[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.)

REPLY 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

June 4, 2012

Counsel for Plaintiffs–Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY

CIA	Central Intelligence Agency
DOD	Department of Defense
FOIA	Freedom of Information Act

STATUTES AND REGULATIONS

All applicable statutes, etc., are contained in the Brief for Plaintiffs-Appellants.

INTRODUCTION

In response to Plaintiffs' January 2010 request under the Freedom of Information Act, the CIA asserted that its use (or non-use) of drones to carry out targeted killings was a "classified fact." The assertion was far-fetched then, but it is fantastical now.[1] As Plaintiffs have explained, senior government officials have repeatedly acknowledged the CIA's use of drones to carry out targeted killings. Brief for Plaintiffs-Appellants ("Pl. Br.") 13–29 (discussing specific and documented instances of official acknowledgement). The CIA contends that each of the statements cited by Plaintiffs can be read as something other than an acknowledgement, Gov't Br. 27–38, but the statements cited by Plaintiffs are not ambiguous. The only reasonable construction of them, and certainly the only reasonable construction of them when they are examined collectively, is the one that Plaintiffs have furnished. Accordingly, the Court should reject the CIA's reliance on the Glomar doctrine and vacate the judgment below.

[1] The CIA asks whether Plaintiffs have narrowed their FOIA request to seek only those records relating to "'the CIA's use' of lethal drones." Brief of Appellee ("Gov't Br.") 24. Plaintiffs continue to seek all records responsive to their January 2010 FOIA request, JA 93–96, with the exception of records responsive to paragraphs 1.B and 2. *See* Plaintiffs' Opposition to Defendant CIA's Motion for Summary Judgment and Cross-Motion for Partial Summary Judgment at 3, *Am. Civil Liberties Union v. Dep't of Justice*, 808 F. Supp. 2d 280 (D.D.C. 2011), ECF No. 20 ("Plaintiffs hereby abandon requests numbered 1.B. and 2 with respect to the CIA.").

To rule in Plaintiffs' favor, the Court need not address the legal significance of the veritable cascade of statements about the CIA's drone program that have been attributed to "officials," "current CIA officials, "former intelligence officials," and "senior administration officials." Pl. Br. 30–37 & nn.17–22. Plaintiffs know of no other case, however, in which an agency has invoked the Glomar doctrine with respect to a program that government officials have discussed so extensively, apparently with official approval, in the media. *Cf.* Jack Goldsmith, *Drone Stories, the Secrecy System, and Public Accountability*, Lawfare, May 31, 2012, http://bit.ly/KgpqUF ("[N]one of the previous Glomar cases involved such extensive and concerted and long-term government leaking and winking."). Last week, the *New York Times* published perhaps the most detailed account yet of the CIA's drone program, one that relied on interviews with "three dozen of [President Obama's] current and former advisors." Jo Becker & Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, N.Y. Times, May 29, 2012, http://nyti.ms/LzQ8mG. On the basis of these three dozen interviews, the article discusses the munitions used by the CIA's armed drones, the agency's efforts to avoid civilian casualties from drone strikes, the agency's method for calculating the number of civilians killed in any given strike, and the agency's process for selecting targets in Pakistan. The article also provides many details about the CIA's use of drones to kill Baitullah Mehsud, the leader of the

Pakistani Taliban.[2] Plaintiffs do not take issue with the general proposition that properly classified information cannot be declassified by unauthorized or

[2] The May 29, 2012 *New York Times* article is not by any means the only recent news story to cite government officials' assertions about the CIA's drone program. *See, e.g.*, Greg Miller, *U.S. Drone Targets in Yemen Raise Questions*, Wash. Post, June 2, 2012, http://wapo.st/KmkVsl ("The airstrikes in Yemen this year have been split fairly evenly between operations carried out by CIA Predators and those conducted by JSOC using Reapers and other drones as well as conventional aircraft, U.S. officials said."); Kimberly Dozier, *Who Will Drones Target? Who in the US Will Decide?*, Assoc. Press, May 21, 2012, http://bit.ly/MB8mJ7 ("The CIA's process is more insular [than the Pentagon's]. Only a select number of high-ranking staff can preside over the debates run by the agency's Covert Action Review Group, which then passes the list to the CIA's Counterterrorism Center to carry out the drone strikes. The Director of National Intelligence, Jim Clapper, is briefed on those actions, one official said."); *CIA Drone Strike Kills Al Qaeda Leader Wanted in USS Cole Bombing, US Officials Say*, Assoc. Press, May 6, 2012, http://fxn.ws/J7s0bO ("The drone strike that killed Quso was carried out by the CIA, after an extended surveillance operation by the CIA and U.S. military, two U.S. officials said."); Eric Schmitt, *U.S. to Step Up Drone Strikes Inside Yemen*, N.Y. Times, Apr. 25, 2012, http://nyti.ms/IalWSv ("The White House has given the Central Intelligence Agency and the Pentagon broader authority to carry out drone strikes in Yemen against terrorists who imperil the United States, reflecting rising concerns about the country as a safe haven for Al Qaeda, a senior administration official said Wednesday night."); Greg Miller, *White House Approves Broader Yemen Drone Campaign*, Wash. Post, Apr. 25, 2012, http://wapo.st/I2FpAU ("The United States has begun launching drone strikes against suspected al-Qaeda operatives in Yemen under new authority approved by President Obama that allows the CIA and the military to fire even when the identity of those who could be killed is not known, U.S. officials said."); Greg Miller, *CIA Seeks New Authority to Expand Yemen Drone Campaign*, Wash. Post, Apr. 18, 2012, http://wapo.st/HIOL4B ("The CIA is seeking authority to expand its covert drone campaign in Yemen by launching strikes against terrorism suspects even when it does not know the identities of those who could be killed, U.S. officials said. . . . U.S. officials said the agency killed more senior al-Qaeda operatives [in Pakistan] with signature strikes than with those in which it had identified and located someone on its kill list."); *US Officials: Drone Strikes Will Go on in Pakistan*, Assoc. Press, Apr. 13, 2012, http://usat.ly/HRQGFM ("The

inadvertent disclosures. Gov't Br. 42. But allowing the CIA to deny the existence of the drone program while it carries on a propagandistic campaign of officially sanctioned leaks would make a mockery of the classification system. The judicially created Glomar doctrine does not require such a result, and the FOIA does not permit it.[3]

SUMMARY OF ARGUMENT

The CIA's claim that it can neither confirm nor deny the existence of its drone program is fatally undermined by the public statements of government officials, including President Obama and former CIA Director (now Defense Secretary) Leon Panetta. As Plaintiffs explained in their opening brief, these

---

White House has no intentions of ending CIA drone strikes against militant targets on Pakistani soil, U.S. officials say . . . ."); *see also* Daniel Klaidman, *Drones: How Obama Learned to Kill*, Newsweek, May 28, 2012, http://bit.ly/JSxKtv ("In the spring of 2012, the United States carried out more drone attacks in Yemen than in the previous nine years combined—dating all the way back to when the CIA conducted its first such operation.").

[3] The CIA's brief suggests, obliquely, that past disclosures about the agency's drone program have been inadvertent or unauthorized. Gov't Br. 17 (rejecting relevance of news stories quoting unnamed officials because "an official disclosure cannot be premised on . . . statements made by *unauthorized* or unofficial government sources" (emphasis added)); *id*. at 42 (dismissing "inadvertent disclosure[s]" and "unauthorized leak[s]" as irrelevant to legitimacy of agency's Glomar invocation). The suggestion that all past disclosures about the agency's drone program have been unauthorized, however, is simply not credible, and unsurprisingly the only support for it in the record is an assertion that is entirely conclusory. *See* JA 43–44 (Decl. of Mary Ellen Cole). If the Court believes it to be relevant whether the government's disclosures were officially sanctioned, Plaintiffs respectfully urge the Court to require the government to submit supplemental affidavits on that specific point.

officials have specifically acknowledged the CIA's use of drones to carry out targeted killings. The Court owes no deference to the CIA's assertion that the drone program has not been officially acknowledged; the question of official acknowledgement is a purely legal one on which the agency has no special expertise. Indeed, the Court should approach the CIA's arguments here with special skepticism, because the volume and consistency of media leaks relating to the CIA's drone program strongly suggest that the government is relying on the Glomar doctrine in this Court while government officials at the same time, under cover of anonymity, disclose selected information about the program to the media. This kind of campaign of selective disclosure is precisely what FOIA was enacted to prevent. The Court should vacate the judgment of the district court.

ARGUMENT

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

In their opening brief, Pl. Br. 16–26, Plaintiffs pointed to "specific information in the public domain that appears to duplicate that being withheld." *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007). The CIA contends that each of the statements Plaintiffs cite is susceptible to an alternative reading, but the CIA's alternative readings range from improbable to implausible. Indeed, Plaintiffs know

of no reporter, commentator, or legal scholar who has understood this collection of statements as the CIA does.[4]

[4] Journalists and commentators have understood Mr. Panetta and President Obama to have acknowledged the CIA's drone program. For example, they understood Mr. Panetta to have acknowledged the program in his May 18, 2009 speech before the Pacific Council on International Policy. *See, e.g.*, Tom Engelhardt, Op-Ed., *The Folly Of A 'Drone War'*, CBS News, Nov. 11, 2009, http://cbsn.ws/OSJue ("CIA Director Leon Panetta, whose agency runs our drone war in Pakistan, has hailed them as 'the only game in town in terms of confronting or trying to disrupt the al-Qaeda leadership.'"); Noah Shachtman, *CIA Chief: Drones 'Only Game in Town' for Stopping Al Qaeda*, Wired, May 19, 2009, http://bit.ly/M1IWWg ("Call off the drones? No chance, CIA director Leon Panetta says. Not only are the spy agency's unmanned aircraft 'very effective' in taking out suspected militants in Pakistan, he told the Pacific Council on International Policy yesterday. 'Very frankly, it's the only game in town in terms of confronting or trying to disrupt the al Qaeda leadership.'"); Judson Berger, *Rise of the Drone: Long-Distance War Hallmark of Obama's Post-9/11 Strategy*, Fox News, Sept. 11, 2011, http://fxn.ws/q3XD5N; Ken Dilanian, *Stepped-Up U.S. Operations in Pakistan Taking Serious Toll on Al Qaeda, CIA Chief Says*, L.A. Times, Oct. 19, 2010, http://lat.ms/aWu0gC; *U.S. Airstrikes in Pakistan Called 'Very Effective'*, CNN, May 18, 2009, http://bit.ly/kZsMMC.

Similar appraisals followed Mr. Panetta's March 2010 interview with *The Washington Post*, his October 2011 remarks at two U.S. military bases in Italy, and his January 2012 interview with *60 Minutes*. *See, e.g.*, Spencer Ackerman, *CIA Snitches Are Pakistan Drone-Spotters*, Wired, Sept. 23, 2010, http://bit.ly/b6DTcM ("CIA Director Leon Panetta has bragged that the drone program is 'the most aggressive operation that CIA has been involved in in our history' . . . ."); Gordon Lubold, *Pakistan Increasingly Playing Ball to Rein in Afghanistan Taliban*, Christian Sci. Monitor, Mar. 23, 2010, http://bit.ly/bHTSmJ; Martha Raddatz, *Drones Take Heavy Toll on al Qaeda Leaders and Fighters' Morale*, ABC News, Mar. 18, 2010, http://abcn.ws/LDQCrl; *Panetta: US 'Fighting A War' in Pakistan*, Agence France-Presse, Oct. 12, 2011, http://mnstr.me/otFzO2 ("During a visit to US bases in Italy last week, Panetta made two casual references to the CIA's use of armed drones."); Lolita C. Baldor, *Panetta Spills -- A Little -- On Secret CIA Drones*, Assoc. Press, Oct. 7, 2011, http://bo.st/nIJvEi; Craig Whitlock, *Panetta: Loose Lips on CIA's Not-So-Secret Secret*, Wash. Post, Oct. 7, 2011, http://wapo.st/qAj8sF ("One of the U.S. government's worst-kept secrets is the

- **Mr. Panetta's comments before the Pacific Council on International Policy (May 18, 2009).**

The CIA claims that on this occasion Mr. Panetta did not acknowledge drone strikes at all,[5] let alone acknowledge that the CIA is sometimes responsible for

---

CIA's program to hunt and kill suspected terrorists with armed drones. Everybody knows the CIA does it. . . . So ears perked up Friday when Defense Secretary Leon E. Panetta not once, but twice made cracks about the agency's fleet of unmanned Predator drones while visiting troops in Italy."); Jack Goldsmith, *John Brennan's Speech and the ACLU FOIA Cases*, Lawfare, May 1, 2012, http://bit.ly/Iox4Zw ("Leon Panetta . . . may have crossed the line [to acknowledging the CIA drone program] when he silently nodded in assent to CBS's Scott Pelley's statement that 'You killed al-Awlaki'; and then explained what appeared to be the legal basis for the al-Awlaki operation with the caveat only of not 'getting into the specifics of *the operation*' (emphasis added); and then noted that the President must make a declaration before the killing of a U.S. citizen, on the 'recommendation of the CIA Director.'").

And similar appraisals followed President Obama's January 2012 remarks in a live online forum. *See, e.g.*, Dan Lothian & Reza Sayah, *Obama's Drone Comment Was No Slip-Up, Official Says*, CNN, Jan. 31, 2012, http://bit.ly/KEIfiY; Christi Parsons, *Obama Defends 'Judicious' Use of Drone Strikes During Online Q&A*, L.A. Times, Jan. 30, 2012, http://lat.ms/KZnIXE ("President Obama offered a vigorous defense of the use of unmanned aircraft to kill Al Qaeda operatives and other militants in Pakistan's tribal areas and in the process, officially acknowledged the highly classified CIA drone program which, until now, U.S. officials have refused to discuss in public."); Mark Landler, *Civilian Deaths Due to Drones Are Not Many, Obama Says*, N.Y. Times, Jan. 30, 2012, http://nyti.ms/wAXUUn.

[5] Any suggestion that the United States has not officially acknowledged that it carries out drone strikes is untenable in light of Assistant to the President for Homeland Security and Counterterrorism John Brennan's public acknowledgment that "the United States Government conducts targeted strikes against specific al-Qaida terrorists, sometimes using remotely piloted aircraft, often referred to publicly as drones." *The Efficacy and Ethics of U.S. Counterterrorism Strategy*, Transcript of Remarks by John O. Brennan (Apr. 30, 2012), *available at*

them. Gov't Br. 28. This claim is untenable. A member of the audience asked Mr. Panetta about the "the President's strategy in Pakistan in the tribal regions, which is the drone—the remote drone strikes," and recited estimates of the numbers of people killed in the strikes. Mr. Panetta 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," and that "it's the only game in town in terms of confronting and trying to disrupt the al-Qaeda leadership." JA 114–15 (Abdo Decl. Ex. B at 9–10). There is no doubt that Mr. Panetta's answer related to the drone program because Mr. Panetta was directly responding to a question about drone strikes. In addition, Mr. Panetta proceeded to distinguish other forms of air-to-ground lethal force—"either plane attacks or attacks from F-16s and others"—from drones, in order to emphasize that he was speaking about the latter.[6] *Id.* at 115. Nor is there any doubt that Mr. Panetta was

---

http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy.

[6] That Mr. Panetta was discussing and acknowledging the drone program is made all the more clear by his pattern of subsequent statements about the use and perceived benefits of targeted killing drone strikes using similar language. Mr. Panetta has repeatedly praised the drone program as "precise" and "effective," both as CIA Director and as Secretary of Defense. Most recently, on May 27, 2012, ABC News aired an interview in which Jake Tapper asked Mr. Panetta whether the U.S. drone program, "because of its imprecision, because of its civilian casualties, is creating more enemy than it is killing?" Mr. Panetta responded: "First and foremost, I think this is one of the most precise weapons that we have in our arsenal." *Full Transcript: Defense Secretary Leon Panetta*, ABC News, May 27, 2012, http://abcn.ws/KDuaBg. Similarly, during an August 16, 2011 forum at

discussing the use of drones by the CIA rather than the DOD. At the time of the discussion, Mr. Panetta was the director of the CIA. Moreover, he specifically addressed drone strikes in Pakistan, *id.* ("I can assure you that in terms of *that particular area* [Pakistan], it is very precise . . . ." (emphasis added)), where the government has made clear that the DOD does not conduct drone strikes, Pl. Br. 25-26 n.15.

- **Mr. Panetta's comments to the *Washington Post* (March 18, 2010), *Wall Street Journal* (March 18, 2010), and ABC News (June 27, 2010).**

The CIA contends that Mr. Panetta did not acknowledge the drone program to the *Washington Post*. The relevant article, however, quotes Mr. Panetta's reference to "the most aggressive operation that CIA has been involved in in our history," JA 124 (Abdo Decl. Ex. C at 1), and then states that "Panetta credited an increasingly aggressive campaign against al-Qaida and its Taliban allies, including more frequent *strikes*." *Id.* (emphasis added). The word "strikes" is not ambiguous in this context because the article goes on to discuss a U.S. drone strike that killed a suspected al-Qaeda commander in Pakistan and to estimate the number of such strikes in the country during the preceding two years.

National Defense University, Mr. Panetta responded to a question about drones by praising the U.S. drone program in Pakistan as "very effective at undermining al-Qaida." Remarks by Secretary Clinton and Secretary Panetta at National Defense University, Fort McNair, Washington, D.C (Aug. 16, 2011), http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4864.

Nor is there any genuine ambiguity about the meaning of Mr. Panetta's statements to ABC News and the *Wall Street Journal*. The CIA argues that Mr. Panetta's use of the first person plural to describe the actor responsible for drone strikes "did not necessarily refer to the CIA." Gov't Br. 32. But it is not simply that Mr. Panetta used the first person plural; it is that he used the first person plural in comments that were expressly about the CIA. Thus, during the ABC News interview, Mr. Panetta said: "*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* just took down number three in their leadership a few weeks ago." JA 134 (Abdo Decl. Ex. E at 4) (emphases added).

- **Mr. Panetta's speeches to U.S. troops in Italy (October 7, 2011)**[7]

In his remarks to U.S. troops in Italy, Mr. Panetta stated: "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. The CIA argues that Mr. Panetta "d[id] not acknowledge that the Agency uses [drones] for lethal purposes, as opposed to surveillance and intelligence-gathering." Gov't Br. 34. But Mr. Panetta mentioned Predator drones

[7] As Plaintiffs have pointed out, this Court may take judicial notice of publicly documented statements made after the district court's opinion in this case. *See* Pl. Br. 19 n.13; *see also Hotel Emps. & Rest. Emps. Union, Local 100 v. City of New York Dep't of Parks & Recreation*, 311 F.3d 534, 540 n.1 (2d Cir. 2002).

in the context of a sentence about *weapons* that were available to him at the CIA. The CIA's reading of Mr. Panetta's statement turns the statement into nonsense.

- **Mr. Panetta's interview on 60 Minutes (January 29, 2012)**

The CIA accepts that Mr. Panetta nodded in reply to the interviewer's statement that "*You* killed al-Awlaki, American citizen, no trial, no due process, you just executed the death penalty." *60 Minutes: The Killing of Anwar al-Awlaki* (CBS television broadcast Jan. 29, 2012), *available at* http://bit.ly/wEx57M (emphasis added). The agency's contention that Mr. Panetta's nod did not necessarily signify agreement with the interviewer's statement is implausible. After nodding, Mr. Panetta proceeded to discuss the process by which Americans may be killed by their own government, and he clarified that the President decides whether to authorize the targeted killing of an American after receiving the recommendation of the CIA director: "it's a recommendation the CIA director makes *in my prior role*." *Id.* (emphasis added). There is simply no way to understand the whole exchange except as a discussion about the CIA's role in the use of drones to carry out targeted killings.[8]

[8] As argued in Plaintiffs' opening brief, President Obama's statements, too, acknowledge the CIA drone program, both in its broad dimensions, and in the particulars of individual drone strikes. *See President Obama Hangs Out With America*, White House Blog (Jan. 30, 2012, 7:44 P.M.), http://www.whitehouse.gov/blog/2012/01/30/president-obama-hangs-out-america; David Nakamura, *Obama on 'Tonight Show' with Jay Leno: Full Video and Transcript*, Wash. Post, Oct. 26, 2011, http://wapo.st/u2GTMf.

* * *

The CIA apparently believes each of these statements to be a hair's breadth short of official acknowledgment and, citing a case from the Second Circuit, it observes that "'the law will not infer official disclosure of information classified by the CIA.'" Gov't Br. 30 (quoting *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009)). But the agency takes that cautionary note out of context. The Second Circuit was not discussing what inferences should be drawn from documented statements of named, authorized officials. Rather, its full admonition was that "the law will not infer official disclosure of information classified by the CIA from (1) widespread public discussion of a classified matter; (2) statements made by a person not authorized to speak for the Agency; or (3) release of information by another agency, or even by Congress." *Wilson*, 586 F.3d at 186 (citations omitted). *Wilson* said nothing at all about drawing appropriate inferences about the meaning of documented, official statements. And certainly nothing in *Wilson*—or any other case—suggests that the courts, in interpreting documented, official statements, should reject logical and plausible constructions in favor of illogical and implausible ones.

Afforded their ordinary meaning, the statements of Mr. Panetta and President Obama constitute official acknowledgements of the CIA's drone

program.[9] This is true of many of the statements individually, but it is certainly true of the statements taken collectively. The CIA contends that the statements must be considered in isolation from one another; it states that "the volume of disclosures, from whatever source, is not the test for official disclosure." Gov't Br. 38. Plaintiffs' point here, however, is not about the volume but the *substance* of the disclosures. Collectively, the statements make it crystal clear that the CIA uses drones to carry out targeted killings. Pl. Br. 26–27; *see also* Jack Goldsmith, *John Brennan's Speech and the ACLU FOIA Cases*, Lawfare, May 1, 2012, http://bit.ly/L7aWSK ("[T]he only reasonable overall conclusion from these

[9] The government argues that to constitute an official acknowledgment, the CIA must have "disclosed the existence of particular records that fall within [Plaintiffs'] FOIA request," not just the existence of the CIA's drone program in general. Gov't Br. 43. That might be the correct standard if the parties were disputing the withholding of particular documents, but this case has not advanced that far. The question before this Court is whether the CIA may refuse to confirm or deny the existence of *any* responsive records. Therefore, the correct inquiry at this point is whether the CIA has officially disclosed the existence of its drone program.

Even if the more specific inquiry were warranted at this point, the CIA has officially disclosed the existence of records responsive to at least some parts of Plaintiffs' request. For example, paragraph 1.F of the request seeks records regarding "whether drones can be used by the CIA . . . in order to execute targeted killings . . . ." JA 94 (Abdo Decl. Ex. A at 6). The official acknowledgment that the CIA operates and has an interest in drones to conduct targeted killings necessarily encompasses an acknowledgement of records responsive to this paragraph. Paragraph 5 of the request seeks records pertaining to the "assessment or evaluation of individual drone strikes after the fact." JA 95 (*id.* at 7). Statements by Mr. Panetta and President Obama about particular persons killed in CIA drone strikes necessarily acknowledge the existence of records responsive to this paragraph.

statements, in context, is that the CIA is involved in the drone program."). There is no reason why the Court should treat each official disclosure about the drone program as if it were the only disclosure. The Court is not obliged to ignore the forest for the trees.

II. THIS COURT OWES NO DEFERENCE TO THE GOVERNMENT'S ARGUMENT THAT IT HAS NOT OFFICIALLY ACKNOWLEDGED THE EXISTENCE OF THE CIA DRONE PROGRAM.

The CIA suggests that its invocation of the Glomar doctrine is entitled to deference, Gov't Br. 21–22, but no deference is owed. While in the national security context courts do sometimes afford a degree of deference to agency affidavits, this deference is afforded to agencies' prediction of harm that may flow from disclosure of information. *See Wolf v. CIA*, 473 F.3d at 376 ("In light of the substantial weight accorded *agency assertions of potential harm* made in order to invoke the protection of FOIA Exemption 1, the [agency] Affidavit both logically and plausibly suffices." (emphasis added)); *Goldberg v. U.S. Dep't of State*, 818 F.2d 71, 78 (D.C. Cir. 1987) ("[C]ourts should . . . accord [agency] affidavits 'substantial weight,' considering the agency's 'unique *insights into what adverse [e]ffects might occur* as a result of public disclosure.'" (last alteration in original) (emphasis added) (citation omitted)); *Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982) ("The test is not whether the court personally agrees in full with the CIA's *evaluation of the danger* [of disclosure]—rather, the issue is whether on the

whole record the Agency's judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility . . . ." (emphasis added)).

Here, however, the question is not whether harm will flow from disclosure of information, but whether already-disclosed information about an agency activity constitutes an official acknowledgement of that activity. The question is a purely legal one, and it is a question on which the agency has no special expertise. Accordingly, it is a question on which the agency is not entitled to deference. *See, e.g.*, *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 69–70 (2d Cir. 2009) (determining, without reference to agency declarations, the scope of the official acknowledgment at issue); *Wolf*, 473 F.3d at 378–80 (performing independent evaluation, without reference to agency declaration, of the plaintiff's claim of official acknowledgment).

Indeed, in the present context there is good reason for the Court to subject the agency's claims to especially searching scrutiny. The volume and consistency of the unattributed disclosures about the CIA's drone program raise the strong possibility that the government is relying on the Glomar doctrine in this Court while at the same time deliberately disclosing selected information about the program to the press. *See, e.g.*, Charles Krauthammer, Op-Ed., *Barack Obama: Drone Warrior*, Wash. Post, May 31, 2012, http://wapo.st/M2YC8X ("The [May 29, 2012 *New York Times*] article could have been titled 'Barack Obama: Drone

Warrior.' Great detail on how Obama personally runs the assassination campaign. On-the-record quotes from the highest officials. This was no leak. This was a White House press release."); Jack Goldsmith, *Drone Stories, the Secrecy System, and Public Accountability*, Lawfare, May 31, 2012, http://bit.ly/KgpqUF ("[T]he global picture is one of a concerted and indeed official effort by the USG to talk publicly about and explain the CIA drone program – almost always in a light favorable to the administration, or at least to the person or interest of the person who is speaking to the reporter."). The strong possibility that the government has officially sanctioned the disclosure of the information it now contends has never been officially disclosed—and that the government has previously said could not be disclosed without grave damage to national security—supplies a reason for heightened scrutiny by this Court. *See Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009) (heightened scrutiny warranted where agency affidavits controverted by contrary evidence in the record or evidence of bad faith); *Wolf*, 473 F.3d at 374 (same).

III. THIS COURT SHOULD CONSTRUE THE "OFFICIAL ACKNOWLDGEMENT" EXCEPTION IN LIGHT OF FOIA'S CORE PURPOSE.

The Glomar doctrine is a judicial construction, and the same is true of the "official acknowledgement" exception to it. Both concepts were developed against the background of a statute whose core purpose is to ensure informed debate about

matters of public concern. That core purpose should inform the Court's analysis here. *See Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (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"); *Milner v. Dep't of Navy*, 131 S. Ct. 1259, 1265 (2011) ("We have often noted 'the Act's goal of broad disclosure' and insisted that the exemptions be 'given a narrow compass.'").

The Congress that enacted FOIA in 1966 was deeply troubled not only by the government's withholding of information but by its selective disclosure of information as well. Indeed, selective disclosure was seen as particularly insidious, because it undermined public faith in government. The House Republican Policy Committee's statement in support of passage of FOIA spoke forcefully about the need for the legislation to address this problem:

> In this period of selective disclosures. managed news, half-truths, and admitted distortions, the need for this legislation is abundantly clear. High officials have warned that our Government is in grave danger of losing the public's confidence both at home and abroad. The credibility gap that has affected the Administration pronouncements on domestic affairs and Vietnam has spread to other parts of the world. The on-again, off-again, obviously less-than-truthful manner in which the reduction of American forces in Europe has been handled has made this country the subject of ridicule and jokes. "Would you believe?" has now become more than a clever saying. It is a legitimate inquiry.
>
> Americans have always taken great pride in their individual and national credibility. We have recognized that men and nations can be

> no better than their word. This legislation will help to blaze a trail of truthfulness and accurate disclosure in what has become a jungle of falsification, unjustified secrecy, and misstatement by statistic. The Republican Policy Committee urges the prompt enactment of S. 1160.

Republican Policy Committee Statement on Freedom of Information Legislation, S. 1160, 112 Cong. Rec. 13020 (1966), *reprinted in* Subcomm. on Admin. Practice, S. Comm. on the Judiciary, 93rd Cong., Freedom of Information Act Source Book: Legislative Materials, Cases, Articles, at 59 (1974) [hereinafter "FOIA Source Book"].

Individual members of Congress, including one of the strongest proponents of the law, then-Congressman Donald Rumsfeld, expressed similar concerns:

> Certainly it has been the nature of Government to play down mistakes and to promote successes. This has been the case in the past administrations. Very likely this will be true in the future.
>
> There is no question but that S. 1160 will not change this phenomenon. Rather, the bill will make it considerably more difficult for secrecy-minded bureaucrats to decide arbitrarily that the people should be denied access to information on the conduct of Government or on how an individual Government official is handling his job.
>
> * * *
>
> I consider this bill to be one of the most important measures to be considered by Congress in the past 20 years.

112 Cong. Rec. 13031 (1966) (statement of Rep. Rumsfeld), *reprinted in* FOIA Source Book at 70; *see also* 112 Cong. Rec. 13041 (statement of Rep. Rogers), *reprinted in* FOIA Source Book at 80 ("Doling out partial information only

cripples the electorate which needs to be strong if a democratic government is to exist.").

Congress was again motivated by these concerns when in 1974 it enacted strengthening amendments to FOIA in the wake of the Watergate scandal. *See* 120 Cong. Rec. 1808 (1974) (statement of Rep. Wright) ("By passing H.R. 12471 with an overwhelming vote we may begin to repair the grave erosion of public confidence in our governmental institutions that has resulted from recent Watergate scandals, secrecy, and coverup."); 120 Cong. Rec. 9314 (1974) (statement of Sen. Kennedy) ("We have seen too much secrecy in the past few years, and the American people are tired of it. Secret bombing of Cambodia, secret wheat deals, secret campaign contributions, secret domestic intelligence operations, secret cost overruns, secret antitrust settlement negotiations, secret White House spying operations—clearly an open Government is more likely to be a responsive and responsible Government."); 120 Cong. Rec. 9334 (1974) (statement of Sen. Muskie) ("It should not have required the deceptions practiced on the American public under the banner of national security in the course of the Vietnam war or since to prove to us that Government classifiers must be subject to some impartial review.").

The FOIA's particular concern with selective disclosure should inform this Court's analysis here. The Glomar doctrine cannot be construed so broadly, or the

official acknowledgment exception so narrowly, as to license the very "selective disclosures, managed news, half-truths, and admitted distortions" that the FOIA was meant to preclude. For more than two years now, senior government officials have freely disclosed information about the CIA's drone program, both on the record and off, while the CIA has insisted to this Court and others that the program cannot be discussed, or even acknowledged, without jeopardizing national security. One consequence is that the public's understanding of the effectiveness, morality, and legality of the government's bureaucratized killing program comes solely from the government's own selective, self-serving, and unverifiable representations concerning it. This is not simply lamentable but dangerous, and, again, it is precisely what the FOIA was designed to prevent. This Court should vacate the judgment below and order the CIA to process Plaintiffs' FOIA request.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be vacated.

Respectfully submitted,

/s/ Jameel Jaffer
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

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

Counsel for Plaintiffs–Appellants

June 4, 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 5,711 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/ Jameel Jaffer
Jameel Jaffer
Counsel for Plaintiffs–Appellants

Dated: June 4, 2012

CERTIFICATE OF SERVICE

On June 4, 2012, I served upon the following counsel for Defendant-Appellee one copy of Plaintiffs−Appellants' REPLY 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/ Jameel Jaffer
Jameel Jaffer
Counsel for Plaintiffs−Appellants

Executed on June 4, 2012