[ORAL ARGUMENT NOT YET SCHEDULED]

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

(A) Parties and Amici.

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

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

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

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

(B) Ruling Under Review.

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

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

(C) Related Cases.

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

/s/ Arthur B. Spitzer
Arthur B. Spitzer

CORPORATE DISCLOSURE STATEMENT

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

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

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GLOSSARY

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

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

11-5320

AMERICAN CIVIL LIBERTIES UNION and
AMERICAN CIVIL LIBERTIES UNION FOUDATION,

Plaintiffs–Appellants,

v.

CENTRAL INTELLIGENCE AGENCY,

Defendant–Appellee.

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

BRIEF FOR PLAINTIFF-APPELLANT

STATEMENT OF JURISDICTION

The district court had jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B), 28 U.S.C. § 1331, and 5 U.S.C. §§ 701–706. It granted summary

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

STATEMENT OF THE ISSUES

Whether the CIA acted lawfully when it refused to confirm or deny the existence of records responsive to Plaintiffs' request under the Freedom of Information Act ("FOIA") for information about the CIA's use of drones to carry out targeted killings, a subject that the President, the CIA Director, and many other government officials have discussed at length on the public record.

STATUTORY PROVISIONS

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

STATEMENT OF THE CASE

This litigation involves a FOIA request submitted by Plaintiffs Appellants

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

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

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

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

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

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

The Court should reverse the judgment of the district court and direct the CIA to process Plaintiffs' request. In processing the request, the CIA may of course redact or withhold information from responsive records where necessary to protect information covered by any of the enumerated FOIA exemptions—and, after the completion of processing, Plaintiffs will challenge those redactions if they

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

STANDARD OF REVIEW

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

ARGUMENT

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

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

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

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

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

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

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

In other cases, the Court rejected the government's Glomar responses as unsubstantiated by its affidavits and required the government to confirm or deny the existence of records. *See Roth*, 642 F.3d at 1181 (rejecting government's justifications for Glomar response under law enforcement exemptions); *Jefferson v. Dep't of Justice*, 284 F.3d 172, 178–79 (D.C. Cir. 2002) ("[A]s the case giving rise to 'the *Glomar* response' itself makes clear, the Department cannot rely on a bare assertion to justify invocation of an exemption from disclosure . . . . [Here,] a *Glomar* response was inappropriate in the absence of an evidentiary record produced by [the agency] . . . ."); *see also Judicial Watch, Inc. v. U.S. Secret Serv.*, 579 F. Supp. 2d 182, 186 (D.D.C. 2008) (rejecting agency's Glomar response because its "argument that knowledge of the mere existence or absence of [records] poses a security risk does not hold water"); *Am. Civil Liberties Union v. Dep't of Def.*, 389 F. Supp. 2d 547, 561, 566 (S.D.N.Y. 2005) (rejecting CIA Glomar response as to one category of requested records because the fact of their existence was not properly classified and noting that "[t]he danger of Glomar responses is that they encourage an unfortunate tendency of government officials

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

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

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

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

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

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

respond to this request by admitting that it possessed responsive records, it would indicate that the CIA was involved in drone strikes or at least had an intelligence interest in drone strikes . . . ."); JA 31 (*id.* ¶ 22) ("Whether or not the CIA possesses legal opinions concerning drone strikes would itself be classified because the answer provides information about the types of intelligence activities in which the CIA may be involved or interested."); *id.* ("[T]he response would

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

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

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

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

On May 18, 2009, then-CIA Director Leon E. Panetta appeared before the

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

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

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

JA 128 (*id.* at 2). In May 2010, after major media organizations reported on a drone strike in Pakistan**,**

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

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

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

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

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

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

Id. (emphasis added).

Mr. Panetta yet again discussed the CIA's drone program in January 2012, in a nationally televised interview on CBS's 60 Minutes. During that interview, Mr. Panetta acknowledged the targeted killing of U.S. citizen Anwar al-Awlaki in

Mr. Pelley: Only the President can decide?

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

The district court also erred in suggesting that the relevant question was whether Mr. Panetta had acknowledged the existence of records concerning the drone program, rather than the drone program itself. 808 F. Supp. 2d at 294 n.5. The case on which the district court principally relied, *Wilner v. National Security Agency*, 592 F.3d 60 (2d Cir. 2009), involved a request for records concerning the National Security Agency's warrantless wiretapping program. There was no dispute in that case, however, that the NSA had acknowledged *some* aspects of program. The question was whether it could invoke the Glomar doctrine to protect other aspects of the program, such as the names of surveillance targets, that had not been disclosed. The Second Circuit held that it could. That holding supplies no support to the government here. Here, the CIA is not seeking to protect aspects of the program from disclosure; it is seeking to protect the very existence of the program. *See* JA 29–32 (Cole Decl. ¶¶ 19, 22). The existence of the program, however, is somethi9 14.03 Tf 1 0 0 1 297.6 707.6re programram84.3(e)-24(am)16.7(,e(n)

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

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

> Mr. President, do you think that possibly these drone strikes, do they

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

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

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

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

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

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

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

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

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

Unlike these earlier cases, which involved small numbers of ambiguous statements, often made by officials outside the relevant agency or even outside the executive branch, this case involves multiple statements, made in the course of

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

In early 2011, John A. Rizzo, who served as the CIA's Acting General

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

Other current and former intelligence and national security officials have

current CIA officials,

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

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

News articles pre-dating the district court decision: Scott Shane, *Contrasting Reports of Drone Strikes*

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

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

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from the unmanned aerial drones which can circle overhead for hours after they strike to assess the damage."); Greg Miller, *Muslim Cleric Aulaqi Is 1st U.S. Citizen on List of Those CIA Is Allowed to Kill*, Wash. Post, Apr. 7, 2010, http://wapo.st/wlYNwB ("A Muslim cleric tied to the attempted bombing of a Detroit-bound airliner has become the first U.S. citizen added to a list of suspected terrorists the CIA is authorized to kill, a U.S. official said Tuesday."); David S.

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

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

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

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

[24] *Id.*

[25] e788 .72Tmes BT /F7 9 Tf 1 0 0 1 108 97.92 Tm [(2)-6.6(5)]TJ

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

CERTIFICATE OF COMPLIANCE

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

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

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

Dated: March 15, 2012

CERTIFICATE OF SERVICE

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

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

Executed on March 15, 2012

ADDENDUM

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

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

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

*** * ***

(3)(A) Except wit0 rg /F7314.03 Tf -4.0(0]TJ Ep)8.0(n)-4.3(ct(*)]TJ8(0

(4)(A)

*** * ***

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

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

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

(III)

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

*** * ***

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

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

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

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

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

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

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

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

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

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

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

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

(B) any information described under subparagrap2(d)-47.7des)