



**U.S. Department of Justice**

*United States Attorney  
Southern District of New York*

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*86 Chambers Street  
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September 14, 2012

**BY FACSIMILE**

Hon. Colleen McMahon  
United States District Judge  
United States Courthouse  
500 Pearl Street, Room 1350  
New York, New York 10007

Re: New York Times v. Department of Justice  
11 Civ. 9336 (CM)

ACLU v. Department of Justice  
12 Civ. 794 (CM)

Dear Judge McMahon:

We write respectfully on behalf of the Department of Justice, the Department of Defense and the Central Intelligence Agency (collectively, the “Government”), the defendants in the above-referenced Freedom of Information Act cases, to oppose the request in the September 11, 2012, letters of the ACLU and the New York Times (collectively, “plaintiffs”) to supplement the record in these case. The cited comments of the President to CNN and the video played at the Democratic National Convention add nothing new and do not constitute an official disclosure of any classified information at issue in this case. Nor do plaintiffs make any effort to demonstrate such a disclosure under the applicable legal standards.

Plaintiffs allege that the President confirmed in his comments to CNN that “‘drones are one tool’ that the government uses against al-Qaeda and those who the government believes would attack Americans.” But that fact is not classified, and the Government does not seek to protect it in these cases. Indeed, as explained in the Government’s briefs, Assistant to the President for Homeland Security and Counterterrorism John Brennan has acknowledged that the Government uses drones as a counterterrorism tool. Further, Attorney General Eric Holder has outlined the legal parameters governing any potential use of lethal force against U.S. citizens. What these officials have never acknowledged – and what the President never addressed in the remarks that plaintiffs cite – is whether or not the CIA participates in drone strikes, and whether or not the United States conducted such a strike against Anwar al-Aulaqi or the other U.S.

citizens addressed by plaintiffs' FOIA requests.<sup>1</sup> Those facts remain classified and have never been officially acknowledged.

Plaintiffs' attempt to infer such a disclosure from the President's comments is flatly inconsistent with Second Circuit precedent, which makes clear that courts may not find official disclosure unless the classified fact at issue "(1) is as specific as the information previously released, (2) matches the information previously disclosed, and (3) was made public through an official and documented disclosure." *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009) (citation, quotation marks and alterations omitted); see also *Halpern v. FBI*, 181 F.3d 279, 294 (2d Cir. 1999) (2d Cir. 1999) (even information that has "entered the realm of public knowledge" remains properly classified and exempt from disclosure unless "the government has officially disclosed the specific information the requester seeks"). Plaintiffs do not even argue that this "strict test," *Wilson*, 586 F.3d at 186, is satisfied here, and it plainly is not.

With respect to the video aired at the Democratic National Convention, which is addressed only in the ACLU's letter, the ACLU concedes that the video does not constitute an official disclosure. In any event, the video simply states that al-Aulaqi "has been killed," which neither confirms nor refutes that the United States (much less the CIA) conducted the operation that resulted in al-Aulaqi's death.


Because plaintiffs cannot show that the classified facts at issue in these cases were disclosed in either the President's remarks to CNN or in the video aired at the Democratic National Convention, they add nothing to the existing record. Accordingly, plaintiffs' request to supplement their summary judgment arguments should be denied.

Respectfully,

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<sup>1</sup> Contrary to the ACLU's claim, the President's remarks do not acknowledge that such strikes "ha[ve] been used against United States citizens." The President stated only that there is "no doubt that when an American has made the decision to affiliate itself with al-Qaeda and target fellow Americans, that there is a legal justification for us to try to stop them from carrying out plots," and that "as an American citizen, they are subject to the protections of the Constitution and due process." Moreover, the President prefaced his statements by emphasizing that he had to be "careful" in responding to the interviewer's questions because "[t]here are classified issues," underscoring that the President calibrated his responses to avoid revealing classified information.

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