THE ACLU'S HOLLOW FOIA VICTORY OVER DRONE STRIKES

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INTRODUCTION

When a government agency's response to a Freedom of Information Act ("FOIA")[1] request is that the requested information is classified and implicates national security, federal courts are generally reluctant to question the government's assertion.[2] Litigation in such circumstances is often an exercise in futility, as even a determined requester may fail to force an agency to admit that responsive documents actually exist. Yet such a forced admission is what makes the United States Court of Appeals for the District of Columbia Circuit's recent decision in *ACLU v. CIA*[3] so remarkable. There, in response to a FOIA request seeking documents related to drone strikes, the court held that it was "neither 'logical' nor 'plausible'" for the Central Intelligence Agency ("CIA") to issue a blanket *Glomar* response asserting that national security would be damaged if the CIA admitted an interest in drone strikes.[4]

While the rejection of the CIA's fantasy world—one in which the CIA's interest in the drone strike program has not been publicly revealed and is a closely held secret—is undoubtedly a victory for rational thought, the D.C. Circuit's other ruling tempers the ACLU's victory. Acknowledging that "we are getting ahead of ourselves" and that the issue had not "been litigated in . . . this court," the court indicated that the CIA may provide a so-called "no number, no list" response.[5] Such a response is precisely that: a declaration that, although documents exist, providing the number of documents or any description of them would damage national security. This ruling has the potential to sharply limit the effectiveness of FOIA as a tool of open government in the context of national security.

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[1] 5 U.S.C. §§ 552-552b (2006).

[2] *See, e.g.*, Miller v. Casey, 730 F.2d 773, 776 (D.C. Cir. 1984) ("In that de novo review, however, the district court must 'accord *substantial weight* to an agency's affidavit concerning the details of the classified status of the disputed record.'" (quoting Military Audit Project v. Casey, 656 F.2d 724, 738 (D.C. Cir. 1981))).

[3] 710 F.3d 422 (D.C. Cir. 2013).

[4] *Id.* at 431.

[5] *Id.* at 434.

I. *GLOMAR* AND OVERCLASSIFICATION

A *Glomar* response is given when a government agency refuses to confirm or deny the existence of a document on the theory that whether such a document even exists is a properly classified fact.[6] Its statutory bases are Exemptions 1 and 3 of FOIA, which protect information properly classified under an executive order or another statute that exempts the document's disclosure.[7] The *Glomar* name comes from the *Hughes Glomar Explorer*, "a ship built (we now know) to recover a sunken Soviet submarine, but disguised as a private vessel for mining manganese nodules from the ocean floor."[8] In the underlying case involving the ship, a journalist sought records regarding the CIA's effort to prevent media reports on the *Glomar Explorer*.[9] The CIA responded that "any records that might exist which reveal any CIA connection with or interest in the activities of the *Glomar* Explorer; and, indeed, any data that might reveal the existence of any such records . . . would be classified and therefore exempt from disclosure."[10] The D.C. Circuit ultimately upheld such a response, provided that it is justified, to the greatest extent possible, through a public record created through affidavits.[11] That way, "the court will at least have the benefit of being able to focus on the issues identified and clarified by the adversary process."[12]

Today, this basic *Glomar* doctrine confronts a world of overclassification and a government willing to use classification as both a shield and a sword. In 2011 alone, the government classified a remarkable 92 million documents.[13] At the same time, the Obama administration makes prodigious use of unofficial leaks. Press leaks serve a double role of ensuring that the public is generally informed of the President's actions while simultaneously allowing aids to "float policy ideas and rebut critics while maintaining deniability."[14] Thus, the Obama administration is able to shield itself from criticism by ensuring that its policies and procedures are not open to public scrutiny because the underlying documents—and the existence thereof—are classified. But whenever it is politically convenient to extol the benefits of a classified program, there is no shortage of leaks from "anonymous govern-

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6 *See, e.g.*, Wolf v. CIA, 473 F.3d 370, 374 (D.C. Cir. 2007).

7 5 U.S.C. §§ 552(b)(1), (3) (2006).

8 Bassiouni v. CIA, 392 F.3d 244, 246 (7th Cir. 2004) (citing Phillippi v. CIA, 546 F.2d 1009, 1011 (D.C. Cir. 1976)).

9 *Phillippi*, 546 F.2d at 1011.

10 *Id.* (alteration in original) (internal quotation marks omitted).

11 *Id.* at 1013.

12 *Id.*

13 Steve Coll, *The Spy Who Said Too Much*, NEW YORKER, Apr. 1, 2013, at 54, 56.

14 *Id.*

ment officials" who are supportive of the President's actions. Policy decisions on drone strikes are a major subject of such leaks.[15]

The obvious irony surrounding the classified status of the drone strike program is that the supposed covert actions involve the very public killing of civilians and alleged terrorists with one-hundred-pound Hellfire missiles.[16] When entire buildings and convoys of vehicles are destroyed in the blink of an eye with a missile, members of the public take notice. Although it is notoriously difficult to obtain accurate casualty statistics from Pakistan's Federally Administered Tribal Areas, Somalia, and Yemen, statistics compiled by the Bureau of Investigative Journalism indicate that, since 2002, there have been at least 428 U.S. drone strikes in these three regions; a conservative estimate indicates that at least 2,700 individuals, including over 400 civilians, have been killed.[17] News reports are constant, and a Google search for "drone strikes" reveals over 62 million results. Senator Rand Paul engaged in a thirteen-hour filibuster on the floor of the U.S. Senate in March of 2013 to raise concerns about using drones to kill alleged terrorists.[18] The program may be classified, but its existence is widely known and discussed by the public. It is at most an open secret, making the CIA's decision to issue a blanket *Glomar* response particularly vexing and troubling.

II. *ACLU V. CIA*'S PROCEDURAL BACKGROUND

It is against this backdrop that the American Civil Liberties Union ("ACLU") sent its January 13, 2010, FOIA request seeking ten categories of documents[19] from the Department of Defense, the Department of Justice, the Office of Legal Counsel, the CIA, and the Department of State.[20] As summarized by Judge Collyer, these requests consisted of:

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15 *Id.*

16 Andrew Tarantola, *The Terrifying Reaper that Shoots Hellfire from 50,000 Feet*, GIZMODO (Sept. 7, 2012, 11:30 AM), http://gizmodo.com/5941047/the-terrifying-reaper-that-shoots-hellfire-from-50000-feet; *AGM-114 Hellfire Modular Missile System (HMMS)*, GLOBALSECURITY.ORG (last modified July 7, 2011), http://www.globalsecurity.org/military/systems/munitions/agm-114-var.htm.

17 *Covert War on Terror - The Datasets*, BUREAU OF INVESTIGATIVE JOURNALISM, http://www.thebureauinvestigates.com/category/projects/drone-data/ (last visited Aug. 12, 2013). The Bureau of Investigative Journalism also estimates that there have been at least 81 additional "possible" U.S. drone strikes in Yemen, which have killed at least 285 individuals. *Id.*

18 Richard W. Stevenson & Ashley Parker, *A Senator's Stand on Drones Scrambles Partisan Lines*, N.Y. TIMES (Mar. 7, 2013), http://www.nytimes.com/2013/03/08/us/politics/mccain-and-graham-assail-paul-filibuster-over-drones.html.

19 The second category of documents, addressing international agreements regarding the use of drones, was not pursued in litigation. *See* ACLU v. Dep't of Justice, 808 F. Supp. 2d 280, 285 (D.D.C. 2011), *rev'd sub nom.* ACLU v. CIA, 710 F.3d 422 (D.C. Cir. 2013).

20 *See* Exhibits to Complaint at 2, ACLU v. Dep't of Justice, 808 F. Supp. 2d 280 (D.D.C. 2011) (No. 1:10-cv-000436-RMC), ECF No. 15-2 (Ex. A) (Letter from Jonathan Manes, Am. Civil Liberties

> 1. The "legal basis in domestic, foreign and international law upon which unmanned aerial vehicles" can be used to execute targeted killings, including who may be targeted with this weapon system, where and why;
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> . . . .
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> 3. The "selection of human targets for drone strikes and any limits on who may be targeted by a drone strike;"
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> 4. "[C]ivilian casualties in drone strikes," including measures to limit civilian casualties;
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> 5. The "assessment or evaluation of individual drone strikes after the fact," including how the number and identities of victims are determined;
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> 6. "[G]eographical or territorial limits on the use of UAVs to kill targeted individuals;"
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> 7. The "number of drone strikes that have been executed for the purpose of killing human targets, the location of each such strike, and the agency of the government or branch of the military that undertook each such strike;"
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> 8. The "number, identity, status, and affiliation of individuals killed in drone strikes;"
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> 9. "[W]ho may pilot UAVs, who may cause weapons to be fired from UAVs, or who may otherwise be involved in the operation of UAVs for the purpose of executing targeted killings," including records pertaining to the involvement of CIA personnel, government contractors, or other non-military personnel, and;
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> 10. The "training, supervision, oversight, or discipline of UAV operators and others involved in the decision to execute a targeted killing using a drone."[21]

Most relevant to the ultimate appeal, the district court probed whether the CIA's involvement in drone strikes had been officially acknowledged. After looking at several statements by former CIA Director Leon Panetta, the court concluded that he never reached the level of specificity necessary to trigger an official acknowledgment. Instead, the court felt that "Plaintiffs seek exactly what is *not* publicly available—an official CIA acknowledgment of the fact that it is or is not involved in the drone strike program."[22] At the least, the court determined that none of Panetta's comments acknowledged that any specific record existed.[23] In the absence of an official acknowledgement of the CIA's specific role in drone strikes and the existence of records, the court allowed the *Glomar* response.

III. THE D.C. CIRCUIT'S OPINION IN *ACLU V. CIA*

On appeal, the D.C. Circuit addressed two primary issues: whether statements of various government officials prevented the CIA from issuing

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Union Found., to Dir. of Freedom of Info. & Sec. Review, Dep't of Def., et al. (Jan. 13, 2009)). A typographical error on the request erroneously referred to the submission year as 2009. Exhibits to Complaint at 22 n.1, ACLU v. Dep't of Justice, 808 F. Supp. 2d 280 (No. 1:10-cv-00436-RMC), ECF 15-2 (Ex. C) (Letter from Jonathan Manes, Legal Fellow, Am. Civil Liberties Union Found., to Agency Release Panel, Cent. Intelligence Agency 1 n.1 (Apr. 22, 2010)).

21 ACLU v. Dep't of Justice, 808 F. Supp. 2d at 285 (alterations in original).

22 *Id.* at 296.

23 *Id.* at 297.

a *Glomar* response and whether, on remand, the CIA could submit a "no number, no list" response in place of a *Vaughn* index.

A. *The Official Acknowledgment Exception to* Glomar

To the D.C. Circuit, the heart of the issue on appeal was whether high-ranking government officials had made sufficient public statements about drone strikes such that it was "neither logical nor plausible" for the CIA to issue a *Glomar* response.[24] This so-called "official acknowledgement" exception to the *Glomar* doctrine applies when authorized government officials have made public statements about an otherwise secret program or document.[25] The D.C. Circuit described the district court as having "upheld a sweeping *Glomar* response that ended the plaintiffs' lawsuit by permitting the Agency to refuse to say whether it had *any documents at all* about drone strikes."[26] The CIA argued that, should it disclose whether it had responsive documents, the fact of whether the CIA itself—as opposed to another government entity such as the Department of Defense—operates drones would be revealed.[27]

But the CIA had "proffered no reason to believe" that a disclosure of the existence of documents would reveal such an operational role.[28] Instead, the question was whether acknowledging the CIA's *intelligence* interest in drone strikes would reveal something not already public.[29] Sufficient public statements about the role of the government in drone strikes would logically suggest that the CIA at least has such an intelligence interest.

The court highlighted four public statements that it determined, in the aggregate, undermined the CIA's position. First, President Obama gave an answer to a question about drone strikes in 2012 in which he admitted that "a lot of these strikes have been . . . going after al Qaeda suspects who are up in very tough terrain along the border between Afghanistan and Pakistan."[30] Also in 2012, then-Assistant to the President for Homeland Security and Counterterrorism John Brennan[31] acknowledged that "the United States Government conducts targeted strikes against specific al-Qaida terrorists,

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24 ACLU v. CIA, 710 F.3d at 430.

25 *Id*. at 426.

26 *Id*. at 428.

27 *Id*.

28 *Id*.

29 *Id*. at 428-29.

30 ACLU v. CIA, 710 F.3d at 429 (alteration in original) (quoting whitehouse, *Your Interview with the President – 2012*, YOUTUBE (Jan. 30, 2012), https://www.youtube.com/watch?feature=player_embedded&v=eeTj5qMGTAI).

31 John Brennan is director of the CIA. *See* Sarah Wheaton, *Brennan Confirmed to Lead the C.I.A.*, N.Y. TIMES (Mar. 7, 2013), http://www.nytimes.com/2013/03/08/us/politics/brennan-confirmed-to-lead-the-cia.html.

sometimes using remotely piloted aircraft, often referred to publicly as drones."[32] He went on to say that the United States "draw[s] on the full range of our intelligence capabilities" and that the intelligence community is asked to "collect additional intelligence or refine its analysis so that a more informed decision can be made" about how to carry out these strikes.[33] Finally, the court noted that then-Director of the CIA Leon Panetta answered a question in 2009 about "remote drone strikes" in Pakistan by acknowledging that "these operations have been very effective . . . . [V]ery frankly, it's the only game in town in terms of confronting and trying to disrupt the al-Qaeda leadership."[34]

In the face of these three public remarks, the court blasted the CIA for issuing a *Glomar* response:

> It is hard to see how the CIA Director could have made his Agency's knowledge of—and therefore "interest" in—drone strikes any clearer. And given these statements by the Director, the President, and the President's counterterrorism advisor, the Agency's declaration that "no authorized CIA or Executive Branch official has disclosed whether or not the CIA . . . has an interest in drone strikes" is at this point neither logical nor plausible.[35]

Although none of these official acknowledgements specifically stated that the CIA has responsive documents, "what they did say makes it neither 'logical' nor 'plausible' to maintain that the Agency does not have any documents relating to drones."[36] To hold otherwise would suggest that the CIA is gathering intelligence related to drone strikes without producing any written documents. The CIA had asked the court to expand *Glomar* to a point where the court would be approving "a fiction of deniability that no reasonable person would regard as plausible."[37]

B. *Approving a "No Number, No List" Response*

Although the D.C. Circuit disposed of the CIA's broad *Glomar* invocation, the court was not finished. Recognizing that on remand the district court must determine the propriety of FOIA exemptions as they apply to

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32 ACLU v. CIA, 710 F.3d at 429 (citing John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, *The Ethics and Efficacy of the President's Counterterrorism Strategy*, Address at the Woodrow Wilson International Center for Scholars (Apr. 30, 2012), *available at* http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy#field_speakers).

33 *Id.* at 430 (quoting Brennan, *supra* note 32) (internal quotation marks omitted).

34 *Id.* (quoting Leon E. Panetta, Dir. Cent. Intelligence Agency, *Remarks at the Pacific Council on International Policy* (May 18, 2009) [hereinafter Panetta Remarks], *available at* https://www.cia.gov/news-information/speeches-testimony/directors-remarks-at-pacific-council.html).

35 *Id.* (alteration in original) (citations omitted).

36 *Id.* at 431.

37 *Id.*

specific documents, the court opined on the level of disclosure required by the CIA. Enter the "no number, no list" response.

Ordinarily, an agency produces a *Vaughn* index,[38] which provides a list of the FOIA exemptions applying to responsive documents that the agency is withholding.[39] Courts allow flexibility regarding a *Vaughn* index's level of detail, ranging from full descriptions to "brief or categorical descriptions"[40] or even in camera submission of the *Vaughn* index itself.[41]

Because of this flexibility, the D.C. Circuit indicated that the CIA may use the same approach it recently employed in related FOIA litigation in New York: submit a "so-called 'No Number, No List'" response.[42] The ACLU argued in briefing that the Seventh Circuit decided that a "no number, no list" response is legally identical to a *Glomar* response.[43] But the D.C. Circuit drew a clear distinction between the two, viewing a "no number, no list" response "as a kind of *Vaughn* index, albeit a radically minimalist one."[44] It could be used only in "unusual circumstances, and only by a particularly persuasive affidavit."[45] To the D.C. Circuit, there is a continuum with a "no number, no list" response on one end and a traditional *Vaughn* on another. A hybrid approach, using the "no number, no list" response for only a discrete selection of documents, could also be appropriate.

Remarkably, the court admitted that "we are getting ahead of ourselves" because "[n]one of these issues has been litigated in this case, either in this court or in the district court."[46] The government had not yet submitted a "no number, no list" response, and the case was remanded to the district court.[47]

IV. IMPLICATIONS OF *ACLU V. CIA*

By rejecting the CIA's *Glomar* response, the D.C. Circuit's opinion was a victory for logic and reality. Jameel Jaffer, the ACLU attorney who argued the case before the D.C. Circuit, was stark in his assessment that the

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38 *See* Vaughn v. Rosen, 484 F.2d 820, 827 (D.C. Cir. 1973).

39 ACLU v. CIA, 710 F.3d at 432.

40 *Id.*

41 Hayden v. Nat'l Sec. Agency/Cent. Sec. Serv., 608 F.2d 1381, 1385 (D.C. Cir. 1979).

42 N.Y. Times Co. v. U.S. Dep't of Justice, 915 F. Supp. 2d 508, 519 (S.D.N.Y. 2013). The FOIA request at issue in the New York litigation seeks records pertaining to targeted killings of U.S. citizens.

43 *See* Plaintiffs-Appellants' Opposition to the CIA's Motion to Remand for Further Proceedings at 4-5, ACLU v. CIA, 710 F.3d 422 (D.C. Cir. 2013) (No. 11-5320), ECF No. 1381308 (citing Bassiouni v. CIA, 392 F.3d 244, 246-47 (7th Cir. 2004)).

44 ACLU v. CIA, 710 F.3d at 433.

45 *Id.*

46 *Id.* at 434.

47 *Id.*

case "requires the government to retire the absurd claim that the C.I.A.'s interest in the targeted killing program is a secret."[48] American University law Professor Steve Vladeck wrote that it was a "pretty big deal . . . to preclude a *Glomar* response based upon the kinds of public acknowledgments documented" in the opinion.[49] In doing so, the court went farther than it had before.

Unfortunately, that was not the extent of the court's opinion. In the *New York Times*, Charlie Savage—who is himself a plaintiff in the New York litigation—wrote that the opinion would require disclosure of a description of relevant records held by the CIA, "at least to a judge," even if the contents of the records are never themselves made public.[50] But Savage's assessment is more optimistic than is warranted, for the court has indicated through its approval of a "no number, no list" response that a sparse, generalized description of the records may be sufficient without a judge ever reviewing descriptions of responsive records.

A. *The High Bar of Official Disclosure*

This case highlights the startling disconnect between reality and the law in *Glomar* cases. The Obama administration routinely authorizes leaks by "senior government officials" or other anonymous government officials to media outlets. Yet the CIA maintains that such statements are "unofficial" and that the court should not "assume that such anonymous, unsourced, or otherwise non-authoritative reports are accurate."[51] The government attempts to have it both ways: on a daily basis it plants quotes in news stories lauding its efforts while pretending that these "leaks" are not authorized, official sources.[52]

Years of case law in the D.C. Circuit have generally affirmed this position. The court has repeatedly held that "mere public speculation, no mat-

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48 Charlie Savage, *Court Orders the C.I.A. to Disclose Drone Data*, N.Y. TIMES (Mar. 15, 2013), http://www.nytimes.com/2013/03/16/us/court-says-cia-must-yield-some-data-on-drones.html (internal quotation marks omitted).

49 Steve Vladeck, *D.C. Circuit Rejects* Glomar *Response in ACLU/CIA Drone FOIA Suit*, LAWFARE (Mar. 15, 2013, 10:21 AM), http://www.lawfareblog.com/2013/03/d-c-circuit-rejects-Glomar-response-in-aclucia-drone-foia-suit/.

50 Savage, *supra* note 48.

51 Declaration of John Bennett, Director, National Clandestine Service Central Intelligence Agency at 44, N.Y. Times Co. v. U.S. Dep't of Justice, 915 F. Supp. 2d 508 (S.D.N.Y. 2013) (No. 1:12-cv-00794-CM), ECF No. 28 [hereinafter Bennett Declaration].

52 *See, e.g.*, Uri Friedman, *Foreign Policy: Good Leak, Bad Leak*, NPR (June 11, 2012, 10:56 AM), http://www.npr.org/2012/06/11/154753346/foreign-policy-good-leak-bad-leak; Glenn Greenwald, *Probing Obama's Secrecy Games*, SALON (June 7, 2012, 6:05 AM), http://www.salon.com/2012/06/07/probing_obamas_secrecy_games/.

ter how widespread" can never be the basis of official acknowledgement.[53] Similarly, a news article citing "unidentified military officials," even when it references "more than a dozen current and former military officials as sources," does not constitute an official acknowledgment absent a clear statement by one of the individuals in his "official capacity."[54] This is because the courts have adopted the position that "'there can be a critical difference between official and unofficial disclosures' in the arena of intelligence and national security."[55] No matter how often the government leaks information as part of a broad public discussion about an otherwise classified topic, no amount of such leaks can ever constitute official acknowledgement sufficient to undermine a *Glomar* response. This underlying theory remains troublingly intact by the D.C. Circuit's opinion.

Nevertheless, when contrasted with existing case law, the court in *ACLU v. CIA* did slightly expand the official acknowledgement doctrine. The D.C. Circuit first addressed the issue of whether official acknowledgment could defeat a general *Glomar* response[56] in *Wolf v. CIA*.[57] The *Wolf* requester sought records relating to Jorge Gaitan, a deceased Colombian politician. The court determined that, although the CIA's *Glomar* response was appropriate, Congressional testimony in 1948 by then-CIA Director Roscoe Hillenkoetter established that the CIA had records about Gaitan.[58] Hillenkoetter's testimony included excerpts from dispatches about the fallout of Gaitan's assassination, and he "suggested that the dispatches were Agency documents."[59] The *Wolf* court applied the official acknowledgement exception and invalidated the CIA's *Glomar* response because the director of the CIA had publicly acknowledged specific records related to the FOIA request.[60]

By contrast, in *Electronic Privacy Information Center v. National Security Agency*,[61] the Electronic Privacy Information Center ("EPIC") submitted a FOIA request to the National Security Agency ("NSA") requesting documents about collaboration between the NSA and Google regarding

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53 Wolf v. CIA, 473 F.3d 370, 378 (D.C. Cir. 2007).

54 Alsawam v. Obama, 764 F. Supp. 2d 11, 19-20 (D.D.C. 2011). Although this is not, strictly speaking, a FOIA case, it bases its analysis on whether documents should be released on D.C. Circuit FOIA precedent.

55 *Id.* at 19 (quoting Fitzgibbon v. CIA, 911 F.2d 755, 765 (D.C. Cir. 1990)).

56 *Id.* Previously, it had only been used to force the release of specific documents. *See, e.g.*, Afshar v. Dep't of State, 702 F.2d 1125, 1130 (D.C. Cir. 1983).

57 473 F.3d 370 (D.C. Cir. 2007).

58 *Id.* at 379.

59 *Id.*

60 On remand, the CIA "identified thirteen field reports referenced in Hillenkoetter's testimony and released two to Wolf." Wolf v. CIA, 569 F. Supp. 2d 1, 5 (D.D.C. 2008). Although the district court's opinion is somewhat vague, it appears that the "segregable, non-exempt" portions of the other eleven documents were also released. *Id.*

61 678 F.3d 926 (D.C. Cir. 2012).

cybersecurity. [62] The NSA responded with a *Glomar* response.[63] To prove official acknowledgement and defeat the *Glomar* response, EPIC cited a public statement from Google that the company was "working with relevant U.S. authorities" on cybersecurity, news reports that Google had been in contact with the NSA, and a comment from former NSA Director Mike McConnell that such collaboration was "inevitable."[64] Although the court acknowledged that the NSA had disclosed basic information about its role in providing security guidance to the private sector, nothing had been publicly disclosed by the NSA indicating a specific relationship with Google.[65] As such, the *Glomar* response was upheld.[66]

In one way, the decision in *ACLU v. CIA* is a significant victory because it goes beyond both of these cases. Government officials had generally disclosed that the United States is engaged in drone strikes, but there was no specific acknowledgment of the CIA's role or CIA records. Instead, the court felt that it was "neither logical nor plausible" for the CIA to refuse to disclose if it even has an "intelligence interest" in drone strikes because, "after all, [it is] the Central *Intelligence* Agency."[67] From the general role the CIA plays in the intelligence community, the court logically inferred that it must have an interest in drone strikes. As a result, on the issue of whether there are responsive *records*, the court was blunt that "it beggars belief that it does not also have documents relating to the subject."[68]

But this is hardly a sweeping victory with broad implications. The drone strike program may be the subject of more public discussion and official statements from high-ranking government officials than any other classified operation. The reasons are clear, as the government cannot hide the deaths of hundreds of civilians and thousands of others. Furthermore, drone strikes are "the only game in town in terms of confronting and trying to disrupt the al-Qaeda leadership."[69] For an administration desperate to appear tough on terrorism, boasting about a visible and widely discussed program is a calculated political move. It is unlikely that the President and two directors of the CIA would publicly comment about other classified programs in a similar way.

Furthermore, the CIA had already abandoned its *Glomar* response by the time the D.C. Circuit's opinion came down. In a June 20, 2012, Motion to Remand for Further Proceedings, the CIA admitted that, in the New York litigation, it had "acknowledge[d] the CIA's possession of some records

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62 *Id.* at 929.

63 *Id.*

64 *Id.* at 930 (internal quotation marks omitted).

65 *Id.* at 933.

66 *Id.*

67 ACLU v. CIA, 710 F.3d 422, 430 (D.C. Cir. 2013) (internal quotation marks omitted).

68 *Id*. at 431.

69 Panetta Remarks, *supra* note 34.

that could potentially be responsive" to the FOIA request in this case, such as a 2012 speech by John Brennan.[70] The CIA argued that remand was appropriate so that the Agency could file a new declaration addressing the "scope of any *Glomar* or 'no number, no list' response" it would file in light of the disclosures in the New York litigation.[71] Although the court denied the request for remand on July 2, 2012, in a one-sentence order,[72] the court's opinion links the CIA's actions with its posture in the New York litigation.[73] It is impossible to know whether the CIA's changed position affected the D.C. Circuit's reasoning, but it may have made the court less wary of ruling against the Agency.

ACLU v. CIA suggests that there has been a slight expansion of the official acknowledgement exception as applied to a *Glomar* response. But the burden of proving an official acknowledgement remains exceedingly high. In the absence of similar statements about another classified program, the court's opinion is unlikely to limit the expansive use of *Glomar*.

B. *The Negative Impact of the "No Number, No List" Response*

The real trouble comes from the D.C. Circuit's approval of a "no number, no list" response. Under its reasoning, agencies may begin to routinely use a "no number, no list" response in instances where they are prevented from using a *Glomar* response but wish to release no substantive information about the documents. This may prove true even where an agency would have historically provided a *Vaughn* index or released documents. For example, after the D.C. Circuit's opinion in *Wolf*, the CIA released several complete and redacted documents on remand.[74] Under the reasoning of *ACLU v. CIA*, the CIA could have instead used a "no number, no list" response with the justification that anything more would reveal the detail of its interest in Gaitan and Colombian politics.

1. The Practical Difference Between a *Glomar* and "No Number, No List" Response

Although the issue of a "no number, no list" response was not raised in the merits briefing, the CIA suggested in its Motion for Remand that it would file one in lieu of a *Glomar* response. The ACLU responded that the

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70 Motion to Remand for Further Proceedings at 4-5, ACLU v. CIA, 710 F.3d 422 (No. 11-5320), ECF No. 1379895.

71 *Id.* at 5.

72 ACLU v. CIA, No. 11-5320, 1:10-cv-00436-RMC (D.C. Cir. July 2, 2012), ECF No. 1381688 (per curiam) (Order Denying Appellee's Motion to Remand for Further Proceedings).

73 *See* ACLU v, CIA, 710 F.3d at 433.

74 *See* Wolf v. CIA, 569 F. Supp. 2d 1, 5 (D.D.C. 2008).

CIA was "elevat[ing] form over substance. . . . [T]he CIA may have relabeled its argument here, but the argument is the same, and accordingly remand is unnecessary."[75]

The ACLU's argument was based on *Bassiouni v. CIA*,[76] the first reported FOIA case in which an agency attempted to use a "no number, no list" response.[77] The *Bassiouni* plaintiff submitted a FOIA request in 1999 seeking documents from the CIA about himself.[78] The CIA had admitted in 1983 that it had documents; in response to the 1999 request, it did not provide a *Glomar* response.[79] Instead, concerned that a list of documents mentioning Bassiouni and a list of "document-by-document exemptions for those whose contents are classified . . . would reveal details about intelligence-gathering methods," the CIA submitted a "no number, no list" response.[80] In assessing the propriety of such a response, the court did not see a substantive distinction between the two responses, as either way "[t]he public is as much in the dark about the agency's sources and methods as it ever was."[81] The court instead felt the two were "functionally" and "legally" identical—at least in that case—because the CIA could have made a *Glomar* response based on the fact that not all documents from 1983 were necessarily still retained by the CIA in 1999.[82]

In *ACLU v. CIA*, the D.C. Circuit rejected the *Bassiouni* reasoning because there is a material difference between the "no number, no list" response and a flat *Glomar* response.[83] The court was obviously correct, as there is a distinction between refusing to confirm whether records exist and admitting that there are records but releasing no details. But the practical differences bear out that the *Bassiouni* court was correct to conclude the two are "functionally" identical: no records are released and no useful information is gleaned.

Unlike a *Vaughn* index, which is a separate document that provides details about withheld documents and is itself supported by affidavits, a "no number, no list" response is only an affidavit. The one such affidavit the D.C. Circuit analyzed was filed in the New York litigation by John Bennett,

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75 *See* Plaintiffs-Appellants' Opposition to the CIA's Motion to Remand for Further Proceedings at 4-5, ACLU v. CIA, 710 F.3d 422 (No. 11-5320), ECF No. 1381308 (citations omitted).

76 392 F.3d 244 (7th Cir. 2004).

77 Subsequently, aside from the opinion in *ACLU v. CIA*, the New York litigation has spawned an opinion addressing a "no number, no list" response. *See* N.Y. Times Co. v. U.S. Dep't of Justice, 915 F. Supp. 2d 508, 550-51 (S.D.N.Y. 2013).

78 *Bassiouni*, 392 F.3d at 245.

79 *Id.*

80 *Id.*

81 *Id.* at 247.

82 *Id.* ("Indeed, unless the CIA is willing to concede that its records system is like a roach motel—papers go in, but they don't come out—disclosure that the agency had some documents identifying a person in Year t does not imply that it still has them in Year t + n.").

83 ACLU v. CIA, 710 F.3d 422, 433 (D.C. Cir. 2013).

the CIA's director of the National Clandestine Service.[84] The portion of the sworn declaration addressing the propriety of the "no number, no list" response is twenty-three pages long and consists of hypothetical explanations about how revealing any details about documents could harm national security. If the CIA admitted it had "several hundred records responsive" to the FOIA request, it would indicate that the CIA "had a significant interest in either actual or contemplated operations against" American citizens who were members of al-Qaeda, the subject of the New York FOIA request.[85] But "if the CIA possessed only a handful of documents responsive" to the FOIA request, it would show that "the Agency was not actively involved in these" activities, that it lacked relevant legal authorities, and/or that it had collected "only a small amount of intelligence" on the issue.[86]

On a practical level, compare the "no number, no list" response to the discussion about a *Glomar* response in *Wolf*. *Wolf* says that, for a court to determine if a *Glomar* response is appropriate, the court must look at the agency affidavits.[87] As the Bennett declaration shows, the "no number, no list" response is only an acknowledgement that documents exist and an explanation of why release of the information would hypothetically harm national security. The only difference is that the agency admits that records exist with a "no number, no list" response.

An acknowledgement that records exist can unquestionably aid public discourse in certain instances. But the requirements to get to that point are so strenuous that it practically renders the acknowledgment a nullity. By the time the D.C. Circuit invalidated the CIA's *Glomar* response in *ACLU v. CIA*, the President and two CIA directors had spoken publicly about drone strikes.[88] If a requester must wait until such high-level statements are made, what is the point in having an agency like the CIA merely admit that it has responsive documents? It provides no new information for the public discourse and will not actually result in the release of any non-public documents.

2. The Direct Harm to FOIA Litigation

More fundamentally, a "no number, no list" response undermines the entire point of FOIA litigation. Agencies assert national security exemptions to FOIA when they should not. Under the relevant executive order on

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84 *Id.* at 431. Notably the Bennett declaration describes a "no number, no list" response as having been "recognized in court cases," although the only cases at that point addressing the topic were the two *Bassiouni* opinions. Bennett Declaration, *supra* note 51, at 3 n.2.

85 Bennett Declaration, *supra* note 51, at 19-20.

86 *Id.* at 20.

87 Wolf v. CIA, 473 F.3d 370, 375-76 (D.C. Cir. 2007).

88 *See* ACLU v. CIA, 710 F.3d at 429-31.

classification, a document is only properly classified when "disclosure of the information reasonably could be expected to result in damage to the national security."[89] If a document, such as one confirming that the CIA has an interest in a widely publicized intelligence program involving drone strikes, would not reasonably be expected to actually harm national security, then by definition the document *cannot* be properly classified and must be released.[90] But without some information about what a document is and why it is withheld, a court cannot know whether it is unlawfully withheld.

FOIA litigation uses the adversarial process to ensure the court is in a position to adequately review an agency's decision to withhold a document.[91] A *Vaughn* index is so important because some explanation of what a document is and why it is withheld must be given for there to be a reasonable opportunity for a requester to ask the court to order the document's release. If a blanket "no number, no list" response is given, there is no opportunity for a requester to argue that any specific document should be released.

As a counterpoint to the idea that a *Vaughn* index would necessarily endanger national security, consider this actual entry from a *Vaughn* index produced by the Army in unrelated litigation that describes a classified document: "(S) Memorandum from The Judge Advocate General Regarding his legal opinions on the opinions posited by Department of Justice regarding current and significant operational law issues regarding enemey [sic] combatants held at Guantanamo Bay."[92] A litigant will likely have no more information than such an entry. It tells the public nothing except that an agency has written a memorandum contemplating the legal consequences of its actions. This example is perfect in the context of the drone strike FOIA litigation: does any person reasonably think that the CIA does not possess a memorandum addressing the legality of drone strikes?

At least compared to the bleak outlook of a "no number, no list" response, even a vague *Vaughn* index entry such as "classified memo" can provide at least some basis for a reasonable argument that the government has provided no evidence that the document's release would harm national

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89 Exec. Order No. 13,292, 68 Fed. Reg. 15,315, 15,315 (Mar. 28, 2003).

90 *Id.*

91 *See, e.g.*, Phillippi v. CIA, 546 F.2d 1009, 1013 (D.C. Cir. 1976).

92 U.S. Army, Army Vaughn Index – Bloche FOIA (on file with author). This *Vaughn* Index was prepared by the Army as part of ongoing litigation in *Bloche v. Department of Defense*. Civil Action No. 07-2050 (HHK/JMF), 2009 WL 1330388 (D.D.C. May 13, 2009). The material was withheld as "Fully exempt under (b)5 and (b)(1) given their [sic] classified, deliberative and advisory documents prepared prior to an agency decision and includes recommendations or express opinions on legal and policy matters before the Department of the Army." The purpose of that litigation is to seek documents addressing the complicity of medical professionals in the interrogation and torture of detainees.

security.[93] If nothing else, it can support a request for in camera review because the requester at least knows that the specific document exists.

Thus, the "no number, no list" response threatens to undermine the already precarious position occupied by requesters seeking documents in the national security realm. The D.C. Circuit has given its blessing to a response that is functionally no different than a traditional *Glomar* response, as the result for each is the same: no information about any document, let alone the content, is released.

CONCLUSION

In a time of overclassification and a concerted strategy by the Obama administration to use leaks to the media to tout the virtues of its national security endeavors, it is increasingly difficult to use FOIA to obtain review of agency actions. In *ACLU v. CIA*, the D.C. Circuit confronted an overly broad *Glomar* response in which the CIA claimed it could neither confirm nor deny even an interest in drone strikes.[94] In rejecting this *Glomar* invocation, the court slightly lowered the threshold required for an official acknowledgement to defeat a *Glomar* response. Although there was not a specific statement that the CIA itself had an interest in and records pertaining to drone strikes, the court found it "neither logical nor plausible" to believe otherwise.[95] But the threshold is still too high to be useful in other cases, as it is unlikely that the President and two directors of the CIA would publicly comment about other classified programs. By the time they feel it is necessary to make such official statements, the fact that such a program exists is likely an open secret.

Worse, by preemptively approving the CIA's use of a "no number, no list" response, the court has given agencies otherwise barred from a *Glomar* response a vehicle by which to avoid releasing any substantive information. The Bennett declaration in the New York litigation demonstrates that, just like a *Glomar* response, an affidavit asserting a "no number, no list" response is nothing more than doublespeak and hypotheticals. The result is the same because no information about any document is ever released. Although *Vaughn* indices have historically been used in FOIA cases involving classified information without endangering national security, agencies now have a viable alternative. Without any details about documents, it is impossible for a requester to make any substantive arguments that a specific doc-

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93 U.S. Navy, Navy Vaughn Index – Bloche FOIA (on file with author). This was document 18 in the Navy's *Vaughn* Index in *Bloche*, 2009 WL 1330388. It was withheld as "Fully exempt under (b)(1) and (b)(5) as classified SECRET and as predecisional agency document withheld as deliberative process, attorney work-product."

94 *See* ACLU v. CIA, 710 F.3d 422, 426 (D.C. Cir. 2013).

95 *Id.* at 430.

ument is being unlawfully withheld. And because the adversarial process is at the heart of FOIA litigation, this severely undermines the effectiveness of FOIA as a tool of open government. While the impact of *ACLU v. CIA* has yet to be felt on remand and as precedent in other cases, its reasoning has the potential to further limit FOIA litigation in the national security context.