UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION, *et al.,*	)	
Plaintiffs,	)	
v.	)	CA No. 1:10cv0436 (RMC)
	)	Judge Collyer
DEPARTMENT OF JUSTICE, *et al.,*	)	
Defendants.	)	

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT CIA'S MOTION FOR SUMMARY JUDGMENT

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INTERESTS OF *AMICI CURIAE*

Amici curiae are two organizations with an interest in national security issues. Their interests are set forth more fully in the accompanying motion for leave to file this brief.

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to promoting America's national security. To that end, WLF has appeared in this and numerous other federal courts to ensure that the U.S. government is not deprived of the tools necessary to protect this country from those who would seek to destroy it and/or harm its citizens. *See, e.g., Boumediene v. Bush,* 553 U.S. 723 (2008); *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004).

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared on a number of occasions in cases raising national security issues.

Amici are concerned that the ability of the American military to carry out its mission will be compromised if federal courts are placed in a position of second-guessing the operational decisions of military commanders and/or invoking the Freedom of Information Act (FOIA) to require the disclosure of highly classified government information. *Amici* concur with Defendants that FOIA Exemption 1 authorizes the Central Intelligence Agency (CIA) to provide a "Glomar response" to this lawsuit. *Amici* are filing separately to call to the Court's attention the CIA's invocation of the "state secrets" doctrine in a related ACLU lawsuit that challenges the alleged CIA "targeted killing" policy that is the subject of this FOIA suit. *Amici* submit that the CIA's determination that *any* judicial inquiry into "targeted killing" could damage national security provides additional support for the CIA's motion for summary judgment.

STATEMENT OF THE CASE

Plaintiffs American Civil Liberties Union, *et al.* (ACLU) filed an FOIA request on January 13, 2010 with, among other federal agencies, the CIA. The request sought records pertaining to 10 categories of information relating to the use of drones by the United States to engage in "targeted killing" of individuals. In particular, the request sought records containing information regarding the internal rules governing when and how the U.S. government deems it appropriate to use drones for targeted killing, including: (1) the selection of human targets for drone strikes and any limits on who may be targeted by a drone strike; (2) geographical or territorial limits on the use of UAVs (drones) to kill targeted individuals; (3) who may pilot UAVs, who may cause weapons to be fired from UAVs, or who may otherwise be involved in the operation of UAVs for the purpose of executing targeted killings; and (4) the training, supervision, oversight, or discipline of UAV operators and others involved in the decision to execute a targeted killing using a drone.

The CIA denied the document request on March 9, 2010, citing FOIA Exemptions 1 and 3 and stating that in accordance with Executive Order 12958 it could "neither confirm nor deny the existence of records responsive to [the ACLU's] request" because, *inter alia*, "[t]he fact of the existence or nonexistence of requested records is currently and properly classified." By letter dated April 22, 2010, the ACLU appealed from the denial. When the CIA had not ruled on the appeal by June 1, 2010, the ACLU on that day amended its complaint in this lawsuit to include a challenge to the CIA's denial.

On October 1, 2010, the CIA filed a motion for summary judgment. The motion asserted, "Official CIA acknowledgment of the existence or nonexistence of responsive records would

reveal sensitive national security information concerning intelligence activities, intelligence sources and methods, and the foreign relations and foreign activities of the United States." CIA Mot. To Dismiss at 4. Citing the attached declaration of Mary Ellen Cole, the Information Review Officer for the National Clandestine Service of the CIA, the CIA asserted, "To confirm the existence of responsive records would provide important insights into the CIA's interests and activities to terrorist organizations; conversely, to confirm the nonexistence of responsive records would provide these same entities with valuable information about potential gaps in the CIA's interests and capabilities." *Id.*

SUMMARY OF ARGUMENT

Amici agree with the CIA that the Cole Declaration provides more than enough information to establish that it has properly withheld records under Exemption 1. Exemption 1 protects material authorized to be kept secret in the interest of national defense and has, in fact, been properly classified. 5 U.S.C. § 552(b)(1). The declaration explains in detail why even confirming or denying the existence of CIA records responsive to the ACLU's FOIA request would reveal classified information that is protected from disclosure by statute. Cole Decl. ¶¶ 12-26.

Amici write separately to note that CIA Director Leon Panetta has made virtually identical assertions in another pending ACLU lawsuit that challenges the constitutionality of the U.S. government's alleged "targeted killing" program and that seeks disclosure of criteria employed in making "targeted killing" decisions. *See Al-Aulaqi v. Obama*, No. 10-cv-1469 (JDB) (D.D.C., complaint filed Aug. 30, 2010). In a declaration dated September 23, 2010 and submitted in support of a motion to dismiss filed by him and other defendants, Panetta invoked the state

secrets privilege "over any information implicated by Plaintiff's Complaint that would tend to confirm or deny any allegations in the Complaint pertaining to the CIA." Panetta Decl. ¶ 3. He further asserted that the ACLU's complaint should be dismissed because "no part of the case can be litigated on the merits without immediately and irreparably risking disclosure of highly sensitive and classified national security information." *Al-Aulaqi*, Mot. to Dismiss at 51. Panetta's response to the *Al-Aulaqi* litigation – coming as it does from the highest levels of the CIA – considerably strengthens the CIA's assertion in this lawsuit that it is authorized under FOIA Exemption 1 to decline to confirm or deny the existence of responsive CIA documents.

The Executive Branch has displayed commendable reluctance to invoke the state secrets doctrine any more often or extensively than necessary. Indeed, it has not explicitly raised it in connection with this FOIA lawsuit. But the Executive Branch's decision to invoke the doctrine in a pending case raising virtually identical facts should weigh heavily in the Court's consideration of whether the CIA has properly invoked Exemption 1 as its basis for providing a Glomar response to the ACLU's FOIA request.

In its April 22, 2010 appeal (Doc. 15-2, hereinafter "ACLU Appeal") from the CIA's initial denial of its FOIA request, the ACLU asserted that the CIA had waived the right to assert a Glomar response because "the government has acknowledged facts at issue in the Request" and because "[t]he CIA use of drones to conduct targeted killings in Pakistan – and, on at least one occasion, in Yemen – are by no means a secret." ACLU Appeal at 2. The ACLU has mischaracterized rules governing waiver of otherwise valid Glomar claims. The ACLU's cited examples of comments by public officials regarding use of drones all involved comments that were quite general in nature and came nowhere close to constituting the sort of official disclosure

of information that could be deemed to constitute a waiver of CIA confidentiality claims.

ARGUMENT

I. THE CIA'S INVOCATION OF THE "STATE SECRETS" DOCTRINE IN RELATED LITIGATION PROVIDES ADDITIONAL SUPPORT FOR THE CIA'S INVOCATION OF EXEMPTION 1 IN THIS CASE

Exemption 1 to the FOIA, 5 U.S.C. § 552(b)(1), provides that the FOIA's disclosure requirements do not apply to matters that are "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and "are in fact properly classified pursuant to such Executive order." *Amici* concur with Defendant CIA that the Declaration of Mary Ellen Cole fully satisfies the requirements of Exemption 1 and justifies the CIA's decision to submit a Glomar response to the request for documents from the agency.[1]

The Cole Declaration adequately demonstrates that an official CIA acknowledgment that confirms or denies the existence or nonexistence of records responsive to the ACLU's FOIA request would reveal whether the CIA is involved in drone strikes and/or has an intelligence interest in drone strikes – and that such a response would in turn implicate information concerning clandestine intelligence activities, intelligence sources and methods, and U.S. foreign relations and foreign activities. Cole Decl. ¶¶ 12-26. As Cole explained:

> It would greatly benefit hostile groups, including terrorist organizations, to know with certainty in what intelligence activities the CIA is or is not engaged or in what the CIA is

[1] A "Glomar response" to an FOIA request is one that neither confirms nor denies the existence or nonexistence of responsive records, on the grounds that the fact of the existence or nonexistence of requested records is currently and properly classified (when records are being withheld pursuant to Exemption 1) or is intelligence sources and methods information (when records are being withheld pursuant to Exemption 3). *See Phillippi v. Central Intelligence Agency*, 546 F.2d 1009, 1011 (D.C. Cir. 1976).

> or is not interested. To reveal such information would provide valuable insight into the CIA's capabilities, interests and resources that our enemies could use to reduce the effectiveness of CIA's intelligence operations.

Id. ¶ 24.

The Cole Declaration also asserts that such acknowledgment could damage U.S. foreign relations, explaining that "[w]hen foreign governments cooperate with the CIA, most of them require the CIA to keep the fact of their cooperation in the strictest confidence. Any violation of this confidence could weaken, or even sever, the relationship between the CIA and its foreign intelligence partners." *Id.* ¶ 25. The Declaration further states that the existence or nonexistence of the requested records is "a properly classified fact" pursuant to Executive Order 13526. *Id.* ¶ 30.[2]

Numerous federal appellate decisions have deemed similar declarations more than sufficient to justify providing a Glomar response to a request for records containing classified information. *See, e.g., Gardels v. CIA*, 689 F.2d 1100, 1103 (D.C. Cir. 1982); *Wilner v. NSA*, 592 F.3d 60, 68 (2d Cir. 2009), *cert. denied*, ___ U.S. ___, 2010 U.S. LEXIS 6407 (U.S., Oct. 4, 2010). As the D.C. Circuit has explained:

> Summary judgment is warranted on the basis of agency affidavits when the affidavits describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of bad faith.

Larson v. Dep't of State, 565 F.3d 857, 862 (D.C. Cir. 2009). The Cole Declaration provides "reasonably specific detail" regarding why national security concerns justify nondisclosure and

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[2] The Executive Order explicitly permits an agency to "refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified under this order or its predecessors." Executive Order 13526, Sec. 3.6(a).

why the requested records logically fall within the contours of Exemption 1. In the absence of contrary evidence from the ACLU that contravenes the Cole Declaration, the CIA's motion for summary judgment should be granted.

A. This Case Threatens Disclosure of Information Very Similar to Information Sought by the ACLU in a Case in Which the CIA Has Invoked the State Secrets Doctrine

This case seeks disclosure of information very similar to information sought by the ACLU in a lawsuit filed in August, *Al-Aulaqi v. Obama*, No. 10-cv-1469 (JDB) (D.D.C., complaint filed Aug. 30, 2010). The CIA and other federal agencies have moved to dismiss the lawsuit on the basis of the state secrets doctrine – they assert that allowing the lawsuit to proceed would pose an unreasonable risk that national security would be compromised due to the disclosure of state secrets. Although the CIA has not undertaken the formal steps necessary to invoke the state secrets doctrine here, the declarations submitted in support of the motion to dismiss the *Al-Aulaqi* case provide strong additional support fort the CIA's contention in this case that nondisclosure is warranted under FOIA Exemption 1.

The U.S. government has determined that Anwar Al-Aulaqi, an American citizen reportedly living in hiding in Yemen, is a leader of an al Qaeda affiliate known as al Qaeda in the Arabian Peninsula (AQAP). He is alleged to be responsible for planning numerous terrorist actions, including the attempted Christmas Day bombing of a Northwest Airlines flight as it approached the Detroit airport. In response to press reports that the CIA has authorized Al-Aulaqi's "targeted killing" by means of a drone attack, Al-Aulaqi's father (represented by the ACLU) has filed suit seeking an injunction against such an attack. The proposed injunction would bar a drone attack in the absence of a determination (at the time of the attack) that Al-

Aulaqi is presenting "a concrete, specific, and imminent threat to life or physical safety." Also, in a request that mirrors the relief sought in this case, the suit seeks an order requiring the U.S. to disclose the criteria that are used in determining whether the federal government will authorize the targeted killing of a U.S. citizen. *See Al-Aulaqi* Complaint at 11.

The Defendants (one of whom is CIA Director Leon Panetta) moved to dismiss the complaint on several grounds, including a claim that dismissal is required under the state secrets doctrine. *See Al-Aulaqi*, Defts. Mot. to Dismiss at 43-59 (filed Sept. 25, 2010). Under the state secrets doctrine, the United States may prevent the disclosure of information in a judicial proceeding if "there is a reasonable danger" that such disclosure "will expose military matters which, in the interest of national security, should not be divulged." *United States v. Reynolds*, 345 U.S. 1, 10 (1953).[3] If a proceeding involving state secrets can be fairly litigated without resort to the privileged information, it may continue. "But if the circumstances make clear that sensitive military secrets will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters, dismissal is the proper remedy." *El-Masri v. United States*, 479 F.3d 296, 306 (4th Cir.), *cert. denied*, 552 U.S. 947 (2007); *see also Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 2010 U.S. App. LEXIS 18746 (9th Cir. 2010) (*en banc*) at *33-*34. The Defendants' pending motion to dismiss the *Al-Aulaqi* case is premised on the notion that the case cannot proceed in any fashion without creating an

[3] The state secrets doctrine may not be casually asserted. *Reynolds* imposed three procedural hurdles that significantly limit the circumstances under which the doctrine may be asserted: (1) the privilege belongs to the federal government and may neither be claimed nor waived by a private party; (2) the only government official with authority to invoke the privilege is "the head of the department which has control over the matter"; and (3) that individual may claim the privilege only if he has given "actual personal consideration" to whether assertion of the claim is warranted. *Id.* at 7-8.

unacceptable risk of the disclosure of state secrets:

> This case is a paradigmatic example of one in which no part of the case can be litigated on the merits without immediately and irreparably risking disclosure of highly sensitive and classified national security information. The purpose of this lawsuit is to adjudicate the existence and lawfulness of alleged targeting decisions and to compel the disclosure of any "secret criteria" used to make those alleged determinations.

Al-Aulaqi, Defts. Mot. To Dismiss at 51.

CIA Director Panetta filed a declaration in support of the motion to dismiss. A copy of the Panetta Declaration is attached hereto as an exhibit (it is labeled "Exhibit 5" to the motion to dismiss). Panetta asserted that the CIA could not confirm or deny any allegations of the complaint – *e.g.,* that the CIA maintained a "targeted killing" program that entailed the use of drone attacks, that Anwar Al-Aulaqi was a targeted individual, and that the CIA maintained secret criteria used to make those determinations – without risking disclosure of classified national security information. Panetta Decl. at 2. He stated:

> The purpose of this declaration is to formally assert and claim the state secrets privilege . . . to protect intelligence sources, methods and activities that may be implicated by the allegations of the Complaint or otherwise at risk of disclosure in this case. Specifically, *I am invoking the privilege over any information, if it exists, that would tend to confirm or deny any allegations in the Complaint pertaining to the CIA*. . . . Such information should be protected by the Court and excluded from any use in this litigation.

Panetta Decl. at 2-3 (emphasis added).[4]

B. The Declaration of CIA Director Leon Panetta Considerably Strengthens the CIA's Invocation of Exemption 1 in This Case

Panetta's response to the *Al-Aulaqi* litigation – coming as it does from the highest levels

[4] Panetta also submitted to the district court a classified, *ex parte*, *in camera* declaration that provided "the specific factual basis" for the privilege assertion. *Id*. at 3. He added, "It is my belief that my declarations adequately explain why this case cannot be litigated without risking or requiring the disclosure of classified and privileged intelligence information that must not be disclosed." *Id.*

of the CIA – considerably strengthens the CIA's assertion in this lawsuit that it is authorized under FOIA Exemption 1 to decline to confirm or deny the existence of responsive CIA documents. While the Cole Declaration sufficiently explains why the CIA is entitled to submit a Glomar response to the ACLU's document request, it arguably is open to the criticism that it might simply represent the views of a single government employee rather than evidencing the considered views of the CIA as a whole. The Panetta Declaration is not subject to such criticism. CIA Director Panetta stated that he invoked the state secrets doctrine with respect to "targeted killing" litigation only after giving the matter careful personal consideration: "I make these claims of privilege in my capacity as the Director of the CIA and after careful deliberation and personal consideration of the matter. I do not make these claims lightly." Panetta Decl. at 3.

The D.C. Circuit has explicitly recognized that an assertion of the state secrets privilege is entitled to a greater degree of judicial deference than is an assertion that Exemption 1 permits the federal government to withhold documents requested under the FOIA:

> [T]he nature of the decision to withhold information in a case of a claim of state secrets privilege fundamentally differs from the decision to claim a FOIA exemption. The most important difference is that the claim of the state secrets privilege is a decision of policy made at the highest level of the executive branch after consideration of the facts of the particular case. The *Reynolds* requirements compel that it fulfill these requisites. Consequently, the risk of permitting relatively unaccountable "invisible" bureaucratic decisions as to the national security value of information (specifically, the decisions to classify information that trigger FOIA Exemption 1) to bar disclosure of information on a wholesale basis is not presented in a state secrets case.

Halkin v. Helms, 690 F.2d 977, 995-96 (D.C. Cir. 1982).

The Executive Branch has displayed commendable reluctance to invoke the state secrets doctrine any more often or extensively than necessary. Indeed, it has not explicitly raised it in connection with this FOIA lawsuit. But the Executive Branch's decision to invoke the doctrine

in a pending case raising virtually identical facts should weigh heavily in the Court's consideration of whether the CIA has properly invoked Exemption 1 as its basis for providing a Glomar response to the ACLU's FOIA request. Moreover, the Court may take judicial notice of the Panetta Declaration because it is part of the record of a pending court proceeding.

The Supreme Court has explicitly recognized the close parallels between an Exemption 1 claim and a state secrets claim. *See Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139, 146-47 (1981). The Court upheld the U.S. Navy's assertion that it properly invoked Exemption 1 to neither admit nor deny whether it had prepared an environmental impact statement (EIS) regarding its operation of a facility capable of storing nuclear weapons. *Id.* at 145.[5] Applying its state secrets case law, the Court held in the alternative that whether the Navy complied with EIS disclosure requirements could not be adjudicated because doing so risked disclosure of classified matters:

> Ultimately, whether or not the Navy has complied with NEPA "to the fullest extent possible" is beyond judicial scrutiny in this case. In other circumstances, we have held that "public policy forbids the maintenance of any sort of suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated." *Totten v. United States*, 92 U.S. 105, 107 (1876). See *United States v. Reynolds*, 345 U.S. 1 (1953). We confront a similar situation in the instant case.

Id. at 146-47.

There cannot be any serious argument that the information that Panetta deemed to be "state secrets" is somehow different from the information that is the subject of the ACLU's FOIA

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[5] The duty to disclose EISs is set forth in § 102(2)(C) of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C). NEPA expressly provides that its public disclosure requirements are governed by FOIA. *See NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132, 161-62 (1975). Accordingly, the question of whether the U.S. Navy was required to disclose whether it had prepared an EIS ultimately was governed by Exemption 1 of FOIA.

request. The ACLU seeks records containing information regarding the internal rules governing when and how the U.S. government deems it appropriate to use drones for targeted killing, including: (1) the selection of human targets for drone strikes and any limits on who may be targeted by a drone strike; (2) geographical or territorial limits on the use of UAVs (drones) to kill targeted individuals; (3) who may pilot UAVs, who may cause weapons to be fired from UAVs, or who may otherwise be involved in the operation of UAVs for the purpose of executing targeted killings; and (4) the training, supervision, oversight, or discipline of UAV operators and others involved in the decision to execute a targeted killing using a drone. The *Al-Aulaqi* litigation seeks disclosure of precisely that information and/or will require disclosure of that information for purposes of determining whether the CIA has targeted Al-Aulaqi for attack and whether any such targeting violates his constitutional rights.

In sum, the records that the ACLU seeks in this FOIA lawsuit encompass information that the United States declared, in the *Al-Aulaqi* litigation, to constitute a state secret. That declaration dispels any lingering uncertainty regarding whether the CIA properly invoked Exemption 1 to declare that it could neither confirm nor deny the existence of responsive records.

II. LIMITED PUBLIC COMMENTS BY A FEW SENIOR GOVERNMENT OFFICIALS DO NOT WAIVE THE CIA'S RIGHT TO ASSERT A GLOMAR RESPONSE

In its April 22, 2010 appeal from the CIA's initial denial of its FOIA request, the ACLU asserted that the CIA had waived the right to assert a Glomar response because "the government has acknowledged facts at issue in the Request" and because "[t]he CIA use of drones to conduct targeted killings in Pakistan – and, on at least one occasion, in Yemen – are by no means a secret." ACLU Appeal at 2. The ACLU has mischaracterized rules governing waiver of

otherwise valid Glomar claims. The ACLU's cited examples of comments by public officials regarding use of drones all involved comments that were quite general in nature and came nowhere close to constituting the sort of official disclosure of information that could be deemed to constitute a waiver of CIA confidentiality claims.

In support of its assertion that CIA Director Panetta "has publicly discussed the CIA's drone operations in Pakistan on several occasions," ACLU App. at 3, the ACLU cites statements made by CIA Director Panetta on February 25, 2009. As reported by the Washington Post, Panetta stated, in response to questions about CIA drone attacks, "Nothing has changed our efforts to go after terrorists, and nothing will change those efforts." Karen DeYong and Joby Warrick, *Drone Attacks Inside Pakistan Will Continue, CIA Chief Says*, Wash. Post (Feb. 26, 2009). He reportedly stated that efforts to destabilize al Qaeda and destroy its leadership "have been successful," and added, "I don't think we can stop just at the effort to disrupt them. I think it has to be a continuing effort, because they aren't going to stop." *Id.* Notably missing from those quotations is the word "drone"; Panetta is quoted as stating that the U.S. will "go after terrorists," and "disrupt" al Qaeda by destroying its leadership, but he did not say what methods the CIA is using to carry out its mission.

The ACLU also cites statements by Panetta on March 17, 2010. The Washington Post reported that Panetta stated that American attacks on al Qaeda leadership in Pakistan "are seriously disrupting al-Qaeda," that "they are having a difficult time putting together any kind of command and control," and that "we really do have them on the run." Joby Warrick and Peter Finn, *CIA Director Says Secret Attacks in Pakistan Have Hobbled al-Qaeda*, Wash. Post (Mar. 18, 2010). Again, Panetta did not discuss drones or state that drones had been used in these

attacks. Indeed, in response to questions about a reported March 8, 2010 drone strike on an al Qaeda facility in an urban area of Pakistan that reportedly killed a top al Qaeda commander, Panetta "declin[ed] to comment on the strike itself." *Id.* The article added merely, "Panetta . . . said the death of the al-Qaeda commander sent a 'very important signal that they are not going to be able to hide in urban areas.'" *Id.*

The ACLU also cites statements by Panetta on March 17, 2010, included in a story regarding reported CIA drone strikes in Pakistan. Peter Finn and Joby Warrick, *Under Panetta, a More Aggressive CIA*, Wash. Post (Mar. 21, 2010). In defending CIA actions in the war against al Qaeda, Panetta reportedly said, "Any time you make decisions on life or death, I don't take them lightly. That's a serious decision. . . . And yet, I also feel very comfortable with making those decisions because I know I'm dealing with people who threaten the safety of this country and are preparing to attack us at any moment." *Id.* Not only did Panetta make no specific reference to drone strikes, but the article stated explicitly, "Panetta refused to directly address the matter of Predator strikes, in keeping with the agency's longstanding practice of shielding its actions in Pakistan from public view." *Id.*

The ACLU also cites statements made by Panetta on May 18, 2009 at an event sponsored by the Pacific Council on International Policy. The ACLU attributes to Mr. Panetta statements that drone attacks "have been very effective" in Pakistan and are favored because "drone attacks . . . 'involve[ ] a minimum of collateral damage.'" ACLU Appeal at 3. A review of the transcript reveals that Panetta said no such thing. He explicitly stated, "[O]bviously because these are covert and secret operations I can't go into particulars." While he stated that these unnamed covert and secret operations were "very effective because they have been very precise

in terms of the targeting and it involved a minimum of collateral damage," he never said what the operations consisted of. *See* Director's Remarks at the Pacific Council on International Policy (May 18, 2009), available at www.cia.gov/news-information/speeches-testimony/directors-remarks-at-pacific-council.html.

Moreover, court decisions make clear that even if the CIA were to admit its use of drone technology, an agency's right to provide a Glomar response to an FOIA request is not waived merely because the agency has acknowledged the existence of a program. Thus, for example, the Second Circuit held that statements by senior Bush Administration officials acknowledging the existence of the Terrorist Surveillance Program (TSP) did not waive the National Security Agency's (NSA) right to provide a Glomar response to FOIA requests seeking information about the TSP. *Wilner v. NSA*, 592 F.3d at 69-70. The appeals court explained:

> An agency is therefore precluded from making a *Glomar* response if the existence or nonexistence of the specific records sought by the FOIA request has been the subject of an official public acknowledgment. . . . 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, its target, the information it has yielded, or other highly sensitive national security information that the government has continued to classify. . . . We therefore hold that, as a threshold matter, and as a general rule, an agency may invoke the *Glomar* doctrine in response to a FOIA request regarding a publicly revealed matter. An agency loses its ability to provide a *Glomar* response when the existence or nonexistence of the particular records covered by the *Glomar* response has been officially and publicly disclosed.

Id. at 70. In the absence of any evidence from the ACLU that the CIA has officially and publicly disclosed the existence or nonexistence of any document covered by its FOIA request, the ACLU's waiver argument must be rejected.

CONCLUSION

Amici curiae Washington Legal Foundation and Allied Educational Foundation respectfully request that the Court grant Defendants' motion to for summary judgment.

Respectfully submitted,

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Dated: October 15, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of October, 2010, I deposited copies of the foregoing *amicus curiae* brief of Washington Legal Foundation, *et al.*, in the U.S. Mail, addressed as follows:

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I further certify that I sent copies of the brief to the above counsel by email (amy.powell@usdoj.gov and artspitzer@aol.com).
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