JAMEEL JAFFER
DEPUTY LEGAL DIRECTOR

October 18, 2013

BY ECF

Hon. Catherine O'Hagan Wolfe
Clerk of the Court
U.S. Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, New York 10007

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OFFICERS AND DIRECTORS
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Re: *N.Y. Times Co. v. U.S. Dep't of Justice*
Nos. 13-422 (Lead) & 13-445 (Con.)

Dear Ms. Wolfe:

Pursuant to the Court's October 1, 2013 order and in response to the government's October 10, 2013 letter–brief, Plaintiffs–Appellants the American Civil Liberties Union and American Civil Liberties Union Foundation (together, the "ACLU") submit this supplemental letter–brief.

1. The government insists that the disclosures it made on page 47 of its opposition brief—like all of the other disclosures it has made since the district court published its opinion—"have no bearing on the question before this Court." Gov't Ltr. 1. This is

wrong. The Court has the authority to take judicial notice of the disclosures. *See Garb v. Republic of Pol.*, 440 F.3d 579, 594 n.18 (2d Cir. 2006) (judicial notice "may be taken at any stage of the proceeding" (quotation marks omitted)); *see also* ACLU Reply 4–5 (D.C. Circuit applies flexible rule when disclosures relate directly to center of a dispute.).[1] Indeed, the D.C. Circuit explicitly considered post-judgment disclosures in a similar FOIA case earlier this year—without any objection from the government. *See Am. Civil Liberties Union v. CIA*, 710 F.3d 422, 431 n.10 (D.C. Cir. 2013) ("*Drones FOIA*"). The government states that the ACLU's position would create a "moving target," Gov't Ltr. 2 (quotation marks omitted), but it is the *government's* position that would have this effect: If the Court refused to consider post-judgment disclosures in a case like this, each such disclosure would compel FOIA plaintiffs to file a new FOIA request. This would serve neither judicial efficiency nor fairness.

2. The government's attempt to minimize the importance of its disclosures on page 47 of its brief ignores the irreconcilable tension between those disclosures

[1] The government attempts to distinguish the D.C. Circuit's rule on the theory that the rule is based on a case involving "a single document." Gov't Ltr. 2 n.1 (discussing *Powell v. U.S. Bureau of Prisons*, 927 F.2d 1239, 1242–43 (D.C. Cir. 1991)). There is no rational reason, however, why the rule should not apply in cases involving more documents—and as *Drones FOIA* shows, the D.C. Circuit does not read *Powell* so narrowly. Notably, the *Powell* court emphasized that judicial notice of post-judgment developments is appropriate where the "intervening events directly contradict" agency affidavits filed in a lower court. 927 F.2d at 1243 & n.9.

and the government's sweeping "no number no list" response. Even if the number of documents withheld by the government was at one time a FOIA-exempt secret (which the ACLU does not concede), the government has now acknowledged that it possesses a "significant number of responsive classified records." *See* ACLU Reply 15 n.7 (comparing assertion in DOJ declaration with page 47).

3. The government also errs when it asserts that "[t]he D.C. Circuit held that the public statements on which the ACLU relied (and on which it relies here) did not constitute official acknowledgment of whether the CIA itself operates drones," Gov't Ltr. 4 (quotation marks omitted); *accord* Gov't Opp. 42; Tr. of Oral Argument at 75:13–20. As an initial matter, the *Drones FOIA* court did not address Mr. Panetta's interview on *60 Minutes*, which provides an "irresistible" inference that the CIA uses drones. Tr. of Oral Argument at 64:21 (statement of Newman, J.); *see* JA 628. Nor did that court address the bulk of disclosures at issue in this case, including those made by CIA Director Brennan, Senator Feinstein, and Representative Rogers. The D.C. Circuit found it *unnecessary* to decide whether the CIA itself operated drones because it found that the agency had disclosed an "intelligence interest" in targeted killing—and that the agency's disclosure of this intelligence interest was sufficient to defeat its "indefensibl[e]" Glomar response. *Drones FOIA*, 670 F.3d at 431. In this case, the Court must answer the question

that the D.C. Circuit found it unnecessary to address. *See* ACLU Reply 30 (outlining instructions that this Court should provide to the district court).

4. The government's claim that "[a]cknowledging whether OLC provided legal advice on the use of targeted force by the CIA or another agency would tend to reveal whether that agency was operationally involved in using" such force, Gov't Ltr. 4 (alteration and quotation marks omitted), is also wrong. After all, while the government has acknowledged the existence of the OLC–DOD Memo, it continues to insist that this acknowledgement does not disclose DOD's operational involvement in targeted killing. *See* Tr. of Oral Argument at 82:13–15; Gov't Opp. 44.[2] The government could similarly disclose the existence of CIA-related legal memoranda without abandoning its position that it has not disclosed the CIA's operational involvement. It is not merely plausible, but likely, that an "interested" intelligence agency would possess legal memoranda concerning the legal basis for targeted killings, whether or not it was the agency conducting them.

Respectfully submitted,

Dated: October 18, 2013

By: /s/ Jameel Jaffer
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
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[2] The government has officially acknowledged the operational involvement of *both* the CIA and DOD in targeted killing, *see* ACLU Br. 38–40, but the ACLU engages the government's assertion for the sake of argument here.

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cc: Defendants–Appellees (via ECF)