

A Resurgence of Secret Law

Jameel Jaffer & Brett Max Kaufman

This much should be uncontroversial: the public should have access to the law and to the government's interpretations of it. This principle is an imperative not just of due process but also of republican governance. The Freedom of Information Act (FOIA), which the Eighty-ninth Congress enacted half a century ago, included a provision requiring federal agencies to disclose their effective law and policy.¹ A decade after Congress enacted the FOIA, the Supreme Court's unanimous decision in *NLRB v. Sears, Roebuck & Co.* construed this provision to require federal agencies to publish their "working law."² The Court explained that "the public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopted," and it held that the FOIA requires "[t]hese reasons, if expressed within the agency," to be disclosed.³ In subsequent cases, lower courts enforced this rule, repeatedly requiring federal agencies to publish legal memoranda and opinions interpreting or applying the law.

Now, however, in a remarkable development that has gone largely unnoticed, the working law doctrine is unraveling. In a series of recent cases, executive branch lawyers have managed to persuade two appellate courts to suggest that the Justice Department's Office of Legal Counsel (OLC)—the paradigmatic generator of working law, one might have thought—cannot generate working law. In ongoing litigation, the Justice Department is urging courts to impose further limits on the working law doctrine, the effect of which would be to enable agencies to withhold general counsel memoranda that guide and con-

1. See 5 U.S.C. § 552(a) (listing FOIA's affirmative-disclosure requirements).

2. 421 U.S. 132 (1975) (8-0 decision in which Justice Powell did not take part).

3. *Id.* at 152-53.

strain agency decision making. If the Justice Department succeeds, the working law doctrine—and, with it, the public’s right to know how agencies understand and wield their power—will be fundamentally compromised, and the universe of what the Supreme Court once labeled “secret law” will expand dramatically.

The working law doctrine is grounded in the FOIA’s “reading room” provision, which “obligates agencies to make certain types of materials available ‘for public inspection and copying,’ without the predicate requirement of a request.”⁴ Among the records to which Congress attached this affirmative government duty are “final opinions . . . made in the adjudication of cases” and “those statements of policy and interpretations which have been adopted by [an] agency and are not published in the Federal Register.”⁵ In *Sears*, the Supreme Court observed that the reading room provision “represents a strong congressional aversion to ‘secret [agency] law’ . . . and represents an affirmative congressional purpose to require disclosure of documents which have ‘the force and effect of law.’”⁶ The Court explained that the FOIA’s affirmative disclosure requirements are the flip side to the statute’s Exemption 5, which authorizes the withholding of documents that are predecisional or deliberative.⁷

Since *Sears*, the appellate courts—and the D.C. and Second Circuits especially—have given effect to the working law doctrine in diverse contexts. For example, in *Coastal States Gas Corp. v. Department of Energy*,⁸ the D.C. Circuit ordered the disclosure of legal memoranda written by the defendant agency’s regional counsel.⁹ The agency argued that the opinions, which related to petroleum companies’ compliance with agency regulations, were not final or formally binding, but the court disagreed. It observed that the opinions were “regularly and consistently followed by the non-legal staff,” “used as precedent in later cases,” and at times “amended or rescinded, which would hardly be necessary if the documents contained merely informal suggestions to staff which

4. *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep’t of Justice*, 164 F. Supp. 3d 145, 147 (D.D.C. 2016).

5. 5 U.S.C. §§ 552(a)(2)(A)-(B).

6. *Sears*, 421 U.S. at 153 (alteration in original) (quoting Kenneth Culp Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 797 (1967); H.R. REP. NO. 89-1497, at 7 (1966)); see *Jordan v. U.S. Dep’t of Justice*, 591 F.2d 753, 781 (D.C. Cir. 1978) (Bazelon, J., concurring) (“One of the principal purposes of the Freedom of Information Act is to eliminate ‘secret law.’ The settled practices of the government, in deciding which cases to prosecute and which cases to divert from the courts are, if not codified ‘law,’ at least as important as any statute to the individual charged with a crime.” (footnote omitted)).

7. See *Sears*, 421 U.S. at 152-53.

8. 617 F.2d 854 (D.C. Cir. 1980).

9. *Id.* at 858.

could be disregarded.”¹⁰ The court wrote that the FOIA foreclosed the government from “promulgating a body of secret law.”¹¹

The court reaffirmed this principle in *Taxation With Representation Fund v. Internal Revenue Service*,¹² decided a year later. In that case, the court ordered the disclosure of three types of legal and policy memoranda after considering the “function and significance of the document[s] in the agency’s decisionmaking process,” as well as the “nature of the decisionmaking authority vested in the office or person issuing the disputed document[s].”¹³ The court held that memoranda written by the agency’s chief counsel for use as precedential guidance for attorneys and other agency staff in dealings with the public plainly constituted Internal Revenue Service (IRS) working law.¹⁴ The court reached the same conclusion as to manuals that had been made systematically available to agency lawyers and that had been “informally adopted by the agency as explanations of its policy.”¹⁵ Finally, the court concluded that memoranda recommending the termination of administrative proceedings were working law because they explained “the agency’s ‘final’ legal position” on the issues underlying those proceedings.¹⁶

In both *Coastal States* and *Taxation Without Representation*, the D.C. Circuit rejected a formalistic inquiry in favor of a functional one. It did the same sixteen years later in *Tax Analysts v. Internal Revenue Service*¹⁷ (*Tax Analysts I*), requiring the IRS to publish “field service advice memoranda” that were not formally binding but that had been drafted by the agency’s Office of Chief Counsel to promote “uniformity throughout the country on significant questions of tax law.”¹⁸ In a later case involving the same parties, the court ordered the disclosure of certain other memoranda written by the Office of Chief Counsel’s technical divisions. The agency contended that the memoranda did not constitute working law because they reflected (at most) the agency’s final *legal* positions, and not its final *programmatic* decisions, but the court dismissed this

10. *Id.* at 860 (internal quotation omitted).

11. *Id.* at 869.

12. 646 F.2d 666 (D.C. Cir. 1981).

13. *Id.* at 678-79.

14. *Id.* at 682-83.

15. *Id.* at 683.

16. *Id.* at 684.

17. 117 F.3d 607 (D.C. Cir. 1997).

18. *Id.* at 617; *see id.* (“[T]he structure and purposes of the [field service advice (FSA)] system reveal that the national office, in issuing these memoranda, is attempting to develop a body of coherent, consistent interpretations of the federal tax laws nationwide. The fact that FSAs are nominally non-binding is no reason for treating them as something other than considered statements of the agency’s legal position.” (internal quotation marks omitted)).

argument.¹⁹ “[W]orking law’ must be disclosed whether or not those who use the working law make the final decisions about program implementation,” the court wrote.²⁰

The Second Circuit has had fewer opportunities to consider the scope of the working law doctrine, but its approach to the issue has tracked the D.C. Circuit’s. In *National Council of La Raza v. Department of Justice*,²¹ the court ordered the release of a legal memorandum that the agency had invoked publicly to justify a change in agency policy. Citing *Sears* and *Coastal States*, among other cases, the Second Circuit wrote: “The Department’s view that it may adopt a legal position while shielding from public view the analysis that yielded that position is offensive to FOIA.”²² Citing *La Raza* as well as the D.C. Circuit’s jurisprudence, the court reaffirmed the working law doctrine in *Brennan Center for Justice v. Department of Justice*, ultimately rejecting the doctrine’s application in that case but only because the plaintiff had failed to submit evidence controverting the agency’s assertion that the memorandum in question was not “effectively binding on the agency.”²³

It is this body of case law—a body of case law rooted in the Supreme Court’s decision in *Sears* and developed by two appellate courts over a period of forty years—whose continuing vitality is now in question. In two recent cases,

19. *Tax Analysts v. Internal Revenue Serv. (Tax Analysts II)*, 294 F.3d 71, 81 (D.C. Cir. 2002).

20. *Id.*; see also *Public Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 876 (D.C. Cir. 2010) (ordering the disclosure, under the working law doctrine, of documents that go beyond “describing and explaining the [agency’s] existing policy and current state of affairs”); *Tax Analysts I*, 117 F.3d at 617 (“The legal conclusions the Office of Chief Counsel provides to field personnel constitute agency law, even if those conclusions are not formally binding.”); *Coastal States*, 617 F.2d at 869 (“[The agency’s] contention that these documents are not ‘final opinions,’ absolutely binding on the auditors, misses the point. The evidence strongly supports the district court’s conclusion that, in fact, these opinions were routinely used by agency staff as guidance in conducting their audits, and were retained and referred to as precedent. If [these opinions are protected by the deliberative process privilege], the agency has promulgated a body of secret law which it is actually applying in its dealings with the public but which it is attempting to protect behind a label. This we will not permit the agency to do.”); *Jordan v. U.S. Dep’t of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978) (holding that a record “consist[ing] of positive rules that create definite standards for Assistant U.S. Attorneys to follow” and “guidelines [that] express the settled and established policy of the U.S. Attorney’s Office” constitute the Justice Department’s “effective policy” under the FOIA).

21. 411 F.3d 350 (2d Cir. 2005).

22. *Id.* at 360 (quoting *Nat’l Council of La Raza v. U.S. Dep’t of Justice*, 339 F. Supp. 2d 572, 587 (S.D.N.Y. 2004); see *Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. U.S. Dep’t of Justice*, 697 F.3d 184, 201-02 (2d Cir. 2012).

23. 697 F.3d at 203; cf. *Nat’l Council of La Raza*, 411 F.3d at 357 (“The references to the OLC Memorandum demonstrate that the Department regarded the Memorandum as the exclusive statement of, and justification for, its new policy on the authority of states to enforce the civil provisions of immigration law.”).

the D.C. Circuit and Second Circuit have dramatically changed direction by suggesting that memoranda of the OLC cannot constitute working law. The first of these cases was *Electronic Frontier Foundation v. Department of Justice*²⁴ (*EFF*), which involved an OLC legal memorandum addressing whether a federal statute prohibited electronic communications service providers from voluntarily sharing customers' call-detail records with the Federal Bureau of Investigation (FBI).²⁵ The circuit court held that the memorandum was not working law because it did not provide "an authoritative statement of the FBI's policy" but "merely examine[d] [the] policy options available."²⁶ The court's holding was narrow, but the opinion included broad dicta suggesting that an OLC memorandum could not constitute working law unless it had been "adopted" by the agency to which it was addressed. "OLC does not speak with authority on the FBI's policy," the court wrote.²⁷

EFF might easily have been limited to its facts, because the facts were idiosyncratic. The OLC opinion at issue in that case addressed a policy that the agency had disavowed and discontinued years earlier.²⁸ But last year the Second Circuit appeared to endorse the D.C. Circuit's expansive dicta. In *New York Times Co. v. Department of Justice*²⁹ (*N.Y. Times II*), the court considered FOIA requests filed by the *New York Times* and the American Civil Liberties Union (ACLU) for OLC legal memoranda concerning the government's targeted-killing program. One year earlier, in response to the same FOIA requests,³⁰ the same Second Circuit panel had ordered the release of a heavily redacted version of an OLC memorandum authorizing the targeted killing of an American citizen.³¹ While the earlier opinion in *N.Y. Times I* did not invoke the working law doctrine, relying instead on the concept of government waiver through official government acknowledgment of information, the court made plain that it considered the OLC opinion at issue to be the government's controlling law on the matter.³² But in *N.Y. Times II*, the court dismissed claims that the government

24. 739 F.3d 1 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 356 (2014).

25. *Id.*

26. *Id.* at 10.

27. *Id.* at 9.

28. *Id.* at 5.

29. 806 F.3d 682 (2d Cir. 2015). (Disclosure: the authors were counsel for the plaintiffs in this case.)

30. *N.Y. Times Co. v. U.S. Dep't of Justice (N.Y. Times I)*, 756 F.3d 100 (2d Cir. 2014), *amended on denial of reh'g* by 758 F.3d 436 (2d Cir. 2014). (Disclosure: the authors were counsel for the plaintiffs in this case.)

31. *Id.* at 120-21.

32. *See id.* at 116 ("After senior Government officials have assured the public that targeted killings are 'lawful' and that OLC advice 'establishes the legal boundaries within which we can

had likewise waived its right to withhold additional legal memoranda, casually concluding—incongruously with its prior opinion—that “[a]t most, [OLC opinions] provide, in their specific contexts, legal advice as to what a department or agency ‘is permitted to do,’ but OLC ‘[does] not have the authority to establish the “working law” of [an] agency.’”³³ The court did not grapple with the long line of cases—*Coastal States* and *Tax Analysts I* among them—establishing that a legal memorandum constitutes working law even if it does not reflect the agency’s final programmatic position, so long as it reflects the agency’s final legal position.

The proposition that the OLC does not have the authority to establish the working law of an agency is a difficult one to accept. As a factual matter, the OLC’s central function is to provide controlling legal guidance to executive branch agencies—indeed, one senior executive branch official recently referred to it, quite justifiably, as the “Supreme Court of the executive branch.”³⁴ The OLC itself has said that its “core function, pursuant to the Attorney General’s delegation, is to provide controlling advice to Executive Branch officials on questions of law that are centrally important to the functioning of the Federal Government.”³⁵ The acting head of the OLC recently explained that even advice offered by the agency informally, through email, is authoritative. “It is still binding by custom and practice in the executive branch,” he explained to a reporter. “It’s the official view of the office. People are supposed to and do follow it.”³⁶ In an implicit acknowledgement that at least some of its opinions constitute working law, OLC regularly publishes many of its legal opinions in what it calls—using a phrase long associated with FOIA’s affirmative disclosure provi-

operate,’ and the Government makes public a detailed analysis of nearly all the legal reasoning contained in the [al-Aulaqi Memorandum], waiver of secrecy and privilege as to the legal analysis in the Memorandum has occurred.”).

33. *N.Y. Times II*, 806 F.3d at 687 (quoting *Elec. Frontier Found. v. U.S. Dep’t of Justice*, 739 F.3d 1, 8, 10 (D.C. Cir. 2014)).
34. *Homeland Security Secretary ‘Fully Confident’ in Legality of Obama’s Immigration Action*, PBS NEWSHOUR (Nov. 24, 2014, 6:35 PM), <http://www.pbs.org/newshour/bb/homeland-security-secretary-fully-confident-legality-obamas-immigration-action> [<http://perma.cc/4MSL-2C6Q>] (quoting Jeh Johnson, Secretary of the Department of Homeland Security).
35. Memorandum from David J. Barron, Acting Assistant Attorney Gen., to Attorneys of the Office of Legal Counsel (July 16, 2010), <http://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf> [<http://perma.cc/8ARY-P7KW>].
36. Josh Gerstein, *Official: FOIA Worries Dampen Requests for Formal Legal Opinions*, POLITICO (Nov. 5, 2015, 3:05 PM), <http://www.politico.com/blogs/under-the-radar/2015/11/official-foia-worries-dampen-requests-for-formal-legal-opinions-215567> [<http://perma.cc/T84F-5QP5>].

sions—the “OLC FOIA Electronic Reading Room.”³⁷ And in *Brennan Center*, the Second Circuit explicitly considered whether a particular OLC opinion constituted working law—an analysis that would have been unnecessary if the court had believed that the OLC could not create working law.³⁸

Unsurprisingly, however, the government has seized on the broad language of *EFF* and *N.Y. Times II*. In a third phase of the targeted-killing FOIA litigation described above, the government has asked the Second Circuit to endorse the view that OLC memoranda can never have the status of working law. Citing *EFF* and *New York Times II*, the government writes that the OLC cannot require an agency to adopt its view of the law, but may only “provide advice about what an agency is permitted to do.”³⁹ Again, this argument is factually wrong. It is doubly so in the context of the targeted-killing program, because senior officials have specifically cited OLC memoranda in defense of the argument that the program operates within clear legal limits.⁴⁰ John Brennan, who was the president’s counterterrorism advisor at the time, told Congress during his 2013 confirmation for Director of the Central Intelligence Agency (CIA) that OLC “advice establishes the legal boundaries within which we can operate.”⁴¹ Other executive-branch officials have said essentially the same thing.⁴²

-
37. See Office of Legal Counsel, *OLC FOIA Electronic Reading Room*, U.S. DEP’T JUSTICE, <http://www.justice.gov/olc/olc-foia-electronic-reading-room> [<http://perma.cc/Z9A4-2XNJ>]. Despite this, in a recent brief, the government—somewhat awkwardly, to say the least—claimed that “OLC’s publication process does not seek to implement FOIA, but instead sets forth a framework for determining whether to *voluntarily* publish certain advice documents when disclosure of those documents is *not* legally required.” Reply Memorandum in Support of Defendant’s Motion to Dismiss at 4, *Campaign for Accountability v. U.S. Dep’t of Justice*, No. 1:16-cv-1068 (D.D.C. Sept. 8, 2016), ECF No. 12.
38. See *Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. U.S. Dep’t of Justice*, 697 F.3d 184, 203-04 (2d Cir. 2012). Indeed, though the government argued to the Second Circuit in *Brennan Center* that not *every* OLC opinion constitutes working law, it did *not* make the argument it makes today: that OLC opinions can *never* constitute working law. See Brief for Defendants-Appellants, *Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. U.S. Dep’t of Justice*, 697 F.3d 184 (2d Cir. 2012) (No. 11-4599); Reply Brief for Defendants-Appellants, *Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. U.S. Dep’t of Justice*, 697 F.3d 184 (2d Cir. 2012) (No. 11-4599).
39. Brief for Defendants-Appellees-Cross-Appellants at 51, *Am. Civil Liberties Union v. U.S. Dep’t of Justice*, Nos. 15-2956, 15-3122(XAP) (2d Cir. June 6, 2016), ECF No. 105. (Disclosure: the authors were—and one remains—counsel for the plaintiffs in this case.)
40. *N.Y. Times Co. v. U.S. Dep’t of Justice (N.Y. Times I)*, 756 F.3d 100, 116-17 (2d Cir. 2014).
41. *Nomination of John O. Brennan to be Director of the Central Intelligence Agency: Hearing Before the S. Select Comm. on Intelligence*, 113th Cong. 57 (Feb. 7, 2013), <http://www.intelligence.senate.gov/sites/default/files/hearings/transcript.pdf> [<http://perma.cc/8EUC-NJA5>].
42. See, e.g., Letter from Eric H. Holder, Jr., Attorney Gen., to Patrick J. Leahy, Chairman of the Senate Comm. on the Judiciary (May 22, 2013), <http://www.justice.gov/slideshow/AG->

Of course, the argument that OLC memoranda are *categorically* beyond the reach of the working law doctrine appeals to the government precisely because it renders off-limits any inquiry into the role that specific OLC memoranda actually play in specific factual contexts.

It would be remarkable enough if the working law doctrine were being narrowed only to exclude OLC memoranda. Because the OLC is the paradigmatic generator of working law, however, to question OLC's ability to generate working law is to call the entire working law doctrine into question. Thus, the government is now using the ammunition provided by *EFF* and *N.Y. Times II* to take aim at the working law doctrine more generally. Another ongoing ACLU case involves a request for legal memoranda concerning government surveillance conducted under Executive Order 12,333.⁴³ The government has argued that memoranda written by CIA lawyers are not working law because agency lawyers do not dictate agency policy. “[L]egal memoranda by CIA attorneys are not controlling interpretations of policy on which the Agency relies in discharging its mission,” it writes.⁴⁴ The government likewise proposes that the National Security Agency's (NSA) Office of General Counsel “provides legal advice on a number of different legal matters, but . . . has no authority to issue final decisions or authoritative statements on NSA policy.”⁴⁵ The government does not say it explicitly, but its argument is essentially that *EFF* and *N.Y. Times II* abandoned the rule of *Coastal States* and *Tax Analysts*. Legal analysis is not working law, the government suggests, unless it dictates policy.

But what kind of legal analysis could dictate policy? Legal analysis always leaves the decisionmaker with a range of options within a set of parameters. To say that legal analysis constitutes working law only when it dictates policy is to say that legal analysis can never be working law. The government's argument, in other words, is not a construction of the concept of working law but a wholesale rejection of it.

The courts should reject this argument. *EFF* and *N.Y. Times II* involved specific OLC memoranda and specific factual contexts. Perhaps the best reading of those cases is that they held that the handful of OLC memoranda at issue

letter-5-22-13.pdf [<http://perma.cc/B7W7-UF2T>] (explaining that OLC memoranda set out “the circumstances in which [the government] could lawfully use lethal force”).

43. 46 Fed. Reg. 59,941 (Dec. 4, 1981), *as amended by* Exec. Order 13,284, 68 Fed. Reg. 4077 (Jan. 23, 2003), Exec. Order 13,355, 69 Fed. Reg. 53,593 (Aug. 27, 2004), *and* Exec. Order 13,470, 73 Fed. Reg. 45,328 (July 30, 2008).
44. Reply Memorandum of Law in Further Support of Defendants' Motion for Partial Summary Judgment, & in Opposition to Plaintiffs' Cross-Motion for Partial Summary Judgment at 15, *Am. Civil Liberties Union v. Nat'l Sec. Agency*, No. 13 Civ. 9198 (S.D.N.Y. June 8, 2016), ECF No. 75.
45. Supplemental Declaration of David J. Sherman, *NSA, Am. Civil Liberties Union v. Nat'l Sec. Agency*, No. 13 Civ. 9198 (S.D.N.Y. June 8, 2016), ECF No. 79.

in those cases did not constitute working law given the nature of the memoranda and the way they were being used.⁴⁶ Read this way, *EFF* and *N.Y. Times II* may have been wrong—we think they were—but they did not upend forty years of case law or signal a new judicial tolerance for secret law. There is surely reason to pause before concluding that the two appellate courts intended to narrow the working law doctrine so radically without extended analysis.

In our view, though, enough damage has been done to the working law doctrine already to warrant congressional intervention. In early 2016, the House passed a bill that would have prohibited the government from withholding opinions that reflect “controlling interpretations of law,” “final reports or memoranda created by an entity other than the agency . . . used to make a final policy decision,” and “guidance documents used by the agency to respond to the public.”⁴⁷ Congress subsequently enacted a FOIA reform bill, but without this crucial language.⁴⁸ Of course, this language should be superfluous—it addresses precisely the kinds of records that the FOIA, properly construed, already requires agencies to disclose. Recent court rulings, however, suggest that a congressional reaffirmation of the working law doctrine may be necessary. The language omitted from the 2016 FOIA reform bill provides a useful starting point. As we mark FOIA’s fiftieth anniversary, Congress should consider reaffirming and strengthening the statutory provisions that were meant to end the phenomenon of secret law.

Jameel Jaffer is the founding director of the Knight First Amendment Institute at Columbia University and a former deputy legal director of the American Civil Liberties Union, in which capacity he co-authored this piece. Brett Max Kaufman is a staff attorney at the American Civil Liberties Union in New York and an adjunct clinical professor at New York University School of Law.

Preferred Citation: Jameel Jaffer & Brett Max Kaufman, *A Resurgence of Secret Law*, 126 YALE L.J. F. 242 (2016), www.yalelawjournal.com/forum/a-resurgence-of-secret-law.

46. It is worth noting that the D.C. Circuit has explicitly held that because the government bears the burden of justifying its withholding of records under Exemption 5, it consequently bears the burden “[t]o establish that documents do not constitute the ‘working law’ of the agency.” *Arthur Andersen & Co. v. Internal Revenue Serv.*, 679 F.2d 254, 258 (D.C. Cir. 1982); see also *Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. U.S. Dep’t of Justice*, 697 F.3d 184, 201-02 (2d Cir. 2012) (“[I]t is the government’s burden to prove that the privilege applies, and not the plaintiff’s to demonstrate the documents sought fall within one of the enumerated section 552(a)(2) categories.”).

47. H.R. 653, 114th Cong. § 2(b)(1) (2016).

48. See FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (2016).

