UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

American Civil Liberties Union and the American Civil Liberties Union Foundation, Plaintiffs, v. Department of Justice, including its components the Office of Legal Counsel and Office of Information Policy; Department of Defense; Department of State; and Central Intelligence Agency, Defendants.	15 Civ. 1954 (CM)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR CLARIFICATION AND MODIFICATION OF COURT'S JULY 9, 2015 SCHEDULING ORDER

Plaintiffs the American Civil Liberties Union and the American Civil Liberties Union Foundation (together, "ACLU") respectfully request that the Court clarify or modify certain aspects of its July 9, 2015 Order, ECF No. 25 (hereinafter, "July 9 Order"). To avoid confusion, the ACLU addresses all four paragraphs of the July 9 Order below, though it seeks clarification or modification of only paragraphs 3 and 4.

In Paragraph 1 of the July 9 Order, the Court granted the government's "request to be excused from filing early preliminary *Vaughn* Indices." The ACLU does not seek reconsideration or clarification of this aspect of the Order.[1]

[1] Paragraph 1 of the July 9 Order also states that "there is no need for the ACLU to file a response" to the government's request to be excused from filing early *Vaughn* indices. In fact, the ACLU had already filed a response—it did so on July 2, 2015. ACLU Opp. to Mot. for

In Paragraph 2 of the July 9 Order, the Court states that it will "not require the government to produce in this lawsuit" documents that were responsive to the ACLU's previous FOIA request and that were listed on *Vaughn* indices provided in response to that request. The ACLU does not seek reconsideration or clarification of this aspect of the Order. The ACLU has already made clear to the government that it does not seek reprocessing of documents that were processed and identified (even if ultimately withheld) in response to the earlier request.

In Paragraphs 3 and 4 of the July 9 Order, the Court stays the government's obligation to respond to requests (3) and (4) pending appellate review in the related case in the District of Columbia. *Am. Civil Liberties Union v. CIA*, No. 10 Civ. 436, -- F.Supp. 3d -- (D.D.C. June 18, 2015). The Court indicates that the ACLU has "agreed to [this] stay." In fact the ACLU agreed to a stay only of the *CIA's* obligation to respond to requests (3) and (4), because the case pending before the D.C. Circuit involves only the CIA. The ACLU did not agree to a stay of the other agencies' obligation to respond to requests (3) and (4) and the government did not seek such a stay. *See* ACLU Opp. to Mot. for Modification at 2 n.2, ECF No. 24 ("[T]he ACLU has already narrowed its request significantly, and it has also agreed to stay certain aspects of its request relating to the CIA."); Gov't Mem. in Supp. of Mot. for Modification at 3, ECF No. 19 ("[T]he ACLU's agreement to a stay does not apply to defendant agencies other than the CIA."). Nor is the litigation in the D.C. Circuit likely to resolve the authority of agencies other than the CIA to withhold records responsive to requests (3) and (4), because the CIA's arguments for withholding these records rely at least in part on CIA-specific statutes (e.g. the CIA Act of 1949, as amended, 50 U.S.C. § 3507) and CIA-specific factual considerations (e.g. the fact that the

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Modification, ECF No. 24. Again, however, the ACLU does *not* seek reconsideration or clarification of Paragraph 1 of the July 9 Order.

CIA's program is ostensibly covert, and the fact that the CIA contends that it has not officially acknowledged its operational role in the drone program).

Accordingly, the ACLU respectfully asks that the Court clarify or modify Paragraphs 3 and 4 of the July 9 Order to make clear that the Court is not staying the obligation of agencies other than the CIA to respond to requests (3) and (4). Counsel for the government have informed the ACLU that the government is "not taking a position at this time" on the ACLU's motion but that the government "may wish to file a response after [it has] had a chance to review [the ACLU's] filing."[2]

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The ACLU appreciates that resolution of its earlier FOIA suit required a very significant investment of judicial resources by this Court. The ACLU does not want to tax the Court's resources (or patience) unnecessarily, and it will make every effort to narrow the issues that require judicial resolution in the instant case. In its response to the government's summary judgment motion, the ACLU will also endeavor to propose ways in which this Court might resolve the issues "categorically"—i.e. in a way that obviates the necessity (or at least limits the scope) of document-by-document review. The ACLU strongly believes that some of the information still being withheld by the government is being withheld unlawfully, and that the public has a compelling interest in the timely disclosure of this information, but it appreciates and shares the Court's interest in resolving the issues efficiently.

[2] Paragraph 3 of the July 9 Order also orders the government to "include former adjudication arguments in its motion for summary judgment." Plaintiffs have no objection to this aspect of the July 9 Order but will of course respond to any former adjudication argument in their response to the government's summary judgment motion.

Respectfully submitted,

/s/ Jameel Jaffer

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