

1 UNITED STATES COURT OF APPEALS
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT

3
4
5 AMERICAN CIVIL LIBERTIES UNION,
6 ET AL.,

7 Appellants,

No. 11-5320

8 v.

9 CENTRAL INTELLIGENCE AGENCY,

10 Appellee.

11 Thursday, September 20, 2012
12 Washington, D.C.

13 The above-entitled matter came on for oral
14 argument pursuant to notice.

15 BEFORE:

16 CIRCUIT JUDGES TATEL, GARLAND AND GRIFFITH

17 APPEARANCES:

18 ON BEHALF OF THE APPELLANTS:

19 JAMEEL JAFFER, ESQ.

20 ON BEHALF OF THE APPELLEES:

21 STUART F. DELERY, ESQ.
22
23
24
25

Deposition Services, Inc.
12321 Middlebrook Road, Suite 210
Germantown, MD 20874
Tel: (301) 881-3344 Fax: (301) 881-3338
info@DepositionServices.com www.DepositionServices.com

C O N T E N T S

ORAL ARGUMENT OF:

PAGE

Jameel Jaffer, Esq.
On Behalf of the Appellants

3, 54

Stuart F. Delery, Esq.
On Behalf of the Appellees

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

THE CLERK: Case number 11-5320, American Civil Liberties Union, et al., Appellants v. Central Intelligence Agency. Mr. Jaffer for Appellants; Mr. Delery for Appellee.

ORAL ARGUMENT OF JAMEEL JAFFER, ESQ.

ON BEHALF OF THE APPELLANTS

MR. JAFFER: Good morning, Your Honors.

JUDGE TATEL: Good morning.

MR. JAFFER: Jameel Jaffer for the ACLU. The question presented here is whether the CIA can refuse to acknowledge in court a program that senior officials have spoken about repeatedly on the record. The President and the CIA Director, the then CIA Director, have spoken repeatedly about the targeted killing program, the drone program. They claim to the public that the program is --

JUDGE GRIFFITH: But the key here is it has to be linked to the CIA. Right? It's the CIA that's in front of us. Correct?

MR. JAFFER: I don't think that's exactly right, Your Honor. The --

JUDGE GRIFFITH: But we have case law that says one agency can't make an official acknowledgment for another, can they?

MR. JAFFER: Well, that's true, Your Honor. But, there are two things about that case law. The first is that

1 that case law doesn't address the kind of situation we have
2 here where the person who's making the disclosure is still a
3 member of the Cabinet at the time that he makes the
4 disclosure. So, CIA Director --

5 JUDGE GRIFFITH: You're referring to Secretary
6 Panetta now talking as Secretary of Defense about things that
7 he did at CIA?

8 MR. JAFFER: That's right. That's right. So --

9 JUDGE GRIFFITH: Is there any case law on that? I
10 mean, there's lots of case law to say that later disclosure by
11 former officials cannot be an official acknowledgment. Right?

12 MR. JAFFER: Right. But most of those --

13 JUDGE GRIFFITH: Why doesn't that fit this case?

14 MR. JAFFER: Well, most of those cases involve lower
15 level employees who are not in Government service anymore at
16 the time that they made those statements. So, they don't
17 control this case. But --

18 JUDGE GRIFFITH: But is there anything in the
19 discussion of those cases that suggests that the subsequent
20 job may affect the analysis?

21 MR. JAFFER: No. But there wouldn't be, Your Honor,
22 because the subsequent job in those cases was a job outside
23 the Government. We weren't talking about somebody who was
24 still a member of the Cabinet, still fighting the same war,
25 still working for the same President. This is a different

1 situation. But, I don't want to get caught up in that because
2 ultimately we are not arguing, and you don't need to hold in
3 order to rule in our favor. You don't need to hold that Mr.
4 Panetta's statements as Secretary of Defense are sufficient in
5 themselves to constitute an official acknowledgment. All
6 we're asking you to do is look to those statements to resolve
7 any ambiguity in the statements that he made as CIA Director.
8 But the --

9 JUDGE GARLAND: Can I, sorry.

10 JUDGE TATEL: Well, but you do argue that these
11 statements, some of these statements alone are sufficient,
12 don't you?

13 MR. JAFFER: That's right.

14 JUDGE TATEL: Okay.

15 MR. JAFFER: And we make that argument with respect
16 to the statements he made as CIA Director.

17 JUDGE TATEL: As CIA Director. So, and just to
18 pursue Judge Griffith's question a little differently, your
19 FOIA request is aimed at the CIA. Correct? That's what your
20 asking for.

21 MR. JAFFER: That's right. And originally it was --

22 JUDGE TATEL: Your asking for information about the
23 CIA's drone program. Correct?

24 MR. JAFFER: That's right.

25 JUDGE TATEL: So, isn't that why these statements

1 need, for you to succeed here since you have to show a strict
2 match between what you're seeking and what's been disclosed
3 under our case law.

4 MR. JAFFER: That's also right. I hadn't --

5 JUDGE TATEL: You have to show not just that there's
6 a disclosure of a Government drone program but that there's a
7 CIA drone program. Correct?

8 MR. JAFFER: That's correct.

9 JUDGE TATEL: Okay. So, which of these four
10 statements that Mr. Panetta made do you think is your best
11 case?

12 MR. JAFFER: I think that the best case is the
13 statement that Mr. Panetta made to the Pacific Council which
14 was May 2009. That's on page 114 of the Joint Appendix. At
15 that particular event, Mr. Panetta was asked specifically
16 about the drone program. He responds not just explaining or
17 stating that the drone program is effective but he
18 distinguishes the drone program from other forms of military--

19 JUDGE TATEL: But, was he asked about the CIA drone
20 program?

21 MR. JAFFER: Well, he was introduced at that event
22 as the CIA Director. The whole talk was about the CIA. The
23 page before that question is entirely about the duties of the
24 CIA in particular, and he returns to that topic after that
25 question. So, I don't think that it's plausible to read that

1 statement as anything other than a response about the CIA's
2 program specifically.

3 JUDGE TATEL: Well, but he was asked about the
4 President's strategy. Right? He was asked about the
5 President. That was the question, the President's strategy.
6 And he didn't acknowledge --

7 MR. JAFFER: Well, it's true that that phrase is
8 used in the question. That's --

9 JUDGE TATEL: Yes. But, right. And he didn't say
10 anything, I was looking at his answer here. He didn't say
11 anything in his answer to suggest that specifically that this
12 was a CIA program.

13 MR. JAFFER: Well, I mean --

14 JUDGE TATEL: True. He's CIA Director. But, that
15 wasn't the question he was asked.

16 MR. JAFFER: Well, at the time he answered the
17 question, he was the CIA Director. He hadn't yet served as
18 Secretary of Defense. He had spoken entirely about the CIA to
19 that point, and he returned to the topic of the CIA after that
20 point.

21 JUDGE TATEL: Yes.

22 MR. JAFFER: So, I don't think, and if you look at
23 the news reports about that particular event, everybody read
24 the statement in the same way. But, I think that if there's
25 any ambiguity about that statement, and I don't concede that

1 there is, but if there is any ambiguity, it's resolved by the
2 other statements that Mr. Panetta made as CIA Director. For
3 example, his statements to the Washington Post on March 17th,
4 and his statements to the Wall Street Journal on March 18th.
5 He makes clear there that the CIA, I think he calls it the
6 most aggressive operation that the CIA has been involved in.
7 He's talking about the same operation that he was talking
8 about at the Pacific Council, and he speaks about the killing
9 of particular individuals. So, I think that, you know, you
10 should look at those statements collectively even if you
11 don't--

12 JUDGE TATEL: Well, that wasn't my question. My
13 question was whether any of these individually get you where
14 you want. I would have thought your answer to my question was
15 the ABC interview where he does mention the CIA.

16 MR. JAFFER: Right. I mean, I think that he --

17 JUDGE TATEL: But there he doesn't mention drones.
18 So --

19 MR. JAFFER: Right. I don't think that, I mean,
20 again, I think that the first interview --

21 JUDGE TATEL: Yes.

22 MR. JAFFER: -- is, in itself, enough. But, I don't
23 think you have to look at these in a vacuum. In fact, I think
24 it would be a mistake to look at each one in isolation. If
25 the CIA says on Monday that the agency is based in Langley and

1 on Tuesday that it has 10,000 employees nobody would say that
2 there was any doubt that the CIA was based in Langley and had
3 10,000 employees, and I think the same thing is going on here.

4 We think that the statements to the Pacific Council
5 discloses that the CIA has a drone program that's engaged in
6 targeted killing and it's used for targeted killing. But,
7 even if you don't accept that all those factors are disclosed
8 in that particular --

9 JUDGE TATEL: Right.

10 MR. JAFFER: -- answer, they're disclosed by the
11 other statements. But, those are all statements, you know, we
12 started by talking about statements that --

13 JUDGE TATEL: You mean other than the four Panetta
14 statements?

15 MR. JAFFER: No. I mean you should look at the four
16 statements collectively.

17 JUDGE TATEL: Yes.

18 MR. JAFFER: And those statements are statements
19 that Mr. Panetta made as CIA Director, and so you don't have
20 reach the question that Judge Griffith was asking about. But
21 if you find --

22 JUDGE TATEL: But you see, I mean, if they don't --
23 I'm having trouble understanding this collective agreement. I
24 mean, if they don't -- I know, I understand the argument.
25 But, if none of them individually make the point that is

1 amount to the official disclosure, how can the group of them
2 do it? That's what I'm thinking about.

3 MR. JAFFER: Well, I mean, I think you could ask the
4 same question about a single --

5 JUDGE TATEL: Yes.

6 MR. JAFFER: Imagine it were a single interview, and
7 in the first paragraph --

8 JUDGE TATEL: Yes.

9 MR. JAFFER: -- Mr. Panetta disclosed A and in the
10 second paragraph he disclosed B.

11 JUDGE TATEL: Yes.

12 MR. JAFFER: You know, I don't think we would be
13 having this conversation about --

14 JUDGE TATEL: Okay. But that isn't this case.
15 These are --

16 MR. JAFFER: Well, I think it's similar to this case
17 in that if you think that there's ambiguity in the Pacific
18 Council's statement about whether Mr. Panetta was talking
19 about the CIA that ambiguity is resolved by the other
20 statements he's made since.

21 JUDGE TATEL: Suppose we read all these and, you
22 know, we understand your argument and we just can't tell.
23 It's just too close a call. Don't you then lose because of
24 the burden of proof?

25 MR. JAFFER: It depends what you mean by --

1 JUDGE TATEL: You do have the burden. Correct? On
2 this aspect of it, that is demonstrating waiver, you have the
3 burden of proof.

4 MR. JAFFER: Well, Your Honor, can I just answer one
5 other question before I answer that one because --

6 JUDGE TATEL: Sure.

7 MR. JAFFER: So, I just want to be clear about what
8 we mean when we're talking about these statements because
9 they're really, in my mind, three different categories of
10 statements here.

11 JUDGE TATEL: Right.

12 MR. JAFFER: There are the statements that Mr.
13 Panetta made as CIA Director --

14 JUDGE TATEL: Right.

15 MR. JAFFER: -- which we think are sufficient in
16 themselves, at least collectively, the four statements
17 collectively, to establish official acknowledgment. To the
18 extent there's ambiguity about those statements and, again, we
19 don't concede there is, but to the extent there is ambiguity,
20 we think you can look to the statements that Mr. Panetta made
21 as Secretary of Defense to resolve that ambiguity.

22 And, again, this is not a situation where we are,
23 we're not asking you to overrule the cases in which the Court
24 has said, obviously, in which the Court has said that
25 statements of former officials aren't sufficient to establish

1 official acknowledgment on the part of their previous
2 employers. We're not asking you to reconsider those cases.
3 We're just saying that those cases are situations in which the
4 plaintiff was relying on those statements, was arguing that
5 those statements themselves were official acknowledgments, and
6 here, all we're arguing is that those statements resolve
7 ambiguity in the statements that Mr. Panetta made as CIA
8 Director.

9 JUDGE TATEL: Yes.

10 MR. JAFFER: But, to answer now the question, Judge
11 Tatel, you asked. It is generally the plaintiff's burden to
12 establish official acknowledgment. The one thing here, one of
13 the things that distinguishes this case from all of the others
14 is this pattern of what appears to be strategic selective
15 disclosures on the part of --

16 JUDGE GRIFFITH: Ah. But, you just said what
17 appears to be and isn't that the problem? You can't say
18 definitively that it is. Right? The strongest part of your
19 argument, it seems to me, is there seems to be this pattern of
20 strategic and selective leaks at very high levels of the
21 Government. But, your problem is you're getting that all from
22 media accounts and we don't have any case law that helps you
23 there. Right? I mean, to the extent that we've dealt with
24 this before, we've suggested that media sources, media
25 reporting of anonymous leaks, can't be a basis for official

1 acknowledgment. How do you get around that?

2 MR. JAFFER: That's right. So, but those cases,
3 just like the cases about officials who are no longer with the
4 agency that they, you know, purport to be acknowledging for,
5 those cases involve plaintiffs who pointed to media statements
6 as the basis of the official acknowledgment, and we are not
7 saying that the media statements here are the official
8 acknowledgment. We're saying that Panetta's statements, Mr.
9 Panetta's statements, as CIA Director are the official
10 acknowledgment. To the extent there's ambiguity, you can
11 resolve ambiguity by looking at the other statements.

12 But, one other thing about the media statements --

13 JUDGE GRIFFITH: And that would be new law. Right?
14 If you would say this is a new fact pattern, right? But
15 there's --

16 MR. JAFFER: Right. I mean, it's a new fact
17 pattern.

18 JUDGE GRIFFITH: Yes.

19 MR. JAFFER: And it would be new law to hold for the
20 Government, too, because the Government would be asking you
21 for the first time to hold that a pattern of this kind, again,
22 what appears to be a pattern of deliberate selective
23 disclosure on the part of the --

24 JUDGE GRIFFITH: Well, we'll ask them about that.
25 My guess is they're going to dispute that but we'll ask them

1 about that.

2 MR. JAFFER: Okay. Good.

3 JUDGE GARLAND: I have a series of questions which
4 will reflect my confusion about your litigation strategy.
5 Sorry. It seems to me you have a much stronger argument here
6 than what we've just heard, and I want to know whether you've
7 waived all of your strongest arguments for us for a strategic
8 reason I do not understand or whether I just don't understand
9 your argument.

10 MR. JAFFER: Okay.

11 JUDGE GARLAND: So, you started out by saying your
12 requests are about the CIA's drone program. Now, I've read
13 your FOIA request and that's not what it's about. It's about
14 documents that they have about drones. Some of them are about
15 the CIA's drones programs but a lot of them could be, if they
16 have other documents about lawfulness of using drones without
17 specific reference to whether they are CIA's drones or --

18 MR. JAFFER: Right.

19 JUDGE GARLAND: -- DOD's drones. They talk about
20 assessment of the effects of the explosions. CIA might be, is
21 making those assessments whether or not they or the DOD is
22 seeking, owns the program. I --

23 MR. JAFFER: Right. Judge Garland, you're
24 absolutely right, and I didn't mean to -- I'm actually using
25 drone program in the way that we use it in the brief and there

1 was at the beginning, I think, of our reply brief. The
2 Government had argued or had questioned in its brief whether
3 we were waiving all of that other stuff. At the beginning of
4 our reply, I think we made clear we're not.

5 JUDGE GARLAND: Okay. So then I'm just going to
6 take a few minutes because --

7 MR. JAFFER: Okay.

8 JUDGE GARLAND: -- I want to get through all of what
9 I think are your best arguments and I want to make sure --

10 MR. JAFFER: All right.

11 JUDGE GARLAND: -- you haven't lost every single one
12 of them.

13 MR. JAFFER: All right.

14 JUDGE GARLAND: Okay? So, on this first one, to
15 take the Pacific Council Director, the statement of the
16 Pacific Council, it seems to me you're not stating what
17 appears to be the best argument. I want to know whether I'm
18 imagining it. So, the question is you mentioned that you
19 believe the strategy in Pakistan is working, the President's
20 strategy in Pakistan and the travel regions which is the
21 drone, the remote drone strikes. Panetta's answer while he
22 was CIA Director is obviously because these are covert and
23 secret, I cannot go into the particulars. I think it does
24 suffice to say that these operations have been very effective
25 because they have been very precise in terms of the targeting

1 and involves a minimum of collateral damage.

2 Now, that seems to me to create at least an
3 inference that there is some document that he has read which
4 shows a minimum of collateral damage unless the CIA Director
5 operates completely on words --

6 MR. JAFFER: Right.

7 JUDGE GARLAND: -- which I think is very unlikely.
8 So, that would suggest --

9 MR. JAFFER: Right.

10 JUDGE GARLAND: -- there is a document in the CIA's
11 file, or many documents, about the scope of collateral damage
12 whether it's the CIA's drone or the DOD's drone or anyone
13 else's drone.

14 MR. JAFFER: Right.

15 JUDGE GARLAND: Now, are you abandoning that
16 argument?

17 MR. JAFFER: No. Of course not. Of course not,
18 Your Honor, and I should have highlighted that argument when I
19 began. I agree with you that a lot of the statements in which
20 the Government argues with some justification that, or in some
21 cases entirely justified, that Secretary Panetta doesn't
22 mention the CIA. He does mention the drone program, and it's
23 quite clear from his discussion of the use of drones that the
24 CIA has an interest of some kind in drones and at the very
25 least has records relating to the drone program.

1 JUDGE GARLAND: So, you're searching here not only
2 for documents about the CIA's own drone program but you want
3 them to acknowledge that they have, well, I'll put it another
4 way. They have said we are not going to acknowledge one way
5 or the other whether we have documents that say anything at
6 all about drones, and that is what you're challenging. Is
7 that right?

8 MR. JAFFER: That's right. So, Your Honor, the FOIA
9 request we filed is much broader than the CIA's, the use of
10 drones as the CIA to carry out targeted killings. We have not
11 abandoned any aspect of the FOIA request except, there are two
12 paragraphs that --

13 JUDGE GARLAND: The ones about foreign.

14 MR. JAFFER: That's right.

15 JUDGE GARLAND: All right. Now, let me --

16 MR. JAFFER: That's right. The rest is still
17 active.

18 JUDGE GARLAND: All right. Now, let me ask you
19 about some more specific arguments, and it may be that you
20 have abandoned these unintentionally.

21 MR. JAFFER: Yes.

22 JUDGE GARLAND: So, I'm not sure. So, the
23 centerpiece of the Government's position below is this Cole
24 Declaration. Right?

25 MR. JAFFER: Right.

1 JUDGE GARLAND: Who's the information officer for
2 the CIA, and she says they can't acknowledge whether it has
3 documents because, quote, it would indicate that the CIA was
4 involved in drone strikes or at least had an intelligence
5 interest in drone strikes, and to me, that suggests three
6 possible arguments.

7 One argument would be why would acknowledging that
8 the agency has documents indicate that it was involved itself
9 in the drone strike. Now, have you abandoned a challenge of
10 that nature? That is a challenge to the logic of her
11 statement that merely conceding you have documents means you
12 are, they're actually your drones.

13 MR. JAFFER: No. I don't think so, Your Honor. The
14 only thing that we have waived for the purpose of the appeal
15 relates to the propriety of the Exemption 1 and 3 invocation.

16 JUDGE GARLAND: Well, that's why I'm confused about
17 what that means. So, let me go through three arguments.

18 MR. JAFFER: Okay.

19 JUDGE GARLAND: You tell me if any of these are
20 within the scope of your waiver.

21 The next question I would have from Cole's
22 Declaration is what is the harm of, since DOD and the
23 President have acknowledged that there is a drone program,
24 what is the national security injury from acknowledging that
25 the CIA is part of that program? I'm not asking whether

1 there's an answer to that question.

2 MR. JAFFER: Right.

3 JUDGE GARLAND: I'm asking you whether for purposes
4 of this appeal, and therefore forever --

5 MR. JAFFER: Right.

6 JUDGE GARLAND: -- have you waived the argument that
7 the Government, that it's not logical, legal, et cetera to
8 argue that there is a national security harm from disclosing
9 the CIA's involvement as compared to the DOD's argument,
10 involvement?

11 MR. JAFFER: Right. I don't think we've waived
12 that, Your Honor. But, I confess I haven't thought about that
13 question directly. If you'll --

14 JUDGE GARLAND: Well, that seems to me, I mean, if
15 you want this, you want to know about whether the CIA's
16 involved and the President has already acknowledged that the
17 rest of the Government's involved.

18 MR. JAFFER: Well, Your Honor, right.

19 JUDGE GARLAND: It seems like your main argument
20 would be well, what's the harm? How can you claim any harm
21 from that?

22 MR. JAFFER: Well, Your Honor, part of the reason,
23 you know, we haven't spent a lot of time thinking of that is
24 because we think it's plain that the CIA's involvement has
25 been disclosed, and so, you know, the question of, the

1 question you're asking is a question we never get to because
2 it's so obvious from the statements --

3 JUDGE GARLAND: We only never get to if we agree
4 with you.

5 MR. JAFFER: No. I know. I understand.

6 JUDGE GARLAND: If we disagree with you --

7 MR. JAFFER: I understand. But, I guess I would
8 like to --

9 JUDGE GARLAND: -- well that's the next question and
10 are you waiving it?

11 MR. JAFFER: Right. I don't think so, Your Honor.
12 But, I would like to convince you to agree with us on the
13 prior question. You know, just, you know, if you look at the
14 statements that the CIA Director, that Mr. Panetta made as
15 Secretary of Defense. They are so clearly, you know, one of
16 his statements, the one he made in Naples is about the
17 predator drone specifically. He uses the phrase predator
18 drones, and he makes clear it was the CIA that has the
19 predator drones.

20 JUDGE GARLAND: Yes.

21 MR. JAFFER: You know, it's, and again, this would
22 be a harbor case if we were arguing that that in itself was an
23 acknowledgment. But, we're not arguing that. We're just
24 arguing that you should feel free and you ought to look to the
25 statements that Mr. Panetta made as --

1 JUDGE GARLAND: I got it.

2 MR. JAFFER: Right.

3 JUDGE GARLAND: But, you're avoiding my question.
4 So, my third question on whether you've lost it on something
5 here, waived something here is that they say there's a harm in
6 acknowledging that we even have an intelligence interest, and
7 have you waived the challenge to how it could be a harm for
8 the Central Intelligence Agency to acknowledge that it has an
9 intelligence interest in drones?

10 MR. JAFFER: Again, Your Honor, I don't think we
11 have waived it. But, on our theory, you don't need to reach
12 that question.

13 JUDGE GARLAND: Yes.

14 MR. JAFFER: You don't need to reach the question
15 because they have acknowledged it. They've acknowledged it in
16 Mr. Panetta's statements at the Pacific Council. Mr. Panetta
17 talked about the CIA's activities in Pakistan, specifically,
18 in the interviews with the Washington Post, the Wall Street
19 Journal, and ABC, and those were all statements that he made
20 as CIA Director. To the extent there's ambiguity there, you
21 can look to the statements he made as Secretary of Defense and
22 to the extent there's still ambiguity at the end of that, then
23 this question that Judge Griffith asked earlier about what to
24 do with the media reports. And there, you know, it's true.
25 We can't establish to a certainty that the Government is

1 deliberately leaking this information to the press while at
2 the same time --

3 JUDGE GARLAND: I guess if I were you, I'd try to
4 focus on the official acknowledgments. Not only would it be a
5 new law, but it would be new, new law if we were going to rely
6 on these leaks.

7 MR. JAFFER: Well, Your Honor, I just want to be --

8 JUDGE GARLAND: If you have an argument here, you
9 have to establish them by some official acknowledgment --

10 MR. JAFFER: Right.

11 JUDGE GARLAND: -- even if we use the word official
12 more broadly than it's used before. But, there's no way we
13 can use the word official for a leak unless you can prove --

14 MR. JAFFER: I'm not asking you to, Your Honor. The
15 only thing I'm asking you to do with the media reports is to
16 the extent you can't resolve the case on the basis of the
17 other statements that are actually attributed to senior
18 officials on the record. To the extent you can't resolve it,
19 we would just ask you to do either of two things with the
20 media statements. Either remand and ask the Government to
21 file a declaration disowning those statements, and it's
22 actually gone some way towards doing that in the Cole
23 Declaration although Ms. Cole was probably not in a position
24 to know whether people like then CIA Director Panetta
25 intentionally leaked this information or intentionally

1 disclosed the information to the press. So, we would ask you
2 just to demand that the Government, require the Government to
3 file a declaration disowning the statements or --

4 JUDGE GARLAND: Has anyone ever done, any Court ever
5 done something like that?

6 MR. JAFFER: No. But, the fact situation here is
7 worlds apart from any other case that the Court has ever been
8 presented with. Every single Glomar case the Government
9 relies on is a case --

10 JUDGE GARLAND: Well, there are lots of other cases
11 with leaks. I mean, if we are going to order the Government
12 to disown every leak, we would be here all day.

13 MR. JAFFER: I think that there is a lot of space
14 between cases involving leaks and this case. This is not just
15 an isolated leak. This is a pattern of dozens of leaks over a
16 long period of time from people who plainly are on the inside.

17 JUDGE GARLAND: I have to say I remain perplexed by
18 this argument. You have the President of the United States
19 announcing we have a drone program. If I were you, I would
20 start with that. I would not start with unauthorized,
21 anonymous leaks --

22 MR. JAFFER: Right.

23 JUDGE GARLAND: -- about a drone program some of
24 which talk about the CIA and some of which not.

25 MR. JAFFER: Your Honor, right.

1 JUDGE GARLAND: I don't understand the nature of the
2 strategy.

3 MR. JAFFER: I agree with you and I'm not, again,
4 I'm not suggesting that you have to rely on the leaks at all.
5 I'm arguing that Secretary Panetta's statements and the
6 President's statements are sufficient in themselves to
7 constitute public acknowledgments of the CIA's involvement in
8 the drone program. I'm just saying that if you disagree --

9 JUDGE GARLAND: And I pause again over those words,
10 the CIA's involvement. I thought you wanted to know whether
11 they had documents about drones regardless of whether the CIA
12 owned the program or not.

13 MR. JAFFER: That's right, Your Honor. I'm just
14 saying that they acknowledge even more than that. That they
15 acknowledge the CIA is --

16 JUDGE GRIFFITH: But, am I right in remembering that
17 throughout your brief you used the phrase the CIA drone
18 program repeatedly.

19 JUDGE TATEL: Right.

20 MR. JAFFER: We do. But, we use it as a shorthand
21 and I think that to the extent there was confusion about it,
22 we tried to resolve it at the beginning of the reply brief.

23 JUDGE GRIFFITH: Yes.

24 MR. JAFFER: When the Government had asked, that's
25 what we meant by that, and we tried to explain. You know, we

1 have not, again, we haven't abandoned any aspect of our FOIA
2 request except for the two specific paragraphs that we
3 identify in the reply.

4 JUDGE TATEL: Okay. Thank you.

5 MR. JAFFER: Thank you.

6 ORAL ARGUMENT OF STUART F. DELERY, ESQ.

7 ON BEHALF OF THE APPELLEE

8 MR. DELERY: May it please the Court, Stuart Delery
9 for the Appellee, CIA.

10 This Court in several cases has identified two
11 important interests that the strict test for official
12 confirmation serves. It protects the Government's vital
13 interest in information related to national security and
14 foreign affairs, and it advances FOIA's interest in disclosure
15 by not punishing officials for attempting to educate the
16 public on matters of public concern because otherwise
17 officials would be reluctant to speak on important national
18 security matters.

19 Here, the Government has acknowledged that the
20 United States makes efforts to target specific terrorists as
21 part of its counter-terrorism operations, that as part of
22 those operations or, in some cases, those operations involve
23 the use of remotely piloted aircraft or drones, and it's also
24 described the legal framework and standards that apply in this
25 context in a series of speeches and interviews including by

1 the President's counter-terrorism advisor, John Brennan, but
2 also the Attorney General, the legal advisor to the State
3 Department, the General Council of DOD, and as has been
4 referenced in yesterday's or the recent exchange of 28J
5 letters including a recent interview by the President. But,
6 there's been no official acknowledgment one way or the other
7 about whether the CIA is involved in these particular
8 operations.

9 JUDGE TATEL: Well, what about Mr. Panetta's ABC
10 interview? I mean, you just said the President has
11 acknowledged the existence of a drone program for killing
12 terrorists and in the ABC interview, he says we are engaged in
13 the most aggressive operation in the history of the CIA in
14 that part of the world, and the result is we are disrupting
15 their leadership. We've taken down nearly half their leaders.
16 We just took down number three. Now, we know from other
17 disclosures that that was all done with drones, and here you
18 have the Secretary, excuse me, the Director directly saying in
19 the history of the CIA.

20 MR. DELERY: I think, Your Honor --

21 JUDGE TATEL: Yes.

22 MR. DELERY: -- the point is that his particular
23 statements did not mention drones one way or the other.

24 JUDGE TATEL: No. But you introduced your whole
25 point by saying that the Government has acknowledged the

1 existence of the drone program.

2 MR. DELERY: That some counter-terrorism operations
3 targeted at particular terrorists --

4 JUDGE TATEL: Yes.

5 MR. DELERY: -- involve the use of drones. That's
6 not the same thing as saying that all of them do and Secretary
7 Panetta in these 2010 interviews in the Washington Post, the
8 Wall Street Journal, ABC News, all three of them talk about
9 CIA efforts generally but not with respect to any particular
10 technique. That has never been officially acknowledged.

11 JUDGE TATEL: How was number three taken down?

12 MR. DELERY: I don't believe then Director Panetta
13 said one way or the other about how.

14 JUDGE TATEL: No. He didn't. But, you know --

15 MR. DELERY: I'm not aware of any official
16 confirmation about the technique that was used.

17 JUDGE TATEL: So, your point then is for an official
18 acknowledgment, it needs to all be contained in one single
19 statement. We can't put two or three statements together that
20 are official to find an official acknowledgment. Is that your
21 position?

22 MR. DELERY: Yes, Your Honor, because I think it
23 reflects this Court's cases which emphasize that an official
24 acknowledgment must match so that the information requested
25 must match the information that had been disclosed before.

1 The Court has, in discussing the reasons for the
2 strict test, has made clear --

3 JUDGE TATEL: Suppose he says, suppose the Director
4 says on Monday we are the agency that uses the drones in the
5 Government's drone program. Okay? That's all he says on
6 Monday. Clearly not enough. Right? And on Tuesday, he says
7 that XX, Mr. XX was killed by a drone. You mean we can't put
8 those two together?

9 MR. DELERY: I think consistent with the Court's
10 cases, there should be a very high bar before connecting dots
11 in that way.

12 JUDGE TATEL: Well, wouldn't this connect the dots?

13 MR. DELERY: I think that these statements don't
14 connect the dots, Your Honor --

15 JUDGE TATEL: I see.

16 MR. DELERY: -- because then Director Panetta talked
17 about particular, you know, the aggressive nature of the
18 operations in that area and some success but I don't believe
19 that there's a connection that makes clear exactly how these
20 operations were conducted.

21 JUDGE GRIFFITH: I'm interested in the leaks
22 question. Could you address that? What are we to make of
23 these allegations of a serious pattern in strategy of leaks at
24 the highest levels of the CIA and the Government as being a
25 selective disclosure and it, in fact, works as an

1 acknowledgment of a CIA drone program.

2 MR. DELERY: I would say several things, Your Honor.
3 First of all, as was indicated earlier, I don't believe
4 there's any basis in the Court's prior cases to support the
5 use of unattributed sources in media reports.

6 JUDGE GRIFFITH: Are you aware of any case in which
7 we have been confronted with allegations of such widespread --

8 MR. DELERY: Right.

9 JUDGE GRIFFITH: -- and strategic leaking at such a
10 high level? Are you aware of any case that's like this? I'm
11 not.

12 MR. DELERY: I think there certainly are other
13 cases.

14 JUDGE GRIFFITH: Like this.

15 MR. DELERY: Other cases involve widespread alleged
16 leaking. I don't think that this particular allegation
17 necessarily is the same. I also emphasize that it's an
18 allegation. The Court when discussing the part of the
19 official confirmation test that suggests that some evidence of
20 bad faith might lead to a different result has never looked at
21 this question. It was also made clear that that inquiry goes
22 to whether there's a basis to believe the national security
23 judgment reflected in the declarations has not been met, and
24 has emphasized that speculation isn't enough, that the
25 plaintiff seeking the information in FOIA needs to come

1 forward with some evidence.

2 JUDGE GRIFFITH: These are allegations. But, the
3 allegations are that senior CIA officials leaked information
4 about a CIA drone program to the New York Times, the Wall
5 Street Journal, a number of other major media sources. So,
6 the common sense of this is we'd have to be left to believe
7 that all of those outlets are, in fact, misinformed or lying.

8 MR. DELERY: Right. Well, I think a few additional
9 points. One is these, well, as a factual matter, for example,
10 when asked about this allegation directly, the President made
11 a statement back in June saying that that was not the case.
12 And so, you're confronted here with unsupported allegations in
13 connection with litigation. You have a record and declaration
14 from the CIA saying that the information being sought here,
15 whether these documents exist, remains a classified fact, and
16 I don't think there's any support in the Court's cases to find
17 that fact pattern sufficient to justify a further inquiry. In
18 effect, it turned FOIA litigation into a leak investigation,
19 and the question I would have is what's the rule that would be
20 articulated about what threshold would trigger that kind of
21 inquiry, and beyond that, how would it proceed? It doesn't
22 seem like a workable result. The Court has never conceived --

23 JUDGE GRIFFITH: But, on the other hand, aren't we,
24 if we're to apply FOIA, aren't we to work to resolve, to work
25 to prevent efforts to get around FOIA through strategic leaks.

1 Right?

2 MR. DELERY: I think what the Court has said is that
3 the purpose of FOIA litigation is to determine whether a
4 particular document should or shouldn't be released not to
5 identify whether a certain fact is or isn't true.

6 And, in fact, it goes to the second interest that I
7 identified at the beginning that the Court has said support
8 the strict application of the official confirmation doctrine
9 which is, you know, you want to further public discussion of
10 these important matters obviously through the channels like
11 the speeches. But, to the extent that you're parsing
12 individual statements of officials or trying to divine the
13 motivations behind unattributed sources in articles, it will
14 have the result of causing officials to refrain from speaking
15 when, in fact, the Court has suggested what we want the
16 Government to do is to identify what can be disclosed
17 consistent with the interest of national security. Disclose
18 up to that line and then justify what's beyond it.

19 So, the kind of attempt to figure out what's behind
20 the unattributed statements and articles in addition to being
21 an unworkable proposition in this context of litigation, we
22 think it would have serious consequences.

23 JUDGE GARLAND: Can I ask? The Glomar response that
24 you made here is that we cannot confirm or deny the existence
25 of documents involving drones. Right? That's the request.

1 Because the request was about drones involving the CIA, the
2 DOD, et cetera. It's a broad request.

3 MR. DELERY: That's right.

4 JUDGE GARLAND: And that was the statement. Right?
5 That you can't confirm the existence or nonexistence of the
6 documents.

7 MR. DELERY: Right.

8 JUDGE GARLAND: Not you can't confirm the existence
9 or nonexistence of the program but that you can't confirm the
10 existence or nonexistence of documents because that's all FOIA
11 asks for is documents. Right?

12 MR. DELERY: Right. And the reason, yes. And the
13 reason is because to do that --

14 JUDGE GARLAND: Yes.

15 MR. DELERY: -- would, itself, reveal information
16 that is appropriate, reclassified.

17 JUDGE GARLAND: Yes.

18 MR. DELERY: That was the basis for the declaration
19 on the record.

20 JUDGE GARLAND: But, how would mere acknowledgment
21 that you have documents, since the President has said and
22 Brennan has said we have a drone program, how would
23 acknowledging that the CIA has documents about drones? That's
24 all. And we're only at that question right now. We're not at
25 the secondary question of what kind of Vaughn Index is

1 provided or anything else. How would that disclose something
2 that would harm the national interest?

3 MR. DELERY: Your Honor, that question, actually,
4 was the motivation for the motion to remand to the District
5 Court that we filed after the evaluation of the Court's, of
6 the Government's position in a somewhat related manner in the
7 Southern District of New York.

8 JUDGE GARLAND: So, then that's what I'm a little
9 unclear about. So, are you prepared today to acknowledge that
10 the, besides the two speeches that were mentioned in the
11 Southern District of New York, very unclear in your statement
12 of whether that's all you're acknowledging, do you acknowledge
13 that the CIA has documents about drones in its files?

14 MR. DELERY: Right. Yes. And, I believe, what the
15 declaration in the New York case said was that that could be
16 acknowledged consistent with national security. The speeches
17 were identified as examples.

18 JUDGE GARLAND: So, you're not --

19 MR. DELERY: And explanations for why just
20 acknowledging the existence of documents would not harm
21 national security.

22 JUDGE GARLAND: But, you're not suggesting those are
23 the only documents that you have in the files.

24 MR. DELERY: Not necessarily. I mean, we're not
25 saying --

1 JUDGE TATEL: Something you were doing.

2 MR. DELERY: -- that it was not limited to the two.

3 JUDGE GARLAND: What?

4 MR. DELERY: We were not saying it was only the two
5 speeches. The point --

6 JUDGE GARLAND: Well, are you willing to acknowledge
7 there are other documents in the file or not? If not, then we
8 should continue the conversation. If so, maybe that's the end
9 of the conversation. You've given up your Glomar response and
10 now the question is what is the scope of the Vaughn Index.
11 Now, appreciate the Seventh Circuit doesn't like the no names,
12 no list --

13 MR. DELERY: Right.

14 JUDGE GARLAND: -- argument. But, of course, they
15 use that as a way to support a Glomar response. But here, you
16 appear to be giving up your Glomar response. Is that correct?

17 MR. DELERY: Yes. As we did in the Southern
18 District case.

19 JUDGE GARLAND: Yes.

20 MR. DELERY: What we said there was, you know, it
21 can be acknowledged that the CIA has documents. However, the
22 number and nature and extent of them can't be disclosed for
23 reasons that were --

24 JUDGE GARLAND: Well, that hasn't even been
25 addressed here yet.

1 MR. DELERY: And that has not been addressed in this
2 case.

3 JUDGE GARLAND: Yes. Yes.

4 MR. DELERY: Again, that was the reason for the
5 motion to remand --

6 JUDGE GARLAND: Yes. Yes.

7 MR. DELERY: -- that we filed.

8 JUDGE GARLAND: Can I take you through the four
9 statements that I'm concerned about?

10 MR. DELERY: Yes, Your Honor.

11 JUDGE GARLAND: None of which involve rumors. Maybe
12 this will turn out to be more important on remand than it is
13 here. I haven't made up my mind about that.

14 So, the first of the important ones is the Pacific
15 Council statement in which then Secretary Panetta says I think
16 it does suffice to say these operations have been very,
17 responding to a question about drones, it does suffice to say
18 that these operations have been effective because they have
19 been very precise in terms of the targeting and involve the
20 minimum of collateral damage. Doesn't that get over the
21 burden of the plaintiffs here to show that there are documents
22 involving the targeting, involving assessment of damage.
23 Whether or not you have to give up those documents, whether or
24 not you have to describe them any more or anything else, isn't
25 that a strong statement to indicate that the CIA Director

1 knows about an assessment of collateral damage and since he's
2 the CIA Director, a logical presumption or inference of that
3 is he read some document that said so.

4 MR. DELERY: Right. I don't think it's sufficient,
5 Your Honor --

6 JUDGE GARLAND: Why?

7 JUDGE GARLAND: --for a couple of reasons. One is
8 where the Court has confronted the question of how a Glomar
9 applies in this context. It's been very specific that the
10 public acknowledgment needs to be of particular documents.
11 So, the Moore case and the Wolf case.

12 JUDGE GARLAND: Well, that seems to be really
13 unclear. That is in Wolf, we talked about the difference
14 between official acknowledgment and the existence of a
15 document and official acknowledgment of whether there are
16 documents or not.

17 So, let's stick to this hypothetical. Not the
18 hypothetical. It's the Glomar case. The CIA says, you know,
19 as a matter-of-fact, we bought Howard Hughes' boat. We
20 actually have a Glomar explorer. We're using it every day.
21 Plaintiffs, the ACLU, files a FOIA request for documents
22 related to the Glomar explorer, and the CIA say we will not
23 acknowledge the existence of documents at that point, having
24 already acknowledge that they operate the boat.

25 MR. DELERY: Right. I think certainly in all of

1 these cases there's a tearing of --

2 JUDGE GARLAND: Yes.

3 MR. DELERY: -- levels of detail.

4 JUDGE GARLAND: yes.

5 MR. DELERY: And so, certainly here, you know, there
6 are a number of specific requests. The case has been briefed
7 up until, you know, up until this Court at the highest level
8 of generality whether any documents could be acknowledged.

9 JUDGE GARLAND: Right.

10 MR. DELERY: Certainly, even consistent with the
11 position that we've taken on the no number, not list in the
12 New York case, many of the specific requests, that really has
13 a bearing on the first request in this particular case.

14 JUDGE GARLAND: Well, you might --

15 MR. DELERY: A number of others might still be
16 subject to Glomar.

17 JUDGE GARLAND: Yes. You might still give a Glomar
18 response to the question do we have any documents that reflect
19 that we own the boat or we own the drones. But, that's a
20 different question then do we have any documents at all and
21 looking at Panetta's statement, it's --

22 MR. DELERY: Right.

23 JUDGE GARLAND: -- sort of hard to imagine that
24 there aren't any documents if he's making an assessment of
25 collateral damage. But, let me move to the next one.

1 The next one is his statement after he's the
2 Secretary of Defense. Now, on this one, it's quite clear.
3 Right? That predators are something I was very familiar with
4 in my last job. He said having moved from the CIA to the
5 Pentagon, obviously, I have a hell of a lot more weapons
6 available to me in this job than I had at the CIA although the
7 predators aren't bad. That pretty much sounds like an
8 acknowledgment that he had a weapon available to him at the
9 CIA called the predator. Correct?

10 MR. DELERY: Right. I think it's an ambiguous aside
11 that I don't think can --

12 JUDGE GARLAND: No. This was a statement to the
13 troops. This wasn't some sort of --

14 MR. DELERY: That's right.

15 JUDGE GARLAND: -- aside. This was a statement he
16 made to the troops.

17 MR. DELERY: I think in the context of what he was
18 saying it's an aside, and even to the extent it acknowledges
19 that predators were available to him when he was --

20 JUDGE GARLAND: Yes.

21 MR. DELERY: -- Secretary of Defense. I'm sorry.
22 CIA Director.

23 JUDGE GARLAND: Yes.

24 MR. DELERY: That doesn't indicate whether they were
25 CIA assets or whether they were available to him because they

1 were being used by another agency. It also doesn't indicate
2 whether they were being used for lethal force which is the
3 issue subject to this FOIA request as opposed to
4 surveillance --

5 JUDGE GARLAND: Well, the FOIA request was about,
6 well, first of all, it's a predator. We're not talking about
7 a surveillance drone.

8 C1: They have multiple purposes, I think, that's
9 fully established.

10 JUDGE GARLAND: Yes. But, he's talking about
11 weapon. Same sentence uses the word weapon.

12 MR. DELERY: And again, I think in --

13 JUDGE GARLAND: Yes.

14 MR. DELERY: -- context of a DOD official, weapons
15 refer to assets including surveillance assets.

16 JUDGE GARLAND: All right. Does this not, at least,
17 be an acknowledgment that he had information about these
18 things when he was the CIA Director?

19 MR. DELERY: I think it is an acknowledgment that he
20 was familiar with --

21 JUDGE GARLAND: In his former job.

22 MR. DELERY: Yes. Exactly.

23 JUDGE GARLAND: Yes. So, it wouldn't injure the
24 national security, then, to acknowledge that there are
25 documents about drones in the CIA unless you think that

1 Secretary Panetta has violated the national security by making
2 this statement.

3 MR. DELERY: Again, Your Honor, I think as reflected
4 in the New York case, we have acknowledged that the question
5 about whether there are any documents is not where we are
6 drawing the line.

7 JUDGE GARLAND: But, that was where you were drawing
8 the line before --

9 MR. DELERY: The question is the number --

10 JUDGE GARLAND: -- notwithstanding Secretary
11 Panetta's statement.

12 MR. DELERY: Right.

13 JUDGE GARLAND: Which makes me wonder how a lower
14 level information officer at the CIA can say it would damage
15 the national security to acknowledge that we have documents
16 about drones when the Secretary of Defense acknowledges
17 information about drones in his job as the CIA.

18 MR. DELERY: Right.

19 JUDGE GARLAND: Unless he should be punished in some
20 way. You don't think that, I assume.

21 MR. DELERY: I mean, I think, also, there is the
22 point about him being a former official of the agency. But, I
23 think --

24 JUDGE GARLAND: He's former. But, he is in a
25 national security position.

1 MR. DELERY: Right. Yes.

2 JUDGE GARLAND: And his statements about, unless we
3 are to say that he's uninterested in the national security,
4 his disclosures have to be taken to suggest more than an
5 information officer at the CIA that it wouldn't harm the
6 national security, and apparently, you've now acknowledged
7 that because now you're acknowledging it.

8 MR. DELERY: I mean, if that's consistent with the
9 declaration that was filed in the Southern District case.

10 JUDGE GARLAND: Yes.

11 MR. DELERY: I think the point here, though, is that
12 where we're talking about ambiguous statements, and I think
13 it's fair to say that all of these are somewhat ambiguous,
14 some people might read them one way if they can be read the
15 other way. So, for example, if all of these statements,
16 individually or collectively, can be read as consistent with,
17 for example, the line that's been drawn in Mr. Brennan's
18 speech which is to acknowledge certain Government activities
19 but not the involvement of the CIA.

20 JUDGE GARLAND: Well, it's not --

21 MR. DELERY: That as a matter of, I'm sorry.

22 JUDGE GARLAND: Yes. So, let's turn to Mr.
23 Brennan's speech which actually is the most problematic at
24 all, and he says in the context of a discussion about drones,
25 right, the United States is the first nation to regularly

1 conduct strikes using remotely piloted aircraft in an armed
2 conflict. He says let me say this as simply as I can. The
3 United States conducts targeted strikes against the specific
4 al-Qaeda terrorists sometimes using a remotely piloted
5 aircraft often referred to publicly as drones.

6 And then he says, when we do this, we are, of
7 course, mindful of important checks. We review the most up-
8 to-date intelligence drawing on the full range of our
9 intelligence capabilities. We may ask the intelligence
10 community to go back and collect additional intelligence or
11 find the analysis. Suffice it to say, our intelligence
12 community has multiple ways to determine with a high degree of
13 confidence that the individual being targeted, is indeed, the
14 al-Qaeda terrorists we are seeking.

15 Now, doesn't that constitute an official
16 acknowledgment that the CIA is, in quote, involved in the
17 drone program regardless of whether it owns the drones or DOD
18 owns the drones or whether its operators run the drones or
19 DOD's operators. It's involved in it because unless it's a
20 member of the intelligence community that has decided to
21 recuse itself.

22 MR. DELERY: I think, Your Honor, it's, again, not
23 sufficient to constitute the kind of precise official
24 confirmation that this Court's test has required. As Your
25 Honor points out, the intelligence community is a collection

1 of agencies. It's 17 agencies, and I don't believe that this
2 Court has read --

3 JUDGE GARLAND: The full range. The full range of
4 our intelligence capabilities. Does the CIA not have any?

5 MR. DELERY: Again, Your Honor, it doesn't say who
6 within the Government is doing that.

7 JUDGE GARLAND: I don't know. You know, Glomar is a
8 judicial construct to begin with as your opponents
9 appropriately point out. You are really asking us to say, you
10 know, I don't know. If the CIA is the emperor, you're asking
11 us to say the emperor has clothes even when the emperor's
12 bosses say that the emperor doesn't. I mean, how can you ask
13 the Court to say that at this point? It's one thing to say it
14 in a circumstance where there's no official acknowledgment of
15 any kind. It's another thing to say it when the President
16 says we have a drone program. The former CIA Director, now
17 the DOD Secretary says the CIA had a program. I understand
18 your point about concern that disclosure of specific documents
19 could disclose things that would injure the national security,
20 and that seems to be an argument for another day. But, the
21 argument that disclosure, that we have documents about, you
22 know, about assessments of the consequences of drone programs.
23 It just beggars belief that the CIA wouldn't care about that
24 question.

25 MR. DELERY: Right. I have a few answers to that,
26 Your Honor. I think, including by pointing to some of this

1 Court's prior cases and other prior cases.

2 In the Wilner case for example, a Second Circuit
3 case involving --

4 JUDGE GARLAND: That's not our case.

5 MR. DELERY: That's not your case.

6 JUDGE GARLAND: Right.

7 MR. DELERY: The terror surveillance program --

8 JUDGE GARLAND: Yes.

9 MR. DELERY: -- and the Afshar case which is the
10 D.C. Circuit's case.

11 JUDGE GARLAND: Yes. Both involved situations in
12 which there was a general acknowledgment of some activity,
13 some program, terrorist surveillance program. And in the
14 Afshar case, the question was some connection to the Iranian
15 intelligence service, and in both cases, the Court's
16 emphasized that discussion at a certain level, that the
17 Government is generally doing something, that there is
18 something called the terrorist surveillance program did not
19 require the disclosure of operational details. So, the Wilner
20 case upheld a public Glomar response, and in the Afshar case,
21 the Court specifically --

22 JUDGE GARLAND: But wasn't a Glomar response about
23 particular communications with particular individuals? Wasn't
24 that what it was about?

25 MR. DELERY: And about the activities in the

1 collection process.

2 JUDGE GARLAND: It was a request for specific kinds
3 of information. It didn't uphold a statement that we have no
4 TSP process or that we have no documents involving TSP at all.
5 Right?

6 MR. DELERY: Right. And, again, we're not here
7 asking Your Honor to conclude that there's been no
8 acknowledgment of the use of drones by the Government. There
9 definitely has been.

10 As the submission on the second, in the SDNY, I'm
11 sorry, suggested, the position the Government is taking here
12 has been evaluated at the highest levels of the executive
13 branch or reflects the considered national security judgment
14 that there would be a harm to going beyond the general
15 discussion of, that has been reflected in the speeches into
16 the particular involvement of this agency one way or the other
17 way. And in the Court's past cases, that has been respected.
18 So, in Afshar, for example, the question --

19 JUDGE GARLAND: Oh. No. That's not in the
20 affidavit here. Right? The discussion you're making which is
21 how national security will be injured by indicating the CIA's
22 involvement as compared to the Government's. That is in the
23 SDNY affidavit. I don't think it's in this affidavit.

24 MR. DELERY: I think that the harm that would flow
25 from acknowledging one way or the other whether the CIA is

1 involved is reflected in the Cole Affidavit although not in as
2 much detail as in later submissions, and so to the extent,
3 that that is an important question, and the Court finds the
4 current summary judgment record insufficient as the Court has
5 done in the past, we'd urge the opportunity to supplement on
6 that point.

7 MR. DELERY: But in Afshar, I think it's
8 illustrative because --

9 JUDGE GARLAND: Afshar was not a Glomar case, was
10 it?

11 MR. DELERY: No. But, the issue in the case was
12 having reflected documents showing FBI involvement. Was the
13 Government, nevertheless, entitled to conceal whether or not
14 the CIA was involved in a particular program. It's a similar
15 analogy.

16 JUDGE TATEL: I'm confused about your response to
17 Judge Garland about the Cole Affidavit. It says that the
18 records they want would reveal the type of activities in which
19 the CIA may be involved and then it says the response would
20 reveal whether or not the CIA specifically, whether the CIA,
21 whether or not the CIA was specifically involved in target
22 selection. Which would be a classified fact. The CIA has
23 never acknowledged that. So --

24 MR. DELERY: That is one of the requests in this
25 request --

1 JUDGE TATEL: Right.

2 MR. DELERY: -- and the Cole Declaration explains
3 why answering whether or not documents exist would reveal that
4 classified information.

5 JUDGE TATEL: I only asked you that because I
6 thought you were responding to Judge Garland's focus questions
7 by saying that the co-affidavit didn't make such a
8 representation. No?

9 MR. DELERY: If so, I'm sorry. What I intended to
10 say was that there were, there are discussions in the Cole
11 Affidavit about why acknowledging the involvement generally
12 and then on particular pieces of the ACLU's request would harm
13 national security if responded to.

14 JUDGE GARLAND: The affidavit in this case says it
15 but doesn't give a reason. The affidavit in the Southern
16 District gives a considerably detailed --

17 JUDGE TATEL: Right. Right. That's true. Right.
18 Right.

19 JUDGE GARLAND: -- I'm not saying whether it's a
20 good reason or not --

21 JUDGE TATEL: Right.

22 JUDGE GARLAND: -- but it addresses the question in
23 a way that this one doesn't.

24 MR. DELERY: Yes.

25 JUDGE TATEL: Right.

1 MR. DELERY: That is certainly true. I think the
2 other point I would make about the exercise here of examining
3 the individual statements is that I go back to the reasons for
4 the very strict tests that the Court has created emphasizing
5 that the executive branch is better situated to make the
6 judgments about whether or not reading pieces of information
7 together would or wouldn't have consequences for the national
8 security, and that there's a difference with respect to
9 international fares quite often between rumor, speculation,
10 news stories that are putting desperate pieces of information
11 together, and official confirmation whether required by the
12 Court or otherwise of Government involvement or a particular
13 agencies involvement in a particular activity and the Court,
14 in several cases, has made clear that CIA's activities in
15 particular present that problem in the area of international
16 affairs, and so for those reasons I think the match --

17 JUDGE GRIFFITH: And for that very reason, you're
18 right. We've given leeway to the intelligence community
19 because of the foreign affairs concerns. But, the allegation
20 here is that there are no foreign affairs concerns. Those
21 were thrown to one side because the allegation here is there
22 was a strategy of selective disclosure not for any foreign
23 policy games but for other concerns. So, I'm not sure how
24 your foreign policy argument works here. It's certainly been
25 an important element of previous cases but this doesn't seem

1 to be a case that the Government ought to get that benefit.

2 MR. DELERY: I think, Your Honor, that that's
3 incorrect because --

4 JUDGE GRIFFITH: The alleged leaks here were done
5 for foreign policy reasons?

6 MR. DELERY: Not for, no. Again, and putting aside
7 whether there actually, there is evidence of the kind of
8 coordinated campaign that you're talking about.

9 JUDGE GRIFFITH: Right.

10 MR. DELERY: The point is that official
11 confirmation, clear statement by, on the record by the
12 Government of CIA involvement or not in particular activities
13 can have foreign affairs consequences.

14 JUDGE GRIFFITH: Yes.

15 MR. DELERY: So, to the extent that there are
16 concerns about the kind of allegations that you've mentioned
17 and, you know, I'm certainly not here to defend leaks as a
18 general matter, putting aside the facts of this case, the FOIA
19 of litigation is not the mechanism for conducting that kind of
20 leak inquiry. There are other mechanisms within the executive
21 branch through public discussion, through congressional
22 oversight for accountability in all of those.

23 JUDGE GRIFFITH: You're exactly right. Except when
24 FOIA can be misused. Right? FOIA can be misused to carry on
25 a campaign of strategic leaks and hind behind FOIA.

1 MR. DELERY: Again, I respectfully submit that the
2 plaintiffs' speculation to that affect --

3 JUDGE GRIFFITH: Yes.

4 MR. DELERY: -- doesn't trigger that concern.

5 JUDGE GRIFFITH: No. But, that's the allegation
6 here, and all I'm saying is --

7 MR. DELERY: Right.

8 JUDGE GRIFFITH: -- it suggests, perhaps, some
9 different values in play than in the cases where we've given
10 wide sway to the Government to engage in activity that didn't
11 rise to the level of official acknowledgment.

12 MR. DELERY: Right. I think the inquiry in FOIA
13 litigation is whether or not, based on the record, the
14 disclosure of the information sought, would or wouldn't harm
15 national security, and to the extent that there are other
16 concerns about activities in the Government, there are other
17 mechanisms to get at that. You know, to go down that road
18 would be new for this Court, and as far as I know, for any
19 Court. It's not clear what the threshold would be for
20 triggering that kind of inquiry, and it's inconsistent with
21 the narrow role that the Supreme Court in the Sims case and
22 this Court in a number of cases that said should be the
23 Court's inquiry in FOIA cases to look for an exact match and
24 if there isn't a match then there's not official confirmation.

25 JUDGE GARLAND: Speaking of new things, I have this

1 question. It may not have any relevance right now. No
2 number, no list, which in reading through the Southern
3 District materials it says this is a common practice that the
4 CIA uses. I've been here 15 years.

5 MR. DELERY: Yes.

6 JUDGE GARLAND: I've heard a lot of FOIA cases. I
7 was in the Government before that. Participated in a lot of
8 FOIA cases. I never heard that phrase before. I used
9 Westlaw. I found three references. Two to the Bassiouni
10 case --

11 MR. DELERY: Yes.

12 JUDGE GARLAND: -- and one to a district court case.
13 So, what's the story here? Is this a new kind of response?
14 Has it never made it into court? Where does this phrase no
15 number, no list as a way of answering rather than Glomar?
16 Where did that come from?

17 MR. DELERY: Well, I'm certainly familiar with it
18 from the Bassiouni case.

19 JUDGE GARLAND: Yes.

20 MR. DELERY: And, you know, in terms of --

21 JUDGE GARLAND: Is that the only case the CIA has
22 ever made that argument for?

23 MR. DELERY: I don't know the answer to that, Your
24 Honor. I do think that the logic of it flows directly from
25 the logic behind Glomar which itself, as has been indicated,

1 is an interpretation of the exemptions. FOIA, the statute,
2 makes clear particularly then when read with other statutes on
3 national security information that the question is whether
4 disclosure of particular information would or wouldn't harm
5 national security. But, a Glomar and no number, no list, I
6 think, are both expressions of the same question which is if
7 forced to provide particular information, whether it's any
8 list at all or details of the number or nature or categories
9 of documents or what have you, whatever level the disclosure
10 would harm national security. The exemptions allow for it to
11 be protected. Exemption 1 --

12 JUDGE GARLAND: Rather than Glomar, it sounds more
13 like a discussion of the Vaughn Index. Sometimes we allow
14 vague Vaughn Indexes, sometimes we allow totally in camera, in
15 the court examination of documents, sometimes we require very
16 specific and very public Vaughn Indexes, and the nature of the
17 Vaughn Index depends on what is, you know, what could be
18 revealed. If the purpose of the Vaughn Index is to provide an
19 opportunity to argue but not to reveal and if a Vaughn Index
20 can't do anything but reveal, then a modified Vaughn Index
21 would apply. I'm not sure exactly why it's the same as -- I
22 appreciate that the Seventh Circuit thinks it's the same but--

23 MR. DELERY: Right.

24 JUDGE GARLAND: -- it seems to me there's a
25 difference between asking the Court to go on with the idea

1 that we can't acknowledge whether there are documents at all
2 when it seems clear that there are, and now you're
3 acknowledging that there are, and asking the Court to go along
4 with a modified Vaughn Index which doesn't harm the national
5 security index, interest after some findings by the District
6 Court in that regard.

7 MR. DELERY: Right. And the Southern District
8 submission, I would suggest, is along that spectrum. The
9 declaration's there, both public and classified, explain why
10 that is the level of detail at which it's appropriate to
11 address these questions.

12 I think the other point I would make in this regard
13 is that in terms of the functions as well as from the statute,
14 most of the this discussion of harm comes in the Exemption 1
15 context. Exemption 3 is a more categorical statement by
16 Congress. When you combine Exemption 3 with the other
17 statutes that there are sets of information, categories of
18 documents, including documents related to the CIA functions
19 and to intelligence sources and methods, that are
20 categorically presumed to be outside the scope of what should
21 be disclosed and therefore exempted from FOIA.

22 And, you know, I don't think that these statements
23 and some of the questions about whether it would or wouldn't
24 harm national security to go a step further address Exemption
25 3 which was noted earlier. The plaintiffs have now conceded

1 or at least are not pressing on appeal that the information
2 that we're talking about falls within those appropriate
3 categories.

4 JUDGE TATEL: Thank you.

5 MR. DELERY: Thank you, Your Honor.

6 JUDGE TATEL: Mr. Jaffer, I think we can officially
7 acknowledge that you used up all your time.

8 MR. JAFFER: Your Honor, can I just, can I clarify
9 one answer?

10 JUDGE TATEL: But you can take four minutes. Go
11 ahead.

12 MR. JAFFER: Thank you.

13 ORAL ARGUMENT OF JAMEEL JAFFER, ESQ.

14 ON BEHALF OF THE APPELLANTS

15 MR. JAFFER: Judge Garland --

16 JUDGE TATEL: Yes.

17 MR. JAFFER: -- I think I avoided one of your
18 questions which I now want to address.

19 JUDGE GARLAND: I try not to let people do that but
20 if you slipped away, you're a very good litigator.

21 MR. JAFFER: You asked me about waiver of the harm
22 argument.

23 JUDGE GARLAND: Yes.

24 MR. JAFFER: And I think it's fair to say that we
25 have waived that argument. As to the question about

1 litigation strategy --

2 JUDGE GARLAND: Which harm argument have you waived?

3 MR. JAFFER: So, to the extent the question is
4 whether the disclosure of the things that Secretary Panetta
5 and the President have now disclosed would otherwise have been
6 protected under Exemptions 1 and 3, I don't think it's open to
7 us to argue now that the exemptions are improperly invoked.
8 Now, that said, I don't think that the CIA --

9 JUDGE GARLAND: I'm still not sure exactly what that
10 means. Can you put that in very specific context here?

11 MR. JAFFER: Sure. So, the Government here has -- I
12 actually don't think this is material at all because of what
13 Government counsel just said which is Exemption 3 doesn't
14 require a showing of harm on the part of the Government, and
15 because it doesn't require a showing of harm, you know, the
16 question of harm relates only to Exemption 1. We need to win.
17 We need to prevail on both Exemption 1 and Exemption 3 to
18 prevail overall. So, I don't think it's material but, to the
19 extent it's material, I think it's fair to say that we have
20 waived the argument that these statements that Secretary
21 Panetta and the President have made would not have been
22 protectable under Exemptions 1 and 3 but for these
23 disclosures.

24 So, you know, I don't know if that clarifies that
25 but --

1 JUDGE GARLAND: Well, the reason I'm unclear --

2 MR. JAFFER: Yes.

3 JUDGE GARLAND: -- is you obviously have a different
4 idea of what the statements were then the Government has.
5 So --

6 MR. JAFFER: That's right. That's right. So --

7 JUDGE GARLAND: So, to put it in the context I was
8 asking you before, the idea that disclosure of the CIA's
9 involvement as compared to the United States involvement
10 overall, whether one's disclosure of the Government's
11 involvement --

12 MR. JAFFER: Yes.

13 JUDGE GARLAND: -- there would be no harm from the
14 CIA's involvement if that hasn't been conceded that the CIA
15 actually operates them, you can't make the argument now.

16 MR. JAFFER: I don't think it's been asserted by the
17 CIA. I don't think that that claim has been made with any
18 specificity at all in their declaration.

19 JUDGE GARLAND: So then you're not waiving that one?

20 MR. JAFFER: No. There's nothing to waive because
21 they hadn't made it.

22 JUDGE GARLAND: Well, you are. So that's why --

23 MR. JAFFER: Right. That's right.

24 JUDGE GARLAND: So, what is it? What harm argument,
25 I'm sorry to press on this but I don't want to make -

1 MR. JAFFER: Right. To the extent they made harm
2 arguments, you know, I don't think it's open to us to oppose
3 those harm arguments now. But, they hadn't made the harm
4 argument.

5 JUDGE GARLAND: I see. I see.

6 MR. JAFFER: The CIA's declaration, you know, it
7 does include one sentence that seems to be referring
8 specifically to the CIA's rule in selecting targets. That's
9 the only sentence, I think, in the declaration that goes to
10 this point, if it goes to the point at all, and I think that
11 at best that's conclusory.

12 As to the question of the Vaughn Declaration, I know
13 that the Court is already aware of this but the District
14 Courts deal with this kind of issue all the time. The fact,
15 you know, if we were to prevail on this Glomar or no number,
16 no list argument, it doesn't mean, obviously, that the CIA now
17 turns over all of its documents to us. There is this phase in
18 which the Government must explain on the record why it's
19 withholding documents from the public if it wants to continue
20 withholding them, and at that phase, the District Court has a
21 lot of leeway to ensure that information that's legitimately
22 secret remains legitimately secret.

23 JUDGE GARLAND: Does the District Court also have a
24 lot of leeway in deciding what goes into the Vaughn, what
25 degree of detail goes into the Vaughn Index?

1 MR. JAFFER: Absolutely, Your Honor. But, in
2 justifying the use of generalities in the Vaughn, the
3 Government can't point or shouldn't be able to point if we get
4 remanded now, shouldn't be able to point to its interest in
5 maintaining the confidentiality of the CIA's drone program.
6 That is something that's been disclosed and to the extent the
7 Government wants to justify the use of generalities in the
8 Vaughn, it must point to something other than that.

9 JUDGE GARLAND: When you use the phrase the CIA's
10 drone program, are you using it in the context that you
11 suggested in your reply brief?

12 MR. JAFFER: As a shorthand.

13 JUDGE GARLAND: Just meaning that the CIA has
14 documents relating to drones or do you mean --

15 MR. JAFFER: That's right, Your Honor.

16 JUDGE GARLAND: -- a program that the CIA owns?

17 MR. JAFFER: In the larger sense. I mean it in the
18 larger sense.

19 JUDGE GARLAND: Broader, more general sense.

20 MR. JAFFER: The documents that the CIA has in its
21 possession. Although, again, we feel that the CIA has
22 actually disclosed, its the fact that the CIA specifically
23 uses drones to carry out targeted killings.

24 JUDGE TATEL: See, I think I read your response to
25 some of the other statements as really focused on the CIA.

1 Like the respect of one of the statements, and I don't
2 remember which one it was, you made the point that certain
3 articles had revealed that the DOD does not have a drone
4 program which led you to conclude that it must be the CIA that
5 did. Correct?

6 MR. JAFFER: That's right, Your Honor.

7 JUDGE TATEL: Yes. So, you are really focusing on
8 the CIA's drone program. Right?

9 MR. JAFFER: No. No, Your Honor.

10 JUDGE TATEL: No.

11 MR. JAFFER: It's just that we, you know, we think
12 it's clear now. I mean, there's obviously no dispute about it
13 anymore that the Government has acknowledged an interest.

14 JUDGE TATEL: Yes.

15 MR. JAFFER: That there is a drone program --

16 JUDGE TATEL: Right.

17 MR. JAFFER: -- run by the U.S. Government and so
18 the hard question to the extent there's, you know, there's a
19 hard question left, it's this question of whether the CIA's
20 role has been disclosed, and so we were just trying to make
21 clear that it's not just that the Government has disclosed
22 that there is a drone program but that the CIA is actually
23 using drones to carry out targeted killings.

24 JUDGE TATEL: Yes. All right.

25 MR. JAFFER: Your Honor, just --

1 JUDGE TATEL: Do you have anything else you want
2 to --

3 MR. JAFFER: The only other thing I want to add --

4 JUDGE TATEL: Yes. Go ahead.

5 MR. JAFFER: -- is that the Glomar Doctrine is a
6 judicially created construct. There's nothing that requires--

7 JUDGE GARLAND: I already said that.

8 JUDGE TATEL: We know that.

9 MR. JAFFER: All right. Thank you, Your Honors.

10 JUDGE TATEL: Yes. Thank you. The Court will take
11 a brief recess before the next case.

12 (Recess.)

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.



Dawn M. Bahn Miller

September 20, 2012

DEPOSITION SERVICES, INC.