COMMENT

PIERCING *GLOMAR*: USING THE FREEDOM OF INFORMATION ACT AND THE OFFICIAL ACKNOWLEDGMENT DOCTRINE TO KEEP GOVERNMENT SECRECY IN CHECK

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INTRODUCTION

On April 30, 2012, in an effort to live up to his pledge of transparency, President Barack Obama ordered White House Counterterrorism Advisor John Brennan to finally reveal one of the Administration's most secretive policies in its fight against terrorism.[1] Brennan approached the podium that day at the Woodrow Wilson International Center for Scholars in Washington, D.C. and adjusted the microphone.[2]

"So let me say it as simply as I can," Brennan said, reading carefully from a prepared script in front of a modest audience.[3] "Yes, in full accordance with the law, and in order to prevent terrorist attacks on the United States and to save American lives, the United States Government conducts targeted strikes against specific al-Qaeda terrorists, sometimes using remotely piloted aircraft, often referred to publicly as drones."[4]

Brennan characterized his remarks as an example of the Administration's openness[5] and as an opportunity to publicly acknowledge and explain the legality of a Central Intelligence Agency (CIA) drone program[6] that had previously been something of a secret weapon.[7]

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1. John O. Brennan, Assistant to the President for Homeland Sec. and Counterterrorism, The Ethics and Efficacy of the President's Counterterrorism Strategy at the Woodrow Wilson Int'l Ctr. for Scholars, (Apr. 30, 2012) [hereinafter Brennan Speech] (transcript available at http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy) (explaining that President Obama instructed representatives of the U.S. government to be more open with the American people about its counterterrorism efforts).

2. *Id.*

3. *Id.*

4. *Id.*; *see also* Jack Goldsmith, *John Brennan's Speech and the ACLU FOIA Cases*, LAWFARE (May 1, 2012, 11:12 AM), http://www.lawfareblog.com/2012/05/john-brennans-speech-and-the-aclu-foia-cases/ (noticing that Brennan was careful not to specifically mention the Central Intelligence Agency (CIA) in the speech, although "the only reasonable overall conclusion" from prior statements and context is "that the CIA is involved in the drone program").

5. Brennan Speech, *supra* note 1 ("I venture to say that the United States government has never been so open regarding its counterterrorism policies and their legal justification.").

6. Alternatively, the U.S. military operates a public drone program in active or once-active war zones, such as Iraq and Afghanistan. *See* Mark Landler, *Civilian Deaths Due to Drones Are Not Many, Obama Says*, N.Y. TIMES, Jan. 30, 2012, http://www.nytimes.com/2012/01/31/world/middleeast/civilian-deaths-due-to-drones-are-few-obama-says.html (comparing the CIA's covert drone program to the U.S. military's public drone program).

7. Brennan Speech, *supra* note 1 (noting how the practice of identifying specific members of al-Qaeda beyond "hot battlefields" and then targeting them with lethal force using drone aircraft has "captured the attention of many" and is the subject of the speech).

Brennan never directly uttered the letters "C-I-A" in his speech;[8] then again, he did not need to. For even before Brennan disclosed the government's involvement in the classified program on that day in April, his "secret" had been a secret only to those who had not picked up a newspaper, watched the news on cable television, or listened to the radio while driving to work.[9]

In the years prior to Brennan's speech, the *Washington Post* and the *New York Times* routinely wrote in detail about the Predator drones and their killing prowess, often quoting high-ranking government officials who were careful to request anonymity.[10] Brennan himself alluded to the classified program in public speeches, if only with a wink and a nod.[11] Even Leon Panetta, the former director of the CIA and current Secretary of Defense, made light of the secrecy surrounding the program's existence to a room full of sailors in Naples, Italy, joking, "Having moved from the CIA to the Pentagon, obviously I have a hell of a lot more weapons available to me in this job than I had in the CIA, although the Predators weren't bad."[12]

Yet, when the American Civil Liberties Union (ACLU) requested information about the CIA drone program last year through the Freedom of Information Act (FOIA),[13] the CIA stonewalled the request by refusing even to confirm or deny the existence of the documents.[14] Further, when

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8. *See* Goldsmith, *supra* note 4 ("The speech did not state which agencies are involved in targeted killing, and most notably did not say a word about the CIA.").

9. *See* Complaint at ¶¶ 26, 28, 35, N.Y. Times Co. v. Dep't of Justice, No. 11-civ-9336 (S.D.N.Y. Dec. 20, 2011) (highlighting the widespread publicity surrounding what is supposed to be a secret program).

10. *See, e.g.*, Karen DeYoung, *Secrecy Defines Obama's Drone War*, WASH. POST, Dec. 19, 2011, http://www.washingtonpost.com/world/national-security/secrecy-defines-obamas-drone-war/2011/10/28/gIQAPKNR5O_story.html; Scott Shane & Thom Shanker, *Strike Reflects U.S. Shift to Drones in Terror Fight*, N.Y. TIMES, Oct. 1, 2011, http://www.nytimes.com/2011/10/02/world/awlaki-strike-shows-us-shift-to-drones-in-terror-fight.html?scp=3&sq=charlie%20savage%20and%20aw-awlaki%20and%20drone%20and%20memo%20and%20legal%20counsel&st=cse.

11. John O. Brennan, Assistant to the President for Homeland Sec. and Counterterrorism, Speech at Harvard Law School—Brookings Conference 9/16/2011 (Sept. 17, 2011), *available at* http://www.youtube.com/watch?v=RruVxY2mxB4 (showing that when asked by a member of the audience whether the CIA has a drone program, Brennan suppressed a smirk and said, "If the agency did have such a program, I'm sure it would be done with the utmost care and precision . . . in accordance with the law and values. If such a program existed.").

12. Julian E. Barnes, *Panetta Makes Cracks About Not-So-Secret CIA Drone Program*, WALL ST. J. (Oct. 7, 2011, 12:32 PM), http://blogs.wsj.com/washwire/2011/10/07/panetta-makes-cracks-about-not-so-secret-cia-drone-program/ (calling the CIA's drone program possibly "the single worst kept secret in the U.S. government").

13. Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2006).

14. Letter from Delores M. Nelson, Info. & Privacy Coordinator, CIA, to Jonathan

the ACLU challenged the CIA's shadowy reply—known in FOIA litigation as the *Glomar* response[15]—its plea elicited little sympathy from the presiding United States district court judge.[16]

That the government would refuse to fulfill a FOIA request demanding properly classified information is no surprise.[17] Nor is it a shock that a federal court would defer to the U.S. government in matters of national security.[18] Most curious, however, is that the District Court for the District of Columbia could so easily allow the CIA to deny the very existence of documentation related to a program that had already been so widely publicized.

Opaque governmental secrecy is what President Barack Obama hoped to avoid when he issued a FOIA memorandum during his first month in office instructing agencies to "adopt a presumption in favor of disclosure."[19] However, almost four years into Obama's presidency and more than a decade after 9/11, FOIA plaintiffs still face insuperable roadblocks in their push for transparency.[20] The government has employed the *Glomar* response with increasing frequency since 9/11 to frustrate records requests,[21] often with good reason. The *Glomar* response has been used in

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Manes, American Civil Liberties Union (ACLU) (Mar. 9, 2010) (on file with the ACLU); *see* ACLU v. Dep't of Justice, 808 F. Supp. 2d 280, 284 (D.D.C. 2011) (clarifying that the CIA invoked FOIA Exemptions 1 and 3 as the basis for its response, and accepting its decision to issue a *Glomar* response that neither confirms nor denies the existence of any responsive record).

15. *ACLU*, 808 F. Supp. 2d at 286 (explaining that the *Glomar* response derives its name from the *Glomar Explorer*, a research vessel at issue in the case that first authorized the government to neither confirm nor deny the existence of records responsive to a FOIA request).

16. *See id.* at 284 (granting summary judgment to the CIA).

17. *See, e.g.*, Phillippi v. CIA (*Phillippi I*), 546 F.2d 1009, 1012 (D.C. Cir. 1976) (allowing the CIA to neither confirm nor deny the existence of any records pertaining to the *Glomar Explorer* vessel in the interest of national security).

18. Morley v. CIA, 508 F.3d 1108, 1124 (D.C. Cir. 2007) (finding that "little proof or explanation is required beyond a plausible assertion that information is properly classified" for the government to withhold documents under FOIA Exemption 1); *see, e.g.*, Halperin v. CIA, 629 F.2d 144, 148 (D.C. Cir. 1980) (conceding that judges lack the necessary expertise to second-guess government agencies in FOIA cases involving national security).

19. Memorandum for the Heads of Exec. Dep'ts & Agencies Concerning the Freedom of Info. Act, 74 Fed. Reg. 4683 (Jan. 26, 2009) [hereinafter Memorandum] ("The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails.").

20. *See, e.g.*, Nathan Freed Wessler, *"[We] Can Neither Confirm Nor Deny the Existence or Nonexistence of Records Responsive to Your Request": Reforming the* Glomar *Response Under FOIA*, 85 N.Y.U. L. REV. 1381, 1382 (2010) (detailing that the specific problem plaintiffs face with the *Glomar* response is that it deprives them of information essential to litigation).

21. *See* Amicus Curiae Brief of Nat'l Sec. Archive in Support of Appellants to Vacate and Remand at 9, Wilner v. Nat'l Sec. Agency, 592 F.3d 60 (2d Cir. 2009) (No. 08-4726-cv)

recent years to conceal covert operations in order to protect American lives, both at home and abroad.[22] The protection of classified information is undoubtedly a way in which our government keeps Americans safe.[23] Any breach, big or small, can jeopardize that mission.[24] But the government has also used *Glomar*ization to conceal information related to programs that no longer *feel* secret to the general public.[25]

Few considered the lasting effects of the *Glomar* response upon its inception in 1975. Now, nearly forty years later, overuse of the *Glomar* response has been well documented.[26] National security and intelligence agencies within the government must use *Glomar*ization responsibly so as not to let an exception to the FOIA undermine the Act. In turn, FOIA plaintiffs, federal courts, and Congress have a responsibility to enforce its proper use. The careful balance between secrecy and transparency can be achieved if the *Glomar* response is used only in responses to requests for information that would otherwise reveal covert operations—not to conceal information already in the public domain or "officially acknowledged."[27]

FOIA litigants for years have relied upon the "official acknowledgment" doctrine, hoping to compel the release of classified information that has reached the public domain.[28] Only recently, however, have they done so

("The *Glomar* Response has arisen in roughly 80 federal court opinions since 1976. Roughly 60 of those cases have been decided since September 11, 2001 . . . .").

22. *See* ACLU v. Dep't of Defense, 389 F. Supp. 2d 547, 564–65 (S.D.N.Y. 2005) (allowing the Government to issue a *Glomar* response when the plaintiff requested information about specific interrogation methods used by the CIA against members of al-Qaeda); Amnesty Int'l USA v. CIA, No. 07 Civ. 5435, 2010 WL 5421928, at *1 (S.D.N.Y. Dec. 21, 2010) (allowing a *Glomar* response when the plaintiff requested information about suspected terrorists detained and rendered by the United States).

23. *See* Devin S. Schindler, *Between Safety and Transparency: Prior Restraints, FOIA, and the Power of the Executive*, 38 HASTINGS CONST. L.Q. 1, 9 (2010) (suggesting that the need to protect confidential information from disclosure seems self-evident).

24. *See, e.g.*, Memorandum for the Heads of Exec. Dep'ts & Agencies from Jacob J. Lew, Dir., Office of Mgmt. & Budget (Nov. 28, 2010) (portraying the release of classified information by WikiLeaks as a significant compromise of national security).

25. *See, e.g.*, ACLU v. Dep't of Justice, 808 F. Supp. 2d 280, 294 (D.D.C. 2011), *appeal docketed sub nom.* ACLU v. CIA, No. 11-5320 (D.C. Cir. filed Nov. 9, 2011) (clarifying that the CIA director's acknowledgement that a program exists does not waive the CIA's ability to properly invoke *Glomar*).

26. Wessler, *supra* note 20, at 1397.

27. *Cf.* James X. Dempsey, *The CIA & Secrecy*, *in* A CULTURE OF SECRECY: THE GOVERNMENT VERSUS THE PEOPLE'S RIGHT TO KNOW 37, 47 (Athan G. Theoharis ed., 1998) ("*Glomar* should not apply to requests about a specific incident that is itself public in nature or to requests about noted public figures.").

28. Fitzgibbon v. CIA, 911 F.2d 755, 765 (D.C. Cir. 1990) (holding that the CIA did not waive its right to withhold documents pertaining to particular CIA station locations); Afshar v. Dep't of State, 702 F.2d 1125, 1129 (D.C. Cir. 1983) (finding that the specific information sought had not been in the public domain); *see* Pub. Citizen v. Dep't of State, 11

when also confronted with an additional layer of secrecy—the *Glomar* response.[29] One of the first plaintiffs to bring this argument to the D.C. Circuit won his case against the CIA, successfully puncturing the *Glomar* response[30] in what served as a rare and important win for purveyors of transparency. The government's *Glomar* response will again be challenged in three separate, but similar, lawsuits[31] pertaining to the drone program and the September 2011 death of al-Qaeda terrorist Anwar al-Awlaki, an American citizen reportedly killed by a CIA drone strike.[32] Whether the courts treat Brennan's drone speech as an "official acknowledgment" of the CIA's involvement will likely determine the outcome of those suits and shape future FOIA litigation in the national security context.

This Comment argues that agencies should not use a *Glomar* response to conceal the existence of documents that have already been widely acknowledged to exist. If agencies are unwilling to do so, federal courts and Congress should hold them to that standard. Part I examines the background of the FOIA and the recent strategy of attacking the *Glomar* response in court through the official acknowledgment doctrine. Part II analyzes why conflicting judicial decisions and a narrow application of the doctrine have led to inconsistent results in the *Glomar* context. Part III recommends administrative, judicial, and legislative changes to best

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F.3d 198, 199 (D.C. Cir. 1993) (holding that the State Department did not waive its right to withhold documents pertaining to a meeting between the U.S. Ambassador to Iraq and former Iraqi President Saddam Hussein).

29. Frugone v. CIA, 169 F.3d 772, 774 (D.C. Cir. 1999) (summarizing that the only issue before the court is whether the CIA may give a *Glomar* response where another Executive Branch agency has already acknowledged the existence of information pursuant to the request); *see* Wolf v. CIA (*Wolf II*), 473 F.3d 370, 378 (D.C. Cir. 2007) (mistakenly suggesting that the "official acknowledgement" standard had not been applied in the context of a *Glomar* response prior to *Wolf*).

30. *See Wolf II*, 473 F.3d at 372 (affirming the district court, except to the extent the CIA officially acknowledged the existence of records).

31. Complaint for Injunctive Relief at 1, ACLU v. Dep't of Justice, No. 12-civ-0794 (S.D.N.Y. Feb. 1, 2012) (requesting "the release of records related to the U.S. government's 'targeted killing' of U.S. citizens overseas"); Complaint at ¶ 11, N.Y. Times Co. v. Dep't of Justice, No. 11-civ-9336 (S.D.N.Y. Dec. 20, 2011) (requesting "memoranda that detail the legal analysis behind the government's use of targeted lethal force"); *see* ACLU v. Dep't of Justice, 808 F. Supp. 2d 280, 284 (D.D.C. 2011), *appeal docketed sub nom.* ACLU v. CIA, No. 11-5320 (D.C. Cir. filed Nov. 9, 2011) (requesting "records pertaining to the use of unmanned aerial vehicles ('UAVs')—commonly referred to as 'drones' and including the MQ-1 Predator and MQ-9 Reaper—by the CIA and the Armed Forces for the purpose of killing targeted individuals").

32. *See, e.g.*, *Multiple Terror Plots Linked to Anwar al-Awlaki*, CBSNEWS.COM (Sept. 30, 2011, 9:25 AM), http://www.cbsnews.com/stories/2011/09/30/501364/main20113812.shtml (describing al-Awlaki as an American-born cleric who was said to have inspired terrorist attacks against the United States for the Yemeni affiliate of al-Qaeda).

accommodate plaintiffs who wish to attack the *Glomar* response through the doctrine. Finally, this Comment concludes that, while classified information important to our national security should stay classified, using the *Glomar* response to conceal documentation that undoubtedly exists undermines not only the spirit of the FOIA but also the public's trust in the federal government.

I. BACKGROUND

Extensive government secrecy and a determined press corps in the 1960s hastened the creation of new and comprehensive legislation that emphasized a general right of access to government documents.[33] In 1966, the FOIA was born.[34] The Act, and the free flow of information that stemmed from it, have been properly described as a "check against corruption"[35] and the "bedrock of democracy."[36]

The public's right to information is not unlimited. A government agency may invoke one or more of the nine discretionary exemptions when it concludes records should not be disclosed.[37] Two such exemptions relate directly to matters of national security: Exemption 1 and Exemption 3.[38] Exemption 1 protects information that has been classified "under criteria established by an Executive order . . . in the interest of national defense or foreign policy" and properly classified pursuant to that order.[39] Executive Order 13,526, which President Obama signed less than one year into office, explicitly allows agencies to use a *Glomar* response following a request for records "whenever the fact of their existence or nonexistence is itself classified under this order or its predecessors."[40] Exemption 3 protects information that is prohibited from disclosure by other federal statutes.[41] The statute most commonly tethered to Exemption 3 in the national security realm is the National Security Act of 1947,[42] which requires the

33. *See* HERBERT N. FOERSTEL, FREEDOM OF INFORMATION & THE RIGHT TO KNOW: THE ORIGINS & APPLICATIONS OF THE FREEDOM OF INFORMATION ACT 39–40 (1999) (describing the collaboration between the news media and Congress in creating the FOIA).

34. *See id.* at 42 ("On July 4, 1966, President Lyndon Johnson signed the [FOIA] into law while vacationing at his Texas ranch.").

35. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

36. JACQUELINE KLOSEK, THE RIGHT TO KNOW xv (2009).

37. *Id.* at 16.

38. The seven remaining exemptions are less relevant to protecting classified information and will not be discussed at length in this Comment.

39. 5 U.S.C. § 552(b)(1) (2006).

40. Exec. Order No. 13,526, 75 Fed. Reg. 707, 719 (Jan. 5, 2010).

41. 5 U.S.C. § 552(b)(3).

42. Nat'l Sec. Act of 1947, Pub. L. No. 80-253, 61 Stat. 495 (codified at 50 U.S.C. § 401 (2006)).

Director of the CIA, and now the Director of National Intelligence, to protect intelligence "sources and methods."[43]

The judiciary's insistence that agencies construe exemptions narrowly means, in theory, that only the most sensitive and protected information is withheld.[44] As such, even embarrassing information and incriminating material are not beyond the FOIA's reach.[45] Since its inception, the FOIA has been used by the press to expose unlawful surveillance by the Federal Bureau of Investigation (FBI),[46] egregious waste in the Medicare system,[47] and mismanagement of government funds designated for economic recovery post-9/11.[48]

Yet, the enthusiasm with which the FOIA is followed often depends on the sitting president's ideology. For example, President Ronald Reagan significantly weakened the public's right to information through Executive Order 12,356 and several FOIA amendments adopted in the 1980s.[49] Secrecy only increased after 9/11 under President George W. Bush, whose Administration removed troves of data from government websites immediately following the attacks and encouraged agencies to "think twice before disclosing information to the public."[50]

Proponents of transparency had new reason for optimism when President Obama took office in 2009.[51] On his first full day in office, President Obama issued a FOIA Memorandum touting a "new era of open

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43. *Id.*

44. *See* Vaughn v. Rosen, 484 F.2d 820, 823 (D.C. Cir. 1973) ("This court has repeatedly stated that these exemptions from disclosure must be construed narrowly, in such a way as to provide the maximum access consonant with the overall purpose of the Act.").

45. Memorandum, *supra* note 19, at 4683 ("The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears.").

46. *See* KLOSEK, *supra* note 36, at 98 (explaining how the *San Francisco Chronicle* used the FOIA to show that the FBI conducted unlawful intelligence activities at the University of California–Berkeley).

47. *See id.* at 94 (noting how the *Washington Post* used the FOIA to show that Medicare officials knew a number of health care facilities were noncompliant with regulations and put some patients in serious risk).

48. *See id.* at 95 (mentioning that the *Associated Press* used the FOIA to show that economic recovery money intended for small businesses affected by 9/11 was mismanaged).

49. *See* FOERSTEL, *supra* note 33, at 51–53 (explaining how Executive Order 12,356 increased the ability of government agencies to withhold information under Exemption 1 and permitted officials to reclassify documents during the FOIA review process, and how subsequent FOIA amendments sought to exempt the CIA and FBI from disclosure).

50. KLOSEK, *supra* note 36, at 118–19 (citing a March 2002 memorandum from White House Chief of Staff Andrew H. Card, Jr.).

51. *Id.* at xi ("With the recent election of Barack Obama as president, there is hope for improved openness and better administration of the FOIA.").

Government."[52] This memorandum, slightly more than a page long and unmistakably clear, encouraged a "presumption of disclosure."[53] However, the Administration's implementation of the FOIA under this new policy continues to draw criticism from transparency watchdogs who claim that it has not lived up to its pledge for openness.[54] Lately, some of that criticism has stemmed from the government's tendency to neither confirm nor deny the existence of documents related to a program already widely acknowledged.[55] That potent response to a FOIA request is the subject of the following subsections. First, Subpart A will summarize the genesis of the *Glomar* response. Then, Subpart B will introduce the official acknowledgment doctrine. Finally, Subpart C will discuss the recent case law in which plaintiffs argued official acknowledgment when faced with a *Glomar* response.

A. The Glomar *Response Is Born*

The government first refused to confirm or deny the existence of documentation in response to a FOIA request in 1975, when a reporter from *Rolling Stone* magazine sought documents related to a suspected covert mission by the CIA and the Agency subsequently attempted to keep it a secret.[56] The tale is every bit the spy caper one would expect from one of the world's most secretive agencies, involving a sunken Soviet submarine, the reclusive Howard Hughes, and a submersible barge called the *Glomar Explorer*.[57]

When a Soviet submarine carrying nuclear weapons sank in the Pacific Ocean in 1968, the CIA enlisted Hughes, the troubled and eccentric billionaire, to finance an enormous platform and barge for the recovery mission.[58] The *Los Angeles Times* eventually learned of the mission and

52. Memorandum, *supra* note 19, at 4683.

53. *Id.*

54. *See, e.g.*, David Kravets, *It's Sunshine Week, But Obama's Transparency Record Is Cloudy*, WIRED.COM (Mar. 14, 2011, 4:11 PM), http://www.wired.com/threatlevel/2011/03/obama-transparency-clouded/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A%20wired27b%20%28Blog%20-%2027B%20Stroke%206%20%28Threat%20Level%29%29.

55. Glenn Greenwald, *ACLU Sues Obama Administration Over Assassination Secrecy*, SALON.COM (Feb. 2, 2012, 4:57 AM), http://www.salon.com/2012/02/02/aclu_sues_obama_administration_over_assassination_secrecy/singleton/ (detailing similar FOIA lawsuits filed by the ACLU and the *New York Times* against the United States).

56. *See* Phillippi v. CIA (*Phillippi II*), 655 F.2d 1325, 1327 (D.C. Cir. 1981) (explaining that Harriet Phillippi requested documents related to attempts by the CIA to dissuade the media from writing about the *Glomar Explorer*).

57. *See,* Dempsey, *supra* note 27, at 46 (providing the history of the *Glomar* response).

58. *Id.*

published an incomplete account of the event in 1975.[59] The CIA immediately scrambled to dissuade other media outlets from reporting the story.[60] When word of that cover-up also reached the press, the CIA received several FOIA requests seeking documents related to the suspected covert project.[61] One such request came from the Military Audit Project, a nonprofit organization tasked to investigate the expenditure of taxpayers' money on national security.[62] Another came from Harriet Phillippi, the reporter from *Rolling Stone*.[63] Each filed a lawsuit in the District Court for the District of Columbia challenging the CIA's novel reply that it could neither confirm nor deny the existence of responsive records.[64]

In *Phillippi v. CIA*[65] and *Military Audit Project v. Casey*,[66] the D.C. Circuit formally recognized the logic of the CIA's response, accepting that the existence or nonexistence of the requested records was itself a classified fact protectable by FOIA Exemptions 1 and 3.[67] Despite the extraordinary steps it took to protect the covert project, the CIA eventually relented in its secrecy and released much of the requested information relating to the *Glomar Explorer*.[68] Even so, *Glomar*ization became well-established within FOIA case law soon thereafter.[69]

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59. Wessler, *supra* note 20, at 1387.

60. Dempsey, *supra* note 27, at 46.

61. *Id.*

62. *See* Military Audit Project v. Casey, 656 F.2d 724, 730 n.11 (D.C. Cir. 1981) (describing the Military Audit Project as a nonprofit organization managed by a thirteen-member board of directors).

63. *See* Phillippi v. CIA (*Phillippi II*), 655 F.2d 1325, 1327–28 (D.C. Cir. 1981).

64. *See* Phillippi v. CIA (*Phillippi I*), 546 F.2d 1009, 1012 (D.C. Cir. 1976); *Military Audit Project*, 656 F.2d at 729–30.

65. 546 F.2d 1009 (D.C. Cir. 1976).

66. 656 F.2d 724 (D.C. Cir. 1981).

67. *See* Dempsey, *supra* note 27, at 46 ("In its rulings, the appeals court concluded that the FOIA permitted the agency to avoid having to admit or deny the existence of responsive records, in essence allowing the government to treat the mere existence of the records as classified."); *see also Phillippi I*, 546 F.2d at 1012 (recognizing the question on appeal is not whether the government may neither confirm nor deny the existence of a document but whether the government must support its position based on the public record); *Military Audit Project*, 656 F.2d at 731 (summarizing that the district court required the government to submit more information as to why it could not confirm or deny the existence of the requested documents).

68. *See* Dempsey, *supra* note 27, at 46–47 (arguing the government's changed position in releasing information about the *Glomar Explorer* "should have prompted the courts to be more skeptical of executive national security claims").

69. *See* McNamera v. Dep't of Justice, 974 F. Supp. 946, 957–58 (W.D. Tex. 1997) (allowing the FBI and INTERPOL to use a *Glomar* response in order to protect a private individual's privacy interest); Dep't of Justice, FOIA Update Vol. VII, No. 1 (1986), http://www.justice.gov/oip/foia_updates/Vol_VII_1/page3.htm (encouraging law enforcement agencies to use the *Glomar* response under Exemption 7(C) when it is

B. The Official Acknowledgment Doctrine

Federal agencies sometimes waive their right to a valid FOIA exemption when what they wish to withhold has already entered the public domain.[70] While FOIA plaintiffs may be tempted to make such arguments, official acknowledgment is actually exceptionally hard to prove in court. The D.C. Circuit, which oversees more FOIA litigation than any other circuit court,[71] developed an exacting test to determine when information has been officially acknowledged.[72] The information requested must be as specific as the information previously released, must match the information previously disclosed, and must already have been made public through an official and documented disclosure.[73]

The D.C. Circuit has taken these requirements to fashion an especially narrow sense of waiver—all in the name of national security. The Circuit is dotted with case law discouraging plaintiffs from making an official acknowledgment argument when an agency invokes Exemption 1.[74] The same is true in other circuits.[75] For instance, an acknowledgment by one

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determined that there is a cognizable privacy interest at stake and that there is insufficient public interest in disclosure to outweigh it); *see, e.g.*, Gardels v. CIA, 689 F.2d 1100, 1103 (D.C. Cir. 1982) ("We have likewise agreed that an agency may refuse to confirm or deny the existence of records where to answer the FOIA inquiry would cause harm cognizable under an FOIA exception."); *see also* Antonelli v. FBI, 721 F.2d 615, 618 (7th Cir. 1983) (approving the FBI's use of the *Glomar* response in the privacy and law enforcement context under Exemptions 6 and 7).

70. *See* Afshar v. Dep't of State, 702 F.2d 1125, 1130 (D.C. Cir. 1983) (describing the willingness of some courts to accept the argument that "publicly known information cannot be withheld under exemptions 1 and 3").

71. Lila L. Seal, Comment, *The Future of the Freedom of Information Act's Deliberative Process Exemption and Disclosure of Computerized Federal Records After* Petroleum Information Corp. v. United States Department of the Interior, 71 DENV. U. L. REV. 719, 724 (1994) ("Since the passage of FOIA, the D.C. Circuit has delivered more FOIA decisions than any other circuit."); *see* Patricia M. Wald, *". . . Doctor, Lawyer, Merchant, Chief,"* 60 GEO. WASH. L. REV. 1127, 1147 (1992) (noting that in 1990, for example, the D.C. Circuit "processed forty-one out of a national total of ninety-three FOIA appeals").

72. *See* Fitzgibbon v. CIA, 911 F.2d 755, 765 (D.C. Cir. 1990) (identifying the three criteria set forth in *Afshar).*

73. *See id.* (reversing the district court by holding the particular location of a CIA station had not been officially acknowledged).

74. Pub. Citizen v. Dep't of State, 11 F.3d 198, 203 (1993) (holding that congressional testimony from a former U.S. Ambassador to Iraq about her meeting with Iraqi President Saddam Hussein did not constitute an official acknowledgement because it was not as specific as the documents Public Citizen requested); *see, e.g.*, *Afshar*, 702 F.2d at 1133–34 (holding that books written by former CIA agents and approved by the Agency's publication review department were not an official acknowledgement).

75. *See, e.g.*, Wilner v. Nat'l Sec. Agency, 592 F.3d 60, 70 (2d Cir. 2009) (rejecting the official acknowledgement argument in reference to the government's Terrorist Surveillance

government agency that the CIA possessed responsive records did not prevent the CIA from withholding essentially the same information under Exemption 1.[76] In another instance, the D.C. Circuit allowed the CIA to invoke Exemption 1 in reply to a request for information that had already been revealed in a book written by a former CIA employee and reviewed by the Agency.[77]

The resistance of the D.C. Circuit to finding official acknowledgment even when information has entered the public domain is an indication of how firmly it defers to the federal government in matters of national security. The D.C. Circuit rarely misses an opportunity to note this deference[78] and admit its reluctance to challenge the government's "unique insights" on national security and foreign relations.[79] As a result, a FOIA requester litigating an Exemption 1 case begins at a distinct disadvantage.[80]

C. Glomar + *Official Acknowledgment* = *?*

Any time the government's *Glomar* response is challenged in court, the defendant agency must justify its response with a responsive declaration.[81] Absent a showing of bad faith in the agency declaration, one of the only remaining ways to puncture the *Glomar* response is to argue that the requested documents have already been officially acknowledged.[82] Only in the past dozen years, however, have courts given much credence to this argument.[83] The first plaintiff to win on this argument in an appellate

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Program, despite the fact the public was aware of the program's existence).

76. Frugone v. CIA, 169 F.3d 772, 774 (D.C. Cir. 1999).

77. *Afshar*, 702 F.2d at 1133.

78. King v. Dep't of Justice, 830 F.2d 210, 217 (D.C. Cir. 1987) ("[T]he court owes substantial weight to detailed agency explanations in the national security context.").

79. *See* Larson v. Dep't of State, 565 F.3d 857, 864 (D.C. Cir. 2009); *see also* Ctr. for Nat'l Sec. Studies v. Dep't of Justice, 331 F.3d 918, 926–27 (D.C. Cir. 2003) ("It is . . . well-established that the [J]udiciary owes some measure of deference to the [E]xecutive in cases implicating national security, a uniquely executive purview.").

80. *See* Jessica Fisher, Note, *An Improved Analytical Framework for the Official Acknowledgement Doctrine: A Broader Interpretation of "Through an Official and Documented Disclosure,"* 54 N.Y.L. SCH. L. REV. 303, 318 (2010) (advocating that the narrow interpretation of "official and documented disclosure" by the courts "creates the potential for censorship to become the starting point, rather than the limited exception").

81. Wilner v. Nat'l Sec. Agency, 592 F.3d 60, 68 (2d Cir. 2009).

82. *See id.* ("In evaluating an agency's *Glomar* response, a court must accord 'substantial weight' to the agency's affidavits, 'provided [that] the justifications for nondisclosure are not controverted by contrary evidence in the record or by evidence of . . . bad faith.'" (alterations in original) (quoting Minier v. CIA, 88 F.3d 796, 800 (9th Cir. 1996))).

83. Nat'l Sec. Archive v. CIA, No. 99-1160, slip op. at 11 (D.D.C. July 31, 2000) (holding that the CIA officially acknowledged the existence of requested biographies and therefore waived its FOIA exemptions); *see* Wolf v. CIA (*Wolf II*), 473 F.3d 370, 380 (D.C.

court, a writer seeking an acknowledgment that the CIA kept records on a Colombian politician, successfully defeated the CIA's *Glomar* response in 2007 as a pro se litigant.[84] In *Wolf v. CIA*,[85] the D.C. Circuit found that the CIA was not entitled to use a *Glomar* response because it had officially acknowledged the existence of records about Jorge Eliecer Gaitan during a congressional hearing in 1948.[86] The court then remanded the case to the district court to determine whether the CIA had to disclose the officially acknowledged records or whether those records could still be withheld in whole or in part pursuant to Exemptions 1 and 3.[87]

While Paul Wolf seems to be the most well-known plaintiff to successfully challenge the government's use of the *Glomar* response, he was not the first. In 2000, the National Security Archive successfully defeated the CIA's *Glomar* response in the District Court for the District of Columbia by using the official acknowledgment doctrine.[88] In an unpublished opinion, district court Judge Colleen Kollar-Kotelly ruled that the CIA waived its opportunity to use a *Glomar* response when the information had been officially made public, noting that "there is no benefit from continued denial."[89] Judge Kollar-Kotelly wrote that the CIA's revelation that it created biographies on *all* world leaders prevented the Agency from using a *Glomar* response to a FOIA request seeking the release of biographies of several former leaders of Eastern European countries.[90]

Although *Wolf* and *National Security Archive* seemingly provide a winning game plan for FOIA litigants, courts have been unsympathetic to those who use the official acknowledgment argument to challenge the government's *Glomar* response. In *Wilner v. National Security Agency*,[91] which concerned the National Security Agency's (NSA's) Terrorist Surveillance Program, the United States Court of Appeals for the Second Circuit ruled that the government "may provide a *Glomar* response to FOIA requests for information gathered under a program whose existence has been publicly revealed."[92] In distinguishing *Wilner* from *Wolf*, the court reasoned that "[a]n agency only loses its ability to provide a *Glomar* response when the existence or nonexistence of the particular records covered by the *Glomar*

Cir. 2007) (holding that the CIA officially acknowledged records pertaining to a former Colombian presidential candidate).

84. *See generally Wolf II*, 473 F.3d 370.
85. *Id.*
86. *Id.* at 379.
87. *Id.* at 380.
88. *See Nat'l Sec. Archive*, No. 99-1160, slip op. at 17.
89. *Id.* at 18.
90. *Id.* at 17.
91. 592 F.3d 60 (2d Cir. 2009).
92. *Id.* at 69.

response has been officially and publicly disclosed."[93]

Perhaps the narrowest interpretation of the official acknowledgment doctrine in the context of *Glomar*ization occurred in 1999, when the D.C. Circuit upheld the CIA's use of the *Glomar* response even when another federal agency seemed to acknowledge the information sought.[94] In *Frugone v. CIA*,[95] the court said an acknowledgment by the Office of Personnel Management (OPM) that the CIA had records responsive to the plaintiff's FOIA inquiry did nothing to prevent the CIA from invoking *Glomar* in response to a request for those records.

> [Frugone's] argument begins and ends with the proposition that the Government waives its right to invoke an otherwise applicable exemption to the FOIA when it makes an "official and documented disclosure" of the information being sought. That observation is inapplicable to the present case, however, for we do not deem "official" a disclosure made by someone other than the agency from which the information is being sought.[96]

Instead, the D.C. Circuit dismissed OPM's acknowledgment as "informal, and possibly erroneous."[97] In the court's interpretation of the official acknowledgment doctrine, only the CIA could waive its own right to invoke an exemption to the FOIA.[98] The *Frugone* holding afforded executive agencies an added layer of protection from the FOIA: whereas agencies once waived exemption protection to information "revealed by an official of the United States in a position to know of what he spoke," *Frugone* effectively limited the scope of officials who could provide official acknowledgment in the *Glomar* context.[99]

II. ANALYSIS

The *Glomar* response is appropriate when the existence or nonexistence of government records is itself a classified fact.[100] Every appellate court that

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93. *Id.* at 70.

94. *See* Frugone v. CIA, 169 F.3d 772, 774 (D.C. Cir. 1999) (declaring that an acknowledgement is not an *official* disclosure when "made by someone other than the agency from which the information is being sought").

95. 169 F.3d 772 (D.C. Cir. 1999).

96. *Id.* at 774 (citation omitted).

97. *Id.* at 775.

98. *Id.*

99. *Compare* Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1370 (4th Cir. 1975) (contrasting mere rumors and speculation by reporters with an official acknowledgment by a reliable government official), *with Frugone*, 169 F.3d at 774 ("[W]e do not deem 'official' a disclosure made by someone other than the agency from which the information is being sought."), *and* Nat'l Sec. Archive v. CIA, No. 99-1160, slip op. at 13 (D.D.C. filed July 31, 2000) ("Only an official disclosure by the CIA can waive a CIA exemption.").

100. *See, e.g.*, Wilner v. Nat'l Sec. Agency, 592 F.3d 60, 68 (2d Cir. 2009) ("The *Glomar*

has considered the issue agrees that the *Glomar* response is appropriate in the national security context—even if the FOIA does not say so directly.[101] Courts have justly permitted the government to neither confirm nor deny the existence of documents related to a specific interrogation technique[102] and the treatment of detainees in Afghanistan.[103] Courts have rightly blessed a *Glomar* response when the seeker of information wanted an acknowledgment, in the form of a FOIA response, as to whether he had been surveilled by the NSA.[104] Clearly then, the permissibility of *Glomar*ization has been an important development in the protection of properly classified information.

However, with such power to conceal comes the possibility of overuse. Scholars note that the *Glomar* response is effective only when there is integrity and consistency in its use, both when the government has records it needs to conceal and when it does not.[105] Further, the frequency with which the government uses the *Glomar* response is tangential to the long-running lament that the government over-classifies information.[106]

Such overarching secrecy is problematic—and not only for those who request information through the FOIA. For an agency to deny what is already widely known undermines our collective trust in government.[107] Thus, Part II will first explain why the government should use a *Glomar* response sparingly. Then, this Part will analyze the inconsistent judicial

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doctrine is well settled as a proper response to a FOIA request because it is the only way in which an agency may assert that a particular FOIA statutory exemption covers the 'existence or nonexistence of the requested records' in a case in which a plaintiff seeks such records."

101. *See* Wessler, *supra* note 20, at 1391; Bassiouni v. CIA, 392 F.3d 244, 246 (7th Cir. 2004).

102. Amnesty Int'l USA v. CIA, No. 07 Civ. 5435, 2010 WL 5421928, at *1–2 (S.D.N.Y. Dec. 21, 2010).

103. ACLU v. Dep't of Def., 389 F. Supp. 2d 547, 565 (S.D.N.Y. 2005).

104. Moore v. Obama, No. 09-5072, 2009 WL 2762827, at *1 (D.C. Cir. Aug. 24, 2009).

105. *See, e.g.*, Wessler, *supra* note 20, at 1396 (recognizing that a *Glomar* response is effective only when the requester believes that the government agency issues identical refusals both when it has responsive records and when it does not).

106. *See* Martin E. Halstuk, *When Secrecy Trumps Transparency: Why the OPEN Government Act of 2007 Falls Short*, 16 COMMLAW CONSPECTUS 427, 461 (2008) (discussing the history of federal agencies overusing the "classified" stamp to create "secret" documents).

107. Nat'l Sec. Archive v. CIA, No. 99-1160, slip op. at 17 (D.D.C. July 31, 2000) ("[T]he CIA has already admitted that it holds a full deck of cards . . . Now the CIA is attempting to deny that it has specific cards. To hold that the CIA has the authority to deny information that it has already admitted would violate the core principles of FOIA without providing any conceivable national security benefit. Indeed, national security can only be harmed by the lack of trust engendered by a government denial of information that it has already admitted.").

decisions in the *Glomar* context.

A. Glomar *Is an Indulgence that the Government Should Use Sparingly*

While there is merit in a FOIA response that allows the government to refuse to confirm or deny the existence of documents, government agencies have often extended the *Glomar*ization concept beyond its logical limits.[108] What began humbly as a rare government indulgence has turned into an increasingly common response since 9/11.[109] Some might even say it has become routine.[110] But it was not the intent of the D.C. Circuit—nor Congress, for that matter[111]—for the *Glomar* response to explode as it has.[112] The *Phillippi* court prescribed "carefully crafted" procedures for government agencies that withhold information through the FOIA and are unable to acknowledge whether responsive records exist.[113] An agency that uses the *Glomar* response and is challenged in court must provide a detailed public declaration explaining the basis for its claim that it can neither confirm nor deny the existence of the requested records.[114] The agency's arguments are then "subject to testing" by the plaintiff, "who should be allowed to seek appropriate discovery when necessary."[115] Finally, "[o]nly after the issues have been identified by this process" may the district court order an in camera review of a classified declaration.[116]

Such judicial supervision would not be so problematic if there were not inherent flaws in the oversight procedures. As noted, the only way that the court reviews an agency's use of the *Glomar* response is through public and,

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108. *See* Danae J. Aitchison, Comment, *Reining in the* Glomar *Response: Reducing CIA Abuse of the Freedom of Information Act*, 27 U.C. DAVIS L. REV. 219, 239 (1993) (highlighting Hunt v. CIA, 981 F.2d 1116 (9th Cir. 1992), as an example of when the CIA abused the *Glomar* response).

109. *See* Wessler, *supra* note 20, at 1388 (explaining that the *Glomar* response had not been addressed in the FOIA or contemplated by Congress when Congress passed the Act).

110. Dempsey, *supra* note 27, at 47 ("Indeed, 'Glomar' responses have become an agency routine.").

111. *See* 132 Cong. Rec. 29,621 (1986) (paraphrasing Phillippi v. CIA (*Phillippi I*), 546 F.2d 1009 (D.C. Cir. 1976) by describing the "manner in which the Federal courts . . . review agency refusals to acknowledge or deny the existence of records").

112. *See Phillippi I*, 546 F.2d at 1013 (adopting procedures consistent with the judiciary's "congressionally imposed obligation to make a *de novo* determination of the propriety" of a *Glomar* response).

113. John Y. Gotanda, Glomar *Denials Under FOIA: A Problematic Privilege and a Proposed Alternative Procedure of Review*, 56 U. PITT. L. REV. 165, 175–76 (1994) (observing that such procedures are meant to safeguard the adversarial process).

114. *Phillippi I*, 546 F.2d at 1013.

115. *Id.*

116. *See id.*

in rare circumstances, in camera declarations.[117] Yet public declarations have become increasingly boilerplate since *Phillippi*[118] and are afforded substantial weight by the courts.[119] Ultimately, courts will likely uphold an agency's *Glomar* response so long as the justifications for nondisclosure are described in "reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemptions, and show that the justifications are not controverted by contrary evidence in the record or by evidence of . . . bad faith."[120] Five circuits have already adopted the *Glomar* response as law.[121] As such, it becomes more accepted with each passing decision. The intense deference shown by courts to government agencies that use the *Glomar* response is one reason why the *Glomar* response is so frequently approved.[122]

B. Dueling Decisions

The deference afforded to the government in matters of national security has created what some have called a new "catch-all 'Tenth Exemption' for intelligence records."[123] At the very least, it has emboldened the government to use the *Glomar* response even when the existence of requested records is already quite obvious.[124] The D.C. Circuit's holding in *Frugone* may be the best such example. Eduardo Frugone said that he served the CIA as a covert employee for fifteen years.[125] In 1990, after he left the CIA, Frugone contacted the Agency asking for a clarification of his retirement status.[126] He received in return written letters from OPM confirming his status as a former CIA employee, providing details

117. *See* Gotanda, *supra* note 113, at 175–76.

118. *See* Wessler, *supra* note 20, at 1392 (suggesting that agencies limit their public affidavits because of the sensitive nature of any existing information).

119. *See* Hunt v. CIA, 981 F.2d 1116, 1119 (9th Cir. 1992).

120. *Id.*

121. *See* Martin Flumenbaum & Brad S. Karp, *Second Circuit Adopts 'Glomar' Doctrine*, 243 N.Y. L.J., Feb. 24, 2010, *available at* LEXIS (listing the First, Second, Seventh, Ninth, and D.C. Circuits as those that have accepted the legality of the *Glomar* response).

122. *See* FOERSTEL, *supra* note 33, at 175 (commenting on the great deference afforded by courts to the intelligence agencies and noting the court-created *Glomar* response is the most prominent manifestation).

123. Brief of Appellants at 4, Wilner v. Nat'l Sec. Agency, 592 F.3d 60 (2d Cir. 2009) (No. 08-4726-cv) (advocating that *Glomar* "must be narrowly construed and sparingly applied"); *see* FOERSTEL, *supra* note 33, at 175 (naming the FBI, CIA, and National Security Agency (NSA) as the biggest benefactors of this deference).

124. *See* Dempsey, *supra* note 27, at 47 (arguing that the CIA has carried its use of *Glomar* to "absurd ends").

125. Brief for Appellant at 3, Frugone v. CIA, 169 F.3d 772 (D.C. Cir. 1999) (No. 97-5199).

126. *Id.*

pertaining to his retirement, and advising him that the CIA retained all of his employment records.[127] When Frugone wrote to the CIA directly, he received a cryptic response from an otherwise-unidentified "Office of Independent Contractor Programs," which determined he was not eligible for retirement benefits.[128] The reply compelled Frugone to make a FOIA request to the CIA asking for all records about his employment with the Agency.[129] The CIA then refused to confirm or deny that it held any such records.[130]

In court, the D.C. Circuit opened its opinion by noting the modesty of Frugone's claim: "No longer does he demand all records concerning himself . . . ; he would now be satisfied with an acknowledgment that the CIA employed him at one time and that it currently has custody of his personnel file."[131] The court then rejected his appeal by ruling that an acknowledgment by OPM did not create an official disclosure.[132]

The D.C. Circuit explained its decision by recognizing the "untoward" consequences that could befall the United States if the CIA were forced to confirm or deny Frugone's employment status.[133] According to the court, an acknowledgment from the CIA could cause even greater diplomatic tension between the United States and Chile than would an acknowledgment by another agency within the government.[134] Yet, without specific discussion as to how release would endanger national security, the court's reasoning seemed to turn more on a technicality—the government agency that had disclosed the information—than any sort of realized risk.[135]

An equally rigid interpretation of the official acknowledgment doctrine in the context of *Glomar* was offered in *Wilner* in 2009.[136] In one sweeping, eighteen-page opinion, the Second Circuit managed to simultaneously adopt the *Glomar* response into its case law while limiting any chance that it

127. *Id.*

128. *Frugone*, 169 F.3d at 773.

129. *Id.*

130. *Id.* at 773–74.

131. *Id.* at 774.

132. *Id.*

133. *See id.* at 775 (relying on the CIA's affidavit that "persuasively" described the consequences of the CIA having to confirm or deny statements made by another agency).

134. *Id.*

135. *Cf.* Fisher, *supra* note 80, at 314 (criticizing the narrow interpretation of the official acknowledgment doctrine in Hudson River Sloop Clearwater, Inc. v. Dep't of Navy, 891 F.2d 414 (2d Cir. 1989) because the decision not to release information pursuant to the FOIA turned on the employment status of a military official).

136. *See* Flumenbaum & Karp, *supra* note 121 (summarizing that the Second Circuit decision sets a high bar for those attempting to obtain records relating to surveillance in matters of national security).

could be genuinely challenged.[137] The *Wilner* case involved twenty-three plaintiffs—all of whom represented detainees at Guantanamo Bay, Cuba—who sought documentation from the NSA and the Department of Justice as to whether their communications had been intercepted under the Terrorist Surveillance Program.[138] The agencies provided a *Glomar* response.[139]

The *Wilner* plaintiffs leaned heavily on the official acknowledgment doctrine throughout litigation.[140] Yet, despite the plaintiffs' claims that at least four members of the Executive Branch had officially acknowledged the existence of the program,[141] the court found the argument unpersuasive. The court explained its conclusion by stating, "The fact that the public is aware of the program's existence does not mean that the public is entitled to have information regarding the operation of the program . . . ."[142] Instead, an agency loses its ability to invoke the *Glomar* response when the existence or nonexistence of "particular records" has been "officially . . . disclosed."[143]

If *Frugone* and *Wilner* represent the narrow end of the official acknowledgment spectrum, then *Wolf* can be found on the broad end. When the D.C. Circuit found the CIA's *Glomar* response invalid in *Wolf* because of prior official acknowledgment, plaintiff Paul Wolf called it a "small victory."[144] Indeed, Wolf had some reason for a muted celebration. Of the thirteen documents the CIA officially acknowledged it possessed, he received only two.[145] Wolf, an author and attorney, thought the CIA

137. *See* Wilner v. Nat'l Sec. Agency, 592 F.3d 60, 68–69 (2d Cir. 2009) (joining its sister circuits in adopting the *Glomar* principle while holding that an agency may use *Glomar* in "response to FOIA requests for information gathered under a program whose existence has been publicly revealed").

138. *Id.* at 65.

139. *Id.* at 66–67.

140. *See* Brief of Appellants at 18–19, *Wilner*, 592 F.3d 60 (No. 08-4726-cv) (explaining the surveillance program had been officially acknowledged and discussed by all key members of the Executive Branch); Plaintiff's Memorandum in Opposition to Defendant's Partial Motion for Summary Judgment Regarding the *Glomar* Response at 19–20, Wilner v. Nat'l Sec. Agency, 2008 WL 2567765 (S.D.N.Y. 2008) (No. 07-civ-3883) (using the official acknowledgement doctrine as its third argument as to the insufficiency of NSA's *Glomar* response).

141. *See* Brief of Appellants at 18–19, *Wilner*, 592 F.3d 60 (No. 08-4726-cv) (listing President Bush, then-Attorney General Alberto Gonzales, CIA Director Michael Hayden, and then-Assistant Attorney General for the Department of Justice Office of Legislative Affairs William Moschella).

142. *Wilner*, 592 F.3d at 70.

143. *Id.*

144. E-mail from Paul Wolf, Plaintiff, Wolf v. CIA (Jan. 16, 2007, 7:26 PM), *available at* http://newsgroups.derkeiler.com/Archive/Soc/soc.culture.colombia/2007-01/msg00015.html.

145. Wolf v. CIA, 569 F. Supp. 2d 1, 5 (D.D.C. 2008), *remanded from* 473 F.3d 370 (D.C.

possessed many more documents related to his search that it did not disclose.[146] But what most troubled Wolf was that a case bearing his name would ultimately stand for the further erosion of the FOIA.[147] An e-mail to a group of supporters on the day of the decision captured his thoughts:

> This case sets the precedent that even if you can prove that documents exist, an agency (not just the CIA but any agency of government) claiming threats to national security does not have to process your Freedom of Information Act request, except to give you copies of what you already have. Thanks a lot.[148]

But Wolf did not give himself enough credit for his victory, however modest. By forcing the CIA to reveal documents that it had withheld through a *Glomar* response, Wolf became only the second FOIA plaintiff to defeat the government's *Glomar* response through the official acknowledgment doctrine in the national security context.[149] The D.C. Circuit held that the CIA waived its ability to provide a *Glomar* response as to the specific records concerning former Colombian politician Jorge Eliecer Gaitan that had already been officially acknowledged in congressional testimony.[150] The court relied on an affidavit from Wolf that alleged then-CIA Director Admiral R.K. Hillenkoetter read from such records in testimony before Congress in 1948.[151] While the district court had ruled against Wolf because it concluded that Hillenkoetter never made a specific reference in his testimony to reading from any report or other official document,[152] the appellate court disagreed.[153] The D.C. Circuit found that Hillenkoetter explicitly read from some excerpts concerning Gaitan and suggested the excerpts were CIA documents containing information typically passed onto the Department of State.[154] "Because the '*specific information at issue*' . . . is the existence *vel non* of 'records about Jorge Eliecer Gaitan,' . . . Hillenkoetter's testimony confirmed the existence

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Cir. 2007).

146. E-mail from Paul Wolf, *supra* note 144.

147. *Id.*

148. *Id.*

149. *See* Wessler, *supra* note 20, at 1394 n.82 (listing Wolf v. CIA (*Wolf II*), 473 F.3d 370 (D.C. Cir. 2007) and Nat'l Sec. Archive v. CIA, No. 99-1160, slip op. (D.D.C. filed July 31, 2000), as the successful challenges to the government's *Glomar* response).

150. *Wolf II*, 473 F.3d at 378.

151. *Id.* at 373.

152. *See* Wolf v. CIA (*Wolf I*), 357 F. Supp. 2d 112, 118 (D.D.C. 2004) ("[T]here is no indication from the transcript that the CIA director was reading from anything more than a prepared statement for the hearing.").

153. *Wolf II*, 473 F.3d at 379 (quoting *Wolf I*, 357 F. Supp. 2d at 118).

154. *Id.*

thereof."[155] Therefore, the court held, the CIA's *Glomar* response did not suffice.[156]

The broadest interpretation of the official acknowledgment doctrine in the *Glomar* context occurred in *National Security Archive*,[157] in which the District Court for the District of Columbia held that the CIA had officially acknowledged it kept biographies on specific European heads of state by admitting that it kept biographies on *all* world leaders.[158] Even so, the court took pains to reemphasize the limits of its holding and the "high hurdle" a plaintiff must overcome to successfully prove an agency has waived its FOIA exemption through official acknowledgment.[159]

The subtle interplay between freedom of information and national security, between official acknowledgment and public awareness, and between *Wilner* and *Wolf,* is no clearer to the courts than it is to scholars. Such subtlety (at best) or ambiguity (at worst) leads to incongruous results and is the reason why the ACLU learned nothing of the CIA's covert drone program,[160] while the National Security Archive succeeded in its request for biographies on European heads of state.[161] It is why Thomas E. Moore III is still unsure whether the CIA kept records on his grandfather, an Icelandic textile merchant who allegedly had ties to the Icelandic Communist Party,[162] while Paul Wolf now possesses some records concerning former Colombian politician Jorge Eliecer Gaitan.[163] This inconsistency demands inspection and resolution.

III. RECOMMENDATIONS

All three branches of the government have an opportunity to ensure the reasonable use of *Glomar*ization. Part III will discuss specific ways in which the government can realize these goals. First, Subpart A will advise how

155. *Id.* (citations omitted).

156. *Id.*

157. No. 99-1160 (D.D.C. July 31, 2000).

158. *See id.* at 16 (reasoning that if the CIA were to disclose that it kept a biography of a specific head of state, it would not be revealing any information that had not already been revealed by the acknowledgment that it kept biographies on all heads of state).

159. *Id.* at 18 (re-affirming the great deference the court shows to the CIA in national security matters).

160. *See* ACLU v. Dep't of Justice, 808 F. Supp. 2d 280, 296 (D.D.C. 2011) (rejecting the ACLU's argument that Leon Panetta officially acknowledged the CIA drone program).

161. *See Nat'l Sec. Archive*, No. 99-1160, slip op. at 17 (granting plaintiff's motion for summary judgment as to the CIA's ability to issue a *Glomar* response).

162. *See* Moore v. CIA, 666 F.3d 1330, 1331 (D.C. Cir. 2011).

163. *See* Wolf v. CIA, 569 F. Supp. 2d 1, 5 (D.D.C. 2008) (noting, on remand, that the CIA identified thirteen field reports about Gaitan referenced in Hillenkoetter's testimony and released two to Wolf).

Executive agencies can better regulate their use of this exceptional response. Then, Subpart B will explain how courts can broadly interpret the official acknowledgment doctrine to prevent overuse of the *Glomar* response. Finally, Subpart C will suggest ways in which Congress can amend the FOIA to set contours for the *Glomar* response.

A. Agencies Should Use Glomar*ization More Responsibly*

If government agencies are at all motivated to use *Glomar*ization responsibly, they can begin by limiting its use when the requested information has officially entered the public domain, either inadvertently or through purposeful disclosure. An example of an arguably inadvertent disclosure can be found in *Frugone*, where OPM stated something in response to a FOIA request that the CIA would neither confirm nor deny.[164] Federal courts have always rejected the notion that official acknowledgment could come from a reporter, an author, or another third-party source,[165] but never before had it considered an acknowledgment from another government agency. In the end, however, the D.C. Circuit treated OPM's acknowledgment as if the executive agency were just another journalist, or some former employee with "uncertain reliability," instead of an official representative of the U.S. government tasked with responding to Frugone's employment inquiries.[166]

A disclosure by the U.S. government, "revealed by an official . . . in a position to know of what he spoke,"[167] should count as an official acknowledgment in the *Glomar* context, no matter how inconvenient or inadvertent the admission. Indeed, the U.S. District Court for the District of Columbia recently held as much, albeit in a slightly different context.[168]

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164. Frugone v. CIA, 169 F.3d 772, 774 (D.C. Cir. 1999) (reminding that Frugone's sole claim on appeal was that because "OPM acknowledged the existence of his relationship with the CIA, so too must the CIA").

165. *See* Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1370 (4th Cir. 1975) ("It is one thing for a reporter or author to speculate or guess that a thing may be so or even, quoting undisclosed sources, to say that it is so; it is quite another thing for one in a position to know of it officially to say that it is so.").

166. *Compare id.* (noting how the public is used to treating reports from uncertain sources with skepticism but would not "discredit reports of sensitive information revealed by an official of the United States in a position to know of what he spoke"), *with Frugone*, 169 F.3d at 775 (calling an acknowledgement by OPM "informal, and possibly erroneous").

167. *See Knopf*, 509 F.2d at 1370 (distinguishing acknowledgements by those "in the know" from those who can only speculate).

168. *See* Memphis Publ'g Co. v. FBI, No. 10-1878, slip op. at 2–3 (D.D.C. Jan. 31, 2012) (the FBI withheld documents pursuant to FOIA Exemptions 6 and 7, in addition to using an "exclusion," which allowed it to flatly deny the existence of other requested documents).

In *Memphis Publishing Company v. FBI*,[169] the FBI sought to withhold information concerning a possible informant even though it had previously released documents that seemed to already confirm the subject's status as a confidential informant.[170] The FBI argued that the court should not find "official confirmation"[171] in an inadvertent acknowledgment.[172] The District Court disagreed, suggesting that a fact has been confirmed whether done purposefully or inadvertently.[173] Executive agencies that invoke the *Glomar* response should hold themselves to similar standards. An inadvertent acknowledgment of information is an acknowledgment nonetheless.

Agencies could further limit *Glomar*ization by no longer using the *Glomar* response in response to requests for information that has been purposefully placed in the public domain, either through strategic, anonymous leaks or other back channels. An example of a purposeful disclosure occurred soon after the targeted killing of al-Awlaki, the al-Qaeda terrorist who was reportedly killed in a CIA drone strike in September 2011.

For years, the U.S. government continually refused to officially acknowledge the CIA's covert drone program, despite the fact that most learned citizens were already aware of its existence.[174] Even the word "drone" had been considered classified, with high-ranking government employees taking pains to avoid it in conversation.[175] Indeed, any utterance of the word "drone" by government officials had almost always been made anonymously,[176] which led one skeptic to conclude that "the only consequence of pretending that it's a secret program is that the courts don't play a role in overseeing it."[177]

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169. No. 10-1878 (D.D.C. Jan. 31, 2012).

170. *Id.* at 6–7.

171. *Id.* at 9 (using an "official confirmation" standard as opposed to the official acknowledgment standard because the case involved an "exclusion" instead of an exemption such as 1 or 3).

172. *See id.* at 18–19 (making the argument that the FBI cannot provide official confirmation unless it intended to do so).

173. *Id.* at 19 ("[T]he word confirmation simply means that a fact has been established, not that it was formally or purposefully announced.").

174. *See* Scott Shane, *A Closed-Mouth Policy Even on Open Secrets*, N.Y. TIMES, Oct. 5, 2011, at A18 (noting the secrecy surrounding a program that is already "old news").

175. *Id.*

176. *See* Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES, Oct. 9, 2011, at A1, A12 (describing the legal justifications for killing an American citizen in a drone strike by interviewing, and granting anonymity, to those who read the legal memo).

177. Karen DeYoung, *After Obama's Remarks on Drones, White House Rebuffs Security Questions*, WASH. POST, Jan. 31, 2012, http://www.washingtonpost.com/world/national-security/after-obamas-remarks-on-drones-white-house-rebuffs-security-questions/2012/01/31/gIQA9s2LgQ_print.html (quoting ACLU Deputy Legal Director Jameel Jaffer).

The linguistic discipline allowed government agencies to continue to withhold information pertaining to the covert program—the legal justification for the targeted killing of al-Awlaki is one prime example—by using a *Glomar* response to neither confirm nor deny the existence of the requested records.[178] The government did just that, despite describing the legal justification for the al-Awlaki killing to *New York Times* reporter Charlie Savage, who wrote about the oft-requested justification memorandum on October 8, 2011.[179] Savage described in detail the legal justification for the targeted strike[180] and simultaneously filed a FOIA request for the document that had just been so clearly relayed to him.[181] The Department of Justice provided a *Glomar* response in return.[182] In essence, it appears "the [A]dministration invoke[d] secrecy to shield the details while simultaneously deploying a campaign of leaks to build public support" for the drone program.[183] Depending on one's viewpoint, the secrecy compulsion makes the government look either silly[184] or self-serving[185]—especially in light of Brennan's speech at the Wilson Center.[186]

The ACLU recently filed a lawsuit in the District Court for the Southern

178. *See* Complaint for Injunctive Relief ¶ 8, ACLU v. Dep't of Justice, No. 12-civ-0794 (S.D.N.Y. Feb. 1, 2012).

179. *See* Savage, *supra* note 176, at A1, 1A2 (noting that "The government has . . . resisted growing calls that it provide a detailed public explanation" of its justification to kill an American citizen).

180. *See id.* (explaining that the legal analysis concluded that "al-Awlaki could be legally killed, if it was not feasible to capture him, because intelligence agencies said he was taking part in the war between the United States and Al Qaeda").

181. *See* Complaint at ¶¶ 10, 11, N.Y. Times Co. v. Dep't of Justice, No. 11-civ-9336 (S.D.N.Y. Dec. 20, 2011) (showing Savage submitted a FOIA request to the DOJ's Office of Legal Counsel (OLC) on October 7, 2011, one day before his al-Awlaki article appeared in print).

182. *See id.* at ¶ 46 ("DOJ OLC stated that it 'neither confirms nor denies the existence of the documents described in your request'. . . .").

183. *See* Arthur S. Brisbane, *The Secrets of Government Killing*, N.Y. TIMES, Oct. 9, 2011, at A12 (positing that for newspapers to allow the government to invoke secrecy, while anonymously leaking information to further policy, gives the appearance of "manipulation"); *see also* Mark Hosenball & Phil Stewart, *Agencies Ordered to Preserve Records in Leak Probes*, REUTERS (June 26, 2012, 3:25 PM), http://www.reuters.com/article/2012/06/26/us-usa-security-leaks-idUSBRE85P1CL20120626 (noting that the Department of Justice chose not to investigate "drone leaks"—as opposed to leaks about the role of cyber-warfare against Iran and a foiled plot to blow up a U.S. airliner—because "administration officials, including Brennan and President Barack Obama, publicly talked about drone attacks, undermining the legal premise for any investigation").

184. *See* Shane, *supra* note 174 (calling it "silly" that obvious facts were excised from recent memoirs by former intelligence officials).

185. *See* Brisbane, *supra* note 183 (advocating that "the public should have documented details concerning civilian casualties of the drone strikes").

186. *See* Hosenball & Stewart, *supra* note 183.

District of New York against several government agencies, including the CIA, challenging the continued use of *Glomar* responses to its requests for the legal justification behind the al-Awlaki attack.[187] The *New York Times* filed a similar lawsuit in the same district challenging the government's reply to its FOIA requests seeking information on targeted killing. And soon the D.C. Circuit will rule on the appeal from *ACLU v. Department of Justice*[188]—*ACLU v. CIA*[189]—in which it will determine whether the CIA waived its right to issue a *Glomar* response when Brennan and others within the Executive Branch publicly discussed the drone program.[190] The ACLU, of course, believes it has.[191]

Refusing to acknowledge the existence or nonexistence of documents pursuant to a FOIA request, while simultaneously leaking information to the press in furtherance of public policy, undermines the spirit of the FOIA and possibly the rule of law.[192] As such, agencies can themselves promote the responsible use of the *Glomar* response by limiting their use of the response in similar situations.[193]

B. Courts Should Broadly Construe the Official Acknowledgment Doctrine to Prevent Glomar *Misuse*

Although courts must afford proper deference to the Executive Branch in matters of national security,[194] such deference does not discharge them of their duty to provide a meaningful de novo review.[195] Indeed, "too

187. Complaint for Injunctive Relief ¶ 38, ACLU v. Dep't of Justice, No. 12-civ-0794 (S.D.N.Y. Feb. 1, 2012).

188. 808 F. Supp. 2d 280 (D.D.C. 2011), *appeal docketed sub nom*. ACLU v. CIA, No. 11-5320 (D.C. Cir. filed Nov. 9, 2011).

189. ACLU v. CIA, No. 11-5320 (D.C. Cir. filed Nov. 9, 2011).

190. *See* Brief for Appellee at 39–40, *ACLU v. CIA*, No. 11-5320 (D.C. Cir. May 21, 2012) (contending that Brennan never officially acknowledged the CIA's involvement in the drone program because he merely acknowledged the U.S.'s involvement in drone strikes without mentioning the CIA); *see also* DeYoung, *supra* note 177 (describing an online town hall meeting sponsored by Google in which President Obama, responding to a question from "Evan in Brooklyn," twice used the word "drone").

191. Brief for Plaintiffs-Appellants at 6, *ACLU v. CIA*, No. 11-5320 (D.C. Cir. March 15, 2012) ("Indeed, upholding the CIA's *Glomar* response here would serve only to harness the Court's institutional authority to a transparent fiction.").

192. *See* Brisbane, *supra* note 183 (criticizing the Government's refusal to provide a "detailed legal justification" for the drone program by quoting Hina Shamsi, the head of the ACLU's National Security Project).

193. In addition, the Executive Branch could theoretically amend Executive Order 13,526, 75 Fed. Reg. 707 (Jan. 5, 2010) on classified national security information to provide contours for the *Glomar* response.

194. *See supra* note 79 and accompanying text.

195. *See* Patricia M. Wald, *Two Unsolved Constitutional Problems*, 49 U. PITT. L. REV. 753,

much . . . deference may be as great a danger to popular government as too little."[196] One way in which courts could curb the misuse of the *Glomar* response, without sacrificing the appropriate deference, is by lending more credence to the official acknowledgment doctrine. The D.C. Circuit has already proven willing to broadly construe the doctrine.[197] Moving forward, other circuits should recognize the doctrine as the most viable and logical check on the *Glomar* response. Designating official acknowledgment as not only a means to obtain information but also a bulwark to the *Glomar* response might compel courts to more seriously consider the doctrine.

Courts could also require a fuller public affidavit.[198] In camera affidavits are meant to be a last resort for the courts,[199] and they should not be used to entirely undercut the public record.[200] The government already holds significant advantages over document requesters in the FOIA context; more exacting oversight could serve to neutralize the playing field.[201]

C. Congress Should Amend the FOIA to Explicitly Address Glomar*ization*

Finally, if neither agencies nor courts are willing to curb *Glomar*ization, Congress could codify and establish the contours for it by explicitly authorizing it in an amendment to the FOIA. As unlikely as it now seems for agencies and courts to change their momentum on this issue, congressional action may be necessary.[202] The D.C. Circuit seemed to

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760–61 (1988) ("Probing even a little into national security matters is not an easy or a pleasant job . . . But if they honor the statutory command, judges must conscientiously make the inquiry to the best of their ability . . . .").

196. *Id.* at 761.

197. *See* Wolf v. CIA (*Wolf II*), 473 F.3d 370, 379 (D.C. Cir. 2007) (finding that the CIA's *Glomar* response did not suffice because the Director read excerpts from CIA records that seemed to officially acknowledge the existence of the requested material).

198. *See* Aitchison, *supra* note 108, at 252 (arguing that a more complete public record would help plaintiffs challenge an agency's rationale for the *Glomar* response).

199. *See* Phillippi v. CIA (*Phillippi I*), 546 F.2d 1009, 1013 (D.C. Cir. 1976) (recognizing that a problem of in camera reviews is that they are undertaken without challenge from the party attempting to force disclosure); *see also* Aitchison, *supra* note 108, at 251 (urging Congress to direct courts to use in camera affidavits only as a last resort).

200. *See Phillippi I*, 546 F.2d at 1013 ("Only after the issues have been identified by this process should the District Court, if necessary, consider arguments or information which the Agency is unable to make public.").

201. *See* Robert G. Vaughn, *Administrative Alternatives and the Federal Freedom of Information Act*, 45 OHIO ST. L.J. 185, 192 (1984) (explaining that the government's control of a document and knowledge of its character in relation to the requester is an advantage in the FOIA context).

202. *See* Christina E. Wells, "*National Security" Information and the Freedom of Information Act*, 56 ADMIN. L. REV. 1195, 1221 (2004) (predicting that agency officials will inevitably withhold too much even amidst judicial oversight).

acknowledge as much in *Public Citizen v. Department of State*.[203] There, the court considered whether the State Department had waived its ability to withhold specific records concerning a meeting between then-U.S. Ambassador to Iraq April Gilaspie and Iraqi President Saddam Hussein, in light of the Ambassador's public admission that she met with Hussein.[204] The court ruled in favor of the State Department,[205] but concluded the opinion by noting its unease with the result:

> Public Citizen's contentions that it is unfair, or not in keeping with FOIA's intent, to permit State to make self-serving partial disclosures of classified information are properly addressed to Congress, not to this court. We are bound by the law of this circuit. . . If the [L]egislature believes that this outcome constitutes an abuse of the agency's power to withhold documents under exemption 1, it can so indicate by amending FOIA.[206]

Amending the FOIA to adopt *Glomar*ization would not be without precedent. In 1986, Congress amended the FOIA to include "exclusions," which provide law enforcement agencies the ability to treat certain agency records as "not subject to the requirements" of the Act.[207] Agencies such as the FBI and Drug Enforcement Administration could therefore use an exclusion to "respond to the [FOIA] request as if the . . . records did not exist."[208] The legislative history of the amendments, and a subsequent memorandum from Attorney General Edwin Meese III, suggest these law enforcement exclusions were seen as an expansion of the *Glomar* response—a way to protect certain information when *Glomar*ization is "simply . . . inadequate."[209] The Attorney General hailed the exclusions as special, yet necessary, protections.[210] Yet, in amending the FOIA to specifically codify exclusions, Congress completely bypassed the concept on which exclusions were premised: *Glomar*ization.[211]

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203. 11 F.3d 198 (D.C. Cir. 1993).

204. *Pub. Citizen v. Dep't of State*, 11 F.3d 198, 199 (D.C. Cir. 1993).

205. *Id.* at 203–04.

206. *Id.* at 204.

207. 5 U.S.C. § 552(c)(1)–(c)(3) (2006).

208. Attorney Gen.'s Memorandum on the 1986 Amendments to the Freedom of Info. Act for Exec. Dep'ts and Agencies Concerning the Law Enforcement Amendments (Dec. 1987) [hereinafter Meese Memorandum] (on file with the Dep't of Justice), *available at* http://www.justice.gov/oip/86agmemo.htm.

209. *See* 132 CONG. REC. 29,616 (1986) (statement of Rep. English) (referring to the proposed exclusions mistakenly as "*Glomar* exclusions"); *see also* Meese Memorandum, *supra* note 208.

210. Meese Memorandum, *supra* note 208 (explaining that the (c)(1) exclusion covers situations in which the mere exemption protection afforded by Exemption 7(A) is inadequate to the task).

211. *Id.* ("It is precisely because '*Glomarization*' inadequately protects against the particular harms in question that the more delicate exclusion mechanism, which affords a

Even remedial legislation could instruct agencies and prevent misuse. Congress should not hamstring executive agencies by telling them when and in what capacity they can use a *Glomar* response. Instead, it should mandate when the *Glomar* response cannot be used—the most logical situation being when information requested is already widely acknowledged, either inadvertently or purposefully.

CONCLUSION

The *Glomar* response is, and will remain, an important element of our national security. It should not be eliminated. However, it should be used responsibly and in moderation. In *ACLU v. Department of Defense*,[212] the court presciently stated, "The danger of *Glomar* responses is that they encourage an unfortunate tendency of government officials to over-classify information, frequently keeping secret that which the public already knows, or that which is more embarrassing than revelatory of intelligence sources or methods."[213] Covert programs are no longer covert when they have been leaked anonymously to the newspapers by government officials or trumpeted in press briefings. The *Glomar* response, as it stands now, allows the government to publicize its successes, to influence policy, and to kill an American citizen, all while also enjoying near-impenetrable protection from the FOIA. The government has a responsibility to keep its citizens safe. Surely it can do so without subverting their trust.

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higher level of protection, sometimes must be employed.").

212. 389 F. Supp. 2d 547 (S.D.N.Y. 2005).

213. *Id.* at 561.