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VIA CM/ECF

March 18, 2016

Hon. Mark Langer
Clerk of the Court
United States Court of Appeals for the District of Columbia Circuit
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001

RE: *ACLU v. CIA*, No. 15-5217

Dear Mr. Langer:

We write in response to the ACLU's March 14, 2016 letter quoting a statement by the Assistant to the President for Homeland Security and Counterterrorism that the Administration intends to release publicly an assessment of combatant and non-combatant casualties resulting from airstrikes taken outside areas of active hostilities since 2009. The ACLU is wrong to suggest that this warrants remand to district court.

First, the ACLU's argument is premature and speculative, as no public disclosure of information has yet occurred.

Second, the ACLU cannot show that the information to be made public is as specific as and matches the withheld information it seeks. *See ACLU v. DOD*, 628 F.3d 612, 620-21 (D.C. Cir. 2011). The ACLU seeks information about the U.S. Government's lethal use of armed drones that goes far beyond the general assessment referred to in the cited speech, including "the identity of the intended targets, assessed number of people killed, dates, status of those killed, agencies

involved, the location of each strike, and the identities of those killed if known." Joint Appendix 199. The description in the statement of the information to be disclosed is markedly different: it appears to refer to summary information only; for a defined period; limited to strikes outside areas of hostilities; and assessing combatant and non-combatant casualties.

Third, the premise of the ACLU's argument is flawed. Even if the government were to disclose previously classified information now, that does not show that the CIA improperly processed the ACLU's Freedom of Information Act request in 2014, or that the district court erroneously granted summary judgment in 2015. An agency must process a FOIA request at a particular time, based on the facts before it, and judicial review "properly focuses on the time the determination to withhold is made." *Bonner v. Dep't of State*, 928 F.2d 1148, 1152 (D.C. Cir. 1991). This rule is consistent with 5 U.S.C. § 552(a)(4)(B)'s focus on whether the agency "improperly withheld" records from the complainant. To require an agency to modify its FOIA responses based on post-response occurrences could create an endless cycle of judicially mandated reprocessing.

Sincerely,

/s/ Sharon Swingle

Sharon Swingle

cc: all counsel (via CM/ECF)