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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

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

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

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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

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

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

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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. [illegible]

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,

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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

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

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 sec243.5hty (s)-423(u)4.2puli a rrasono

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.

> 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.

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

CONCLUSION

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

Respectfully submitted,

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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.

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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:

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Executed on June 4, 2012