

# ELIMINATING THE NO NUMBER, NO LIST RESPONSE: KEEPING THE CIA WITHIN THE SCOPE OF THE LAW AMIDST AMERICA’S GLOBAL WAR ON TERROR

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*“Truth, it has been said, is the first casualty of war.”<sup>1</sup>*

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<sup>1</sup> Philip Snowden, *Introduction* to E. D. MOREL, TRUTH AND THE WAR, at ix (1916) (internal quotation marks omitted).

## INTRODUCTION

America's Global War on Terror<sup>2</sup> began as a direct response to the deadliest terrorist attack in modern history.<sup>3</sup> On September 11, 2001, the Taliban-backed terrorist group al-Qaeda coordinated four separate attacks on New York and Washington, D.C. that took the lives of nearly three thousand innocent people.<sup>4</sup> With strong domestic and international support, America invaded Afghanistan in October of 2001 with several focused objectives: overthrow the Taliban government, destroy al-Qaeda's training camps, and capture or kill Osama bin Laden.<sup>5</sup> Although U.S. military forces quickly overthrew the Taliban government and destroyed al-Qaeda's network within Afghanistan's borders,<sup>6</sup> America soon found itself being drawn into global conflict as its resilient and highly mobile enemy retreated across international borders to regroup and return as an insurgent force.<sup>7</sup> The U.S. military campaign was not deterred. President Bush made America's commitment clear, saying, "The message to every country is, there will be a campaign against terrorist activity, a worldwide campaign . . . Freedom-loving people understand that terrorism knows no borders, that terrorists will strike in order to bring fear . . . [a]nd we will not let them do that."<sup>8</sup>

The worldwide campaign against terrorism that President Bush promised in 2001 quickly became a reality—one that continues to this day. Besides the war

<sup>2</sup> See 32 C.F.R. § 578.32 (2007); Anup Shah, *War on Terror*, GLOBAL ISSUES (Oct. 7, 2013), <http://www.globalissues.org/issue/245/war-on-terror>.

<sup>3</sup> *U.S. War in Afghanistan*, COUNCIL ON FOREIGN REL., <http://www.cfr.org/afghanistan/us-war-afghanistan/p20018> (last visited Nov. 6, 2015); U.S. DEP'T OF STATE, SEPTEMBER 11 1–2, <http://www.state.gov/documents/organization/10288.pdf> (last visited Nov. 6, 2015).

<sup>4</sup> U.S. DEP'T OF STATE, *supra* note 3; *9/11 by the Numbers*, N.Y. MAG. Sept. 2014, <http://nymag.com/news/articles/wtc/1year/numbers.htm>.

<sup>5</sup> Interview by Tavis Smiley with U.S. Senator Jeff Merkley (Sept. 2, 2011), <http://www.pbs.org/wnet/tavissmiley/features/targeting-terrorists-counterterrorism-in-a-post-911-world/destroying-al-qaeda-training-camps/>.

<sup>6</sup> See Satinder Bindra, *India Identifies Terrorist Training Camps*, CNN (Sept. 19, 2001, 9:36 PM), <http://edition.cnn.com/2001/WORLD/asiapcf/central/09/19/inv.afghanistan.camp/>; David Rohde & C.J. Chivers, *A Nation Challenged; Qaeda's Grocery Lists and Manuals of Killing*, N.Y. TIMES (Mar. 17, 2002), <http://www.nytimes.com/2002/03/17/world/a-nation-challenged-qaeda-s-grocery-lists-and-manuals-of-killing.html>; *DOD News Briefing*, U.S. DEP'T OF DEF. (Oct. 23, 2001, 2:15 PM), <http://webcache.googleusercontent.com/search?q=cache:8uZXte0pPUoJ:www.defense.gov/Transcripts/Transcript.aspx%3FTranscriptID%3D2155+&cd=1&hl=en&ct=clnk&gl=us> ("I can tell you that we have struck all of the terrorist training camps that we are aware of. I can't tell you that I know what a number is, and I think that you can appreciate that if al Qaeda has an ability to train, they will try to make or find a camp that they can use. There aren't going to be any camps that we're going to allow them to use, and when we find them, we'll strike them.")

<sup>7</sup> See *U.S. War in Afghanistan*, *supra* note 3.

<sup>8</sup> *The Global War on Terrorism: The First 100 Days*, U.S. DEP'T OF STATE, <http://2001-2009.state.gov/s/ct/rls/wh/6947.htm> (last visited Nov. 6, 2015).

in Afghanistan—the longest war in U.S. history<sup>9</sup>—America is currently engaged in armed conflicts<sup>10</sup> in Pakistan,<sup>11</sup> Yemen,<sup>12</sup> and Uganda,<sup>13</sup> and military interventions<sup>14</sup> in Iraq,<sup>15</sup> Syria,<sup>16</sup> and against the Islamic State of Iraq and the Levant (ISIL).<sup>17</sup> In addition, the U.S. has engaged in military actions<sup>18</sup> in the Philippines,<sup>19</sup> under Operation Enduring Freedom—Philippines;<sup>20</sup> Mali,<sup>21</sup> Chad,<sup>22</sup> Mauritania,<sup>23</sup> and Niger,<sup>24</sup> under Operation Enduring Freedom—Trans-Sahara;<sup>25</sup> Somalia,<sup>26</sup> Kenya,<sup>27</sup> Djibouti,<sup>28</sup> Sudan,<sup>29</sup> and Eritrea,<sup>30</sup> under Com-

<sup>9</sup> Thomas Nagorski, *Editor's Notebook: Afghan War Now Country's Longest*, ABC NEWS (June 7, 2010), <http://abcnews.go.com/Politics/afghan-war-now-longest-war-us-history/story?id=10849303>.

<sup>10</sup> See generally INT'L COMM. OF THE RED CROSS, HOW IS THE TERM "ARMED CONFLICT" DEFINED IN INTERNATIONAL HUMANITARIAN LAW? 5 (Mar. 2008), <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf> (defining armed conflict as "armed force between two or more States").

<sup>11</sup> Steve Coll, *The Unblinking Stare*, NEW YORKER (Nov. 24, 2014), <http://www.newyorker.com/magazine/2014/11/24/unblinking-stare>.

<sup>12</sup> *Get the Data: Drone Wars*, THE BUREAU OF INVESTIGATIVE JOURNALISM, <https://www.thebureauinvestigates.com/category/projects/drones/drones-graphs/> (last visited Nov. 6, 2015).

<sup>13</sup> Ken Opalo, *The Consequences of the U.S. War on Terrorism in Africa*, ALJAZEERA AM. (June 2, 2014, 12:45 AM), <http://america.aljazeera.com/opinions/2014/6/africom-u-s-war-onterrorisminafricaalshabaabbokoharam.html>.

<sup>14</sup> See generally *Military Intervention*, THE FREE DICTIONARY, <http://www.thefreedictionary.com/military+intervention> (last visited Aug. 20, 2015) ("The deliberate act of a nation or a group of nations to introduce its military forces into the course of an existing controversy.").

<sup>15</sup> Loveday Morris, *The U.S. Military is Back Training Troops in Iraq, but It's a Little Different This Time*, WASH. POST (Jan. 8, 2015), [http://www.washingtonpost.com/world/the-us-military-is-back-training-troops-in-iraq-but-its-a-little-different-this-time/2015/01/08/11b9aa58-95f2-11e4-8385-866293322c2f\\_story.html](http://www.washingtonpost.com/world/the-us-military-is-back-training-troops-in-iraq-but-its-a-little-different-this-time/2015/01/08/11b9aa58-95f2-11e4-8385-866293322c2f_story.html).

<sup>16</sup> Craig Whitlock, *U.S. Military Leaders: Strikes in Syria Are Just the Start of a Prolonged Campaign*, WASH. POST (Sept. 23, 2014), [http://www.washingtonpost.com/world/us-attacks-islamic-state-in-syria-with-five-middle-east-partners/2014/09/23/b78ad7e8-c8f2-4aa8-aaa7-ec92572f6716\\_story.html](http://www.washingtonpost.com/world/us-attacks-islamic-state-in-syria-with-five-middle-east-partners/2014/09/23/b78ad7e8-c8f2-4aa8-aaa7-ec92572f6716_story.html).

<sup>17</sup> Mark Thompson, *U.S. Military Plan for Looming ISIS Offensive Takes Shape*, TIME (Feb. 26, 2015), <http://time.com/3722740/isis-islamic-state-military/>.

<sup>18</sup> As used here, the phrase "military actions" encompasses a broad range of activities based on geographic location and other factors. It includes, but is not limited to, U.S. military base agreements, regional counter-terrorism support, air strikes, training, weapons supply, and aid and support projects. See *infra*, footnotes 19–47.

<sup>19</sup> Jim Gomez, *Deadly Filipino Anti-Terror Raid Bittersweet for U.S.*, MIL. TIMES (Mar. 18, 2015 9:23 AM), <http://www.militarytimes.com/story/military/2015/03/18/deadly-filipino-anti-terror-raid-bittersweet-for-us-forces/24951213/>.

<sup>20</sup> Joe Penney, *The 'War on Terror' Rages in the Philippines*, ALJAZEERA (Oct. 5, 2011, 10:31 PM), <http://www.aljazeera.com/indepth/inpictures/2011/10/2011104145947651645>.

<sup>21</sup> Maria Ryan, *'War in Countries We are not at War With': The 'War on Terror' on the Periphery from Bush to Obama*, 48 INT'L POL. 364, 371 (2011).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> THE BUREAU OF INVESTIGATIVE JOURNALISM, *supra* note 12.

bined Joint Task Force—Horn of Africa;<sup>31</sup> Algeria,<sup>32</sup> Morocco,<sup>33</sup> Nigeria,<sup>34</sup> Senegal,<sup>35</sup> and Tunisia,<sup>36</sup> under the Trans-Sahara Counter-Terrorism Initiative;<sup>37</sup> and Georgia,<sup>38</sup> Azerbaijan,<sup>39</sup> Kazakhstan,<sup>40</sup> Uzbekistan,<sup>41</sup> Tajikistan,<sup>42</sup> Kyrgyzstan,<sup>43</sup> Ethiopia,<sup>44</sup> Burkina Faso,<sup>45</sup> Kashmir,<sup>46</sup> and Libya.<sup>47</sup> Collectively, these thirty-two military actions comprise America’s Global War on Terror.

Maintaining an open-ended global war is a monumental task. In an effort to keep up with its enemies, both old and new, the United States continually adapts its military forces around the world. One such adaptation has been the introduction and ever-increasing use of armed, remotely piloted aircraft, commonly referred to as “drones.”<sup>48</sup> Drones are marketed to the public as the consummate wonder-weapon—one that prevents civilian casualties by striking enemies with “surgical precision.”<sup>49</sup> The drone program is supplied with pilots from the United States Air Force (“USAF”),<sup>50</sup> but it is administered under two

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<sup>27</sup> Opalo, *supra* note 13.

<sup>28</sup> Ryan, *supra* note 21, at 371.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 372.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 371.

<sup>38</sup> *Id.* at 373.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Opalo, *supra* note 13.

<sup>45</sup> *Id.*

<sup>46</sup> Michael Smith, *SAS Joins Kashmir Hunt for bin Laden*, TELEGRAPH (Feb. 23, 2002, 12:01 AM), <http://www.telegraph.co.uk/news/worldnews/asia/india/1385795/SAS-joins-Kashmir-hunt-for-bin-Laden.html>.

<sup>47</sup> *U.S. Military Airstrikes in Libya Likely Kill al-Qaida-Linked Militant*, ASSOCIATED PRESS (June 14, 2015, 9:30 PM), [http://www.nola.com/military/index.ssf/2015/06/us\\_military\\_airstrikes\\_in\\_libya.html](http://www.nola.com/military/index.ssf/2015/06/us_military_airstrikes_in_libya.html).

<sup>48</sup> Warren Bass, *How the U.S. Stumbled into the Drone Era*, WALL ST. J. (July 24, 2014, 4:46 PM), <http://www.wsj.com/articles/how-the-u-s-stumbled-into-the-drone-era-1406234812>.

<sup>49</sup> John Brennan, White House Counterterrorism Adviser, Speech on Drone Ethics at the Woodrow Wilson Center (May 1, 2012, 1:00 PM), <http://www.npr.org/2012/05/01/151778804/john-brennan-delivers-speech-on-drone-ethics>.

<sup>50</sup> Chris Woods, *CIA’s Pakistan Drone Strikes Carried Out by Regular US Air Force Personnel*, GUARDIAN (Apr. 14, 2014, 9:30 AM), [http://www.theguardian.com/world/2014/apr/14/cia-drones-pakistan-us-air-force-documentary; Home\\_of\\_the](http://www.theguardian.com/world/2014/apr/14/cia-drones-pakistan-us-air-force-documentary; Home_of_the)

distinct chains of command; the Department of Defense (“DOD”) directs operations in the war zone of Afghanistan,<sup>51</sup> and the Central Intelligence Agency (“CIA”) directs most, if not all, drone operations everywhere else.<sup>52</sup> In a state of war, such as that in Afghanistan, the use of armed drones by the USAF represents little more than the technological advancement of modern warfare.<sup>53</sup> But outside of war, targeted killing<sup>54</sup> by the CIA’s drone program represents much more. The CIA’s program operates without transparency, eliminating any opportunity for public or judicial scrutiny of military actions carried out in the name of the United States and its citizens.<sup>55</sup> The CIA does not disclose its criteria for selecting targets, its procedures for protecting non-combatants, the effect of its operations on civilian populations, or the existence of authorization from the sovereign nations in which the CIA deploys armed drones.<sup>56</sup>

Although the Director of the CIA, John Brennan, and the Obama Administration have assured the American public that the CIA’s drone operations are “surgically precise,”<sup>57</sup> the claim does not stand up to scrutiny.<sup>58</sup> Before it was

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*Hunters*, CREECH AIR FORCE BASE, <http://www.creech.af.mil/units/> (last visited Nov. 6, 2015).

<sup>51</sup> Alice K. Ross, *Erased US Data Shows 1 in 4 Missiles in Afghan Airstrikes Now Fired by Drone*, BUREAU OF INVESTIGATIVE JOURNALISM (Mar. 12, 2013), <https://www.thebureauinvestigates.com/2013/03/12/erased-us-data-shows-1-in-4-missiles-in-afghan-airstrikes-now-fired-by-drone/>; Micah Zenko, *Transferring CIA Drone Strikes to Pentagon*, COUNCIL ON FOREIGN REL. (Apr. 2013), <http://www.cfr.org/drones/transferring-cia-drone-strikes-pentagon/p30434>.

<sup>52</sup> See Greg Miller, *CIA Remains Behind Most Drone Strikes, Despite Effort to Shift Campaign to Defense*, WASH. POST (Nov. 25, 2013), [https://www.washingtonpost.com/world/national-security/cia-remains-behind-most-drone-strikes-despite-effort-to-shift-campaign-to-defense/2013/11/25/c0c07a86-5386-11e3-a7f0-b790929232e1\\_story.html](https://www.washingtonpost.com/world/national-security/cia-remains-behind-most-drone-strikes-despite-effort-to-shift-campaign-to-defense/2013/11/25/c0c07a86-5386-11e3-a7f0-b790929232e1_story.html); Zenko, *supra* note 51.

<sup>53</sup> Christopher Drew, *Drones Are Weapons of Choice in Fighting Qaeda*, N.Y. TIMES (Mar. 16, 2009), [http://www.nytimes.com/2009/03/17/business/17uav.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2009/03/17/business/17uav.html?pagewanted=all&_r=0).

<sup>54</sup> Jonathan Masters, *Targeted Killings*, COUNCIL ON FOREIGN REL. (May 23, 2013), <http://www.cfr.org/counterterrorism/targeted-killings/p9627>.

[T]argeted killings are premeditated acts of lethal force employed by states in times of peace or during armed conflict to eliminate specific individuals outside their custody. “Targeted killing” is not a term distinctly defined under international law, but gained currency in 2000 after Israel made public a policy of targeting alleged terrorists in the Palestinian territories. The particular act of lethal force, usually undertaken by a nation’s intelligence or armed services, can vary widely—from cruise missiles to drone strikes to special operations raids. The primary focus of U.S. targeted killings, particularly through drone strikes, has been on the al-Qaeda and Taliban leadership networks in Afghanistan and the remote tribal regions of Pakistan. However, U.S. operations have expanded in recent years to include countries such as Somalia and Yemen.

*Id.*

<sup>55</sup> Miller, *supra* note 52; Zenko, *supra* note 51.

<sup>56</sup> Miller, *supra* note 52; Zenko, *supra* note 51.

<sup>57</sup> Coll, *supra* note 11; see also Ken Dilanian, *U.S. Counter-Terrorism Strategy to Rely on Surgical Strikes, Unmanned Drones*, L.A. TIMES (June 29, 2011), <http://articles.latimes.com/2011/jun/29/news/la-pn-al-qaeda-strategy-20110629>; Devin Dwyer, *Obama: Nobel Peace Prize Winner Becomes Drone Warrior-in-Chief*, ABC NEWS (May 29, 2012),

usurped for the public relations campaign, the term “surgical precision” was not used to define covert actions that resulted in double-digit civilian casualties.<sup>59</sup> Before the CIA’s drone program, it would not have been understood to describe erroneous strikes on civilian grandmothers,<sup>60</sup> children,<sup>61</sup> and innocent Americans.<sup>62</sup> Nor would it have been used to describe strikes on a Yemeni wedding party that left fourteen civilians dead.<sup>63</sup> The term would not have been used to describe the killing of twenty-six of the thirty-two people gathered to resolve a mining dispute in Pakistan,<sup>64</sup> or to describe the sixty-nine school children who were killed when a drone strike destroyed their school so that the CIA could eliminate the school’s headmaster, a known militant.<sup>65</sup> Unfortunately, in the course of America’s Global War on Terror, the term “surgically precise” has been redefined to mean all of these things.

Alarmed by reports of civilian casualties and targeted killings that mirror extrajudicial assassinations, concerned citizens and organizations have attempted to utilize the Freedom of Information Act to obtain records outlining the legal justification for the CIA’s use of armed drones in non-war zones.<sup>66</sup> Congress passed the Freedom of Information Act (“FOIA” or “Act”) in 1966 in an effort to increase the transparency of federal government agencies.<sup>67</sup> The legislature structured FOIA to allow access “to official information long shielded unnecessarily from public view and . . . to create a judicially enforceable public

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<http://abcnews.go.com/Politics/Blotter/obama-drone-warrior-chief/story?id=16451227>;  
Conor Friedersdorf, *Calling U.S. Drone Strikes ‘Surgical’ Is Orwellian Propaganda*, ATLANTIC (Sept. 27, 2012), <http://www.theatlantic.com/politics/archive/2012/09/calling-us-drone-strikes-surgical-is-orwellian-propaganda/262920/>.

<sup>58</sup> See Coll, *supra* note 11. See also Dilanian, *supra* note 57; Dwyer, *supra* note 57; Friedersdorf, *supra* note 57.

<sup>59</sup> Friedersdorf, *supra* note 57.

<sup>60</sup> Karen McVeigh, *Drone Strikes: Tears in Congress as Pakistani Family Tells of Mother’s Death*, GUARDIAN (Oct. 29, 2013, 3:24 PM), <http://www.theguardian.com/world/2013/oct/29/pakistan-family-drone-victim-testimony-congress>.

<sup>61</sup> Chris Woods, *The Day 69 Children Died*, EXPRESS TRIB. (Aug. 12, 2011), <http://tribune.com.pk/story/229844/the-day-69-children-died/>.

<sup>62</sup> Letter from Eric H. Holder, Jr., U.S. Attorney Gen., to Senator Patrick J. Leahy, Chairman, Comm. on the Judiciary (May 22, 2013), <http://www.justice.gov/slideshow/AG-letter-5-22-13.pdf>.

<sup>63</sup> Hakim Almasmari, *Yemen Says U.S. Drone Struck a Wedding Convoy, Killing 14*, CNN (Dec. 13, 2013, 6:56 PM), <http://www.cnn.com/2013/12/12/world/meast/yemen-u-s-drone-wedding/>.

<sup>64</sup> Salman Masood & Pir Zubair Shah, *C.I.A. Drones Kill Civilians in Pakistan*, N.Y. TIMES (Mar. 17, 2011), <http://www.nytimes.com/2011/03/18/world/asia/18pakistan.html>.

<sup>65</sup> Woods, *supra* note 61.

<sup>66</sup> See generally *N.Y. Times Co. v. U.S. Dep’t of Justice*, 758 F.3d 436 (2d Cir. 2014), *supplemented*, 762 F.3d 233 (2d Cir. 2014); *Nat’l Sec. Counselors v. CIA*, 898 F. Supp. 2d 233 (D.D. Cir. 2012); *First Amendment Coal. v. U.S. Dep’t of Justice*, No. C 12-1013 CW, 2014 WL 1411333, at \*1 (N.D. Cal. Apr. 11, 2014), *vacated*, No. C 12-1013 CW, 2014 WL 7148340 (N.D. Cal. Dec. 15, 2014).

<sup>67</sup> *Nat’l Sec. Counselors*, 898 F. Supp. 2d at 252.

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right to secure such information from possibly unwilling official hands.”<sup>68</sup> Recognizing the inherent difficulties in administering such a progressive piece of legislation, Congress carefully designed FOIA to strike a workable balance between broad provisions favoring public disclosure and specific exemptions protecting certain legitimate government interests.<sup>69</sup>

Courts must make determinations of fact and law when adjudicating claims arising under FOIA. Since FOIA’s enactment, courts have developed several methods for efficiently dealing with the large number of cases resulting from the government’s refusal to disclose documents requested under the Act. Courts use two judicial constructs, the *Vaughn* index<sup>70</sup> and the *Glomar* response,<sup>71</sup> in reviewing withheld documents, which allows them to quickly and correctly determine whether the claimed exemptions fit within the scope of the Act. The courts have been effectively utilizing the *Vaughn* index and the *Glomar* response since the 1970s<sup>72</sup> to ensure that Congress’s vision of an informed citizenry does not go beyond the scope of the exemptions provided by FOIA.

Although the courts had successfully and correctly applied FOIA law for decades, the CIA created and began using the *no number, no list* response in 2004. Unlike the *Vaughn* index and the *Glomar* response, which help the withholding agency attempt to justify its exemptions to the reviewing court, the *no number, no list* response is a simple assertion that documents responsive to a FOIA request are exempt from disclosure.<sup>73</sup> Since at least 2012, the CIA has responded to FOIA requests regarding drone attacks with the *no number, no list* response, allowing it to evade valid judicial proceedings, and ultimately, to operate outside the scope of the law.<sup>74</sup>

In light of the CIA’s numerous erroneous drone strikes and legally suspect practices, this note argues that it is critical that the judicial branch apply FOIA law as Congress intended, thereby eliminating the CIA’s ability to continue its use of the *no number, no list* response. This note proceeds in four parts. Part I provides a brief overview of the Freedom of Information Act and its exemptions, and describes the structure of the *Vaughn* index and the *Glomar* response.

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<sup>68</sup> *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 151 (1989).

<sup>69</sup> H.R. REP. NO. 89-1497, at 27 (1966); *see also* *E.P.A. v. Mink*, 410 U.S. 73, 80 (1973), *superseded by statute*, 5 U.S.C. § 552(a)(4)(B), *as recognized in* *CIA v. Sims*, 471 U.S. 159 (1985).

<sup>70</sup> *See generally* *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

<sup>71</sup> *See generally* *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976); *Bassiouni v. CIA*, No. 02 C 4049, 2004 WL 1125919, at \*7 (N.D. Ill. Mar. 31, 2004).

<sup>72</sup> *See generally* *Phillippi*, 546 F.2d at 1009; *Bassiouni*, 2004 WL 1125919 at \*7.

<sup>73</sup> *N.Y. Times Co. v. U.S. Dep’t of Justice*, 752 F.3d 123, 126 (2d Cir. 2014); *see* *ACLU v. CIA*, 710 F.3d 422 (D.C. Cir. 2013) (giving a brief timeline of previous no number, no list cases); *see also* *First Amendment Coal. v. U.S. Dep’t of Justice*, No. C 12-1013 CW, 2014 WL 1411333, at \*3 (N.D. Cal. Apr. 11, 2014).

<sup>74</sup> *New York Times Co. v. U.S. Dep’t of Justice*, 915 F. Supp. 2d 508, 517 (S.D.N.Y. 2013), *aff’d in part, rev’d in part*, 752 F.3d 123 (2d Cir. 2014); *See N.Y. Times Co.*, 752 F.3d at 126.

Part II outlines the CIA's creation of the *no number, no list* response, and describes how it initially passed judicial scrutiny. Part III demonstrates how the *no number, no list* response destroys the balance between the protections afforded by FOIA's exemptions and the public's "right to know."<sup>75</sup> Finally, Part IV suggests eliminating the *no number, no list* response, and outlines the long-standing FOIA law that should operate in its place.

#### I. THE FREEDOM OF INFORMATION ACT: ITS PURPOSE AND EXEMPTIONS

Enacted by Congress on July 4, 1966, and taking effect one year later,<sup>76</sup> the Freedom of Information Act allows and encourages public access to federal government records with the express purpose of lifting "the veil of administrative secrecy" and exposing government actions to public scrutiny.<sup>77</sup> Under FOIA, "any person"<sup>78</sup> has a legally enforceable right to obtain records from any of the fifteen departments or seventy-three agencies of the executive branch of the federal government, which expressly includes the CIA, unless such records fall within one of nine exemptions provided for in FOIA's statutory language.<sup>79</sup>

The Freedom of Information Act provides that "[an] agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules . . . shall make the records promptly available to any person."<sup>80</sup> The text outlines the procedures for properly requesting agency records.<sup>81</sup> Under FOIA, "records" is broadly defined to include papers, letters, reports, video footage, pictures, audio recordings, and any other documentary information in the possession or control of a government agency.<sup>82</sup> FOIA requires that upon receipt of a records request, the agency grant or deny the request within twenty working days.<sup>83</sup> If a record cannot be released, the withholding agency is required to assert one or more of FOIA's nine statutory exemptions in its denial.<sup>84</sup> The requestor may appeal the withholding agency's denial and, if necessary, may challenge it in court.<sup>85</sup>

<sup>75</sup> U.S. Dep't of Justice v. Tax Analysts, 492 U.S. 136, 154 (1989).

<sup>76</sup> U.S. DEP'T OF JUSTICE, DEP'T OF JUSTICE GUIDE TO THE FREEDOM OF INFO. ACT (2013).

<sup>77</sup> Dep't of Air Force v. Rose, 425 U.S. 352, 361 (1976).

<sup>78</sup> Freedom of Information Act, 5 U.S.C. § 552 (2012). Under FOIA, "all United States citizens, as well as foreign nationals, are entitled to invoke the provisions of FOIA. Furthermore, requests for records, documents, and information may be made in the name of a corporation, partnership, and/or other entity. In other words, under FOIA, a request for federal government records can be made by anyone, anywhere, and for any reason." Elizabeth O'Connor Tomlinson, *Litigation Under Freedom of Information Act*, 110 AM. JUR. TRIALS 367, § 5 (Aug. 2015).

<sup>79</sup> *What is FOIA?*, FOIA.GOV, <http://www.foia.gov/about.html> (last visited Nov. 8, 2015).

<sup>80</sup> 5 U.S.C. § 552.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at (a)(3)(B).

<sup>83</sup> *Id.* at (a)(6)(A)(i).

<sup>84</sup> *Id.* at (b)(1)–(9).

(b) This section does not apply to matters that are—



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A cause of action arises under FOIA when a government agency “(1) improperly (2) with[holds] (3) agency records.”<sup>86</sup> “The agency asserting the exemption bears the burden of proof, and all doubts regarding the applicability of the exemption must be resolved in favor of disclosure.”<sup>87</sup> An agency may meet its burden by providing affidavits that describe “the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption[s], and [that it is] not controverted by either contrary evidence in the record nor by evidence of agency bad faith.”<sup>88</sup> “[C]onclusory affidavits that merely recite statutory

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(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—

(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

<sup>85</sup> *Introduction to FOIA*, FOIADVOCATES, <http://www.foiadvocates.com/intro.html> (last visited Nov. 8, 2015).

<sup>86</sup> *U.S. Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989).

<sup>87</sup> *Wilner v. Nat’l Sec. Agency*, 592 F.3d 60, 69 (2d Cir. 2009) (citing *A. Michael’s Piano, Inc. v. FTC*, 18 F.3d 138, 143 (2d Cir. 1994)).

<sup>88</sup> *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981).

standards, or are overly vague or sweeping will not . . . carry the government's burden . . . ."<sup>89</sup>

After hearing many cases involving the government's refusal to disclose properly requested records, the courts created the *Vaughn* index and the *Glomar* response to aid in the proper and efficient handling of FOIA litigation.<sup>90</sup> The circumstances under which one or the other is triggered differ slightly, but the goal of each is the same: to prescribe the manner in which a withholding agency must attempt to prove to the reviewing court that it properly denied a request under FOIA.

#### A. *Vaughn* Index

To allow for the quick and effective examination of an agency's withheld records, the withholding agency provides the reviewing court with a *Vaughn* index. A *Vaughn* index "(1) describes the justifications for non-disclosure with reasonably specific detail; (2) demonstrates that the information withheld logically falls within the claimed exemptions; and (3) shows that the justifications are not controverted by evidence in the record or by evidence of bad faith on the part of the agency."<sup>91</sup>

The index is the result of *Vaughn v. Rosen*, a 1973 case that addressed challenges faced by the public when seeking information under FOIA, and the difficult task shouldered by the courts in this unique area of law.<sup>92</sup> At issue was a FOIA request that had been directed to the Civil Service Commission, which sought disclosure of certain reports from the Bureau of Personnel Management.<sup>93</sup> The Director of the Civil Service Commission refused to release documents responsive to the request, asserting that the information was not subject to disclosure under FOIA exemptions (b)(2), (b)(5), and (b)(6).<sup>94</sup> Upon the agency's refusal, the requestor, Robert Vaughn,<sup>95</sup> filed an action in U.S. District Court seeking an injunctive order to compel the disclosure of the withheld information.<sup>96</sup> The Civil Service Commission responded with a motion to dismiss, supported only by a conclusory affidavit asserting that the Director of the Commission held the opinion that the material was not subject to disclosure under FOIA.<sup>97</sup> Based solely on the opinion of the withholding agency's direc-

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<sup>89</sup> *Larson v. Dep't of State*, 565 F.3d 857, 864 (D.C. Cir. 2009).

<sup>90</sup> *See generally* *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976); *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

<sup>91</sup> *Bassiouni v. CIA*, No. 02 C 4049, 2004 WL 1125919, at \*3 (N.D. Ill. Mar. 31, 2004) (citing *Hunt v. CIA*, 981 F.2d 1116, 1119 (9th Cir. 1992)).

<sup>92</sup> *See generally* *Vaughn*, 484 F.2d 820.

<sup>93</sup> *Id.* at 822.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 820.

<sup>96</sup> *Id.* at 823.

<sup>97</sup> *Id.*

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tor, the district court granted the agency's motion to dismiss.<sup>98</sup> Vaughn appealed.<sup>99</sup>

The *Vaughn* court began its discussion by outlining the then existing procedures government agencies used when asserting exemptions under FOIA.<sup>100</sup> Although the Act was less than a decade old, the court found numerous examples where government agencies had provided conclusory affidavits declaring that the factual nature of information requested under FOIA would not be disclosed pursuant to one of the various FOIA exemptions.<sup>101</sup> Despite Congress's statutory mandate requiring the withholding agency prove the applicability of a claimed exemption, the *Vaughn* court found that trial courts typically accepted such affidavits due to the overwhelming volume of documents in question, often numbering in the hundreds or even thousands of pages.<sup>102</sup> Even where a trial court did examine the withheld documents, the *in camera* (private) review was necessarily conducted without the presence of the adverse party, heavily undermining the adversarial nature of the U.S. legal system.<sup>103</sup> The court found that:

existing customary procedures foster inefficiency and create a situation in which the Government need only carry its burden of proof against a party that is effectively helpless and a court system that is never designed to act in an adversary capacity. It is vital that some process be formulated that will (1) assure that a party's right to information is not submerged beneath governmental obfuscation and mischaracterization, and (2) permit the court system effectively and efficiently to evaluate the factual nature of disputed information.<sup>104</sup>

The *Vaughn* court formulated a three-step procedure for testing claimed exemptions.<sup>105</sup> First, in accordance with the provisions of FOIA, courts require government agencies to provide relatively detailed justifications, proving the appropriate exemptions for each withheld document.<sup>106</sup> Second, agencies are required to specify, separate, and index material, allowing the reviewing court to quickly examine documents and compare them with claimed exemptions.<sup>107</sup> Third, withholding agencies are required to justify exemptions, providing a basis for the adverse party to challenge the denial.<sup>108</sup> The procedure, which came to be known as the *Vaughn* index, satisfied the court's goals.<sup>109</sup> More importantly, it provided other courts with a tool to effectively handle FOIA litiga-

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *See id.* at 824.

<sup>101</sup> *See id.* at 825.

<sup>102</sup> *Id.*

<sup>103</sup> *See id.*

<sup>104</sup> *Id.* at 826.

<sup>105</sup> *Id.* at 826–28.

<sup>106</sup> *Id.* at 826.

<sup>107</sup> *Id.* at 827.

<sup>108</sup> *Id.* at 828.

<sup>109</sup> *Id.*

tion going forward, enabling them to balance public interests against the interests of the government.<sup>110</sup>

While the purpose of the *Vaughn* index remains unchanged, more than forty years of litigation has fine-tuned its application to meet the myriad needs arising under FOIA litigation. Where highly sensitive materials are involved, a *Vaughn* index may consist of a “particularly persuasive affidavit”<sup>111</sup> together with brief descriptions of the withheld information. Alternatively, the agency may request *in camera* review.<sup>112</sup> Typically, however, “the index is public and relatively specific in describing the kinds of documents the agency is withholding.”<sup>113</sup> District courts have considerable discretion to determine what constitutes “reasonably specific detail”<sup>114</sup> on a case-by-case basis. This allows the reviewing court to ensure the agency meets its burden of proof under FOIA, while protecting the information it hopes to withhold.<sup>115</sup> Ultimately, a *Vaughn* index must provide the reviewing court with a “reasonable basis” for evaluating the agency’s asserted exemptions.<sup>116</sup>

### B. *Glomar Response*

Several years after the creation of the *Vaughn* index, unusual circumstances related to national security led to the creation of the *Glomar* response.<sup>117</sup> The *Glomar* response allows an agency to “refuse to confirm or deny the existence of records,”<sup>118</sup> but only when the knowledge of existence *vel non* (or nonexistence) of responsive records would itself cause harm.<sup>119</sup>

The *Glomar* response originated in *Phillippi v. CIA* during the height of the Cold War.<sup>120</sup> In 1968, a Soviet Golf-Class submarine, the K-129,<sup>121</sup> sank 750 miles northwest of Hawaii, still laden with nuclear weapons.<sup>122</sup> Shortly after the sinking, business magnate Howard Hughes purportedly began construction on

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<sup>110</sup> *See id.* at 823.

<sup>111</sup> *N.Y. Times Co. v. U.S. Dep’t of Justice*, 756 F.3d 100, 122 (2d Cir. 2014), *opinion amended on denial of reh’g*, 758 F.3d 436 (2d Cir. 2014), *supplemented*, 762 F.3d 233 (2d Cir. 2014), *reh’g denied*, 762 F.3d 233 (2d Cir. 2014), *citing with approval*, *ACLU v. CIA*, 710 F.3d 422, 433 (D.C. Cir. 2013).

<sup>112</sup> *ACLU*, 710 F.3d at 433.

<sup>113</sup> *Id.* at 432.

<sup>114</sup> *Larson v. Dep’t of State*, 565 F.3d 857, 862 (D.C. Cir. 2009).

<sup>115</sup> *ACLU*, 710 F.3d at 432.

<sup>116</sup> *Delaney, Migdail & Young v. IRS*, 826 F.2d 124, 128 (D.C. Cir. 1987).

<sup>117</sup> *See generally* *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976).

<sup>118</sup> *ACLU*, 710 F.3d at 426 (citing *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007)).

<sup>119</sup> *Id.*

<sup>120</sup> *See* Trent Schindler, *Raising Sunken Ships*, PBS, <http://www.pbs.org/saf/1305/features/ship.htm> (last visited Nov. 8, 2015).

<sup>121</sup> Matthew Aid et al., *Project Azorian: The CIA’s Declassified History of the Glomar Explorer*, THE NAT’L SEC. ARCHIVE (Feb. 22, 2010), <http://nsarchive.gwu.edu/nukevault/ebb305/>.

<sup>122</sup> Schindler, *supra* note 120.

the Hughes Glomar Explorer, an enormous barge allegedly meant for mining manganese nodules from the ocean floor.<sup>123</sup> In fact, Howard Hughes and his manganese nodule mining project were part of an elaborate cover story; the Hughes Glomar Explorer had actually been commissioned by the CIA as part of an ambitious and covert plan to raise the Soviet submarine.<sup>124</sup>

Several news organizations published rumors regarding the true purpose of the Hughes Glomar Explorer, and in 1975, journalist Harriet Phillippi<sup>125</sup> submitted a FOIA request to the CIA, seeking any documents that it possessed regarding the vessel.<sup>126</sup> The CIA denied the request, claiming that “any records that might exist which reveal any CIA connection with or interest in the activities of the Glomar Explorer; and, indeed, any data that might reveal the existence of any such records” were exempt under FOIA, and therefore, not subject to disclosure.<sup>127</sup> After Phillippi’s appeal to the agency failed, she filed for injunctive relief in U.S. District Court, seeking justification for each document on which the CIA had asserted an exemption.<sup>128</sup> In response, the CIA submitted an affidavit to the court *in camera*, signed by Brent Scowcroft, then Assistant to the President for National Security Affairs.<sup>129</sup> The affidavit asserted that “[o]fficial acknowledgement of the involvement of specific United States Government agencies would disclose the nature and purpose of the Program and could . . . severely damage the foreign relations and the national defense of the United States.”<sup>130</sup> After reviewing Scowcroft’s affidavit, the district court found that the withheld material was properly exempt from disclosure under FOIA.<sup>131</sup> The court granted summary judgment for the CIA, and Phillippi appealed.<sup>132</sup>

The issue decided by the *Phillippi* court was not whether the documents must be disclosed; rather, it decided whether “the Agency should have been required to support its position on the basis of the *public* record.”<sup>133</sup> The court determined that in the limited circumstances where an agency “can neither confirm nor deny the existence of the requested records, there are no relevant documents for the court to examine other than the affidavits which explain the Agency’s refusal.”<sup>134</sup> The *Phillippi* court found that the public record consisted entirely of rumors published in newspapers, not disclosures by the agency it-

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Aid, supra* note 121.

<sup>126</sup> *Phillippi v. CIA*, 546 F.2d 1009, 1011 (D.C. Cir. 1976).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 1012.

<sup>129</sup> *Id.* at 1013.

<sup>130</sup> *Id.* at 1013–14.

<sup>131</sup> *Id.* at 1012.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* (emphasis added).

<sup>134</sup> *Id.* at 1013.

self.<sup>135</sup> The court held that this alone did not waive the agency's right to assert what is now referred to as a *Glomar* response.<sup>136</sup>

A *Glomar* response is an "exception to the general rule that agencies must acknowledge the existence of information responsive to a FOIA request and provide specific, non-conclusory justifications for withholding that information . . . ."<sup>137</sup> A *Glomar* response is therefore permitted only when confirming or denying the existence of records would itself "cause harm cognizable under [a] FOIA exemption."<sup>138</sup> Accordingly, to determine whether the existence *vel non* of agency records fits an exemption under FOIA, courts apply the review standards established in non-*Glomar* cases.<sup>139</sup> Because a *Glomar* response is properly invoked only when the disclosure of the existence or nonexistence of agency records is itself exempt under FOIA, requestors may overcome this response by showing that the agency has already disclosed the existence *vel non* of responsive records.<sup>140</sup> Still, a failed *Glomar* response does not necessarily mean that a government agency will be compelled to disclose information otherwise protected under FOIA's exemptions.<sup>141</sup> However, once information on the existence *vel non* has been disclosed, the agency must provide the reviewing court with a *Vaughn* index to allow it to "determine whether the *contents*—as distinguished from the *existence*—of the officially acknowledged records may be protected from disclosure . . . ."<sup>142</sup>

## II. AN EXTRAJUDICIAL SOLUTION TO A NON-PROBLEM: THE CIA'S "NO NUMBER, NO LIST" RESPONSE

The *no number, no list* response was first considered by a court in *Bassiouni v. CIA*,<sup>143</sup> nearly three decades after the *Vaughn* index and the *Glomar* response were established. The "*no number, no list* response acknowledges the existence of documents responsive to [a FOIA] request, but neither numbers nor identifies them by title or description."<sup>144</sup> The response originated as a simple legal misunderstanding, asserted by the Information Review Officer for the Directorate of Operations of the CIA,<sup>145</sup> but began to take on a sense of quasi-

<sup>135</sup> *Id.* at 1017.

<sup>136</sup> *Id.*

<sup>137</sup> *Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1178 (D.C. Cir. 2011).

<sup>138</sup> *Gardels v. CIA*, 689 F.2d 1100, 1103 (D.C. Cir. 1982).

<sup>139</sup> *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007).

<sup>140</sup> *ACLU v. CIA*, 710 F.3d 422, 427 (D.C. Cir. 2013).

<sup>141</sup> *Id.* at 432.

<sup>142</sup> *Wolf*, 473 F.3d at 380.

<sup>143</sup> *Bassiouni v. CIA*, No. 02 C 4049, 2004 WL 1125919, at \*5 (N.D. Ill. Mar. 31, 2004) *aff'd*, 392 F.3d 244 (7th Cir. 2004).

<sup>144</sup> *N.Y. Times Co. v. U.S. Dep't of Justice*, 752 F.3d 123, 128 (2d Cir. 2014), *reh'g granted*, 758 F.3d 436 (2d Cir. 2014) (emphasis added).

<sup>145</sup> *See Bassiouni*, 2004 WL 1125919, at \*4–5.

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legitimacy as it passed through courts for more than a decade before being detected.

A. Bassiouni v. CIA—*District Court*

In 1983, Mahmoud Bassiouni wrote to the CIA seeking all material it possessed regarding himself, pursuant to the Privacy Act of 1974.<sup>146</sup> The CIA responded that it had material responsive to his request, but that it was classified and could not be released.<sup>147</sup> Sixteen years later, in 1999, Bassiouni wrote to the CIA seeking the same records, this time utilizing the rights afforded to him under FOIA.<sup>148</sup> When the CIA again refused to disclose all relevant responsive records, Bassiouni filed suit in U.S. District Court to compel the CIA to produce a *Vaughn* index to justify its claimed exemptions under FOIA.<sup>149</sup> The CIA moved for summary judgment and submitted a detailed affidavit (hereinafter “McNair Declaration”) signed by William McNair, then Information Review Officer for the Directorate of Operations of the CIA.<sup>150</sup> The McNair Declaration asserted McNair’s authority, pursuant to Executive Order 12,958, to conduct classification reviews and make classification decisions.<sup>151</sup> The McNair Declaration states, in part:

This case is one in which the CIA would normally use a *Glomar* response—neither confirming nor denying it holds documents on plaintiff. However, since the CIA personnel handling plaintiff’s 1983 Privacy Act request acknowledged the Agency held material on plaintiff at that time, CIA cannot use the *Glomar* response in 2003. The only practical alternative at this point, to protect classified and otherwise exempt information, is to use the ‘no number, no list’ response . . . .<sup>152</sup>

The McNair Declaration went on:

Assuming CIA still holds responsive documents, providing a portion of the withheld responsive documents, or even a list or number of such responsive documents, would expose sensitive and classified methods and would reveal the extent of the U.S. collection efforts, analysis and reporting directed at particular targets. It could further reveal the relative priority that the CIA attached to a particular intelligence subject and indicate where the Agency had allocated its limited resources. This could reveal U.S. policy interests and expose strengths and gaps in the Agency’s intelligence gathering ability. It would reveal information that could damage U.S. foreign relations.<sup>153</sup>

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<sup>146</sup> *Id.* at \*1.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at \*1, \*4.

<sup>151</sup> *Id.* at \*4.

<sup>152</sup> *Id.* at \*5 (emphasis added).

<sup>153</sup> *Id.* at \*7.

Bassiouni argued that there were two critical problems with the McNair Declaration. First, McNair cited his authority pursuant to Executive Order 12,958, which states that a federal agency may “refuse to confirm or deny the existence or nonexistence of requested information whenever the fact of its existence or nonexistence is itself classified . . . .”<sup>154</sup> In other words, Executive Order 12,958 authorizes a *Glomar* response.<sup>155</sup> After McNair admitted that the CIA could no longer give a *Glomar* response, he cited his authority by an Executive Order authorizing one.<sup>156</sup> The second, and more important point Bassiouni argued, was that the CIA’s use of a *no number, no list* response was not supported by any legal authority, either in the text of FOIA or in any case law.<sup>157</sup> The court summarily rejected both arguments, claiming that it would not “become fixated with labels or parse semantics [sic].”<sup>158</sup>

Although the *Bassiouni* court was not fixated with labels or on parsing semantics, it was intensely focused on meeting the provisions of a FOIA-compliant affidavit, as prescribed in *Hunt v. CIA*.<sup>159</sup> According to *Hunt*, which the *Bassiouni* court cited, an agency’s affidavit meets FOIA’s requirements for exemption if it: “(1) describes the justifications for non-disclosure with reasonably specific detail; (2) demonstrates that the information withheld logically falls within the claimed exemptions; and (3) shows that the justifications are not controverted by evidence in the record or by evidence of bad faith on the part of the agency.”<sup>160</sup> To support the CIA’s position, McNair provided to the court, *in camera*, “reasonably specific detail [demonstrating] that the information withheld logically falls within [FOIA exemptions (b)(1) and (b)(3)].”<sup>161</sup> The court found that the justifications were “a well-reasoned, specific and plausible basis for concluding that [exemptions (b)(1) and (b)(3)] preclude further identification of records responsive to Bassiouni’s request due to the detrimental effects of disclosure on intelligence methods, interests, sources and capabilities, as well as detrimental effects on United States foreign relations.”<sup>162</sup> In short, although McNair mistakenly labeled the affidavit a “*no number, no list*” response, he had in fact provided the court with nothing less than an *in camera Vaughn* index, in full compliance with the requirements of FOIA—the distinction was lost on the court.<sup>163</sup>

Despite decades of case law, and even the court’s own direct quote and comparison to *Hunt*, which outlines the form of a FOIA-compliant *Vaughn* in-

<sup>154</sup> Exec. Order No. 12958, 32 C.F.R. 701.23 § 3.7(a) (1995).

<sup>155</sup> See *ACLU v. CIA*, 710 F.3d 422, 427 (D.C. Cir. 2013).

<sup>156</sup> See *Bassiouni*, 2004 WL 1125919, at \*4.

<sup>157</sup> *Id.* at \*5.

<sup>158</sup> *Id.* at \*6.

<sup>159</sup> *Id.* at \*3.

<sup>160</sup> *Id.* (citing *Hunt v. CIA*, 981 F.2d 1116, 1119 (9th Cir. 1992)).

<sup>161</sup> *Id.* at \*7.

<sup>162</sup> *Id.*

<sup>163</sup> See *id.* at \*6.



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dex, it held that “the CIA [did] not [waive] the right to assert a ‘no number, no list’ response to Bassiouni’s FOIA . . . request, and that such a response was appropriate.”<sup>164</sup> Bassiouni appealed.<sup>165</sup>

### B. Bassiouni v. CIA—*Court of Appeals*

While the district court determined that the differences between a *Glomar* and a *no number, no list* response could be chalked up to semantics,<sup>166</sup> the Seventh Circuit Court of Appeals took the fundamental misunderstanding a step further.<sup>167</sup> The court considered whether “it would be best to jettison the distinction between” the twenty-nine-year-old judicially created *Glomar* response, along with the protections it afforded, together with the nine-month-old CIA-created *no number, no list* response, in favor of a new reply that “could cover both situations”—the “Bassiouni Response.”<sup>168</sup> Importantly, as of January 7, 2016, no other court has mentioned the “Bassiouni Response.” Instead, based on the “legally identical” assertion made by the court (discussed *infra*), other courts still accept the CIA’s use of the *no number, no list* response.

The Seventh Circuit went on to state that neither the *Glomar* response, which “[refuses] to acknowledge whether the CIA has even one responsive document,” nor the *no number, no list* response, which “[acknowledges] that the CIA has at least one responsive document but [refuses] to elaborate,” held any “magic” significance.<sup>169</sup> The court held that leaving the *Glomar* response and the *no number, no list* response intact would confuse judges into thinking “that something depends on the turn of a phrase.”<sup>170</sup> It declared the two responses “legally identical”<sup>171</sup> and affirmed the district court’s decision.<sup>172</sup>

### III. PROBLEMS WITH THE NO NUMBER, NO LIST RESPONSE

The Seventh Circuit’s “legally identical” assertion in *Bassiouni* rubber-stamped the CIA’s ability to deny FOIA requests at will. Prior to the creation of the *no number, no list* response, the CIA denied requests—like all other federal government agencies subject to FOIA—by providing a list of withheld documents, along with the exemptions it was claiming on each. In special circumstances, when the CIA had not disclosed the existence *vel non* of records responsive to a request, it issued a *Glomar* response.<sup>173</sup> The requestor could then

<sup>164</sup> *Id.* at \*7 (emphasis added).

<sup>165</sup> See generally *Bassiouni v. CIA*, 392 F.3d 244 (7th Cir. 2004).

<sup>166</sup> *Bassiouni*, 2004 WL 1125919, at \*6.

<sup>167</sup> See *Bassiouni*, 392 F.3d at 247.

<sup>168</sup> *Id.*

<sup>169</sup> See *Bassiouni*, 392 F.3d at 247.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 248.

<sup>173</sup> See, e.g., *ACLU v. CIA*, 710 F.3d 422, 433 (D.C. Cir. 2013).

challenge the *Vaughn* index or the *Glomar* response in court, where the agency would attempt to prove that its withheld records were properly exempt under FOIA.<sup>174</sup> If the reviewing court found that the agency's records were in fact exempt, it would uphold the denial and no information would be disclosed.<sup>175</sup> But critically, where the agency's records did not fit under at least one of FOIA's exemptions, the court compelled disclosure in accordance with the Act.<sup>176</sup> The *Vaughn* index and the *Glomar* response complemented each other and preserved the public's "right to know,"<sup>177</sup> while ensuring that the exemptions provided for under FOIA were upheld. After *Bassiouni*, everything changed.

The holding in *Bassiouni* was disappointing for two reasons. First, despite decades of FOIA case law that had developed procedures and safeguards to address circumstances exactly like those presented in *Bassiouni*, the court "jettison[ed]" the *Glomar* response to allow for the amorphous *no number, no list* response.<sup>178</sup> Second, and more importantly, by allowing a government agency to assert a *no number, no list* response, the distinction between a *Vaughn* index and a *Glomar* response was effectively destroyed.<sup>179</sup> Simply stated, the Seventh Circuit's "legally identical" assertion gutted the mechanisms that had allowed FOIA to operate as Congress had intended.

#### A. *Jarvik v. CIA*

Emboldened by its success in the Seventh Circuit, the CIA continued its use of the *no number, no list* response in *Jarvik v. CIA*, where the court took the misunderstanding further still.<sup>180</sup> The *Jarvik* court gave the *no number, no list* response a legal test and what appeared to be an increasingly legitimate purpose within FOIA's statutory scheme.<sup>181</sup>

At issue was a FOIA request, submitted by Laurence Jarvik in 2006, that sought all records possessed by the CIA "relating to the violence of May 2005 and its aftermath [in Andijan, Uzbekistan], as well as subsequent trials and evaluation of refugees."<sup>182</sup> The CIA responded to the request, stating that it had "located [records] which [it] had determined [to be] currently and properly classified and [therefore, the FOIA request] must be denied in its entirety on the basis of . . . exemptions (b)(1) & (b)(3)."<sup>183</sup> Despite acknowledging that it held records responsive to the request, the CIA continued by claiming, "the only response [that it] can provide on the public record in this case is the general 'no

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<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *See id.*

<sup>177</sup> *See* U.S. Dep't of Justice v. Tax Analysts, 492 U.S. 136, 154 (1989).

<sup>178</sup> *Bassiouni v. CIA*, 392 F.3d 244, 247 (7th Cir. 2004).

<sup>179</sup> *See id.*

<sup>180</sup> *See generally* *Jarvik v. CIA*, 741 F. Supp. 2d 106 (D.D.C. 2010).

<sup>181</sup> *See id.* at 123.

<sup>182</sup> *Id.* at 109.

<sup>183</sup> *Id.*

*number, no list*’ declaration,” because any other response “could reasonably be expected to cause serious damage to the national security.”<sup>184</sup>

In the “Factual & Procedural Background” section of its opinion, the *Jarvik* Court notes that CIA had “located [records]”<sup>185</sup> responsive to the plaintiff’s request. In order to test this assertion, the court looked to *Phillippi v. CIA*,<sup>186</sup> the Hughes Glomar Explorer case that led to the *Glomar* response.<sup>187</sup> Quoting *Phillippi*, the court held that where the CIA “can neither confirm nor deny the *existence* of the requested records, there are no relevant documents for the court to examine other than the affidavits which explain the [a]gency’s refusal.”<sup>188</sup> Despite facts that directly contradicted the legal test being employed, the *Jarvik* court held that the *Glomar* test applied to the CIA’s assertion of a *no number, no list* response, and the court thus denied the plaintiff’s request for discovery.<sup>189</sup>

#### B. *Two Steps Forward, One Step Back: Courts Begin to Challenge the No Number, No List Response*

More than a decade after its dubious creation, seven courts had heard cases involving the CIA’s use of the *no number, no list* response: six of the courts appeared to accept the Seventh Circuit’s “legally identical” assertion and ruled accordingly.<sup>190</sup> Only the D.C. Circuit noted a “material difference” between a *Glomar* and a *no number, no list* response in *ACLU v. CIA*.<sup>191</sup>

A *Glomar* response requires the agency to argue, and the court to accept, that the very fact of the existence or nonexistence of responsive records is protected from disclosure. That is conceptually different from conceding (or being compelled by the court to concede) that the agency has some documents, but nonetheless arguing that any description of those documents would effectively disclose validly exempt information. There may be cases where the agency cannot plausibly make the former (*Glomar*) argument with a straight face, but where it can legitimately make the latter.<sup>192</sup>

In dicta, the court found that a *no number, no list* response might be viewed as a minimalist form of a *Vaughn* index, applicable only in very unusual circum-

<sup>184</sup> *Id.* at 123 (emphasis added).

<sup>185</sup> *Id.* at 109.

<sup>186</sup> *Id.* at 123.

<sup>187</sup> See *Phillippi v. CIA*, 546 F.2d 1009, 1011 (D.C. Cir. 1976).

<sup>188</sup> *Jarvik*, 741 F. Supp. 2d at 123 (quoting *Phillippi*, 546 F.2d at 1013) (emphasis added).

<sup>189</sup> *Id.*

<sup>190</sup> See generally *ACLU v. CIA*, 710 F.3d 422, 433 (D.C. Cir. 2013) (giving a brief timeline of previous *no number, no list* cases); *N.Y. Times Co. v. U.S. Dep’t of Justice*, 752 F.3d 123, 126, *aff’d in part*, 756 F.3d 100, 112, *aff’d in part*, 758 F.3d 436, *supplemented*, 762 F.3d 233 (2d Cir. 2014); *First Amendment Coal. v. U.S. Dep’t of Justice*, No. C 12-1013 CW, 2014 WL 1411333, at \*1, *vacated*, 2014 WL 7148340 (N.D. Cal. Apr. 11, 2014).

<sup>191</sup> *ACLU*, 710 F.3d at 433.

<sup>192</sup> *Id.*

stances, and justified only by a “particularly persuasive affidavit.”<sup>193</sup> Although the court did not reference *Bassiouni*, this is precisely what the McNair Declaration had provided—a “particularly persuasive affidavit” and an *in camera Vaughn* index.<sup>194</sup> Unfortunately, the *ACLU* court’s analysis necessarily ended with the issues being litigated, and it left no clear direction for other courts to follow going forward.<sup>195</sup>

### C. *N.Y. Times v. U.S. Department of Justice—District Court*

The facts in *N.Y. Times v. U.S. Department of Justice* pushed *Bassiouni*’s “legally identical” assertion beyond any form of reason. The FOIA requests at issue focused primarily on CIA drone strikes that killed three United States citizens in 2011—suspected terrorist Anwar al-Awlaki, his son Abdulrahman al-Awlaki, and Samir Khan.<sup>196</sup> New York Times reporters Scott Shane and Charlie Savage (collectively “N.Y. Times”) and the American Civil Liberties Union and the American Civil Liberties Union Foundation (collectively “ACLU”) each submitted separate, but similar, requests for information concerning the attacks.<sup>197</sup> They specifically requested any documents prepared by the Office of Legal Counsel (“OLC”) of the Department of Justice (“DOJ”) regarding the CIA’s legal justification for targeted killing generally, as well as the extrajudicial execution of United States citizens abroad.<sup>198</sup>

#### 1. *N.Y. Times and ACLU FOIA Requests*

Shane’s request to the OLC sought “[A]ll Office of Legal Counsel opinions or memoranda since 2001 that address the legal status of targeted killings, assassination, or killing of people suspected of ties to Al-Qaeda or other terrorist groups by employees or contractors of the United States government.”<sup>199</sup> Savage’s request, also submitted to the OLC, sought “[A] copy of all Office of Legal Counsel memorandums analyzing the circumstances under which it would be lawful for United States armed forces or intelligence community assets to target for killing a United States citizen who is deemed to be a terrorist.”<sup>200</sup>

The ACLU submitted identical, but separate, requests<sup>201</sup> to (1) the DOJ (including two of the DOJ’s component agencies—the Office of Information

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<sup>193</sup> *Id.*

<sup>194</sup> See *Bassiouni v. CIA*, No. 02 C 4049, 2004 WL 1125919, at \*7 (N.D. Ill. Mar. 31, 2004) *aff’d*, 392 F.3d 244 (7th Cir. 2004); *ACLU*, 710 F.3d at 433.

<sup>195</sup> See *ACLU*, 710 F.3d at 433.

<sup>196</sup> *N.Y. Times Co. v. U.S. Dep’t of Justice*, 756 F.3d 100, 104, *aff’d in part*, 758 F.3d 436, *supplemented*, 762 F.3d 233 (2d Cir. 2014).

<sup>197</sup> *Id.* at 104–06.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 104–05.

<sup>200</sup> *Id.* at 105.

<sup>201</sup> *Id.* at 106 n.6.

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1. All records created after September 11, 2001, pertaining to the *legal basis in domestic, foreign, and international law* upon which U.S. citizens can be subjected to targeted killings, whether using unmanned aerial vehicles (“UAVs” or “drones”) or by other means.
  2. All records created after September 11, 2001, pertaining to the process by which U.S. citizens can be designated for targeted killings, including who is authorized to make such determinations and what evidence is needed to support them.
  3. All memoranda, opinions, drafts, correspondence, and other records produced by the OLC after September 11, 2001, pertaining to the *legal basis in domestic, foreign, and international law* upon which the targeted killing of Anwar al-Awlaki was authorized and upon which he was killed, including discussions of:
    - A. The reasons why domestic-law prohibitions on murder, assassination, and excessive use of force did not preclude the targeted killing of al-Awlaki;
    - B. The protection and requirements imposed by the Fifth Amendment Due Process Clause;
    - C. The reasons why International-law prohibitions on extrajudicial killing did not preclude the targeted killing of al-Awlaki;
    - D. The applicability (or non-applicability) of the Treason Clause to the decision whether to target al-Awlaki;
    - E. The legal basis authorizing the CIA, JSOC, or other U.S. Government entities to carry out the targeted killing of Anwar Al-Awlaki;
    - F. Any requirement for proving that al-Awlaki posed an imminent risk of harm to others, including an explanation of how to define imminence in this context; and
    - G. Any requirement that the U.S. Government first attempt to capture Al-Awlaki before killing him.
  4. All documents and records pertaining to the *factual basis for the targeted killing of Al-Awlaki*, including:
    - A. Facts supporting a belief that al-Awlaki posed an imminent threat to the United States or United States interests;
    - B. Facts supporting a belief that al-Awlaki could not be captured or brought to justice using nonlethal means;
    - C. Facts indicating that there was a legal justification for killings persons other than al-Awlaki, including other U.S. citizens, while attempting to kill al-Awlaki himself;
    - D. Facts supporting the assertion that al-Awlaki was operationally involved in al Qaeda, rather than being involved merely in propaganda activities; and
    - E. Any other facts relevant to the decision to authorize and execute the targeted killings of al-Awlaki.
  5. All documents and records pertaining to the *factual basis for the killing of Samir Khan*, including whether he was intentionally targeted, whether U.S. Government personnel were aware of his proximity to al-Awlaki at the time the missiles were launched at al-Awlaki’s vehicle, whether the United States took measures to avoid Khan’s death, and any other facts relevant to the decision to kill Khan or the failure to avoid causing his death.
  6. All documents and records pertaining to the *factual basis for the killing of Abdulrahman al-Awlaki*, including whether he was intentionally targeted, whether U.S. Government personnel were aware of his presence when they launched a missile or missiles at his location, whether he was targeted on the basis of his kinship with Anwar al-Awlaki, whether the United States took measures to avoid his death, and any other factors relevant to the decision to kill him or the failure to avoid causing his death.

Policy (“OIP”) and the OLC); (2) the DOD; (3) and the CIA (collectively “Government”).<sup>202</sup> The ACLU’s requests sought any documents concerning the targeted killings of United States citizens generally, as well as any documents specifically related to al-Awlaki, his son, and Khan.<sup>203</sup>

## 2. Government Responses

The OLC bifurcated Shane’s FOIA request, and denied both parts.<sup>204</sup> First, the OLC acknowledged involvement with the DOD, but submitted a *no number, no list* response pursuant to FOIA exemptions (b)(1), (b)(3), and (b)(5).<sup>205</sup> Second, the OLC submitted a “*Glomar* response” regarding documents pertaining to agencies other than the DOD.<sup>206</sup>

The OLC also denied Savage’s request, and submitted a *Glomar* response asserting exemptions (b)(1), (b)(3), and (b)(5).<sup>207</sup> Unlike its response to Shane, the OLC’s initial response to Savage “did not identify responsive documents relating to the DOD.”<sup>208</sup> During litigation, the OLC modified its response to both reporters to acknowledge the existence of one document, referred to as the “OLC–DOD Memorandum,” but claimed that it was exempt from disclosure under exemption (b)(5).<sup>209</sup> After acknowledging the existence of an OLC–DOD relationship, the OLC did not make clear whether it was continuing to assert a *no number, no list* response, as it had made to Shane, or a *Glomar* response, as it had made to Savage.<sup>210</sup>

The OLC provided the ACLU with a *Vaughn* index that listed sixty unclassified email chains, each reflecting “internal deliberations”<sup>211</sup> regarding extrajudicial lethal force against United States citizens.<sup>212</sup> The OLC withheld the emails pursuant to exemption (b)(5).<sup>213</sup> It also submitted a *no number, no list* response, stating that the remaining records were protected from disclosure by exemptions (b)(1) and (b)(3).<sup>214</sup> The DOD provided the ACLU with a speech given at Yale Law School in 2012 by then DOD General Counsel Jeh Johnson, and a *Vaughn* index that listed ten unclassified records, withheld pursuant to exemption (b)(5).<sup>215</sup> The DOD also acknowledged that it possessed the OLC–

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<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 106–07.

<sup>204</sup> *Id.* at 105.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*; *see supra* note 84 (text of FOIA defining these exemptions).

<sup>208</sup> *N.Y. Times*, 756 F.3d at 105.

<sup>209</sup> *Id.* at 105–06; *see supra* note 84 (text of FOIA defining these exemptions).

<sup>210</sup> *N.Y. Times*, 756 F.3d at 106.

<sup>211</sup> *Id.* at 107.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

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DOD Memorandum, but withheld it under exemptions (b)(1) and (b)(5).<sup>216</sup> The DOD submitted a *no number, no list* response for all other responsive records.<sup>217</sup>

### 3. *The Court's Holding*

Dissatisfied with the Government's sweeping and unsubstantiated responses, the N.Y. Times and the ACLU filed a consolidated action in U.S. District Court, seeking an injunctive order to compel the disclosure of the OLC-DOD Memorandum, as well as *Vaughn* indices for all withheld documents, rather than the *no number, no list* and *Glomar* responses they had received.<sup>218</sup>

The district court acknowledged that “[t]he FOIA requests [at] issue implicate serious issues about the limits on the power of the Executive Branch under the Constitution and laws of the United States.”<sup>219</sup> The court continued “[t]he Administration has engaged in public discussion of the legality of targeted killing, even of [United States] citizens, but in cryptic and imprecise ways, generally without citing to any statute or court decision that justifies its conclusions.”<sup>220</sup> But the court, finding itself “constrained by law,”<sup>221</sup> could “only conclude that the Government has not violated FOIA by refusing to turn over the documents sought in the FOIA requests, and so cannot be compelled . . . to explain . . . why its actions do not violate the Constitution and laws of the United States.”<sup>222</sup> The court declared that

The Alice-in-Wonderland nature of this pronouncement is not lost on me; but after careful and extensive consideration, I find myself stuck in a paradoxical situation in which I cannot solve a problem because of contradictory constraints and rules—a veritable Catch-22. I can find no way around the thicket of laws and precedents that effectively allow the Executive Branch of our Government to proclaim as perfectly lawful certain actions that seem on their face incompatible with our Constitution and laws, while keeping the reasons for its conclusion a secret.<sup>223</sup>

After claiming it was bound by precedent, the court considered the plaintiffs' arguments regarding the *Glomar* and *no number, no list* responses.<sup>224</sup> It began by finding that, contrary to the holding in *Bassiouni*, a *Glomar* and a *no number, no list* response are in fact separate and distinct concepts, and that their structures are not “legally identical.”<sup>225</sup> But the court's analysis of the issue

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<sup>216</sup> *Id.* at 108.

<sup>217</sup> *Id.*

<sup>218</sup> *See* N.Y. Times v. U.S. Dep't of Justice, 915 F. Supp. 2d 508, 508–09 (S.D.N.Y. 2013).

<sup>219</sup> *Id.* at 515.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 515–16.

<sup>224</sup> *See id.* at 551–52.

<sup>225</sup> *Id.* at 550.

ended there.<sup>226</sup> After finding that the core holding in *Bassiouni* was incorrect, the court looked to the same body of erroneous case law—*Bassiouni* and *Jarvik*—to determine that “*Glomar* law should be used to evaluate the propriety of a No Number, No List response.”<sup>227</sup> Accordingly, the court applied the *Glomar* test to all the Government’s responses and found the plaintiffs’ objections to the *Glomar* and *no number, no list* responses to be “without merit.”<sup>228</sup> It granted summary judgment in favor of the Government.<sup>229</sup>

#### D. *N.Y. Times v. U.S. Department of Justice—Court of Appeals*

On appeal, *N.Y. Times* and the ACLU pressed for the disclosure of the OLC-DOD Memorandum and *Vaughn* indices for all withheld documents.<sup>230</sup> In its discussion, the *N.Y. Times* court of appeals focused on the Government’s assertion that disclosure of the legal analysis in the OLC-DOD Memorandum would jeopardize national security by revealing “military plans, intelligence activities, sources and methods . . . .”<sup>231</sup> It also focused on the Government’s assertion that even if the legal analysis could be disclosed, it would still pose a threat to national security because it would identify the agency or agencies “that had an operational role in the drone strike that killed al-Awlaki.”<sup>232</sup>

In its evaluation of the Government’s claims, the *N.Y. Times* court of appeals referenced several public pronouncements made by government officials that concerned the legal analysis of targeted killings, and the CIA’s direct involvement in the program.<sup>233</sup> Speaking at Northwestern University in 2012, Attorney General Holder stated:

[I]t is entirely lawful—under both United States law and applicable law of war principles—to target specific senior operational leaders of al Qaeda and associated forces . . . [if] [f]irst, the U.S. government has determined, after a thorough and careful review, that the individual poses an imminent threat of violent attack against the United States; second, capture is not feasible; and third, the operation would be conducted in a manner consistent with applicable law of war principles.<sup>234</sup>

The Attorney General emphasized the last point by saying that the “use of lethal force by the United States will comply with the four fundamental law of war principles governing the use of force . . . necessity[,] . . . distinction[,] . . .

<sup>226</sup> See *id.* at 551.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 553.

<sup>229</sup> *Id.*

<sup>230</sup> *N.Y. Times Co. v. U.S. Dep’t of Justice*, 756 F.3d 100, 112, *aff’d in part*, 758 F.3d 436, *supplemented*, 762 F.3d 233 (2d Cir. 2014).

<sup>231</sup> *Id.* at 119.

<sup>232</sup> *Id.* at 118.

<sup>233</sup> *Id.* at 114–15, 118.

<sup>234</sup> *Id.* at 114.



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proportionality[,] . . . [and] humanity.”<sup>235</sup> In March 2010, then CIA Director Leon Panetta said:

Anytime we get a high value target that is in the top leadership of al Qaeda, it seriously disrupts their operations . . . It [sends] two important signals . . . No. 1 that we are not going to hesitate to go after them wherever they try to hide, and No. 2 that we are continuing to target their leadership.<sup>236</sup>

The court noted that “the reference to ‘we’ [did] not unequivocally [implicate the] CIA, and might arguably be taken as a reference to the Government generally,”<sup>237</sup> but found this doubt was eliminated by a statement Panetta made three months later:<sup>238</sup>

[We] are engaged in the most aggressive operations in the history of the CIA in that part of the world, and the result is that we are disrupting their leadership. We’ve taken down more than half of their Taliban leadership, of their Al Qaida leadership. We just took down number three in their leadership a few weeks ago.<sup>239</sup>

Panetta also stated:

[Al-]Awlaki is a terrorist and yes, he’s a United States citizen, but he is first and foremost a terrorist and we’re going to treat him like a terrorist. We don’t have an assassination list, but I can tell you this. We have a terrorist list and he’s on it.<sup>240</sup>

Furthermore, in October 2011, Panetta, then acting as Secretary of Defense, said “[h]aving moved from the CIA to the Pentagon, obviously I have a hell of a lot more weapons available to me in this job than I had at the CIA, although the Predators aren’t bad.”<sup>241</sup> Then, in 2012, Scott Pelley of the television program “60 Minutes” asked Panetta, “‘You killed al-Awlaki?’ Panetta ‘nodded affirmatively.’”<sup>242</sup> Next, Panetta was asked about targeting a person who has been identified as an enemy combatant. Panetta said, “It’s a recommendation we make, it’s a recommendation the CIA director makes in my prior role . . .”<sup>243</sup> Finally, the current Director of the CIA, John Brennan, testified in front of the Senate Select Committee on Intelligence in February 2013, saying, “[t]he Office of Legal Counsel advice establishes the legal boundaries within which [the CIA] can operate.”<sup>244</sup>

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<sup>235</sup> *Id.* at 114–15.

<sup>236</sup> *Id.* at 118.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

After reviewing the statements made by Attorney General Holder, current Director of the CIA John Brennan, and Leon Panetta in his roles as both Director of the CIA and as the Secretary of Defense, the court determined:

After senior Government officials have assured the public that targeted killings are “lawful” and that OLC advice “establishes the legal boundaries within which [the CIA] can operate,” and the Government makes public a detailed analysis of nearly all the legal reasoning contained in the OLC-DOD Memorandum, waiver of secrecy and privilege as to the legal analysis in the Memorandum has occurred.<sup>245</sup>

The court was careful to clarify that the waiver of protection regarding the legal analysis in the OLC-DOD Memorandum did not mean that the entire document would need to be disclosed.<sup>246</sup> It cited FOIA, stating “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.”<sup>247</sup> The court found that only parts II-VI of the OLC-DOD Memorandum had been officially acknowledged, and ordered only those parts disclosed.<sup>248</sup>

The court also addressed the plaintiffs’ arguments regarding the validity of *no number, no list* and *Glomar* responses.<sup>249</sup> After quoting then CIA Director Panetta’s direct acknowledgement of the CIA’s use of armed drones, the court held that “the [Government’s] main argument for the use of *Glomar* and *no number, no list* responses evaporates.”<sup>250</sup> In accordance with its holding, the court ordered the DOD and CIA to submit classified *Vaughn* indices for *in camera* inspection and disclosure on remand to the district court.<sup>251</sup> Finally, a court demanded that the CIA substantiate its exemptions in accordance with the provisions of FOIA.

#### IV. THE BEST WAY FORWARD

The “Alice-in-Wonderland”<sup>252</sup> analogy made by the district court in *N.Y. Times v. CIA* signals a fundamental breakdown in the judicial application of the Act. Congress did not enact FOIA to “allow the Executive Branch of our Government to proclaim . . . actions that seem . . . incompatible with our Constitution [to be perfectly lawful], while keeping the reasons for its conclusion a secret.”<sup>253</sup> Congress enacted FOIA “to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to

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<sup>245</sup> *Id.* at 116.

<sup>246</sup> *Id.* at 117.

<sup>247</sup> *Id.* (quoting 5 U.S.C. § 552(b)).

<sup>248</sup> *Id.*

<sup>249</sup> *See id.* at 122.

<sup>250</sup> *Id.* (emphasis added).

<sup>251</sup> *Id.*

<sup>252</sup> *N.Y. Times Co. v. U.S. Dep’t of Justice*, 915 F. Supp. 2d 508, 515 (S.D.N.Y. 2013).

<sup>253</sup> *Id.* at 515–16.

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hold the governors accountable to the governed.”<sup>254</sup> That is why clear, consistently enforced procedures regarding the *Vaughn* index and the *Glomar* response are absolutely critical to the ongoing viability of FOIA.

The opinion written by the court of appeals in *N.Y. Times* was spot-on, but its rationale was virtually eclipsed by the messy intersection of the *Glomar*, *Vaughn*, and *no number, no list* responses. Although the court deftly cut through the myriad FOIA requests originating from three different sources, as well as the varying replies from the OLC, DOD, and the CIA, it did not directly address the *no number, no list* response, nor provide a clear framework for other courts going forward. Perhaps the court did not find it necessary; after all, the *Vaughn* index has been a judicial construct of FOIA exemptions since 1973,<sup>255</sup> and the *Glomar* response has been used since 1976.<sup>256</sup> Nevertheless, the fact remains that without supplying the court with a “particularly persuasive affidavit”<sup>257</sup> justifying the reasons for its withholding, the CIA is operating outside of the law when submitting a *no number, no list* response.<sup>258</sup>

Although a *no number, no list* response may technically comply with FOIA when it takes the form of an *in camera Vaughn* index, the CIA’s abuse of the response has left little, if anything, worth salvaging. A better standard would be to eliminate the *no number, no list* response altogether, and return to the clearly defined legal framework provided for by the *Vaughn* index and the *Glomar* response.

Enforcing FOIA does not require any judicial or extrajudicial imagination. To return to FOIA-compliant law, reviewing courts should begin by examining the withholding agency’s *Vaughn* index. If a publicly disclosed, detailed *Vaughn* index would legitimately compromise government interests in national security, the agency may request *in camera* inspection.<sup>259</sup> At that point, the court will ensure that legitimate issues of national security are not disclosed. In the most extreme situations, where an agency has not officially disclosed the existence *vel non* of records relating to the request, and the very existence of the information is protected under one or more of FOIA’s exemptions, a *Glomar* response may be properly invoked.<sup>260</sup> Where an agency may properly invoke a *Glomar* response, it must supply the court with an *in camera* affidavit “giving reasonably detailed explanations why any withheld documents fall within an exemption,”<sup>261</sup> allowing the court to ensure that the public’s “right to information is not submerged beneath governmental obfuscation and mischar-

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<sup>254</sup> NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

<sup>255</sup> Vaughn v. Rosen, 484 F.2d 820, 827 (D.C. Cir. 1973).

<sup>256</sup> See generally Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976).

<sup>257</sup> ACLU v. CIA, 710 F.3d 422, 433 (D.C. Cir. 2013).

<sup>258</sup> See *id.* at 433–34.

<sup>259</sup> *Id.* at 433.

<sup>260</sup> *Id.*

<sup>261</sup> ACLU v. Dep’t of Justice, 681 F.3d 61, 69 (2d Cir. 2012).

acterization . . . .”<sup>262</sup> If a court follows this structure, and therefore the law, the *no number, no list* response will be unnecessary even in the most sensitive of cases.

#### CONCLUSION

For years, the CIA has been evading valid judicial proceedings by using unsubstantiated *no number, no list* responses. Between the incorrect “legally identical”<sup>263</sup> assertion made by the Seventh Circuit in 2004, and the *Vaughn* index, which legitimately offers the court broad discretion in determining the requisite level of detail on a case-by-case basis, the true purpose behind FOIA’s exemptions has been all but lost.

Today, amidst America’s ongoing Global War on Terror, an ever-increasing number of erroneous CIA drone strikes<sup>264</sup> coupled with targeted killings that mirror extrajudicial assassinations<sup>265</sup> make it more important than ever to uphold the purpose behind the Act. By eliminating the *no number, no list* response and applying the actual, long-standing FOIA rules across the board, the judiciary will not only ensure that legitimate matters of national security remain confidential, it will also ensure that the CIA does not operate above the law.

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<sup>262</sup> *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973).

<sup>263</sup> *Bassiouni v. CIA*, 392 F.3d 244, 247 (7th Cir. 2004).

<sup>264</sup> *See supra* notes 60–64.

<sup>265</sup> *See generally* *N.Y. Times Co. v. U.S. Dep’t of Justice*, 758 F.3d 436 (2d Cir. 2014), *supplemented*, 762 F.3d 233 (2d Cir. 2014); *Nat’l Sec. Counselors v. CIA*, 898 F. Supp. 2d 233 (D.D. Cir. 2012); *First Amendment Coal. v. U.S. Dep’t of Justice*, No. C 12-1013 CW, 2014 WL 1411333, at \*1 (N.D. Cal. Apr. 11, 2014), *vacated*, No. C 12-1013 CW, 2014 WL 7148340 (N.D. Cal. Dec. 15, 2014).