[ORAL ARGUMENT NOT YET SCHEDULED]

11-5320

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN CIVIL LIBERTIES UNION and
AMERICAN CIVIL LIBERTIES UNION FOUDATION,

Plaintiffs–Appellants,

v.

CENTRAL INTELLIGENCE AGENCY,

Defendant–Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
No. 1:10-cv-00436-RMC
(Rosemary M. Collyer, J.)

BRIEF FOR PLAINTIFFS–APPELLANTS

Arthur B. Spitzer
American Civil Liberties Union of the
Nation's Capital
4301 Connecticut Avenue, NW, Suite 434
Washington, DC 20008
Telephone: (202) 457-0800
Fax: (202) 452-1868
art@aclu-nca.org

Jameel Jaffer
Ben Wizner
Nathan Freed Wessler
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: (212) 549-2500
Fax: (212) 549-2654
jjaffer@aclu.org
bwizner@aclu.org
nwessler@aclu.org

March 15, 2012

Counsel for Plaintiffs–Appellants

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Plaintiffs−Appellants American Civil Liberties Union and American Civil Liberties Union Foundation respectfully submit this certificate as to parties, rulings, and related cases:

(A) Parties and Amici.

The American Civil Liberties Union and American Civil Liberties Union Foundation are the Plaintiffs−Appellants in this matter. The Defendant-Appellee is the Central Intelligence Agency. The Department of Justice, Department of Defense, and Department of State were Defendants in the case before the district court, but were voluntarily dismissed prior to the appeal.

The Washington Legal Foundation and the Allied Education Foundation were amici in support of Defendants in the case before the district court.

Counsel expects a number of organizations to join as amici in support of Plaintiffs-Appellees' position on appeal. However, the full list of amici will not be known to counsel until the filing date for the amicus brief.

Counsel is unaware of any amici in support of the Defendant-Appellee in this Court.

(B) Ruling Under Review.

The ruling under review is an Order granting Defendant-Appellee's motion for summary judgment and denying Plaintiffs−Appellants' motion for partial

summary judgment, which was issued by District Judge Rosemary M. Collyer on September 9, 2011 and entered as Docket Number 35. JA 296. A Memorandum Opinion explaining the Order was issued the same day and entered as Docket Number 34. JA 265–95. It is available at *American Civil Liberties Union v. Department of Justice*, 808 F. Supp. 2d 280 (D.D.C. 2011).

(C) Related Cases.

This case has not previously been before this Court or any other court. Counsel is aware of two potentially related cases. On February 1, 2012, Plaintiffs−Appellants filed a case in the U.S. District Court for the Southern District of New York against the Department of Justice, Department of Defense, and Central Intelligence Agency. That case, *American Civil Liberties Union v. U.S. Department of Justice*, No. 12-CIV-0794 (S.D.N.Y.), which seeks to enforce a Freedom of Information Act request for records related to the targeted killing of US citizens (a request distinct from the one at issue in the case before this Court), is before District Judge Colleen McMahon. It has been marked as related to *New York Times Co. v. U.S. Department of Justice*, No. 11-CIV-9336 (S.D.N.Y. filed Dec. 20, 2011), also before Judge McMahon, which seeks a subset of the records at issue in *ACLU v. U.S. Department of Justice*. The Department of Justice is the only Defendant in *New York Times Co.*

/s/ Arthur B. Spitzer
Arthur B. Spitzer

CORPORATE DISCLOSURE STATEMENT

As required by Circuit Rules 12(f) and 26.1, Plaintiffs−Appellants state that the American Civil Liberties Union and the American Civil Liberties Union Foundation have no publicly held stock, nor do they have any parent corporations, or any corporations that own 10% of more of their stock, that have publicly held stock.

The American Civil Liberties Union and the American Civil Liberties Union Foundation are affiliated non-profit membership corporations devoted to defending and expanding civil liberties and civil rights in the United States.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Authorities upon which we chiefly rely are marked with asterisks.

Statutes

Other Authorities

GLOSSARY

CIA	Central Intelligence Agency
DOD	Department of Defense
DOJ	Department of Justice
DOS	Department of State
FOIA	Freedom of Information Act

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

11-5320

AMERICAN CIVIL LIBERTIES UNION and
AMERICAN CIVIL LIBERTIES UNION FOUDATION,

Plaintiffs–Appellants,

v.

CENTRAL INTELLIGENCE AGENCY,

Defendant–Appellee.

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

BRIEF FOR PLAINTIFF-APPELLANT

STATEMENT OF JURISDICTION

The district court had jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B), 28 U.S.C. § 1331, and 5 U.S.C. §§ 701–706. It granted summary judgment in favor of Defendant Central Intelligence Agency ("CIA" or "the Agency") on September 9, 2011. Plaintiffs voluntarily dismissed all other defendants, making the district court's judgment final and appealable, on October

26, 2011. Plaintiffs timely filed a Notice of Appeal on November 9, 2011. This Court has jurisdiction pursuant to 28 U.S.C. § 1292.

STATEMENT OF THE ISSUES

Whether the CIA acted lawfully when it refused 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 carry out targeted killings, a subject that the President, the CIA Director, and many other government officials have discussed at length on the public record.

STATUTORY PROVISIONS

The relevant statutory provisions are attached as an addendum to this brief.

STATEMENT OF THE CASE

This litigation involves a FOIA request submitted by Plaintiffs−Appellants American Civil Liberties Union and American Civil Liberties Union Foundation (collectively, "ACLU" or "Plaintiffs") for records relating to the government's use of unmanned aerial vehicles—"drones"—to carry out targeted killings. Plaintiffs filed the request on January 13, 2010 with the Department of Defense (DOD), the Department of Justice (DOJ), the Department of State (DOS), and the CIA. JA 47–62. None of the agencies timely processed Plaintiffs' request, but on March 9, 2010 the CIA, citing FOIA exemptions 1 and 3, stated that it would neither confirm nor deny the existence of responsive records. JA 64.

Plaintiffs filed suit against DOD, DOJ, and DOS on March 16, 2010; they added the CIA as a defendant after exhausting administrative remedies with respect to that agency. JA 10–20 (Am. Compl.). After the suit was filed, Plaintiffs were able to negotiate a processing schedule with DOD, DOJ, and DOS, and, following those agencies' completion of processing,[1] Plaintiffs voluntarily dismissed them as defendants. JA 297–98. In the interim, the CIA moved for summary judgment and Plaintiffs cross-moved for partial summary judgment on the issue whether the CIA's refusal to confirm or deny the existence of responsive records was lawful. On September 9, 2011, the district court granted the government's motion and denied Plaintiffs'. JA 265–95 (Mem. Op.); JA 296 (Order). That ruling became final and appealable on Oct. 26, 2011, when Plaintiffs dismissed DOD, DOJ, and DOS from the case. Plaintiffs timely appealed the district court's ruling to this Court on November 9, 2011. JA 299 (Notice of Appeal).

STATEMENT OF FACTS

Over the last decade, the U.S. government has used remotely piloted drones to carry out lethal strikes in at least half a dozen countries—Afghanistan, Iraq,

[1] DOS eventually released 186 records; DOD released 17 records in addition to a multi-volume record relating to an investigation of a drone strike that killed civilians in Afghanistan; and DOJ identified responsive records but withheld them in full. The released documents and the agencies' indices of withheld records are available on the ACLU's website, https://www.aclu.org/national-security/drone-foia-released-documents.

Libya, Pakistan, Yemen, and Somalia.[2] Both the U.S. military and the CIA have drone programs and both have been using drones to carry out "targeted killings."[3] The frequency of CIA drone strikes has increased dramatically in the last several years, and public interest in the agency's drone program has increased concomitantly. Many government officials, including the President and the then-CIA Director, have discussed specifics about the program with the press and public. They have taken credit for its putative successes, defended its legality, and dismissed concerns about civilian casualties. The government's disclosures about the program, however, have been limited and selective.

In an effort to help the public better assess the wisdom and lawfulness of the CIA's drone program, Plaintiffs filed the FOIA request that is at issue in this case. The request sought records concerning, among other things, the putative legal basis for carrying out targeted killings; any restrictions on those who may be targeted; any civilian casualties; any geographic limits on the program; the number of

[2] *See* Greg Miller, *Under Obama, an Emerging Global Apparatus for Drone Killing*, Wash. Post, Dec. 27, 2011, http://wapo.st/sqJrdf (discussing US drone strikes in Pakistan, Yemen, and Somalia); David S. Cloud, *U.S. Begins Using Predator Drones in Libya*, L.A. Times, Apr. 22, 2011, http://lat.ms/fg28en (discussing US drone program in Libya); Christopher Drew, *Drones Are Playing a Growing Role in Afghanistan*, N.Y. Times, Feb. 19, 2010, http://nyti.ms/duqBwK (discussing US drone operations in Iraq and Afghanistan).

[3] This case concerns records about the CIA's use of drones to carry out targeted killings. Plaintiffs use the term "drone program" throughout the brief to refer specifically to this practice, and not to the CIA's use of drones for any other purpose.

targeted killings that the agency has carried out; and the training, supervision, oversight, or discipline of drone operators. *See* JA 51–54.

The CIA responded to Plaintiffs' request by supplying what is known as a "Glomar" response, *see Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976), stating that it would neither confirm nor deny the existence of responsive records. *See* JA 64. The district court held that the CIA's response was lawful, finding that the numerous statements made by senior officials on the public record about the CIA's drone program could plausibly be read to refer to the use of drones by the government generally (rather than by the CIA in particular) or to the CIA's activities generally (rather than the CIA's use of drones in particular). Plaintiffs appealed.

Since Plaintiffs filed this appeal, government officials, including the former CIA director and the President, have continued to speak publicly about the Agency's drone program. CIA personnel have also leaked detailed information about the program to the media. The Agency has not, however, changed its position in this litigation.

SUMMARY OF ARGUMENT

This FOIA case presents the question whether the CIA can lawfully refuse to confirm or deny the existence of records about a program that has already been acknowledged and discussed by the President, the then-CIA Director, and many

other government officials in scores of public statements. It cannot. This Court has allowed a Glomar response only where an agency's disclosing the existence or non-existence of responsive records would itself disclose information that the agency may lawfully withhold under an enumerated exemption to the FOIA. It has repeatedly emphasized that a Glomar response is inappropriate where the government has officially acknowledged the very information sought to be protected. The government has already acknowledged the existence of the CIA's drone program. The CIA cannot lawfully refuse to process Plaintiffs' request on the grounds that doing so would require it to confirm what it has already confirmed.

Indeed, upholding the CIA's Glomar response here would serve only to harness the Court's institutional authority to a transparent fiction. Anyone who has followed the debate about the CIA's drone program knows that the program has been discussed on the record not only by the President and the then-CIA Director but by many other officials as well, and it is plain that any harm to the nation's security that would result from disclosure of the program has already been inflicted by the Agency itself. Unsurprisingly, many commentators have already observed (and lamented) the increasing chasm between the categorical proposition the CIA advances in this litigation—that the very existence of the Agency's drone program is a secret—and the numerous, detailed, and often self-serving statements the

government has made about the program in other fora.[4] The Glomar doctrine surely does not permit the government to play this kind of double game, still less to enlist the judiciary as a participant in it.

The Court should reverse the judgment of the district court and direct the CIA to process Plaintiffs' request. In processing the request, the CIA may of course redact or withhold information from responsive records where necessary to protect information covered by any of the enumerated FOIA exemptions—and, after the completion of processing, Plaintiffs will challenge those redactions if they believe them to be unwarranted. The Agency should not be permitted, however, to

[4] *See, e.g.*, Jack Goldsmith, *More on al-Aulaqi and Transparency*, Lawfare, Oct. 5, 2011, http://www.lawfareblog.com/2011/10/more-on-al-aulaqi-and-transparency ("[I]t is wrong . . . for the government to maintain technical covertness but then engage in continuous leaks, attributed to government officials, of many (self-serving) details about the covert operations and their legal justifications. It is wrong because it is illegal."); Arthur S. Brisbane, *The Secrets of Government Killing*, N.Y. Times, Oct. 8, 2011, http://nyti.ms/naggsE (quoting American University law professor Kenneth Anderson: "'[o]ne area in which I have been relentless in criticism of the Obama administration has been their refusal to say anything about [drone strikes], and at the same time essentially conducting the foreign policy of the U.S. by leaked journalism . . . . I just don't think that is acceptable.'"); Peter Finn, *Political, Legal Experts Want Release of Justice Dept. Memo Supporting Killing of Anwar al-Awlaki*, Wash. Post, Oct. 7, 2011, http://wapo.st/n6l3vK (citing, among others, Senators Dianne Feinstein and Carl Levin and former State Department Legal Advisor John Bellinger); Benjamin Wittes, *More on Releasing the Legal Rationale for the Al-Aulaqi Strike*, Lawfare, Oct. 4, 2011, http://www.lawfareblog.com/2011/10/more-on-releasing-the-legal-rationale-for-the-al-aulaqi-strike (observing that the CIA's drone program is "covert only for purposes of accountability, not for purposes of credit-claiming. It is an abuse of the secrecy system, and it is an abuse that grows worse the more that drone strikes become the centerpiece of American counter-terrorism policy.").

reject categorically Plaintiffs' FOIA request on the meritless basis that disclosing even the mere existence of the drone program would disclose information that the Agency has a right to suppress.[5]

STANDARD OF REVIEW

This Court reviews an agency's Glomar response *de novo*. *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007).

ARGUMENT

I. AN AGENCY CANNOT LAWFULLY PROVIDE A GLOMAR RESPONSE TO PROTECT INFORMATION THAT IT HAS ALREADY OFFICIALLY AND SPECIFICALLY DISCLOSED.

Congress enacted FOIA "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). The FOIA "create[s] a 'strong presumption in favor of disclosure.'" *Pub. Citizen, Inc. v. Rubber Mfrs. Ass'n*, 533 F.3d 810, 813 (D.C. Cir. 2008) (quoting *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991)). Thus, "[a]lthough Congress enumerated nine exemptions from the

[5] Before the district court, Plaintiffs argued that, even if the CIA had not officially acknowledged the program, the CIA's invocation of the Glomar doctrine was unlawful because the mere existence of the drone program was not protected by any FOIA exemption. Plaintiffs do not pursue this argument here, because the Court need not reach it. As further discussed below, the CIA's official acknowledgement of the program forecloses the Agency's reliance on any FOIA exemptions that might otherwise apply.

disclosure requirement, these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Id.* (quoting *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002)) (internal quotation marks omitted). The Supreme Court reaffirmed last year that the courts are to construe FOIA's exemptions narrowly. *Milner v. Dep't of Navy*, 131 S. Ct. 1259, 1262 (2011).

The normal practice under FOIA is for an agency to search for responsive documents, release nonexempt records to the requester, and then provide a detailed justification of any withholdings to the requester and the court. *See Vaughn v. Rosen*, 484 F.2d 820, 826–28 (D.C. Cir. 1973). In narrow circumstances, however, an agency may refuse to confirm or deny the existence of records. *Wolf*, 473 F.3d at 374. The refusal to confirm or deny is known as a "Glomar response," after the Hughes Glomar Explorer, an oceanic research vessel whose connection to the CIA was at issue in the case that established the doctrine. *See generally Phillippi v. CIA* (*Phillippi I*), 546 F.2d 1009 (D.C. Cir. 1976). "Because *Glomar* responses are an exception to the general rule that agencies must acknowledge the existence of information responsive to a FOIA request and provide specific, non-conclusory justifications for withholding that information, they are permitted only when confirming or denying the existence of records would itself 'cause harm cognizable under an FOIA exception.'" *Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1178

(D.C. Cir. 2011) (quoting *Wolf*, 473 F.3d at 374) (internal quotation marks and citation omitted).

"In determining whether the existence of agency records *vel non* fits a FOIA exemption, courts apply the general exemption review standards established in non-*Glomar* cases." *Wolf*, 473 F.3d at 374. An agency must support its Glomar response with a "public affidavit explaining in as much detail as is possible the basis for its claim that it can be required neither to confirm nor to deny the existence of the requested records." *Phillippi I*, 546 F.2d at 1013. Although courts typically accord "substantial weight" to government declarations in national-security-related FOIA cases, that deference is due only when the government's affidavits "'contain reasonable specificity of detail rather than merely conclusory statements, and if they are not called into question by contradictory evidence in the record . . . .'" *Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982) (quoting *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980)); *see also Goldberg v. U.S. Dep't of State*, 818 F.2d 71, 77 (D.C. Cir. 1987) (even in the national-security context, courts must not "relinquish[] their independent responsibility" to review an agency's withholdings); *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998) ("[D]eference is not equivalent to acquiescence . . . .").

This Court has carefully scrutinized agency Glomar responses and has not hesitated to reject them when appropriate. Indeed, the first case to recognize the

possibility of a Glomar response, *Phillippi I*, rejected the CIA's invocation of the response and remanded with instructions for the CIA to substantiate its response with a detailed public declaration. *Phillippi I*, 546 F.2d at 1013. On remand, the CIA abandoned its Glomar response and produced responsive records. *See Phillippi v. CIA* (*Phillippi II*), 655 F.2d 1325, 1328 (D.C. Cir. 1981); *Military Audit Project v. Casey*, 656 F.2d 724, 734–35 & n.27 (D.C. Cir. 1981). In subsequent cases, the Court took similar care to ensure that the Glomar response was justified, and not simply an effort by the agency to exempt itself unilaterally from the congressionally mandated FOIA process. Thus, in *Morley v. CIA*, 508 F.3d 1108, 1126 (D.C. Cir. 2007), the Court held that the CIA failed sufficiently to explain why confirming or denying the existence of records about operations by a particular CIA officer would reveal intelligence sources and methods under Exemption 3, and remanded with instructions for the CIA to "substantiate its *Glomar* response with 'reasonably specific detail.'" In *Wolf v. CIA*, 473 F.3d at 379, and *Boyd v. Criminal Division of U.S. Department of Justice*, 475 F.3d 381, 389 (D.C. Cir. 2007), the Court rejected agencies' Glomar responses as deficient because the agencies had already acknowledged the existence of records about a deceased Colombian politician and a former government informant, who were the subjects of the plaintiffs' requests.

In other cases, the Court rejected the government's Glomar responses as unsubstantiated by its affidavits and required the government to confirm or deny the existence of records. *See Roth*, 642 F.3d at 1181 (rejecting government's justifications for Glomar response under law enforcement exemptions); *Jefferson v. Dep't of Justice*, 284 F.3d 172, 178–79 (D.C. Cir. 2002) ("[A]s the case giving rise to 'the *Glomar* response' itself makes clear, the Department cannot rely on a bare assertion to justify invocation of an exemption from disclosure . . . . [Here,] a *Glomar* response was inappropriate in the absence of an evidentiary record produced by [the agency] . . . ."); *see also Judicial Watch, Inc. v. U.S. Secret Serv.*, 579 F. Supp. 2d 182, 186 (D.D.C. 2008) (rejecting agency's Glomar response because its "argument that knowledge of the mere existence or absence of [records] poses a security risk does not hold water"); *Am. Civil Liberties Union v. Dep't of Def.*, 389 F. Supp. 2d 547, 561, 566 (S.D.N.Y. 2005) (rejecting CIA Glomar response as to one category of requested records because the fact of their existence was not properly classified and noting that "[t]he danger of Glomar responses is that they encourage an unfortunate tendency of government officials to over-classify information, frequently keeping secret that which the public already knows, or that which is more embarrassing than revelatory of intelligence sources or methods"); *Nat'l Sec. Archive v. U.S. CIA*, No. 99-1160 (CKK), slip op. at 15–16, 19 (D.D.C. July 31, 2000), ECF No. 26 (holding that CIA had waived

Glomar response by previous official disclosures of information); *Nuclear Control Inst. v. U.S. Nuclear Regulatory Comm'n*, 563 F. Supp. 768, 772 (D.D.C. 1983) (rejecting Glomar response because the existence of the requested document had already been acknowledged by the agency).

This Court has repeatedly held that a Glomar response is inappropriate where the information the agency seeks to protect has already been disclosed: "[W]hen information has been 'officially acknowledged,' its disclosure may be compelled even over an agency's otherwise valid exemption claim." *Wolf*, 473 F.3d at 378. A FOIA requester challenging a withholding on the basis of official acknowledgment must satisfy three criteria.

> First, the information requested must be as specific as the information previously released. Second, the information requested must match the information previously disclosed . . . . Third, . . . the information requested must already have been made public through an official and documented disclosure.

Wolf, 473 F.3d at 378 (quoting *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990)) (ellipses in original).

II. THE CIA'S GLOMAR RESPONSE IS UNLAWFUL BECAUSE THE EXISTENCE OF THE DRONE PROGRAM HAS ALREADY BEEN SPECIFICALLY AND OFFICIALLY DISCLOSED.

The CIA bases its Glomar invocation here on the theory that disclosing the existence of records concerning the drone program would disclose the existence of the program itself. *See, e.g.*, JA 29 (Cole Decl. ¶ 19) ("[I]f the CIA were to

respond to this request by admitting that it possessed responsive records, it would indicate that the CIA was involved in drone strikes or at least had an intelligence interest in drone strikes . . . ."); JA 31 (*id.* ¶ 22) ("Whether or not the CIA possesses legal opinions concerning drone strikes would itself be classified because the answer provides information about the types of intelligence activities in which the CIA may be involved or interested."); *id.* ("[T]he response would reveal whether or not the CIA was specifically involved in target selection, which would itself be a classified fact as the CIA has never officially acknowledged whether or not it is involved in drone strikes."); JA 32 (*id.*) ("If the CIA were to respond with anything other than a Glomar, it would unquestionably reveal whether or not the CIA was involved in drone strike operations, which is a classified fact.").

But the government has already specifically and officially acknowledged the program that the CIA now says is secret. The then-CIA Director (and now-Secretary of Defense) has discussed the program in speeches and interviews with the media. The President has done the same. Officials have made statements on the record about the program's legality, assured the public that the program is closely supervised, insisted that civilian casualties associated with the program are minimal, and taken credit for the program's putative successes. Accordingly, this is decidedly not a case that turns on citation to "[u]nofficial leaks and public

surmise," *Afshar v. Dep't of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983), "media speculation," *Pub. Citizen v. Dep't of State*, 11 F.3d 198, 201 (D.C. Cir. 1993), or "a disclosure made by someone other than the agency from which the information is being sought," *Frugone v. CIA*, 169 F.3d 772, 774 (D.C. Cir. 1999). Because the CIA and the President have specifically and officially disclosed the existence of the CIA's drone program—as well as details about the legality, oversight, and scope of that program—the Agency's Glomar response is unlawful.

The CIA tethers its Glomar response to Exemption 1, which shields properly classified national security information, and Exemption 3, which (insofar as relevant here) shields information protected by the National Security Act of 1947 and the Central Intelligence Agency Act of 1949. Specifically, the Agency claims that confirming or denying the existence of its drone program would reveal information falling within three categories protected by these exemptions: "intelligence sources and methods," the "functions" of CIA personnel, and the "foreign relations or foreign activities of the United States." *See* JA 23, 36, 42–43 (Cole Decl.). As Plaintiffs argued below, the mere existence of the drone program is not protected under any of these exemptions. But, assuming it is, the CIA's official acknowledgment of the existence of the drone program overrides the "agency's otherwise valid exemption claim." *Wolf*, 473 F.3d at 378 (quoting *Fitzgibbon*, 911 F.2d at 765) (internal quotation marks omitted); *see also Moore v.*

CIA, 666 F.3d 1330, 1333 (D.C. Cir. 2011).[6] The CIA's official acknowledgment of the drone program requires rejection of the CIA's Glomar response.

A. The President and the Then-CIA Director Have Specifically and Officially Disclosed the CIA's Drone Program

On May 18, 2009, then-CIA Director Leon E. Panetta appeared before the Pacific Council on International Policy. One member of the audience asked Mr. Panetta the following question:

> You mentioned that you believe the strategy in Pakistan is working—the President's strategy in Pakistan in the tribal regions, which is the drone—*the remote drone strikes*. You've seen the figures recently from David Kilcullen and others that the strikes have killed 14 midlevel operatives and 700 civilians in collateral damage. And his assessment as a counterinsurgency expert is it's creating more anti-Americanism than it is disrupting al-Qaeda networks.

JA 114–15 (Abdo Decl. Ex. B at 9–10) (emphasis added).[7] Mr. Panetta responded to the question about the drone strikes as follows:

> On the first issue, obviously because these are covert and secret operations I can't go into particulars. *I think it does suffice to say that these operations have been very effective because they have been very precise in terms of the targeting and it involved a minimum of collateral damage.* I know that some of the—sometimes the

[6] An official acknowledgment waives withholding claims under both Exemptions 1 and 3. *See Wolf*, 473 F.3d at 379–80 (Glomar response under Exemptions 1 and 3); *see also Nuclear Control Inst.*, 563 F. Supp. at 771–72 (Glomar response under Exemption 1).

[7] *See* Leon E. Panetta, Director's Remarks at the Pacific Council on International Policy (May 18, 2009), https://www.cia.gov/news-information/speeches-testimony/directors-remarks-at-pacific-council.html (last visited Mar. 1, 2012).

> criticisms kind of sweep into other areas from either plane attacks or attacks from F-16s and others that go into these areas, which do involve a tremendous amount of collateral damage. And sometimes I've found in discussing this that all of this is kind of mixed together. *But I can assure you that in terms of that particular area, it is very precise and it is very limited in terms of collateral damage and, very frankly, it's the only game in town in terms of confronting and trying to disrupt the al-Qaeda leadership.*

JA 115 (*Id.* at 10) (emphases added).

Mr. Panetta's statements before the Pacific Council on International Policy were consistent with statements he made to major media organizations. In a March 2010 interview with *The Washington Post*, Mr. Panetta described the drone strikes in Pakistan as "the most aggressive operation that CIA has been involved in in our history." JA 124 (Abdo Decl. Ex. C at 1).[8] Referring to the drone program, he stated that "[t]hose operations are seriously disrupting al-Qaida" and that "we really do have them on the run." *Id.*

In other statements, Mr. Panetta acknowledged the targets of particular drone strikes. When asked in March 2010 about the killing of Hussein al-Yemeni in a "drone strike" of a suspected bomb-making facility in Pakistan, Mr. Panetta commented that "We now believe that al-Yemeni, who was one of the top 20 [al Qaeda leaders], was one of those who was hit." JA 127 (Abdo Decl. Ex. D at 1)

[8] Peter Finn & Joby Warrick, *CIA Director Says Secret Attacks in Pakistan Have Hobbled al-Qaeda*, Wash. Post, Mar. 18, 2010, http://wapo.st/ypsAAt.

(alteration in original).[9] In the same interview, Mr. Panetta lauded the strike and the message it sent:

> "Anytime we get a high value target that is in the top leadership of al Qaeda, it seriously disrupts their operations," Mr. Panetta said. "It sent two important signals," Mr. Panetta said. "No. 1 that we are not going to hesitate to go after them wherever they try to hide, and No. 2 that we are continuing to target their leadership."

JA 128 (*id.* at 2). In May 2010, after major media organizations reported on a drone strike in Pakistan**,** *see, e.g.*, JA 149–55 (*id.* Exs. F–G),[10] Mr. Panetta stated, during a videotaped interview with ABC News, that the strike had killed al Qaeda's third in charge:

> But having said that, the more we continue to disrupt Al Qaida's operations, and we are engaged in the most aggressive operations in the history of the CIA in that part of the world, and the result is that we are disrupting their leadership. We've taken down more than half of their Taliban leadership, of their Al Qaida leadership. *We just took down number three in their leadership a few weeks ago.*

[9] Siobhan Gorman & Jonathan Weisman, *Drone Kills Suspect in CIA Suicide Bombing*, Wall St. J., Mar. 18, 2010, http://on.wsj.com/dxQNCj.

[10] Eric Schmitt, *American Strike Is Said to Kill a Top Qaeda Leader*, N.Y. Times, May 31, 2010, http://nyti.ms/9SBhsj; Justin Fishel, *CIA Drone Strike Kills Al-Qaeda #3*, FOX News, June 1, 2010, http://bit.ly/blPidu.

JA 134 (*id.* Ex. E at 4) (emphasis added).[11] (The White House also commented on the drone strike, describing al Qaeda's third in charge as the "biggest target to be either killed or captured in five years." JA 165 (*id.* Ex. H).[12])

After he became Secretary of Defense in June 2011, Mr. Panetta continued to discuss the CIA's drone program publicly. In October 2011, he spoke on the record to U.S. troops stationed at two bases in Italy. In a speech at the U.S. Navy's 6th Fleet headquarters in Naples, he said: "Having moved from the CIA to the Pentagon, obviously I have a hell of a lot more weapons available to me in this job than I had at the CIA, *although the Predators aren't bad*." *U.S.: Defense Secretary Refers to CIA Drone Use*, L.A. Times, Oct. 7, 2011, http://lat.ms/roREDq (emphasis added).[13] The *L.A. Times*' report of Mr. Panetta's subsequent speech includes this passage:

---

[11] *Jake Tapper Interviews CIA Director Leon Panetta*, ABC News, June 27, 2010, http://abcn.ws/xgWHFk. The video recording of the interview is also available at the internet link provided.

[12] Press Briefing by Press Secretary Robert Gibbs, White House (June 1, 2010), http://www.whitehouse.gov/the-press-office/press-briefing-press-secretary-robert-gibbs-6110.

[13] This statement, as well as several others cited below, was made subsequent to the filing of the district court's opinion and therefore was not offered as an exhibit below and is not included in the Joint Appendix. This Court may take notice of the newspaper articles and other publications in which the statements appear. *See* Fed. R. Evid. 201(f); 21B Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5110.1, at 299 (2d ed. 2005); *Hope*

> A few hours later, addressing U.S. and NATO troops on the tarmac at Naval Air Station Sigonella in Sicily, Panetta's thoughts again turned to the CIA drones as he praised the Libya operation. "This was a complicated mission, there's no question about it," he said, noting that it involved "*the use of Predators, which is something I was very familiar with in my past job.*"

Id. (emphasis added).

Mr. Panetta yet again discussed the CIA's drone program in January 2012, in a nationally televised interview on CBS's 60 Minutes. During that interview, Mr. Panetta acknowledged the targeted killing of U.S. citizen Anwar al-Awlaki in a joint CIA-DOD drone strike in Yemen. The interviewer, Scott Pelley, stated to Mr. Panetta, "You killed al-Awlaki," to which Mr. Panetta nodded in response. 60 Minutes, *The Killing of Anwar al-Awlaki* (CBS Jan. 29, 2012), http://bit.ly/wEx57M. After Mr. Panetta explained his understanding of the U.S. government's legal authority to kill U.S. citizens it suspects of terrorism, he and Mr. Pelley had the following exchange:

> Mr. Pelley: So it's the requirement of the administration under the current legal understanding that the President has to make that declaration [to kill a U.S. citizen]?
>
> Mr. Panetta: That is correct.
>
> Mr. Pelley: Not you?
>
> Mr. Panetta: That's correct.

---

v. Pelzer, 536 U.S. 730, 737 n.7 (2002); *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010).

> Mr. Pelley: Only the President can decide?
>
> Mr. Panetta: Well, it's a recommendation we make, *it's a recommendation the CIA director makes in my prior role*, but in the end when it comes to going after someone like that, the President of the United States has to sign off.

Id.

The district court explained away some of Mr. Panetta's statements, adopting strained and implausible constructions of words whose meaning is unambiguous. As to the Pacific Council on International Policy address, JA 114–15, the court held that Mr. Panetta

> never acknowledged the CIA's involvement in [the drone] program. That Director Panetta acknowledged that such a program exists and he had some knowledge of it, or that he was able to assess its success, is simply not tantamount to a specific acknowledgment of the CIA's involvement in such program . . . .

Am. Civil Liberties Union v. Dep't of Justice, 808 F. Supp. 2d 280, 294 (D.D.C. 2011). But this interpretation of Mr. Panetta's remarks defies logic. A questioner asked the sitting CIA Director about the drone program in Pakistan, and the Director responded directly by discussing what he viewed to be the advantages and successes of that program. The CIA Director referenced the existence of the program ("these operations have been very effective"), distinguished it from operations carried out by other means ("plane attacks or attacks from F-16s"), and insisted on its effectiveness ("very effective") and necessity ("the only game in town"). *See* JA 115. This surely comprises an acknowledgment.

The district court's reading of Mr. Panetta's March 2010 comments to the *Washington Post* was equally problematic. The court contended that "[w]hile the story cited 'more frequent strikes' as one example of the aggressive campaign waged in Pakistan, the reference is just as easily read to describe part of a larger campaign in Pakistan, in which the CIA played an undefined role." 808 F. Supp. 2d at 295. To say that the CIA's role was "undefined," however, requires disregarding most of the article. The article is largely about the CIA's drone program; it cites Mr. Panetta for the view that drone strikes "are seriously disrupting al-Qaida"; and it quotes Mr. Panetta saying that the death of a suspected al-Qaeda figure in a recent drone strike sent "a very important signal." JA 124–25. (The article also cites an unnamed CIA official for the proposition that the latter drone strike caused no civilian casualties.) The district court found it relevant and possibly determinative that "the CIA formally declined to acknowledge U.S. participation in the use of unmanned aerial vehicles in Pakistan"; it reasoned that "it would be contradictory under the circumstances to read Director Panetta's reference to the CIA operations as a specific reference to drone strikes." 808 F. Supp. 2d at 295. But the government cannot avoid the official acknowledgement doctrine simply by *saying* that it refuses to acknowledge the conduct at issue—i.e. by "formally declin[ing] to acknowledge U.S. participation." The relevant

question is whether the government has *in fact* acknowledged the conduct. If it has, its formal denials are simply irrelevant.

The district court also erred in suggesting that the relevant question was whether Mr. Panetta had acknowledged the existence of records concerning the drone program, rather than the drone program itself. 808 F. Supp. 2d at 294 n.5. The case on which the district court principally relied, *Wilner v. National Security Agency*, 592 F.3d 60 (2d Cir. 2009), involved a request for records concerning the National Security Agency's warrantless wiretapping program. There was no dispute in that case, however, that the NSA had acknowledged *some* aspects of program. The question was whether it could invoke the Glomar doctrine to protect other aspects of the program, such as the names of surveillance targets, that had not been disclosed. The Second Circuit held that it could. That holding supplies no support to the government here. Here, the CIA is not seeking to protect aspects of the program from disclosure; it is seeking to protect the very existence of the program. *See* JA 29–32 (Cole Decl. ¶¶ 19, 22). The existence of the program, however, is something that the CIA has already specifically and officially acknowledged.[14]

[14] In any event, the CIA does not contend that it has an interest in refusing to confirm or deny the existence of records independent from its (asserted) interest in refusing to confirm or deny the existence of the program.

The district court erred in holding that Mr. Panetta had not officially acknowledged the CIA's drone program. Mr. Panetta's repeated acknowledgments of the existence of the CIA's drone program meet the requirements of the official acknowledgment test. The statements were specific, documented, and made by a senior official within the agency at issue, the CIA. *See Wolf*, 473 F.3d at 378; *Frugone v. CIA*, 169 F.3d 772, 774 (D.C. Cir. 1999). The information disclosed by Mr. Panetta matches the information the CIA now refuses to confirm or deny, and it is at least as specific. *See Wolf*, 473 F.3d at 378. That was true on the record before the district court, and Mr. Panetta's post-September 2011 statements about his own activities at the CIA are consistent with the statements he made earlier. His October 2011 statements in Italy and his January 2012 statements to 60 Minutes, in particular, were clear and reasonably susceptible to only one interpretation.

And Mr. Panetta's acknowledgements of the CIA drone program do not stand alone. Since the district court's decision, President Obama, too, has acknowledged the program. On January 30, 2012, the President took questions on a live internet video forum organized by the social media site Google+ and the internet video forum YouTube. The President acknowledged that the United States carries out targeted killings using drones in Pakistan and made representations about the number of civilian casualties caused by drone strikes and the quality of

oversight of the program. *See President Obama Hangs Out With America*, White House Blog (Jan. 30, 2012), http://www.whitehouse.gov/blog/2012/01/30/president-obama-hangs-out-america (relevant statements begin at minute 26:30 of video); *see also* Mark Landler, *Civilian Deaths Due to Drones Are Not Many, Obama Says*, N.Y. Times, Jan. 30, 2012, http://nyti.ms/wAXUUn. A participant in the event asked:

> Mr. President, do you think that possibly these drone strikes, do they send the message that the U.S. is interfering in other country's affairs? Because I feel like regardless of how much we do, people in other countries might perceive that we're interfering, and that might not be good for us. Is there a way that we're combatting that?

The President responded:

> Well, I think that we have to be judicious in how we use drones. But understand that probably our ability to respect the sovereignty of other countries and to limit our incursions into somebody else's territory is enhanced by the fact that we are able to pinpoint-strike an al Qaeda operative in a place where the capacities of that military in that country may not be able to get them. *So obviously a lot of these strikes have been in the [Federally Administered Tribal Areas], and going after al Qaeda suspects who are up in very tough terrain along the border between Afghanistan and Pakistan.*

President Obama Hangs Out With America, White House Blog (Jan. 30, 2012) (emphasis added).[15]

[15] The President's statements were a clear acknowledgement not simply of the government's use of drones, but of the CIA's drone program in particular, because the government has made clear that the DOD does not conduct drone strikes in Pakistan. *See 'US Drone' Hits Pakistan Funeral*, Al Jazeera, June 24, 2009, http://aje.me/yKZJWO ("Questioned about the reported attacks, a US

The President has also acknowledged particular CIA drone strikes. Within hours of the CIA drone strike that killed U.S. citizens Anwar al-Awlaki and Samir Khan in Yemen, the President publicly lauded al-Awlaki's death as "another significant milestone in the broader effort to defeat al Qaeda and its affiliates" and then acknowledged the U.S. government's role, stating that "this success is a tribute to our intelligence community." Barack Obama, Remarks by the President at the "Change of Office" Chairman of the Joint Chiefs of Staff Ceremony (Sept. 30, 2011), http://1.usa.gov/o0mLpT. Several weeks later, President Obama stated on national television that "[al-Awlaki] was probably the most important al Qaeda threat that was out there after Bin Laden was taken out, and it was important that working with the enemies [sic: Yemenis], *we were able to remove him from the field*." David Nakamura, *Obama on 'Tonight Show' with Jay Leno: Full Video and Transcript*, Wash. Post, Oct. 26, 2011, http://wapo.st/u2GTMf (emphasis added).

At least some of the statements by Mr. Panetta and the President are sufficient in themselves to establish official acknowledgement. But even if these statements were insufficient individually, the district court erred by failing to

---

defence department official said: 'There are no US military strike operations being conducted in Pakistan.'"); *see also* Karen DeYoung, *U.S. Launches Airstrike Against al-Qaeda Affiliate in Yemen*, Wash. Post, Jan. 31, 2012, http://wapo.st/zSgzxq ("Unlike in Pakistan, where the CIA has had sole responsibility for hundreds of drone strikes against alleged insurgent safe havens in the tribal regions along the Afghan border, both the CIA and the military have participated in the Yemen strikes.").

consider them collectively, and this Court should consider them collectively now. *Cf. Salahi v. Obama*, 625 F.3d 745, 753 (D.C. Cir. 2010) ("Merely because a particular piece of evidence is insufficient, standing alone, to prove a particular point does not mean that the evidence 'may be tossed aside and the next [piece of evidence] may be evaluated as if the first did not exist.' The evidence must be considered in its entirety in determining whether the government has satisfied its burden of proof." (quoting *Al-Adahi v. Obama*, 613 F.3d 1102, 1105 (D.C. Cir. 2010) (alteration in original)). Collectively, the statements make clear that the CIA uses drones to conduct lethal strikes, that those strikes have occurred in (at least) Pakistan and Yemen, that the government believes the strikes to be accurate and effective and to involve minimal "collateral damage," and that the strikes have killed particular targeted individuals. When considered together, the statements of Mr. Panetta and the President plainly acknowledge the CIA drone program.

The volume of interlocking acknowledgments distinguishes this case from the other cases in which "official acknowledgement" has been at issue. "Official acknowledgement" cases, in both the Glomar and traditional FOIA contexts, have generally involved assessment of small numbers of statements reasonably susceptible to diverse interpretations, often made by officials with no connection to the relevant agency. Earlier cases have not involved a veritable avalanche of clear and consistent acknowledgments accumulating over the course of many months.

In *Moore v. C.I.A.*, 666 F.3d 1330 (D.C. Cir. 2011), for example, the plaintiff sought historical records from the CIA and FBI about a particular person. The FBI released a partially-redacted report and the CIA provided a Glomar response. *Id.* at 1331–32. In its declaration submitted to the district court, the CIA stated that it had asked the FBI to withhold certain of the redacted sections of the report, but it did not reveal the subject matter of those redacted sections. *Id.* at 1332. The plaintiff argued that the CIA's declaration alone constituted an official acknowledgment that it possessed information responsive to the request. Unsurprisingly, the court held that the CIA's solitary statement lacked the requisite specificity because there was no indication that the information redacted at the CIA's behest even related to the relevant person. *Id.* at 1334.

In *Frugone v. CIA*, the plaintiff sought CIA records about his own employment with the agency, which the CIA refused to confirm or deny. 169 F.3d at 773. He identified several letters from the Office of Personnel Management that referred to the CIA, but no statements from the CIA itself. *Id.* The court upheld the agency's Glomar response on the basis that only the CIA, and not another government agency, could officially acknowledge information in its control. *Id.* at 774. The lack of *any* CIA statement doomed the claim.

Non-Glomar cases discussing official disclosures are in accord. In *Fitzgibbon v. CIA*, for example, the plaintiff pointed to a single congressional

committee report as containing an official disclosure of information subject to the request. 911 F.2d at 765. The court upheld the agency's withholding on the basis that Congress could not officially acknowledge information on behalf of an executive agency. *Id.* at 766. In *Public Citizen v. Department of State*, the plaintiff identified two congressional hearings at which an agency official had testified, but then conceded that the testimony neither was "as specific as" the requested documents, nor "matche[d]" the information in the documents. 11 F.3d at 200, 203.

Unlike these earlier cases, which involved small numbers of ambiguous statements, often made by officials outside the relevant agency or even outside the executive branch, this case involves multiple statements, made in the course of scores of interviews and speeches, by the President and the relevant agency head. Even if none of the individual statements by Mr. Panetta or the President were sufficient in itself to constitute an official acknowledgement, the combination of them surely is. It is not possible to read this collection of statements and come to any conclusion except that the CIA has a drone program, and that it has specifically and officially acknowledged as much.

B. Other Senior Officials Have Acknowledged the Drone Program.

For the reasons stated above, this Court should hold that Mr. Panetta and President Obama have acknowledged the CIA's drone program. To so hold, the

Court need not consider any of the scores of statements that have been made about the program, anonymously or for attribution, by officials other than Mr. Panetta and the President. Plaintiffs submit, however, that these numerous statements by other officials make the CIA's Glomar invocation in this case particularly suspect, and particularly unseemly, and that they warrant particularly searching review by this Court.

In early 2011, John A. Rizzo, who served as the CIA's Acting General Counsel until 2009, spoke about the CIA's drone program to *Newsweek*. *See* JA 260–63.[16] He acknowledged the existence of the program, stated that "[t]he Predator [drone] is the weapon of choice," JA 261, explained that the CIA's drones are operated remotely from offices in northern Virginia, and discussed the process by which CIA drone strikes are approved. He also stated that, during his time at the CIA, he personally authorized the strikes. *Id.* Mr. Rizzo was not in the employ of the CIA when he made these comments, and, though Mr. Rizzo was plainly a senior official with firsthand knowledge of the program, plaintiffs do not suggest that his comments, taken alone, establish official acknowledgement. Mr. Rizzo's comments, however, constitute part of the background against which the CIA's Glomar invocation must be assessed. *Cf. Watts v. Indiana*, 338 U.S. 49, 52 (1949)

[16] Tara Mckelvey, *Inside the Killing Machine*, Newsweek, Feb. 21, 2011, *available at* 2011 WLNR 2990757.

(plurality opinion of Frankfurter, J.) ("[T]here comes a point where this Court should not be ignorant as judges of what we know as men.").

Other current and former intelligence and national security officials have also talked on the record about the drone program. Those who have done so include former Director of National Intelligence Dennis Blair[17] and White House counterterrorism advisor John Brennan.[18] And dozens of news articles have quoted

---

[17] *See* Josh Gerstein, *Ex-DNI Dennis Blair: Get CIA Out of Long-Term Drone Campaigns*, Politico, Nov. 30, 2011, http://politi.co/rp90Cm ("Former Director of National Intelligence Dennis Blair, who previously proposed scaling back the armed drone operation run in Pakistan by the Central Intelligence Agency, is now urging that program be publicly acknowledged and placed in the hands of the U.S. military."); Josh Gerstein, *Dennis Blair Rips Obama White House*, Politico, July 29, 2011, http://politi.co/qtu6zn ("Blair . . . said the administration should curtail U.S.-led drone strikes on suspected terrorists in Pakistan, Yemen and Somalia . . . .").

[18] The Los Angeles Times reported on remarks by Mr. Brennan at Johns Hopkins University:

> Later, when asked whether a policy of targeted killing was appropriate for the United States, Brennan responded that the U.S. is "exceptionally precise and surgical in terms of addressing the terrorist threat. And by that I mean, if there are terrorists who are within an area where there are women and children or others, you know, we do not take such action that might put those innocent men, women and children in danger."
>
> He added that in the last year, "there hasn't been a single collateral death because of the exceptional proficiency, precision of the capabilities that we've been able to develop."
>
> Brennan presumably was referring to covert strikes by the CIA and the Joint Special Operations Command, because in April, two

current CIA officials,[19] former intelligence officials,[20] "senior administration officials,"[21] and other "officials,"[22] discussing the CIA drone program on the

---

> American servicemen were killed by a Hellfire missile fired from a military drone after apparently being mistaken for insurgents moving to attack another group of Marines in southern Afghanistan.

Ken Dilanian, *U.S. Counter-Terrorism Strategy to Rely on Surgical Strikes, Unmanned Drones*, L.A. Times, June 29, 2011, http://lat.ms/qYd6Ot.

[19] Greg Miller and Julie Tate, *CIA Shifts Focus to Killing Targets*, Wash. Post, Sept. 1, 2011, http://wapo.st/zxxkO8 ("CIA officials insist that drone strikes are among the least common outcomes in its counterterrorism campaign. 'Of all the intelligence work on counterterrorism, only a sliver goes into Predator operations,' a senior U.S. official said."); David S. Cloud, *CIA Drones Have Broader List of Targets*, L.A. Times, May 5, 2010, http://lat.ms/Az87H9 ("As a matter of policy, CIA officials refuse to comment on the covert drone program. Those who are willing to discuss it on condition of anonymity refuse to describe in detail the standards of evidence they use for drone strikes, saying only that strict procedures are in place to ensure that militants are being targeted.").

[20] Peter Finn, *Secret US Memo Sanctioned Killing of Aulaqi*, Wash. Post, Sept. 30, 2011, http://wapo.st/plhkRQ ("The operation to kill Aulaqi involved CIA and military assets under CIA control. A former senior intelligence official said that the CIA would not have killed an American without such a written opinion."); Peter Finn & Joby Warrick, *Under Panetta, A More Aggressive CIA*, Wash. Post, Mar. 21, 2010, http://wapo.st/zdoJPn ("[CIA Director] Panetta authorizes every strike, sometimes reversing his decision or reauthorizing a target if the situation on the ground changes, according to current and former senior intelligence officials.").

[21] Karen DeYoung, *Secrecy Defines Obama's Drone War*, Wash. Post, Dec. 19, 2011, http://wapo.st/AtEH1H ("'Everybody knows we're using drones,' said a senior U.S. official familiar with the program . . . ."); Adam Entous, Siobhan Gorman & Julian E. Barnes, *U.S. Tightens Drone Rules*, Wall St. J., Nov. 4, 2011, http://on.wsj.com/xPDAka ("The [White House] review ultimately affirmed support for the underlying CIA [drone] program. But a senior official said: 'The bar has been raised. Inside CIA, there is a recognition you need to be damn sure it's worth it.'"); Greg Miller, *CIA Sees Increased Threat in Yemen*, Wash. Post,

Aug. 25, 2010, http://wapo.st/w4QPP3 ("The sober new assessment of al-Qaeda's affiliate in Yemen has helped prompt senior Obama administration officials to call for an escalation of U.S. operations there - including a proposal to add armed CIA drones to a clandestine campaign of U.S. military strikes, the officials said. 'We are looking to draw on all of the capabilities at our disposal,' said a senior Obama administration official, who described plans for 'a ramp-up over a period of months.'").

[22] News articles post-dating the district court decision: Greg Miller, *Under Obama, an Emerging Global Apparatus for Drone Killing*, Wash. Post, Dec. 27, 2011, http://wapo.st/A2pTGn ("But others directly involved in the drone campaign offered a simpler explanation: Because the CIA had only recently resumed armed drone flights over Yemen, the agency hadn't had as much time as JSOC to compile its kill list. Over time, officials said, the agency would catch up."); Scott Shane, *A Closed-Mouth Policy Even on Open Secrets*, N.Y. Times, Oct. 4, 2011, http://nyti.ms/xWkr2d ("Administration officials said the [CIA] drones are an especially delicate subject today because they are entangled with the United States' complex relations with the governments of Pakistan and Yemen."); Mark Mazzetti, Eric Schmitt, & Robert F. Worth, *C.I.A. Strike Kills U.S.-Born Militant in a Car in Yemen*, N.Y. Times, Oct. 1, 2011, at A1, *available at* http://nyti.ms/rsjp7J ("The drone strike was the first C.I.A. strike in Yemen since 2002 . . . . Friday's operation was the first time the agency had carried out a deadly strike from a new base in the region. The agency began constructing the base this year, officials said, when it became apparent to intelligence and counterterrorism officials that the threat from Al Qaeda's affiliate in Yemen had eclipsed that coming from its core group of operatives hiding in Pakistan."); Greg Miller, *Strike on Aulaqi Demonstrates Collaboration between CIA and Military*, Wash. Post, Sept. 30, 2011, http://wapo.st/nU0Ia0 ("Traveling from secret bases on opposite sides of Yemen, armed drones from the CIA and the military's Joint Special Operations Command converged above Anwar al-Aulaqi's position in northern Yemen early Friday and unleashed a flurry of missiles. US officials said the CIA was in control of all the aircraft . . . ."); *Anwar Al-Awlaki Killed in Yemen-As It Happened*, Guardian, Sept. 30. 2011, http://bit.ly/zf96Iw ("US and Yemeni officials say Samir Khan and al-Awlaki were killed early Friday in a strike on a convoy in Yemen. The strike was carried out by the CIA and US Joint Special Operations Command."); *U.S. Officials Warn of Possible Retaliation After Al Qaeda Cleric Is Killed*, CNN, Sept. 30, 2011, http://bit.ly/xHb4Gd ("'It was a joint U.S. military-intelligence operation,' a U.S. official said, adding that the U.S. military helped target al-Awlaki and that manned American military aircraft were flying overhead

ready to offer assistance. The drone was operated by the CIA, officials said."); Siobhan Gorman, *CIA Steps Up Missile Strikes in Pakistan*, Wall St. J., Sept. 27, 2010, http://on.wsj.com/xKGj6u ("[T]he Central Intelligence Agency has ramped up missile strikes against militants in Pakistan's tribal regions, current and former officials say. The strikes, launched from unmanned drone aircraft, represent a rare use of the CIA's drone campaign to preempt a possible attack on the West.").

News articles pre-dating the district court decision: Scott Shane, *Contrasting Reports of Drone Strikes*, N.Y. Times, Aug. 11, 2011, http://nyti.ms/AAVUrn ("Obama administration officials say the Central Intelligence Agency's drone program in Pakistan has killed about 600 militants and no civilians since May 2010."); Ken Dilanian, *CIA Drones May Be Avoiding Pakistani Civilians*, L.A. Times, Feb. 22, 2011, http://lat.ms/y4iunB ("U.S. officials said there had been no policy change and that there always have been occasions when the CIA decided not to fire at a target in the midst of civilians. Those officials would confirm only the Haqqani incident. But they cited two other occasions in the last year when missiles that had already been fired from drones were diverted off target to avoid killing civilians."); Greg Miller, *Increased U.S. Drone Strikes in Pakistan Killing Few High-Value Militants*, Wash. Post, Feb. 20, 2011, http://wapo.st/zufBgz ("U.S. officials familiar with [CIA] drone operations said the strikes are hitting important al-Qaeda operatives and are critical to keeping the United States safe."); Greg Miller, *CIA Backed by Military Drones in Pakistan*, Wash. Post, Oct. 3, 2010, http://wapo.st/AlqVcK ("The CIA is using an arsenal of armed drones and other equipment provided by the U.S. military to secretly escalate its operations in Pakistan by striking targets beyond the reach of American forces based in Afghanistan, U.S. officials said."); Mark Mazzetti & Eric Schmitt, *C.I.A. Steps Up Drone Attacks on Taliban in Pakistan*, N.Y. Times, Sept. 27, 2010, http://nyti.ms/zpruqa ("The C.I.A. has drastically increased its bombing campaign in the mountains of Pakistan in recent weeks, American officials said."); Corey Flintoff, *U.N. Official to Call for End of CIA Drone Strikes*, Nat'l Pub. Radio, May 28, 2010, http://n.pr/xzX100 ("A soon-to-be-released United Nations report will call into question the use of unmanned aircraft for targeted killings in Afghanistan and Pakistan by U.S. intelligence agencies. . . . [A] U.S. official [said]: 'Those who think we strike at terrorists over the objections of the Pakistani government are mistaken.'"); Adam Entous, *Drones Kill Low-Level Militants, Few Civilians: U.S.*, Reuters, May 3, 2010, http://reut.rs/ydioAx ("[I]t is unclear what criteria the CIA uses to pick its targets and to determine who constitutes a combatant. A U.S. counterterrorism official, who spoke on condition of anonymity, said the estimate was compiled using available intelligence as well as visual images – presumably

condition that they not be identified by name. *See, e.g.*, JA 193–245 (Abdo Decl. Exs. J–U).

The New York Times even published a detailed description, based on statements of unnamed officials, of a DOJ Office of Legal Counsel memorandum

---

from the unmanned aerial drones which can circle overhead for hours after they strike to assess the damage."); Greg Miller, *Muslim Cleric Aulaqi Is 1st U.S. Citizen on List of Those CIA Is Allowed to Kill*, Wash. Post, Apr. 7, 2010, http://wapo.st/wlYNwB ("A Muslim cleric tied to the attempted bombing of a Detroit-bound airliner has become the first U.S. citizen added to a list of suspected terrorists the CIA is authorized to kill, a U.S. official said Tuesday."); David S. Cloud, *U.S. Citizen Anwar Awlaki Added to CIA Target List*, L.A. Times, Apr. 6, 2010, http://lat.ms/wTsegG (citing U.S. officials as disclosing that "Anwar Awlaki, 38, who was born in New Mexico, recently was added to the CIA target list after a special government review of his activities"); Nick Schifrin, *CIA's Near Miss of Top Afghan Taliban Leader Sign of Improved Intelligence*, ABC News, Feb. 25, 2010, http://abcn.ws/zdOWmY ("U.S. officials also suggest the [CIA] strike is an indication that the Pakistani military and its intelligence agency, while not totally turning their backs on their past support for the Haqqani network, are now 'less and less inclined to care about the Haqqanis,' according to one U.S. official who spoke to ABC News in exchange for anonymity."); Greg Miller, *U.S. Citizen in CIA's Cross Hairs*, L.A. Times, Jan. 31, 2010, http://lat.ms/toSDOm ("Other current and former U.S. officials agreed to discuss the outlines of the CIA's target selection procedures on the condition of anonymity because of their sensitive nature. Some wanted to defend a program that critics have accused of causing unnecessary civilian casualties."); Scott Shane, *C.I.A. Drone Use is Set To Expand Inside Pakistan*, N.Y. Times, Dec. 4, 2009 at A1, http://nyti.ms/wucXpN ("[O]ne government official agreed to speak about the [CIA] program on the condition of anonymity. About 80 missile attacks from drones in less than two years have killed 'more than 400' enemy fighters, the official said…."); Jane Mayer, *The Predator War*, New Yorker, Oct. 26, 2009, http://nyr.kr/ADVVeV ("At any given moment, a former White House counterterrorism official says, the C.I.A. has multiple drones flying over Pakistan, scouting for targets."); *Pakistan: No Compromise on U.S. Cross-Border Strikes*, USA Today, Sept. 18, 2008, http://usat.ly/yviEig ("Two U.S. officials said Thursday that the missile strike was carried out by the CIA. They spoke on condition of anonymity because of the sensitivity of the subject.").

that provided the government's legal justification for the targeted killing of U.S. citizen Anwar al-Awlaki. Pursuant to that analysis, the *Times* reported, Al-Awlaki was killed in a joint CIA-DOD drone strike in Yemen last year. The *Times* explained that the memo "provided the justification for acting despite an executive order banning assassinations, a federal law against murder, protections in the Bill of Rights and various strictures of the international laws of war, according to people familiar with the analysis."[23] The *Times* also described the memo's explicit reference to the CIA's drone program:

> [The memo] raised another pressing question: would it comply with the laws of war if the drone operator who fired the missile was a Central Intelligence Agency official, who, unlike a soldier, wore no uniform? The memorandum concluded that such a case would not be a war crime, although the operator might be in theoretical jeopardy of being prosecuted in a Yemeni court for violating Yemen's domestic laws against murder, a highly unlikely possibility.[24]

Again, plaintiffs do not argue that any of these statements or disclosures, taken alone, would constitute official acknowledgement. But the specificity, consistency, and sheer volume of these statements—a pattern that one prominent law professor has aptly termed a pattern of "leaking promiscuously"[25]—suggests

---

[23] Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. Times, Oct. 8, 2011, http://nyti.ms/ru0jQH.

[24] *Id.*

[25] Jack Goldsmith, *More on al-Aulaqi and Transparency*, Lawfare, Oct. 5, 2011, http://www.lawfareblog.com/2011/10/more-on-al-aulaqi-and-transparency.

an official policy on the part of the agency and, more to the point, underlines that the existence of the CIA's drone strike program has been disclosed. *See Founding Church of Scientology, Inc. v. Nat'l Sec. Agency*, 610 F.2d 824, 831–32 (D.C. Cir. 1979) ("[T]he [withheld] documents may implicate aspects of the agency's operations already well publicized. Suppression of information of that sort would frustrate the pressing policies of the Act without even arguably advancing countervailing considerations.").

There is still another reason why the Court should reject the CIA's Glomar invocation here. The CIA's drone program has not simply been acknowledged and discussed by senior administration officials; it has been documented by extensive on-the-ground reporting that corroborates the official accounts. It bears emphasis that the use of drones is not a secret method of killing; a drone strike is a dramatic public event, in which individuals are killed by an explosive missile. The drones are visible from the ground, and, after any strike, components of the exploded missile can be retrieved by bystanders. Witnesses are common, and many strikes are documented in the news media, both inside the United States and in the countries in which the strikes are carried out. Several organizations based in the United States and abroad publish continually updated information about the locations, dates, and impacts of CIA drone strikes, including information about

civilian casualties.[26] Media outlets have published photos of the aftermath of drone strikes, including images of destroyed buildings, missile components, and injured victims.[27] The press has also reported details of particular CIA drone strikes based on interviews with eyewitnesses and residents of locations where strikes occurred.[28] An American journalist has written about witnessing a drone

---

[26] *See Covert Drone War*, Bureau of Investigative Journalism, http://www.thebureauinvestigates.com/category/projects/drones/ (last visited Mar. 7, 2012) (reporting 467–815 civilian deaths from U.S. drone strikes in Pakistan); *The Year of the Drone: An Analysis of U.S. Drone Strikes in Pakistan, 2004-2012*, New America Foundation, http://counterterrorism.newamerica.net/drones (last visited Mar. 7, 2012) (calculating between 1,753 and 2,733 deaths from U.S. drone strikes in Pakistan); Bill Roggio & Alexander Mayer, *Charting the Data for US Airstrikes in Pakistan, 2004 – 2012*, Long War Journal, http://www.longwarjournal.org/pakistan-strikes.php (last visited Mar. 7, 2012) (identifying 286 U.S. airstrikes in Pakistan since 2004).

[27] *See* Spencer Ackerman, *Rare Photographs Show Ground Zero of the Drone War*, Wired, Dec. 12, 2011, http://bit.ly/vFh2gx; David R Arnott, *Photos Document Alleged US Drone Strike Victims in Pakistan*, MSNBC PhotoBlog, Aug. 3, 2011, http://on.msnbc.com/p4cYMN.

[28] *See, e.g.*, Sebastian Abbot, *AP Impact: Study Suggests Drones Kill Far Fewer Civilians Than Many Pakistanis Believe*, Assoc. Press, Feb. 24, 2012, http://bit.ly/z3I7NI (reporting an "on-the-ground investigation by The Associated Press of 10 of the deadliest attacks in the past 18 months," during which an AP reporter "spoke to about 80 villagers at the sites of the 10 attacks in North Waziristan . . . ."); Chris Woods, *Witnesses Speak Out*, Bureau of Investigative Journalism, Feb. 4, 2012, http://www.thebureauinvestigates.com/2012/02/04/witnesses-speak-out/ ("Researchers working for the Bureau in Waziristan spoke to people who had witnessed US drone attacks on both rescuers and funeral-goers. These personal testimonies provide eyewitness accounts of events reported in leading media outlets including the New York Times, CNN, ABC News and Associated Press.").

strike first hand while he was being held captive in the tribal areas of Pakistan in 2009:

> Throughout our captivity, American drones were a frequent presence in the skies above North and South Waziristan. Unmanned, propeller-driven aircraft, they sounded like a small plane—a Piper Cub or Cessna—circling overhead. Dark specks in a blue sky, they could be spotted and tracked with the naked eye. . . . The most difficult day of our captivity was March 25, 2009. Late that afternoon, a drone attack occurred just outside our house in Makeen, South Waziristan. Missiles fired by an American drone had struck dozens of yards away. After chunks of mud and bits of shrapnel landed in our courtyard.

David Rohde, *The Drone War*, Reuters Mag., Jan. 17, 2012, http://reut.rs/Alsamt. Again, plaintiffs do not suggest that this kind of reporting, taken alone, could satisfy the test for official acknowledgement. But this kind of reporting certainly undermines the CIA's claim that the Glomar invocation serves a legitimate purpose, and it counsels special scrutiny of that invocation by this Court. The Court should not lightly give its official imprimatur to a fiction that allows the executive to disclose classified information with impunity but forecloses the public from assessing for itself whether the claims being made by executive officials are accurate and complete and denies the public the opportunity to determine for itself whether one of the most controversial of the government's counterterrorism policies is lawful, adequately supervised, and necessary.

CONCLUSION

For the reasons above, the Court should vacate the judgment below and direct the CIA to release responsive records or justify their withholding under FOIA's exemptions.

/s/ Arthur B. Spitzer
Arthur B. Spitzer
American Civil Liberties Union of the
Nation's Capital
4301 Connecticut Avenue, NW, Suite 434
Washington, DC 20008
Telephone: (202) 457-0800
Fax: (202) 452-1868
art@aclu-nca.org

Jameel Jaffer
Ben Wizner
Nathan Freed Wessler
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: (212) 549-2500
Fax: (212) 549-2654
jjaffer@aclu.org
bwizner@aclu.org
nwessler@aclu.org

Counsel for Plaintiffs–Appellants

March 15, 2012

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,553 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

/s/ Arthur B. Spitzer
Arthur B. Spitzer
Counsel for Plaintiffs−Appellants

Dated: March 15, 2012

CERTIFICATE OF SERVICE

On March 15, 2012, I served upon the following counsel for Defendant-Appellee one copy of Plaintiffs−Appellants' BRIEF FOR PLAINTIFFS−APPELLANTS via this Court's electronic filing system:

Douglas N. Letter
U.S. Department of Justice
950 Pennsylvania Ave., NW
Room 7513
Washington, D.C. 20530
Direct: (202) 514-3602
Email: douglas.letter@usdoj.gov

/s/ Arthur B. Spitzer
Arthur B. Spitzer
Counsel for Plaintiffs−Appellants

Executed on March 15, 2012

ADDENDUM

U.S.C. § 552. Public information; agency rules, opinions, orders, records, and proceedings

[Selected subsections provided; omissions denoted by "*** * ***"]

(a) Each agency shall make available to the public information as follows:

*** * ***

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term "search" means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4))) shall not make any record available under this paragraph to--

(i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or

(ii) a representative of a government entity described in clause (i).

(4)(A)

*** * ***

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

*** * ***

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall--

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section. The 20-day period shall not be tolled by the agency except--

(I) that the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or

(II) if necessary to clarify with the requester issues regarding fee assessment. In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period.

(B)(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. To aid the requester, each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).

(iii) As used in this subparagraph, “unusual circumstances” means, but only to the extent reasonably necessary to the proper processing of the particular requests--

(I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(C)(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(ii) For purposes of this subparagraph, the term “exceptional circumstances” does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person

made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.

*** * ***

(b) This section does not apply to matters that are--

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute--

(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy,

(D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

*** * ***

(f) For purposes of this section, the term--

(1) “agency” as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and

(2) “record” and any other term used in this section in reference to information includes--

(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and

(B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.

*** * ***