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VIA ECF

Honorable Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals for the Second Circuit
40 Centre St.
New York, NY 10007-1312

Re: New York Times Co. v. U.S. Dep't of Justice (Nos. 13-422, 13-445)

Dear Ms. Wolfe:

Pursuant to the Court's order of October 1, 2013, appellants The New York Times Company, Charlie Savage, and Scott Shane (jointly, "The Times") submit this supplemental letter in response to Defendant's supplemental letter of October 10, 2013 (the "Letter").

Point No. 1 of the Letter is mainly addressed to the FOIA requests of the ACLU. To the extent it touches on The Times's FOIA requests, we adopt the views expressed in the supplemental letter of the ACLU.

In Point No. 2, the Government argues that the D.C. Circuit's decision in *ACLU v. CIA*, 710 F.3d 422 (2013), has no bearing on The Times's appeal. To the contrary, *ACLU* is applicable in several respects.

The Times seeks only the Justice Department's abstract legal analyses justifying targeted killings. In *ACLU*, the Government argued that confirming the existence of CIA documents about drone strikes would disclose whether the CIA was "involved in" or had an "interest in" in such strikes. *Id*. at 429-31. The D.C. Circuit, reversing the District Court, held that the CIA's intelligence interest had already been acknowledged and that confirmation of documents would not disclose CIA "involvement." *Id.* The Government in the instant appeal argues that confirming the existence of DOJ legal analyses (beyond the OLC DOD Memorandum) would reveal that involvement. The District Court below accepted that claim, relying on the now-reversed D.C. District Court decision. *See* S.A. 65.[1] However, both District Courts relied solely on certain statements made by CIA Director Leon Panetta in coming to that conclusion. *See* S.A. 64-65.

The D.C. Circuit, by contrast, took into account a host of statements from government officials—including statements made *after* the D.C. District Court's decision. *ACLU*, 710 F.3d at 429-30. Further, the D.C.

[1] While the District Court was expressly dealing with the ACLU requests at that point in the decision, the court's logic was equally applicable to The Times's requests.

Circuit rejected the idea that "official acknowledgement" was limited to acknowledgement of specific documents. *Id.* at 427-28. It held that the proper focus of the courts' inquiry was whether there was official acknowledgement of the Government's proffered secret. *Id*. at 429-30. The same analytical approach—looking at the entire public record and eschewing narrow consideration of whether a particular document was acknowledged—is appropriate here.

More fundamentally, the Government (Letter at p. 4) claims that disclosure of CIA involvement remains a secret and is "information that the D.C. Circuit held has not been officially disclosed"—when in fact the court never decided that issue because it found that the disclosure being ordered would not reveal involvement in any event. *See ACLU*, 710 F.3d at 429-30. As is evident from the record in this appeal, multiple statements from administration officials and congressional leaders, coupled with the Government's acknowledgement of CIA involvement in the strike on Osama Bin Laden, belie the claim that the CIA's involvement remains a secret.

But, as set out in *ACLU*, even before a court evaluates the scope and nature of the official acknowledgements, it should first determine whether "it is logical or plausible for [the defendant] to contend that [the disclosure sought] would reveal something not already officially acknowledged." *See*

id. at 429. The Government suggests that because the OLC DOD Memorandum was acknowledged, any further disclosure would necessarily reveal CIA involvement. (*See* Letter at 4.) Not so. A Vaughn index would simply show legal analyses existed at DOJ. If the identities of the recipients of memoranda were secret—whether the recipients were others at DOJ, the DOD, State, the White House, the NSA, or the CIA—the identities could be redacted in the first instance. It is neither "logical nor plausible" that such an index would reveal any secret, let alone CIA involvement.

Alternatively, if indexing is truly a problem, nothing prevents the Government from foregoing the index and simply releasing the legal analysis sections of the relevant documents after redacting agency identity and secret operational details. The Government has yet to make the case for why abstract legal analysis—of the sort found in the Attorney General's Northwestern speech and the White Paper—is a national security secret.

Contrary to the Government's assertions (Letter at p. 3), *ACLU* supports appellants' position that this matter should be remanded to the District Court with appropriate guidance. (*See* ACLU Reply Brief at 30 (proposing standards for remand).

Respectfully submitted,

/s/ David E. McCraw

cc: Counsel of Record via ECF