

# US appeals court rules against Obama administration on drone assassination secrecy

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Last Friday, an appellate court rejected the Obama administration's argument that the Central Intelligence Agency (CIA) can respond to a Freedom of Information Act (FOIA) request on drone assassinations by refusing to confirm or deny it has any records. The administration maintains this position even though numerous government officials, including President Barack Obama and his former "counterterrorism" adviser John Brennan (now CIA director), have publicly acknowledged using the unmanned aircraft to kill people.

The ruling by a three-judge panel from the United States Court of Appeals for the District of Columbia, which routinely hears appeals from lower court rulings on the legality of federal actions and is considered second in influence only to the Supreme Court, called the Justice Department's argument "implausible." The panel said this argument "strains credulity" and amounted to a request that the court give its "imprimatur to a fiction," and even suggested that lawyers could not make it "with a straight face."

In January 2010 the American Civil Liberties Union (ACLU) submitted a FOIA request to various federal agencies seeking documents "pertaining to the use of unmanned aerial vehicles (UAVs) to carry out targeted killings."

The Departments of State, Defense and Justice eventually released over 200 documents, along with a detailed study of multiple civilian casualties during one operation in Afghanistan. The ACLU posted those documents [here](#).

The CIA stonewalled, however, responding to the FOIA request with what is known as a "Glomar response"—a refusal to confirm or deny the existence of any records on the basis that the fact of their existence or non-existence alone would jeopardize national

security.

"Glomar" is not the name of a court precedent, but refers to a ship, the Glomar Explorer, built by billionaire Howard Hughes for the CIA's use in raising a sunken Soviet submarine in 1974. The categorical "refusal to confirm or deny" response was famously given to a 1975 FOIA request after news broke of the Glomar Explorer, causing the federal government great embarrassment that it was collaborating secretly with a notoriously reclusive and mentally disturbed private citizen in a Cold War operation directed against the Soviet Union.

The ACLU sued the CIA to compel a more complete disclosure, asserting that a Glomar response cannot stand where the government has already acknowledged publicly the supposedly secret activity. The lower court judge accepted the CIA's blanket assertion of national security, however, and threw out the case.

The various legal briefs filed in the ACLU's appeal from that ruling are remarkable in that there is little dispute over the applicable law or the existence of the drone assassination program itself. Instead, the briefs focus on whether CIA involvement was already a matter of public record.

The ACLU's briefs assembled all the official statements on the targeted killings, including high praise from former CIA director Leon Panetta for a model of drone called the "Predator." (There is also a model called the "Reaper.")

In a particularly interesting passage, the ACLU points to the many "leaks" attributed to anonymous officials that have appeared in bourgeois media. "One consequence," the ACLU lawyers explained, "is that the public's understanding of the effectiveness, morality, and legality of the government's bureaucratized killing program comes solely from the

government's own selective, self-serving, and unverifiable representations concerning it."

In response, the Justice Department lawyers parsed the official statements, over and over giving them such strained and unnatural interpretations that the words seemed to be emptied of any objective content.

Claiming that none of the statements unambiguously confirm direct CIA involvement in the drone program, the Obama administration lawyers argued that "an official CIA acknowledgment that confirms or denies the existence or non-existence of records ... would reveal, among other things, whether or not the CIA is involved in drone strikes or at least has an intelligence interest in drone strikes."

The written opinion by Judge Merrick Garland, a Clinton appointee who was considered twice for elevation to the Supreme Court by Obama, is unusually blunt and dismissive of the CIA's claim for secrecy.

After quoting Obama, Brennan, and Panetta at length on the use of drones for "targeted strikes," Garland wrote, "it is neither logical nor plausible for the CIA to maintain that it would reveal anything not already in the public domain to say that the Agency 'at least has an intelligence interest' in such strikes. The defendant is, after all, the Central *Intelligence Agency*" (italics in the original).

Garland continues, "It strains credulity to suggest that an agency charged with gathering intelligence affecting the national security does not have an 'intelligence interest' in drone strikes, even if that agency does not operate the drones itself."

Quoting former Supreme Court Justice Felix Frankfurter that "there comes a point where courts should not be ignorant as judges of what they know as men," Garland accused the CIA of asking judges "to give their imprimatur to a fiction of deniability that no reasonable person would regard as plausible."

The ruling does not, however, mean that the ACLU will now obtain CIA records on drone assassinations. Garland's opinion leaves the door open for a so-called "no number, no list" FOIA response; that is a concession that records exist, but a new objection that their identification would jeopardize national security.

Writing in the abstract—but no doubt referring to the case in front of him—Garland said that where a federal agency "cannot plausibly make the former (Glomar) argument with a straight face," it might "legitimately

make the latter."

Jameel Jaffer, the ACLU deputy legal director who argued the case, said the ruling "requires the government to retire the absurd claim that the CIA's interest in targeted killing is a secret." Jaffer added that the ruling means "the CIA must explain what records it is withholding and on what grounds it is withholding them."

The full scale of drone assassinations is not known. According to a recent report by a United Nations investigator, there have been at least 330 drone strikes in Pakistan alone, killing at least 2,200 people, including almost 500 civilians. Drones have killed at least three US citizens abroad, and Attorney General Eric Holder has refused to rule out their use on US citizens domestically.

On Saturday, the *Los Angeles Times* reported a new theater for drone killings. According to anonymous "current and former U.S. officials" the CIA is now developing targets among the groups fighting for control of Syria.



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