No. 24-____

IN THE

Supreme Court of the United States

JAMES G. CONNELL, III,

Petitioner,

—v.—

CENTRAL INTELLIGENCE AGENCY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Arthur B. Spitzer
Scott Michelman
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF THE DISTRICT OF COLUMBIA
529 14th Street NW, Suite 722
Washington, D.C. 20045

Brett Max Kaufman
Counsel of Record
Sara Robinson
Hina Shamsi
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500
bkaufman@aclu.org

Cecillia D. Wang
Evelyn Danforth-Scott
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
425 California Street, Suite 700
San Francisco, CA 94104

Counsel for Petitioner

QUESTION PRESENTED

When a federal agency responds to a request for records under the Freedom of Information Act, 5 U.S.C. § 552, it may assert a "Glomar response," neither confirming nor denying the existence of responsive records, on the theory that even a mere acknowledgment that the records do or do not exist is itself exempt from disclosure under one of the statute's narrow exemptions.

The question presented is whether, in assessing the legality of a Glomar response, a court may weigh any relevant evidence bearing on the existence of responsive records, as the Second Circuit has held, or may only look to evidence that the responding agency has waived protection over the existence of records through its own official acknowledgment, as the D.C. Circuit held in the decision below.

PARTIES TO THE PROCEEDINGS

Petitioner (plaintiff–appellant below) is James G. Connell, III.

Respondent (defendant–appellee below) is the Central Intelligence Agency.

RELATED PROCEEDINGS

There are no proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner James G. Connell, III,[1] respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a) is reported at *Connell v. Central Intelligence Agency*, 110 F.4th 256 (D.C. Cir. 2024). The opinion of the district court granting Respondent's motion for summary judgment (App. 29a) is reported at *Connell v. Central Intelligence Agency*, No. 21-cv-627, 2023 WL 2682012 (D.D.C. Mar. 29, 2023). The order of the district court dismissing the case (App. 46a) is not reported.

JURISDICTION

The court of appeals issued its decision on August 6, 2024 (App. 1a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

[1] James G. Connell, III, though contracted by the Department of Defense to represent an individual before a Guantánamo Bay military commission, files this petition only in his individual capacity, and does not represent the position of that agency or the United States. Any citation to publicly reported information should not be read as a confirmation or denial of any classified information by Mr. Connell.

STATUTORY PROVISIONS INVOLVED

In relevant part, the Freedom of Information Act 5 U.S.C. § 552, provides:

(a) Each agency shall make available to the public information as follows:

* * *

(3) (A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

* * *

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

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

* * *

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

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

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

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

* * *

5 U.S.C. § 552(a)(3)(A), (b)(1), (b)(3).

INTRODUCTION

This case is about whether courts evaluating the legality of a unique type of agency response to a FOIA request must categorically ignore any evidence, no matter how probative, that does not originate with the agency itself. The D.C. Circuit's decision below—which squarely conflicts with a ruling of the Second Circuit and will affect the behavior of practically every federal agency—permits agencies to refuse to "confirm or deny" the existence of records responsive to a FOIA request even when the complete evidentiary record makes clear that those records exist. This Court should grant review to resolve the split of authority and correct the court of appeals' far-reaching error.

The FOIA presumptively opens government records to public inspection, subject to a set of narrowly defined exemptions. Ordinarily, after receiving a request under the statute, an agency searches for responsive records. Then it decides either to release those records, or to instead withhold them, in full or in part, by invoking one of the statute's exemptions. A requester who is dissatisfied with an agency's decision to withhold records can seek judicial review.

When a court considers the lawfulness of an agency's withholding claim, the burden is on the agency to show that it has logically and plausibly justified its application of a statutory exemption. The court assesses the agency's justification in two main ways, which are theoretically and practically distinct. First, it determines whether an agency's invocation of an exemption is valid in the first place, by evaluating the agency's explanation, usually made through one or

more sworn declarations, as well as any other record evidence that may call the agency's explanation into question. And second, the court considers whether an agency has waived its ability to rely on a FOIA exemption to withhold information (regardless of the exemption's applicability) because it has already "officially acknowledged" that same or similar information.

Sometimes, an agency declines to search for responsive records and instead issues what is known as a "Glomar response." With a Glomar response, an agency refuses to "confirm or deny" whether it has any records responsive to a FOIA request at all, because, in its view, the existence or nonexistence of records is itself protected by one of the FOIA's exemptions.

In the decision below, the D.C. Circuit held that the only way for a FOIA plaintiff to defeat an agency's Glomar response is by pointing to evidence of the agency's waiver by "official acknowledgment." That ruling explicitly broke with the Second Circuit, which years ago held that a requester can defeat a Glomar response in either of the two ways: by identifying an agency's "official acknowledgments," *or* by pointing to evidence in the record that contradicts the agency's justification for withholding. The decision below shuts off the latter path in the D.C. Circuit.

This case makes clear the folly of the D.C. Circuit's rule. Here, Petitioner sought records concerning the CIA's "operational control" over Camp VII, a detention center for "high-value detainees" at the U.S. Naval Base at Guantánamo Bay. The CIA asserted a Glomar response. Petitioner then pointed to public evidence that, he argued, made it plain that

the CIA was indeed involved in operating Camp VII and that, therefore, the CIA's Glomar response was illogical and implausible. Petitioner's evidence included the CIA's own documents; an official report by the Senate Select Committee on Intelligence; officially disclosed documents from the Office of the Director of National Intelligence ("ODNI"); the public sworn testimony of a military official at the Guantánamo military commissions; unclassified formal military commissions filings; and an unclassified military commission judicial opinion.

In a FOIA case not involving Glomar, a court would have considered the effect of all of this contrary record evidence when evaluating the logic and plausibility of the CIA's exemption claim. But the court below held that, when it came to the CIA's Glomar response, Petitioner could not rely on any evidence that did not originate with the CIA itself—no matter what it showed—to show that the agency's Glomar response was not logical or plausible. Instead, the court held that Petitioner could prevail only if the CIA had waived its own ability to rely on a FOIA exemption through official acknowledgment.[2]

The Court should grant certiorari for two reasons.

First, the D.C. Circuit's decision creates a clear split with the Second Circuit. In *Florez v. Central Intelligence Agency*, 829 F.3d 178 (2d Cir. 2016), the Second Circuit held that courts must consider all relevant record evidence in determining whether a

[2] While Petitioner argued below that the CIA had, in fact, waived its ability to invoke a Glomar response through official acknowledgment, he does not seek certiorari on that issue.

Glomar response is logical or plausible. The decision below explicitly rejects that rule.

Second, review is necessary because the decision below is wrong on the merits and will give federal agencies license to flout FOIA's requirements. Because of "the D.C. Circuit's special situation with respect to FOIA,"[3] and because other circuit courts frequently look to the D.C. Circuit's extensive FOIA experience for authority on both the FOIA and Glomar, the decision will have a widespread impact on the pre-litigation behavior of agencies responding to FOIA requests. Absent review by this Court, the decision below will leave most federal agencies free to ignore any evidence from sources other than themselves when deciding whether to assert a Glomar response—and more FOIA requests will be shut down at the earliest possible stage even when it is not logical or plausible for an agency to deny the existence of responsive records.

STATEMENT OF THE CASE

I. LEGAL BACKGROUND

Passed in 1966 and strengthened several times since, the FOIA "is often explained as a means for citizens to know what their Government is up to." *Nat'l Archives & Recs. Admin. v. Favish*, 541 U.S. 157, 171 (2004) (quotation marks omitted). As this Court has noted, the statute's "central purpose is to ensure that the Government's activities be opened to the sharp eye of public scrutiny." *DOJ v. Reps. Comm. for*

[3] Transcript of Oral Argument at 64:1, *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427 (2019) (No. 18-481) (statement of Kagan, J.).

Freedom of Press, 489 U.S. 749, 774 (1989). Indeed, public scrutiny of government decision-making that is many times removed from the voting booth—so that the people may "pierce the veil of administrative secrecy"—is the FOIA's central purpose. *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (quotation marks omitted). This serves "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). As this Court has recognized, the statute is a "structural necessity in a real democracy." *Favish*, 541 U.S. at 172.

The cardinal rule of the FOIA is its presumption in favor of the disclosure of government records. *See* 5 U.S.C. § 552(a)(3)(A) ("[E]ach agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person."). Of course, the rule is not categorical: since Congress recognized that the disclosure of certain records might be contrary to legitimate public or private interests, the FOIA allows for nine narrow, exclusive exemptions. 5 U.S.C. § 552(b); *Milner v. Dep't of Navy*, 562 U.S. 562, 565 (2011).

And, sometimes, an agency may claim that the very existence or nonexistence of records responsive to a request is protected under an exemption. Refusing to confirm or deny the existence of records is known as a "Glomar response," thanks to the CIA's first, now-famous use of this technique. Almost half a century

ago, the CIA sought to keep secret, using a cover story, its attempt to salvage a sunken Soviet submarine using a large vessel, built by the filmmaker Howard Hughes, called the Hughes Glomar Explorer. *See Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976). The press got wind of the attempt, and "Director William Colby and other CIA officials then scrambled to suppress the story." *Mil. Audit Project v. Casey*, 656 F.2d 724, 729 (D.C. Cir. 1981). Ultimately, the agency resisted FOIA requests for records about the vessel's real objective by maintaining that even confirming the CIA's mere possession of records about the vessel would harm national security by revealing a classified secret. *See id.* at 730–31.

For several decades, the government rarely used Glomar responses, but today they are commonplace.[4] In a Westlaw search, the term "Glomar" appears in 608 federal court decisions, with 455 of those coming in the last fifteen years. And the same search shows that more than half of the total decisions, including those since 2009, were in the district courts and the court of appeals within the D.C. Circuit. This exponential growth of the Glomar response has taken place even though this Court has never mentioned the word, let alone endorsed the technique.

---

[4] The phrase "can neither confirm nor deny the existence or nonexistence" has become so well known that it has been the subject of extensive media attention, and even public art. *See, e.g.*, M. Todd Bennett, *Neither Confirm Nor Deny* (2023); Radiolab, *Neither Confirm Nor Deny*, WNYC Studios (June 4, 2019), https://perma.cc/63NK-QSZZ; David Birkin, Severe Clear Part 1: Existence or Nonexistence (2014), https://perma.cc/LSM2-EHBP.

Glomar has long been associated with the CIA, and the agency has made that association something of a perverse point of pride. When the CIA joined Twitter, its first post read: "We can neither confirm nor deny that this is our first tweet."[5] Today, though, use of the technique is no longer limited to intelligence agencies.[6]

When a FOIA requester is dissatisfied with an agency's administrative response to its request, it can file suit. 5 U.S.C. § 552(a)(4)(B). Once in litigation, FOIA cases are almost always decided at the summary judgment stage, on a paper record. It is the agency's burden to "sustain" its invocation of one or more of the FOIA's exemptions to withhold records in full or in part. *Id.* To meet that burden, the agency ordinarily submits one or more declarations from agency personnel explaining why disclosure would cause harm under one of the statutory exemptions. *See, e.g.*, *Mil. Audit Project*, 656 F.2d at 738, 738 n.49 (collecting cases).

In the usual FOIA case, along with its declarations, a defendant agency produces what is known as a "*Vaughn* index" that identifies withheld documents with "relatively detailed" and "specific" descriptions. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). Together, the declarations and the index are intended to allow both the requester and the court to assess whether each document is properly withheld

---

[5] @CIA, Twitter (June 6, 2014, 10:49 a.m.), https://perma.cc/M4RG-WRVU.

[6] *See, e.g.*, *Montgomery v. IRS*, 40 F.4th 702 (D.C. Cir. 2022); *PETA v. NIH*, 746 F.3d 535 (D.C. Cir. 2014); *Marino v. DEA*, 685 F.3d 1076 (D.C. Cir. 2012).

under one or more exemptions. *See Abdelfattah v. DHS*, 488 F.3d 178, n.3 (3d Cir. 2007) (*Vaughn* index prevents agencies from unilaterally controlling disclosures under the FOIA and gives courts "a reasonable basis to evaluate . . . claim[s] of privilege" as part of "a meaningful adversarial process"). Courts will deny summary judgment to an agency if its justifications for the invocation of FOIA exemptions are not logical or plausible because they are controverted by contrary evidence in the record. *See ACLU v. DOD*, 901 F.3d 125, 133–34 (2d Cir. 2018) (citing *Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982)); *Hamdan v. DOJ*, 797 F.3d 759, 774 (9th Cir. 2015).

But when an agency asserts a Glomar response, it bypasses the entire FOIA process—from the initial search for responsive records, to the listing and description of withheld documents under *Vaughn*, to the justification for withholding of specific documents or portions thereof. Instead, the agency simply asserts that the existence or nonexistence of responsive records is *itself* exempt from disclosure under a FOIA exemption. If a court sustains the Glomar, that is the end of the matter. But even where a court rejects the response, the agency need not necessarily disclose any records; the agency simply must go through the ordinary FOIA steps of searching for responsive records and justifying any asserted statutory exemptions over any of them that it seeks to withhold. That is, the secrecy of the *contents* of responsive records is a distinct, and subsequent, issue to the secrecy of the existence or nonexistence of those records. *See ACLU v. CIA*, 710 F.3d 422, 432 (D.C. Cir. 2013) (discussing *Wolf v. CIA*, 473 F.3d 370, 380 (D.C.

Cir. 2007)). Thus, in some cases, the defeat of a Glomar response will not lead to the release of any information at all beyond the fact that the agency does possess responsive material. *See, e.g.*, *ACLU v. DOJ*, 640 F. App'x 9 (D.C. Cir. 2016) (summary affirmance of withholding of all responsive records three years after defeat of Glomar response in *ACLU v. CIA*).

II. FACTUAL & PROCEDURAL BACKGROUND[7]

In this case, Petitioner filed a FOIA request with the CIA seeking documents about the measure of the agency's operational control over Camp VII, a facility for "high-value detainees" at Guantánamo Bay, during a five-month period in 2006 and 2007. The CIA responded to the request by releasing several records, and then asserting a Glomar response as to any others.

The context for Petitioner's request began with the September 11, 2001 attacks. Six days later, President George W. Bush authorized the CIA "to capture and detain persons" at detention sites outside the United States.[8] On that authority, the CIA instituted its "rendition, detention, and interrogation program," under which dozens of Muslim men and boys were abducted, tortured, held incommunicado,

---

[7] In this petition, "JA" citations are to the joint appendix as filed in the court of appeals. *See* Joint Appendix, *Connell v. CIA*, No. 23-5118 (D.C. Cir. Oct. 12, 2023), *available at* https://perma.cc/N6GD-4L3Z.

[8] Off. of the Inspector Gen., CIA, Counterterrorism Detention and Interrogation Activities 1 (2004), https://perma.cc/Q8JT-HZGS (quoting Mem. of Notification for Members of the Nat'l Sec. Council (Sept. 17, 2001)).

and denied legal process. The program is well documented, including by Congress and the executive branch.[9]

In early September 2006, the CIA transferred fourteen men—the so-called high-value detainees—to "the high-value detention center"[10] at Camp VII.[11] According to a 2014 report by the Senate Select Committee on Intelligence (the "Senate Report" or "Report"), after their arrival at Camp VII, the fourteen high-value detainees "remained under the operational control of the CIA."[12]

---

[9] *See generally, e.g.*, S. Comm. on Armed Servs., 110th Cong., Inquiry into the Treatment of Detainees in U.S. Custody (2008), https://perma.cc/DG9M-3FJJ; Off. of the Inspector Gen., DOJ, A Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantánamo Bay, Afghanistan, and Iraq (2009), https://perma.cc/Y3NM-JCXY; S. Select Comm. on Intel., 112th Cong., Committee Study of the CIA's Detention and Interrogation Program: Executive Summary 458–61 (2014), https://perma.cc/K4PX-FGGM ("Senate Report") (excerpted at JA79–82, JA110–15, JA159); Off. Of the Press Sec'y, Press Conference by the President (Aug. 1, 2014), https://perma.cc/W7KF-FQHR; *see also* ACLU Torture Database, https://perma.cc/6RS5-5BV8 (compiling government documents obtained through FOIA requests and FOIA litigation).

[10] Expanded Background Mem. at JA319; Press Release, White House, President Discusses Creation of Military Commissions to Try Suspected Terrorists (Sept. 6, 2006), https://perma.cc/LZN9-YPWK; David Stout, *C.I.A. Detainees Sent to Guantánamo*, N.Y. Times, Sept. 6, 2006, https://www.nytimes.com/2006/09/06/washington/06cnd-bush.html.

[11] Mil. Comm'n Tr. at JA367.

[12] Senate Report at JA114 (citing a "CIA Background Memo for CIA Director visit to Guantánamo," dated December 2006,

To learn more about the extent of the CIA's operational control over Camp VII, Petitioner filed a FOIA request with the CIA.[13] He requested "any and all information that relates to such 'operational control' of the CIA over Guantánamo Bay detainees."[14] The CIA released three documents with redactions, withheld a fourth document in its entirety and issued a Glomar response as to any remaining documents.[15] The Glomar response was based on the CIA's assertion that revealing the existence or nonexistence of records would reveal classified sources and methods.[16]

In the ensuing lawsuit, the CIA moved for summary judgment.[17] Petitioner, proceeding pro se, argued that summary judgment was inappropriate, in part because contrary record evidence called into question the logic and plausibility of the CIA's Glomar response. In so arguing, Petitioner relied on evidence from a variety of sources.

First, Petitioner relied on CIA documents. Those documents included a 2006 Memorandum of

---

"entitled Guantánamo Bay High-Value Detainee Detention Facility"); *see also* Nashiri Op. at JA518.

[13] FOIA Req. at JA58 (May 23, 2017).

[14] *Id.* (quoting Senate Report at JA114).

[15] FOIA Resp. at JA68–69 (releasing one document); Final FOIA Resp. at JA73–74 (releasing two documents, withholding one document in its entirety, and asserting a Glomar response as to any remaining documents).

[16] Final FOIA Resp. at JA74.

[17] Def.'s Mot. for Summ. J., *Connell v. CIA*, No. 21-cv-627 (D.D.C. Mar. 28, 2022), ECF No. 13.

Agreement between the CIA and the Department of Defense ("DOD") concerning "the detention by DOD of certain terrorists at a facility at Guantánamo Bay Naval Station" and "sett[ing] out the duties and responsibilities of DOD and CIA."[18] Petitioner also relied on a background memorandum prepared for the December 2006 visit of the Director of the CIA to Guantánamo that included information about Camp VII, which it referred to as the "Guantánamo Bay High-Value Detainee Detention Facility," as well as over a dozen pages of information about the detainees held there.[19] And Petitioner pointed to publicly acknowledged CIA documents, like "site daily reports" and cables about the detainees.[20]

Second, Petitioner pointed to evidence that did not come from the CIA. For example, he relied on details published in the Senate Report, which has become the country's official record concerning the government's use of torture and other mistreatment of detainees in U.S. custody as part of the government's rendition, detention, and interrogation program. To draft the Report, the Committee spent five and a half years reviewing more than six million pages of records from the intelligence community, including the CIA.[21] And

---

[18] DOD–CIA Mem. of Agreement at JA307 (emphasis omitted).

[19] Expanded Background Mem. at JA319, JA323–39; *see also* Senate Report at JA114 (citing the background memorandum).

[20] Senate Report at JA111 & nn.427–28; Pradhan Decl. at JA151 ¶¶ 6–8; Mil. Comm'n Tr. at JA209, JA216–17, JA182–84.

[21] Brinkmann Decl. Ex. B, at JA244; Higgins Decl. at JA250, JA255.

as evidence in the record in this case shows, the CIA itself played a central role in the publication of the Report, and its ultimate contents: the Senate Committee revised it to address issues raised in the CIA's reply to an initial draft,[22] and the CIA and the Director of National Intelligence, in consultation with other executive branch agencies, conducted a declassification review of the executive summary before its publication, which the President approved.[23]

Further, Petitioner introduced declassified documents and transcripts from military commissions proceedings at Guantánamo Bay. The degree of the CIA's control over Camp VII has been a long-running focus of discovery in multiple commissions cases.[24] Drawing from those cases, Petitioner introduced testimony from firsthand participants, including a military commander, about the goings-on at Camp VII during the time period in question.[25] This evidence showed that, in the commissions setting, the government has not treated as a classified secret the

---

[22] *See* Higgins Decl. at JA254 ¶ 17.

[23] *See* Lutz Decl. at JA271–72 ¶¶ 5–6; Higgins Decl. at JA248 ¶ 4, JA253–56 ¶¶15–20.

[24] For example, in 2022, the military commission granted a motion to compel CIA records related to Camp VII. *See* Jan. 2022 Discovery Order at JA228–30; *see also* Mot. to Compel at JA161; Mil. Comm'n Tr. at JA179–229; Mil. Comm'n Tr. at JA438; Mar. 2022 Discovery Order at JA476.

[25] *See, e.g.*, Mil. Comm'n Tr. at JA362 (testimony from the first Camp VII commander); *id.* at JA453–54, JA456, JA458–59 (referencing testimony from FBI agents who questioned detainees held at Camp VII); *id.* at JA196 (same).

question of whether the CIA had at least some measure of operational control over Camp VII.[26]

The district court granted summary judgment to the CIA and upheld the CIA's Glomar response as "logical" and "plausible." App. 36a–38a, 44a. Evaluating all of Petitioner's evidence under the official acknowledgment doctrine, the court concluded that the agency had not waived its right to issue a Glomar response with respect to Petitioner's request. App. 39–45a.

Petitioner retained counsel and appealed to the Court of Appeals for the D.C. Circuit,[27] which affirmed.

First, the court held that the CIA had not waived its ability to assert a Glomar response by official acknowledgment. App. 10a. (Petitioner does not seek certiorari on this ground of the court of appeals' decision.)

Second, the court held that the CIA's Glomar response was "plausible" because "revealing the existence or nonexistence of records of a classified or otherwise unacknowledged connection between the CIA and the subject of [Petitioner]'s FOIA request could reveal intelligence sources and methods information." App 19a. In its opinion, the court of appeals rejected Petitioner's argument that it should evaluate whether contrary record evidence not originating from the CIA—including the Senate

---

[26] *See, e.g.*, Zittritsch Decl. at JA78–79, JA83–84; Pub. Tr. Process at JA148; Pradhan Decl. at JA157; Connell Decl. at JA296.

[27] Notice of Appeal at JA497.

Report; military commission documents, testimony, and opinions; and ODNI documents—undermined the CIA's Glomar response, by making clear that the CIA possessed additional records responsive to his FOIA request. *See* App. 21a. It explained:

> Connell's key legal argument in asking us to focus on these materials is that even if statements that are not from the CIA or an authorized representative of its parent cannot qualify as official acknowledgments under our waiver cases, they are still relevant evidence to consider when assessing whether it is plausible for the CIA to state that confirming or denying the existence of responsive records would reveal something that is not already public. . . . We reject that argument, as agreeing with Connell would amount to an end-run around our official acknowledgment cases and contravene both their logic and results.

Id.

The court of appeals explicitly noted its rejection of the Second Circuit's contrary holding. *See* App. 23a n.3 (discussing *Florez*, 829 F.3d at 186–87). And it expressly held that, in evaluating whether an agency's Glomar response is logical or plausible, a court cannot consider *any* evidence that does not come from a defendant agency. *See* App. 24a n.4.

REASONS FOR GRANTING THE PETITION

I. THE D.C. AND SECOND CIRCUITS ARE DIVIDED ON THE QUESTION PRESENTED.

In the decision below, the D.C. Circuit broke with the Second Circuit and held that, when evaluating whether an agency's Glomar response is logical and plausible, courts must ignore all evidence from sources other than the responding agency. App. 23a n.3 (discussing *Florez*, 829 F.3d 178). The D.C. Circuit reasoned that allowing courts to consider such evidence would conflict with its judge-made, waiver-based "official acknowledgment" doctrine, upon which a handful of past circuit cases had turned.[28] *See* App. 22a–23a, 23a n.3. By contrast, the Second Circuit recognizes that, while an out-of-agency acknowledgment cannot establish an agency's waiver through official acknowledgment, that kind of evidence—like any other kind of relevant evidence—can still undermine the plausibility of agency's Glomar response. *See Florez*, 829 F.3d at 187.

In *Florez*, the Second Circuit examined this distinction at length. There, the court considered a FOIA request sent to the CIA for all records concerning a former Cuban diplomat that the requester, the diplomat's son, surmised had been

[28] This Court has remarked upon the "official acknowledgment" doctrine only once: in a portion of Justice Breyer's opinion in *United States v. Zubaydah*, 595 U.S. 195, 210 (2022), that was joined only by Chief Justice Roberts and Justice Kagan. *Zubaydah* concerned the state secrets doctrine, and Justice Breyer looked to D.C. Circuit caselaw on the FOIA "official acknowledgment" waiver doctrine as a helpful, but "imperfect[,] analogy." *Id.*

under CIA surveillance. *Id.* at 180. The agency responded with a Glomar response, asserting that acknowledging the existence or nonexistence of records would reveal classified intelligence sources and methods. *Id.* at 181. The district court upheld the response. *Id.* Then, while an appeal was pending before the Second Circuit, the FBI declassified and released several documents about the diplomat, and the plaintiff argued that the FBI's new disclosures were contrary record evidence that undermined the CIA's Glomar response. *Id.* at 182.

The Second Circuit agreed that the FBI disclosures were relevant to assessing whether the CIA's Glomar response was logical and plausible, and it remanded the matter for further examination of the response in light of the newly declassified documents. *Id.* at 189–90. It explained that, even though the new information did not come from the responding agency—and thus could not "waive the asserting agency's right to a Glomar response"—such disclosures still "may well shift the factual groundwork upon which" courts evaluate the agency's response. *Id.* at 186; *see id.* at 184 (FBI disclosures were "germane to the CIA's asserted rationale for asserting a Glomar response"). Looking to fundamental concepts in the Rules of Evidence, the Court held that the FBI's disclosures were relevant to the legality of the CIA's Glomar response because they had "appreciable probative value in determining, under the record as a whole, whether the justifications set forth in the CIA's declaration are logical and plausible." *Id.* at 184–85 (cleaned up).

To reach this conclusion, the Second Circuit specifically rejected the argument upon which

Respondent prevailed in the court below: namely, that, "under the official acknowledgment doctrine, the disclosures of other federal agencies—regardless of the extent to which they bear on the validity of another agency's Glomar rationale—are never relevant and must be wholly disregarded." *Id.* at 186. And it rejected "exclusive reliance on the official acknowledgment doctrine to create out of whole cloth a rule limiting the evidence a district court may consider in a Glomar inquiry." *Id.* at 187. It concluded by explaining that "[i]t defies reason to instruct a district court to deliberately bury its head in the sand to relevant and contradictory record evidence solely because that evidence does not come from the very same agency seeking to assert a Glomar response," and that letting agencies do so would be tantamount to letting them "avoid the strictures of FOIA." *Id.* (citing *Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982)). (On remand, the CIA withdrew its Glomar response, conducted a search, and disclosed responsive records.[29])

Judge Livingston dissented. As relevant here, she challenged the majority's reliance on out-of-agency evidence to cast doubt on an agency's assertion of confidentiality via Glomar. If FBI documents could somehow "render illogical or implausible the CIA's affidavits," she reasoned, that outcome would "produce the anomalous result of one agency's revelations obligating disclosure of classified material by another." *Id.* at 196 (Livingston, J., dissenting) (cleaned up). This would "invite by the back door what

[29] CIA Mem. of Law at 9–11, *Florez v. CIA*, No. 14-cv-1002 (S.D.N.Y. Mar. 28, 2017), ECF No. 51.

the official acknowledgment doctrine prohibits at the front." *Id.*

In its opinion below, the D.C. Circuit expressly aligned itself with Judge Livingston's position in *Florez*, remarking that the consideration of evidence from beyond the responding agency "would amount to an end-run around our official acknowledgment cases and contravene both their logic and results." App. 21a; *accord Florez*, 829 F.3d at 196. On that basis, the D.C. Circuit acknowledged its split with the majority in *Florez*, and instead held that waiver by official acknowledgment is the *only* available means to challenge a Glomar response.

The split between the D.C. and Second Circuits could not be sharper.[30]

---

[30] Although the D.C. and Second Circuits are the only courts of appeals to squarely address the question presented, the Ninth Circuit once accepted as logical and plausible a CIA affidavit justifying the agency's Glomar response even though "some of the information sought by [the requester] had already been made public by other governmental and law enforcement agencies." *Hunt v. CIA*, 981 F.2d 1119, 1120 (9th Cir. 1992). But the opinion's fleeting discussion includes no details about the particular records at issue, whether the court found the specific explanation in the CIA affidavit outweighed the value of the other agencies' releases (which would align the case with *Florez*), or whether it believed that evidence from outside the CIA could never bear on the logic and plausibility of a Glomar response (which would align the case with the D.C. Circuit's decision below). A few years ago, a district court in the Ninth Circuit followed *Florez*—and did not cite *Hunt* at all—in determining that a separate agency's disclosures were "relevant" to whether the FBI had adequately justified its entitlement to a Glomar response. *ACLU v. DOD*, No. 18-cv-154, 2019 WL 3945845, at *12 (D. Mont. Aug. 21, 2019); *see also ACLU v. CIA*, No. 22-cv-11532,

II. REVIEW IS WARRANTED BECAUSE THE D.C. CIRCUIT'S INCORRECT RULING WILL HAVE AN OUTSIZED, NATIONWIDE IMPACT.

A. The decision below is wrong on the merits.

The D.C. Circuit's decision is wrong because, in Glomar cases, it requires courts to displace the ordinary evidentiary inquiry under the FOIA to determine whether an agency's invocation of an exemption is logical or plausible, in favor of a narrow, judge-made waiver doctrine. The ruling gives agencies responding to FOIA requests a free pass to evade even the first, basic step of their statutory obligations by issuing a Glomar response when relevant evidence in the record contradicts the logic and plausibility of that response. As a result, the decision below requires courts to endorse an agency's implausible claims of secrecy even when, in cases like this one, everyone can see for themselves that some responsive records exist.

The decision below rewrites the Federal Rules of Evidence in Glomar cases. In the federal courts, evidence is "relevant" when it has "*any* tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Fed. R. Evid. 401 (emphasis added). As this Court has held, that rule's "basic standard" is "a liberal one." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 587 (1993). The D.C.

2023 WL 3394485, at *9–11 (D. Mass. May 11, 2023) (applying *Florez* in a similar fashion).

Circuit's ruling is flatly inconsistent with Rule 401. *See Florez*, 829 F.3d at 184 (majority op.).

This departure from basic evidentiary practice will force courts into untenable positions by compelling them to "be ignorant as judges of what [they] know to be true as citizens." *Zubaydah*, 595 U.S. at 237–38 (Gorsuch, J., dissenting) (citing *Watts v. Indiana*, 338 U.S. 49, 52 (1949) (Frankfurter, J.)). Consider a FOIA case where an agency maintained a Glomar response in the face of contrary, sworn testimony (before Congress, or in litigation) by multiple other agency heads with personal knowledge of a particular matter involving the defendant agency. Of course, that kind of evidence would not be evidence of the defendant agency's *waiver*. But it would quite obviously be relevant—in every meaningful sense—to the ultimate question of whether the Glomar response was logical and plausible. Under the D.C. Circuit's rule, though, a court would be required to ignore this testimony and endorse the agency's farcical secrecy claim, enlisting the courts in an obvious charade.

That kind of result has no basis in the FOIA's text, and it is contrary to Congress's purpose of enacting the FOIA to end a "period of selective disclosures, managed news, half-truths, and admitted distortions" by those in power. Republican Policy Committee Statement on Freedom of Information Legislation, S. 1160, 112 Cong. Rec. 13014 (1966), *reprinted in* Subcomm. on Admin. Practice, S. Comm. on the Judiciary, 93d Cong., *Freedom of Information Act Source Book: Legislative Materials, Cases, Articles*, at 59 (1974) ("*FOIA Source Book*"). Passed after a time that had exposed the "nature of Government to play down mistakes and to promote successes," the FOIA

was meant to "make it considerably more difficult for secrecy-minded bureaucrats to decide arbitrarily that the people should be denied access to information on the conduct of Government." 112 Cong. Rec. 13019 (1966) (statement of Rep. Rumsfeld), *reprinted in FOIA Source Book* at 70. But the D.C. Circuit's decision undermines that purpose by making it easier for the government to pull the wool over the public's eyes.

The decision below is also a marked departure from ordinary (i.e., non-Glomar) FOIA cases, where the consideration of contrary record evidence is taken as a given. In fact, the D.C. Circuit itself has recognized the relevance of this kind of evidence under the FOIA, including in cases involving national security topics. In those cases, the court weighed evidence that did not originate from the defendant agency in concluding that the agency was entitled to summary judgment. *See Mil. Audit Project*, 656 F.2d at 742–45, 753; *Salisbury v. United States*, 690 F.2d 966, 970–71 (D.C. Cir. 1982). Although the court granted summary judgment to the agencies in both instances, it did not categorically refuse to consider such evidence, and instead held that the weight of the evidence was insufficient to create a genuine issue of material fact. *Id.*

For another example, look to a recent FOIA case in this Court, where the parties disagreed about whether the Department of Agriculture could withhold certain data as "confidential" private-sector "commercial or financial information" under FOIA Exemption 4. *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 430–31 (2019). After denying the government's motion for summary judgment, the

district court held a two-day bench trial, during which experts from both parties testified about the sensitivity of the commercial information at issue. *Argus Leader Media v. Dep't of Agric.*, 889 F.3d 914, 915 (8th Cir. 2018). In holding that the courts below had applied the wrong legal standard under Exemption 4, this Court relied on testimony from the bench trial to conclude that the correct standard had been satisfied. *Argus Leader*, 588 U.S. at 434–35. At no point in the litigation did anyone insist that only evidence from the Department of Agriculture mattered, nor did anyone question the relevance of record evidence from the businesses themselves. Excluding non-agency evidence would have been plainly absurd, because it obviously weighed on the correct resolution of the matter. *See* Fed. R. Evid. 401.

Arbitrarily restricting the scope of evidence that a court may consider—and creating a Glomar exception to the rules of evidence that does not apply in all other FOIA cases—makes no sense. Petitioner's FOIA request sought records about the CIA's operational control of a facility at Guantánamo Bay. Had the CIA released a record and redacted part of it, there would be no question that Petitioner could have submitted evidence from sources outside the CIA to evaluate whether the redactions were properly applied.[31] After

[31] Indeed, eleven federal courts of appeals—including the D.C. Circuit—recognize that government agencies are not entitled to summary judgment in FOIA cases if their justifications for the application of FOIA exemptions are controverted by "contrary evidence in the record." *Mil. Audit Project*, 656 F.2d at 738 n.49 (collecting cases); *see also Hrones v. CIA*, 685 F.2d 13, 18 (1st Cir. 1982); *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999); *Am. Friends Serv. Comm. v. DOD*, 831 F.2d 441, 444 (3d Cir. 1987); *Benavides v.*

all, evidence from the U.S. military, the ODNI, judges and prosecutors at the military commissions, and others all have some "tendency to make a fact more or less probable than it would be without the evidence." Fed. R. Evid. 401. It was wrong for the D.C. Circuit to dismiss the relevance of such evidence out of hand simply because the CIA was protecting one type of information—the existence or nonexistence of records—instead of another. And, critically, this is true regardless of whether the court would have ultimately found this evidence compelling enough to defeat the CIA's Glomar response.[32]

In this case, the court of appeals has rewritten not only the Rules of Evidence, but the FOIA statute, too. Creating special evidentiary rules in Glomar cases runs contrary to this Court's "repeated[] state[ments] that the policy of the Act requires that the disclosure requirements be construed broadly, the exemptions narrowly." *Rose,* 425 U.S. at 366 (cleaned up). Refusing to consider relevant evidence flips that standard on its head. In order ensure that the public has a fair opportunity "to pierce the veil of administrative secrecy and to open agency action to

---

U.S. Marshals Serv., 990 F.2d 625, 1993 WL 117797, at *4 (5th Cir. 1993); *Rugiero v. DOJ*, 257 F.3d 534, 544 (6th Cir. 2001); *Stein v. FBI*, 662 F.2d 1245, 1253 (7th Cir. 1981); *Madel v. DOJ*, 784 F.3d 448, 452 (8th Cir. 2015); *Hamdan v. DOJ*, 797 F.3d 759, 769 (9th Cir. 2015); *Hull v. IRS*, 656 F.3d 1174, 1177–78 (10th Cir. 2011); *Broward Bulldog, Inc. v. DOJ*, 939 F.3d 1164, 1180–81 (11th Cir. 2019).

[32] Similarly, if this Court were to grant review, it would not need to weigh Petitioner's evidence itself, and could remand to the district court for that exercise—just as the Second Circuit did in *Florez*. *See* 829 F.3d at 189–90.

the light of public scrutiny," *id.* at 361 (cleaned up), courts must consider all relevant record evidence when deciding whether to uphold an agency's Glomar response. The court below erred.

B. The D.C. Circuit's ruling will affect countless FOIA cases and incentivize agency behavior that undermines the purpose of the FOIA statute.

Because the D.C. Circuit is particularly influential in FOIA matters, including on the contours of the Glomar doctrine, the Court should grant *certiorari* and resolve its split with the Second Circuit now, rather than wait for the question presented to percolate further in the circuit courts.

The D.C. Circuit is the forum for the vast majority of FOIA litigation. In the last two calendar years, the circuit has been home to more than half of all FOIA appeals (51 out of 101 total).[33] And during the same two-year period, 1,129 out of the 1,697 FOIA cases filed nationally—more than 66 percent—were filed in that circuit's district courts.[34] The decision below therefore applies to a huge percentage of the FOIA

---

[33] *Table B-7–U.S. Court of Appeals Statistical Tables for the Federal Judiciary (December 31, 2023)*, U.S. Courts, https://www.uscourts.gov/statistics/table/b-7/statistical-tables-federal-judiciary/2023/12/31 (detailing the number of appeals by nature of suit and by circuit court in calendar year 2023); *Table B-7–U.S. Court of Appeals Statistical Tables for the Federal Judiciary (December 31, 2022)*, U.S. Courts, https://www.uscourts.gov/statistics/table/b-7/statistical-tables-federal-judiciary/2022/12/31 (same for calendar year 2022).

[34] This statistic was calculated using Bloomberg Law's docket search feature, which enables users to search by nature of suit, appellate court, and date range.

cases in the country, regardless of how the caselaw develops in other circuits.

Moreover, unless corrected by this Court, the D.C. Circuit's decision will have a nationwide impact because it gives federal agencies an incentive to use Glomar responses tactically, to stall or stymie FOIA requesters around the country, even when there is ample evidence that the requested records exist. This defeats Congress's intent, especially because there is already an enormous backlog of FOIA requests in practically every agency, leading to months- or even years-long delays before requesters receive responsive records, in violation of the deadlines Congress set.[35] As a practical matter, when an agency determines that it may lawfully keep records secret, it can take years of litigation for a requester to ultimately prevail.[36] All of this has effectively gutted Congress's statutory presumption of prompt public inspection of government records. And Glomar responses exacerbate these issues, as a requester may (as in this case) need to engage in years of litigation challenging the Glomar response before the agency even conducts

---

[35] *See* 5 U.S.C. § 552(a)(6); U.S. Gov't Accountability Off., GAO-24-106535, *Freedom of Information Act: Additional Guidance and Reliable Data Can Help Address Agency Backlogs* at i, 1, 7–8, 13, 17 (Mar. 2024), https://perma.cc/C66P-AQPE; DOJ, *Summary of Annual FOIA Reports for Fiscal Year 2023: Highlights of Key Government-wide FOIA Data*, at 11–12, 14–15, https://perma.cc/H54N-VZ2T.

[36] *FOIA Lawsuits Are Taking Longer to Resolve*, FOIA Project (Jan. 23, 2020), https://perma.cc/6BMJ-DF3D; Mark H. Grunewald, *Reducing FOIA Litigation Through Targeted ADR Strategies*, Admin. Conf. of U.S. Courts, 22–23 (Apr. 28, 2014), https://perma.cc/PC8B-6SPE.

a search for responsive records. *See, e.g.*, *ACLU v. CIA*, 710 F.3d at 425 (defeat of Glomar response thirty-eight months after request was filed).

By removing the ability of a FOIA requester to challenge an agency's Glomar response (or any other FOIA response) using evidence that is not supplied by the very agency invoking the response, the D.C. Circuit has made it even more difficult for the public to use the FOIA statute as Congress intended. That is the opposite of what the same court did more than fifty years ago in *Vaughn*, where it sought to get back to "what Congress had in mind," 484 F.2d at 826, and held, based on the statute's text and purpose, that an agency cannot evade FOIA obligations simply on its own say-so.

The decision below permits any government agency to flout the FOIA by saying that it will neither confirm nor deny the existence of records when everyone—including the requester, the public, and the courts—knows the records do exist. That is strikingly at odds with the D.C. Circuit's own earlier warnings against courts allowing the government to "stretch th[e Glomar] doctrine too far" and "giv[ing] their imprimatur to a fiction of deniability that no reasonable person would regard as plausible." *ACLU v. CIA*, 710 F.3d at 431. The FOIA does not countenance this absurd result.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Arthur B. Spitzer
Scott Michelman
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF THE
DISTRICT OF COLUMBIA
529 14th Street NW, Suite 722
Washington, D.C. 20045

Brett Max Kaufman
Counsel of Record
Sara Robinson
Hina Shamsi
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500
bkaufman@aclu.org

Cecillia D. Wang
Evelyn Danforth-Scott
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
425 California Street, Suite 700
San Francisco, CA 94104

Date: November 4, 2024

APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-5118

JAMES G. CONNELL, III,

Appellant

v.

CENTRAL INTELLIGENCE AGENCY,

Appellee

On Appeal from the United States District Court for the District of Columbia
(District Court No. 1:21-cv-00627)

Argued April 9, 2024

Decided August 6, 2024

BRETT MAX KAUFMAN argued the cause for appellant. With him on the briefs was ARTHUR B. SPITZER.

THOMAS G. PULHAM, Attorney, U.S. Department of Justice, argued the cause for appellee. With him on the brief were BRIAN M. BOYNTON, Principal Deputy Assistant Attorney General, and SHARON SWINGLE, Attorney.

Before: CHILDS and GARCIA, Circuit Judges, and GINSBURG, Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge GARCIA.

Concurring opinion filed by Senior Circuit Judge GINSBURG.

OPINION OF THE COURT

GARCIA, Circuit Judge,

In 2014, the Senate Select Committee on Intelligence released a report that referred to the CIA's "operational control" over fourteen CIA detainees transferred in September 2006 to the U.S. military base at Guantanamo Bay, Cuba. Based on that reference, a lawyer representing one of the detainees requested records from the CIA under the Freedom of Information Act about the CIA's "operational control" at Guantanamo from September 2006 through January 2007. After searching a database of records cleared for public release or previously released, the CIA identified three documents. As to any classified or otherwise

unacknowledged connection between the CIA and the topic of the request, however, the agency declared that it could neither confirm nor deny the existence of such records without revealing classified intelligence sources and methods information. The sole issue in this appeal is whether the CIA can rely on such a response to the records request here. We conclude that it can.

I

The Freedom of Information Act ("FOIA") provides for disclosure of agency records to the public subject to nine exemptions. 5 U.S.C. § 552(b); *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007). As in this case, agencies sometimes respond to FOIA requests by declaring that they can neither confirm nor deny the existence of records responsive to the request. This kind of response is known as a *Glomar* response based on a case permitting the CIA to refuse to confirm or deny whether it had records about a ship named the *Glomar Explorer*. *See Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976).

In 2009, the Senate Select Committee on Intelligence ("SSCI") began to investigate the CIA's post-9/11 detention and interrogation program. The SSCI investigation included reviewing CIA documents. In 2012, the Committee sent drafts of the resulting report and executive summary to the Executive Branch for comment, which the CIA submitted. The Committee then requested that the executive summary be declassified, a process involving a review by the Director of National Intelligence and the CIA. The executive

summary was released in redacted form in 2014. The full, unredacted report remains classified.

The SSCI executive summary states that fourteen CIA detainees were transferred "to Department of Defense custody at Guantanamo Bay" in September 2006. J.A. 114.[1] According to the executive summary, the detainees "remained under the operational control of the CIA." *Id.* Footnote 977 cited a document titled "CIA Background Memo for CIA Director visit to Guantanamo, December [], 2006, entitled Guantanamo Bay High-Value Detainee Detention Facility." J.A. 114 n.977. And a footnote on an earlier page cited a "September 1, 2006, Memorandum of Agreement Between the Department of Defense (DOD) and the Central Intelligence Agency (CIA) Concerning the Detention by DOD of Certain Terrorists at a Facility at Guantanamo Bay Naval Station." J.A. 112 n.848.

These unredacted references formed the basis for the records request at issue in this case. Appellant James G. Connell III is a lawyer who represents one of the fourteen detainees transferred to Guantanamo in September 2006. In May 2017, citing the SSCI executive summary's reference to "operational control," Connell submitted a FOIA request to the CIA for "any and all information that relates to such 'operational control' of the CIA over Guantanamo Bay detainees including but not limited to the document cited in the footnote 977." J.A. 58. The CIA asked Connell to clarify the scope of his request. Connell's response specified an interest in records that shed light on the meaning and extent of the CIA's "operational control" over

[1] Cites reflect the J.A.'s pagination, though some pages are not marked with the page number.

a specific part of Guantanamo called Camp 7 from September 1, 2006 to January 31, 2007. J.A. 63. Connell also listed "[b]y way of example and not limitation," seven "possible topics," including whether any "operational control" included facilities other than Camp 7, what organization had decisionmaking authority over Camp 7, whether CIA "operational control" ended before or after January 31, 2007, whether "operational control" involved CIA personnel, any detainee records maintained by the CIA during such a period, how other agencies could access detainees during such a period, and how the facilities transitioned from CIA to DOD "operational control." *Id.*

The CIA deemed this an amended FOIA request and responded in September 2020. It produced in partially redacted form the itinerary and background memo cited in footnote 977 of the SSCI executive summary, which had been previously released. The CIA stated that it could neither confirm nor deny the existence of any other responsive records. Connell filed an administrative appeal. The CIA failed to timely respond, and Connell filed his complaint in this suit in district court on March 8, 2021.

In July 2021, the CIA provided a final response to Connell's FOIA request. As CIA Information Review Officer Vanna Blaine later explained in a declaration in this case, *see* Blaine Decl. (J.A. 33–57), the CIA searched for records "that would reveal an unclassified or openly acknowledged association between the Agency and the subject of [Connell]'s Amended FOIA request," *id.* ¶ 16 (J.A. 38–39); *see also* J.A. 73, in a database of "all Agency records that have been reviewed and/or compiled for potential release, or that

have been previously disclosed to the public," Blaine Decl. ¶ 20 (J.A. 40–41).

That search located three documents. Two were released with redactions: another version of the itinerary and background memo in footnote 977 that the CIA had previously produced, and the Memorandum of Agreement ("MOA") between the DOD and CIA cited in footnote 848. The CIA identified a third document but withheld it in full.[2]

As to any other records, the CIA stated that "it could neither confirm nor deny the existence of records that may reveal a classified connection between the Agency and the subject of [Connell]'s Amended FOIA request because confirming or denying the existence or nonexistence of such records would reveal classified intelligence sources and methods information that is protected from disclosure" under FOIA Exemptions 1 and 3. *Id.* ¶ 26 (J.A. 43); *see also* J.A. 74. According to the agency, responding otherwise could "reveal sensitive details about CIA's intelligence sources and methods and jeopardize the safety of . . . CIA employees and the employees of other agencies" or "provide adversaries with insight into the CIA's priorities, resources, capabilities, and relationships with other agencies." Blaine Decl. ¶ 34 (J.A. 47).

---

[2] Connell does not challenge that withholding, nor does he attempt to use this third document in any way to support his other arguments in this case. Connell's counsel attempted to do so for the first time at oral argument, but that came far too late. *U.S. ex rel. Davis v. District of Columbia*, 793 F.3d 120, 127 (D.C. Cir. 2015) ("Generally, arguments raised for the first time at oral argument are forfeited.").

The CIA moved for summary judgment, relying on Blaine's declaration. Connell opposed, arguing that the CIA could not refuse to confirm or deny the existence or nonexistence of further responsive records in light of the documents it had produced, the SSCI executive summary, and other non-CIA documents which, according to Connell, indicated that the CIA had records about its "operational control" of Camp 7 during the specified time period.

The district court granted summary judgment in favor of the CIA, concluding that the CIA adequately justified its *Glomar* response to show entitlement to summary judgment and had not otherwise waived such a response. Connell timely appealed.

II

We review *de novo* a district court's grant of summary judgment in favor of an agency that invokes a FOIA exemption, including when the agency has issued a *Glomar* response. *See Montgomery v. IRS*, 40 F.4th 702, 709 (D.C. Cir. 2022). Whether the CIA is entitled to summary judgment here depends on two inquiries—whether the CIA waived its ability to assert a *Glomar* response through official acknowledgment and, if not, whether the CIA's justification for its *Glomar* response was sufficient to show it was entitled to summary judgment. We address each inquiry in turn.

A

"[A]n agency can waive a *Glomar* response through official acknowledgment," *Mobley v. CIA*, 806 F.3d 568, 584 (D.C. Cir. 2015), because "[o]nce an

agency has officially acknowledged that records exist, there is no value in a *Glomar* response. The secret is out." *Leopold v. CIA*, 987 F.3d 163, 167 n.5 (D.C. Cir. 2021).

To show such a waiver, a plaintiff must "identify information in the public domain that (1) matches the information requested, (2) is as specific, and (3) has 'been made public through an official and documented disclosure.'" *Knight First Amend. Inst. v. CIA*, 11 F.4th 810, 815 (D.C. Cir. 2021) (quoting *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990)). To satisfy the first two requirements in "the *Glomar* context, the prior disclosure must confirm the existence or nonexistence of records responsive to the FOIA request." *Id.* at 813. These requirements are exacting: "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." *Wolf*, 473 F.3d at 378. In cases like this one, this "insistence on exactitude recognizes 'the Government's vital interest in information relating to national security and foreign affairs.'" *Id.* (quoting *Pub. Citizen v. Dep't of State*, 11 F.3d 198, 203 (D.C. Cir. 1993)).

Crucially for this case, the third requirement is also strict: A disclosure is "'official'" only if made by "the agency from which the information is being sought." *Knight First Amend. Inst.*, 11 F.4th at 816 (quoting *Frugone v. CIA*, 169 F.3d 772, 774 (D.C. Cir. 1999)). Our cases have repeatedly affirmed the rationale for such a narrow approach: "While information from outside an agency may be viewed as 'possibly erroneous,' confirmation by the agency itself 'would remove any lingering doubts.'" *Id.* at 816 (quoting *Frugone*, 169 F.3d at 774–75). We have also

explained that "the rationale for not imputing statements by one agency to another applies with greater force, not lesser, in the intelligence context." *Id.* at 818.

We have applied the rule that an official acknowledgment must come from the agency whose records are sought "in various cases and contexts." *Id.* at 816. For example, the FBI cannot make an official acknowledgment on behalf of the CIA. *Moore v. CIA*, 666 F.3d 1330, 1333–34 (D.C. Cir. 2011). Neither can the State Department, *Knight First Amend. Inst.*, 11 F.4th at 816–18, the Office of Personnel Management, *Frugone*, 169 F.3d at 774–75, nor Congress, *Fitzgibbon*, 911 F.2d at 765–66. We have recognized one "limited exception" to this agency-specific rule: An agency is bound by a disclosure "made by an authorized representative of the agency's parent," *Knight First Amend. Inst.*, 11 F.4th at 816 (quoting *ACLU v. CIA*, 710 F.3d 422, 429 n.7 (D.C. Cir. 2013))—that is, a disclosure by another component within the same executive department or by the President as the head of the entire Executive Branch, *id.* at 816–17.

Connell argues that the CIA waived its ability to assert a *Glomar* response here based on the SSCI executive summary that gave rise to his request and the documents the CIA produced in this litigation—the itinerary and background memo and the CIA-DOD MOA. Connell argues that these documents officially confirm the existence of responsive records showing a classified or otherwise unacknowledged connection between the CIA and the subject of his FOIA request. We are not persuaded.

1

Start with the SSCI executive summary and its reference to CIA "operational control." The SSCI executive summary's reference to CIA "operational control" is not an "official" acknowledgment: It was made by a congressional committee, not by the CIA or an authorized representative of the agency's parent, and thus cannot be attributed to the CIA for purposes of waiver under our case law. *Knight First Amend. Inst.*, 11 F.4th at 816–18 (noting that the CIA does not have a parent agency, but acknowledging the President or their authorized representative could qualify). In so holding, we follow a well-trodden path—indeed, as just explained, we have specifically rejected imputing disclosures by Congress to the CIA before. *See, e.g.*, *Fitzgibbon*, 911 F.2d at 766; *see also Knight First Amend. Inst.*, 11 F.4th at 816 (noting that this Court has "rejected attempts to establish an agency's official acknowledgment based on disclosures by Congress").

Connell argues that we can nonetheless consider the SSCI executive summary an "official" acknowledgement by the CIA because the summary would be seen as "similarly credible" in the eyes of "the public and U.S. adversaries," Reply Brief 23–24, in part because the CIA "submitted . . . comments" and participated in the report's declassification review, J.A. 248. That approach would create a new exception to our well-established and "'strict'" insistence that an "official" statement must be made by the agency itself; that rule has never turned on the perceived credibility of the other speaker. *Leopold*, 987 F.3d at 170 (quoting *Moore*, 666 F.3d at 1333). Nor does the CIA's submission of comments and participation in the

declassification review transmute the congressional report into a CIA one. We have rejected similar arguments that disclosures by former employees are official acknowledgments where the CIA participated in some advance review or failed to prevent the disclosure. *See, e.g.*, *Afshar v. Dep't of State*, 702 F.2d 1125, 1133–34 (D.C. Cir. 1983); *Phillippi v. CIA*, 655 F.2d 1325, 1330–31 (D.C. Cir. 1981). Those cases are instructive here. The CIA's review does not make the Committee's choice to use the phrase "operational control" an "official" disclosure attributable to the CIA. That is true at least where, as here, Connell has not pointed to anything in the record that describes the scope or content of the CIA's comments or the extent to which the Committee implemented them, much less anything that would support attributing the particular phrase "operational control" to the CIA.

Lacking support in our FOIA case law, Connell turns to two non-FOIA cases. But both are inapposite. In *United States v. Zubaydah*, 595 U.S. 195 (2022), a Guantanamo detainee sought to depose two former CIA contractors in ways that would reveal the existence (or not) of a CIA detention site in Poland. *Id.* at 199. The government moved to quash the subpoenas based on the state secrets privilege. *Id.* at 208. The Court concluded that the privilege applied, reasoning that even though there was already public speculation that such a site existed, disclosures by the contractors could reasonably be expected to significantly harm national security interests. *Id.* at 207. Because the contractors played a "central role in the relevant events," their disclosure would be "tantamount to a disclosure from the CIA itself." *Id.* at 211. In a portion of the opinion joined by only two other Justices, Justice Breyer

drew "some support" for this conclusion from FOIA cases, including ours, *id.* at 210–11, for the proposition that disclosure from an agency "insider," *id.* at 208, like the contractors or the agency itself, would carry greater weight, and thus inflict more potential harm to national security interests, than mere public speculation, *id.* at 207–09.

Connell argues that *Zubaydah* undermines our official acknowledgement case law, and that now statements from sufficiently credible non-agency actors (like, he says, the SSCI here) waive an agency's rights under FOIA. This argument fails for at least two reasons. First, it is implausible to read the Court in *Zubaydah* as casting doubt on our FOIA case law—to the contrary, only three Justices joined the portion of the opinion discussing the FOIA cases, and even those Justices treated those cases as settled law and drew a "rough[] analog[y]" from them to support their conclusion in the different context presented in that case. *Id.* at 210. Second, and in any event, those Justices found the analogy helpful only because the contractors there were agency "insider[s]," *id.* at 208, who played a "central role in the relevant events," *id.* at 211; neither characterization applies to the Committee here.

Connell's other case, *Ameziane v. Obama*, 699 F.3d 488 (D.C. Cir. 2012), is also not a FOIA case. *Ameziane* considered whether the government could adequately justify protecting certain information under a protective order governing all Guantanamo habeas litigation. *Id.* at 490. In holding that the case was not mooted by certain unofficial disclosures of the information at issue, the court reasoned that if, as the plaintiff requested, his attorney—a government official and officer of the court—could disclose the

information, that would be treated as tantamount to a similar statement by the government itself. *Id.* at 493. As with *Zubaydah*, however, *Ameziane* nowhere casts doubt on our FOIA precedent, and (as our description of the case shows) is both legally and factually inapposite.

In short, our precedent squarely prohibits treating the Committee's statement that the detainees remained under the CIA's "operational control" as an official acknowledgment of the same by the CIA, and the non-FOIA cases Connell points to cast no doubt on that conclusion.

2

We turn next to the CIA-produced documents. As an initial matter, the CIA's production of some documents in response to Connell's FOIA request does not foreclose its ability to assert a *Glomar* response as to others. *See Wolf*, 473 F.3d at 379; *see also Mobley*, 806 F.3d at 583–84 (affirming CIA's reliance on partial *Glomar* response). Here, the CIA explained that it identified three documents, two of which it produced, from a database of records "that have been previously disclosed to the public." Blaine Decl. ¶ 20 (J.A. 41). That limited disclosure does not categorically prevent the CIA from invoking a *Glomar* response as to records showing a classified or otherwise unacknowledged connection between the CIA and the subject of Connell's FOIA request. *See Wolf*, 475 F.3d at 379. And we are not persuaded that either of the two CIA-produced documents specifically matches the information protected by the CIA's *Glomar* response. Neither document reveals the existence or nonexistence

of records about a classified or otherwise unacknowledged connection between the CIA and the subject of Connell's FOIA request, namely, the CIA's "operational control" over Camp 7 from September 1, 2006 to January 31, 2007.

The itinerary and background memo refer to a December 21, 2006 visit by the CIA Director to Guantanamo and to the CIA transferring detainees to Guantanamo. The only reference to the CIA's role is a description of the "CIA's end game" as "assist[ing] DoD in any way possible in the Military Commission process, while at the same time protecting CIA equities." J.A. 322.

The MOA between DOD and the CIA "concerning the detention by DOD of certain terrorists at a facility at Guantanamo Bay Naval Station" indicates DOD, not CIA, control over detainees at Guantanamo. J.A. 307. It refers to "DoD's detention of certain individuals," who were "transferred to DoD and whose detention by DoD is the subject of this MOA" and states that these "DoD detainees [are] under the exclusive responsibility and control of the Secretary of Defense," who "is solely responsible for the[ir] continued detention, release, transfer, or movement." J.A. 307. The only reference to the CIA's role is with respect to "coordinat[ion] with [DOD] with regard to all communications with Congress," J.A. 313, and "on all public affairs matters and, as necessary, other US agencies," J.A. 314.

These documents do not suggest one way or the other whether the CIA has still-undisclosed records about CIA operational control over Camp 7 in the specified time period. The documents indicate only

that detainees had been in CIA custody elsewhere before being transferred to DOD control at Guantanamo, and that thereafter the CIA communicated with DOD about issues relating to the detainees. Neither fact reveals the existence or nonexistence of records concerning CIA "operational control." Indeed, Connell concedes that at least the itinerary and background memo "on its face . . . doesn't necessarily point to operational control." Oral Argument Tr. 12:18–19; *see also id.* at 23:8–16. Our precedent "insist[s] on exactitude" in matching the prior disclosure with the information protected by the *Glomar* response. *Moore*, 666 F.3d at 1333 (quoting *Wolf*, 473 F.3d at 378). There is no such specific match here.

Perhaps recognizing the problem, Connell seeks to reshape his FOIA request to fit what the CIA-disclosed documents show. Specifically, Connell argues that his FOIA request sought records showing any CIA "connection to, relationship with, and authority (or partial authority) over" Camp 7 in the specified time period. Appellant's Brief 30. Because the CIA-produced records do show *some* connection between the CIA and Camp 7 in the specified time period, Connell argues, they officially acknowledged the existence of such records.

But Connell's request did not seek records of "any connection" between the CIA and Camp 7 in the specified time period. It sought records about, in the SSCI's words, the CIA's "operational control" of Camp 7 during that period. As explained, nothing in the documents the CIA produced discloses that the CIA had such control, much less discloses whether the CIA has other, previously undisclosed documents related to that request.

Finally, Connell argues that because the CIA identified the itinerary and background memo and CIA-DOD MOA as responsive, the CIA did, in fact, confirm that the documents show "operational control." Oral Argument Tr. 9:20–23; *see also id.* at 9:5–8. But Connell's request specifically referenced the SSCI executive summary and its footnote citations. That the CIA produced these as responsive documents indicates only that the SSCI report cited them, not that the CIA was confirming that they showed "operational control" on any independent understanding of the term by the CIA.

Ultimately, as we have explained, what Connell needed to show was a CIA disclosure that addresses whether *other* CIA records exist that are responsive to the request. *See Wolf*, 473 F.3d at 379 (even where CIA had officially acknowledged the existence of *some* records pertaining to a specific person, it was required to disclose the "existence of CIA records about [him] that have been previously disclosed (*but not any others*)" (emphasis added)). He has not done so.

B

Even though the CIA has not waived its *Glomar* response, it must still show that it properly issued that response to be entitled to summary judgment. "An agency properly issues a *Glomar* response when its affidavits plausibly describe the justifications for issuing such a response, and these justifications are not substantially called into question by contrary record evidence." *Schaerr v. DOJ*, 69 F.4th 924, 926 (D.C. Cir. 2023); *see ACLU*, 710 F.3d at 427 ("Ultimately, an agency's justification for invoking a FOIA exemption,

whether directly or in the form of a *Glomar* response, is sufficient if it appears logical or plausible." (cleaned up)).

1

Recall that the CIA's *Glomar* response asserted that the existence or nonexistence of records reflecting a classified or otherwise unacknowledged connection between the CIA and the subject of Connell's FOIA request was protected from disclosure by Exemptions 1 and 3. **[J.A. 43.]** Because our analysis of Exemption 3 is dispositive on the issue, we do not discuss or reach Exemption 1. *See Wolf*, 473 F.3d at 375 ("Proper invocation of, and affidavit support for, either Exemption, standing alone, may justify the CIA's *Glomar* response."); *Larson v. Dep't of State*, 565 F.3d 857, 862–63 (D.C. Cir. 2009) (similar).

Exemption 3 applies to "matters" that are "specifically exempted from disclosure by statute," 5 U.S.C. § 552(b)(3), recognizing that Congress can protect particular matters from FOIA's broad disclosure requirements. To show Exemption 3 applies, an agency must establish only "the existence of a relevant statute and the inclusion of withheld material within the statute's coverage." *Morley v. CIA*, 508 F.3d 1108, 1126 (D.C. Cir. 2007). In invoking Exemption 3 here, the CIA relied on the National Security Act, which commands the Director of National Intelligence to "protect . . . intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 3024(i)(1). "By delegation," the CIA Director "must do the same." *Leopold*, 987 F.3d at 167. As Connell does not dispute, the National Security Act is a qualifying "withholding statute under

Exemption 3." *CIA v. Sims*, 471 U.S. 159, 167 (1985). The CIA's burden was therefore to establish that disclosing whether it has other records responsive to Connell's FOIA request would itself reveal intelligence sources and methods protected by the National Security Act.

To meet that burden, the CIA relied on Blaine's declaration. We accord "substantial weight" in the national security context to an agency's determinations as to whether particular information is related to intelligence sources and methods or is otherwise classified. *Knight First Amend. Inst.*, 11 F.4th at 818 (quoting *Wolf*, 473 F.3d at 374) (emphasis omitted); *see also Sims*, 471 U.S. at 179 (determinations of intelligence officials "familiar with 'the whole picture,' as judges are not," as to whether information relates to intelligence sources and methods "are worthy of great deference given the magnitude of the national security interests and potential risks at stake"). We "do not require a degree of specificity that would itself possibly 'compromise intelligence methods and sources.'" *Knight First Amend. Inst.*, 11 F.4th at 821 (quoting *Mil. Audit Project v. Casey*, 656 F.2d 724, 751 (D.C. Cir. 1981)).

Here, the CIA's declaration explains that a "defining characteristic of the CIA's intelligence activities is that they are carried out through clandestine means, and therefore they must remain secret in order to be effective." Blaine Decl. ¶ 23 (J.A. 41–42). Accordingly, "the CIA generally does not confirm or deny the existence, or disclose the target, of specific intelligence collection activities of the operations it conducts or supports." *Id.* ¶ 44 (J.A. 52). Turning to the specific request here, the declaration states that "acknowledging

the existence or nonexistence of records reflecting a classified or otherwise unacknowledged connection to the CIA in this matter would reveal information that concerns intelligence sources and methods, which the National Security Act is designed to protect." *Id.* ¶ 39 (J.A. 49); *see also id.* ¶ 16 (J.A. 39) (defining scope of *Glomar* response as to "any records that may reveal a classified connection between the Agency and the subject of Plaintiff's Amended FOIA Request"). The declaration also states that "confirmation or denial of the existence or nonexistence of such records would reveal sensitive information about the CIA's intelligence interests, personnel, capabilities, authorities, and resources." *Id.* ¶ 34 (J.A. 47). A *Glomar* response was further needed to avoid "reveal[ing] sensitive details about CIA's intelligence sources and methods and jeopardiz[ing] the safety of the CIA employees and the employees of other agencies" and to avoid "provid[ing] adversaries with insight into the CIA's priorities, resources, capabilities, and relationships with other agencies." *Id.*

Though the CIA could arguably have provided additional detail as to what intelligence sources and methods would be revealed here, the CIA met its burden of justifying its Glomar response. It is plausible that revealing the existence or nonexistence of records of a classified or otherwise unacknowledged connection between the CIA and the subject of Connell's FOIA request could reveal intelligence sources and methods information. It is also plausible that stating whether the CIA has records about its operational control (or partial control or utter lack thereof) over Camp 7 would reveal information about the CIA's "relationships with other agencies," including DOD, or

information about the CIA's "priorities," "capabilities," and "resources." *Id.* ¶ 34 (J.A. 47).

Furthermore, as we have recognized, protecting intelligence sources and methods information under the National Security Act allows the CIA to withhold even "superficially innocuous information on the ground that it might enable an observer to discover" an intelligence source or method. *Sims*, 471 U.S. at 178. Because "bits and pieces of data may aid in piecing together bits of other information even when the individual piece is not of obvious importance itself," the CIA's protection of intelligence sources and methods can cover "what may seem trivial to the uninformed," but "may appear of great moment to one who has a broad view of the scene" and can "put the questioned item of information in its proper context." *Id.* (cleaned up). The CIA's declaration here makes precisely this point. *See* Blaine Decl. ¶ 32 (J.A. 46) ("Terrorist organizations, foreign intelligence services, and other hostile groups . . . search continually for information regarding the activities of the CIA and are able to gather information from a myriad of sources, analyze this information, and devise ways to defeat CIA activities from seemingly disparate pieces of information.").

Connell does not dispute any of those points. He does not argue that the declaration lacks sufficient specificity about which intelligence sources and methods would be revealed or how, nor does he dispute that the CIA's explanation for its *Glomar* response was otherwise sufficiently logical or plausible on its own terms.

2

Connell instead argues that the CIA cannot plausibly claim that it has no further documents in light of "contrary record evidence," *Schaerr*, 69 F.4th at 926—the documents the CIA produced and disclosures from other government entities. *See* Appellant's Brief 31 ("If the record establishes that it is not logical or plausible that the agency has no such records, the CIA must acknowledge that it does, in fact, have them . . . ."). In other words, he argues that there is nothing for the CIA's *Glomar* response to protect because based on already-public information it is obvious, at least to him, that the CIA does have other documents responsive to his FOIA request.

Connell bases this argument not only on the two CIA documents the agency produced, but also on an array of non-CIA materials, such as statements from various parties and a judge in military commission proceedings. *See also infra* at note 4. Because Connell's argument turns primarily on the non-CIA documents, we address those first. Connell's key legal argument in asking us to focus on these materials is that even if statements that are not from the CIA or an authorized representative of its parent cannot qualify as official acknowledgments under our waiver cases, they are still relevant evidence to consider when assessing whether it is plausible for the CIA to state that confirming or denying the existence of responsive records would reveal something that is not already public. *See* Appellant's Brief 32–35. We reject that argument, as agreeing with Connell would amount to an end-run around our official acknowledgment cases and contravene both their logic and results.

As detailed above, the rationale underlying our official acknowledgment cases, as applied to *Glomar* responses, is that confirmation that an agency has responsive records (or not) by the agency itself is different from statements to that effect by other sources—even trusted government sources—because confirmation by the agency itself removes "any lingering doubts" on the issue. *Knight First Amend. Inst.*, 11 F.4th at 816; *see Frugone*, 169 F.3d at 774–75. For that reason, "other agencies of the Executive Branch" cannot "obligate agencies with responsibility in [the national security] sphere," like the CIA here, to reveal protected intelligence information. *Frugone*, 169 F.3d at 775. The upshot for present purposes is that when an agency has not officially acknowledged whether it has records responsive to a FOIA request, we cannot assume the answer to that question based on "public speculation, no matter how widespread," *Wolf*, 473 F.3d at 378; *see Casey*, 656 F.2d at 745 ("We cannot assume, as the appellants would have us, that the CIA has nothing left to hide."). Yet that is exactly what Connell's theory would have us do: assume the CIA has responsive documents based on non-CIA statements.

To take just one concrete example from our case law, we held in *Frugone* that the CIA could plausibly maintain a *Glomar* response to a request for an individual's personnel records even where the Office of Personnel Management had stated in no uncertain terms that such records were "maintained by the CIA." 169 F.3d at 773. Because the statement was not made by the CIA, and the CIA explained why Exemptions 1 and 3 justified a *Glomar* response, we upheld that response. *Id.* On Connell's theory, however, the

plaintiff there could have sidestepped that holding by arguing that even if that non-CIA statement could not amount to an official acknowledgement, that statement (from an undoubtedly trustworthy speaker) nonetheless rendered it implausible for the CIA to assert that it might not have such records and that protected information would be revealed if the CIA itself confirmed or denied the records' existence. Connell's approach would undermine not just *Frugone* but decades of settled precedent, and we decline to endorse it.[3]

---

[3] Connell identifies one case that arguably relied on nonofficial statements in the way he urges: *Florez v. CIA*, 829 F.3d 178 (2d Cir. 2016). We do not find that out-of-circuit case persuasive. In *Florez*, a divided Second Circuit panel addressed whether FBI disclosures that post-dated the district court's summary judgment opinion required remand for the district court to reconsider whether the CIA was entitled to summary judgment on its *Glomar* response. *Id.* at 180–81. The majority did not find that FBI disclosures rendered the CIA's *Glomar* response implausible, but it concluded that the disclosures were "relevant" and remanded for the district court to consider in the first instance. *Id.* at 186–87. The dissent, however, reasoned that FBI disclosures that did not mention the CIA at all, let alone the existence of CIA records responsive to the FOIA request at issue, could not affect the adequacy of the CIA's justification that its *Glomar* response was necessary to avoid unauthorized disclosures of intelligence sources and methods information under Exemptions 1 and 3. *Id.* at 191–95 (Livingston, C.J., dissenting). Further, the dissent pointed out—correctly, in our view—that "[t]he majority's error in deeming these irrelevant documents germane thus appears to invite by the back door what the official acknowledgment doctrine prohibits at the front." *Id.* at 196. To the extent the *Florez* majority characterized the FBI disclosures as "relevant" to the CIA's justification for its *Glomar* response, we find the dissent's explanation of how this improperly circumvents the official acknowledgment doctrine persuasive and in accord with this court's case law, at least as applied to our analysis of Connell's

Accordingly, the non-CIA statements on which Connell seeks to rely could not render illogical or implausible the CIA's assertion that it would reveal protected intelligence information to confirm or deny the existence or nonexistence of records showing a classified or unacknowledged connection between the CIA and the subject of Connell's request.[4]

Connell also relies heavily on our 2013 decision in *ACLU v. CIA*, but that case only confirms our conclusion. The FOIA request there sought CIA records regarding the United States' use of drone strikes, and the CIA issued a *Glomar* response "on the ground that it was necessary to keep secret whether the CIA itself was involved in, or interested in, such strikes." 710 F.3d at 428 (emphasis omitted). The question was therefore whether it was logical or plausible "for the CIA to contend that it would reveal something not already officially acknowledged to say that the Agency

---

argument here.

[4] These materials include the SSCI executive summary's footnote reference to a site daily report and cable (which, we note, does not correspond to the dates of Connell's FOIA request and is thus not responsive); November 2006 interagency meeting materials produced by the Office of the Director of National Intelligence in response to a separate FOIA request, which show, at most, inter-agency communication related to Camp 7; testimony from Camp 7's commander, which never identifies the CIA; a military judge's decision and factfinding in a case concerning a Guantanamo detainee, which does not correspond to the dates of Connell's FOIA request; the protective order in Connell's client's case before the military commission; and a government response to motions to compel discovery related to the CIA's role at Camp 7. Although we do not resolve the question, we note that it is far from clear that these materials are properly read to undermine the CIA's justification for its *Glomar* response even if they were accorded the same status as statements from the CIA itself.

'at least has an intelligence interest' in [drone] strikes." *Id.* at 429. The problem for the CIA there was that repeated official statements—from the President, his counterterrorism advisor, and the CIA Director—revealed that the United States used drone strikes. *Id.* at 429–30. As a result of those *official statements*, we held that it "strains credulity" for the CIA—"an agency charged with gathering intelligence affecting the national security"—to maintain that it did not at least have an "intelligence interest" in that subject. *Id.* at 430.

ACLU indicates that even when official statements do not precisely match the secret protected by the *Glomar* response as required for waiver through official acknowledgment, such statements can render a *Glomar* response insufficiently logical or plausible if they directly undermine the justification given for that response. But the statements in *ACLU* were, crucially, *official*. Everything our cases have said about the special import of official statements (those from the agency or an authorized representative of the agency's parent) was therefore not in tension with our rationale there. *ACLU* did not turn in any respect on the type of nonofficial statements Connell asks us to consider here.

And, unlike in *ACLU*, the official statements Connell identifies here do not undermine the CIA's justification for its *Glomar* response. As discussed above, the two CIA-produced documents indicate that detainees had been in CIA custody elsewhere before being transferred to DOD control at Guantanamo, and that the CIA communicated with DOD about issues relating to the detainees. But records revealing prior custody and ongoing inter-agency communication do not

make it implausible that the CIA's confirmation of the existence or nonexistence of records showing a classified or unacknowledged connection between the CIA and "operational control" over Camp 7 in the specified time period would reveal intelligence sources and methods protected by the National Security Act or information about the CIA's relationships with other agencies, priorities, or resources.

* * *

In sum, the CIA did not waive its ability to assert a *Glomar* response through official acknowledgment. On Connell's articulation of the topic of his FOIA request, neither the SSCI executive summary nor the CIA-produced documents support waiver. Further, though its declaration could have provided more detail, the CIA's justification for its *Glomar* response was logical and plausible. Connell's "contrary record evidence" does not indicate otherwise.

III

For the foregoing reasons, the judgment of the district court is affirmed.

So ordered.

GINSBURG, Senior Circuit Judge, concurring:

I concur fully in the opinion of the Court. I write separately to make two additional points.

First, Connell's reliance on the Second Circuit's decision in *Florez v. CIA*, 829 F.3d 178 (2016), is misplaced. In that case, the Second Circuit deemed *Glomar* responses "justified only in 'unusual circumstances, and only by a particularly per-suasive affidavit.'" *Id.* at 182 (quoting *N.Y. Times v. Dep't of Just.*, 756 F.3d 100, 122 (2d Cir. 2014)). The Second Circuit borrowed that wording from our opinion in *ACLU v. CIA*, 710 F.3d 422 (2013), but it misread that opinion. There we explained that when an agency must disclose the existence of a document requested under the FOIA, but believes the content of the document is exempt from disclosure, it may issue either a "no number, no list" response or a "*Vaughn* index."* *See id.* at 432–35. Observing that "there is a material difference be-tween a 'no number, no list' response and a *Glomar* response," we held that a "no number, no list" response, unlike a *Glomar* response, is justified under the FOIA only "in unusual circum-stances, and only by a particularly persuasive affidavit." *Id.* at 433. We made clear that a *Glomar* response, unlike a "no number, no list" response, is to be judged under "the same

*As we have previously explained, a "*Vaughn* index" is a filing that lists the documents an agency has withheld and explains why each is subject to a particular FOIA exemption. *See, e.g.*, *DiBacco v. U.S. Army*, 795 F.3d 178, 186 n.2 (D.C. Cir. 2015), *ACLU*, 710 F.3d at 432–33; *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 145–46 (D.C. Cir. 2006). A "no number, no list" response is a filing in which an agency admits it has responsive documents but declines to enumerate or describe them at all. *See, e.g.*, *ACLU*, 710 F.3d at 432–33; *N.Y. Times*, 756 F.3d at 105.

general exemption review standards established in non-*Glomar* cases." *Id.* at 426 (quoting *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007)). That is the standard the FOIA requires for a *Glomar* response, as we reiterated three terms ago in *Knight First Amendment Institute at Columbia University v. CIA*, 11 F.4th 810, 819 (2021).

Second, a litigant that challenges an agency's justification for a *Glomar* response by pointing to publicly available information related to the subject of the documents it seeks would do well to remember that the touchstone of FOIA Exemption 1 is whether the document in question "'pertains to' either 'intelligence activities' or 'intelligence sources or methods'" and "'could reasonably be expected to cause identifiable or describable damage to the national security' if disclosed." *Knight Inst.*, 11 F.4th at 813 (quoting Exec. Order No. 13,526, § 4(c), 75 Fed. Reg. 707, 709 (2009)). It is for this very reason that our past decisions "have unequivocally recognized that the fact that information resides in the public domain does not eliminate the possibility that further disclosures can cause harm to intelligence sources, methods[,] and operations." *Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990). We give substantial weight to the CIA's judgment regarding that possibility, for as we have often repeated, "[t]he assessment of harm to intelligence sources, methods[,] and operations is entrusted to the Director of Central Intelligence, not to the courts." *ACLU v. U.S. Dep't of Def.*, 628 F.3d 612, 624 (2011) (first alteration in original); *Assassination Archives & Rsch. Ctr. v. CIA*, 334 F.3d 55, 58 (2003); *Students Against Genocide v. Dep't of State*, 257 F.3d 828, 835 (2001); *Fitzgibbon*, 911 F.2d at 766.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 21-cv-627 (CRC)

JAMES G. CONNELL, III,

Plaintiff,

v.

UNITED STATES CENTRAL INTELLIGENCE AGENCY,

Defendant.

MEMORANDUM OPINION

COOPER, District Judge,

In 2006, the Central Intelligence Agency transferred a number of "high-value" detainees to a detention facility at the U.S. military base in Guantanamo Bay, Cuba known as Camp 7. The intelligence community later declassified snippets of information that touch on the CIA's relationship to that facility. In 2014, for instance, the Director of National Intelligence blessed the public release of a redacted executive summary to a study by the Senate Select

Committee on Intelligence ("SSCI") on the CIA's detention and interrogation program in the aftermath of the September 11, 2001 terrorist attacks. The executive summary states that in September 2006, after "14 CIA detainees arrived at the U.S. military base at Guantanamo Bay, they were housed in a separate building from other U.S. military detainees and remained under the operational control of the CIA." Decl. of Amy Zittritsch ("Zittritsch Decl.") Ex. B at 160. Seizing on this statement, defense lawyer James Connell, who represents Guantanamo detainee Ammar al Baluchi before a U.S. military commission, filed a FOIA request with the CIA seeking "any and all information" relating to the CIA's "operational control . . . over Guantanamo Bay detainees." Decl. of Vanna Blaine, Information Review Officer ("Blaine Decl.") Ex. 1 at 1. After receiving clarification of the request, the agency responded by providing Connell three documents and withholding one other. As to other records, the agency issued a "*Glomar*"[1] response, neither confirming nor denying that any responsive information exists. The agency based its *Glomar* response on FOIA Exemptions 1 and 3, which protect from release, respectively, classified records and records prohibited from disclosure by statute.

Connell challenges the CIA's *Glomar* response. Specifically, he contends the agency waived its ability to assert the response because it has purportedly declassified and publicly acknowledged the existence of information reflecting its "operational control" over

[1] The *Glomar* response got its name from the Glomar Explorer vessel—the focus of Phillippi v. CIA, where a FOIA requester challenged the CIA's refusal to acknowledge the existence of records about the ship. 546 F.2d 1009 (D.C. Cir. 1976).

Camp 7, including in the two documents the CIA released to him. Rejecting Connell's waiver argument, the Court will grant summary judgment for the CIA.

I. Background

Mr. Connell lodged the request at issue with the CIA in May 2017. Blaine Decl. Ex. 1 at 1. The request begins:

> **Description of Request:** In the Report: "Senate Select Committee on Intelligence: Committee Study of the Central Intelligence Agency's Detention and Interrogation Program" reads [sic] on page 160:
>
> "After the 14 CIA detainees arrived at the U.S. military base at Guantanamo Bay, they were housed in a separate building from other U.S. military detainees and remained under the operational control of the CIA." [Footnote 977 – CIA Background Memo for CIA Director Visit to Guantanamo, December [redacted], 2006, entitled Guantanamo Bay High-Value Detainee Detention Facility]. (brackets in original) (emphasis omitted).

It continues:

> I request for [sic] any and all information that relates to such "operational control" of the CIA over Guantanamo Bay detainees including but not limited to the document cited in the footnote 977.

Id.

After acknowledging receipt, the CIA's FOIA office wrote to Connell seeking clarification regarding the scope of the request. Blaine Decl. Exs. 2, 3. It

asked Connell to "provide the aspects of operational control that interest you, as well as a specific [] period of time you would like us to search." Id. Ex. 3 at 1. Connell responded that "[t]he specific period of time in which I am interested is 1 September 2006 to 31 January 2007." Id. Ex. 4 at 1. He further explained that "I am seeking to determine what 'operational control' means," and offered the following unexhaustive list of "possible topics:"

> (1) Whether CIA "operational control" included only Camp 7 or extended to other facilities such as Echo 2;
>
> (2) What organization had decision-making authority over Camp 7;
>
> (3) Whether CIA "operational control" ended before or after 31 January 2007;
>
> (4) Whether the "operational control" involved CIA personnel, whether employees or contractors;
>
> (5) Any detainee records maintained by the CIA during the period of "operational control," such as Detainee Inmate Management System records or the equivalent;
>
> (6) How other agencies would obtain access to detainees during the period of "operational control,["] such as a Memorandum of Understanding with the Federal Bureau of Investigation or Criminal Investigative Task Force; [and]
>
> (7) How the facilities transitioned from CIA "operational control" to DOD "operational control."

Id.

The CIA replied in September 2020. Blaine Decl.

Ex. 6. Treating Connell's clarifications as an amended request covering the period September 1, 2006 to January 31, 2007 and encompassing the seven listed topics, the agency indicated that a "thorough search" had revealed one three-page document, which it released. Id. at 1; Decl. of James G. Connell III ("Connell Decl.") Ex. A. As to other records, the agency issued a *Glomar* response, stating that it could "neither confirm nor deny the existence of records responsive to your request." Blaine Decl. Ex. 6 at 1–2. The agency explained that "[t]he fact of the existence or nonexistence of such records is itself currently and properly classified and is intelligence sources and methods information protected from disclosure by Section 6 of the CIA Act of 1949, as amended, and Section 102A(i)(l) of the National Security Act of 1947, as amended. Therefore, your request is denied pursuant to FOIA exemptions (b)(1) and (b)(3)." Id.

Connell filed an administrative appeal in December 2020 and followed with this lawsuit in March 2021. Blaine Decl. Ex. 7; see also Compl. The CIA responded to the appeal in July 2021, indicating that it had found three additional responsive documents, two of which it released in redacted form and the third of which it withheld in its entirety. Blaine Decl. Ex. 8 at 1. The two additional documents released by the agency were: (1) a Department of Defense ("DoD")-CIA Memorandum of Agreement ("MOA") concerning DoD's detention of certain suspected terrorists at Guantanamo; and (2) a proposed itinerary and memo for the then-CIA Director's visit to Guantanamo in December 2006. Connell Decl. ¶ 11; id. Exs. B, C. The agency withheld Document C06833121, which it describes as "consist[ing] of classified draft

remarks/discussion points addressing a specific aspect of a sensitive Agency intelligence program/operation." Blaine Decl. ¶ 41. The agency also repeated its *Glomar* response. Id. Ex. 8 at 2.

The CIA moved for summary judgment; Connell did not cross move. See Mot. Summ. J. ("Mot."). Connell has since indicated that he does not challenge the withholding or redaction of the documents the CIA deemed responsive. Opp'n Mot. Summ. J. ("Opp'n") at 6 n.4; Pl.'s Status Report (July 29, 2021). The lone remaining dispute, then, is Connell's objection to the agency's *Glomar* response.

II. Legal Standards

"FOIA cases typically and appropriately are decided on motions for summary judgment." Eddington v. U.S. Dep't of Just., 581 F. Supp. 3d 218, 225 (D.D.C. 2022). Under FOIA, federal agencies are generally required to "disclose their records upon request," subject to several exemptions. Knight First Amend. Inst. at Columbia Univ. v. CIA, 11 F.4th 810, 813 (D.C. Cir. 2021) (citing 5 U.S.C. § 552(a)(3)(A)). Agencies "may refuse to confirm or deny the existence of records where to answer the FOIA inquiry would cause harm cognizable under an FOIA exception." Wolf v. CIA, 473 F.3d 370, 374 (D.C. Cir. 2007) (cleaned up). This practice, known as a *Glomar* response, is proper if "the fact of the existence or nonexistence of agency records" itself falls within a FOIA exemption. Id. (cleaned up). In considering a *Glomar* response, courts apply the "general exemption review standards established in non-*Glomar* cases." Knight First Amend. Inst., 11 F.4th at 813 (cleaned up). The burden falls on the agency to justify the "applicability of FOIA exemptions." Mobley

v. CIA, 806 F.3d 568, 580 (D.C. Cir. 2015).

An otherwise valid *Glomar* response can be waived if the agency has "officially and publicly acknowledged the records' existence." Leopold v. CIA, 987 F.3d 163, 167 (D.C. Cir. 2021) (citing Am. C.L. Union v. CIA, 710 F.3d 422, 426–27 (D.C. Cir. 2013)). An official acknowledgement must satisfy a three-part test—the information requested (1) "must be as specific as the information previously released;" (2) "must match the information previously disclosed;" and (3) "must already have been made public through an official and documented disclosure." Wolf, 473 F.3d at 378 (quoting Fitzgibbon v. CIA, 911 F.2d 755, 765 (D.C. Cir. 1990)). Plaintiffs relying on this strict test "bear the initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld." Schaerr v. U.S. Dep't of Just., 435 F. Supp. 3d 99, 116 (D.D.C. 2020) (quoting Afshar v. Dep't of State, 702 F.2d 1125, 1130 (D.C. Cir. 1983)). When applied to *Glomar* responses, the first two prongs of the inquiry merge—"if the prior disclosure establishes the existence (or not) of records responsive to the FOIA request, the prior disclosure necessarily matches both the information at issue—the existence of records—and the specific request for that information." Wolf, 473 F.3d at 379 (cleaned up). The prior disclosure must thus "confirm the existence or nonexistence of records responsive to the FOIA request." Knight First Amend. Inst., 11 F.4th at 813 (citing Am. C.L. Union, 710 F.3d at 427). Courts should "accord substantial deference to an agency's *Glomar* response and avoid searching judicial review when the information requested implicates national security, a uniquely executive purview." Eddington, 581 F. Supp. 3d at 225

(cleaned up).

III. Analysis

The CIA supports its *Glomar* response with a declaration from Information Review Officer Vanna Blaine. See Blaine Decl. ¶ 1. Like the agency's initial response to Connell's FOIA request, Ms. Blaine grounds the *Glomar* response in FOIA Exemptions 1 and 3. Id. ¶¶ 16, 22, 26.

Beginning with Exemption 1, Blaine correctly notes that it protects from disclosure any information that has been properly classified pursuant to Executive Order ("E.O.") 13526, which established the current system for classifying national security information. Blaine Decl. ¶ 27. Blaine further explains that she holds "original classification authority" under E.O. 13526, meaning she has authority to assess the proper classification of CIA information up to the TOP SECRET level. Id. ¶ 3. Exercising that authority, Blaine declares that she "ha[s] determined that the existence or nonexistence of the requested records is a properly classified fact; the records concern 'intelligence activities' and 'intelligence sources and methods' within the meaning of . . . the Executive Order; the records are owned by and under the control of the U.S. Government; and . . . the disclosure of the existence or nonexistence of [the] requested records reasonably could be expected to result in damage to national security." Id. ¶ 30. Blaine continues, stating that formally acknowledging the existence or nonexistence of records "reflecting a classified or otherwise publicly unacknowledged connection between the CIA and the topics in Plaintiff's Amended FOIA request would reveal classified intelligence information and jeopardize

the clandestine nature of the Agency's intelligence activities." Id. ¶ 34. Either a confirmation or a denial, Blaine posits, "could be used by terrorist organizations, foreign intelligence services, and other hostile adversaries to undermine CIA intelligence activities and attack the United States and its interests." Id.

Blaine alternatively based the *Glomar* response on FOIA Exemption 3, which shields information that is specifically exempted from disclosure by statute. Blaine Decl. ¶ 37. One such statute is the National Security Act, which directs the Director of National Intelligence to "protect intelligence sources and methods from unauthorized disclosure." Id. ¶ 38; 50 U.S.C. § 3024(i)(1). The CIA relies on the National Security Act to protect its own sources and methods. Blaine Decl. ¶ 38. Consistent with her discussion of Exemption 1, Blaine asserts that "acknowledging the existence or nonexistence of records reflecting a classified or otherwise unacknowledged connection to the CIA in this matter would reveal information that concerns intelligence sources and methods, which the National Security Act is designed to protect." Id. ¶ 39. While the National Security Act does not require the CIA to identify the damage to national security that might result should it confirm or deny the existence of a responsive record, Blaine points to the same potential harms noted with respect to Exemption 1. Id. ¶ 40.

Courts "must accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record." Am. C.L. Union, 710 F.3d at 427 (cleaned up). An agency's rationale for invoking an exemption—even for *Glomar* responses—"is sufficient if it appears 'logical' or 'plausible.'" Id. (quoting Wolf, 473 F.3d at 374–75).

Connell does not dispute Blaine's authority to assess classification of CIA information. Nor does he contest that E.O. 13526 and the National Security Act are recognized grounds upon which to assert FOIA Exemptions 1 and 3, respectively. Rather, he argues that the CIA has waived its ability to invoke Exemptions 1 and 3 to support its *Glomar* response because the agency has declassified "the intelligence connection between [the] CIA and Guantanamo Bay's Camp VII and [officially acknowledged] the existence of responsive documents about that connection."[2] Opp'n at 5–7. Specifically, Connell claims that "the [DNI] declassified CIA 'operational control' over Camp VII in 2014" and, since then, "CIA and other authorities have—until now—consistently treated both the fact of [the] CIA'[s] connection to Camp VII and the existence of documents providing specifics as unclassified, even if the specifics themselves are classified." Id. at 8. As a

[2] While Connell presents declassification as a standalone basis for a *Glomar* response waiver—separate from the public acknowledgement test—he cites no authority supporting that approach and the Court has not independently found any. While an agency can publicly acknowledge the existence of records by declassifying documents discussing that information, waiver still requires satisfying the three criteria of the public acknowledgment test. To the extent that Connell relies on declassification to contend that the CIA's rationale for invoking exemptions 1 and 3 is not "logical" or "plausible," the Court rejects this argument. The Court finds the CIA's description of the "potential harm from further disclosures is both logical and plausible," Competitive Enter. Inst. v. Nat'l Sec. Agency, 78 F. Supp. 3d 45, 60 (D.D.C. 2015), and that the declassified documents referenced do not definitively disclose the CIA's "operational control" over Camp 7. "[T]he fact that information resides in the public domain does not eliminate the possibility that further disclosures can cause harm to intelligence sources, methods and operations." Fitzgibbon, 911 F.2d at 766 (cleaned up).

result, he argues, further "confirming or denying the existence of responsive records will not result in a harm cognizable under Exemption 1 or 3 because the DNI has already declassified the intelligence connection [the] CIA claims to be protecting." Id.

Before tackling Connell's waiver argument and the declassified materials upon which it is based, the Court will first pinpoint the topic of Connell's FOIA request that he claims the agency has publicly acknowledged. As discussed above, Connell initially sought "any and all information" related to the CIA's purported "operational control . . . over Guantanamo Bay detainees." Blaine Decl. Ex. 1 at 1. He later clarified that he was interested in materials reflecting "what 'operational control' means," with reference to seven specific topics as examples. Id. Ex. 4 at 1. He further refined the request to cover the five-month period from September 1, 2006 through January 31, 2007. Id. And he reiterated that he was requesting the document cited at footnote 977 of the redacted SSCI Executive Summary, namely the "CIA Background Memo" for the CIA Director's visit to Guantanamo in December 2006. Id. With those refinements, the topic of Connell's FOIA request can fairly be described as records reflecting not only the fact of the CIA's purported "operational control" over Guantanamo detainees from September 2006 through January 2007, but also "what [that] operational control means"—that is, details about the CIA's purported operational control, including the seven questions Connell posed in response to the agency's call for clarification of his original request. See id. The topic of Connell's request also includes the specific unclassified documents noted in the request: the SSCI Executive Summary and the

CIA Background Memo cited at footnote 977. Id.

Turning to Connell's *Glomar*-waiver argument, to support his contention that the CIA's "intelligence connection" to the topics of his FOIA request has been declassified or otherwise officially acknowledged, Connell points to information contained in several publicly released documents.

He focuses primarily on the passage from the redacted SSCI Executive Summary quoted in his FOIA request, which states: "After the 14 CIA detainees arrived at the U.S. military base at Guantanamo Bay, they were housed in a separate building from other U.S. military detainees and remained under the operational control of the CIA." Opp'n at 12 (citing Zittritsch Decl. Ex. B at 160). The parties spar over whether the DNI's declassification of the quoted sentence in the executive summary is attributable to the CIA for purposes of the public acknowledgement doctrine. Opp'n at 11; Reply at 18–19. But the Court need not decide that question. Instead, assuming *arguendo* that DNI declassification suffices, the Court asks whether the passage matches the topics of Connell's FOIA request. In other words, does it acknowledge that the CIA in fact exercised "operational control" over Camp 7 and "what operational control means" in context? The Court thinks not.

As noted above, the information requested "must be as specific as the information previously released" and "must match the information previously disclosed." Wolf, 473 F.3d at 378 (cleaned up). The quoted sentence from the redacted SSCI Executive Summary does not meet this standard. For starters, it is not an acknowledgement *by the CIA* of its operational control

over Camp 7; rather, it reflects the SSCI's characterization of the CIA's relationship to Camp 7, presumably based on its interpretation of the source document cited at footnote 977: the "CIA Background Memo" for the agency director's visit to Guantanamo Bay in September 2006. Accordingly, any CIA acknowledgment flowing from the declassification of the Executive Summary would only extend to the fact that the SSCI read the Background Memo cited at footnote 977 to imply CIA "operational control" over the fourteen detainees. That is not enough to establish public acknowledgement. Knight First Amend. Inst., 11 F.4th at 816 ("While information from outside an agency may be viewed as 'possibly erroneous,' confirmation by the agency itself 'would remove any lingering doubts.'" (quoting Frugone v. CIA, 169 F.3d 772, 774–75 (D.C. Cir. 1999))).

The declassified sections of the CIA Background Memo do not acknowledge the CIA's operational control over Camp 7, either. See Connell Decl. Ex. C. To the contrary. The redacted memo states that the CIA "sent fourteen high-value detainees to the high-value detention center at GTMO." Id. at 4. It then indicates that "[u]pon their arrival . . . all detainees are subject to the same general in-processing utilized by DoD for other detainees arriving at GTMO." Id. That processing included "a medical exam by the on-site DoD physician, as well as any needed dental and psychiatric care." Id. The memo continues that "[i]n order for a detainee to be considered for transfer from the CIA program to GTMO, . . . the detainee must no longer be of significant intelligence value" and be subject to trial by a military commission. Id. Finally, under a section heading titled "End Game[,]" the memo explains that

the "CIA desires to maintain custody of any given detainee only so long as that detainee continues to provide significant intelligence." Id. Thus, if the unclassified portions of the memo suggest anything about "operational control," it is that CIA transferred the fourteen high-value detainees to Guantanamo, and relinquished "custody" over them, because they no longer had "significant intelligence value." Id. And once the detainees were there, they were subject to customary DoD procedures. As a result, neither the quoted language from page 160 of the redacted SSCI Executive Summary nor the CIA memo upon which it was based supports Connell's waiver argument.

Connell also points to the following snippet from page 80 of the redacted SSCI's unclassified Executive Summary: "On September 5, 2006, [detainee] bin al Shibh was transferred to U.S. military custody at Guantanamo Bay, Cuba. After his arrival, bin al Shibh was placed on anti-psychotic medications." Opp'n at 13 (citing Zittritsch Decl. Ex. B at 80). Connell contends that the DNI declassified references to two CIA documents supporting these statements. Opp'n at 13. But the passage says nothing about CIA "operational control." Indeed, the CIA Background Memo indicates that psychiatric screening was a standard part of *DoD* intake procedures for all detainees who arrived at Guantanamo.

Next, Connell points to a redacted version of a 2006 MOA between the DoD and the CIA concerning "DoD's detention of certain individuals" at Guantanamo Bay. Connell Decl. Ex. D at 1. As far as the Court can tell, however, none of the unredacted material discusses the CIA's role or activities under the MOA, let alone acknowledges the agency's operational

control of Camp 7.

Connell also relies on two facsimiles from the Office of the Director of National Intelligence to a lawyer at the State Department regarding the agenda for an upcoming "[i]nter-agency meeting." Connell Decl. Exs. E, F. An attached agenda—for a discussion of "Inter-agency Decisions Needed Regarding the 14 High Value Detainees"—includes questions on "[w]hat level of security clearance is required to adequately protect the classified information" about "the CIA program and physical access to the detainees" and "[w]ho should be permitted to have access to the detainees." Id. Ex. E at 1–3. These questions may well encompass some of the specific topics of Connell's FOIA request. But a document that merely reflects the CIA's participation in an interagency meeting on those subjects falls far short of an acknowledgement by the agency that it had "operational control" of Camp 7 or that documents concerning such "operational control" exist.

Finally, Connell cites excerpts from transcripts of military commission proceedings where defense lawyers, prosecutors, and the First Camp 7 Commander—all of whom are either employed or retained by DoD—referenced the CIA's purported operational control of Camp 7, including the sentence about "operational control" from page 160 of the SSCI Executive Summary. See Opp'n at 15–18; Reply at 13; see also Connell Decl. Ex. G at 28584–86; Organization Office, Office of Military Commissions, https://www.mc.mil/ABOUTUS/OrganizationOverview.aspx. Although not entirely clear to the Court, these proceedings appear to concern discovery disputes involving efforts by defense counsel to unearth specifics about the CIA's role at Camp 7. See Decl. of Alka

Pradhan ¶¶ 9–14. Connell claims that the CIA has declassified the transcripts. Opp'n at 16–18. But like the executive summary, the transcripts only reflect characterizations of the CIA's relationship to Camp 7 by people outside the agency. They say nothing about the CIA's position on the matter.

In sum, none of the unclassified information Connell highlights constitutes public acknowledgement by the CIA of its "operational control" of Camp 7 or the ins and outs of "what [such] operational control means." See Wolf, 473 F.3d at 378 ("An agency's official acknowledgment of information by prior disclosure . . . cannot be based on mere public speculation, no matter how widespread." (cleaned up)). As a result, none of the materials referenced constitute a public acknowledgement by the CIA of the existence of documents concerning the agency's purported operational control of Camp 7.

The agency therefore has not waived its ability to assert a *Glomar* response to Connell's amended FOIA request. And because the Blaine Declaration "logically" and "plausibly" supports the response under FOIA Exemptions 1 and 3, the Court will uphold it.

A final point. Even if the Court were to assume *arguendo* that the CIA acknowledged its operational control of Camp 7 by declassifying one or more of the documents Connell cites, the agency's *Glomar* response would still be valid. In Wolf v. CIA, the CIA asserted a *Glomar* response with respect to a FOIA request for records related to former Colombian politician Jorge Eliecer Gaitan. 473 F.3d at 372. The requester countered with evidence that a former CIA Director had given Congressional testimony decades

earlier that included direct quotations from CIA dispatches referencing Gaitan. Id. at 378–79. The D.C. Circuit found that the testimony amounted to public acknowledgment of the existence of records about Gaitan. Id. It thus held that the agency's *Glomar* response "[did] not suffice regarding the dispatch excerpts that reference Gaitan." Id. at 379. The Circuit went on to find, however, that the "official acknowledgment waiver relate[d] only to the existence or nonexistence of the records about Gaitan disclosed by [the former Director's] testimony." Id. As a result, the requestor "[wa]s entitled to disclosure of *that* information, namely the existence of CIA records about Gaitan that ha[d] been previously disclosed (*but not any others*)." Id. (emphasis added). Applying Wolf here, if the release of the redacted SSCI Executive Summary or any of the other documents that Connell highlights triggered a public acknowledgement waiver, then he would be entitled to an acknowledgement of the existence of those specific documents "but not any others." Id. All of those documents have been produced to Connell or are otherwise publicly available.

Accordingly, the CIA's *Glomar* response was valid and the agency is entitled to summary judgment. A separate order will follow.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 21-cv-627

JAMES G. CONNELL, III

Plaintiff,

v.

UNITED STATES CENTRAL INTELLIGENCE AGENCY,

Defendant.

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby **ORDERED** that [13] Defendant's Motion for Summary Judgment is **GRANTED**.

This is a final appealable Order.

SO ORDERED.

s/ CHRISTOPHER R. COOPER
District Judge

Date: March 29, 2024