

[ORAL ARGUMENT NOT YET SCHEDULED]

**11-5320**

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA**

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AMERICAN CIVIL LIBERTIES UNION and  
AMERICAN CIVIL LIBERTIES UNION FOUNDATION,  
*Plaintiffs–Appellants*

v.

CENTRAL INTELLIGENCE AGENCY,  
*Defendants* *–Appellees.*

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

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**BRIEF OF *AMICI CURIAE* THE BUREAU OF INVESTIGATIVE  
JOURNALISM, CAMPAIGN FOR INNOCENT VICTIMS IN CONFLICT,  
CENTER FOR CONSTITUTIONAL RIGHTS, CENTER ON NATIONAL  
SECURITY AT FORDHAM LAW, THE CONSTITUTION PROJECT,  
FIRST AMENDMENT COALITION, HUMAN RIGHTS WATCH,  
INTERNATIONAL COMMISSION OF JURISTS, AND NATIONAL  
SECURITY ARCHIVE  
IN SUPPORT OF PLAINTIFFS-APPELLANTS SEEKING REVERSAL**

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DATED: March 22, 2012

## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

**A. Parties and *Amici*.** Except for the following, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Plaintiffs-Appellants:

The Bureau of Investigative Journalism, Campaign for Innocent Victims in Conflict, Center for Constitutional Rights, Center on National Security at Fordham Law, The Constitution Project, First Amendment Coalition, Human Rights Watch, International Commission of Jurists and National Security Archive are *amici curiae* in this appeal.

**B. Rulings under Review.** References to the rulings at issue appear in the Brief for Plaintiffs-Appellants. *See ACLU v. DOJ*, 808 F.Supp. 2d 280 (D.D.C. 2011).

**C. Related Cases.** References to related cases appear in the Brief for Plaintiffs-Appellants.

Dated: March 22, 2012

Respectfully submitted,

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## **CORPORATE DISCLOSURE STATEMENT**

*Amici curiae* the Bureau of Investigative Journalism, Campaign for Innocent Victims in Conflict, Center for Constitutional Rights, Center on National Security at Fordham Law, The Constitution Project, First Amendment Coalition, Human Rights Watch, International Commission of Jurists, and National Security Archive are non-profit corporations. None of the *amici* is a publicly held corporation, and no corporation or other publicly held entity own more than 10% of the stock of any of the *amici*. The *amici* have no parents, subsidiaries, or affiliates that have issued shares or debt securities to the public. The general purpose, insofar as relevant to this litigation, of the *amici* organizations is to promote or advocate for greater access to government records through the Freedom of the Information Act when such records relate to pressing public debates on important national and global issues.

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## **GLOSSARY**

CIA	Central Intelligence Agency
FOIA	Freedom of Information Act
DOJ	U.S. Department of Justice

## **STATUTES AND REGULATIONS**

All applicable statutes and regulations are contained in the Brief for Plaintiffs-Appellants.

## **IDENTITIES AND INTERESTS OF *AMICI CURIAE***

*Amici curiae* the Bureau of Investigative Journalism, Campaign for Innocent Victims in Conflict, Center for Constitutional Rights, Center on National Security at Fordham Law, The Constitution Project, First Amendment Coalition, Human Rights Watch, International Commission of Jurists and National Security Archive are organizations that believe the public should have greater access to records regarding the CIA's drone-based targeted killing program, in order to promote the Freedom of Information Act's twin goals of government transparency and

accountability.<sup>1</sup> Detailed statements of interest of *amici curiae* are provided in the Appendix.<sup>2</sup>

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<sup>1</sup> This brief was not authored in whole or in part by counsel for a party. No person or entity other than amici curiae or their counsel made a monetary contribution to the preparation or submission of this brief.

<sup>2</sup> Defendants-Appellees consent to the submission of this brief.



## SUMMARY OF ARGUMENT

In this Freedom of Information Act (“FOIA”) lawsuit, the CIA maintains that revealing the very existence of records relating to its program of targeted killing via drone-based missile strikes would expose a classified secret and cause national security harms. The existence of the CIA’s targeted killing program, however, is so widely acknowledged and heavily reported upon that it can hardly be called a secret anymore.

First, the President and the CIA Director have officially acknowledged the CIA’s targeted killing program. Second, unnamed government officials have not only confirmed the program’s existence, but revealed important details, such as its geographic scope and target selection process. Moreover, the Attorney General publicly defended the program in a recent speech that provided the government’s legal rationale for targeted killings. The volume and breadth of program information originating from government officials calls into grave doubt the CIA’s claim that national security harms will result from the CIA merely acknowledging that it has responsive records.

The public has a significant interest in obtaining information on the CIA’s program, as demonstrated by the fierce ongoing public debate on the issue of targeted killing. Having tolerated or allowed significant informational disclosures

on the classified program, the CIA should not be allowed to hide behind its “Glomar” response to avoid the governmental accountability and transparency enabled by FOIA.

## **ARGUMENT**

### **I. THE PUBLIC HAS A SIGNIFICANT AND PRESSING INTEREST IN INFORMATION RELATING TO THE CIA’S DRONE-BASED TARGETED KILLING PROGRAM.**

The public has a pressing interest in accessing records of the CIA’s drone-based targeted killing program because the information is central to an ongoing national debate. If the CIA is allowed to continue selectively leaking details of the classified program while using the Glomar response as a shield, the public cannot hold the government accountable for its conduct of this controversial program.

A national debate on targeted killing is ongoing. Speculation and reporting about the program have spawned a fierce debate among ordinary citizens, legislators, media, scholars, and government officials. At the heart of the debate are questions relating to Executive powers during wartime. One important aspect of the debate is whether and to what extent the CIA, an intelligence agency that functions in secret with far less public and Congressional oversight than the armed forces, should be conducting operations using lethal force.

The targeted killing program’s lawfulness is also under debate, and the

Attorney General's recent remarks on the program's legal basis have not quelled the controversy. First, disagreements have arisen about whether and when the U.S. Constitution and laws authorize the President to target individuals for killing without any judicial process.<sup>3</sup> Second, disagreements have arisen as to whether and under what circumstances international humanitarian law and human rights laws allow the targeted killing of alleged terrorists.<sup>4</sup> Finally, the debate also concerns the criteria for targeting and killing individuals, including U.S. citizens, the existence of substantive or procedural safeguards to ensure accuracy and

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<sup>3</sup> See, e.g., Richard Murphy and Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 *Cardozo L. Rev.* 405 (2009); Jules Lobel, *Covert War and the Constitution*, 5 *J. Nat'l Security L. & Pol'y* 393 (2012) (Constitution does not authorize President to conduct covert wars); Robert F. Turner, *Covert War and the Constitution: A Response*, *J. Nat'l Security L. & Pol'y* 409 (2012) (Constitution authorizes President to conduct covert wars); Robert Chesney, *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 5 *J. Nat'l Security L. & Pol'y* 539 (2012) (discussing statutory questions relating to joint CIA-military activities and CIA killing operations).

<sup>4</sup> See, e.g., Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, Human Rights Council, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston); Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 *Harv. Nat'l Sec. J.* 145 (2010); Mary Ellen O'Connell, *Unlawful Killing with Combat Drones, A Case Study of Pakistan 2004-2009* (July 2010), [http://papers.ssrn.com/sol3/cf\\_dev/AbsByAuth.cfm?per\\_id=375701](http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=375701); John C. Dehn & Kevin Jon Heller, *Targeted Killing: The Case of Anwar Al-Aulaqi*, 159 *U. Pa. L. Rev. PENNumbra* 175 (2011).

legitimacy of killings, and the existence of accountability mechanisms.<sup>5</sup>

The CIA records sought herein are needed to ensure an informed citizenry that can fully participate in these debates. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (“The basic purpose of FOIA is 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.”). Currently, the public has relatively limited knowledge, based solely on media reports, of whether the targeted killing program is effective in reducing the capacity of Al Qaeda and its associates; its collateral impact, including deaths and injuries to innocent civilians; the accuracy and reliability of intelligence used for these killings; the CIA’s internal and external accountability mechanisms; and the program’s operational limitations, whether geographic, evidentiary, legal, or procedural.<sup>6</sup>

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<sup>5</sup> Special Rapporteur, *Targeted Killings*; Philip Alston, *The CIA and Targeted Killings Beyond Borders*, 2 Harv. Nat’l Sec. J. 283 (2011); Afsheen John Radsan and Richard Murphy, *The Evolution of Law and Policy for CIA Targeted Killing*, 5 J. Nat’l Security L. & Pol’y 439 (2012).

<sup>6</sup> Since jurisdictional and prudential barriers may prevent lawsuits challenging allegedly wrongful targeted killings, *see, e.g., Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (2010) (dismissing lawsuit seeking to enjoin extrajudicial killing of U.S. citizen, on standing and political question grounds), transparency through FOIA is all the more important.

In limited and exceptional circumstances, an agency may refuse to confirm or deny the existence of records responsive to the FOIA request, when the response itself would result in harm cognizable under one of FOIA's nine exemptions.

*Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976). Here, the CIA has provided such a non-response (termed a Glomar response), claiming that a confirmation or denial of responsive records would reveal secret intelligence activities, sources, and methods and would impact foreign relations and foreign activities. *ACLU v. DOJ*, 808 F.Supp.2d 280 (D.D.C. 2011). This is entirely unpersuasive because, as shown herein, the President and CIA have officially acknowledged the program, making a Glomar response impermissible. *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007). Moreover, high-level government officials have unofficially divulged (presumably classified) information on numerous aspects of the program, making the claim of secrecy implausible.

By claiming that the CIA's targeted killing program is secret, while officially and unofficially acknowledging the program and its details, the government prevents the public from gaining a full understanding of the program, thereby undermining transparency and governmental accountability. The CIA's refusal to respond deprives the public of its right to form and make known its informed views on targeted killing.

## **II. THE EXISTENCE OF THE CIA'S DRONE-BASED TARGETED KILLING PROGRAM IS WIDELY ACKNOWLEDGED, AND NUMEROUS DETAILS OF THE PROGRAM HAVE BEEN DISCLOSED.**

### **A. Background: The CIA's Targeted Killing Program**

“Targeted killing” refers to premeditated acts of lethal force employed by states in times of peace or war to kill specific individuals outside of their custody.<sup>7</sup> Drone-based targeted killing refers to the use of “drones,” or unmanned aerial vehicles that are piloted remotely or run autonomously, to remotely launch missile strikes for targeted killing.<sup>8</sup>

The CIA's drone-based targeted killing program is one of three such U.S. government programs. First, the U.S. military conducts drone operations in Afghanistan, as a publicly acknowledged part of that war effort.<sup>9</sup> Second, the Joint Special Operations Command (JSOC), “a sub-unified command of the U.S. Special

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<sup>7</sup> Special Rapporteur, *Targeted Killings*; Murphy & Radsan, *Due Process*.

<sup>8</sup> Elizabeth Bone, Cong. Research Serv., RL 31872, *Unmanned Aerial Vehicles, Background and Issues for Congress* (2003), [www.fas.org/irp/crs/RL31872.pdf](http://www.fas.org/irp/crs/RL31872.pdf); Jeremiah Gertler, Cong. Research Serv., R 42136, *U.S. Unmanned Aerial Systems* (2012), [www.fas.org/sgp/crs/natsec/R42136.pdf](http://www.fas.org/sgp/crs/natsec/R42136.pdf).

<sup>9</sup> See, e.g., Christopher Drew, *Drones Are Playing a Growing Role in Afghanistan*, N.Y. Times, Feb. 21, 2010, at A6 (military estimates of drone strikes in Afghanistan in 2009); National Public Radio, *War By Remote Control: Drones Make It Easy*, Nov. 26, 2011 (describing global use of drone surveillance).

Operations Command” conducts drone operations.<sup>10</sup> The details are secret, though reportedly JSOC operates in Yemen and Somalia, perhaps with the CIA.<sup>11</sup> Third, the CIA conducts a drone-based targeted killing program, whose records Plaintiffs seek.<sup>12</sup> Although the CIA program is officially a classified secret, aspects of the program and its existence are well-known.

**B. First-Hand News Reports and Investigations Have Confirmed The CIA’s Targeted Killing Program**

First-hand reports of CIA drone strikes abound, especially in Pakistan.<sup>13</sup>

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<sup>10</sup> *Joint Special Operations Command*, United State Special Operations Command, <http://www.socom.mil/Pages/JointSpecialOperationsCommand.aspx> (last visited Mar. 18, 2012).

<sup>11</sup> Eric Schmitt, *U.S. Teaming With New Yemen Government on Strategy to Combat Al Qaeda*, N.Y. Times, Feb. 26, 2012, at A6; Greg Jaffe and Karen DeYoung, *U.S. drone targets two leaders of Somali group allied with al-Qaeda, official says*, Wash. Post, June 29, 2011 (unnamed government official confirming JSOC participation in drone strikes in Somalia and Yemen); Greg Miller, *CIA to Operate Drones Over Yemen*, Wash. Post, June 13, 2011 (same, in Yemen); Dana Priest & William M. Arkin, *‘Top Secret America’: A Look at the Military’s Joint Special Operations Command*, Wash. Post, Sept. 2, 2011 (noting JSOC’s “level of obscurity”).

<sup>12</sup> See Siobhan Gorman & Adam Entous, *CIA Plans Yemen Drone Strikes*, Wall St. J., June 14, 2011, at A8 (secret 2001 Presidential finding created legal underpinnings for CIA program in Pakistan, and similar 2010 approval for Yemen program); Bob Woodward, *Bush at War*, at 101 (2004).

<sup>13</sup> See, e.g., Pir Zubair Shah, *My Drone War*, Foreign Policy (Mar./Apr. 2012), [http://www.foreignpolicy.com/articles/2012/02/27/my\\_drone\\_war?page=full](http://www.foreignpolicy.com/articles/2012/02/27/my_drone_war?page=full) (describing reporter’s extensive reporting of drone strikes in Pakistan).

Pakistani and international news sources have reported on the locations of particular strikes, the number of dead and injured and sometimes their identities, subsequent burials, and the physical damage caused, based on eyewitness accounts and statements by locals. *See, e.g., US Drone 'Kills 23 in Training Camp Strike'*, Al Jazeera, (Aug. 10, 2011), <http://www.aljazeera.com/news/asia/2011/08/20118106185901308.html> (reporting Pakistani official confirmation of death toll at 18, with “more bodies [] being dug out of the rubble,” after two missiles hit house and nearby parked vehicle); S.H. Khan, *US Drone Kills Three Taliban in Pakistan: Officials*, AFP, Sept. 30, 2011, <http://www.google.com/hostednews/afp/article/ALeqM5iAr585MBstWwM1b4b0jVBWhjDbVw> (U.S. drone strike killed three Taliban fighters, “blowing their vehicle into a ball of flames, local officials said.”).<sup>14</sup>

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<sup>14</sup> *See also*, The Associated Press, *AP IMPACT: New Light On Drone War's Death Toll*, National Public Radio, (Feb. 26, 2012), <http://www.npr.org/templates/story/story.php?storyId=147407641> (noting local villager's account of nearby drone strike); *Drone Strike 'Kills Fighters' in Pakistan*, Al Jazeera (Nov. 15, 2011) <http://www.aljazeera.com/news/asia/2011/11/201111155354189611.html> (noting security official's account of nearby drone strike); Manzoor Ali, *Drone Attacks: Two Strikes Wipe Out 11 Militants*, Express Trib. (Oct. 27, 2011) <http://tribune.com.pk/story/283153/drone-strike-kills-6-in-s-waziristan/> (noting account of drone strike from “tribal sources”); *Pakistan Drone Attack 'Kills Four Fighters'*, Al Jazeera (Aug. 16, 2011), <http://www.aljazeera.com/news/asia/2011/08/201181615038200379.html> (noting



Pakistani officials also have confirmed details of drone strikes, in their aftermath. *See, e.g., US Drone Strike Kills 10 'Haqqani' Militants in Waziristan*, Dawn, Feb. 8, 2012, <http://www.dawn.com/2012/02/08/us-drone-strike-kills-eight-in-pakistan-officials.html> (“Two missiles hit the compound located in Tappi, 10 kilometres southeast of Miramshah . . . a military official in Peshawar said.”); Haji Mujtaba, *U.S. Drone Attacks Kill at Least 4 in Pakistan: Officials*, Reuters, Jan. 23, 2012, <http://www.reuters.com/article/2012/01/23/us-pakistan-drones-idUSTRE80M0HG20120123> (“U.S. drone aircraft fired missiles in Pakistan's North Waziristan tribal region on Monday, killing at least four militants, intelligence officials and tribesmen said . . .”).<sup>15</sup>

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local official's account of drone strike); *Drone attack: US Strikes Kill 10 Militants in S Waziristan*, Express Trib. (June 16, 2011) <http://tribune.com.pk/story/189377/drone-strikes-kill-4-in-wana-south-waziristan> (noting eyewitness account of drone strike).

<sup>15</sup> *See also, Two Drone Strikes Kill 17 in North Waziristan*, Express Trib., (Feb. 16, 2012) <http://tribune.com.pk/story/337310/us-drone-strike-kills-five-militants-in-pakistan-officials> (local Pakistani officials confirming nearby drone strike); Iftikha Firdous, *Attacks resume: Drone strike kills six in North Waziristan*, Express Trib. (Jan. 13, 2012) <http://tribune.com.pk/story/320437/us-drone-strike-kills-four-militants-officials/> (same); *US drone attack kills four militants in Pakistan: Officials*, Express Trib. (Jan. 11, 2012) <http://tribune.com.pk/story/319683/us-drone-attack-kills-four-militants-in-pakistan-officials/> (same); Wasim Yousufzai, *5 killed in South Waziristan drone strike*, Pajhwok Afghan News (Aug. 1, 2011) <http://www.pajhwok.com/en/2011/08/01/5-killed-south-waziristan-drone-strike> (same).

Media and other organizations have conducted extensive field investigations into U.S. drone strikes in Pakistan's Federally Administrated Tribal Areas. The Bureau of Investigative Journalism ("BIJ"), a non-profit organization based in London and providing high-quality investigations for press and broadcast media, identified by name more than 100 civilians killed in CIA strikes since 2009 and provided eyewitness testimonies.<sup>16</sup> The Associated Press concluded a major investigation based on eyewitness testimonies of more than 80 civilians, in relation to ten CIA strikes since 2009.<sup>17</sup>

The New America Foundation ("NAF"), a non-profit, non-partisan public

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<sup>16</sup> See Chris Woods, *Get the Data: Obama's Terror Drones*, BIJ (Feb. 4, 2012), <http://www.thebureauinvestigates.com/2012/02/04/get-the-data-obamas-terror-drones/>; Chris Woods & Rahimullah Yusufzai, *Get the Data: Twenty-five Deadly Strikes*, BIJ (July 18, 2011), <http://www.thebureauinvestigates.com/2011/07/18/get-the-data-twenty-five-deadly-strikes/>; Chris Woods, *Witnesses Speak Out*, BIJ (Feb. 4, 2012), <http://www.thebureauinvestigates.com/2012/02/04/witnesses-speak-out/>.

<sup>17</sup> See Sebastian Abbot, *AP Impact: New Light on Drone War's Death Toll*, Associated Press, Feb. 26, 2012, [http://hosted2.ap.org/APDEFAULT/3d281c11a96b4ad082fe88aa0db04305/Article\\_2012-02-26-AS-Pakistan-Drones'-Human-Cost/id-2da4d269c49441d5b80d67f1d5c5b8e4](http://hosted2.ap.org/APDEFAULT/3d281c11a96b4ad082fe88aa0db04305/Article_2012-02-26-AS-Pakistan-Drones'-Human-Cost/id-2da4d269c49441d5b80d67f1d5c5b8e4). See also, *Complaint Against the United States of America for the Killing of Innocent Citizens of the Islamic Republic of Pakistan*, Reprieve (Feb. 23, 2012), [http://reprieve.org.uk/media/downloads/2012\\_02\\_22\\_PUB\\_drones\\_UN\\_HRC\\_complaint.pdf](http://reprieve.org.uk/media/downloads/2012_02_22_PUB_drones_UN_HRC_complaint.pdf) (case filed with U.S. Human Rights Council based on sworn affidavits by 18 family members of civilians reportedly killed by drone strike in Pakistan.).

policy institute, has compiled comprehensive data on over 300 drone strikes in Pakistan, from 2004 to the present, based on news reports. *The Year of the Drone*, New America Foundation (Mar. 5, 2012), <http://counterterrorism.newamerica.net/drones>. Drawing its data from reliable international and Pakistani media outlets and services with reporting capability within Pakistan, NAF shows the locations, dates, and targets of each strike. *Id.* (showing 290 drone strikes in Pakistan since 2004, killing between 1,753 to 2,733 people, with a civilian death rate of 17%).

In August 2011, BIJ also released a study on drone strikes in Pakistan since 2004. Based on media and eyewitness reports, government documents, and other sources, BIJ estimated 305 drone strikes since 2004, killing between 2,347 and 2,956 people, including 175 children, and injuring at least 1,158 people. Chris Woods, *Drone War Exposed – the Complete Picture of CIA Strikes in Pakistan*, BIJ, (Aug. 10, 2011), <http://www.thebureauinvestigates.com/2011/08/10/most-complete-picture-yet-of-cia-drone-strikes/>.<sup>18</sup>

First-hand accounts of drone strikes also have been reported in Yemen. *See*,

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<sup>18</sup> *See also*, Bill Roggio & Alexander Mayer, *Charting the Data for US Airstrikes in Pakistan, 2004 – 2012*, *The Long War Journal* (Feb. 23, 2012) <http://www.longwarjournal.org/pakistan-strikes.php> (news website with statistics on drone strikes in Pakistan).

*e.g.*, *Yemen official survives assassination attempt*, Al Jazeera, Jan. 31, 2012, <http://www.aljazeera.com/news/middleeast/2012/01/2012131154046370290.html> (local residents and tribal officials reporting local drone strike); Shatha Al-Harazi & Anas Rawi, *American Drone Strikes Provoke Yemenis Against interim government*, Yemeni Times, Feb. 2, 2012, <http://yementimes.com/en/1543/news/269/American-drone-strikes-provoke-Yemenis-against-interim-government.htm> (noting recent U.S. drone strike killing 11 alleged Al-Qaeda members).

**C. The President and CIA Director Have Officially Acknowledged The CIA's Targeted Killing Program**

Statements by President Obama and then-CIA Director Leon Panetta confirm the existence of the CIA's drone-based targeted killing program.<sup>19</sup> Given such official acknowledgements, the CIA cannot maintain that revealing the mere existence of records about the program could result in further damage to national security. Rather, the CIA's acknowledgment of responsive records will only confirm what government officials have already publicly acknowledged.

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<sup>19</sup> The Brief for Plaintiffs-Appellants contains previous and/or further examples of official and unofficial acknowledgments of the CIA's program. Pl. Br. 16-37.

## 1. Official Acknowledgments by President Obama

President Obama recently acknowledged the existence of the CIA's drone-based targeted killing program. In a "Town Hall" hosted by Google + on January 30, 2012, he addressed a viewer question asking whether he felt the unusually high number of drone attacks ordered in his first year as president was helping our nation. Google+, *Your Interview with the President-2012*, YouTube (Jan. 30, 2012), <http://youtu.be/eeTj5qMGTAI?t=26m30s>. President Obama explained that "drones have not caused a huge number of civilian casualties" and, instead, are "precision strikes against al Qaeda and their affiliates." *Id.* He stated that he wanted to dispel notions that America was "just sending in a whole bunch of strikes willy-nilly," and he emphasized "that this thing is kept on a very tight leash." *Id.* He continued, "It's not just a bunch of folks in a room somewhere just making decisions. And it is also part and parcel of our overall authority when it comes to battling al Qaeda." *Id.*

His answer to a follow-up question was even more explicit. Someone asked whether the drone strikes "send a message that the U.S. is interfering in other countries' affairs." *Id.* In response, President Obama referenced drone strikes in a specific area of Pakistan that is outside the geographic scope of active military operations and that has been consistently linked to the CIA by numerous media

sources relying on unnamed government sources. He stated in part that “a lot of these strikes have been in the FATA [Federally Administered Tribal Areas of Pakistan], and going after al Qaeda suspects are who are in very tough terrain along the border between Afghanistan and Pakistan . . . .” In addition, explaining the policy reasoning behind the drone program, he stated, “[F]or us to be able to get them another way would involve probably a lot more intrusive military actions than the one we’re already engaging in.”

With this, President Obama publicly acknowledged the CIA’s targeted killing program. Christi Parsons & Michael A. Memoli, *Obama Opens Up about Drone Strikes in Pakistan*, L.A. Times, Jan. 31, 2012 (“CIA air attacks on Al Qaeda usually aren’t discussed publicly, but the president defends them in a ‘virtual interview’ via Google+ and YouTube.”); Mark Landler, *Civilian Deaths Due to Drones Are Not Many, Obama Says*, N.Y. Times, Jan. 30, 2012, at A6 (“Mr. Obama, in an unusually candid public discussion of the Central Intelligence Agency’s covert program, said the drone strikes had not inflicted huge civilian casualties.”).<sup>20</sup>

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<sup>20</sup> See also, *Obama Defends US Drone Strikes in Pakistan*, BBC News, Jan. 31, 2012, <http://www.bbc.co.uk/news/world-us-canada-16804247> (President defended use of drones in Pakistan’s tribal areas, a program “which is run by the CIA...”); Chris Woods, *Analysis: Obama Outs CIA Drone Campaign—But Do His Words*

Even earlier, President Obama had acknowledged the CIA program when discussing the targeted killing of Anwar Al-Awlaki. Al-Awlaki, a U.S. citizen, was killed in a drone strike that “was the first C.I.A. strike in Yemen since 2002 . . . and was part of an effort by the spy agency to duplicate in Yemen the covert war [sic] it has been running in Pakistan.”<sup>21</sup> In remarks made soon thereafter, President Obama stated that the operation was a “tribute to our intelligence community, and to the efforts of Yemen and its security forces.”<sup>22</sup> With this, he acknowledged CIA involvement.<sup>23</sup>

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*Add Up?*, Bureau of Investigative Journalism (Feb. 1, 2012), <http://www.thebureauinvestigates.com/2012/02/01/analysis-obama-outs-secret-cia-drone-campaign-but-do-his-words-add-up/> (“[i]t came as a surprise to everyone when President Obama used a live ‘town hall’ webcam chat via Google . . . to talk—for almost four minutes—about the covert U.S. drones campaign in Pakistan”).

<sup>21</sup> Mark Mazzetti et al., *C.I.A. Strike Kills U.S.-Born Militant In A Car In Yemen*, N.Y. Times, Oct. 1, 2011, at A1.

<sup>22</sup> President Barack Obama, Remarks by the President at the “Change of Office” Chairman of the Joint Chiefs of Staff Ceremony (Sept. 30, 2011), <http://www.whitehouse.gov/the-press-office/2011/09/30/remarks-president-change-office-chairman-joint-chiefs-staff-ceremony>.

<sup>23</sup> Landler, *Civilian Deaths* (although President Obama “never mentioned the agency,” the “tribute to our intelligence community” language referred to the CIA); Scott Shane, *A Closed-Mouth Policy Even on Open Secrets*, N.Y. Times, Oct. 5, 2011, at A18 (characterizing President Obama’s comments on Al-Awlaki’s killing as “the latest reflection of a growing phenomenon: information that is public but classified”).

## 2. Official Acknowledgments by the CIA Director

While Director of the CIA,<sup>24</sup> Leon Panetta also confirmed the existence of the CIA's drone-based targeted killing program. During an appearance before the Pacific Council on International Policy in May 2009, Panetta was asked about "the President's strategy in Pakistan in the tribal regions, which is the drone—the remote drone strikes."<sup>25</sup> He responded 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." *Id.*; Pl.Br. 16-17. Despite stating that he could not "go into particulars," Panetta acknowledged the existence and details of drone strikes in Pakistan. *Id.*

Panetta was even more explicit in an interview with the Washington Post, stating that drone strikes in Pakistan were "the most aggressive operation that CIA

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<sup>24</sup> Panetta also acknowledged the program since his departure from the CIA. In October 2011, the now-Secretary of Defense jokingly referred to his previous experience with drones as CIA director. Julian E. Barnes, *Panetta Makes Cracks About Not-So-Secret CIA Drone Program*, Wall St. J., Oct. 7, 2011, <http://blogs.wsj.com/washwire/2011/10/07/panetta-makes-cracks-about-not-so-secret-cia-drone-program/> ("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 in the CIA, although the Predators weren't bad.").

<sup>25</sup> 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>.



has been involved in in our history.”<sup>26</sup> He also emphasized that “[t]hose operations are seriously disrupting al-Qaida” and that “we really do have them on the run.”<sup>27</sup>

Panetta also admitted CIA drone strikes against specific people during his tenure with the agency. When asked about the killing of Hussein al-Yemeni by drone strike, he stated that “[a]nytime *we* get a high value target that is in the top leadership of al-Qaeda, it seriously disrupts their operations.” (emphasis added).<sup>28</sup> Similarly, he confirmed that the CIA killed the number three leader of al-Qaeda by drone strike, in remarks to ABC News in June 2010:

[W]e 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.<sup>29</sup>

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<sup>26</sup> Peter Finn & Joby Warrick, *CIA Director Says Secret Attacks in Pakistan Have Hobbled al-Qaeda*, Wash. Post, Mar. 18, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/17/AR2010031702558.html?hpid=topnews>.

<sup>27</sup> *Id.*

<sup>28</sup> Siobhan Gorman & Jonathan Weisman, *Drone Kills Suspect in CIA Suicide Bombing*, Wall St. J., Mar. 18, 2010, <http://online.wsj.com/article/SB30001424052748704059004575128123449551524.html>.

<sup>29</sup> Interview by Jake Tapper with Leon Panetta, CIA Director, ABC News (June 27, 2010), <http://abcnews.go.com/ThisWeek/week-transcript-panetta/story?id=11025299>.

Panetta's remarks were unambiguous: he clearly acknowledged CIA participation in drone-based targeted killing.

These public statements by President Obama and Panetta confirm the existence of the CIA targeted killing program. Therefore, although nominally secret, the program has been officially acknowledged. *Wolf v. CIA*, 473 F.3d at 378.

**D. Government Officials Have Unofficially Confirmed Numerous Aspects of the CIA's Targeted Killing Program.**

Unnamed government officials have repeatedly confirmed that the CIA conducts drone strikes. Moreover, they have revealed details on aspects of the CIA's program, including its geographic scope, the target selection process, the identity of targets, the post-strike analysis, and its stated legal basis.

**1. Geographic Scope**

Unnamed government officials have confirmed that the CIA's targeted killing program operates in at least Pakistan, Yemen, and Somalia. Dana Priest & William M. Arkin, *Top Secret America* 205 (2011).

Officials have indirectly confirmed that the program operates in Pakistan. *See e.g.* Greg Miller, *Feinstein Comment on U.S. Drones Likely to Embarrass Pakistan*, L.A. Times, Feb. 13, 2009 (“[Senator Dianne Feinstein] said Thursday

that unmanned CIA Predator aircraft operating in Pakistan are flown from an air base in that country . . . .”). In August 2011, according to several U.S. officials, U.S. Ambassador to Pakistan Cameron Munter reportedly asked former CIA Director Leon Panetta to stop an imminent drone strike in Pakistan based on diplomatic concerns, but Panetta refused. Kathy Gannon et al., *AP Exclusive: Timing of US Drone Strike Questioned*, ABC News, Aug. 2, 2011, <http://abcnews.go.com/International/wireStory?id=14213135#.T2bBc3kU58E>.

Unnamed government officials have directly confirmed the Pakistan program. Greg Miller, *CIA Backed by Military Drones in Pakistan*, Wash. Post, Oct. 3, 2010 (“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.”); Salman Masood, *U.S. Leaves Drone Base On Orders From Pakistan*, N.Y. Times, Dec. 12, 2011, at A10 (“[A] senior American counterterrorism official, speaking on condition of anonymity because the drone operations at Shamsi were classified,” stated that the CIA vacating a Pakistani air base would not end counterterrorism operations there).<sup>30</sup>

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<sup>30</sup> See also, Siobhan Gorman, *Drones Target Terror Plot*, Wall St. J., Sept. 27, 2010 (“current and former officials say” that CIA has ramped up missile strikes in

Also, unnamed government sources have confirmed CIA drone strikes in Yemen. *See, e.g.*, Gorman & Entous, *Yemen Drone Strikes* (“The Central Intelligence Agency is preparing to launch a secret program to kill al Qaeda militants in Yemen. . . U.S. officials say.”); Mark Mazzetti et al., *Two-year Manhunt Led to Killing of Awlaki in Yemen*, N.Y. Times, Oct.1, 2011, at A1 (American officials confirmed that CIA drone program is operational in Yemen); Tom Finn & Noah Browning, *An American Teenager in Yemen: Paying for the Sins of his Father?*, Time, Oct. 27, 2011, <http://www.time.com/time/world/article/0,8599,2097899,00.html> (U.S. official stated that U.S. was trying to kill al-Qaeda leader in strike that killed American teenager); *U.S. Officials Warn of Possible Retaliation after al Qaeda Cleric is Killed*, CNN, Sept. 30, 2011, [http://articles.cnn.com/2011-09-30/middleeast/world\\_africa\\_yemen-radical-cleric\\_1\\_al-qaeda-cleric-samir-khan-awlaki?](http://articles.cnn.com/2011-09-30/middleeast/world_africa_yemen-radical-cleric_1_al-qaeda-cleric-samir-khan-awlaki?hpid=hp_top-news_story_1) (officials stating CIA drone killed Al-Awlaki).

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Pakistani tribal regions); Eric Schmitt, *New C.I.A. Drone Attack Draws Rebuke From Pakistan*, N.Y. Times, Apr. 14, 2011, at A10 (unnamed U.S. official defending drone strike as “consistent with the U.S.-Pakistan agreements”); Mark Mazzetti, *C.I.A. Kills Top Qaeda Operative*, N.Y. Times, Sept. 16, 2011, at A8 (“two American officials said” that recent CIA drone strike killed top Al-Qaeda operative in Pakistan); Declan Walsh, Eric Schmitt, and Ihsanullah Tipu Mehsud, *Drones at Issue as U.S. Rebuilds Ties to Pakistan*, N.Y. Times, Mar. 18, 2012, at A1 (Pakistani-U.S. diplomatic deadlock caused by CIA drone program).

Therefore, unnamed government officials have revealed aspects of the program's geographic scope.

## 2. Target Selection

Unnamed government officials have disclosed aspects of the CIA's process for target selection in Pakistan. *See, e.g.,* Greg Miller, *U.S. Citizen in CIA's Cross Hairs*, L.A. Times, Jan. 31, 2010, at A1 ("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").

According to unnamed government sources, the government has many "kill lists" of counterterrorism targets. Priest & Arkin, at 204. The CIA maintains one such list. Ken Dilanian, *CIA has Suspended Drone Attacks in Pakistan, U.S. Officials Say*, L.A. Times, Dec. 23, 2011; *see also*, Miller, *CIA's Cross Hairs*; Priest & Arkin, at 204; Adam Entous et al., *U.S. Tightens Drone Rules*, Wall St. J., Nov. 4, 2011, <http://online.wsj.com/article/SB10001424052970204621904577013982672973836.html> ("The CIA has had freedom to decide who to target and when to strike.").

According to government officials, the CIA "kill list" is based on a dossier on each target prepared by CIA and other agencies' analysts. Priest & Arkin, at

205–207. The CIA’s general counsel and lawyers from other agencies review the dossiers and decide whether to place someone on the list. *Id.* at 208. The targets must pose a direct threat to the United States. *Id.*

According to government officials, the CIA conducts two types of drone strikes, “personality” and “signature” strikes. Ken Dilanian, *U.S. Put New Restrictions on CIA Drone Strikes in Pakistan*, L.A. Times, Nov. 7, 2011; Entous et al., *Drone Rules*. “Personality strikes” target specific individuals on the “kill list.” Dilanian, *New Restrictions*; Entous et al., *Drone Rules*. “Signature strikes” target unknown groups of suspects based on behavior observed through surveillance. Dilanian, *New Restrictions*; Entous et al., *Drone Rules* (“Signature strikes target groups of men believed to be militants associated with terrorist groups, but whose identities aren't always known.... Twice as many wanted terrorists have been killed in signature strikes than in personality strikes, a U.S. counterterrorism official said.”).

Government officials have disclosed the procedures and technologies used to select targets and conduct strikes. Scott Shane, *C.I.A. Is Disputed on Civilian Toll in Drone Strikes*, N.Y. Times, Aug. 12, 2011, at A1 (“The officials say C.I.A. drone operators view their targets for hours or days beforehand, analyzing what they call a “pattern of life” and distinguishing militants from others.”); Entous et

al., *Drone Rules* (drones provide “constant surveillance over tribal areas of Pakistan,” according to unnamed government officials); David Ignatius, *What the Partisan Squabbles Miss on Obama's Terror Response*, Wash. Post, Feb. 17, 2010 (“On a typical day, there are roughly a half-dozen Predators in the air over the tribal areas of western Pakistan, looking for targets, sources say.”). Software is used to model the strike. Shane, *Civilian Toll*. A strike is watched as it is being conducted. *Id.* The identities of those killed are later confirmed by further intelligence, including “observing funerals” and “eavesdropping on conversations about the strikes.” Dilanian, *New Restrictions*.

Government officials have said that the CIA gives the final go-ahead for a strike, though the U.S. Ambassador is informed in advance, and members of Congress are informed afterward. Priest & Arkin, at 207; Entous et al., *Drone Rules* (noting participation, without veto power, by State Department officials); *Timing of U.S. Drone Strike Questioned By Munter*, Dawn, Aug. 2, 2011, <http://www.dawn.com/2011/08/02/timing-of-us-drone-strike-questioned-by-munter.html> (noting participation by U.S. Ambassador to Pakistan); Priest & Arkin, at 205 (unnamed government sources stated that “[i]n Somalia, where there was no effective government, once the White House approved the overall mission, all that was needed were multiple CIA or JSOC confirmations of the target’s

location—so the wrong person wouldn't be killed. . . . In Pakistan, however, in August 2010, after a number of civilians had died in drone attacks and the public there began to grow more vocal in its opposition to them, CIA director Leon Panetta announced that he would personally approve every drone strike.”).

Thus, unnamed government officials have revealed some target selection procedures in the CIA's program.

### **3. Identity of Targets**

Unnamed government officials have touted the effectiveness of CIA drone strikes. Pam Benson & Elise Labott, *US Disputes Report Alleging High Civilian Death Toll from Drone Strikes*, CNN Security Clearance Blog (Aug. 12, 2011), <http://security.blogs.cnn.com/2011/08/12/us-disputes-report-alleging-high-death-toll-from-drone-strikes/> (“ . . . privately, officials have said the covert strikes are legal and an effective tactic in the fights against extremists”); Shane, *Civilian Toll* (““Nobody is arguing that [the drone] is perfect, but it remains the most precise system we've ever had in our arsenal,” the official said.”).

Officials have estimated the numbers of militants killed. Ignatius, *Partisan Squabbles* (unnamed U.S. officials estimate “several hundred” named militants from al-Qaeda and its allies killed since 2009); Benson & Labott, *U.S. Disputes Report* (senior U.S. official estimating that “2,000 militants and 50 civilians have



been killed in strikes since 2001,” and no confirmed “noncombatant casualties” since May 2010); Shane, *Civilian Toll* (“American officials, who will speak about the classified drone program only on the condition of anonymity, say it has killed more than 2,000 militants and about 50 noncombatants since 2001. . .”); Dilanian, *New Restrictions*; Priest & Arkin, at 209 (agency sources estimate 220 strikes inside Pakistan from July 2008 to June 1, 2011, killing 1,400 suspected militants and 30 civilians); Entous et al., *Drone Rules* (similar estimate by unnamed government officials).

Officials have confirmed that targets include “high-value targets” and “lower-level militants.” Dilanian, *New Restrictions*; Entous et al., *Drone Rules* (“For the first years, U.S. officials used drones only to target known, top terror suspects. . . . Initially, the CIA was skeptical of the value of expending resources on lower-level operatives through signature strikes, a former senior intelligence official said. Military officials, however, favored the idea. The debate eventually would lead to the CIA and the military reversing their initial positions.”); Greg Miller, *Increased U.S. drone strikes in Pakistan killing few high-value militants*, Wash. Post, Feb. 20, 2011 (noting program’s evolving focus on lower-level fighters).

Unnamed government officials have claimed confidence in the identities of those killed. Dilanian, *New Restrictions*. The government rarely acknowledges the identities of those killed by CIA drone strikes, making it difficult “for anyone without access to U.S. intelligence to assess whether the deaths were justified.” See e.g. Karen DeYoung, *Secrecy Defines Obama’s Drone War*, Wash. Post, Dec. 19, 2011 (government named only one of sixty dead in fourteen reported CIA drone strikes in Pakistan in four-month period). On occasion, however, it does so. *Id.*; Karen DeYoung, *U.S. Steps up Drone Strikes in Pakistan Against Haqqani Network*, Wash. Post, Oct. 13, 2011; Ismail Khan & Declan Walsh, *Drone Kills Pakistani Militant, Official Says*, N.Y. Times, Feb. 10, 2012, at A11; Scott Shane, *Drone Strike Kills Qaeda Operative in Pakistan, U.S. Says*, N.Y. Times, Jan. 20, 2012, at A11; Mazzetti, *Top Qaeda Operative*; Ignatius, *Partisan Squabbles*.

President Obama noted the killing of U.S. citizen Anwar Al-Awlaki. Mazzetti et al., *Two-year Manhunt*. Unnamed officials confirmed that a CIA drone strike killed Al-Awlaki and Samir Khan, another U.S. citizen. Jennifer Griffin & Justin Fishel, *Two U.S.-Born Terrorists Killed in CIA-Led Drone Strike*, Fox News, Sept. 30, 2011, <http://www.foxnews.com/politics/2011/09/30/us-born-terror-boss-anwar-al-awlaki-killed/#ixzz1oH5tdxda> (“senior U.S. official” stated that JSOC carried out Al-Awlaki operation “under the direction of the CIA.”).

Therefore, unnamed government officials have revealed select target-related information.

#### 4. Post-strike Analysis

Unnamed government officials have stated that the CIA collects information after a strike using drone surveillance and other intelligence-gathering capabilities. Dilanian, *New Restrictions*; Shane, *Civilian Toll*; Adam Entous, *Drones Kill Low-Level Militants, Few Civilians: U.S.*, Reuters, May 3, 2010 (“A U.S. counterterrorism official, who spoke on condition of anonymity, said the [civilian casualty] estimate was compiled using available intelligence as well as visual images -- presumably from the unmanned aerial drones which can circle overhead for hours after they strike to assess the damage.”).

Moreover, U.S. officials have commented on civilian casualties.<sup>31</sup> *See, e.g.*, Shane, *Civilian Toll* (unnamed officials estimate more than 2,000 militants and

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<sup>31</sup> *See also*, Scott Shane, *U.S. Drone Strikes Are Said To Target Rescuers at Sites*, N.Y. Times, Feb. 6, 2012, at A4 (U.S. official disputing independent report on civilian casualties of CIA drone strikes); Ken Dilanian, *CIA Drones May Be Avoiding Pakistani Civilians*, L.A. Times, Feb. 22, 2011, <http://articles.latimes.com/2011/feb/22/world/la-fg-drone-strikes-20110222> (unnamed U.S. officials noting “occasions when the CIA decided not to fire at a target in the midst of civilians.”); Scott Shane, *Contrasting Reports of Drone Strikes*, N.Y. Times, Aug. 11, 2011, p. A11 (unnamed officials providing details of four strikes to defend CIA program).

about 50 noncombatants killed since 2001); Dilanian, *Suspended Drone* (unnamed officials acknowledged “a few civilian deaths this year”).

Therefore, unnamed government officials have revealed some of the agency’s post-strike data analysis.

## 5. Legal Support

Government officials have explained the general legal bases for the CIA’s targeted killing program, while keeping details secret. Unnamed government officials confirm the existence of a secret Department of Justice memorandum addressing the legality of killing U.S. citizen Anwar Al-Awlaqi. Peter Finn, *Secret U.S. Memo Sanctioned Killing of Aulaqi*, Wash. Post, Sept. 30, 2011. Those officials detailed the memo’s legal arguments, which included analysis of Bill of Rights protections, the federal crime of murder, and the laws of war. Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. Times, Oct. 8, 2011, <http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html?pagewanted=all>. Still the government refuses to publicly release the memo.<sup>32</sup>

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<sup>32</sup> See also, Charlie Savage, *A Not-Quite Confirmation of a Memo Approving Killing*, N.Y. Times, Mar. 9, 2012, at A16 (Senator Patrick Leahy’s request for same DOJ memorandum).

Nevertheless, government officials have publicly defended the legality of the government's targeted killing programs. In a recent speech, Attorney General Eric Holder asserted:

. . . an operation using lethal force in a foreign country, targeted against a U.S. citizen who is a senior operational leader of al Qaeda or associated forces, and who is actively engaged in planning to kill Americans, would be lawful at least in the following circumstances: First, the U.S. government has determined, after a thorough and careful review, that the individual poses an imminent threat of violent attack against the United States; second, capture is not feasible; and third, the operation would be conducted in a manner consistent with applicable law of war principles.

Attorney General Eric Holder Speaks at Northwestern University School of Law (Mar. 5, 2012), <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.<sup>33</sup>

Such public explanations, taken together with other information revealed by unnamed government officials, further confirm the existence of the CIA's program.<sup>34</sup>

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<sup>33</sup> See also, Speech by Harold Koh, Legal Adviser for U.S. Department of State, at Annual Meeting of the American Society of International Law (Mar. 25, 2010), <http://www.state.gov/s/l/releases/remarks/139119.htm> (distinguishing targeted killing from assassinations); Remarks of John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, at Harvard Law School (Sept. 16, 2011), <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an> (defending use of targeted killing outside "hot battlefields").

<sup>34</sup> See also, *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1200 (9th Cir.

Despite the information on the CIA program already in the public domain, emanating from unnamed high-level officials releasing presumably classified information, the public needs fuller official disclosure by the CIA.<sup>35</sup> Such disclosure is needed both to ensure that the information is complete and not one-sided, and because anonymous statements to media outlets do not satisfy the need for government transparency and accountability.

**III. GIVEN WIDESPREAD ACKNOWLEDGMENT OF THE CIA'S PROGRAM, THE COURT SHOULD REJECT THE CIA'S ARGUMENT THAT NATIONAL SECURITY WILL BE HARMED IF THE CIA IS REQUIRED TO PROCESS THE FOIA REQUEST.**

When what was once a secret becomes public, an agency's remaining rationale for a Glomar response is that unique harms flow from the agency itself

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2007) (refusing to dismiss challenge to NSA warrantless wiretapping program on state secrets grounds because government officials had acknowledged the program, and DOJ had publicly explained its legal basis, suggesting that “the government both knew that details of the surveillance program were in the public sphere and recognized that the program was already the subject of significant public discussion and interest.”).

<sup>35</sup> So much important information remains unknown about the CIA program. Alston, *Targeted Killings*; Murphy & Radsan, *Due Process*. By contrast, military battlefield-drone operations are more transparent. See e.g., Dept. of the Army, *Army Unmanned Aircraft System Operations: Field manual 3-04.155* (2006), <http://www.fas.org/irp/doddir/army/fmi3-04-155.pdf> (detailing drone resources); David Zucchino, *Remote Drone Crews Feel Combat Strain*, L.A. Times, Mar. 18, 2012, at A1 (combat stress survey data of military drone operators, noting no such data of CIA drone operators).

confirming or disproving its role in a particular activity. *Phillippi*, 546 F.2d at 1014 n.11. The CIA claims that acknowledging responsive records relating to its targeted killing program would reveal its “intelligence activities, sources and methods,” and impact on “foreign relations or foreign activities of the United States, including confidential sources.” *ACLU v. DOJ*, 808 F.Supp.2d at 298-99. As shown above, however, government officials have already disclosed numerous aspects of the CIA’s program. It defies logic to suggest that acknowledging the mere existence of responsive records would further reveal intelligence activities, sources and methods, or information on foreign relations and activities. After all, the publicly available information shows that the CIA has responsive records. An official statement to that effect cannot by itself possibly pose more harm to national security than the information already disclosed.<sup>36</sup>

The agency’s insistence on keeping this publicly known program secret is especially disturbing because officials tout the program’s purported effectiveness. Arthur S. Brisbane, Op-Ed., *The Secrets of Government Killing*, N.Y. Times, Oct. 9, 2011, at SR12 (“After the drone strike. . . unnamed government officials poured

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<sup>36</sup> Moreover, even if the CIA acknowledges responsive records, it may redact or withhold under applicable FOIA exemptions. 5 U.S.C. §552(b)(1-9).

forth with comments. There was no mistaking the administration's eagerness to put its antiterrorism success on display."').<sup>37</sup>

The public lacks full information to test the government's claims. For example, the claim that drone strikes have not killed any noncombatants in Pakistan since May 2010 has been challenged by reliable media investigations and by Pakistani officials.<sup>38</sup> With greater transparency, the public can use CIA information to more intelligently debate this program and advocate for reforms if needed. So long as the CIA unilaterally controls information on its targeted killing program, the public cannot meaningfully evaluate the program's wisdom, legality, or effectiveness.

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<sup>37</sup> See also, Eric Schmitt, *Pakistan Drone Strikes Resume*, N.Y. Times, Jan. 11, 2012, at A10, ("Officials in Washington confirmed the strike but, as is customary with missile attacks from drones operated by the Central Intelligence Agency, they would not provide any details"); Mazzetti, *Top Qaeda Operative* ("[U.S. officials] spoke on condition of anonymity because, despite the fact that C.I.A. drone strikes are widely discussed and reported publicly, the spy agency's drone program remains classified").

<sup>38</sup> See, e.g., Chris Woods, *U.S. Claims of 'No Civil Deaths' are Untrue*, BIJ (July 18, 2011), <http://www.thebureauinvestigates.com/2011/07/18/washingtons-untrue-claims-no-civilian-deaths-in-pakistan-drone-strikes/> (refuting claim of no civilian casualties); Chris Woods & Christina Lamb, *Obama Terror Drones: CIA Tactics in Pakistan Include Targeting Rescuers and Funerals*, BIJ (Feb. 4, 2012), <http://www.thebureauinvestigates.com/2012/02/04/obama-terror-drones-cia-tactics-in-pakistan-include-targeting-rescuers-and-funerals/> (noting CIA tactic of targeting rescuers); Shane, *Target Rescuers* (same).



## CONCLUSION

For the reasons stated above, the CIA's Glomar response is unjustified. Accordingly, the Court should require the CIA to process the FOIA request.

Date: March 22, 2012

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

Certificate of Compliance with Type-Volume Limitation, Typeface  
Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,983 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2011 in Times New Roman font, 14pt.

Date: March 22, 2012

/s/ Ranjana Natarajan  
Ranjana Natarajan

*Counsel for Amici Curiae*

**CERTIFICATE OF SERVICE**

I, Ranjana Natarajan, certify that today, March 22, 2012, a copy of the BRIEF OF *AMICI CURIAE* THE BUREAU OF INVESTIGATIVE JOURNALISM, CAMPAIGN FOR INNOCENT VICTIMS IN CONFLICT, CENTER FOR CONSTITUTIONAL RIGHTS, CENTER ON NATIONAL SECURITY AT FORDHAM LAW, THE CONSTITUTION PROJECT, FIRST AMENDMENT COALITION, HUMAN RIGHTS WATCH, INTERNATIONAL COMMISSION OF JURISTS, AND NATIONAL SECURITY ARCHIVE IN SUPPORT OF PLAINTIFFS-APPELLANTS SEEKING REVERSAL was filed with the Clerk of the Court by using the Electronic Case Filing (CM/ECF) system, which will send a notice of the electronic filing to all counsel of record.

/s/ Ranjana Natarajan  
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## **APPENDIX**

### **A. *AMICI* STATEMENTS OF INTEREST**

#### **The Bureau of Investigative Journalism**

The Bureau of Investigative Journalism is dedicated to the highest standards of investigative journalism. In its two year existence it has garnered numerous awards and plaudits for its forensic investigations in partnership with major media groups. Uniquely, the Bureau has a dedicated investigations team examining aspects of the covert U.S. war on terror, most notably the use of drones by the CIA and the Pentagon's JSOC.

The Bureau believes that the CIA's position that its Pakistan campaign in Pakistan is 'secret' is untenable, in the face of repeated selective briefings by U.S. officials, including by the President himself. Moreover, the Bureau understands from its own investigations that U.S. officials have demonstrably abused claims of secrecy to promote a distorted perspective of the covert drones campaign, which significantly affect the general public's understanding. There are also clear indications that specific tactics have emerged in recent years which exploit an absence of accountability, in possible contravention of U.S. domestic and international law.

## **Campaign for Innocent Victims in Conflict (CIVIC)**

Campaign for Innocent Victims in Conflict (CIVIC) works to make warring parties more responsible to civilians before, during, and after armed conflict. We believe that warring parties should do everything in their power to avoid harming civilians in the course of their combat operations, and when harm is caused, provide recognition and assistance to civilian victims – formally called making amends -- despite having no formal obligation to do so when such harm is caused within permissible legal bounds.

CIVIC's concerns within the unmanned aerial vehicle debate are specific to U.S. Department of Defense (DOD) operations and, separately, operations by the U.S. Central Intelligence Agency (CIA). While both involve larger questions of accountability for civilian harm around a continuum of U.S. government decision-making, our chief concerns with regard to CIA operations include: 1) the lack of transparency regarding who is considered a civilian; 2) the lack of transparency regarding the training of drone operators, ability to conduct civilian harm assessments post-strike, and potential for recognizing and assisting civilians considered by the U.S. Government to be collateral to operations; 3) that the United States is setting a negative precedent for a relatively new weapon and accountability for civilian harm.

From 2009-2010, CIVIC conducted research in Pakistan with the dual goals of documenting civilian harm caused by drone strikes and assessing the impact on the civilian population. CIVIC's research noted that civilians negatively effected by U.S. drone operations in the northwest are often not believed to be "innocent" even by their neighbors, given the lore of drone precision, and seldom receive recognition or assistance for the harms they have suffered. CIVIC's recommendations to the Pakistani Government, the U.S. Government, the United Nations, stakeholders, and donor nations, based on its research, can be found here: <http://civicworldwide.org/healing-the-wounds/pakistan/2010-report-northwest-pakistan>.

CIVIC is continuing its advocacy on behalf of Pakistani civilians adversely impacted by drone strikes, by requesting the CIA and U.S. Government to come forward with relevant information about its targeting and operational practices with regard to civilian harm mitigation.

### **The Center for Constitutional Rights**

The Center for Constitutional Rights (“CCR”) is a national non-profit legal and educational organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966, CCR has a long history of undertaking litigation

and advocacy to expose and challenge government abuses of power.

CCR has a specific interest in information about the U.S targeted killing program. CCR was co-counsel with the American Civil Liberties Union in *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010), which challenged the government's authorization for the targeted killing of U.S. citizen Anwar Al-Awlaki in Yemen by the CIA and JSOC forces.

CCR has been at the center of efforts to challenge the secrecy and abuses of other government policies and practices in the context of the "war on terror." CCR's work in this area has included representation of individuals detained and tortured at Guantánamo and other U.S. military and CIA prisons, and subjected to the U.S. program of "extraordinary rendition." CCR also filed a Freedom of Information Act lawsuit seeking information from the CIA and other government agencies about the secret detention and extraordinary rendition of individuals suspected of terrorism. *See Amnesty Int'l USA, et. al., v. CIA, et. al.*, 2010 U.S. Dist. LEXIS 137165 (S.D.N.Y. Dec. 21, 2010).

### **Center on National Security at Fordham Law School**

Fordham Law School founded the Center on National Security (CNS) in September 2011. Karen J. Greenberg, a noted expert on national security, terrorism, and civil liberties is the Center's first Director and a Fordham Law

Fellow. CNS is a home for understanding the intersection of national security and rights issues in a post September 11<sup>th</sup> world. Its mission is to educate policy makers, the media and the public about national security issues, past and present: What does the domestic terror threat look like and how is it evolving? What policies have made sense as a reaction to the terror threat – and what precedents have been set? What are the constitutional and legal limits on the power of the Executive Branch to curtail individual freedoms in the name of national security? What are the national security threats of the new century?

The Center brings together a broad array of practitioners, policymakers, and academics to engage in research, policy work, and public programming on cutting-edge issues related to national and global security.

The Center distributes the popular "Morning Brief," and "Cyber Brief," e-newsletters providing a comprehensive round up of the salient news and opinion on the national and global security and cyber issues of the day.

### **The Constitution Project**

The Constitution Project (TCP) is a constitutional watchdog that brings together legal and policy experts from across the political spectrum to promote and defend constitutional safeguards. TCP's bipartisan Liberty and Security Committee, founded in the aftermath of September 11<sup>th</sup>, addresses the importance



of preserving civil liberties as we work to protect our Nation from international terrorism. The committee develops policy recommendations on such issues as U.S. detention and surveillance policies and government secrecy. In particular, TCP has advocated for reforms to address the problem of over-classification; for limits to restore the role of the courts in assessing application of the state secrets privilege; and for an application of FOIA that preserves First Amendment values and promotes transparency and accountability. As TCP's Liberty and Security Committee cautioned in its 2009 report on *Reining in Excessive Secrecy*: "The fundamental principles of openness, public debate, and accountability, central to our democracy, are most vulnerable when our nation's security is threatened. It is difficult during times of threats to our nation's security for our leaders to find the ideal balance between accountability and security; however, recent history reveals we have repeatedly failed to find the true balance. We have too often favored secrecy and lack of transparency at the expense of openness and accountability. This pattern persists today, as excessive secrecy and over-classification remove vast amounts of information from public scrutiny, shielding misconduct and impeding oversight."

### **First Amendment Coalition**

The First Amendment Coalition is a California non-profit organization dedicated to freedom of speech and government transparency. FAC provides legal information and consultations to journalists, academics, bloggers and ordinary citizens regarding access rights under the FOIA and California's various open-government laws. FAC files amicus briefs in important appeals, both in state and federal courts, including the U.S. Supreme Court. FAC also files test-case lawsuits to challenge restrictions on free speech, to defend rights under existing access laws and to help create new access rights. FAC's members include big and small newspapers throughout California, digital news media such as Wired.com, and nearly 150 AOL/Patch Media websites, as well hundreds of individual citizens committed to open-government. A section 501C(3) exempt organization, FAC is nonpartisan and non-ideological. FAC's offices are in San Rafael, CA.

### **Human Rights Watch**

Human Rights Watch, a non-profit organization, is the largest U.S.-based international human rights organization, and was established in 1978 to investigate and report on violations of fundamental human rights in some 90 countries worldwide. By exposing and calling attention to human rights abuses committed by state and non-state actors, Human Rights Watch seeks to bring international

public opinion to bear upon offending governments and others in order to end abusive practices.

### **International Commission of Jurists**

International Commission of Jurists (ICJ) is an international non-governmental organization dedicated to the promotion and observance of the rule of law and human rights. The ICJ was created in 1952 and is integrated by 60 eminent jurists representing different legal systems. It has its headquarters in Geneva, Switzerland, has three regional offices, and approximately 90 national sections and affiliated organizations throughout the globe. It enjoys consultative status before the United Nations Economic and Social Council, the Council of Europe and the Organizations of African Union. It maintains cooperation ties with the Organization of American States. The ICJ regularly addresses the United Nations Human Rights Council and other U.N. bodies to provide authoritative statements of international human rights law. It also provides legal expertise in international law in the context of national and international litigation.

### **National Security Archive**

The National Security Archive (the Archive) is an independent non-profit 501(c)3 public interest research institute, library and publisher based at George Washington University ([www.nsarchive.org](http://www.nsarchive.org)). A frequent user and advocate of the

Freedom of Information Act, the Archive collects, indexes and publishes declassified and unclassified government documentation on national security and foreign affairs policy, practices and activities. The Archive's work has won multiple journalism and history awards, including the Emmy, the George Polk, the Peabody, the Lionel Gelber, and the Pulitzer.

**B. TRANSCRIPT OF SELECT RELEVANT PORTION OF PRESIDENT OBAMA'S GOOGLE+ INTERVIEW (JAN. 30, 2012)<sup>39</sup>**

26:31 **Evan:** Mr. President, since you took office,  
26:32 you've ordered more drone attacks in your first year than  
26:34 your predecessor did in his entire term.  
26:37 These drone attacks cause a lot of civilian casualties.  
26:39 I'm curious to know how you feel they help the nation and whether  
26:42 you think they're worth it.  
26:46 **Obama:** Steve, I can't hear you right now.  
26:48 **Steve Grove:** Oh, I'm sorry.  
26:49 **Obama:** There you go.  
26:51 **Steve Grove:** I wanted to explain the reference to the New York  
Times,  
26:52 just because the story today focused on the use of drones in  
26:55 Iraq, actually.  
26:56 **Obama:** Well, that story I think was a little overwritten.

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<sup>39</sup> Google+, *Your Interview with the President-2012*, YouTube (Jan. 30, 2012), <http://youtu.be/eeTj5qMGTAI?t=26m30s>. Interview transcribed by Gwen Vindell, law student, University of Texas School of Law (prepared solely for this brief).

27:01 The truth of the matter is we're not engaging in a bunch of drone  
27:04 attacks inside of Iraq.

27:05 There's some surveillance to make sure that our embassy  
27:09 compound is protected.

27:11 As a general proposition, the question that was posed,

27:17 I want to make sure that people understand actually drones have  
27:20 not caused a huge number of civilian casualties.

27:22 For the most part, they have been very precise precision  
27:27 strikes against al Qaeda and their affiliates.

27:31 And we are very careful in terms of how it's been applied.

27:34 So I think that there's this perception somehow that we're  
27:38 just sending in a whole bunch of strikes willy-nilly.

27:41 This is a targeted, focused effort at people who are on a

27:47 list of active terrorists who are trying to go in and harm

27:54 Americans, hit American facilities, American bases,

27:58 and so on.

28:00 It is important for everybody to understand that this thing is

28:03 kept on a very tight leash.

28:05 It's not a bunch of folks in a room somewhere just

28:09 making decisions.

28:10 And it also part and parcel of our overall authority when it

28:16 comes to battling al Qaeda.

28:18 It is not something that's being used beyond that.

28:21 **Steve Grove:** Got it.

28:22 **Paras Patel:** Mr. President, do you think that possibly these drone strikes,

28:25 do they send the message that the U.S. is interfering in other

28:29 countries' affairs?

28:30 Because I feel like regardless of how much we do,

28:32 people in other countries might perceive that we're interfering,

28:35 and that might not be good for us.

28:36 Is there a way that we're combating that?

28:38 **Obama:** Well, I think that we have to be judicious in how we use drones.

28:44 But understand that probably our ability to respect the

28:51 sovereignty of other countries and to limit our incursions into

28:57 somebody else's territory is enhanced by the fact that we are

29:01 able to pinpoint-strike an al Qaeda operative in a place where

29:06 the capacities of that military in that country may not be able  
29:10 to get them.

29:11 So obviously a lot of these strikes have been in the FATA  
29:14 and going after al Qaeda suspects who are up in very  
29:20 tough terrain along the border between Afghanistan  
29:22 and Pakistan.

29:23 For us to be able to get them in another way would involve  
29:29 probably a lot more intrusive military actions than the one  
29:33 that we're already engaging in.

29:35 That doesn't mean that we shouldn't be careful about how  
29:38 we proceed on this.

29:39 And obviously I'm looking forward to a time where al Qaeda  
29:47 is no longer an operative network and we can refocus a lot  
29:53 of our assets and attention on other issues.

29:57 But this is something that we're still having to deal with.

30:00 There are still active plots that are directed against the  
30:04 United States.

30:05 And I think that we are on the offense now.

30:08 al Qaeda has been really weakened.



30:10 But we've still got a little more work to do,  
30:12 and we've got to make sure that we're using all our capacities  
30:16 in order to deal with it.