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' MOTION FOR EXPEDITED ARGUMENT

Plaintiffs-Appellants American Civil Liberties Union and American Civil Liberties Union Foundation ("Plaintiffs") respectfully move for expedited argument of the above-captioned appeal. Briefing is now complete but oral argument has not yet been scheduled. Plaintiffs hereby request that oral argument be held at the Court's earliest opportunity. Plaintiffs have conferred with counsel for the Government, who have indicated that the Government intends to file a response to this motion.

1. This case concerns the refusal of Defendant-Appellee Central Intelligence Agency ("CIA") to confirm or deny the existence of records responsive to

Plaintiffs' request under the Freedom of Information Act ("FOIA") for information about 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.

2. The only issue on appeal is whether the CIA's refusal to confirm or deny the existence of the drone program—its "Glomar" response, *see Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976)—is lawful given that senior government officials have repeatedly discussed the program in press conferences, in public speeches, and in the media. Plaintiffs have argued that government officials have officially acknowledged the program in those contexts and that the CIA's refusal to confirm or deny the existence of the program here is unlawful.

3. Plaintiffs request expedited resolution of this appeal because 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, and because the CIA's refusal to release responsive records, or even to confirm or deny the existence of the drone program, 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 (same).

4. Plaintiffs also believe that expedited resolution of the appeal is warranted because senior government officials' on-the-record statements about the drone program are manifestly inconsistent with the CIA's reliance on the Glomar doctrine here, Pl. Br. 16–29; Pl. Reply Br. 5–14, and because the disconnect between government officials' public statements and the government's litigation position in this suit is undermining public confidence in FOIA and the classification system, *see* Scott Shane, *U.S. Attacks, Online and From the Air, Fuel Secrecy Debate*, N.Y. Times, June 6, 2012, http://nyti.ms/NiGcTK; Jack Goldsmith, *Drone Stories, the Secrecy System, and Public Accountability*, Lawfare, May 31, 2012, http://bit.ly/KgpqUF.

5. Further undermining public confidence is the "the veritable cascade of statements about the CIA's drone program that have been attributed to 'officials,' 'current CIA officials,' 'former intelligence officials,' and 'senior administration officials.'" Pl. Reply Br. 2. Since Plaintiffs filed their brief, additional evidence has come to light that at least some of these leaks were authorized by the White House and CIA. A recently-published book by investigative reporter Daniel Klaidman includes this passage:

> Though the [drone] program was covert, [former White House Chief of Staff Rahm] Emanuel pushed the CIA to publicize its kinetic successes. When [Pakistani Taliban leader Baitullah] Mehsud was killed, agency public affairs officers anonymously trumpeted their triumph, leaking colorful tidbits to trusted reporters on the intelligence beat. Newspapers described the hit in cinematic detail, including the

> fact that Mehsud was blown up on the roof of his father-in-law's compound while his wife was massaging his legs.

Daniel Klaidman, *Kill or Capture* 122 (2012). *See also* Scott Shane, *U.S. Attacks, Online and From the Air, Fuel Secrecy Debate*, N.Y. Times, June 6, 2012, http://bit.ly/KgpqUF ("Senator John McCain of Arizona . . . told reporters on Tuesday that administration officials were 'intentionally leaking information to enhance President Obama's image as a tough guy for the elections'").[1]

6. Plainly, the White House and CIA are free to decide that previously classified information should no longer be classified, and the mere fact that information has been withheld in the past does not mean that it must be withheld for all time. (Indeed, Plaintiffs filed the FOIA request at issue here because they believe that more disclosure about the CIA's drone program would serve the public interest.) But the executive cannot lawfully release selected information about the CIA's drone program to the media, both on the record and off, while insisting to the courts that the release of *any* information about the program would jeopardize national security. As

[1] On June 8, Attorney General Eric Holder announced that the Justice Department would investigate recent leaks about classified national security operations. Evan Perez, *Holder Puts Top Prosecutors on Leak Probe*, Wall St. J., June 8, 2012, http://on.wsj.com/Ki2jtR. It is unclear whether this investigation encompasses leaks relating to the CIA's drone program. Charlie Savage, *Holder Directs U.S. Attorneys to Track Down Paths of Leaks*, N.Y. Times, June 8, 2012, http://nyti.ms/LFxvyB.

Plaintiffs have explained, Pl. Reply Br. 16–20, FOIA was enacted to prevent precisely this.

7. For these reasons, Plaintiffs respectfully request that the Court schedule oral argument at its earliest opportunity.

Respectfully submitted,

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June 13, 2012

CERTIFICATE OF SERVICE

On June 13, 2012, I served upon the following counsel for Defendant-Appellee one copy of PLAINTIFFS-APPELLANTS' MOTION FOR EXPEDITED ARGUMENT via this Court's electronic filing system:

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Executed on June 13, 2012