

[ORAL ARGUMENT NOT YET SCHEDULED]

**No. 15-5217**

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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AMERICAN CIVIL LIBERTIES UNION and  
AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

*Appellants,*

v.

CENTRAL INTELLIGENCE AGENCY, *et al.*,

*Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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**PLAINTIFFS–APPELLANTS’ MOTION  
FOR EXPEDITED BRIEFING AND ARGUMENT**

Pursuant to Circuit Rule 27(f), Plaintiffs–Appellants American Civil Liberties Union and American Civil Liberties Union Foundation (together, the “ACLU”) respectfully move for expedited briefing and oral argument relating to this appeal. On September 1, 2015, the ACLU notified counsel for the Central Intelligence Agency (“CIA”) of its intention to file this motion. The ACLU understands that the CIA intends to file a response.

This appeal relates to a Freedom of Information Act (“FOIA”) request filed by the ACLU in January 2010 for records concerning the government’s use of drones to conduct “targeted killings.” *See ACLU v. CIA*, No. 10-cv-436, 2015 WL 3777275, at \*1 (D.D.C. June 18, 2015). The CIA refused to release records in response to the request, or even to list or describe records that were responsive. In 2013, this Court ruled that the CIA’s position was “indefensib[le]” and akin to “ask[ing] the courts . . . to give their imprimatur to a fiction of deniability that no reasonable person would regard as plausible.” *ACLU v. CIA*, 710 F.3d 422, 431 (D.C. Cir. 2013).<sup>1</sup> Almost three years later, however, the CIA has still not released a single document in response to the ACLU’s request. In an effort to streamline the agency’s processing of the request, narrow the issues before the courts, and ensure that the public has timely information about matters of profound national concern, the ACLU agreed to limit its request to twelve legal memos and to discrete categories of statistical and factual information. Still, the agency’s unlawful stonewalling continues.

The ACLU requests expedited resolution of this appeal because the underlying request pertains to a subject of immense public interest—namely, the

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<sup>1</sup> In a related case, the Second Circuit ruled last summer that the Office of Legal Counsel could not lawfully withhold a memorandum that detailed the government’s legal justifications for the CIA’s targeted killing of an American citizen, and the Court published a redacted version of the memorandum. *See N.Y. Times Co. v. DOJ*, 756 F.3d 100 (2d Cir. 2014).

lawfulness, effectiveness, strategic wisdom, and morality of the CIA's use of drones to carry out targeted killings—and because the CIA's refusal to release responsive records inhibits the ongoing public debate about this subject. *See* U.S. Court of Appeals for the D.C. Circuit, *Handbook of Practice and Internal Procedures* 33 (2015) (“The Court also may expedite cases in which the public generally . . . have an unusual interest in prompt disposition.”). The ACLU has sought basic information about the CIA's use of drones for targeted killing in order to inform an important public debate—one with consequences to both human lives and national interests. *See Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004) (Under FOIA, “if information is subject to disclosure, it belongs to all.”). This debate is taking place *now*, as illustrated by the sample of fifteen recent articles cited in the margin, and accordingly the public needs access to information quickly, and not years from now, when the information will be of only historical interest.<sup>2</sup> The prompt resolution of this appeal would contribute to the ongoing

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<sup>2</sup> *See, e.g.*, Greg Miller, *U.S. Launches Secret Drone Campaign to Hunt Islamic State Leaders in Syria*, Wash. Post, Sept. 2, 2015, <http://wapo.st/1IJtlRT>; Julian Hattem, *Sanders: I Wouldn't End Drone Program*, Aug. 30, 2015, The Hill, <http://thehill.com/policy/national-security/252270-sanders-i-wouldnt-end-drone-program>; Greg Miller, *CIA Didn't Know Strike Would Hit Al-Qaeda Leader*, Wash. Post, June 17, 2015, <http://wapo.st/1Fi8ULP>; Eli Lake & Josh Rogin, *How the U.S. Tracked Down Al-Qaeda's Yemen Chief*, Bloomberg View, June 16, 2015, <http://bv.ms/1Fi91ab>; Andrea Prasow, *The Open Secret of Targeted Killings*, The Hill, June 8, 2015, <http://thehill.com/opinion/op-ed/245332-the-open-secret-of-targeted-killings>; Karen DeYoung, *Debate Is Renewed on Control of Lethal Drone Operations*, Wash. Post, May 5, 2015, <http://wapo.st/1Fi9h94>; Julian Hattem and

debate by ensuring that the government is not unlawfully withholding information to which the public is entitled.

Expedited consideration of this appeal would also further the purposes of FOIA. The Supreme Court has made clear that “public awareness of the government’s actions is a ‘structural necessity in a real democracy.’” *Elec. Privacy Info. Ctr. v. DOJ*, 416 F. Supp. 2d 30, 40 (D.D.C. 2006) (quoting *Favish*, 541 U.S. at 172). And as the drafters of FOIA explained, “information is only useful if it is timely.” H.R. Rep. No. 93-876, at 6, 1974 U.S.C.C.A.N. 6267, 6271; see *Elec. Privacy Info. Ctr.*, 416 F. Supp. 2d at 40 (“Not only is public awareness a necessity, but so too is *timely* public awareness.”); 5 U.S.C. § 552(a)(6)(A)(i)

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Martin Matishak, *Drone Fight Simmers in Congress*, The Hill, May 2, 2015, <http://thehill.com/policy/technology/240853-drone-fight-simmers-in-congress>; Martin Matishak, *McCain: Defense Bill Could Move Drones to Pentagon*, The Hill, Apr. 28, 2015, <http://thehill.com/policy/defense/240328-mccain-defense-bill-will-move-drone-program-to-pentagon>; Greg Miller & Julie Tate, *U.S. Government’s Refusal to Discuss Drone Attacks Comes Under Fire*, Wash. Post, Apr. 24, 2015, <http://wapo.st/1Fi93Pj>; Ryan Bender, “*I don’t think the CIA should be in the business of carrying out wars*”: Obama’s Plan to Shift Oversight to the Pentagon Flagged in Face of Opposition in Congress, Politico, Apr. 24, 2015, <http://politi.co/1Fi9k4S>; Peter Baker & Julie Hirschfeld Davis, *Amid Errors, Obama Publicly Wrestles With Drones’ Limits*, N.Y. Times, Apr. 24, 2015, <http://nyti.ms/1Fi959H>; Martin Matishak, *Key Republicans Defend the Use of Drones*, The Hill, Apr. 23, 2015, <http://thehill.com/policy/defense/239872-key-senators-say-no-need-to-examine-us-drone-policy>; Peter Baker, *Obama Apologizes After Drone Strikes Kills American and Italian Held by Al Qaeda*, N.Y. Times, April 23, 2015, <http://nyti.ms/1Fi9d9p>; Scott Shane, *Drone Strikes in Yemen Said to Set a Dangerous Precedent*, N.Y. Times, Apr. 13, 2015, <http://nyti.ms/1O7sqOO>; Craig Whitlock, *Yemen Chaos Threatens U.S. Counterterrorism Efforts, Including Drone Program*, Wash. Post, Jan. 22, 2015, <http://wapo.st/1Fi9nxo>.

(requiring determination of whether to comply with FOIA request within twenty days); 5 U.S.C. § 552(a)(6)(A)(i) (requiring determination of FOIA appeal within twenty days); *see also Spannaus v. DOJ*, 824 F.2d 52, 58 (D.C. Cir. 1987) (FOIA serves “interests of timely disclosure” by “permit[ting] early ‘accrual’ of a cause of action.”). Delaying resolution of this appeal would be tantamount to denial of the right that FOIA was meant to guarantee: the right of the public to *timely* access to information about government conduct.

Expedited consideration of this appeal is also warranted because, contrary to the purposes of FOIA, and as was implicit in this Court’s earlier ruling, *see ACLU v. CIA*, 710 F.3d at 429–31, the government has engaged in a continuing pattern of selective disclosure in an attempt to shape public debate. FOIA was meant to prevent the government from manipulating public opinion through strategic disclosure, and to ensure that the public would have the information it needed to evaluate the government’s policies and practices for itself. *See, e.g.*, Republican Policy Committee Statement on Freedom of Information Legislation, S. 1160, 112 Cong. Rec. 13020 (1966) (“In this period of selective disclosures, managed news, half-truths, and admitted distortions, the need for this legislation is abundantly clear.”), *reprinted in* Subcomm. on Admin. Practice, S. Comm. on the Judiciary, 93d Cong., *Freedom of Information Act Source Book: Legislative Materials, Cases, Articles*, at 59 (1974). Selective disclosure is inimical to a statute whose

animating purpose is to provide “a means for citizens to know what their Government is up to,” *Favish*, 541 U.S. at 171 (quotation marks omitted). The government’s selective disclosures relating to its targeted-killing program raise precisely this concern.

Finally, the prompt hearing and consideration of this appeal would permit the earlier resumption of litigation in the Southern District of New York that has been stayed pending this Court’s resolution of the issues before it. In *ACLU v. DOJ*, No. 15 Civ. 1954 (S.D.N.Y. filed Mar. 16, 2015), the ACLU seeks to enforce a FOIA request against various agencies for information similar to, but postdating, the information at issue in this appeal. The district court has stayed litigation of portions of the request at issue there pending completion of appellate review in this case. *See* Order Modifying Apr. 30, 2015 Scheduling Order & Otherwise Issuing Directions for the Further Conduct of This Action ¶ 3, *ACLU v. DOJ*, No. 15 Civ. 1954 (S.D.N.Y. July 9, 2015), ECF No. 25.<sup>3</sup> Thus, expedited consideration of this appeal would prevent undue delay of the resolution of the public’s right to information at issue in the Southern District of New York.

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<sup>3</sup> In the Southern District of New York, the ACLU and the government agreed to stay litigation concerning certain categories of responsive records for the CIA. Notwithstanding the parties’ agreement, and over the ACLU’s objection, the district court imposed a stay of litigation concerning those categories for *all* defendant agencies.

For these reasons, the ACLU respectfully requests that the Court expedite briefing and oral argument in this appeal. The ACLU proposes the following schedule, with oral argument to be scheduled at the Court's earliest convenience thereafter:

**October 2, 2015: Appellants' Brief Due**

**November 3, 2015: Appellee's Brief Due**

**November 17, 2015: Appellants' Reply Brief Due**

Dated: September 2, 2015

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Respectfully submitted,

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