[SCHEDULED FOR ORAL ARGUMENT SEPTEMBER 20, 2012]

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

AMERICAN CIVIL LIBERTIES UNION and AMERICAN CIVIL LIBERTIES UNION FOUNDATION, Plaintiffs-Appellants, v. CENTRAL INTELLIGENCE AGENCY, Defendant-Appellee.	No. 11-5320

PLAINTIFFS-APPELLANTS' OPPOSITION TO THE CIA'S MOTION TO REMAND FOR FURTHER PROCEEDINGS

Plaintiffs-Appellants oppose the CIA's motion to remand this case to the district court. The CIA asserts that a remand is necessary to allow it to address the significance of its June 20 filing in two FOIA cases in the U.S. District Court for the Southern District of New York. As explained below, however, the CIA's filings in those cases have no bearing on the issue before this Court. Accordingly, remand is neither necessary nor appropriate. This appeal, which involves issues of extraordinary public concern, has been fully briefed, and remand would needlessly

delay its resolution. Plaintiffs respectfully submit that the case should proceed to oral argument on the schedule already set by the Court.

1. This case concerns the CIA's invocation of the "Glomar" doctrine, *see Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976), in response to Plaintiffs' FOIA request for records concerning the CIA's use of drones to conduct targeted killings. Plaintiffs filed their FOIA request on January 13, 2010 and commenced this suit on March 16, 2010. After the district court (Collyer, J.) granted summary judgment to the CIA on September 9, 2011, Plaintiffs filed a timely appeal. On June 13, 2012, after briefing was completed in this Court, Plaintiffs filed a motion for expedited argument. Shortly thereafter, the Court scheduled oral argument for September 20, 2012, and dismissed the motion for expedited argument as moot.

2. The only issue on appeal is whether the CIA's Glomar response is lawful given that senior government officials have repeatedly, and in some detail, discussed the drone program in press conferences, in public speeches, and in the media. Plaintiffs have demonstrated in their briefs that government officials have officially acknowledged the program in those contexts and that the CIA's Glomar response is unlawful.

3. On June 20, 2012, the government moved for summary judgment in the two S.D.N.Y. cases, which concern FOIA requests for (among other things) records relating to the CIA's use of drones to carry out targeted killings. In its

June 20 filing, the agency acknowledged that it possessed two records responsive to those FOIA requests, namely, copies of recent, widely-publicized speeches made by Attorney General Eric Holder and White House counterterrorism adviser John Brennan. Memorandum of Law in Support of Defendants' Motion for Summary Judgment at 8, *Am. Civil Liberties Union v. Dep't of Justice*, No. 12 Civ. 794 (S.D.N.Y. June 20, 2012) ("[I]t does not harm national security to reveal that copies of the Attorney General's and Mr. Brennan's speeches exist in the CIA's files."). As to any other responsive records, however, the CIA stated that it "cannot further describe or even enumerate on the public record the number, types, dates, or other descriptive information about these responsive records because to do so would reveal classified information about the nature and extent of the CIA's interest in" the targeted killing of U.S. citizens. Declaration of John Bennett at ¶ 28, *Am. Civil Liberties Union*, No. 12 Civ. 794. The CIA termed this a "no number, no list" response. *Id.*

4. Before June 20, the CIA's position was that it had not officially acknowledged the agency's use of drones to carry out targeted killings. Its position now is exactly the same, and the CIA's June 20 filing in the S.D.N.Y. cases does not change the factual or legal context of this case. *Cf. Maydak v. U.S. Dep't of Justice*, 218 F.3d 760, 768 (D.C. Cir. 2000) (finding remand inappropriate where "there ha[d] been no substantial change in the factual or legal context of

th[e] case"). The speeches that the CIA apparently has in its files were already publicly available, and had already been cited to this Court. *See* Gov't Br. 40 (citing speech of John Brennan); Pl. Reply Br. 7 n.5 (same). *See also* Br. of Amici Curiae 31 & n.33 (citing speeches by Attorney General Holder, John Brennan, and State Department Legal Advisor Harold Koh). The CIA's acknowledgment that it possesses copies of the speeches in its files has as much relevance to this case as if it acknowledged that it has copies of the newspaper articles cited in Plaintiffs' briefs (as we assume it does). The acknowledgment has no bearing on this appeal because the CIA continues to maintain its Glomar response with respect to any other records. The CIA's position in this case has not changed in any material respect.

5. To the extent the CIA suggests that the legal landscape has changed because it is now abandoning its Glomar invocation in favor of a "no number, no list" response to Plaintiffs' FOIA request, the CIA elevates form over substance. In *Bassiouni v. CIA*, 392 F.3d 244 (7th Cir. 2004), the only Court of Appeals decision to have addressed the "no number, no list" response, Judge Easterbrook, joined by Judges Posner and Sykes, explained that the "no number, no list" response is "legally identical" to the Glomar response: "the *Glomar* response and the no number, no list response are functionally identical and . . . the verbal distinction should be eliminated, lest it confuse or mislead requesters and judges

into thinking that something depends on the turn of phrase." *Id.* at 247. Thus, the CIA may have relabeled its argument here, but the argument is the same, and accordingly remand is unnecessary.

6. Moreover, remand would cause unwarranted delay in the resolution of this case. The underlying FOIA request pertains to a subject of immense public interest—namely, the lawfulness, effectiveness, strategic wisdom, and morality of the CIA's use of drones to carry out targeted killings. The CIA's invocation of the Glomar doctrine inhibits an ongoing and time-sensitive public debate about this subject. *See* Pl. Br. 16–39 (documenting extensive press coverage of and public debate about CIA drone program); Pl. Reply Br. 2–3 & n.2 (same). The remand the CIA seeks here would add months to this litigation for no good reason, and after the completion of the CIA's proposed "further proceedings" in the district court, the issue now before this Court would almost certainly be presented to the Court again in the same legal and factual context, except that the record would formally include the fact that the CIA has copies of the Holder and Brennan speeches, which this Court already knows from the CIA's motion to remand.[*] Remand would result only in unwarranted delay.

7. For these reasons, Plaintiffs oppose the CIA's motion.

[*] The texts of those speeches can be found at http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html and http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy.

Respectfully submitted,

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June 29, 2012

CERTIFICATE OF SERVICE

On June 29, 2012, I served upon the following counsel for Defendant-Appellee one copy of PLAINTIFFS-APPELLANTS' OPPOSITION TO THE CIA'S MOTION TO REMAND FOR FURTHER PROCEEDINGS via this Court's electronic filing system:

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