security Act and when its disclosure would be
24 harmful. The portion of the New York Times case that my
25 colleague was referring to has to do with the discussion of

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argument

1 official acknowledgment.

2 Official acknowledgment is a doctrine that applies
3 when the question is whether the government's prior disclosure,
4 official disclosure of specific information is, overrides an
5 exemption whether it be Exemption 1 or Exemption 3. And the
6 Court in that case, I think it is important to point out,
7 ordered the disclosure only of the legal analysis in an OLC
8 opinion -- Official of Legal Counsel opinion. It allowed the
9 government to withhold the entire factual sections of the same
10 opinion. So, the point that counsel was making about the
11 Court's statement that there was no, the discussion of an
12 additional statute in that OLC opinion added nothing to the
13 risk, was made in the context of determining whether,
14 essentially, the legal analysis underlying a proposed legal
15 operation against Anwar al-Awlaki had previously been disclosed
16 by the government in an official government disclosure. That
17 doctrine just has no application here because the question is
18 not whether the government has previously made public the
19 particular facts that are being withheld here. The government
20 has not made public those facts.

21 In this case, the government has released, in this
22 document, large portions of information that relate to the
23 former detention and interrogation program. The facts that
24 have been withheld as classified and statutorily protected are
25 facts that have not been declassified and have not been

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argument

1 publicly and officially disclosed by the government and other
2 locations. So, we don't believe that portion of the New York
3 Times -- or that the New York Times is a relevant case here for
4 that reason.

5 Counsel also alluded to or argued that the government
6 was stretching Exemption 3 here and talked a little bit about
7 the Sims case. Sims is, we agree, a seminal case and it is
8 very important here. What Sims said was that the government
9 need not make a showing of harm to national security because
10 Congress has made that assessment, that disclosure of
11 intelligence sources and methods would be harmful.

12 JUDGE POOLER: That's Exemption 3 you are talking
13 about?

14 MR. NORMAND: Correct, your Honor; Exemption 3, which
15 is statutory protection and it could apply to a number of
16 statutes but in this particular case and in Sims, the statute
17 at issue was the National Security act and, particularly, the
18 section of the National Security Act that permits the Central
19 Intelligence Agency director, now the Director of National
20 Intelligence to withhold, to protect sources and methods --
21 intelligence sources and methods from unauthorized disclosure.

22 What happened in Sims was the Supreme Court rejected
23 the D.C. Circuit's effort there to impose sort of a narrower
24 definition on the intelligence sources and methods that would
25 be protected under the Act. The Court in that case believed

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argument

1 that really what was intended to be protected by the statute
2 was -- I am talking now about the D.C. Circuit, was sources and
3 methods that were protected by assurances of confidentiality
4 and it went up to the Supreme Court and the Supreme Court said,
5 no, there is no such limiting definition in the statute.

6 Instead, Congress left it to the CIA director to determine what
7 sources and methods needed to be protected and that protection
8 extends even to sources and methods that might be superficially
9 or seemingly innocuous.

10 So, we do agree that Sims is a seminal case but we
11 don't believe any stretching of Exemption 3 is necessary here
12 because Sims is quite clear that the statute has a broad sweep
13 and encompasses anything that the CIA determines is within its
14 mandate to conduct foreign intelligence, provided it gives a
15 plausible and logical explanation why that is so, which is done
16 here.

17 Focusing on the specific information that has been
18 withheld here, I recognize that it is difficult for the ACLU to
19 discuss it because of the redactions. Their focus seems to be
20 on the media reports and the notion that if they are shorn of
21 characterizations of accuracy, that the disclosure of media
22 reports should be fine and shouldn't be harmful.

23 JUDGE POOLER: Well, their argument is that it is
24 already public and what are we doing not making public what is
25 already public?

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argument

1 MR. NORMAND: Well, it is not already public, is the
2 short answer to that question. And the reason it is not
3 already public is because what has been withheld by the CIA in
4 this particular report is not just summaries and the District
5 Court believed, but summaries with commentary that reflect the
6 author's understanding and comments on the particular document
7 so it is not -- this has to do -- this does tell you something
8 about what this senior CIA OMS official thought about
9 particular articles and particular portions.

10 JUDGE POOLER: The selection of the articles is also
11 source and method?

12 MR. NORMAND: It is, your Honor.

13 The author's selection of the articles is revealing in
14 this case and, just to give you an example, if you have -- let
15 me back up.

16 One of the suggestions that the ACLU made in its brief
17 was, well, even if you protect the commentary you could release
18 the citations in the footnote. What that would leave you with,
19 your Honor, is a big redaction followed by a citation to a
20 particular article, very much raising the inference that there
21 is something in that article that is confirmatory about a
22 particular article and I would, in making this point, I would
23 also like to draw the Court's attention to the fact that this
24 author was a senior official within the agency with personal
25 involvement in this program and he was in a position to know

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argument

1 what facts were true and not true about the program.

2 JUDGE POOLER: So, just including them gives us some
3 inclination about authentication.

4 MR. NORMAND: That's right, your Honor. It was
5 certainly logical and plausible for the CIA to conclude that
6 even providing the citations to particular articles following a
7 redaction would be revealing that the author thought there was
8 something within that and that the CIA believes there is
9 something within that article that would reveal facts about the
10 program that remain classified, and in relation to this I would
11 point out that the author begins this document by talking about
12 significant leaks about the program.

13 So, I think it is accurate to say that the author's
14 selection of particular articles and then the fact that the CIA
15 determined that that particular discussion needed to be
16 redacted would be quite revealing.

17 JUDGE LEVAL: The article talks about quite
18 significant leaks and then it cites and quotes from selected
19 articles that contain significant leaks and the inference is
20 that these were leaks.

21 MR. NORMAND: That's exactly right, your Honor.

22 JUDGE LEVAL: And one who is made aware that that is
23 the article, that that is the article that was cited all the
24 more so if it is quoted, shows that the CIA includes this as a
25 discussion of what the CIA regards as having been significant

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argument

1 leaks.

2 MR. NORMAND: That's exactly the inference, your
3 Honor, that the CIA believes would be drawn and is the basis
4 for that.

5 JUDGE LEVAL: If I understand part of what you are
6 saying, while the article is public and anybody can read it,
7 what is not public is that the CIA saw fit -- a senior person
8 at the CIA saw fit to discuss this particular article and not
9 others in the CIA report apparently revealing there is
10 something about that article which is of sufficient
11 significance to the CIA to discuss it as something that needs
12 discussion in our intelligence.

13 MR. NORMAND: That's right, your Honor. And I would
14 add that even some years later, when the document is reviewed
15 by an original classification authority, the fact that the CIA
16 saw fit to redact certain discussions would add additional
17 authentication to that inference, your Honor.

18 We do agree, your Honor, with my colleague's statement
19 in court that context is critical. We have gone through, in
20 earlier discussion, piece by piece each withholding, and this
21 is not a case where the CIA is attempting to withhold anything
22 relating to intelligence sources and methods. It has
23 identified very specific targeted information in this document
24 that would reveal protected sources and methods the release of
25 which, in the CIA's judgment, would be harmful to national

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argument

1 security. The District Court rejected that showing,
2 effectively substituting his own view of the harmfulness or
3 lack of harmfulness of release of the information. We think
4 that violated the rule that this Court has repeated over and
5 over from Willner, to ACLU, to most recently last year in ACLU
6 v. DOD, that it is bad law and bad policy for Judges to second
7 guess the predictive judgments of the intelligence community
8 when it comes to whether particular information would be
9 harmful, if released.

10 JUDGE POOLER: Thank you.

11 MR. NORMAND: Thank you.

12 JUDGE POOLER: We didn't plan on rebuttal but since
13 you are here, if you wanted to take a minute or two at the
14 podium, counsel, I would allow to you do so.

15 MR. LADIN: Thank you so much, your Honor and I will
16 be very brief.

17 I think fundamentally we are pretty close on the law
18 so I just want to speak about the facts again. Judge Leval,
19 you sort of articulated a way in which, if you disclose the
20 information, the agency thought this leak significant and then
21 attached a bunch of articles, a person could infer something
22 about that article. With respect to my colleague, we are not
23 looking at a document in which the fact that this CIA
24 decision-maker was looking at articles is an unknown fact, or
25 the fact that this person is looking at articles that he

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argument

1 considers error-filled, wrong, and takes issue with over and
2 over throughout the argument. Some of those are cited in our
3 brief.

4 So, I think this is, again, where the judicial role
5 comes in. The question is, is it logical or plausible to infer
6 from a list of citations and here at this point I understand we
7 are talking even shorn of any discussion of them. So, a mere
8 list of citations to newspaper articles, to suggest that that
9 confirms that this CIA decision-maker thought something secret
10 about them and that that secret thought will be conveyed to a
11 very sophisticated adversarial reader, and I think again --

12 JUDGE LEVAL: We are not talking about a list of
13 newspaper articles, we are talking about a placement of a
14 quotation from an article in a particular report written by a
15 CIA person.

16 MR. LADIN: Absolutely; and the report is a history of
17 the CIA's and his or her office's actions in this program and
18 throughout the author has taken great pains to say this was
19 inaccurate, this was wrong, and the articles themselves are
20 filled with information that my colleague would agree has not
21 been confirmed by the fact that it is now in the public record.
22 So, we cited several examples in the brief but these articles
23 discuss, for example, to be concrete, a CIA prison in Thailand.
24 If you ask my colleague she will tell you, nothing has been
25 confirmed about the existence or nonexistence of a CIA prison

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argument

1 in Thailand. The word "Thailand" is not released, it is not
2 public. No matter how many articles describe it, it is not
3 public and no matter how many articles in this document are
4 publicly released by the CIA, it still hasn't been confirmed.

5 So, to say that on the one hand, and on the other hand
6 to say even if you black out all discussion, the mere citation
7 of an article in a document that purports to discuss inaccurate
8 articles in a document that purports to discuss a broad history
9 of various things that have been written about the CIA's
10 actions, to say that the citation to one of those articles
11 would nonetheless cast an inference that that article was true,
12 that every aspect of that article was true, or anything like
13 that, to me, that strains credulity. Again, I haven't seen,
14 obviously, what your Honors have seen. To the extent that that
15 is backed up by some concrete, plausible showing of what
16 actually would be inferred, obviously that's the judicial role
17 here. All we are saying is there has been nothing public about
18 that beyond the sweeping idea that a sophisticated adversary
19 could infer any number of things.

20 And, while that might be true as a general matter, we
21 need to look at it in the context of this document where we
22 already have before us statements by that author saying these
23 articles are wrong, this didn't happen, we never gave
24 Abu Zubaydah this particular medicine, none of this is
25 accurate.

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argument

1 Again, we understand arguments when they're talking
2 about the accuracy or inaccuracy of articles and Judge
3 Hellerstein understood those arguments as well and allowed them
4 though redact that. But, we are now here moving pretty far
5 from that into the release of articles that are themselves
6 seemingly echoed by other articles and other discussions
7 released in this document.

8 JUDGE POOLER: Thank you.

9 MR. LADIN: Thank you, your Honor.

10 JUDGE POOLER: Thank you, all. We will excuse
11 everyone. The panel will stay here.

12 I thank you, all. We will send the transcript, CIA
13 will redact the transcript. We will, your Honor.

14 JUDGE POOLER: Thank you.

15 MR. NORMAND: We will file a redacted version.

16 JUDGE POOLER: Thank you, all. I thank you,
17 especially for waiting. Sorry we didn't get organized early
18 enough.

19 Thank you, all.

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