

JAMEEL JAFFER
DEPUTY LEGAL DIRECTOR



June 10, 2015

BY ECF

Hon. Catherine O'Hagan Wolfe
Clerk of the Court
U.S. Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, New York 10007

Re: *N.Y. Times Co. v. Dep't of Justice* (14 Civ. 4432, 14 Civ. 4764 (Con.))

AMERICAN CIVIL LIBERTIES
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Dear Ms. Wolfe:

Pursuant to Federal Rule of Appellate Procedure 28(j), Plaintiffs-Appellants the American Civil Liberties Union and American Civil Liberties Union Foundation (together, "ACLU") write to call the Court's attention to the government's recent release of two declarations that were filed by former Secretary of Defense Robert Gates and former CIA Director Leon Panetta to justify the government's assertion of the state secrets privilege in *al-Aulaqi v. Obama*, 1:10cv01469 (JDB) (D.D.C.). The declarations were originally filed under seal, but the government provided the attached versions of them to the ACLU on June 4 in response to the Freedom of Information Act request that is the subject of this litigation.

The declarations are relevant to this appeal because they disclose facts concerning the government's reasons for targeting Anwar al-Aulaqi with lethal force, *see, e.g.*, Gates Decl. pp.5, 8, 14; Panetta Decl. p.3, the same kinds of facts the ACLU is seeking here. The ACLU has argued that the Office of Legal Counsel memos at issue in this appeal should be disclosed to the extent that they contain officially acknowledged facts. *See* ACLU Br. 22-25; ACLU Reply 16-18. The declarations support the ACLU's argument that at least some of the facts in the OLC memos should be disclosed.

In light of the government's release of the declarations, the ACLU respectfully suggests that the Court address the ACLU's arguments concerning the withholding of legal analysis from the OLC memos (because the arguments relating to the withholding of legal analysis are ripe for review and unaffected by the disclosures in the declarations) but then remand to the district court so that the government may (i) re-review the OLC memos to determine whether any factual information contained therein should be released; and (ii) file affidavits justifying the withholding of any factual information it does not release.

Respectfully submitted,

/s/ Jameel Jaffer

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