

## [Second Circuit deems classified documents relating to the 2014 government-sanctioned drone killing of three Americans as exempt from disclosure under the Freedom of Information Act \(ACLU v. DOJ\)](#)

Provides guidance on the type of documents that are exempt from the Freedom of Information Act and limits public inquiry into government drone strikes.

Updated last **December 13, 2017**  
for the 12/20/2016 decision.



### WHAT IT DOES

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[ACLU v. United States DOJ, 844 F.3d 126 \(2d. Cir. 2016\)](#) is a decision regarding the disclosure of documents regarding US drone strikes that killed Americans [Anwar Al-Awlaki, Samir Khan, and 16-year-old Abdulrahman Al-Awlaki](#) in Yemen in 2011. The American Civil Liberties Union (ACLU) was seeking the documents under the [Freedom of Information Act](#) (FOIA), which grants the public the right to request access to records from federal agencies.

The published opinion is heavily redacted because it considers information that the court ultimately deemed classified. However, the decision had five core holdings:

1. The continued withholding of 52 challenged documents is warranted;
2. An internal Department of Justice (DOJ) memo, which summarized a meeting at which the legal justification for the killings was discussed, is pre-decisional, and therefore falls within the scope of FOIA's exemption for inter-agency or intra-agency memoranda;
3. A draft of paragraphs relating to the legal justification for the drone strikes was pre-decisional, and therefore exempt from FOIA disclosure;
4. A set of suggested talking points on the legal bases for drone strikes, as well an internal outline of classified facts and some fragmentary discussion of legal advice, are exempt as pre-decisional;
5. A draft of an unpublished op-ed article that suggested ways to justify the DOJ's legal reasoning is also exempt as it was pre-decisional; and
6. Two documents, CIA 109 and 113, which the District Court disclosed in part, are informal and preliminary. The second is unsigned and undated. Despite the redactions, some phrases are still entitled to secrecy. Although both appear to have been written after the action they comment on, they are nonetheless pre-decisional with respect to the formulation of a policy or a clear legal position.

Although increasingly regulated at the local, state, and federal level, this decision exhibits the extent to which the federal government's use of drone strikes—lethal attacks by unmanned aircraft—abroad is legally shielded from public scrutiny. Though controversial, the use of unmanned aerial assault vehicles in the global war on terror is [ever increasing](#).

### THE FACTS

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On September 30, 2011, two Predator drones flew from a secret CIA base in Saudi Arabia to the Yemen province of al-Jawf. There, the unmanned aircrafts fired multiple missiles at a vehicle containing American citizens Anwar al-Awlaki and Samir Khan. Both men, who had substantial links to al-Qaeda, were killed in the strike. Several weeks later, Awlaki's sixteen-year-old son, American-born

Abdulrahman, was killed in Yemen in a similar drone attack. The latter attack was targeting a senior al-Qaeda official. The killings of the three American citizens, though done with the approval of the Obama administration, prompted a great deal of controversy.

In the wake of these events, the ACLU submitted a Freedom of Information Act request seeking information about the killings of the three men. Over the course of five years of litigation, this case was appealed to the Second Circuit three times, resulting in [many documents](#) being disclosed, and others withheld.

This decision had to deal with the last set of documents that the ACLU was seeking. The plaintiff argued that these documents should be ordered disclosed by the court, whereas the defense argued that they were exempt from a Freedom of Information Act request.

#### PROCEDURAL HISTORY

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In 2014, the ACLU filed actions under the FOIA seeking disclosure of documents prepared by the DOJ's Office of Legal Counsel (OLC) that detailed the government's rationale for determining that the targeted killings of three US citizens was lawful. After actions were consolidated, the United States District Court for the Southern District of New York entered summary judgment in the government's favor, and the ACLU appealed.

The Court of Appeals affirmed in part, reversed in part, and remanded. The government's motion for rehearing was granted in part. On remand, the United States District Court for the Southern District of New York ruled that ten of eleven OLC documents could be withheld from disclosure, but rejected the government's request to redact three paragraphs of the opinion. Interlocutory appeals were taken. The Court of Appeals affirmed in part and reversed in part. On remand, the United States District Court for the Southern District of New York ruled that the government was entitled to withhold from disclosure a number of documents, but ordered disclosure, in whole or in part, of seven documents. The parties then filed cross-appeals, with the ACLU challenging the lower court's ruling to the extent it upheld nondisclosure of 52 documents, and with the government appealing to the extent the lower court ruling ordered disclosure, in whole or in part, of seven documents.

#### DECISION POINTS

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The crux of the court's reasoning in determining that the documents in question were exempt from FOIA was that they were "pre-decisional," (communications used to help an agency decision-maker decide on a policy) and thus fell within scope of the FOIA's exemption from disclosure of inter-agency or intra-agency memorandums or letters.

However, without being able to scrutinize the classified documents, it is difficult to speculate how the Second Circuit came to the conclusion that it did.

#### RELEVANT SCIENCE

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Drones are often referred to in the military context as Unmanned Aerial Vehicles (UAVs) or Remotely Piloted Aerial Systems (RPAS). Their value comes from the fact that they can be controlled and operated remotely, allowing the unmanned aircraft to perform strikes or gather intelligence on missions that would generally be [considered too dangerous](#) for a servicemember to perform.

Military drones, such as the MQ-1B Predator, are [controlled via a communications satellite](#) link from a military ground-control station. Using GPS technology, the drone relays its position to a remote Air Force crew, who are able to maneuver the drone and control its onboard equipment. The Predator, originally designed as a surveillance drone, is [equipped with](#) onboard sensors, cameras, image intensifiers, radar, infra-red imaging, and laser targeting systems to aid pilots in [intelligence, surveillance, reconnaissance](#), and targeted strikes. Certain versions of the Predator drone are outfitted with [laser-guided Hellfire missiles](#).

**COUNSEL**

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The ACLU was represented by Brett Kaufman of the American Civil Liberties Union Foundation; and Colin Wicker of Dorsey & Whitney LLP. The DOJ was represented by Sarah Normand and Preet Bharara of the US Attorney's Office of the Southern District of New York; Benjamin Mizer, Principal Deputy Assistant Attorney General; and Sharon Swingle, Civil Division of the DOJ.

**STATUS**

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This decision was handed down on December 20, 2016, and no appeal has been filed at this time.

**RELEVANT EXPERTS**

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[Missy Cummings](#), PhD, Professor in the Department of Mechanical Engineering and Materials Science, Duke University. Dr. Cummings' research interests include human-unmanned vehicle interaction, human-autonomous system collaboration, human-systems engineering, public policy implications of unmanned vehicles, and the ethical and social impact of technology.

[Robert Sparrow](#), PhD, Professor of Philosophy, Monash University. Dr. Sparrow's primary research interests are bioethics, political philosophy and applied ethics.

**RELATED POLICIES**

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This decision is one of several actions the ACLU has brought under FOIA to gain information about US drone strikes in non-combat zones. Other cases include [ACLU v. CIA](#), a similar request filed against the Central Intelligence Agency (still being litigated), and a request filed against the DOJ, which resulted in the Obama administration releasing a redacted version of the [White House document](#) that sets out the government's policy for drone strikes "outside the United States and areas of actual hostilities."

**PRIMARY AUTHOR**

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**RECOMMENDED CITATION**

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Duke SciPol, "ACLU v. DOJ", available at <http://scipol.duke.edu/content/second-circuit-deems-classified-documents-relating-2014-government-sanctioned-drone-killing> (12/13/2017).

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