

**[ORAL ARGUMENT HELD FEBRUARY 17, 2016]****No. 15-5217**

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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AMERICAN CIVIL LIBERTIES UNION and  
AMERICAN CIVIL LIBERTIES UNION FOUNDATION,*Plaintiffs–Appellants,*

v.

CENTRAL INTELLIGENCE AGENCY *et al.*,*Defendants–Appellees.*

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**PLAINTIFFS–APPELLANTS’ OPPOSITION TO DEFENDANTS–  
APPELLEES’ MOTION TO PUBLISH THE COURT’S  
APRIL 21, 2016 *PER CURIAM* DECISION**

Plaintiffs–Appellants oppose the government’s motion to publish this Court’s *per curiam* decision in this case and respectfully request that the Court deny the Motion.

First, this Court has already “accorded the issues full consideration and . . . determined that they do not warrant a published opinion.” *ACLU v. DOJ*, No. 15-5217, 2016 WL 1657953, at \*1 (D.C. Cir. Apr. 21, 2016) (*per curiam*) (citing D.C. Cir. R. 36); *see* D.C. Cir. R. 36(e)(2) (“[A] panel’s decision to issue an

unpublished disposition means that the panel sees no precedential value in that disposition.”). Critically, the government does not assert that the Court’s *per curiam* decision in this case meets any of the specific criteria justifying publication under this Circuit’s rules. *See* D.C. Cir. R. 36(c)(2)(A)–(F) (explaining that “an order or judgment will be published if it” resolves an issue of first impression; alters, modifies, or clarifies a rule of law; calls attention to an overlooked rule of law; criticizes or questions existing law; resolves or creates a conflict within the circuit or with another circuit; or reverses an agency or district court decision); *see also* Gov’t Mot. 5 (failing to cite Rule 36(c)(2)(A)–(E) and acknowledging that “this case does not come within the precise terms of” Rule 36(c)(2)(F)).

Second, the government’s argument that the Court should publish the April 21 decision ““in light of other factors that give it general public interest,”” Gov’t Mot. 6 (quoting D.C. Cir. R. 36(c)(2)(G)), is wrong. As an initial matter, publication of the Court’s *per curiam* decision here is not necessary to achieve the government’s stated purpose. Under this Court’s rules, the government is free to cite to the unpublished opinion, D.C. Cir. R. 32.1(b)(1)(B)—indeed, in the *Leopold* litigation, the government already has done so, as has the district court. *See* Defendant’s Notice of Supplemental Authority at 1, *Leopold v. DOJ*, No. 14-cv-168 (D.D.C. Apr. 21, 2016), ECF. No. 39; Order Denying Mot. to Vacate and

Mod. Order at 2, *Leopold v. DOJ*, No. 14-cv-168 (D.D.C. May 9, 2016), ECF No. 44.

Moreover, this Court’s opinion does not (as the government represents) address “precisely the same legal and factual issues” that are present in the *Leopold* litigation, Gov’t Mot. 5. Whereas the district court’s ruling in this case was based entirely on agency affidavits asserting that the government had lawfully withheld the May 2011 White Paper (and the other eleven legal memoranda and thousands of intelligence products sought by Plaintiffs–Appellants), the district court’s ruling in *Leopold* based its ruling on an *in camera* examination of the May 2011 White Paper itself. *See Leopold v. DOJ*, 130 F. Supp. 3d 32, 46 (D.D.C. 2015); *see also* 5 U.S.C. § 552(a)(4)(B) (district court’s authority “to examine the contents of . . . agency records in camera”). As a result, when this Court considers *Leopold*—unlike when it considered this case—it will have before it both the contents of the May 2011 White Paper as well as the district court’s (now reconsidered) findings of fact concerning that document. *See Leopold*, 130 F. Supp. 2d at 49 (“Several redacted passages contain nothing more than legal analysis that does not in any way reference or pertain to any classified information. . . . Other parts of the White Paper containing similar legal analysis were disclosed to Plaintiff.”); *see also* Fed. R. App. P. 10.

For these reasons, the Court should deny the government’s motion.

Date: May 13, 2016

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**CERTIFICATE OF SERVICE**

On May 13, 2016, I served upon the following counsel for Defendant–  
Appellee one copy of Plaintiffs–Appellants’ REPLY BRIEF FOR PLAINTIFFS–  
APPELLANTS via this Court’s electronic-filing system:

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Date: May 13, 2016