

# “[WE] CAN NEITHER CONFIRM NOR DENY THE EXISTENCE OR NONEXISTENCE OF RECORDS RESPONSIVE TO YOUR REQUEST”<sup>1</sup>: REFORMING THE GLOMAR RESPONSE UNDER FOIA

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*Under normal Freedom of Information Act procedures, an individual submits a request for records to a government agency and receives one of three responses: The agency may identify responsive records and release them, determine that there are no responsive records and inform the requestor of this fact, or identify responsive records but determine that they are exempt from disclosure under one of FOIA's nine statutory exemptions. Since the 1970s, however, a fourth type of response has arisen: Agencies sometimes refuse to confirm or deny whether responsive records do or do not exist on the grounds that acknowledging their very existence itself would reveal secret information. This withholding mechanism, known as the Glomar response, creates special problems for FOIA requestors and receives remarkable deference from federal courts. This Note assesses the justifications for such deference, which are often rooted in separation of powers concerns. Arguing that the level of deference afforded is excessive, this Note posits that both separation of powers and institutional conflict of interest considerations support greater judicial scrutiny of agency invocations of the Glomar response. This Note concludes by offering proposals for judicial, legislative, and administrative reform of the Glomar response.*

## INTRODUCTION

The Freedom of Information Act (FOIA),<sup>2</sup> now in its fifth decade, remains a remarkable, if troubled, tool for government transparency and accountability. FOIA has unquestionably opened government functions and activities to public scrutiny. Federal agencies

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<sup>1</sup> Letter from Delores M. Nelson, Info. & Privacy Coordinator, Cent. Intelligence Agency, to Melissa Goodman, Staff Attorney, Nat'l Sec. Project, ACLU (May 13, 2009), available at [http://www.aclu.org/pdfs/natsec/CIA\\_05132009.pdf](http://www.aclu.org/pdfs/natsec/CIA_05132009.pdf).

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<sup>2</sup> 5 U.S.C. § 552 (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, further amended by OPEN FOIA Act of 2009, Pub. L. No. 11-83, 123 Stat. 2142, 2184.

process hundreds of thousands of FOIA requests each year, often releasing information about government programs that were previously shrouded in secrecy.<sup>3</sup> Indeed, President Obama used the occasion of his first day in office to issue a memorandum to executive branch officials setting out his interpretation of the scope and import of FOIA, declaring that “[i]n our democracy, the Freedom of Information Act . . . , which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government.”<sup>4</sup> But despite the trumpeted successes and unmistakable import of FOIA, the law and its enforcement suffer pathologies that undermine the Act’s effectiveness. This Note examines the most vexing of these, the “Glomar response,” and assesses issues raised by extreme judicial deference to agencies’ use of that response in cases involving withholding of national security information.

Under normal FOIA procedures, an individual submits a request for records to a government agency and receives one of three responses: The agency may identify responsive records and release them, determine that there are no responsive records and inform the requestor of this fact, or identify responsive records but determine that they are exempt from disclosure under one of FOIA’s nine statutory exemptions.<sup>5</sup> Since the 1970s, however, a fourth type of response has arisen: Agencies sometimes refuse to confirm or deny whether responsive records do or do not exist on the grounds that acknowledging their very existence would itself reveal secret information. This withholding mechanism, known as the Glomar response,<sup>6</sup> has been recognized by every federal circuit court to consider it but is not a part of the FOIA statute.<sup>7</sup>

The Glomar response creates particularly difficult problems for litigants in FOIA suits because, by both depriving them of information essential to litigation and hobbling judicial review, it severely limits litigants’ ability to contest agencies’ withholding of records. The response also facilitates excessive secrecy. To be effective, the Glomar response must be invoked both when the government has responsive

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<sup>3</sup> See *Advancing Freedom of Information in the New Era of Responsibility: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 7 (2009) (statement of Miriam Nisbet, Director, Office of Government Information Services) (“[T]he government receives over 600,000 FOIA requests per year . . .”).

<sup>4</sup> Freedom of Information Act: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683 (Jan. 21, 2009).

<sup>5</sup> See *infra* notes 17–26 and accompanying text (describing FOIA procedures and exemptions).

<sup>6</sup> See *infra* Part II.A (describing origins of Glomar response and explaining its name).

<sup>7</sup> See *infra* note 62 (citing circuit decisions authorizing Glomar response).

records and when it does not.<sup>8</sup> In practice, however, this undermines the government's credibility and the public's trust in legitimate secrecy. The Glomar response may sometimes be necessary to protect the government's deepest national security secrets, and this Note does not argue that it should be totally barred.<sup>9</sup> Nevertheless, overuse hinders FOIA requestors and undermines FOIA itself. Acknowledging that use of the Glomar response is sometimes justified raises difficult questions of accurately delineating legitimate from illegitimate uses. This Note posits that such distinctions can be made and offers suggestions for drawing principled lines.

Judges routinely defer to agency use of the Glomar response. This hesitance to engage in robust scrutiny of Glomar denials has been justified on both constitutional and prudential separation of powers grounds: Courts opine that protection of national security information is entrusted to the executive under Article II of the Constitution and that courts lack the competence to assess executive determinations to withhold national security information.<sup>10</sup> This Note argues that Congress and the courts do in fact have constitutional power to regulate and review use of the Glomar response. Further, they should exercise that power because concerns about comparative competence are overblown and are outweighed by the institutional conflict of interest that arises when the executive branch makes essentially unreviewed decisions to withhold its own records from disclosure.

Although there is an expansive literature on FOIA and government secrecy more broadly, very little has been written about the Glomar response. This Note is the first scholarship since the 1990s devoted to analyzing the Glomar response and the first piece ever to offer a systematic account of the response in the national security realm.<sup>11</sup> Part I describes the structure and function of FOIA. Part II examines the origin of the Glomar response and its current use. Part III analyzes the difficulties posed by judicial deference to the executive's invocation of the Glomar response in cases involving national security-related information. Part IV explores the separation of powers rationales used to support such deference and balances them

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<sup>8</sup> See *infra* notes 93–95 and accompanying text.

<sup>9</sup> See *infra* note 86 (noting agreement of commentators on this point).

<sup>10</sup> See *infra* notes 137–40 and accompanying text (discussing prudential separation of powers in national security context).

<sup>11</sup> Two articles about the Glomar response were published in the 1990s: Danae J. Aitchison, *Reining in the Glomar Response: Reducing CIA Abuse of the Freedom of Information Act*, 27 U.C. DAVIS L. REV. 219 (1993); John Y. Gotanda, *Glomar Denials Under FOIA: A Problematic Privilege and a Proposed Alternative Procedure of Review*, 56 U. PITT. L. REV. 165 (1994). Several other authors have offered brief discussions about Glomar in articles addressing other problems under FOIA. See sources cited *infra* note 33.

against concerns with institutional conflicts of interest raised when courts allow agencies to decide to withhold their own records under Glomar. It then offers proposals for judicial, administrative, and congressional reform of the response.

## I

### THE FREEDOM OF INFORMATION ACT

The Freedom of Information Act,<sup>12</sup> originally enacted in 1966,<sup>13</sup> marked a watershed change in citizen access to government records. FOIA provided, for the first time, a mandatory and judicially enforceable requirement that government agencies release records to members of the public upon request.<sup>14</sup> The Supreme Court has repeatedly recognized FOIA as a key tool of democratic accountability,<sup>15</sup> and scholarly commentary consistently hails FOIA as a landmark statute and a powerful instrument of open government.<sup>16</sup>

Under FOIA, any person may submit a request to a federal agency for records.<sup>17</sup> The agency is then required to make a prompt search for those records, and to release them to the requestor<sup>18</sup> unless they fall within one of nine statutory exemptions.<sup>19</sup> Where only a portion of a record is exempt from disclosure, the agency must release all

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<sup>12</sup> 5 U.S.C. § 552 (2006).

<sup>13</sup> See Pub. L. No. 89-487, 80 Stat. 250, 250–51 (1966) (amending Administrative Procedure Act § 3, 60 Stat. 238 (1946), 5 U.S.C. § 1002 (1964)); Pub. L. No. 89-554, § 552, 80 Stat. 378, 383 (1966) (codified as amended at 5 U.S.C. § 552 (2006)).

<sup>14</sup> Martin E. Halstuk, *When Secrecy Trumps Transparency: Why the OPEN Government Act of 2007 Falls Short*, 16 COMM'LAW CONSPECTUS 427, 430 (2008).

<sup>15</sup> Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 171–72 (2004); NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

<sup>16</sup> See, e.g., HERBERT N. FOERSTEL, FREEDOM OF INFORMATION AND THE RIGHT TO KNOW: THE ORIGINS AND APPLICATIONS OF THE FREEDOM OF INFORMATION ACT 44 (1999) (“Despite its many inadequacies, America’s FOIA is recognized worldwide as trailblazing legislation.”); Halstuk, *supra* note 14, at 431 (“[P]reserving and fostering democratic principles lays at the heart of [FOIA.]”); David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 314 (2010) (“[FOIA’s] enactment entrenched a dramatic normative shift in Americans’ expectations of government. . . . FOIA [is] the closest thing we have to a constitutional amendment on state secrecy.”).

<sup>17</sup> 5 U.S.C. § 552(a)(3)(A) (2006).

<sup>18</sup> *Id.*; *id.* § 552(a)(6)(A)(i).

<sup>19</sup> *Id.* § 552(b). The exemptions cover classified national security information, *id.* § 552(b)(1), records “specifically exempted from disclosure by [another] statute,” *id.* § 552(b)(3), certain internal agency records, *id.* § 552(b)(2), (5), records whose disclosure would “constitute a clearly unwarranted invasion of personal privacy,” *id.* § 552(b)(6), (7)(C), certain records compiled for law enforcement purposes, *id.* § 552(b)(7), and several other narrow categories of information. Exemptions are typically referred to by the number of their subsection. Thus, for example, the exemption for classified information contained in § 552(b)(1) is known as “Exemption 1.”

nonexempt information that is “reasonably segregable” from the exempt material.<sup>20</sup>

If an agency denies a FOIA request (either by determining that records are exempt from disclosure or for another reason such as the nonexistence of responsive records), the requestor may file an administrative appeal within the agency.<sup>21</sup> If the agency upholds the denial on appeal, the requestor has a right to bring suit in federal district court.<sup>22</sup> The court reviews the agency decision *de novo* and may examine withheld records *in camera* to assess whether nondisclosure is justified.<sup>23</sup> In litigation, the defendant agency is typically required to provide the plaintiff/requestor with a detailed affidavit, known as a *Vaughn* index, describing the contents of each withheld document and explaining the statutory justification for its exemption.<sup>24</sup> The *Vaughn* index serves to provide the plaintiff with enough information to contest the agency’s basis for withholding<sup>25</sup> and allows the agency to carry its burden of proof.<sup>26</sup>

The statutory requirement of *de novo* review means that courts are tasked with evaluating, based on their own assessment of the record, whether the agency properly applied the FOIA exemptions.<sup>27</sup> Yet this apparent lack of deference is misleading because, in practice, courts regularly defer to agency determinations under FOIA regardless of the nature of the request or the agency’s justification for rejecting it.<sup>28</sup> Such deference is particularly strong in cases where

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<sup>20</sup> *Id.* § 552(b).

<sup>21</sup> *Id.* § 552(a)(6)(A).

<sup>22</sup> *Id.* § 552(a)(4)(B).

<sup>23</sup> *Id.* District courts rarely exercise their power to order *in camera* review. Gotanda, *supra* note 11, at 173 & n.55.

<sup>24</sup> *See Vaughn v. Rosen*, 484 F.2d 820, 826–28 (D.C. Cir. 1973) (setting out index procedures).

<sup>25</sup> *Id.* at 823, 826. *Vaughn* indices typically include brief substantive descriptions of the contents of each withheld document. For example, the index provided by the government in response to a recent FOIA suit brought by the ACLU describes one withheld document as “an eighteen-page memo, dated August 1, 2002, discussing the legality of the CIA’s proposed interrogation of Abu Zubaydah, with handwritten attorney markings.” Response to FOIA/PA Request No. F-2004-01456 at 1, *ACLU v. Dep’t of Def.*, No. 4 Civ. 1782 (S.D.N.Y. 2009), available at [http://www.aclu.org/files/assets/20091113\\_OLC-CIA\\_II\\_Vaughn\\_Index\\_Part\\_1.pdf](http://www.aclu.org/files/assets/20091113_OLC-CIA_II_Vaughn_Index_Part_1.pdf). *Vaughn* indices also explain the legal bases for withholding all or part of a document, with references to the specific FOIA exemptions relied on. *E.g.*, *id.* at 1–2.

<sup>26</sup> *Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991).

<sup>27</sup> *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 379 (1976).

<sup>28</sup> Nathan Slegers, Comment, *De Novo Review Under the Freedom of Information Act: The Case Against Judicial Deference to Agency Decisions To Withhold Information*, 43 *SAN DIEGO L. REV.* 209, 212 (2006); *see also* Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 *WM. & MARY L. REV.* 679, 713 (2002) (finding that, over ten-year

agencies have withheld records based on national security concerns.<sup>29</sup> In such cases, courts “must accord substantial weight to the Agency’s determinations.”<sup>30</sup> When reviewing FOIA requests for classified material, courts demand only that the government “articulate a logical basis for classification” in submissions to the court instead of subjecting withheld documents to actual scrutiny.<sup>31</sup>

## II

### THE GLOMAR RESPONSE

#### A. *The Origin of the Glomar Response*

Normally, an agency will respond to a FOIA request by acknowledging whether responsive records do or do not exist and then either releasing those records or explaining that they are exempt from disclosure. Since the 1970s, however, agencies have sometimes offered a fourth, nonstatutory response: Under certain circumstances, agencies refuse to confirm or deny whether or not responsive records exist.<sup>32</sup> This evasive reply, known as the Glomar response, creates special problems for FOIA requestors but has received surprisingly little attention in the FOIA literature.<sup>33</sup>

The Glomar response was first judicially recognized in two parallel FOIA cases in the D.C. Circuit, *Phillippi v. CIA*,<sup>34</sup> and *Military Audit Project v. Casey*,<sup>35</sup> both involving requests for information about a secret Central Intelligence Agency (CIA) program to raise a

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period, district courts reversed just ten percent of FOIA cases and concluding that this reversal rate is lower than should be expected under de novo review standard).

<sup>29</sup> Robert P. Deyling, *Judicial Deference and De Novo Review in Litigation over National Security Information Under the Freedom of Information Act*, 37 VILL. L. REV. 67, 67, 90 (1992); Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 973 (2006).

<sup>30</sup> *Gardels v. CIA*, 689 F.2d 1100, 1104 (D.C. Cir. 1982) (internal quotation marks omitted) (citing *Ray v. Turner*, 587 F.2d 1187, 1194 (D.C. Cir. 1978)); see also *CIA v. Sims*, 471 U.S. 159, 176 (1985) (exhibiting such deference).

<sup>31</sup> Samaha, *supra* note 29, at 939.

<sup>32</sup> See *Phillippi v. CIA (Phillippi I)*, 546 F.2d 1009, 1012 (D.C. Cir. 1976) (providing first judicial recognition of Glomar response).

<sup>33</sup> Only two articles out of the voluminous literature on FOIA have been devoted to discussing the Glomar response. See generally Aitchison, *supra* note 11 (discussing use of Glomar response by CIA under national security exemptions); Gotanda, *supra* note 11 (discussing use of Glomar response under privacy exemptions). Several other pieces provide brief discussions of Glomar. See, e.g., Karen A. Winchester & James W. Zirkle, *Freedom of Information and the CIA Information Act*, 21 U. RICH. L. REV. 231, 248–50 (1987) (describing Glomar response as used by CIA); Gregory G. Brooker, Note, *FOIA Exemption 3 and the CIA: An Approach To End the Confusion and Controversy*, 68 MINN. L. REV. 1231, 1252–61 (1984) (discussing use of Glomar response by CIA in Exemption 3 cases).

<sup>34</sup> *Phillippi I*, 546 F.2d at 1009.

<sup>35</sup> 656 F.2d 724 (D.C. Cir. 1981).

sunken Soviet submarine using a privately registered salvage ship named the Hughes Glomar Explorer. The Los Angeles Times partially broke the story about the program in February 1975,<sup>36</sup> prompting the CIA to attempt to suppress further reports.<sup>37</sup> CIA officials convinced news outlets to refrain from further reporting on the subject for more than a month, but eventually the major news organizations ran stories both about the details of the Glomar Explorer project and about the CIA's efforts to bury the story.<sup>38</sup>

After news broke about the government's attempts to suppress the Glomar Explorer story, Harriet Ann Phillippi, a journalist, filed a FOIA request with the CIA seeking "all records relating to the [CIA's] attempts to persuade any media personnel not to . . . make public the events relating to the activities of the *Glomar Explorer*."<sup>39</sup> Instead of responding to Phillippi's request with the usual acknowledgement that responsive records existed but were exempt from release, the Agency issued a novel response: It stated that "the fact of the existence or nonexistence of the records you request" was itself exempt from disclosure as a classified matter of national security.<sup>40</sup>

Around the same time as Phillippi, plaintiffs in *Military Audit Project* submitted FOIA requests to the CIA and Department of Defense seeking records describing the U.S. government's role in the "planning, design, construction, leasing, use and disposition of the Glomar Explorer."<sup>41</sup> Both agencies responded by refusing to confirm or deny the existence of such records.<sup>42</sup> The requestors in *Phillippi* and *Military Audit Project* independently filed suit to compel the government to reveal whether or not it possessed responsive records and, if so, to release them.

Phillippi's request was the first to reach decision on appeal. The CIA claimed that the very fact of whether or not it had records responsive to Phillippi's request was exempt from disclosure under Exemptions 1 and 3.<sup>43</sup> The court held that the agency's refusal to confirm or deny the existence of requested documents was permissible under FOIA but reversed and remanded because the district court

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<sup>36</sup> See William Farr & Jerry Cohen, *CIA Reportedly Contracted with Hughes in Effort To Raise Sunken Soviet A-Sub*, L.A. TIMES, Feb. 8, 1975, at 18.

<sup>37</sup> *Military Audit Project*, 656 F.2d at 729; see also Seymour Hersh, *C.I.A. Salvage Ship Brought Up Part of Soviet Sub Lost in 1968, Failed To Raise Atom Missiles*, N.Y. TIMES, Mar. 19, 1975, at 52.

<sup>38</sup> *Military Audit Project*, 656 F.2d at 729.

<sup>39</sup> *Phillippi I*, 546 F.2d at 1011 n.1.

<sup>40</sup> *Id.* at 1011–12.

<sup>41</sup> *Military Audit Project*, 656 F.2d at 729.

<sup>42</sup> *Id.* at 729–30.

<sup>43</sup> *Phillippi I*, 546 F.2d at 1012.

had based its ruling solely on in camera affidavits submitted by the CIA without attempting to compile a public record.<sup>44</sup> In approving the Glomar response, the court explained its reasoning as follows: “In effect, the situation is as if appellant had requested and been refused permission to see a document which says either ‘Yes, we have records related to contacts with the media concerning the *Glomar Explorer*’ or ‘No, we do not have any such records.’”<sup>45</sup> In such cases, where disclosure of that hypothetical document would itself compromise national security, the government could “claim that national security considerations require it to refuse to disclose whether or not requested documents exist.”<sup>46</sup>

*Phillippi I* thus opened the doors to a new government response to FOIA requests, one neither described in the statute nor contemplated by Congress when it passed the Act. Ironically, soon after the decision in *Phillippi I*, the government abandoned its Glomar response and acknowledged that it possessed records relating to the Glomar Explorer.<sup>47</sup> Still, it was not until nearly thirty-five years later that the CIA would actually begin releasing records about the Glomar Explorer project, and even then significant details continued to be withheld.<sup>48</sup>

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<sup>44</sup> *Id.* at 1012–15 & n.14. The court noted that in some cases the subject matter of a FOIA request could be so sensitive as to require “examin[ation of] classified affidavits *in camera* and without participation by plaintiff’s counsel.” *Id.* at 1013. Before resorting to that procedure, however, trial courts must “attempt to create as complete a public record as possible” by requiring an agency “to provide a public affidavit.” *Id.*

<sup>45</sup> *Id.* at 1012.

<sup>46</sup> *Id.* This point was uncontested by *Phillippi*. *Id.*

<sup>47</sup> *Phillippi v. CIA (Phillippi II)*, 655 F.2d 1325, 1328 (D.C. Cir. 1976). Even before this decision, the government’s argument in *Phillippi I* was complicated by the fact that it had disclosed its connection with the Glomar Explorer in a tax case in Los Angeles. *Phillippi I*, 546 F.2d at 1014 n.9. Although the Glomar response is widely accepted by courts today, its initial use was controversial. Indeed, the CIA’s use of the Glomar response in *Military Audit Project* raised the ire of the district court judge, who removed himself from further proceedings in the case in protest. After the CIA finally admitted to involvement with the Glomar Explorer in mid-1977, the judge called the CIA’s initial use of the Glomar response “just a game that was played over a period of a year in front of me” and decried the Agency’s refusals to confirm to the court that it held responsive records—later revealed to include more than 128,000 documents—as “irresponsible” and “outrageous.” Timothy S. Robinson, ‘Compromised,’ *Judge Gesell Quits CIA Case*, WASH. POST, July 1, 1977, at A13.

<sup>48</sup> Calvin Woodward, *Gone Fishing: Secret Hunt for a Sunken Soviet Sub*, ASSOCIATED PRESS, Feb. 13, 2010, available at <http://abcnews.go.com/Politics/wireStory?id=9827998>. Although the official government account of the Glomar Explorer project was recently partially declassified in PROJECT AZORIAN: THE STORY OF THE HUGHES GLOMAR EXPLORER (2010), available at <http://www.gwu.edu/~nsarchiv/nukevault/ebb305/doc01.pdf>, significant portions of the account remain redacted. See, e.g., *id.* at 6–9.



### B. *How the Glomar Response Works*

The principle behind the Glomar response is that revealing the very fact of whether or not the government possesses records about a topic can sometimes reveal protected information, even if the underlying records would themselves be safe from disclosure under FOIA's exemptions. The Glomar response does not function independently of the FOIA statute, however: "[I]n order to invoke the *Glomar* response . . . , an agency must tether its refusal to one of the nine FOIA exemptions."<sup>49</sup> Since *Phillippi I*, the Glomar response has been accepted by courts in connection with three distinct types of disclosure concerns: those relating to national security (justified by Exemptions 1 and 3), those that would result in an "unwarranted invasion of personal privacy" (pursuant to Exemptions 6 and 7(C)),<sup>50</sup> and those entailing the protection of the identities of confidential informants to federal law enforcement agencies (under § 552(c)(2)).<sup>51</sup> Although important in their own right, this Note does not analyze the latter two uses of the Glomar response.

In national security FOIA cases, the government's claim is that revealing whether or not responsive records exist would itself damage national security. Take, for example, a FOIA request submitted to the CIA seeking information about covert and unacknowledged CIA actions in a Latin American country, including interference with political and military leadership there.<sup>52</sup> The government might issue a Glomar response on the grounds that acknowledging whether such records exist would necessarily disclose classified national security

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<sup>49</sup> *Wilner v. NSA*, 592 F.3d 60, 71 (2d Cir. 2009) (internal quotation marks and citation omitted); *accord Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007).

<sup>50</sup> *Gotanda, supra* note 11, at 176. In the privacy context, the concern is that the government would infringe upon an individual's privacy interest by acknowledging that the government has records about him or her, as when a request is made to the FBI for investigative records about an individual. Because it is presumed that an agency like the FBI would hold certain types of records about an individual only if he or she had been under investigation, acknowledging whether records exist would compromise the individual's privacy interest by "carry[ing] a stigmatizing connotation." Office of Info. Policy, U.S. Dep't of Justice, *OIP Guidance: The Bifurcation Requirement for Privacy "Glomarization,"* 17 FOIA UPDATE 3, 3 (1996) [hereinafter *Bifurcation Requirement*], available at [http://www.usdoj.gov/oip/foia\\_updates/Vol\\_XVII\\_2/page3.html](http://www.usdoj.gov/oip/foia_updates/Vol_XVII_2/page3.html) (quoting Office of Info Policy, U.S. Dep't of Justice, *OIP Guidance: Privacy "Glomarization,"* 7 FOIA UPDATE 3, 3 (1986)).

<sup>51</sup> Subsection (c)(2) of FOIA provides that requests for certain records that would reveal the identity of confidential informants to federal law enforcement agencies may be treated as not subject to disclosure. 5 U.S.C. § 552(c)(2) (2006). This provision has been interpreted as "provid[ing] express legislative authorization for a Glomar response" in a narrow set of circumstances. *Benavides v. DEA*, 968 F.2d 1243, 1246 (D.C. Cir. 1992).

<sup>52</sup> *See Riquelme v. CIA*, 453 F. Supp. 2d 103, 105–06 (D.D.C. 2006) (turning on these facts).

information by indicating whether the CIA had in fact engaged in the alleged covert activities, since the agency would only possess records if it had a role in the activities in question.<sup>53</sup>

Two FOIA exemptions are used to protect national security information—Exemptions 1 and 3. Exemption 1 shields from disclosure records that are properly classified under the executive order governing classification of national security information.<sup>54</sup> The executive order specifically allows the Glomar response, stating that in response to a FOIA request “[a]n agency may refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified . . . .”<sup>55</sup> Courts consistently allow invocation of the Glomar response under Exemption 1.<sup>56</sup>

Exemption 3 provides that an agency may withhold records that are “specifically exempted from disclosure by [another] statute.”<sup>57</sup> Dozens of federal statutes have been recognized by courts as providing grounds for exempting records from disclosure under this provision.<sup>58</sup> In the national security context, most intelligence agencies

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<sup>53</sup> *Id.* at 109.

<sup>54</sup> 5 U.S.C. § 552(b)(1) (2006). Under the executive order currently in effect, classification of information is called for when “unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security . . . , and [the information] pertains to” military matters; intelligence activities, sources, or methods; foreign relations; and other described categories of information. Exec. Order No. 13,526 § 1.4, 75 Fed. Reg. 707, 709 (Dec. 29, 2009), *reprinted in* 50 U.S.C.A. § 435 note (West 2010).

<sup>55</sup> Exec. Order No. 13,526 § 3.6(a), 75 Fed. Reg. at 719. President Carter issued the first executive order on classification of national security information to recognize the Glomar response. *See* Exec. Order No. 12,065 § 3-505, 3 C.F.R. 190, 199 (1979) (“No agency in possession of a classified document may, in response to a request for the document made under the Freedom of Information Act . . . refuse to confirm the existence or non-existence of a document unless the fact of its existence or non-existence would itself be classifiable under this Order.”). Each subsequent president to issue a classification order has included similar language in his order. *See* Exec. Order No. 12,356 § 3.4(f)(1), 3 C.F.R. 166, 174 (1983) (President Reagan); Exec. Order No. 12,958 § 3.7(a), 3 C.F.R. 333, 347 (1996), *reprinted as amended in* 50 U.S.C. § 435 note (Supp. III 2003) (President Clinton); Exec. Order No. 13,292 § 3.6(a), 3 C.F.R. 196, 207 (2004) (President George W. Bush) (amending Exec. Order No. 12,958).

<sup>56</sup> *See, e.g.,* Wilner v. NSA, 592 F.3d 60, 71 (2d Cir. 2009); Miller v. Casey, 730 F.2d 773, 777 (D.C. Cir. 1984).

<sup>57</sup> 5 U.S.C. § 552(b)(3) (2006). Exemption 3 is triggered by statutes that either “(A) require[ ] that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establish[ ] particular criteria for withholding or refer[ ] to particular types of matters to be withheld.” *Id.* § 552(b)(3). Any withholding statute enacted “after the date of enactment of the OPEN FOIA Act of 2009” must “specifically cite[ ] to this paragraph” to trigger Exemption 3. *Id.* § 552(b)(3)(B) (Supp. III 2009).

<sup>58</sup> *See* OFFICE OF INFO. POLICY, U.S. DEP’T OF JUSTICE, STATUTES FOUND TO QUALIFY UNDER EXEMPTION 3 OF THE FOIA (2010), *available at* <http://www.justice.gov/oip/exemption3-april-2010.pdf> (listing statutes that courts have found to satisfy requirements of Exemption 3).

are covered by nondisclosure statutes. Records held by the CIA relating to “intelligence sources and methods,” for example, are exempt from disclosure under § 102(d)(3) of the National Security Act of 1947.<sup>59</sup> Information regarding the functions or activities of the National Security Agency is similarly exempt from disclosure under § 6 of the National Security Act of 1959.<sup>60</sup> In Glomar cases, courts ask whether “acknowledging the existence or nonexistence of the information entailed in [the] FOIA [r]equest would reveal” information protected by the relevant withholding statute, such as intelligence sources and methods in the case of the CIA or the organization, functions, and activities of the National Security Agency (NSA).<sup>61</sup> If the fact of existence or nonexistence of records can be construed as within the ambit of the withholding statute, the agency’s Glomar response is deemed valid.

The Glomar response for national security information has been approved by every circuit to consider the issue (in cases involving either or both of the national security exemptions).<sup>62</sup> Congress has never amended FOIA to include express authorization for Glomar.<sup>63</sup>

### C. *Glomar Procedures in Practice*

FOIA cases are marked by asymmetrical access to information between the requesting party and the responding agency.<sup>64</sup> When the agency claims that records are exempt from disclosure under § 552(b),

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<sup>59</sup> Pub. L. No. 108-458, 118 Stat. 3643 (2004) (codified at 50 U.S.C. § 403-1(i) (2006)); see also *CIA v. Sims*, 471 U.S. 159, 167 (1985) (holding that section 102(d)(3) of National Security Act “qualifies as a withholding statute under Exemption 3”). The CIA’s “operational files” are also exempt from disclosure pursuant to Pub. L. No. 98-477, 98 Stat. 2209 (1984) (codified at 50 U.S.C. § 431(a) (2006)).

<sup>60</sup> Pub. L. No. 86-36, § 6, 73 Stat. 63, 64 (codified at 50 U.S.C. § 402 (2006)); see also *Founding Church of Scientology v. NSA*, 610 F.2d 824, 827–28 (D.C. Cir. 1979) (holding that section 6 of National Security Act qualifies as withholding statute under FOIA Exemption 3).

<sup>61</sup> *Wilner*, 592 F.3d at 72.

<sup>62</sup> See *Bassiouni v. CIA*, 392 F.3d 244, 246 (7th Cir. 2004) (“Every appellate court to address the issue has held that the FOIA permits the CIA to make a ‘Glomar response’ . . .”). For illustrative decisions, see *Wilner*, 592 F.3d at 68, *Larson v. Dep’t of State*, 565 F.3d 857, 861–62, 870 (D.C. Cir. 2009), *Bassiouni*, 392 F.3d at 246, *Pullara v. CIA*, 248 F.3d 1140, 1140 (5th Cir. 2001) (per curiam), and *Minier v. CIA*, 88 F.3d 796, 801 (9th Cir. 1996). For analogous cases, compare *Adejumobi v. NSA*, 287 F. App’x 770 (11th Cir. 2008) (per curiam) (noting NSA’s Glomar response but not deciding its validity), and *Carpenter v. U.S. Dep’t of Justice*, 470 F.3d 434, 436–37 & nn.3, 6 (1st Cir. 2006) (recognizing but not applying Glomar response).

<sup>63</sup> See generally 5 U.S.C. § 552 (2006). At least one congressional committee has (briefly) indicated approval of the response. See H.R. REP. NO. 98-726, pt. 1, at 27 (1984), reprinted in 1984 U.S.C.C.A.N. 3741, 3765.

<sup>64</sup> See, e.g., *Campaign for Responsible Transplantation v. FDA*, 511 F.3d 187, 196 (D.C. Cir. 2007) (“[This court has] expressed concern over the ‘distort[ing]’ effects of . . . infor-

requestors face special difficulties because they lack information about the actual content of withheld records that would allow them to contest vigorously the withholding in court.<sup>65</sup> In non-Glomar FOIA cases, *Vaughn* indices<sup>66</sup> and in camera review of records<sup>67</sup> alleviate the burden on plaintiffs and facilitate accurate resolution of the case.

Although these procedures certainly have their faults,<sup>68</sup> they have substantially enabled an adversarial process that ensures robust disclosure of records. With Glomar, however, these procedures are unavailable. Because the existence of underlying documents is shielded in the Glomar context and creating a *Vaughn* index necessarily requires acknowledging the existence of underlying records, a *Vaughn* index would be of no assistance.<sup>69</sup> Similarly, in camera review of withheld records is seen as inapposite, since there are no records to review as long as an agency maintains a Glomar response. As a substitute procedure, courts require the government to prepare public affidavits describing, in as much detail as possible, the logical justifications for refusing to confirm or deny the existence of responsive records.<sup>70</sup> But although courts call for agencies to “create as complete a public record as possible,”<sup>71</sup> the sensitive nature of issues at stake in Glomar cases generally prompts the agency to limit its public affidavits and supplement them with submission of classified declarations to the court. These declarations can be considered in camera and ex parte.<sup>72</sup> When reviewing such submissions, courts are required to afford “substantial weight”<sup>73</sup> to agency affidavits as long as they contain “reasonably specific detail, demonstrate that the information

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mation asymmetry [in FOIA litigation] on ‘the traditional adversary nature of our legal system’s form of dispute resolution.’” (citation omitted) (second alteration in original)).

<sup>65</sup> Agencies’ Glomar responses are typically terse, providing requestors with virtually no information. *See, e.g.*, Letter from Delores M. Nelson to Melissa Goodman, *supra* note 1 (“The fact of the existence or nonexistence of requested records is currently and properly classified and is intelligence sources and methods information that is protected from disclosure . . . . Therefore, your request has been denied . . . .”).

<sup>66</sup> *See supra* notes 24–26 and accompanying text (describing *Vaughn* index requirement and procedure).

<sup>67</sup> *See generally* 5 U.S.C. § 552(a)(4)(B) (2006).

<sup>68</sup> *See, e.g.*, Brooker, *supra* note 33, at 1249–51 (criticizing courts’ hesitancy to use in camera review in Exemption 3 cases); Deyling, *supra* note 29, at 82–86 (arguing that in camera review has not been effectively used by judges); *id.* at 98–102 (criticizing *Vaughn* indices as often insufficiently descriptive and of little aid to adversarial process).

<sup>69</sup> *See Phillippi v. CIA (Phillippi I)*, 546 F.2d 1009, 1013 n.7 (D.C. Cir. 1976) (“Since the ‘document’ the Agency is currently asserting the right to withhold is confirmation or denial of the existence of the requested records, we stress that we are not requiring, at this stage, the *Vaughn* index requested by appellant.”).

<sup>70</sup> *Wilner v. NSA*, 592 F.3d 60, 68 (2d Cir. 2009); *Phillippi I*, 546 F.2d at 1013.

<sup>71</sup> *Phillippi I*, 546 F.2d at 1013.

<sup>72</sup> *Wilner*, 592 F.3d at 68; *Phillippi I*, 546 F.2d at 1012.

<sup>73</sup> *Wilner*, 592 F.3d at 68.

withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.”<sup>74</sup> Courts give tremendous deference to agency arguments, accepting them if they are “logical or plausible.”<sup>75</sup> Although courts occasionally reject agency Glomar responses,<sup>76</sup> most assertions of the Glomar response are accepted.<sup>77</sup>

Once an agency has carried its burden of justifying use of the Glomar response, a requestor can force disclosure of the existence or nonexistence of requested records only by one of two showings: Either that the government has already “officially acknowledged” the existence of the sought-after records,<sup>78</sup> or that the government is acting in bad faith or concealing violations of law.<sup>79</sup> Both are extremely hard to prove in court.

To invalidate a Glomar response on the grounds that the government has already acknowledged the existence of the requested records, the information previously disclosed must exactly match the information requested, both in specificity and content, and the previous disclosure must have been both official and documented.<sup>80</sup> Information in the public domain indicating that the government holds requested records is not sufficient unless it came from an acknowledgement by a government official in the same agency subject

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<sup>74</sup> *Larson v. Dep’t of State*, 565 F.3d 857, 862 (D.C. Cir. 2009) (quoting *Miller v. Casey*, 730 F.2d 773, 776 (D.C. Cir. 1984)).

<sup>75</sup> *Id.* (internal quotations omitted) (citing *Wolf v. CIA*, 473 F.3d 370, 374–75 (D.C. Cir. 2007)); *see also* *Aitchison*, *supra* note 11, at 237–38 (“[C]ourts have extreme difficulty determining the propriety of the Glomar response . . . [in part because they have] no method for checking the agency’s accuracy other than examining public and *in camera* affidavits.”).

<sup>76</sup> *See, e.g.*, *Morley v. CIA*, 508 F.3d 1108, 1126 (D.C. Cir. 2007) (remanding for agency to “substantiate its *Glomar* response”); *Judicial Watch, Inc. v. U.S. Secret Serv.*, 579 F. Supp. 2d 182, 185–86 (D.D.C. 2008) (invalidating agency’s *Glomar* response on basis that agency’s proffered harms justifying refusal were not credible); *ACLU v. Dep’t of Def.*, 389 F. Supp. 2d 547, 561, 565–66 (S.D.N.Y. 2005) (rejecting government’s *Glomar* response as to one part of plaintiffs’ FOIA request); *Nat’l Sec. Archive v. CIA*, No. 99-1160, slip op. at 15–16, 19 (D.D.C. July 31, 2000) (holding that CIA had waived *Glomar* response by previous official disclosures of information).

<sup>77</sup> *See ACLU*, 389 F. Supp. 2d at 562 (“[T]he courts generally respect the CIA’s right to make a *Glomar* response.”).

<sup>78</sup> *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990); *see also Wilner*, 592 F.3d at 70 (quoting *Fitzgibbon*).

<sup>79</sup> *E.g.*, *Wilner*, 592 F.3d at 75.

<sup>80</sup> *Fitzgibbon*, 911 F.2d at 765; *see also Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007) (“Prior disclosure of similar information does not suffice; instead, the *specific* information sought by the plaintiff must already be in the public domain by official disclosure.”).

to the request.<sup>81</sup> This exacting standard is difficult to meet, although some requestors have prevailed on this ground.<sup>82</sup>

Proving bad faith on the part of the agency is similarly difficult. Agencies may not, as a rule, invoke the Glomar response out of bad faith or to conceal violations of law.<sup>83</sup> Courts place the burden of proof for showing bad faith on the requestor, and will uphold the agency's action as long as its explanation is "logical or plausible."<sup>84</sup> Given the information asymmetry inherent in Glomar cases, plaintiffs have a difficult time meeting this standard. Even where the subject of a FOIA request is a program that is arguably operating in violation of the law, such as the NSA's warrantless wiretapping program, courts will not presume that the agency used the Glomar response *in order to* conceal such violations of the law and thus let the agency's response stand.<sup>85</sup>

### III

#### DIFFICULTIES POSED BY THE GLOMAR RESPONSE

Few, if any, commentators (or litigants for that matter) contest that the government may in some cases legitimately invoke the Glomar response.<sup>86</sup> Rather, most criticism directed at the practice is that the response is used too often or that courts treat it too deferentially, and that it allows the government to withhold information

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<sup>81</sup> *Hunt v. CIA*, 981 F.2d 1116, 1120 (9th Cir. 1992); *Afshar v. Dep't of State*, 702 F.2d 1125, 1129–30 (D.C. Cir. 1983).

<sup>82</sup> *See, e.g., Wolf*, 473 F.3d at 379 (invalidating CIA Glomar response on basis that former CIA director had testified before Congress that agency possessed information relating to subject of FOIA request); *Nat'l Sec. Archive v. CIA*, No. 99-1160, slip op. at 15–16, 19 (D.D.C. July 31, 2000) (holding that CIA waived Glomar response as to request for CIA biographies of former leaders of Eastern European countries through previous admissions that agency compiles "biographies on *all* heads of state").

<sup>83</sup> A similar rule applies to claims that information is classified, as the executive order governing classification of national security information prohibits classification to "conceal violations of law, inefficiency, or administrative error [or to] prevent embarrassment to a person, organization, or agency." Exec. Order No. 13,526 § 1.7(a)(1)–(2), 75 Fed. Reg. 707, 710 (Dec. 29, 2009), *reprinted in* 50 U.S.C.A. § 435 note (West 2010).

<sup>84</sup> *Wilner*, 592 F.3d at 75.

<sup>85</sup> *E.g., People for the Am. Way Found. v. NSA*, 462 F. Supp. 2d 21, 29–31 (D.D.C. 2006); *see also Arabian Shield Dev. Co. v. CIA*, No. 3-98-CV-0624-BD, 1999 WL 118796, at \*4 (N.D. Tex. Feb. 26, 1999) (prohibiting agency "from classifying documents as a ruse when they could not otherwise be withheld from public disclosure [but not preventing] the classification of national security information merely because it might reveal criminal or tortious acts").

<sup>86</sup> *See, e.g., Aitchison, supra* note 11, at 237 ("Arguably, legitimate uses for the Glomar response do exist."); *Pozen, supra* note 16, at 313–14 n.203 ("*Glomar* responses may be necessary in some extreme cases."). Even the requestor in *Phillippi I* conceded that the Glomar response was sometimes appropriate. *Phillippi v. CIA (Phillippi I)*, 546 F.2d 1009, 1012 (D.C. Cir. 1976).

excessively.<sup>87</sup> It is difficult to determine the frequency of invocation of the Glomar response, as government agencies are not required to keep statistics on its use.<sup>88</sup> The only publicly accessible indication of the frequency of Glomar responses is in reported court cases, from which it appears that use of the response has increased sharply in recent years.<sup>89</sup> This is only moderately illuminating, however, as most agency denials of FOIA requests do not result in litigation.<sup>90</sup> It is clear that numerous agencies have taken advantage of the Glomar response since its first use by the CIA,<sup>91</sup> but the frequency of use by each agency is unreported.

Curtailling use of the response is difficult, as agencies have a strong incentive, in addition to the general dynamics contributing to

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<sup>87</sup> See, e.g., Aitchison, *supra* note 11, at 237 (“[T]he CIA extended the Glomar response beyond its logical limits . . . .”); Gotanda, *supra* note 11, at 177 (“The expanded use of Glomar denials has made it significantly more difficult for FOIA requestors to effectively challenge an agency’s withholding.”).

<sup>88</sup> FOIA requires all agencies to submit annual public reports detailing “the number of determinations made by the agency not to comply with requests for records . . . and the reasons for each such determination.” 5 U.S.C. § 552(e)(1)(A) (2006). This is interpreted as requiring agencies to specify how often they invoked each of FOIA’s disclosure exemptions and to account for other reasons for denying requests, but not how often the Glomar response has been used. See, e.g., CIA, FREEDOM OF INFORMATION ACT ANNUAL REPORT, FISCAL YEAR 2008, at 8–9 (2008), available at [http://www.foia.ucia.gov/txt/Annual\\_Report\\_2008.pdf](http://www.foia.ucia.gov/txt/Annual_Report_2008.pdf) (reporting number of FOIA exemptions claimed but not Glomar responses). Because the Glomar response is never invoked independently of the nine FOIA exemptions, it is not considered an independent reason for denying a request. Telephone Interview with Office of the Info. & Privacy Coordinator, CIA (Feb. 5, 2010) (relating that CIA’s FOIA tracking database does not differentiate Glomar responses from other denials).

<sup>89</sup> Amicus Curiae Brief of National Security Archive in Support of Appellants to Vacate and Remand at 9, *Wilner*, 592 F.3d 60 (No. 08-4762-cv) (“The Glomar Response has arisen in roughly 80 federal court opinions since 1976. Roughly 60 of those cases have been decided since September 11, 2001 . . . .”). This statistic covers invocation of the Glomar response in both national security and privacy cases.

<sup>90</sup> In a recent two-year period, only approximately 0.2% of FOIA denials resulted in litigation against the withholding agency. Compare Edward B. Gerard, Note, *Bush Administration Secrecy: An Empirical Study of Freedom of Information Act Disclosure*, 15 MEDIA L. & POL’Y 84, 121 tbl.5 (2005) (reporting that 88,966 and 108,919 FOIA requests were fully or partially denied by federal agencies in 2002 and 2003, respectively (excluding requests made to Social Security Administration and Veterans Administration)), with DEP’T OF JUSTICE, 2002 LITIGATION AND COMPLIANCE REPORT: 2002 CALENDAR YEAR REPORT ON FREEDOM OF INFORMATION ACT LITIGATION ACTIVITIES (2003), available at <http://www.justice.gov/oip/02introduction.htm> (listing 184 FOIA cases received by DOJ for litigation in 2002), and DEP’T OF JUSTICE, 2003 LITIGATION AND COMPLIANCE REPORT: 2003 CALENDAR YEAR REPORT ON FREEDOM OF INFORMATION ACT LITIGATION ACTIVITIES (2004), available at <http://www.justice.gov/oip/03introduction.htm> (listing 265 FOIA cases received by DOJ in 2003).

<sup>91</sup> See, e.g., ROBERT M. PALLITTO & WILLIAM G. WEAVER, PRESIDENTIAL SECRECY AND THE LAW 82 (2007) (noting that Glomar response has been “seized on by other government departments” and listing some agencies that have invoked it since mid-1990s).

excessive classification,<sup>92</sup> to overuse it. The most basic difficulty posed by the Glomar response is that, to be effective, it must be used consistently.<sup>93</sup> For any particular refusal to confirm or deny the existence of records to be credible, the requestor must believe that the government agency issues identical refusals both when it has responsive records and when it does not.<sup>94</sup> Were the government to invoke the Glomar response only when it had responsive records that it wished to conceal, while giving a traditional “no records” response when it had no such responsive records, then requestors would come to see the Glomar response as nothing more than a functional government admission that records existed but were being covered up.<sup>95</sup> As a result, the government is overprotective of information in two distinct ways.

First, agencies tend to use the Glomar response in reply to FOIA requests that seek information about implausible government activities or operations which could easily be denied on their merits without harming national security. For example, the National Reconnaissance Office and the CIA issued Glomar denials in response to a FOIA request seeking information about an alleged secret spy satellite program “able ‘to read the pulses and patterns of the human brain.’”<sup>96</sup> It seems rather implausible that such a program exists. Refusing to confirm or deny the existence of responsive records appears more likely to stoke paranoid conspiracy theories than to conceal classified information about the nation’s intelligence activities. But because the request seeks the *type* of information that could reveal sensitive national security information if acknowledged—namely, the capabilities of the government’s spy satellite technology—the desire to make consistent use of Glomar likely prompted the agency to issue the response.

Second, agencies issue Glomar responses even when broad details of a program are publicly known and when requestors have a

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<sup>92</sup> There is widespread agreement that the government overclassifies information. *See, e.g., THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES* 417 (“Current security requirements nurture overclassification and excessive compartmentation of information among agencies.”); Steven Aftergood, *Reducing Government Secrecy: Finding What Works*, 27 *YALE L. & POL’Y REV.* 399, 401 (2009) (“In recent years, in fact, classification—specifically overclassification—has increased . . .”).

<sup>93</sup> Winchester & Zirkle, *supra* note 33, at 249–50.

<sup>94</sup> *Bassiouni v. CIA*, 392 F.3d 244, 246 (7th Cir. 2004); Winchester & Zirkle, *supra* note 33, at 249–50.

<sup>95</sup> DOD Freedom of Information Act Program Regulation, 32 C.F.R. § 286.12(a)(1) (2009).

<sup>96</sup> *Roman v. Dailey*, No. 97-1164, 1998 U.S. Dist. LEXIS 6708, at \*2, \*6–12 (D.D.C. May 8, 1998) (upholding Glomar responses).



significant basis for believing that the requested records exist. This was the case in *Phillippi* and *Military Audit Project*, where the government issued Glomar responses amid widespread press reports about both the substance of the Glomar Explorer project and about the CIA's efforts to suppress press coverage of it.<sup>97</sup>

This expansive application of the Glomar response can be viewed as either necessary or destructive. Per the former view, consistent and widespread use of the Glomar response is necessary to protect sensitive information from damaging disclosure<sup>98</sup> and is a vital mechanism for preventing release of the government's deepest secrets.<sup>99</sup> In the national security realm, this view is sharpened by the mosaic theory, which posits that “[e]ven disclosure of what appears to be the most innocuous information . . . poses a threat to national security . . . because it might permit our adversaries to piece together sensitive information.”<sup>100</sup>

On the alternative view, the Glomar response is dangerous because, in the words of one district court judge, it “encourage[s] an unfortunate tendency of government officials to over-classify information, frequently keeping secret that which the public already knows, or that which is more embarrassing than revelatory of intelligence sources or methods.”<sup>101</sup> That tendency to overclassify is revealed in the story of the Glomar Explorer itself: In *Phillippi*, the CIA refused to confirm or deny whether it had records related to its own efforts to persuade news outlets to withhold publication of articles about the Glomar Explorer,<sup>102</sup> even though those very same news organizations necessarily had firsthand knowledge of those efforts.<sup>103</sup> Even after the CIA acknowledged that it held records, problems with excessive secrecy persisted. In the late 1980s, a private citizen filed a FOIA request with the NSA seeking, among other documents, records about

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<sup>97</sup> See *supra* notes 36–38 and accompanying text (discussing press reports about CIA's involvement with Glomar Explorer).

<sup>98</sup> H.R. REP. NO. 98-726, at 26–27 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3741, 3764–65.

<sup>99</sup> Pozen, *supra* note 16, at 313 n.203.

<sup>100</sup> *Wilner v. NSA*, 592 F.3d 60, 74 (2d Cir. 2009) (internal quotation marks omitted). See generally David E. Pozen, Note, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628 (2005) (discussing evolution of mosaic theory and problems of judicial deference to mosaic theory claims). For discussions of mosaic theory in Glomar cases, see, for example, *Wolf v. CIA*, 473 F.3d 370, 377 (D.C. Cir. 2007), and *Hunt v. CIA*, 981 F.2d 1116, 1119 (9th Cir. 1992).

<sup>101</sup> *ACLU v. Dep't of Def.*, 389 F. Supp. 2d 547, 561 (S.D.N.Y. 2005).

<sup>102</sup> *Phillippi v. CIA (Phillippi I)*, 546 F.2d 1009, 1011 (D.C. Cir. 1976).

<sup>103</sup> See, e.g., Hersh, *supra* note 37, at 52 (“The New York Times was informed by the C.I.A. . . . that publication [of details about the Glomar Explorer project] would endanger the national security [and therefore] decided at that time to withhold publication.”).

the Glomar Explorer.<sup>104</sup> Despite the CIA's decision to acknowledge the existence of such records more than a decade earlier, the NSA initially refused to confirm or deny whether it possessed responsive records.<sup>105</sup> Such secrecy seems excessive, as it closes the barn doors far too late: The horse is out of the government's stable, and everybody knows where it came from.

#### IV

##### SEPARATION OF POWERS AND PROPOSALS FOR REFORM

Deference by courts to agency use of the Glomar response is pervasive, but traditional explanations of that deference are faulty. In the national security arena, the two recurring justifications for such deference stand on separation of powers grounds: first, that the judiciary should not interfere with the executive's constitutional authority to protect national security information;<sup>106</sup> and second, that courts are comparatively less well equipped to make determinations about the protection of national security records.<sup>107</sup> These concerns are important to address, as they are the major obstacles preventing courts from subjecting Glomar responses to more searching review.

This Part addresses these separation of powers issues by first considering whether courts have constitutional authority to more vigorously scrutinize national security-related Glomar responses. Concluding that Congress has given courts this authority, this Part then assesses whether courts *should* engage in such permitted scrutiny by balancing prudential separation of powers concerns against the problem of institutional conflict of interest that arises when executive agencies make essentially unreviewed decisions to withhold their own records from disclosure.<sup>108</sup> This Part concludes by offering proposals for reform.

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<sup>104</sup> See *Lindsey v. NSA*, No. 90-2408, 1990 WL 148422, at \*1 (4th Cir. Oct. 9, 1990).

<sup>105</sup> *Id.* at \*2. More than two years after issuing this initial Glomar response, the NSA changed course, conducting a search for records and informing the requestor that the agency could find no responsive files. *Id.*

<sup>106</sup> See *infra* Part IV.A.1.

<sup>107</sup> See *infra* Part IV.A.2.

<sup>108</sup> For a similar analysis in the state secrets context, see D.A. Jeremy Telman, *Our Very Privileged Executive: Why the Judiciary Can (and Should) Fix the State Secrets Privilege*, 80 TEMP. L. REV. 499, 505–10 (2007). The constitutional and prudential separation-of-powers dimensions roughly track the formalist and functionalist interpretations of separation of powers. This Note does not seek to enter the debate between proponents of these modes of interpretation. See generally M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1136–45 (2000) (describing and analyzing this debate).

## A. Separation of Powers Concerns in Glomar Oversight

### 1. Constitutional Separation of Powers Concerns

Judicial deference to the Glomar response raises the question of whether constitutional separation of powers concerns prohibit, or conversely, require, more probing review. The federal judiciary often takes a “deferential view of the Executive’s classification power [based on] the notion that . . . the President is constitutionally vested with broad, substantive responsibility for the conduct of foreign affairs” and national defense.<sup>109</sup> On this view, the executive branch “must have the largely unshared duty to determine and preserve the degree of internal security necessary . . . . [I]t is the constitutional duty of the Executive to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense.”<sup>110</sup> Such a view locates executive authority in the President’s Article II national security powers as commander in chief of the military<sup>111</sup> and in his or her foreign affairs powers suggested by the treaty and ambassador clauses,<sup>112</sup> as bolstered by judicial discussions of executive power in these contexts.<sup>113</sup> Under this reading of executive power, courts are constitutionally obligated to defer to executive actions intended to protect national security information under FOIA, including the use of the Glomar response.

Of course, the separation of powers in our constitutional system is not absolute, and the role of interbranch checks and balances is crucial to cabining the power of each branch.<sup>114</sup> Courts have never held that the executive’s classification decisions are beyond the reach of

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<sup>109</sup> Note, *Keeping Secrets: Congress, the Courts, and National Security Information*, 103 HARV. L. REV. 906, 917–18 (1990).

<sup>110</sup> N.Y. Times Co. v. United States, 403 U.S. 713, 728–30 (1971) (Stewart, J., concurring); see also Note, *supra* note 109, at 906 (“Driven by separation of powers considerations, both Congress and the judiciary have recognized the legitimacy of th[e] executive[’s] role in protecting national security], and generally have declined to challenge either the breadth or the scope of executive classification decisions.”).

<sup>111</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>112</sup> U.S. CONST. art. II, § 2, cl. 2; *Id.* §§ 2, 3.

<sup>113</sup> See, e.g., *Dep’t of the Navy v. Egan*, 484 U.S. 518, 527 (1988) (“[The President’s] authority to classify and control access to information bearing on national security . . . flows primarily from th[e] constitutional investment of power in the President and exists quite apart from any explicit congressional grant.”); *United States v. Nixon*, 418 U.S. 683, 706 (1974) (suggesting that separation of powers doctrine provides heightened protection to presidential communications when they involve “military, diplomatic, or sensitive national security secrets”). Fuller engagement with the varied literature on theories of the unitary executive and the national security constitution is beyond the scope of this Note.

<sup>114</sup> THE FEDERALIST NO. 48, at 300 (James Madison) (Gary Wills ed., 1982) (“[U]nless [the legislative, executive, and judiciary] departments be so far connected and blended, as to give to each a constitutional controul over the others, the degree of separation which the maxim requires as essential to a free government, can never in practice, be duly main-

judicial review in FOIA cases, and proper judicial review of Exemption 1 FOIA claims leaves ample space to place checks on executive authority. Indeed, Congress, which itself has deep and wide-ranging national security powers enumerated in the Constitution,<sup>115</sup> has specifically given the courts a role in overseeing executive withholding of records under FOIA's Exemption 1, both in the command that courts review agency determinations *de novo*<sup>116</sup> and in the requirement that courts determine whether withheld records are "in fact properly classified."<sup>117</sup> In Exemption 3 cases, somewhat less scrutiny may be envisioned, as the judicial role is simply to determine whether an effective withholding statute exists and whether that statute applies in the given case.<sup>118</sup> Still, the *de novo* review provision requires courts to make a serious inquiry into the proper application of the withholding statute, again demonstrating congressional intent to give courts a role in balancing executive power.

The most useful means of determining the degree of deference due to executive invocation of the Glomar response is provided by the framework proposed by Justice Jackson in his concurrence to *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>119</sup> In Justice Jackson's tripartite scheme, the extent of executive power to perform a given action is dependent on whether Congress has spoken on the issue and the degree of authority the Constitution grants to the executive in that

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tained."); Magill, *supra* note 108, at 1157–59 (discussing mixture of separation of powers and balance of powers in constitutional system).

<sup>115</sup> U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To . . . provide for the common Defence . . ."); *id.* cl. 3 (granting foreign commerce power to Congress); *id.* cl. 10 ("[Congress shall have power] To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations . . ."); *id.* cls. 11–16 (granting Congress power to declare war and to create and regulate military); *id.* art. II, § 2, cl. 2 (granting Senate significant role in Treaty and Ambassador clauses). Congress was thus by far the dominant branch in national security and foreign affairs at the time of the country's founding. Moreover, courts have often reaffirmed Congress's national security powers. *See, e.g.,* Hamdan v. Rumsfeld, 548 U.S. 557, 591–95 (2006) (discussing necessity of congressional power to authorize use of military commissions); Greene v. McElroy, 360 U.S. 474, 496, 495–500 (1959) (noting Congress's power to authorize government agencies' security clearance programs); *Ex parte Quirin*, 317 U.S. 1, 26–28 (1942) (listing constitutional sources of Congress's national security powers and finding that Congress had authorized military commissions in World War II); Little v. Barreme, 6 U.S. (2 Cranch) 170, 177–79 (1804) (approving only those executive actions taken on high seas which Congress had explicitly authorized through legislation).

<sup>116</sup> 5 U.S.C. § 552(a)(4)(B) (2006).

<sup>117</sup> *Id.* § 552(b)(1)(A).

<sup>118</sup> *See* Wolf v. CIA, 473 F.3d 370, 377 (D.C. Cir. 2007) ("The Supreme Court gives even greater deference to CIA assertions of harm to intelligence sources and methods under [Exemption 3 withholdings pursuant to] the National Security Act [than under Exemption 1]."); *supra* notes 57–60 and accompanying text (describing Exemption 3 and providing examples of judicial decisions involving Exemption 3 statutes).

<sup>119</sup> 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

sphere.<sup>120</sup> Presidential authority is at its greatest when Congress has approved the action taken (category one), occupies a murky middle ground when Congress is silent on the issue (category two), and is at its lowest when Congress has expressly disapproved the President's action (category three). In FOIA cases, Congress has expressly granted power to the judiciary to evaluate the executive's national security-justified FOIA withholdings. The executive's power is thus pushed toward its "lowest ebb," Jackson's third category.<sup>121</sup> In the presence of such congressional action, the President can claim plenary authority over classification and withholding decisions only if the President's own constitutional powers are sufficient to encompass them.<sup>122</sup> In the FOIA context, because Congress has occupied the field and created a role for the courts, the executive must act consistently with the will of Congress, unless the President has independent powers in this area that trump Congress's.<sup>123</sup> As Justice Jackson cautioned, recognizing executive power in such circumstances is dangerous, as it means that the President's power is exclusive in the field and that Congress may never effectively regulate the area, threatening the very "equilibrium established by our constitutional system."<sup>124</sup>

While Congress has vested courts with authority to review national security-related FOIA withholdings in general, it has been almost completely silent regarding the Glomar response. Congress has failed to limit or prohibit Glomar, despite Congress's (arguable) knowledge of Glomar's use.<sup>125</sup> This congressional inaction may push

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<sup>120</sup> Justice Jackson proposed a three-part framework for evaluating presidential power. First, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum." *Id.* at 635. Second, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority." *Id.* at 637. Third, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id.* The Court has recently reaffirmed the utility of this framework. *Medellin v. Texas*, 127 S. Ct. 1346, 1368 (2008).

<sup>121</sup> 343 U.S. at 637 (Jackson, J., concurring).

<sup>122</sup> *Id.*

<sup>123</sup> FOIA is a creation of Congress, as are its disclosure exemptions. The issue here is not whether Congress could force executive disclosure of classified or otherwise sensitive national security information under FOIA by repealing Exemptions 1 and 3. Rather, the issue is simply whether Congress and the courts have the power to *regulate* executive applications of those exemptions.

<sup>124</sup> *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring).

<sup>125</sup> For limited evidence of congressional cognizance of the Glomar response, see *supra* note 63 (noting brief favorable discussion of Glomar response in 1984 committee report). Passing reference to the Glomar response was later made in testimony at a 1996 House subcommittee hearing. *War Crimes Disclosure Act, Health Information, Privacy Protection Act: Hearing on H.R. 1281 and S. 1090 Before the Subcomm. on Government Management,*

executive authority over Glomar toward Justice Jackson's second category, the "zone of twilight."<sup>126</sup> Judicial decisions in category two cases are split. Congressional silence has sometimes been read by courts as evidencing congressional acquiescence, vesting the executive with authority to act.<sup>127</sup> Conversely, congressional silence has also been interpreted as *divesting* the executive of authority to act in cases where the President lacks clear inherent authority over the matter at hand, and Congress's silence is interpreted as lack of approval.<sup>128</sup>

In the case of the Glomar response, congressional silence should not be interpreted as vesting the executive with exclusive authority so as to oust the courts from the ability to provide meaningful review. First, congressional silence does not always (or even often) constitute congressional assent.<sup>129</sup> Although Congress gave fleeting mention to the Glomar response in a 1984 committee hearing, it has apparently not considered the issue since.<sup>130</sup> Congress has amended FOIA nine times<sup>131</sup> but has never spoken on use of the Glomar response. In *Dames & Moore v. Regan*, the Supreme Court held congressional silence to be tantamount to consent to presidential power where Congress *had* considered proposals to limit executive power on an issue but had explicitly rejected them.<sup>132</sup> Such knowing acquiescence is not present here, as the history of congressional nonengagement with the Glomar response does not fairly suggest that the practice is "known to and acquiesced in by Congress."<sup>133</sup>

Second, although Congress has not spoken to the Glomar response, it has spoken clearly on the judicial role in FOIA cases. Congress's mandates that courts engage in *de novo* review and that

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*Information and Technology of the H. Comm. on Government Reform and Oversight*, 104th Cong. 48 (1996) (statement of Professor Robert E. Herzstein).

<sup>126</sup> *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

<sup>127</sup> *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981); *Haig v. Agee*, 453 U.S. 280, 300–01 (1981).

<sup>128</sup> See *Youngstown*, 343 U.S. at 585, 587–89 (majority opinion) (holding that Congress had power over areas in question and that because it had passed no statutes expressly or impliedly authorizing President's actions, President was without power to act).

<sup>129</sup> See Burt Neuborne, *In Praise of Seventh-Grade Civics: A Plea for Stricter Adherence to Separation of Powers*, 26 LAND & WATER L. REV. 385, 400 (1991); cf. *Rapanos v. United States*, 547 U.S. 715, 750 (2006) (Scalia, J.) (plurality opinion) (arguing that congressional inaction should not be interpreted as acquiescence with executive activity absent "overwhelming evidence" of congressional intent).

<sup>130</sup> See *supra* note 125 (setting forth references to Glomar response by Congress).

<sup>131</sup> See OPEN FOIA Act of 2009, Pub. L. No. 111-83, § 564, 123 Stat. 2142, 2184 (2009) (codified at 5 U.S.C. § 552(b)(3) (Supp. III 2009)) (amending Exemption 3); DEPARTMENT OF JUSTICE, GUIDE TO THE FREEDOM OF INFORMATION ACT 5–7 (2009), available at [http://www.justice.gov/oip/foia\\_guide09.htm](http://www.justice.gov/oip/foia_guide09.htm) (listing eight amendments through 2007).

<sup>132</sup> 453 U.S. at 685–86.

<sup>133</sup> *Id.* at 686 (internal quotations omitted).

Exemption 1 withholdings be “properly classified”<sup>134</sup> evinces a background principle of judicial review and congressional retention of power when the executive withholds national security information. Further, Congress recently amended Exemption 3 to require that for any new statute to trigger withholding under that section, the new law must explicitly reference Exemption 3.<sup>135</sup> This reaffirms congressional control over withholding under that exemption, and gives an additional role to courts in scrutinizing agency withholding claims. Congress’s default norm of judicial review of agency withholding decisions applies equally to Glomar and non-Glomer cases and undermines claims that congressional silence on the Glomar response is of constitutional import.<sup>136</sup>

Assuming that Congress could regulate (whether or not it could prohibit) use of the Glomar response through legislation—just as it regulates national security–related agency withholdings under Exemptions 1 and 3—then the corollary question is whether the courts currently possess power to review and restrict use of the Glomar response. Congressional silence on the propriety of Glomar should not be interpreted as acquiescing to current uses of the response and extreme judicial deference to those uses. Rather, such silence should be understood as continuing Congress’s policy of retaining limitations on executive power and investing the judiciary with authority over national security FOIA withholdings in general. Thus, the courts are in fact required to scrutinize and restrain uses of the Glomar response. Given that they have such power as a matter of law, the next question is whether they should, as a matter of policy, exercise it.

## 2. *Prudential Separation of Powers*

The question of whether courts *should* scrutinize the Glomar response, as opposed to the question of whether they *may* do so, requires engagement with prudential separation of powers issues, namely, the judiciary’s supposed relative lack of institutional competence in protecting sensitive national security information.<sup>137</sup> This con-

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<sup>134</sup> 5 U.S.C. § 552 (b)(1)(B) (2006).

<sup>135</sup> OPEN FOIA Act of 2009 § 564.

<sup>136</sup> See *Wilner v. NSA*, 592 F.3d 60, 68 (2d Cir. 2009) (noting that “[a]n agency ‘resisting disclosure’ of the requested records [via the Glomar response] ‘has the burden of proving the applicability of an exemption,’” just as in non-Glomer cases).

<sup>137</sup> See *Telman*, *supra* note 108, at 507–10 (discussing prudential separation of powers justifications for allowing executive to invoke state secrets privilege in civil suits); *cf.* *Neuborne*, *supra* note 129, at 391 (discussing “functional” separation of powers).

cern is manifest in ordinary FOIA cases,<sup>138</sup> but it is especially strong in cases upholding the Glomar response. In a recent Glomar case, the Second Circuit “affirm[ed its] ‘deferential posture in FOIA cases regarding the uniquely executive purview of national security.’”<sup>139</sup> It did so on the basis that, given “the relative competencies of the executive and judiciary, we believe that it is bad law and bad policy to ‘second-guess the predictive judgments made by the government’s intelligence agencies’ regarding questions [about] whether disclosure of . . . records would pose a threat to national security.”<sup>140</sup> This species of deference stems partly from a concern about the severity of harms that could result from incorrect disclosure decisions by courts—if the fact of existence or nonexistence of records would reveal truly sensitive national security information, then forcing an agency to confirm whether it has records could cause harm.<sup>141</sup> Mosaic theory exacerbates this concern, since judges fear that second-guessing agency justifications for refusing to confirm or deny the existence of records about seemingly innocent or minor matters would allow enemy analysts to place the last tile into an accumulating mosaic of information.<sup>142</sup>

Additionally, the Glomar response in particular lends itself to abdication of judicial oversight as a result of the nature of evidence received in Glomar cases. Unlike the *Vaughn* affidavits and in camera review of withheld documents available to judges in normal FOIA cases, the evidence put forward by the government in Glomar response cases consists solely of affidavits—public or classified—that describe the logical bases for agencies’ refusal to confirm or deny the existence of records.<sup>143</sup> Thus, the judge must proceed on the basis of the agency’s logical arguments alone, without the benefit of examining records or other evidence. As one commentator has noted, the evidence typically considered by judges in Glomar cases “threaten[s] to undermine the text and purpose of [FOIA because courts rely] solely on the agenc[ies]’ representations and do[ ] not determine for [them-

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<sup>138</sup> See, e.g., *CIA v. Sims*, 471 U.S. 159, 176 (1985) (allowing CIA to withhold records under Exemption 3 based partly on concern that “judges, who have little or no background in the delicate business of intelligence gathering,” are ill-equipped to make accurate determinations in protecting national security information).

<sup>139</sup> *Wilner*, 592 F.3d at 76 (quoting *Larson v. Dep’t of State*, 565 F.3d 857, 865 (D.C. Cir. 2009)).

<sup>140</sup> *Id.* (citation omitted) (quoting *Larson*, 565 F.3d at 865); accord *Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982).

<sup>141</sup> See *Wheeler v. CIA*, 271 F. Supp. 2d 132, 140 (D.D.C. 2003) (“[T]he decisions of the [agency], who must, of course, be familiar with the whole picture, as judges are not, are worthy of great deference given the magnitude of the national security interests and the potential risks at stake.” (quoting *Knight v. CIA*, 872 F.2d 660, 664 (5th Cir. 1989))).

<sup>142</sup> See *supra* note 100 and accompanying text (describing mosaic theory).

<sup>143</sup> *Wilner*, 592 F.3d at 68; *Larson*, 565 F.3d at 862.



selves] whether the underlying documents are properly classified or whether any portion can be reasonably segregated and disclosed.”<sup>144</sup> In the case of classified affidavits examined in camera and ex parte, judges also lose the benefit of receiving informed adverse arguments from the requesting party. Because agencies will likely argue the danger of disclosure in the strongest possible terms, judges’ fears about mistakenly forcing disclosures will be at their peak while the resources available to allay those fears will be particularly limited when the Glomar response is in play.

Institutional competence concerns can become paralyzing if played out to their logical end. It is certainly true that agencies tasked with regularly handling national security information possess expertise that allows them to assess the risks of disclosing records. But it is also widely recognized that the government radically overclassifies information.<sup>145</sup> This tendency to overclassify—and the attendant deference courts confer—may be even greater with the Glomar response, which allows agencies to argue that they are protecting their greatest, most sensitive secrets. Whether agencies’ true rationale for invoking Glomar is legitimately to protect information that would damage the national security if released, or instead to conceal wrongdoing or avoid embarrassment, is unknown and unexamined in most Glomar cases. Ceding all questions of competence to the executive results in a level of deference inconsistent with the judicial function and, particularly, with de novo review.

Moreover, there is no reason to think that courts are unable to handle national security information—the comparative competency concern is overblown.<sup>146</sup> The provision for in camera, ex parte review of withheld records under FOIA clearly contemplates a role for judges in assessing government withholding decisions, thus evidencing

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<sup>144</sup> Pozen, *supra* note 16, at 313 n.203.

<sup>145</sup> See *supra* note 92 (discussing general agreement that government overclassifies information).

<sup>146</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004) (“[W]e necessarily reject the Government’s assertion that separation of powers principles mandate a heavily circumscribed role for the courts in [evaluating enemy combatant designation procedures].”); *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 320 (1972) (“We cannot accept the Government’s argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to . . . the issues involved in domestic security cases.”); *Arar v. Ashcroft*, 585 F.3d 559, 613 (2d Cir. 2009) (en banc) (Parker, J., dissenting) (“The Supreme Court has repeatedly made clear that the separation of powers does not prevent the judiciary from ruling on matters affecting national security, and that the courts are competent to undertake this task.”); *Zweibon v. Mitchell*, 516 F.2d 594, 643 (D.C. Cir. 1975) (“[J]udges do, in fact, have the capabilities needed to consider and weigh data pertaining to the foreign affairs and national defense of this nation.”).

congressional confidence in the ability of courts to make determinations in all areas covered by FOIA, including the national security exemptions.<sup>147</sup> Courts frequently deal with sensitive national security information in contexts outside of FOIA,<sup>148</sup> and there is no reason they cannot apply their expertise in evaluating factual and legal arguments to examinations of the Glomar response.

Overblown concerns about judicial competence must be balanced against another serious concern: institutional conflicts of interest inherent in agencies making largely unreviewed decisions to withhold information that those agencies have a (potentially illegitimate) interest in keeping secret.<sup>149</sup> When it comes to the Glomar response, these conflict concerns militate against judicial deference to agency decisionmaking. Indeed, agencies' inability effectively to police themselves *requires* a structural separation of powers check in the form of meaningful judicial review. Given agency incentives to over-invoke the Glomar response, more restrained use of the response will depend on courts exercising their constitutional power to examine Glomar claims. Arguments made in the context of the state secrets privilege, which raises issues parallel to those at stake with the Glomar response—and has spawned a more developed literature—help explain the point.

The state secrets privilege is a common law evidentiary doctrine recognized by the Supreme Court more than fifty years ago.<sup>150</sup> The

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<sup>147</sup> See *Ray v. Turner*, 587 F.2d 1187, 1210 (D.C. Cir. 1978) (“The major argument [for judicial deference is] that judges lack the knowledge and expertise necessary to make decisions about disclosure in [national security] cases. Congress soundly rejected this contention, however, and refused to create a presumption in favor of agency classifications or to retreat from full *de novo* review.”).

<sup>148</sup> See Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. §§ 1806(f), 1825(g) (2006) (empowering district courts to review applications and orders from Foreign Intelligence Surveillance Court in camera and ex parte); Classified Information Procedures Act (CIPA), 18 U.S.C. app. 3 §§ 1–16 (setting procedures for federal courts to review, evaluate, and protect classified information in criminal trials); *United States v. Reynolds*, 345 U.S. 1, 9–11 (1953) (affirming power of courts to review executive claims of state secrets privilege and to examine documents in camera if necessary); *Parhat v. Gates*, 532 F.3d 834, 844–48 (D.C. Cir. 2008) (evaluating classified intelligence documents and concluding that assertions in those documents were not reliable for purposes of making enemy combatant designation). Courts also issue classified or redacted opinions in order to protect classified national security information at issue in suits before them. See, e.g., *Parhat v. Gates*, No. 06-1397, 2008 WL 2588713, at \*1 (D.C. Cir. June 30, 2008) (ordering public release of sealed opinion regarding challenge to detention at Guantánamo, and noting that classified material is to be redacted in public opinion).

<sup>149</sup> Cf. Ben Wizner, Staff Attorney, ACLU, Remarks at the American Constitution Society Panel Discussion: The State Secrets Privilege: Time for Reform? (Apr. 4, 2008) (transcript available at [http://www.acslaw.org/files/2008-04-07\\_ACS\\_State\\_Secrets\\_Privilege.doc](http://www.acslaw.org/files/2008-04-07_ACS_State_Secrets_Privilege.doc)) (making this argument in state secrets context).

<sup>150</sup> *Reynolds*, 345 U.S. at 1.

privilege, which can be invoked by the government in any civil case, serves as a means of protecting secret government documents from forced disclosure in discovery.<sup>151</sup> Under the state secrets privilege, “[t]he executive branch that is making the determinations [to invoke the state secrets privilege is,] in most of these cases[,] the same executive branch that’s being charged with wrongdoing in these cases.”<sup>152</sup> Thus, just as with the Glomar response, the executive branch has “an interest . . . in avoiding embarrassment” which distorts its ability to properly invoke the state secrets privilege in some cases.<sup>153</sup> The judiciary’s fixation on its own lack of expertise with protecting national security information in state secrets cases—the prudential separation of powers concern discussed above—leads to excessive deference to state secrets claims and an insufficient check on excessive withholding of information.<sup>154</sup> Analogous concerns inhere in the Glomar context.

Agencies undoubtedly have expertise that allows them to evaluate whether acknowledging the existence of records would cause harm to national security or other government interests. But they also have incentives to withhold records for other, less legitimate reasons. One dangerous, though not necessarily invidious, reason stems from institutional culture and individual incentives to overclassify information. No individual FOIA officer or agency classification authority wants to be responsible for acknowledging the existence of agency records (or releasing those records) if doing so would cause harm to national security or other interests. Thus, they are likely to err on the side of nondisclosure when faced with a FOIA request implicating national security issues.<sup>155</sup> Institutional incentives also run toward

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<sup>151</sup> *Id.* at 7–8, 10 (holding that privilege prevents disclosure when “there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged”).

<sup>152</sup> Wizner, *supra* note 149.

<sup>153</sup> *Id.*; see also Beth George, Note, *An Administrative Law Approach to Reforming the State Secrets Privilege*, 84 N.Y.U. L. REV. 1691, 1706–07 (2009) (discussing incentives for government to “over-invoke the [state secrets] privilege,” including “the desire to cover up embarrassing or illegal acts within the administration,” “to prevent the prosecution of government officials,” and “to prevent paying money damages as a result of alleged government misconduct”).

<sup>154</sup> See Telman, *supra* note 108, at 505 (“Courts have been inexplicably obtuse in ignoring the conflict of interest inherent in the government’s invocation of the Privilege and inexcusably callous in dismissing the rights of individual litigants who cannot vindicate their rights due to the Privilege.”).

<sup>155</sup> See *Too Many Secrets: Overclassification as a Barrier to Critical Information Sharing: Hearing Before the Subcomm. on National Security, Emerging Threats and International Relations of the H. Comm. on Government Reform*, 108th Cong. 82 (2004) [hereinafter *Too Many Secrets*] (statement of Carol A. Haave, Undersecretary of Defense for Intelligence) (“[P]eople have a tendency to err on the side of caution and so therefore may in fact

excessive secrecy by sanctioning underclassification and overdisclosure but taking a permissive stance toward excessive withholding of records.<sup>156</sup> Thus, in a setting where excessive classification is the norm, FOIA officers and agency classification authorities tend to withhold information when it is unnecessary to do so.<sup>157</sup>

A more troubling reason for overuse of the Glomar response lies in agencies' desire to conceal embarrassing information or cover up illegal conduct. This tendency is especially problematic in cases where publicly available information about government programs raises questions about the legality or propriety of government conduct.<sup>158</sup> For example, the government has maintained Glomar responses in the face of requests for information about the NSA's warrantless wiretapping program,<sup>159</sup> details of which were revealed by the *New York Times* in 2005.<sup>160</sup> Prior to congressional authorization of that program in 2008,<sup>161</sup> serious challenges to its legality were raised in courts and the press, with one federal court holding that the program violated "the [Administrative Procedure Act]; the Separation of Powers doctrine; the First and Fourth Amendments of the United States Constitution; and the statutory law."<sup>162</sup> Given that the program is already public, issuing a Glomar response raises an inference that the government is seeking to suppress incriminating evidence of illegal spying on Americans, or, perhaps, to protect itself from embarrassment and additional public scrutiny. Most of the harms that would flow from acknowledging the existence of records about a truly secret

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[over]classify things . . ."); Christina E. Wells, "National Security" Information and the Freedom of Information Act, 56 ADMIN. L. REV. 1195, 1202 (2004) ("[E]xecutive officials have every incentive to read a classification charge expansively. In fact, psychological studies suggest that executives will err on the side of safety when something as important as national security is at stake.").

<sup>156</sup> Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 148–49 (2006).

<sup>157</sup> Cf. *Too Many Secrets*, *supra* note 155, at 81–82 (statement of Carol A. Haave, Undersecretary of Defense for Intelligence) (estimating that up to fifty percent of classifications are excessive).

<sup>158</sup> See *ACLU v. Dep't of Def.*, 389 F. Supp. 2d 547, 561 (S.D.N.Y. 2005) ("The danger of Glomar responses is that they encourage an unfortunate tendency of government officials to over-classify information, frequently keeping secret that which the public already knows, or that which is more embarrassing than revelatory of intelligence sources or methods.").

<sup>159</sup> See generally *Wilner v. NSA*, 592 F.3d 60 (2d. Cir. 2009); *People for the Am. Way v. NSA/Cent. Sec. Serv.*, 462 F. Supp. 2d 21 (D.D.C. 2006).

<sup>160</sup> James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

<sup>161</sup> FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (2008) (codified at 50 U.S.C. § 1881 (2010)).

<sup>162</sup> *ACLU v. NSA/Cent. Sec. Serv.*, 438 F. Supp. 2d 754, 782 (E.D. Mich. 2006), *rev'd on standing grounds*, 493 F.3d 644 (6th Cir. 2007).

program dissipate once that program becomes public, leaving a smaller scope of legitimate potential harm that can be invoked to support the Glomar response.<sup>163</sup>

In sum, courts are competent to handle national security information and routinely do so in FOIA and other contexts, so there is no reason to doubt their competence to review invocations of the Glomar response. Further, the judiciary has a crucial structural separation-of-powers role to play in checking the executive: Given the dangers of institutional conflict of interest, courts should exercise their oversight power with increased vigor in Glomar cases.

### 3. *Judicial Reform of the Glomar Response*

The most obvious remedy for excessive judicial deference is for courts to apply greater scrutiny. However, this is not to argue that courts should uniformly reject use of the Glomar response. The response surely has a role in a small subset of cases where the government is legitimately shielding highly sensitive information and where no other response would adequately protect national security. Several modest reforms would help restrict the Glomar response to only such appropriate uses. First, courts could more aggressively apply the existing bad faith standard.<sup>164</sup> By probing more deeply into agency justifications for the Glomar response, courts can help smoke out illegitimate attempts to use the response to avoid embarrassment or conceal violations of law. Further, courts could use the bad faith standard to look behind agency rationales and ensure that agencies invoke the Glomar response only when it is absolutely necessary—that is, only when traditional withholding of records under the FOIA exemptions would not suffice to protect against harmful disclosures.

Courts could also take advantage of their *in camera* review power to demand that agencies produce more evidence to justify their invocation of the Glomar response, including any underlying records (if they exist) or an admission that records do not exist if that is the case. This would help judges more accurately evaluate the propriety of Glomar claims, including by allowing them to take a hard look at justi-

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<sup>163</sup> When what was once a secret becomes public, an agency's remaining rationale for invoking a Glomar response is that unique harms flow from that agency *itself* confirming or disproving its role in a particular activity. *Phillippi v. CIA (Phillippi I)*, 546 F.2d 1009, 1014 n.11 (D.C. Cir. 1976). Thus, in the context of the NSA's warrantless wiretapping program, the Agency asserts that acknowledging the existence of certain records would confirm operational details, such as exactly who has been surveilled, which are as yet not public. *Wilner*, 592 F.3d at 69–70.

<sup>164</sup> See *supra* notes 83–85 and accompanying text (describing bad faith standard); *cf.* Deyling, *supra* note 29, at 102–04 (proposing that courts apply strengthened bad faith standard in non-Glomar national security cases).

fications based on mosaic theory.<sup>165</sup> In order to protect against accidental disclosure of the existence or nonexistence of records, courts could take advantage of protective procedures already used in cases involving classified records.<sup>166</sup> This approach has been criticized on the grounds that it would “draw[ ] [courts] into a sham review if documents do not exist.”<sup>167</sup> To the contrary, such review would help provide a check on executive power by providing judges with a fuller picture of agencies’ decisionmaking. Increased judicial scrutiny is an important first step toward reform of the Glomar response, especially given the existing statutory mandate of *de novo* judicial review.

### B. *Alternative Proposals for Reform*

Alongside increased judicial scrutiny, Congress or the executive itself could pursue other potentially effective means of reform. Further, because relatively few FOIA requestors seek judicial review of agency denials, the courts are a realistic option only for sophisticated and well-funded parties with the time and patience to litigate.<sup>168</sup> While such litigation can result in significant disclosures of information,<sup>169</sup> even if courts more vigorously oversaw use of the Glomar response in cases that reached them, the infrequency of FOIA suits

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<sup>165</sup> See *supra* notes 100, 142 and accompanying text (discussing mosaic theory).

<sup>166</sup> Existing procedures include *ex parte* and *in camera* document review, employing law clerks with security clearances, use of Department of Justice court security officers who are trained to “assist the courts in protecting the secrecy of classified information,” and measures to secure secret records physically, including use of “Sensitive Compartmented Information Facilit[ies]” in or near courthouses. ROBERT TIMOTHY REAGAN, KEEPING GOVERNMENT SECRETS: A POCKET GUIDE FOR JUDGES ON THE STATE-SECRETS PRIVILEGE, THE CLASSIFIED INFORMATION PROCEDURES ACT, AND COURT SECURITY OFFICERS 3, 17–19 (2007), available at [http://www.fjc.gov/public/pdf.nsf/lookup/Secrets1.pdf/\\$file/Secrets1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Secrets1.pdf/$file/Secrets1.pdf); see also Security Procedures Established Pursuant to PL 96-456, 94 Stat. 2025, by the Chief Justice of the United States for the Protection of Classified Information, 18 U.S.C. app. 3 § 9 note (2006), reprinted in REAGAN, *supra*, at 31–37. Such procedures would respond to concerns that “any *in camera* review of requested materials would necessarily confirm their existence, thus eviscerating defendant’s Glomar Response.” Roman v. NSA, No. 07-CV-4502, 2009 WL 303686, at \*6 n.5 (E.D.N.Y. Feb. 9, 2009).

<sup>167</sup> Gotanda, *supra* note 11, at 179 (proposing reforms in privacy “Glomarization” context).

<sup>168</sup> See *supra* note 90 (calculating that approximately only 0.2% of agency denials of FOIA requests result in litigation).

<sup>169</sup> Recent FOIA lawsuits by civil liberties and human rights organizations have resulted in the release of thousands of pages of government documents. See, e.g., JAMEEL JAFFER & AMRIT SINGH, ADMINISTRATION OF TORTURE 2 (2007) (“In October 2003, the ACLU . . . filed a [FOIA] request . . . for government records concerning the treatment of prisoners apprehended by the United States in connection with the ‘war on terror.’ A lawsuit filed . . . to enforce the FOIA request has since resulted in the release of thousands of government documents.”); Ctr. for Constitutional Rights, Freedom of Information Act: Ghost Detention and Extraordinary Rendition Case, <http://ccrjustice.org/ghostfoia> (last visited Mar. 21, 2010) (making available thousands of pages of government documents regarding

would still dilute the effectiveness of judicial review because agencies would expect few of their actions to be challenged in court. Congressional and executive reforms are no substitute for proper judicial review, but they can play a role in ensuring that limitations are placed on use of the Glomar response and that FOIA's goal of government transparency and citizen oversight is adequately served.

### 1. *Administrative Reform*

Reforms instituted wholly within the executive branch provide one possible solution.<sup>170</sup> Regulation of agency use of the Glomar response can occur both at the level of individual agencies and across the entire executive branch. Within agencies, FOIA procedures are governed by published regulations,<sup>171</sup> some of which include provisions authorizing the Glomar response and regulating its use.<sup>172</sup> Agencies whose regulations do not provide rules for invocation of the Glomar response, such as the Departments of Justice and Homeland Security, should promulgate regulations setting out clear rules for when it is appropriate to use Glomar.<sup>173</sup> Agencies such as the CIA and Department of Defense that already have Glomar regulations should amend them to clarify the limited circumstances under which Glomar may be invoked. Such rules should make clear that under existing law Glomar is never appropriate to conceal agency wrongdoing or to avoid embarrassment and that it should be used only when no other response will protect legitimately classified information. The benefit of including rules on the proper use of the Glomar response in the Code of Federal Regulations is that doing so makes the rules public, predictable, and more readily enforceable.<sup>174</sup> It also avoids ad

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CIA's secret rendition and black site-prison programs that were released in response to FOIA lawsuit).

<sup>170</sup> A similar path has been proposed in the state secrets context as a way of bolstering "internal self-policing" and curbing abuse in light of barriers to meaningful judicial oversight. George, *supra* note 153, at 1716–17. As compared to the state secrets privilege, administrative reforms to the Glomar response are even more apt to produce results because FOIA is implemented and administered in the first instance by agency officials granting or denying requests.

<sup>171</sup> See generally 28 C.F.R. § 16.1–.12 (2009) (DOJ FOIA regulations); 32 C.F.R. § 286.1–.36 (2009) (DOD FOIA regulations); 32 C.F.R. § 1900.01–.45 (2009) (CIA FOIA regulations).

<sup>172</sup> E.g., 32 C.F.R. § 286.12(a)(1) (2009) (DOD Glomar regulation); 32 C.F.R. § 1900.21(c) (2009) (CIA Glomar regulation).

<sup>173</sup> In the absence of formal rules governing use of the Glomar response, agencies are bound by only the general limitations established by courts. However, court cases provide limited guidance for agency officials to determine whether the Glomar response is proper in connection with any given FOIA request.

<sup>174</sup> See George, *supra* note 153, at 1721–23, 1722 n.156 (arguing for publicly published rules governing use of state secrets privilege). Creating agency rules on Glomar also allows

hoc application of Glomar, thus helping ensure that the response is not used inappropriately to conceal records when they would be embarrassing to agency officials but not damaging to national security on the whole.<sup>175</sup>

Reform at the agency level may prove difficult, as institutional pressures on FOIA officers and other staff to err on the side of excessive concealment are likely to be significant. Thus, a more powerful catalyst for reform may come from top-level executive action. The Attorney General sets broad priorities for FOIA implementation through memoranda to the heads of executive departments and agencies announcing the standards that the DOJ will use in deciding whether to defend agency withholding decisions in court.<sup>176</sup> The Attorney General could draft and circulate such standards regarding the Glomar response.<sup>177</sup> These standards should state that the DOJ will defend an agency's Glomar response only if the response is required to avoid foreseeable and serious harm to national security and if using normal FOIA procedures would be highly likely to reveal classified or otherwise protected national security information. Additionally, the standards should make clear that the Glomar response is never to be used to shield agencies from embarrassment, or otherwise used in bad faith.

Congress recently created another oversight mechanism: the Office of Government Information Services (OGIS).<sup>178</sup> OGIS is tasked with "reviewing [agency] compliance with [FOIA]," and "recommending policy changes to Congress and the President."<sup>179</sup> As OGIS develops its purview, it should make oversight of the Glomar response a priority. Because OGIS is located in the National Archives and Records Administration, and not in the DOJ, it may have suffi-

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for notice-and-comment rulemaking, which provides an opportunity for public input and the potential for more transparency-oriented rules in response to commenters' concerns.

<sup>175</sup> Short of promulgating new Glomar regulations, the Chief FOIA Officers in each federal agency could play a role in ensuring greater compliance with FOIA and more moderate use of the Glomar response. See generally OPEN Government Act of 2007, Pub. L. No. 110-175, § 10(a), 121 Stat. 2524, 2529 (2007) (codified at 5 U.S.C. § 552(j)-(k) (Supp. I 2009) (creating position of Chief FOIA Officer in each agency)).

<sup>176</sup> See, e.g., Memorandum from Eric H. Holder, Jr., U.S. Att'y Gen., to Heads of Executive Dep'ts and Agencies (Mar. 19, 2009), available at <http://www.justice.gov/ag/foia-memo-march2009.pdf> (describing policy under President Obama).

<sup>177</sup> Cf. *Bifurcation Requirement*, supra note 50, at 2 ("[I]n employing privacy 'Glomarization,' agencies must be careful not to use it to an extent that is not warranted . . . . [T]his means making sure that the *only possible* response that the agency can give to the request is to neither confirm nor deny that any responsive record exists.").

<sup>178</sup> OPEN Government Act of 2007 § 10(a). OGIS began operating in September 2009. Office of Government and Information Services, <http://www.archives.gov/ogis/> (last visited May 25, 2010).

<sup>179</sup> 5 U.S.C. § 552(h)(2) (Supp. I 2007).



cient independence to play a forceful oversight role.<sup>180</sup> OGIS should track agency use of Glomar and should draft best practices guidelines for Glomar use.

## 2. *Legislative Reform*

Congress also has a role to play in limiting agency use of the Glomar response. Because FOIA is wholly a statutory creation (unlike, for example, the state secrets privilege<sup>181</sup>), it makes sense for Congress to regulate use of the Glomar response under the Act. Congress has recently demonstrated a willingness to strengthen FOIA by passing pro-transparency amendments in the last two legislative sessions,<sup>182</sup> and there is no reason it could not weigh in on the appropriate uses of the Glomar response.<sup>183</sup>

Danae Aitchison has proposed amending FOIA to regulate use of the Glomar response by expanding the review power of courts.<sup>184</sup> He proposes that “Congress . . . explicitly grant[ ] courts in Glomar response cases the power to order live testimony [from agency officials] about a request,” and that Congress “should direct courts to use *in camera* affidavits only as a last resort.”<sup>185</sup> These amendments would be steps in the right direction, in part because they, along with similar mechanisms, would demonstrate to courts that Congress intends there to be robust judicial review of Glomar claims. This, in turn, would undermine courts’ reliance on comparative competence concerns.<sup>186</sup>

An alternative approach would be for Congress to regulate the primary conduct of agencies, rather than judicial review of that conduct, by specifying when the Glomar response may properly be

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<sup>180</sup> See 155 CONG. REC. S2818 (2009) (statement of Sen. Leahy) (“Establishing [the OGIS] within the National Archives is essential to reversing the troubling trend of lax FOIA compliance and excessive government secrecy during the past 8 years.”).

<sup>181</sup> See Telman, *supra* note 108, at 514 (“The . . . problem with a statutory solution [to state secrets privilege problems] is that it is hard to imagine . . . how legislators . . . could fashion a solution that would anticipate all the contexts in which the Privilege might be invoked.”).

<sup>182</sup> See OPEN Government Act of 2007; OPEN FOIA Act of 2009, Pub. L. No. 111-83, § 564, 123 Stat. 2142, 2184 (2009) (codified at 5 U.S.C. § 552(b)(3) (Supp. III 2009)).

<sup>183</sup> Indeed, some other countries’ freedom of information laws specifically discuss—and regulate—responses analogous to the Glomar response. See, e.g., Freedom of Information Act, 2000, c. 36, § 24(2) (Eng.) (“The duty to confirm or deny does not arise if, or to the extent that, exemption from [that duty] is required for the purpose of safeguarding national security.”); Freedom of Information Act, 1982, § 25 (Austl.) (describing when agency is not required to “give information as to the existence or non-existence of a document”).

<sup>184</sup> See Aitchison, *supra* note 11, at 249–51.

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

<sup>186</sup> See generally *supra* Part IV.A.2 (discussing institutional competence concerns and prudential separation of powers).

used.<sup>187</sup> Congress should clarify that the Glomar response is to be used only as a last resort, when traditional responses would reveal properly protected national security information. Congress should also modify the official acknowledgement standard<sup>188</sup> to prohibit an agency from maintaining a Glomar response once *any* government official has officially acknowledged that records about a topic or program exist. This would end overuse of the Glomar response in cases where one agency continues to refuse to confirm or deny the existence of records after another agency has acknowledged government involvement in a formerly secret program.<sup>189</sup>

Reporting requirements provide a further means of regulation because they reveal agency practices and can act as catalysts for future reform. FOIA requires that each federal agency prepare annual reports detailing their activity under the Act.<sup>190</sup> Congress should add a subsection to FOIA requiring these reports to include information about the number of times the Glomar response is used and the exemptions under which it is invoked. Additionally, the Government Accountability Office is now tasked with “conduct[ing] audits of administrative agencies on the implementation of [FOIA].”<sup>191</sup> The GAO should examine and evaluate use of the Glomar response during such audits.

Finally, the relevant congressional committees should hold hearings to investigate use and abuse of the Glomar response. Congressional oversight would help push agency officials to self-regulate and could trigger constructive reform. Hearings would also allow courts to better evaluate the executive’s constitutional authority under Justice Jackson’s *Youngstown* framework by ending congressional silence about Glomar.

## CONCLUSION

FOIA is a powerful instrument of government transparency, but its effectiveness is frustrated by overuse of the Glomar response in

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<sup>187</sup> See Aitchison, *supra* note 11, at 246 (“Congress should state that agencies may use the Glomar response only in very limited circumstances.”).

<sup>188</sup> See *supra* notes 78–82 and accompanying text (discussing official acknowledgements standard applied by courts).

<sup>189</sup> See, e.g., *Hunt v. CIA*, 981 F.2d 1116, 1120 (9th Cir. 1992) (“According to CIA affidavits, it is . . . irrelevant that some of the information sought by [the requestor] had already been made public by other governmental and law enforcement agencies.”).

<sup>190</sup> 5 U.S.C. § 552(e) (2010); see also *supra* note 88 (describing reporting requirements). Similar reporting schemes are required in other areas involving national security concerns, such as with FISA warrants and National Security Letters. George, *supra* note 153, at 1721.

<sup>191</sup> OPEN Government Act of 2007, Pub. L. No. 110-175, § 10(a), 121 Stat. 2524 (2007) (codified at 5 U.S.C. § 552(i) (Supp. I 2007)).

connection with national security–related requests. Reviewing judges seldom invalidate Glomar responses and often invoke separation of powers concerns to justify their deference to agency Glomar claims. Although such concerns are not wholly without basis, they are exaggerated. This Note argues that the judiciary should give greater weight to conflict-of-interest problems raised when agencies use the Glomar response to withhold their own records with little judicial oversight. Greater scrutiny of agency uses of the Glomar response is needed.

Congressional and judicial reforms aimed at decreasing deference to Glomar claims deserve serious consideration, but reforms implemented by the executive may be the most effective short-term strategy for limiting use of the Glomar response. Executive branch reforms have the virtue of addressing problems with the Glomar response at their root, before judicial review becomes necessary. Ultimately, however, it is most important that action is taken, not that any particular actor makes the first move. There is clearly a role for limited secrecy in our democracy, but the government must take seriously the spirit of transparency underlying FOIA in its responses to requests made under the Act.<sup>192</sup> Vigorous regulation and oversight can prevent the Glomar response from continuing to be an exception that swallows the rule.

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<sup>192</sup> Cf. DANIEL PATRICK MOYNIHAN, *SECRECY* (1998) (discussing dangers of government secrecy); Fuchs, *supra* note 156, at 136–39 (arguing that excessive government secrecy undermines national security).

