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. Brennan approached the podium that day at the Woodrow Wilson International Center for Scholars in Washington, D.C. and adjusted the microphone.

“So let me say it as simply as I can,” Brennan said, reading carefully from a prepared script in front of a modest audience. “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.”

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


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-achu-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

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.”).


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.”).


the ACLU challenged the CIA’s shadowy reply—known in FOIA litigation as the *Glomar* response15—itself 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 any responsive record).

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).


20. *See, e.g.*, Nathan Freed Wessler, “[W]e 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).

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

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. National security and intelligence agencies within the government must use Glomarization 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.”

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. 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 . . . .”).


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. 11-3320 (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).


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* response30 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, lawsuits31 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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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 acknowledgment” 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).


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. In 1966, the FOIA was born. The Act, and the free flow of information that stemmed from it, have been properly described as a “check against corruption” and the “bedrock of democracy.”

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. Two such exemptions relate directly to matters of national security: Exemption 1 and Exemption 3. 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. 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.” Exemption 3 protects information that is prohibited from disclosure by other federal statutes. The statute most commonly tethered to Exemption 3 in the national security realm is the National Security Act of 1947, which requires the

34. See id. at 42 (“On July 4, 1966, President Lyndon Johnson signed the [FOIA] into law while vacationing at his Texas ranch.”).
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.
41. 5 U.S.C. § 552(b)(3).
Director of the CIA, and now the Director of National Intelligence, to protect intelligence “sources and methods.”

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

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. 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.”

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

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
published an incomplete account of the event in 1975. The CIA immediately scrambled to dissuade other media outlets from reporting the story. When word of that cover-up also reached the press, the CIA received several FOIA requests seeking documents related to the suspected covert project. One such request came from the Military Audit Project, a nonprofit organization tasked to investigate the expenditure of taxpayers’ money on national security. Another came from Harriet Phillippi, the reporter from Rolling Stone. 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.

In Phillippi v. CIA and Military Audit Project v. Casey, 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. 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. Even so, Glomarization became well-established within FOIA case law soon thereafter.

59. Wessler, supra note 20, at 1387.
60. Dempsey, supra note 27, at 46.
61. Id.
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).
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

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”).


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.\textsuperscript{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.\textsuperscript{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\textsuperscript{78} and admit its reluctance to challenge the government’s “unique insights” on national security and foreign relations.\textsuperscript{79} As a result, a FOIA requester litigating an Exemption 1 case begins at a distinct disadvantage.\textsuperscript{80}

\textbf{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.\textsuperscript{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.\textsuperscript{82} Only in the past dozen years, however, have courts given much credence to this argument.\textsuperscript{83} The first plaintiff to win on this argument in an appellate Program, despite the fact the public was aware of the program’s existence).

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

\textsuperscript{77} \textit{Afshar}, 702 F.2d at 1133.

\textsuperscript{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.”).

\textsuperscript{79} \textit{See} Larson v. Dep’t of State, 565 F.3d 857, 864 (D.C. Cir. 2009); \textit{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 judiciary owes some measure of deference to the Executive in cases implicating national security, a uniquely executive purview.”).

\textsuperscript{80} \textit{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”).

\textsuperscript{81} Wilner v. Nat’l Sec. Agency, 592 F.3d 60, 68 (2d Cir. 2009).

\textsuperscript{82} \textit{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))).

\textsuperscript{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); \textit{see} Wolf v. CIA (\textit{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

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\(^84\) *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.”

Perhaps the narrowest interpretation of the official acknowledgment doctrine in the context of Glomarization 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. In Frugone v. CIA, 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.

Instead, the D.C. Circuit dismissed OPM’s acknowledgment as “informal, and possibly erroneous.” 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. 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.

II. ANALYSIS

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

93. Id. at 70.
94. See Frugone v. CIA, 169 F.3d 772, 774 (D.C. Cir. 1999) (declaring that an acknowledgment 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.”).
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. Courts have justly permitted the government to neither confirm nor deny the existence of documents related to a specific interrogation technique and the treatment of detainees in Afghanistan. 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. Clearly then, the permissibility of *Glomarization* 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. Further, the frequency with which the government uses the *Glomar* response is tangential to the long-running lament that the government over-classifies information. 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. Thus, Part II will first explain why the government should use a *Glomar* response sparingly. Then, this Part will analyze the inconsistent judicial

document 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; Bassioumi v. CIA, 392 F.3d 244, 246 (7th Cir. 2004).


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).


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 Glomarization 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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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 refusal[s] 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).


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

115. Id.

116. See id.
in rare circumstances, in camera declarations. Yet public declarations have become increasingly boilerplate since Phillippi and are afforded substantial weight by the courts. 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.” Five circuits have already adopted the Glomar response as law. 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.

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.” 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. 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. In 1990, after he left the CIA, Frugone contacted the Agency asking for a clarification of his retirement status. 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.
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 beneficiaries of this deference).
124. See Dempsey, supra note 27, at 47 (arguing that the CIA has carried its use of Glomar to “absurd ends”).
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. The \textit{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. The agencies provided a Glomar response.

The \textit{Wilner} plaintiffs leaned heavily on the official acknowledgment doctrine throughout litigation. Yet, despite the plaintiffs' claims that at least four members of the Executive Branch had officially acknowledged the existence of the program, 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 . . . .” Instead, an agency loses its ability to invoke the Glomar response when the existence or nonexistence of “particular records” has been “officially . . . disclosed.”

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.” Indeed, Wolf had some reason for a muted celebration. Of the thirteen documents the CIA officially acknowledged it possessed, he received only two. Wolf, an author and attorney, thought the CIA

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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.


possessed many more documents related to his search that it did not disclose. But what most troubled Wolf was that a case bearing his name would ultimately stand for the further erosion of the FOIA. 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.

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. 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. 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. 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, the appellate court disagreed. 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. “Because the ’specific information at issue’... is the existence vel non of ’records about Jorge Eliecer Gaitan,’... Hillenkoetter’s testimony confirmed the existence
thereof." Therefore, the court held, the CIA’s Glomar response did not suffice.

The broadest interpretation of the official acknowledgment doctrine in the Glomar context occurred in National Security Archive, 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. 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.

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, while the National Security Archive succeeded in its request for biographies on European heads of state. 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, while Paul Wolf now possesses some records concerning former Colombian politician Jorge Eliecer Gaitan. This inconsistency demands inspection and resolution.

III. RECOMMENDATIONS

All three branches of the government have an opportunity to ensure the reasonable use of Glomarization. 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.
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 Glomarization More Responsibly

If government agencies are at all motivated to use Glomarization 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*, 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. The FBI argued that the court should not find “official confirmation” in an inadvertent acknowledgment. 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 *Glomarization* 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. Even the word “drone” had been considered classified, with high-ranking government employees taking pains to avoid it in conversation. Indeed, any utterance of the word “drone” by government officials had almost always been made anonymously, 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.”

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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.”).
175. *Id.*
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
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. 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—ACLU v. CIA—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. The ACLU, of course, believes it has.

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. As such, agencies can themselves promote the responsible use of the Glomar response by limiting their use of the response in similar situations.

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, such deference does not discharge them of their duty to provide a meaningful de novo review. Indeed, “too

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. CL, 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. 3, 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." 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. 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. In camera affidavits are meant to be a last resort for the courts, and they should not be used to entirely undercut the public record. The government already holds significant advantages over document requesters in the FOIA context; more exacting oversight could serve to neutralize the playing field.

**C. Congress Should Amend the FOIA to Explicitly Address Glomarization**

Finally, if neither agencies nor courts are willing to curb *Glomarization*, 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. 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."*).


acknowledge as much in *Public Citizen v. Department of State.* 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. The court ruled in favor of the State Department, 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.

Amending the FOIA to adopt *Glomarization* 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. 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.” 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 *Glomarization* is “simply . . . inadequate.” The Attorney General hailed the exclusions as special, yet necessary, protections. Yet, in amending the FOIA to specifically codify exclusions, Congress completely bypassed the concept on which exclusions were premised: *Glomarization.*

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203. 11 F.3d 198 (D.C. Cir. 1993).
205. Id. at 203–04.
206. Id. at 204.
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*, 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.”

C o v e r t  p r o g r a m s  a r e  n o  l o n g e r  c o v e r t  w h e n  t h e y  h a v e  b e e n  l e a k e d  a n o n y m o u s l y  t o  t h e  n e w s p a p e r s  b y  g o v e r n m e n t  o f f i c i a l s  o r  t r u m p e t e d  i n  p r e s s  b r i e f i n g s.  T h e  *G l o m a r*  r e s p o n s e,  a s  i t  s t a n d s  n o w,  a l l o w s  t h e  g o v e r n m e n t  t o  p u b l i c i z e  i t s  s u c c e s s e s,  t o  i n f l u e n c e  p o l i c y,  a n d  t o  k i l l  a n  A m e r i c a n  c i t i z e n,  a l l  w h i l e  a l s o  e n j o y i n g  n e a r-i m p e n e t r a b l e  p r o t e c t i o n  f r o m  t h e  F O I A.  T h e  g o v e r n m e n t  h a s  a  r e s p o n s i b i l i t y  t o  k e e p  i t s  c i t i z e n s  s a f e.  S u r e l y  i t  c a n  d o  s o  w i t h o u t  s u b v e r t i n g  t h e i r  t r u s t.

\*higher level of protection, sometimes must be employed.*

213.  *Id.* at 561.