I IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 1:10-cv-00436-RMC
CENTRAL INTELLIGENCE AGENCY,	)	
Defendant.	)	

DEFENDANT'S MOTION TO STAY PROCEEDINGS

For the reasons stated in the attached memorandum, Defendant Central Intelligence Agency hereby moves to stay these proceedings until completion of any further review of the proceedings in the Second Circuit. *See New York Times Co. v. DOJ*, Nos. 13-0422-cv(L), 13-0445-cv (CON) (April 21, 2014). Defendant will advise the Court of the status of any further proceedings ninety (90) days after that opinion was issued, or July 21, 2014.

Undersigned counsel has consulted with Plaintiffs' counsel, who indicated that Plaintiffs will file an opposition to this motion.

Dated: April 29, 2014

Respectfully Submitted,

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Plaintiffs,	)	
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Defendant.	)	

DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION FOR A STAY OF PROCEEDINGS

INTRODUCTION

Defendant Central Intelligence Agency ("the CIA") hereby requests a stay of proceedings in this case until completion of any further review of the recent decision in the United States Court of Appeals for the Second Circuit that involves FOIA requests for some of the same types of records as in the instant case. *See New York Times Co. v. DOJ*, Nos. 13-0422-cv(L), 13-0445-cv (CON) (April 21, 2014). This Court recently ordered Defendant to respond to Plaintiffs' recently filed Notice of Supplemental Authority. While this order was pending, the Second Circuit issued an opinion in that case ordering release of certain records, withholding of others, and additional information about others. In yet another FOIA case involving a similar request, the Northern District of California entered judgment dismissing the case. Plaintiffs American Civil Liberties Union and American Civil Liberties Union Foundation (collectively, "the ACLU") are also plaintiffs in the Second Circuit matter. Because the issues and records partly

overlap in these cases, a stay in this case is appropriate until the completion of any further review of the Second Circuit's judgment.[1]

BACKGROUND

1. This Case.

This action arises from FOIA requests Plaintiffs submitted to the CIA, the Department of Defense ("DOD"), the Department of State ("State"), and the Department of Justice ("DOJ"). In its requests, dated January 13, 2010, the ACLU sought records pertaining to ten categories of information, each of which concerns "drone strikes." *See* Declaration of Mary Ellen Cole ("Cole Decl.") Exhibit A (the "CIA Request") (filed October 1, 2010 as Doc. No. 15). The CIA is the only remaining defendant, and this Court upheld the CIA's original Glomar response, holding that the existence or non-existence of responsive records was currently and properly classified and exempt pursuant to statute because to reveal the existence or non-existence of records would reveal whether or not the CIA was involved in or at least had an intelligence interest in drone strikes. The Court held that to reveal such information could reveal intelligence activities and intelligence sources and methods, as well as functions of the CIA, all of which are exempt from disclosure under FOIA Exemptions 1 and 3. *See ACLU v. DOJ*, 808 F. Supp. 2d 280, 286-93, 298-301 (D.D.C. 2011).

While the ACLU's appeal was pending, the Executive Branch declassified and disclosed certain additional information about U.S. counterterrorism operations, including targeted lethal operations with drones. *See* Declaration of Martha Lutz ("Lutz Decl.") at ¶11 (filed August 9, 2013 at Doc. No. 49-2). In light of the newly declassified information, the CIA moved the D.C.

[1] Undersigned counsel has consulted with Plaintiffs' counsel, who has indicated that Plaintiffs oppose this motion and plan on filing an opposition.

Circuit Court of Appeals to remand this case so that the district court could determine the effect of these disclosures on the case at bar, but that motion was denied pending consideration of the appeal. *See* Docket No. 10-436, Doc. No. 41 (D.C. Cir. July 11, 2012).

The D.C. Circuit ultimately remanded the case after argument and after reversing the District Court. The Court of Appeals held that, given certain statements by the President and other high-level government officials, the CIA's Glomar response is no longer appropriate, but the court also refused to adopt the position urged by the ACLU. The ACLU had argued primarily that the CIA had officially disclosed that it not only had an interest in drone strikes, but also conducted drone strike operations. The Court noted that Plaintiffs' FOIA request was not limited to drones purportedly operated by the CIA but instead sought records related to drones operated by the CIA or the Armed Forces, and in light of these statements, the Court found that the CIA "proffered no reason to believe that disclosing whether it has any documents at all about drone strikes [would] reveal whether the Agency itself – as opposed to some other U.S. entity such as the Defense Department – operates drones." *ACLU v. CIA*, 710 F.3d 422, 428 (D.C. Cir. 2013). The Court determined that although certain official statements "do not acknowledge that the CIA itself operates drones, they leave no doubt that some U.S. agency does," *id.* at 429. The Court found it was "neither logical nor plausible for the CIA to maintain that it would reveal anything not already in the public domain to say that the Agency 'at least has an intelligence interest' in such strikes," *id.* at 430. The D.C. Circuit left open the issue as to "[j]ust how detailed a disclosure must be made." *Id*. at 432.

On remand, Defendant has provided a "no number no list" response, which the D.C. Circuit noted might be a possible response. Defendant has explained that to reveal the number and details of responsive documents would reveal sensitive information regarding CIA functions

and intelligence activities, sources and methods. *See* Defs MSJ (filed August 9, 2013 as Doc. No. 49). The parties had completed briefing cross-motions for summary judgment when Plaintiffs filed a Notice of Supplemental Authority (*see* Doc. No. 56), referencing part of a public statement by the Director of National Intelligence in response to a question about drones, and the Court ordered Defendant to respond by April 30, 2014 (*see* Order dated April 9, 2014).

2. New York Litigation

In October 2011, after the first district court opinion in the present matter but before the appellate ruling, the ACLU submitted additional FOIA requests to DOJ, DOD and CIA, seeking multiple categories of records about "targeted killings," including legal analysis about such use of force against U.S. citizens and information about specific operations.[2] When the ACLU filed suit on that request in the Southern District of New York, the CIA acknowledged that it possessed copies of certain government speeches, which were responsive to the request that sought, *inter alia*, legal analysis pertaining to the use of targeted lethal force against U.S. citizens. Lutz Decl. ¶11 & n.4. Accordingly, the CIA disclosed that it possessed responsive records and withheld all details about those records – a "no number, no list" response. *See* Lutz Decl. ¶11; *see generally NY Times v. DOJ*, 915 F. Supp. 2d 508 (S.D.N.Y. 2013).

Other FOIA requests were litigated in a separately filed matter in the Southern District of New York. In one of the those requests, the New York Times sought all Office of Legal Counsel ("OLC") opinions about the use of targeted lethal force by DOD or intelligence agencies against U.S. citizens in counterterrorism operations, and the other sought OLC opinions about the use of targeted lethal force by DOD or intelligence agencies in counterterrorism operations.

[2] The ACLU also has pending at the administrative stage another similar request related to the targeted use of lethal force, with multiple government agencies, including DOJ, DOD, CIA, and State.

DOJ acknowledged the existence of one responsive opinion pertaining to DOD and refused to confirm or deny the existence of OLC opinions pertaining to any other agency or agencies. The district court consolidated the ACLU and New York Times cases and granted the Government's motion for summary judgment, ruling that the CIA's no number no list response was appropriate and had not been waived, and upholding DOJ's partial Glomar response to the New York Times. *See* 915 F. Supp. 2d at 550-53 ("Plaintiffs have provided the Court with every public pronouncement by a senior Executive Branch official that touches on the intelligence community's involvement in the Government's targeted killing program. In none of these statements is there a reference to any particular records pertaining to the program, let alone the number or nature of those records.").

On April 21, 2014, the Second Circuit Court of Appeals reversed the decision of the district court, holding, *inter alia*, that the CIA's no number no list response was insufficiently justified and remanding to the district court for an examination of classified Vaughn indices to determine which documents or document descriptions would be disclosed. The Court of Appeals also held that the Government had waived statutory exemptions over certain information.[3] *See NY Times v. DOJ*, --- F.3d ----, 2014 WL 1569514 (2d Cir. 2014).

3. California Litigation

In a fourth FOIA matter in the Northern District of California, the First Amendment Coalition sought any OLC opinions related to the targeting of Anwar al-Aulaqi. After withdrawing its initial Glomar response in light of declassification of the fact of the U.S. Government's Aulaqi operation, consistent with its position in the New York litigation, DOJ

[3] The opinion of the Second Circuit was redacted in order to preserve the opportunity for further judicial review.

acknowledged the existence of a responsive OLC opinion pertaining to DOD (which was withheld in full under Exemptions 1, 3, and 5) and refused to confirm or deny the existence of opinions relating to any agency other than DOD. On April 11, 2014, the district court for the Northern District of California granted the government's motion for summary judgment, holding, *inter alia*, that the government's partial Glomar response was proper, and rejecting the plaintiff's argument that the government had acknowledged the existence or nonexistence of alleged CIA operations. *See First Amendment Coal. v. DOJ*, 2014 WL 1411333, *18 (N.D. Cal. 2014).

STANDARD FOR A STAY OF PROCEEDINGS

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). In determining whether a stay is appropriate, the Court is to consider "the possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay." *Lockyer v. Mirant Corp*, 398 F.3d 1098, 1110 (9th Cir. 2005); *see also Belize Soc. Dev. Ltd. v. Gov't of Belize*, 668 F.3d 724, 731-733 (D.C. Cir. 2012) (applying *Landis* and its D.C. Circuit progeny). *Landis* teaches that deciding whether to grant a stay motion "calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." 299 U.S. at 254-55. While "[t]he proponent of a stay bears the burden of establishing its need," *Clinton v. Jones*, 520 U.S. 681, 708 (1997), courts should "be on . . . guard against depriving the

processes of justice of their suppleness of adaptation to varying conditions." *Landis*, 299 U.S. at 256. A stay is proper, so long as it is "kept within the bounds of moderation." *Id.*

Among other reasons, a district court may stay a case in order to allow a higher court to settle in a separate case issues of law that have bearing on the matter to be stayed. *See Marshel v. AFW Fabric Corp.*, 552 F.2d 471, 472 (2d Cir. 1977); *Bechtel Corp. v. Local 215, Laborers' Int'l Union of N. Am.*, 544 F.2d 1207, 1215 (3d Cir. 1976). *See also LaSala v. Needham & Co., Inc.*, 399 F. Supp. 2d 421, 427 n.39 (S.D.N.Y. 2005) (finding that a stay is appropriate "where a higher court is close to settling an issue of law bearing on the action") (citing *Marshel*, 552 F.2d at 472). Moreover, "'a trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case,'" *Hisler v. Gallaudet Univ.*, 344 F. Supp. 2d 29, 35 (D.D.C. 2004) (quoting *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863–64 (9th Cir. 1979)) (alteration in original), even if a decision in those independent proceedings would not be controlling in the case to be stayed, *see Leyva*, 593 F.2d at 863-64; *LaSala*, 399 F. Supp. 2d at 427. A district court may grant a stay pending the resolution of other proceedings regardless of whether "the parties to the two causes [are] the same and the issues identical." *Landis*, 299 U.S. at 254. The Supreme Court has noted that, "a decision in the cause [] pending … may not settle every question of fact and law in [this] suit[] …, but in all likelihood it will settle many and simplify them all." *Id.* at 256; *see also Goldstein v. Time Warner NY City Cable Corp.*, 3 F. Supp. 2d 423, 438 (S.D.N.Y 1998) (granting a stay pending an appellate proceeding in a separate case even though the appellate proceeding addressed only one of the three aspects of the statute at issue in the case to be stayed). Granting a stay in these circumstances is not an

abuse of discretion so long as the length of the stay is not immoderate and the stay does not endure for an indefinite period of time absent a pressing need. *See Landis*, 299 U.S. at 255-56.

ARGUMENT

A STAY OF PROCEEDINGS IN THIS MATTER WOULD BENEFIT THE COURT AND THE PARTIES WITH NO PREJUDICE TO PLAINTIFFS

A stay of this case pending any further review of the Second Circuit decision would serve the interests of judicial economy. Although the requests are not identical, agency records that are responsive to the ACLU's FOIA request in the Second Circuit case would likely be responsive to its request in this case. In addition, the ACLU has made similar arguments in both cases regarding alleged disclosures regarding the nature of supposed CIA involvement in the use of force in counterterrorism operations, and the CIA has asserted a no number, no list response in both cases, explaining that the nature, depth and breadth of a CIA role, if any, is classified and exempt pursuant to statute. In the Second Circuit case, the court found that the CIA's no number, no list response was insufficiently justified. If the Government does not seek further review of the Second Circuit decision (or seeks further review but does not prevail), the Government may reveal records or other information that could impact the no number no list response in this matter or influence the outcome of the pending motion for summary judgment. If the Government seeks further review in the Second Circuit and prevails, the resulting holding could be persuasive authority affecting this Court's decision. If the Government petitions for a writ of certiorari, any resulting Supreme Court action could control the issues currently before this Court. Accordingly, any further review of the Second Circuit case could substantially advance the present litigation.

The Government is currently faced with the possibility of conflicting judicial decisions in multiple courts related to similar or identical information, making it difficult to manage conflicting decisions and litigation in varying stages.[4] In FOIA cases, unlike other matters involving multiple cases with different plaintiffs (where protective orders or some other discovery-limiting mechanism might be appropriate), the release of records or information in a FOIA case in one jurisdiction discloses the records or information for all, regardless of the law of an individual circuit. Disclosure to the public is particularly consequential when classified information is at stake, and the government must take extreme care to protect national security. "Especially in cases of extraordinary public moment, the individual may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted." *Landis*, 299 U.S. at 256.

Moreover, a stay in this case is limited in duration and unlikely to prejudice the Plaintiff. The government has 45 days in which to seek panel rehearing or en banc review, and 90 days after the opinion or any further rehearing or en banc ruling in which to seek a writ of certiorari. *See* Fed. R. App. Proc. 35, 40; Supreme Court Rule 13. Defendant will file a status report on July 21, 2014, advising the Court of whether further review is being sought. Until that time, it would therefore promote judicial economy to stay this case until completion of any further review.

[4] In light of these conflicting orders that analyze similar public statements very differently and reach opposite conclusions on similar matters of great public import, the Government's response to Plaintiffs' Notice of Supplemental Authority regarding DNI Clapper's statements would be appropriately provided after such further review in the Second Circuit matter. If the Court denies this motion for a stay, Defendant requests an additional 60 days to respond.

CONCLUSION

For the foregoing reasons, Defendant CIA respectfully requests that the Court stay further proceedings in this matter.

Dated: April 29, 2014

Respectfully submitted,

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DEPARTMENT OF JUSTICE, et al.,	
Defendants.	

[PROPOSED] ORDER

This matter is before the Court on Defendant CIA's Motion to Stay Proceedings. Upon consideration of the parties' submissions, it is hereby ORDERED that Defendant CIA's Motion is GRANTED. Defendant is ordered to file a status report on or before July 21, 2014 advising the Court as to the status of any further proceedings in the Second Circuit matter.

SIGNED and ENTERED this ___ day of _____, 2014.

_____

DISTRICT JUDGE ROSEMARY M. COLLYER