[SCHEDULE FOR ORAL ARGUMENT SEPTEMBER 20, 2012]

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

AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION FOUNDATION,	
Plaintiffs-Appellants,	
v.	No. 11-5320
CENTRAL INTELLIGENCE AGENCY,	
Defendant-Appellee.	

MOTION TO REMAND FOR FURTHER PROCEEDINGS

Pursuant to Federal Rule of Appellate Procedure 27, defendant-appellee, the Central Intelligence Agency ("CIA"), hereby moves to remand this case to the district court, to permit the government to file a supplemental response that takes into account a government filing made today in *ACLU, et al.* v. *U.S. Department of Justice*, No. 12-CIV-0794 (S.D.N.Y.); *New York Times Co.* v. *U.S. Department of Justice*, No. 11-CIV-9336 (S.D.N.Y.). In those consolidated cases, the CIA has responded to a request made by the ACLU to several agencies for certain records related to the use of targeted lethal force by the U.S. government and has acknowledged the existence of responsive records in the CIA's possession.

Specifically, the CIA determined that it could acknowledge officially, without harming national security, its possession of some responsive records regarding the legal basis for the use of targeted lethal force against U.S. citizens and the process by which citizens can be designated for targeted lethal force. The official acknowledgment explained that such records would include the Attorney General's March 5, 2012 speech, in which he discussed circumstances in which the use of such lethal force would be lawful, and the April 30, 2012 speech by Assistant to the President for Homeland Security and Counterterrorism John O. Brennan, which included discussion of the use of drones. It further explained that, "[b]ecause the CIA is a critical component of the national security apparatus of the United States, and because the speeches covered a wide variety of issues relating to U.S. counterterrorism efforts, it does not harm national security to reveal that a copy of the Attorney General's and Mr. Brennan's speeches exist in the CIA's files." Memorandum of Law in Support of Defendants' Motion for Summary Judgment, *New York Times, Co.* v. *Department of Justice*, No.11-civ-9336 (S.D.N.Y); *ACLU* v. *Department of Justice, et al.*, No. 12-civ-794 (S.D.N.Y.), at 8. The CIA further explained, however, that the number and nature of the responsive records are exempt from disclosure under FOIA exemptions 1 and 3.

In light of that official acknowledgment in the New York cases, we respectfully ask this Court to remand this case to allow the Agency to file a supplemental response to plaintiffs' FOIA request to take into account that action. Such a remand would enable the district court, in the first instance, to determine the effect, if any, of that official acknowledgment on the case at bar. In support of this motion, defendant-appellee states as follows:

1. Plaintiffs' appeal in this case challenges the propriety of the CIA's "*Glomar* response," in which the CIA refused to confirm or deny that it possesses any records responsive to plaintiffs' request under the Freedom of Information Act ("FOIA"). The sole issue on appeal is whether the district court correctly held that the CIA had not previously officially acknowledged its possession of records responsive to plaintiffs' broad request concerning the lethal use of unmanned aerial vehicles, or "drones," "by the CIA and the Armed Forces," and therefore had not waived its ability to refuse to confirm or deny the existence of such records. The case has been fully briefed and is scheduled for oral argument on September 20, 2012.

2. The *ACLU* and *New York Times* cases in the Southern District of New York involve FOIA requests made to several federal agencies, including the CIA, seeking records relating to the use of targeted lethal force against U.S. citizens.[1] On June 20,

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[1] Plaintiffs in this appeal identified those cases as related to the instant appeal. *See* Brief for Plaintiffs-Appellants, Certificate as to Parties, Rulings and Related

2012, the CIA (along with several other agencies) submitted a response to those requests in conjunction with a motion for summary judgment. The CIA acknowledged that it possesses some records responsive to the requests, but determined that it could not reveal the number, nature, or category of the records it possesses, nor could it provide an index of those records, because doing so would reveal information relating to intelligence activities, sources and methods, the foreign activities and foreign affairs of the United States, and the functions of the CIA, the unauthorized disclosure of which reasonably could be expected to harm national security, thereby making that information exempt from disclosure under FOIA exemptions 1 and 3. *See Bassiouni* v. *CIA*, 392 F.3d 244 (7th Cir. 2004); *Lame* v. *Department of Justice*, 654 F.2d 917 (3rd Cir. 1981).

3. In the instant case, the CIA does not agree with plaintiffs that the statements they discuss in the briefing constitute an official acknowledgment that the CIA possesses any records responsive to plaintiffs' request. However, the June 20 filing in the Southern District of New York officially acknowledges the CIA's possession of some records that could potentially be responsive to plaintiffs' FOIA requests in this case as well, such as a copy of the April 30, 2012 speech by Assistant to the President for Homeland Security and Counterterrorism John O. Brennan, which

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included discussion of the U.S. government use of drones. Explaining the effect, if any, of this later development on the FOIA request here will require a further filing by the government.

4. If the case is remanded to the district court, the government will file a supplemental response that will take into account the effect of the June 20 response in the Southern District of New York, and also will provide the district court a further declaration that addresses that response and the scope of any *Glomar* or "no number, no list" response in this case. The district court is in the best position to receive such new information and to consider, in the first instance, its effect on the government's response in this case.

For the foregoing reasons, we respectfully request that this Court remand this case to the district court, to permit the government to provide a supplemental response that will enable the district court to consider that response in the first instance.

Respectfully submitted,

STUART F. DELERY
Acting Assistant Attorney General

BETH S. BRINKMANN
Deputy Assistant Attorney General

MATTHEW M. COLLETTE
(202) 514-4214

s/Catherine Y. Hancock
CATHERINE Y. HANCOCK
(202) 514-3469
Attorneys, Appellate Staff
Civil Division, Room 7236
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

June 20, 2012

CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2012, I served the foregoing Motion To Remand For Further Proceedings by causing an electronic copy to be served on the Court via the ECF system, and by causing one copy to be served on the following counsel via the ECF system:

Arthur B. Spitzer
ACLU of the Nation's Capital
4301 Connecticut Ave., NW, Suite 434
Washington, DC 20008
(202) 457-0800

Jameel Jaffer
Ben Wizner
Nathan Freed Wessler
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500

s/ Catherine Y. Hancock
Catherine Y. Hancock
Counsel for Defendant-Appellee