UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION and AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs,

v.

DEPARTMENT OF DEFENSE, DEPARTMENT OF JUSTICE, and DEPARTMENT OF STATE,

Defendants.

No. 17 Civ. 09972 (ER)

Hon. Edgardo Ramos
United States District Judge

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT & IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This case asks just how far the government can stretch logic, plausibility, and common sense in the service of enforcing its own version of official secrecy.

Three years ago, news reports indicated that President Trump had issued new policy rules—dubbed the "Principles, Standards, and Procedures," or "PSP"—governing where, how, and after what process the government could use lethal force abroad outside of war zones. These rules relaxed more stringent ones put in place by President Obama in 2013, which included safeguards intended to limit the killing of civilians. In June 2019, the Department of Defense ("Defense Department") disseminated an official report on its website and to reporters evaluating the department's multiple policy and operational failures surrounding a military raid in Niger that left more than thirty people, including four U.S. soldiers, dead. In that report, the Defense Department both named the Trump administration's new lethal-force rules and explicitly acknowledged that those rules had superseded the Obama administration's rules.

Despite the publication of the report, when the American Civil Liberties Union sued under the Freedom of Information Act ("FOIA") to obtain the Trump administration's new lethal-force rules, three government agencies effectively insisted that the report's acknowledgments of those rules had never happened. The three agencies—the Departments of Defense, State, and Justice—maintained that even to acknowledge the existence of the new rules would compromise national security, issuing a so-called "Glomar" response and refusing to confirm or deny whether they possessed such records.

This Court should not abide what the D.C. Circuit once called, in a similarly reality-bending case, this "fiction of deniability." *ACLU v. CIA* (*Drones FOIA*), 710 F.3d 422, 431 (D.C. Cir. 2013) (Garland, C.J.). The Defense Department's report is an official acknowledgment of the new PSP and its status as superseding the Obama administration's lethal-

force policy rules. As a result, the Defense Department has waived its right under FOIA to rely on the secrecy of the PSP in issuing a Glomar response. And as evidence in the record in this case, the report undermines the other agencies' Glomar responses as illogical and implausible—and therefore unlawful. Plaintiffs respectfully request that the Court reject the agencies' responses and order them to search for responsive records.

STATEMENT OF FACTS[1]

The U.S. government has carried out lethal strikes abroad, outside of war zones, since at least 2001—including through the use of armed drones.[2] In May 2013, the Obama administration promulgated legal and policy guidelines governing this publicly controversial program of lethal strikes. These guidelines were known as the "Presidential Policy Guidance," or "PPG." Although the administration issued the PPG as a classified document, it published a "fact sheet," titled "U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities," summarizing the PPG's provisions.[3] Later, in August 2016, the ACLU secured the public release of a minimally redacted version of

[1] While parties ordinarily file Local Rule 56.1 Statements of Material Facts when moving for summary judgment, this Circuit does not require such statements in FOIA cases. *See, e.g.*, *N.Y. Times Co. v. DOJ*, 872 F. Supp. 2d 309, 313 (S.D.N.Y. 2012).

[2] *See* Dylan Matthews, *Everything You Need to Know About the Drone Debate, In One FAQ*, Wash. Post., Mar. 8, 2013, https://wapo.st/2xhjR80; Jessica Purkiss & Jack Serle, *Obama's Covert Drone War in Numbers: Ten Times More Strikes than Bush*, Bureau of Investigative Journalism, Jan. 17, 2017, https://www.thebureauinvestigates.com/stories/2017-01-17/obamas-covert-drone-war-in-numbers-ten-times-more-strikes-than-bush; Paul D. Shinkman, *'Areas of Active Hostilities': Trump's Troubling Increases to Obama's Wars*, U.S. News, May 16, 2017, https://www.usnews.com/news/world/articles/2017-05-16/areas-of-active-hostilities-trumps-troubling-increases-to-obamas-wars.

[3] Press Release, Office of the Press Secretary, White House, Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities (May 23, 2013), https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism.

the PPG through a FOIA lawsuit.[4]

In 2017, the Trump administration reportedly released a new, less restrictive policy.[5] This new policy is known as the "Principles, Standards, and Procedures," or "PSP."[6] The PSP reportedly eliminates safeguards contained in the previous PPG policy, including measures intended to limit civilian deaths.[7]

The public has a strong interest in the government's legal and policy positions regarding the use of lethal force abroad, not least if civilians may be killed in the name of American national security. Accordingly, after public reports indicated that the Trump administration had amended the PPG and formally issued the PSP in its stead, the ACLU submitted a FOIA request to Defendants seeking the release of the PSP. Compl. ¶¶ 1–2, ECF No. 1 (Dec. 21, 2017); *see also* Exhibit 1 to Declaration of Charles Hogle ("Hogle Decl.") (ACLU FOIA Request). Having received no response, the ACLU initiated this lawsuit to enforce its request. In their answer to the ACLU's complaint, Defendants issued blanket "Glomar" responses, stating that they were "unable to confirm or deny the existence of" the PSP "without revealing information that [was] exempt from disclosure under FOIA." Answer 9, ECF No. 14 (Feb. 1, 2018). While Defendants did not specify in their answer which FOIA exemption or exemptions justified their Glomar responses, *see id.*, they identified Exemptions 1 and 3 as the basis for their response in a pre-motion letter to this Court, *see* Letter from Sarah S. Normand at 2, Assistant U.S. Att'y, to Hon.

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[4] *See* Charlie Savage, *U.S. Releases Rules for Airstrike Killings of Terror Suspects*, N.Y. Times, Aug. 6, 2016, https://nyti.ms/2aJL3w6 ("Airstrike Article"); *see also ACLU v. DOJ*, No. 15 Civ. 1954 (CM) (S.D.N.Y. filed Mar. 16, 2015).

[5] *See* Charlie Savage, *Will Congress Ever Limit the Forever-Expanding 9/11 War?*, N.Y. Times, Oct. 28, 2017, https://nyti.ms/2BbxmDC.

[6] *See* Charlie Savage & Eric Schmitt, *Trump Poised to Drop Some Limits on Drone Strikes and Commando Raids*, N.Y. Times, Sept. 21, 2017, https://nyti.ms/2jPwvnB.

[7] *See* Airstrike Article, *supra* note 4.

Edgardo Ramos, ECF No. 24 (Jan. 13, 2020) ("Normand Letter").

On June 5, 2019, the Defense Department released a public report (the "Report") on the results of an administrative investigation into an October 2017 military raid in Niger that left four U.S. soldiers, four Nigerien soldiers, an interpreter, and a number of alleged Islamic State militants dead.[8] The Defense Department posted the Report to one of its own public websites.[9] It also provided the Report to members of the news media, which proceeded to publish stories about it.[10]

The Report makes multiple explicit references to the PSP, including that the PSP "supersedes" previous executive policies governing U.S. "direct action against terrorists" in Africa. Exhibit 2.7 to Hogle Decl. at 109; *see* Ex. 2.3 to Hogle Decl. at 8.[11] As part of a discussion concluding that "[o]perational constraints meant to minimize the likelihood of [U.S. forces] engaging in direct combat [in Niger] are insufficient," the Report reads:

> ~~(S/NF)~~ On 3 October 2017, the Executive Policy governing U.S. direct action against terrorists on the continent of Africa was codified in the "U.S. Policy Standards and Procedures for the use of force in counterterrorism operations outside the United States and areas of active hostilities," (CT-PPG). Since 3 October, the President has issued new guidance on [REDACTED UNDER EXEMPTION 1]. **The PSP supersedes the CT-PPG and makes substantive changes to the standards and procedures for approval of U.S. direct action missions**, but the core principle remains

[8] *See*, *e.g.*, Rukmini Callimachi et al., *'An Endless War': Why 4 U.S. Soldiers Died in a Remote African Desert*, N.Y. Times, Feb. 20, 2018, https://nyti.ms/2C4ny25.

[9] The Report was posted to the Executive Services Directorate's website, at https://www.esd.whs.mil. Each section of the Report remains retrievable via the public Internet. *See* Hogle Decl. at 2 n.1 (listing URLs).

[10] *See, e.g.*, Eric Schmitt, *Pentagon Ends Review of Deadly Niger Ambush, Again Blaming Junior Officers*, N.Y. Times, June 6, 2019, https://nyti.ms/2XvkROf ("The Pentagon provided copies of the 176-page redacted report to reporters on Wednesday."); *see also* Declaration of Eric Schmitt ("Schmitt Decl.") ¶ 4 & Ex. A (detailing and documenting DOD's public release of the Report), ECF No. 19.

[11] The Report is divided into seven sections, which Plaintiffs have numbered as Ex. 2.1 through Ex. 2.7 in this memorandum.

> the same: decisions to use U.S. forces to conduct [REDACTED UNDER EXEMPTION 1] will be made at the most senior levels after reasonable review and considerable oversight.

Ex. 2.3 at 8 (emphasis added); *see also* Ex. 2.7 at 109. In its glossary, the Report defines "CT-PPG" as "Counterterrorism-Presidential Policy Guidance." Ex. 2.7 at 169.

Three weeks after the publication of the Report, the ACLU wrote to Defendants and asked them to withdraw their Glomar responses in light of the Defense Department's official statements confirming the existence of the PSP. *See* Exhibit 3 to Hogle Decl. At some later date, the Defense Department removed the Report from its website (though it remains archived elsewhere on the Internet).[12] On September 13, 2019, Defendants informed the ACLU that because the Defense Department "does not have authority to declassify the information at issue," Defendants would "maintain their Glomar response[s] to the FOIA request." Exhibit 4 to Hogle Decl. at 1. For support, Defendants cited Section 3.1(b) of Executive Order 13,526, which contains a general overview of classification authority in the Executive Branch. *See* Exhibit 4 to Hogle Decl. at 1.

On January 8, 2020, the ACLU filed a letter with the Court indicating its intent to move for partial summary judgment against Defendants.[13] Defendants replied on January 13, 2020, asserting that their Glomar responses remained justified under FOIA Exemptions 1 and 3, and indicating an intent to move for summary judgment against the ACLU.[14] Pursuant to the Court's scheduling order, Defendants filed their motion for summary judgment and supporting memorandum of law on February 26, 2020, ECF Nos. 28, 31.

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[12] *See supra* note 9.

[13] Letter from Brett Max Kaufman, ACLU, to Hon. Edgardo Ramos, ECF No. 23 (Jan. 8, 2020).

[14] Normand Letter at 2.

STANDARD OF REVIEW

The Court reviews *de novo* an agency's justifications for issuing a *Glomar* response. *ACLU v. DOD* (*Yemen Raid FOIA*), 322 F. Supp. 3d 464, 473 (S.D.N.Y. 2018).

LEGAL FRAMEWORK

I. FOIA and Glomar Responses

FOIA's basic presumption is that all government records responsive to a request must be disclosed. *ACLU v. NSA*, 925 F.3d 576, 588 (2d Cir. 2019). Because Congress recognized that the disclosure of certain records might be contrary to legitimate public or private interests, FOIA allows for nine narrow, exclusive exemptions. *Milner v. Dep't of Navy*, 562 U.S. 562, 565 (2011). These "limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

Consistent with that objective, when an agency refuses to disclose records responsive to a FOIA request, the agency bears the burden of justifying its refusal—that is, the agency must prove that the withheld records fall within one of the FOIA's exemptions. *Wilner v. NSA*, 592 F.3d 60, 68 (2d Cir. 2009). This burden is high. FOIA exemptions are to be "narrowly construed," *Milner*, 562 U.S. at 565 (citation omitted), and "all doubts as to the applicability of [an] exemption must be resolved in favor of disclosure," *Wilner*, 592 F.3d at 69.

In narrow and unusual circumstances, an agency may refuse to confirm or deny the existence (or nonexistence) of records responsive to a FOIA request. This refusal to confirm or deny records is known as a Glomar response. Glomar responses are valid only when the act of "confirming or denying the existence of records would itself cause harm cognizable under an FOIA exception." *Roth v. DOJ*, 642 F.3d 1161, 1178 (D.C. Cir. 2011) (citation omitted).

A Glomar response requires an especially strong justification. Indeed, in the Second Circuit, Glomar responses are permitted "only in unusual circumstances and only [when

supported] by a particularly persuasive affidavit." *Florez v. CIA*, 829 F.3d 178, 182 (2d Cir. 2016) (quotation marks omitted); *Yemen Raid FOIA*, 322 F. Supp. 3d at 474 (same). An agency's justification for a Glomar response must include "reasonably detailed explanations" of how disclosing the existence (or non-existence) of the requested records would cause a cognizable harm under FOIA. *N.Y. Times Co. v. DOJ*, 756 F.3d 100, 112 (2d Cir. 2014). These explanations, no matter how detailed, must be both logical and plausible in light of all of the evidence in the record; if they are not, the agency's Glomar response is unlawful. *See Florez*, 829 F.3d at 184–85; *N.Y. Times Co.*, 756 F.3d at 112.

II. Official acknowledgment doctrine

Even when a FOIA exemption would otherwise permit an agency to withhold responsive records, the agency cannot do so if the government has already officially acknowledged the information in the records. *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990). An official acknowledgment occurs when the government releases information that (1) is as specific as the information sought by the FOIA requestor, (2) matches the information sought by the FOIA requestor, and (3) "was 'made public through an official and documented disclosure.'" *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009) (quoting *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007)). Notably, the Second Circuit has cautioned against "rigid application" of the *Wilson* test "in view of its questionable provenance." *N.Y. Times Co.*, 756 F.3d at 120 n.19 (reviewing the cases upon which the test is purportedly based); *see Yemen Raid FOIA*, 322 F. Supp. 3d at 480 ("The Second Circuit has recently called into question how strictly the *Wilson* test is to be applied in practice[.]").

The official-acknowledgment doctrine prohibits an agency from issuing a Glomar

response regarding records whose existence the government has officially disclosed.[15] *Wilner*, 592 F.3d at 70. Indeed, when an agency (or its parent) officially acknowledges that certain records exist or do not exist, the agency *waives* its ability to issue a Glomar response to a FOIA request. *See Drones FOIA*, 710 F.3d at 429 n.7; *Florez*, 829 F.3d at 186.

Under the official-acknowledgment doctrine, one agency's ability to issue a Glomar response is not necessarily waived by another agency's disclosures. *See Florez*, 829 F.3d at 186. Nevertheless, the Second Circuit has squarely held that evidence of a public disclosure by one agency remains relevant to evaluating whether another agency's Glomar response is lawful under the ordinary standard for evaluating agency FOIA responses—whether they are both logical and plausible. *Id.* Thus, in a Glomar case, even if a government agency has not itself disclosed the existence or non-existence of records responsive to a FOIA request, its Glomar response may fail on the merits if another agency's disclosures render it illogical and implausible. *Id.*

ARGUMENT

To justify their Glomar responses, Defendants assert that they cannot acknowledge the existence of the PSP without causing a harm cognizable under FOIA Exemptions 1 and 3.[16]

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[15] The government can officially acknowledge the existence or non-existence of records either directly or indirectly. A direct acknowledgment occurs when the agency makes a statement expressly admitting the existence (or non-existence) of the records. *See Yemen Raid FOIA*, 322 F. Supp. 3d at 475; *James Madison Project v. DOJ*, 302 F. Supp. 3d 12, 22 (D.D.C. 2018). An indirect acknowledgment occurs when the "substance of an official statement and the context in which it is made permits the inescapable inference that the requested records in fact exist." *Yemen Raid FOIA*, 322 F. Supp. 3d at 475 (quoting *James Madison Project*, 302 F. Supp. 3d at 22).

[16] Normand Letter at 2. Exemption 1 permits an agency to withhold responsive records that "(A) [are] 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 . . . ." 5 U.S.C. § 552(b)(1). Exemption 3 permits an agency to withhold responsive records that are "specifically exempted from disclosure by [a] statute" other than FOIA. § 552(b)(3).

Defendants' position is not supported by the record. First, the Defense Department has officially acknowledged through its Report both that the PSP exists and that it supersedes the PPG; therefore, the Defense Department has waived its ability to maintain a Glomar response to the ACLU's FOIA request. Second, the Report leaves no room for rational doubt as to whether the Trump administration has issued a policy on the use of lethal force abroad that supersedes the PPG, making it illogical and implausible for any of the Defendants to refuse to confirm or deny the existence of records responsive to the ACLU's request. Ultimately, all three Defendants' Glomar responses rest on "a fiction of deniability that no reasonable person would regard as plausible." *Drones FOIA*, 710 F.3d at 431.

I. The Defense Department has waived its ability to issue a Glomar response under the official-acknowledgment doctrine.

The Defense Department has waived its ability to issue a Glomar response to the ACLU's FOIA request by officially acknowledging the existence of responsive records. *See Drones FOIA*, 710 F.3d at 427; *Yemen Raid FOIA*, 322 F. Supp. 3d at 479. The Report discloses the existence of an executive policy, the "PSP," that supersedes the CT-PPG—that is, the "Presidential Policy Guidance" issued by the Obama administration in 2013. Thus, the information disclosed in the Report matches the specific information requested in the ACLU's FOIA request. *See Wolf*, 473 F.3d at 379 ("In the Glomar context . . . 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."); *Yemen Raid FOIA*, 322 F. Supp. 3d at 480 n.7. Furthermore, because the Report was authored and approved by high-ranking members of the Defense Department and disseminated to the public through Defense Department channels, the Report qualifies as an "official and documented disclosure." *Fitzgibbon*, 911 F.2d at 765. The Report

therefore constitutes an official acknowledgment of the existence of records responsive to the ACLU's request.

A. The information disclosed in the Report matches the specific information the ACLU's request seeks because the Report confirms both that the PSP exists and that it supersedes the PPG.

The Report confirms the existence of the PSP—indeed, the fact of the PSP's existence "is plain on the face of" the Report. *James Madison Project*, 302 F. Supp. 3d at 22. In a paragraph describing executive policies "governing U.S. direct action against terrorists," the Report states that "[t]he PSP supersedes the CT-PPG and makes substantive changes to the standards and procedures for approval of U.S. direct action missions . . . ." Ex. 2.3 at 8. Separately, the Report states that the military's "investigation" of a controversial and highly publicized combat engagement in Niger "revealed several problems with the advise, assist, and accompany activity as it relates to the CT-PPG and the PSP." Ex. 2.3 at 9; *see* Ex. 2.7 at 111.

Additionally, the Report flatly states that "the PSP supersedes the CT-PPG." Ex. 2.3 at 8; Ex. 2.7 at 109. The term "CT-PPG" clearly refers to the PPG—i.e., the use-of-force policy issued by the Obama administration in 2013. Indeed, the Report's own Glossary defines "CT-PPG" as "Counterterrorism-Presidential Policy Guidance," Ex. 2.7 at 169, which echoes the title of the Obama administration's 2013 policy. And the very Defense Department official who ordered the creation of the Report, General Thomas D. Waldhauser, has used the abbreviation "CT-PPG" to refer to the Obama administration's 2013 policy in congressional testimony. *See DOD Authorization for Appropriations for Fiscal Year 2018 and the Future Years Defense Program: Hearing before the S. Comm. on Armed Servs*., 115th Cong. 448 (Mar. 9, 2017) (statement of Gen. Thomas D. Waldhauser), https://www.govinfo.gov/content/pkg/CHRG-115shrg39567/html/CHRG-115shrg39567.htm (Question 24).

The government's efforts to cast doubt on the meaning of "CT-PPG" are contradicted by the Report itself. First, the government notes that, in one of the paragraphs that references the CT-PPG, the Report seems to refer to the CT-PPG by a different title: "U.S. Policy Standards and Procedures for the use of force in counterterrorism operations outside the United States and areas of active hostilities." Gov't Br. 14; *see* Ex. 2.3 at 8; Ex. 2.7 at 109. But this apparent discrepancy merely confirms that "CT-PPG" refers to the use-of-force policy that the Obama administration issued in 2013. The full title given for the "CT-PPG" in the Report is exactly the same as the title of the 2013 unclassified "Fact Sheet" that summarized the Obama administration's policy. And in fact, in a footnote to the relevant paragraph, the Report's authors explain that "the Obama administration published an unclassified 'Fact Sheet' outlining the principles of the [CT-PPG]," and that to avoid quoting from the CT-PPG itself, the authors have quoted from the Obama administration's unclassified Fact Sheet. Ex. 2.7 at 109 n.14. Moreover, the PPG itself is replete with references to "counterterrorism"—which it abbreviates, unsurprisingly, as "CT"—as well as "CT objectives" and "CT operations."[17] Thus, there is no doubt that the term "CT-PPG," as used in the Report, is equivalent to the term "PPG," as used in the ACLU's FOIA request. Both acronyms refer to the use-of-force policy that the Obama administration issued (and summarized in the unclassified Fact Sheet) in 2013.

Second, the government suggests that the term "CT-PPG" might refer not to the 2013 Obama-era use-of-force policy, but to a 2017 policy that is "limited to" U.S. direct action in

[17] White House, Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities (May 22, 2013), https://www.justice.gov/oip/foia-library/procedures_for_approving_direct_action_against_terrorist_targets/download.

Africa. Gov't Br. 14.[18] That reading is baseless. The Report does state that the CT-PPG was, "[o]n 3 October 2017, the Executive Policy governing U.S. direct action against terrorists on the continent of Africa." Ex. 2.3 at 8. But that merely (and obviously) means that the CT-PPG was the effective use-of-force policy *in place on that date in Africa* (where the incident leading to the Report took place). And, dispelling any doubt, the Report explains, "[s]ince 3 October, the President has issued new guidance on [REDACTED]," clarifying in the very next sentence that "the PSP supersedes the CT-PPG and makes substantive changes to the standards and procedures for approval of U.S. direct action missions . . . ." Ex. 2.3 at 8; *see* Ex. 2.7 at 109.

Third, the government suggests that the Report's redaction of the full title of the document it shortens as the "PSP" creates meaningful ambiguity as to whether that policy exists. *See* Gov't Br. 14 ("[I]t is not clear to what 'PSP' refers."). That is implausible. It is crystal clear on the face of the Report that the "PSP," whatever its full title, is a policy that was issued by the Trump administration in 2017, governs U.S. direct action against terrorists abroad, and replaces the PPG. Thus, even if the full title of the document referenced in the Report were not "Principles, Standards, and Procedures," there would be no doubt that the document called the "PSP" is responsive to the ACLU's FOIA request. *See* Ex. 1 at 6 n.21 ("The ACLU's FOIA request should be construed to include the record containing the Trump administration's rules governing the use of lethal force as described in Part I, even if the final version of this document bears a different title or form than that specifically requested here.").

B. The Report is an official and documented disclosure.

A disclosure of classified information constitutes an official acknowledgment when

[18] While it cites its supporting declaration for this proposition, *see* Gov't Br. 14 (citing only Knight Decl. ¶ 8), the cited paragraph does not mention Africa at all.

"made public through an official and documented disclosure." *Wilson*, 586 F.3d at 186 (quoting *Wolf*, 473 F.3d at 378). As the D.C. Circuit has explained, an "official and documented" disclosure is one that comes from a government agency or official who is "in a position to know of [the classified information] officially." *Fitzgibbon*, 911 F.2d at 765 (quoting *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1370 (4th Cir. 1975)); *see Wilson*, 586 F.3d at 200–01. This requirement encapsulates the heart of the official-acknowledgment inquiry: the distinction between "rumors and speculations," on the one hand, and "reports of sensitive information revealed by an official . . . in a position to know of what he spoke," on the other. *Alfred A. Knopf, Inc.*, 509 F.2d at 1370; *see ACLU v. DOD*, 628 F.3d 612, 622 (D.C. Cir. 2011); *Schlesinger v. CIA*, 591 F. Supp. 60, 66 (D.D.C. 1984) (defining "official disclosures" as "direct acknowledgments by an authoritative government source"). The touchstone for official acknowledgment is whether the disclosure in question leaves "some increment of doubt," or whether, by contrast, it will be understood as reliable, credible, and official. *Wilson*, 586 F.3d at 195; *see Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982) ("Official acknowledgement ends all doubt[.]").

The Defense Department was inarguably in a position to know whether the PSP had replaced the PPG and governed uses of lethal force when it authored and publicized the Report. Contrary to the government's protestations, there is not the slightest "increment of doubt regarding the reliability of the" information disclosed in the Report. Gov't Br. 17 (quoting *Wilson*, 586 F.3d at 195). Indeed, after viewing the Report, no member of the public or U.S. adversary could possibly question whether the Defense Department is, or was, aware of executive branch policies governing the use of force abroad, including which policies are current (the PSP) and which have been replaced or revised (the PPG). This is especially obvious because

the Report was commissioned and signed by high-ranking Defense Department personnel. The Report is the product of an investigation by Major General Roger J. Cloutier, Jr., who was appointed to the task by General Thomas D. Waldhauser, the then-Commander of the U.S. Africa Command. *See* Ex. 2.6 at 1. Both generals gave the Report their signed authentication. *See* Ex. 2.6 at 4. The imprimatur of these officials makes it all the more clear that there is no need to "speculate or guess" as to the accuracy of the information the Report reveals. *Fitzgibbon*, 911 F.2d at 765.

Moreover, the Defense Department itself, using its own resources, took multiple affirmative steps to disseminate the Report and insert it into the public conversation, making the Report "a matter[ ] of public record." *Wilson*, 586 F.3d at 188 (quotation marks omitted). The Defense Department posted the Report to the public website of the Executive Services Directorate, a component of the Defense Department that, among other things, "provides comprehensive knowledge management, information security and visual information services to the Office of the Secretary of Defense."[19] At the same time, the Defense Department provided the Report to reporters at major media outlets, who proceeded to publish stories on it.[20] A disclosure can hardly be more "official" than that.[21] And while the government may have acted

[19] Home, Dep't of Def., Executive Services Directorate, https://www.esd.whs.mil. While the Report has been removed from the live website of the Executive Services Directorate, it remains archived and readily available on the Internet. *See* Hogle Decl. ¶ 7 n. 1.

[20] *See, e.g.*, Schmitt, *supra* note 10; *see also* Schmitt Decl. ¶ 4 & Ex. A.

[21] The government, relying on *Wilson*, does imply that the Defense Department's publication and dissemination of the Report does not constitute an "official disclosure" because it is reducible to a "bureaucratic transmittal" that revealed classified information only as a result of "agency 'negligence.'" Gov't Br. 16 (quoting *Wilson*, 586 F.3d at 195 & n. 27). But contrary to the government's implication, *Wilson* does not hold that "agency negligence" makes *un*official what would otherwise be an official disclosure; it merely states that *even if* the CIA had been negligent in failing to mark the letter as classified, its negligence would not change the fact that a disclosure made by a former CIA employee is not equivalent to a disclosure made by the CIA

at some point (during this pending litigation) to remove the Report from its website, it does not argue that its original publication and dissemination were mistaken or inadvertent.[22] In these circumstances, ignoring the Report would yield perverse incentives: If government officials who perhaps regret their public words could later render them legally meaningless, the government would acquire a dangerous power to rewrite history through the use of official, though unjustified and implausible, secrecy.

Rather than disputing the Report's authorship and dissemination, the government, relying principally on *Wilson*, 586 F.3d at 180–81, and two other cases, argues that the simple fact that the Report "was made public at one time"—a conspicuous use of the passive voice—"does not render the disclosure official." Gov't Br. 16. Yet what makes the acknowledgment "official" here is not simply that the Report "was made public," but that *the Defense Department published* it.

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itself. *Wilson*, 586 F.3d at 195 & n.27. Moreover, the Defense Department's dissemination of the Report to the press is utterly unlike sending a private personnel letter to a former employee, which was the "bureaucratic transmittal" at issue in *Wilson*.

[22] On rare occasions, courts have permitted an agency to maintain a Glomar response when the agency's supposed official acknowledgment was nothing more than a clerical error. *See Mobley v. CIA*, 806 F.3d 568, 584 (D.C. Cir. 2015) (stating that "a FOIA response" could constitute an official acknowledgment, in contrast to "a simple clerical mistake in FOIA processing"); *Montgomery v. IRS*, 330 F. Supp. 3d 161, 169 (D.D.C. 2018) (Glomar response was not waived when, in letters responding to a FOIA request, the IRS "mistakenly used standard form language" indicating the existence of unspecified responsive records).

The government has not characterized the Defense Department's disclosures as clerical errors. Even if it had done so, though, its effort would have been wholly unconvincing. There is every indication that before affirmatively distributing the Report to journalists, the Defense Department carefully redacted it, word by word, under the strictures of FOIA. Indeed, where it first appears in the Report, the term "PSP" is bracketed by extensive redactions, including some within the same sentence; these redactions are labeled "(b)(1)," in reference to FOIA Exemption 1. *See* Ex. 2.7 at 109. The Report also contains instructions from General Waldhauser "direct[ing] [that] this investigation's documentary evidence, findings, and recommendations be appropriately classified, declassified, and coordinated for Freedom of Information Act (FOIA) processing." Ex. 2.2 at 1. Thus, the release of the information in the Report cannot be brushed aside as a non-substantive ministerial fumble.

That alone makes this case entirely unlike *Wilson*. In *Wilson*, the plaintiff argued that the CIA had officially acknowledged her employment as a covert CIA agent through two purported disclosures. The court rejected both. It held that the first disclosure—"private correspondence sent directly—and only—to [the plaintiff] at her home" by the CIA—was "not 'public' in the sense relevant to the official disclosure doctrine." *Wilson*, 586 F.3d at 188 (explaining that the letter "was not a matter of public record that could be easily discoverable by any interested member of the public" (cleaned up)). And it held that the second disclosure—the inclusion of the same private letter in the *Congressional Record* by a member of Congress—did not "demonstrate official disclosure *by the CIA*," *id.* at 189 (emphasis added).

The government's other cases are likewise unhelpful to its argument that the Report is not an official disclosure. In *Hudson River Sloop Clearwater, Inc. v. Department of Navy*, 891 F.2d 414 (2d Cir. 1989), the Second Circuit merely held that a former government employee cannot issue an "official" disclosure sufficient to effect a waiver on behalf of his former agency. *See id.* at 422 ("Officials no longer serving with an executive branch department cannot continue to disclose official agency policy, and certainly they cannot establish what is agency policy through speculation, no matter how reasonable it may appear to be.").[23] Here, by contrast, the Report was not disclosed by a former government employee: it was disclosed by the Defense Department, the very agency now asserting a Glomar response.

And in *Frugone v. CIA*, 169 F.3d 772 (D.C. Cir. 1999), the D.C. Circuit held that a letter from the Office of Personnel Management acknowledging a prior relationship between the CIA

[23] *Hudson* also held that the congressional testimony of "various [current] high-ranking Navy officials" did not constitute an official acknowledgment that the Navy intended to deploy nuclear weapons at the New York Harbor Homeport not because the testimony was not "official," but because it did not match the information requested. 891 F.2d at 421.

and a former CIA employee did not defeat an exemption claim *by the CIA*. *See id.* at 774–75; *Drones FOIA*, 710 F.3d at 429 n.7 ("We have permitted agencies to give a Glomar response despite the prior disclosure of another, unrelated agency." (citing *Frugone*, 169 F.3d at 774–75)); *see also Elec. Privacy Info. Ctr. v. NSA*, 678 F.3d 926, 933 n.5 (D.C. Cir. 2012) (characterizing *Frugone*'s holding as: "only official acknowledgement from the agency from which the information is being sought can *waive* an agency's protective power over records sought under the FOIA" (emphasis added)); *Mobley*, 806 F.3d at 583 (citing *Frugone* for the proposition that "[d]isclosure by one federal agency does not *waive* another agency's right to assert a FOIA exemption" (emphasis added)).

Here, of course, the issue is not whether the Defense Department's disclosures have waived *another* agency's ability to maintain a Glomar response. Instead, the Defense Department, through its *own* disclosures, has waived its *own* ability to maintain a Glomar response.[24] That is how waiver operates in the Glomar context. *See Florez*, 829 F.3d at 186 (waivers of FOIA exemptions through official acknowledgment are "limited only to official and public disclosures made *by the same agency providing the Glomar response*" (emphasis added) (citing *Frugone*, 169 F.3d at 775)); *N.Y. Times Co. v. CIA*, 314 F. Supp. 3d 519, 531 (S.D.N.Y. 2018) ("a Glomar response can only be waived by the agency that issued it").[25]

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[24] As discussed below, the Defense Department's Report is evidence, and therefore has bearing, on the logic and plausibility of the State and Justice Departments' Glomar responses under *Florez*. *See infra* Part II.

[25] "The touchstone of waiver is a knowing and intentional decision." *United States* v. *Jaimes-Jaimes*, 406 F.3d 845, 848 (7th Cir. 2005); *United States* v. *Brown*, 843 F.3d 74, 81 (2d Cir. 2016) ("Waiver is the intentional relinquishment or abandonment of a known right." (cleaned up) (quoting *United States* v. *Olano*, 507 U.S. 725, 733 (1993)).

Notably, the government itself cited these cases as relevant to the official acknowledgment inquiry in a recent case before the Second Circuit. There, the government argued that the Secretary of State had not officially acknowledged that the government uses

Finally, the government asserts that the Report cannot constitute an "official" acknowledgment because only the National Security Council ("NSC"), and not the Defense Department, has the authority to *declassify* the current status of the PPG—and therefore, only the NSC can officially acknowledge it.[26] *See* Gov't Br. 15. But no court has ever held that, under the official acknowledgment doctrine, "official" disclosures can only be made by those who have declassification authority, and (as explained below) such a rule would make little sense.[27]

To support its novel argument, the government relies almost exclusively on *Wilson*. *See* Gov't Br. 14–16. But *Wilson* does not hold that the authority to declassify information is a prerequisite to official acknowledgment. It is true that *Wilson* involved a straightforward factual situation in which the agency with authority to classify the information at issue (the CIA) was also the agency asserting secrecy. *See* 586 F.3d at 186. But *Wilson* was not a FOIA case in which official acknowledgment would have resulted in a waiver of statutory authority to withhold information. *See N.Y. Times Co.*, 756 F.3d at 113–14 (summarizing its conclusion that "waiver of

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armed drones in Pakistan. *See* Br. for Defs.–Appellants 32, *ACLU v. DOJ*, No. 17-157 (2d Cir. Apr. 21, 2017), ECF No. 33. And tellingly, in that case, the government did not argue that the Secretary of State had not officially acknowledged that information because his public statements were not "official" (let alone because he lacked declassification authority)—even though the ACLU had anticipated that argument in its own brief. *See* Resp. Br. of Pls.–Appellees 25, *ACLU v. DOJ*, No. 17-157 (2d Cir. July 17, 2017), ECF No. 47. Instead, the government argued that the Secretary of State's remarks did not "match" the classified information at issue. *See* Reply Br. for Defs.–Appellants 9–15, *ACLU v. DOJ*, No. 17-157 (2d Cir. Aug. 4, 2017), ECF No. 59.

[26] The NSC is not subject to FOIA. *See Main St. Legal Servs. v. NSC*, 811 F.3d 542 (2d Cir. 2016). Even if it were, the ACLU would not argue that the Defense Department's disclosures had *waived* the NSC's ability to issue a Glomar response in this context.

[27] The government seems to suggest that declassification and official acknowledgment are equivalent and identical processes. *See* Gov't Br. 18. But whether certain public statements officially *declassify* particular information pursuant to Executive Order 13,526, and whether those statements *officially acknowledge* that information and waive FOIA exemptions, are separate inquiries. *See, e.g.*, *N.Y. Times Co.*, 314 F. Supp. 3d at 526–28.

Exemptions 1 and 5 has occurred" through official acknowledgment). Rather, *Wilson* was a First Amendment challenge to the CIA's censorship of classified information from the plaintiff's memoir, a context in which proper classification, not waiver, is the central issue. *See Wilson*, 586 F.3d at 183–86; *see also Snepp v. United States*, 444 U.S. 507 (1980).

Moreover, declassification authority has never been a mandatory part of the test for "official disclosure" (which originated in the D.C. Circuit) in *any* context. Such a rule would be flatly incompatible with the D.C. Circuit's decision—and the government's own arguments—in *Ameziane v. Obama*, 699 F.3d 488 (D.C. Cir. 2012). There, the circuit court confronted whether a district court order containing protected information—the fact that a Guantánamo detainee had been cleared for transfer—could be unsealed, or whether the unsealing would officially acknowledge the information. The government sought to keep the information sealed, arguing that both the release of the information in a district court order, and the detainee's lawyer's potential out-of-court statements relaying the information, would constitute official acknowledgments. The D.C. Circuit agreed, with little trouble. *See id.* at 493 (observing that the "district court order itself . . . would *clearly* constitute an official acknowledgment of [the detainee's] cleared status" (emphasis added)); *id.* (explaining that because the detainee's attorney was "an officer of the court, subject to the serious ethical obligations inherent in that position," any representations made by him "would be tantamount to, and a sufficient substitute for, official acknowledgment by the U.S. government"); *see also id.* ("Although foreign governments would be unlikely to rely on a claim by a third party—or even by [the detainee] himself—that [the detainee] has been cleared for transfer, the same is not true with respect to a similar representation made by counsel."). While *Ameziane* involved protected (rather than classified) information, the case makes plain that the government authority responsible for the protection of

information is not the sole entity that may "officially acknowledge" that information under the three-part test.

Indeed, the concern the government identifies as animating its argument that declassification authority is necessary to effectuate an official acknowledgment in FOIA litigation is undermined by its own citations to *Frugone*. *See* Gov't Br. 18. The government quotes the *Frugone* court's worry that if one agency could waive another's ability to issue a Glomar response, then "agencies of the Executive Branch—including those with no duties related to national security—could obligate agencies with responsibility in that sphere to reveal classified information." *Frugone*, 169 F.3d at 775. But that case involved a potential waiver of the CIA's Glomar response, issued on the basis of likely harm to national security, through public statements made by the Office of Personnel Management. *See id.* at 774–75.

Frugone is miles away from this case. There, the court refused to order the CIA to abandon a Glomar response based on private correspondence from an agency with a very different mandate—federal human resources and personnel policy—and without any control over or expertise in national security. Here, the Defense Department, like the NSC, has duties specific to and grounded in national security, and many of their duties are closely coordinated. In fact, the Secretary of Defense is one of the six principal members of the NSC, while the Chairman of the Joint Chiefs of Staff of the Armed Services is the NSC's statutory military advisor.[28] Unsurprisingly, it is obvious that high-ranking Defense Department officials were keenly aware that the Report contained potentially sensitive material that required coordination and classification review. *See* Ex. 2.2 at 1 (General Waldhauser: "I direct this investigation's documentary evidence, findings, and recommendations be appropriately classified, declassified,

[28] *See* White House, National Security Council, https://www.whitehouse.gov/nsc.

and coordinated for Freedom of Information Act (FOIA) processing."); Ex. 2.1 at 4 (General Waldhauser: "USAFRICOM will continue to coordinate for necessary declassification and process the investigation for Freedom of Information Act and internal accessibility purposes.").

Ultimately, the government's position is at odds with the very foundation of the official acknowledgment doctrine, which recognizes that it is illogical and implausible for the government to insist that it cannot confirm or deny the existence of responsive records when a government source "in a position to know of [the records] officially" has already admitted their existence. *Fitzgibbon*, 911 F.2d at 765 (quoting *Alfred A. Knopf, Inc.*, 509 F.2d at 1370). Indeed, the government's position, if adopted, would permit executive agencies to selectively discuss, in public and with impunity, any classified information that they were not officially authorized to declassify, even while they remained totally insulated from their disclosure obligations under FOIA. (Absurdly, the government's classification-authority argument would, if adopted, prevent the Report from serving as an official acknowledgment even if it were still hosted on the Defense Department's website.) That result, exemplified by the government's position in this litigation, would utterly undercut the reason for FOIA's existence: when it enacted FOIA, Congress voiced pointed concerns about the tendency of government officials to provide the public with selective and misleading statements about national security policies, and it explicitly crafted the legislation to enable the public to evaluate those policies—and the government's assertions about them—for itself.[29]

[29] In enacting the FOIA, Congress meant to curtail the government's ability to use selective disclosure and overbroad withholding as a means of manipulating public debate. *See, e.g.*, Republican Policy Committee Statement on Freedom of Information Legislation, S. 1160, 112 Cong. Rec. 13020 (1966) ("In this period of selective disclosures, managed news, half-truths, and admitted distortions, the need for this legislation is abundantly clear."), *reprinted in* Subcomm. on Admin. Practice, S. Comm. on the Judiciary, 93d Cong., Freedom of Information

II. Independent of waiver, Defendants' Glomar responses fail because the government's justifications for them are vague, illogical, and implausible.

Even where it has not waived the ability to issue a Glomar response, an agency bears the independent burden of demonstrating that, upon consideration of the entire record, the response is justified by one of FOIA's nine exemptions. *See Florez*, 829 F.3d at 186. In this case, Defendants' attempts to satisfy that burden fall well short.

Defendants have tethered their Glomar responses to FOIA Exemptions 1 and 3. *See* Gov't Br. 1. To justify a Glomar response under Exemption 1, the government bears the burden of demonstrating that the existence or non-existence of responsive records "logically must remain classified in the interest of national security." *Larson v. Dep't of State*, 565 F.3d 857, 864 (D.C. Cir. 2009). To justify a Glomar response under Exemption 3, the government bears the burden of demonstrating that the existence or non-existence of responsive records is "specifically exempted from disclosure by [a] statute" other than FOIA. 5 U.S.C. § 552(b)(3). The government can meet its burden under either exemption through a "particularly persuasive affidavit." *Florez*, 829 F.3d at 182 (citing *N.Y. Times Co.*, 756 F.3d at 122). Such an affidavit must contain "reasonably detailed explanations" of why the withheld information falls within a FOIA exemption. *Ctr. for Constitutional Rights v. CIA*, 765 F.3d 161, 166 (2d Cir. 2014) (quoting *Wilner*, 592 F.3d at 69); *accord Florez*, 829 F.3d at 182. A "vague or sweeping" affidavit, or one that rests predominantly on legal conclusions, is not enough. *Larson,* 565 F.3d at 864; *Hayden v. NSA/Cent. Sec. Serv.*, 608 F.2d 1381, 1387 (D.C. Cir. 1979) ("The affidavits will not suffice if the agency's claims are

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Act Source Book: Legislative Materials, Cases, Articles, at 59 (1974) ("FOIA Source Book"); *see also* 112 Cong. Rec. 13031 (1966) (statement of Rep. Rumsfeld), *reprinted in* FOIA Source Book at 70 ("Certainly it has been the nature of Government to play down mistakes and to promote successes. . . . [This] bill will 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[.]").

conclusory, merely reciting statutory standards, or if they are too vague or sweeping.").

Even considered on their own, Defendants' justifications for issuing their Glomar responses are insufficient to carry the government's burden. To support their invocations of Exemptions 1 and 3, Defendants have submitted a declaration by Ellen J. Knight, an NSC official responsible for the classification review of NSC information requested under FOIA. Decl. of Ellen J. Knight ("Knight Decl.") ¶ 3, ECF No. 30 (Feb. 26, 2020). But as to Exemption 1, the declaration consists of vague and conclusory statements that do not logically or plausibly explain why revealing the existence or non-existence of the PSP would cause harm to national security. Nowhere does the public version of the declaration explain—much less explain with reasonable specificity—how the mere knowledge that the United States has issued new guidance on the use of lethal force abroad, without any details on the contents of that guidance, could possibly enable anyone to "avoid detection or targeting, or otherwise thwart military or intelligence operations." Knight Decl. ¶ 15.[30] Likewise, the government's declaration fails to carry Defendants' burden under Exemption 3 to establish that revealing the current status of the PPG (and the mere existence of the PSP) would reveal intelligence sources and methods. *See* Knight Decl. ¶¶ 26–27 (asserting that such disclosure "could undermine intelligence operations . . . , which by their nature involve intelligence sources and methods"). The declaration fails to explain how acknowledging the existence of the PSP or the current status of the PPG would result in the unauthorized disclosure of intelligence sources and methods. The only method implicated by the ACLU's request appears to be the use of lethal force abroad

[30] After all, acknowledging that the Trump administration has replaced the Obama administration's 2013 guidelines would not compel Defendants to release the entirety of those guidelines publicly; it would merely require that the government search for records related to the PSP and justify any withholdings, including by redacting the actual PSP, on a case-by-case basis with reference to specific FOIA exemptions.

outside of war zones, but that the United States engages in such uses of lethal force, including through the use of drones for targeted killing, is not a secret. *See Drones FOIA*, 710 F.3d at 429; *N.Y. Times Co.*, 756 F.3d at 115.

But even if the government's declaration does meet Defendants' initial burdens under Exemptions 1 and 3, it fails to carry the government's ultimate burden of persuasion because its assertions are illogical and implausible in light of "the record as a whole." *Florez*, 829 F.3d at 184 (quoting *Ctr. for Constitutional Rights*, 765 F.3d at 167). When, given the record as a whole, an agency's claimed justification for its Glomar response is neither logical nor plausible, the agency's Glomar response must give way. *See id.*; *Yemen Raid FOIA*, 322 F. Supp. 3d at 478–79. This is particularly so when the government's explanations for why it needs to withhold responsive records are "called into question by contradictory evidence in the record." *Elec. Privacy Info. Ctr.*, 678 F.3d at 931 (citing *Gardels*, 689 F.2d at 1105).

Critically, information publicly disclosed by one agency can render another agency's justification for maintaining a Glomar response illogical and implausible, even if the latter agency has not formally waived its reliance on Glomar through official acknowledgment. *See Florez*, 829 F.3d at 187. Indeed, the Second Circuit has made it perfectly clear that "the release of information from a third party agency may . . . directly bear upon whether another agency's revelation of the existence or nonexistence of records reasonably could be expected to result in damage to the national security." *Id.* at 185 n.6 (quotation marks and citation omitted). Such information may also "permit an inference contradicting an asserting agency's Glomar response under Exemption 3." *Id.* As the Second Circuit stated in *Florez*, "[i]t defies reason [for] 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 in order to avoid the strictures of FOIA." *Id.* at 187.

This commonsense aspect of FOIA doctrine is enough on its own to resolve the present controversy. The disclosures in the Report—which is record evidence—directly bear on, and thoroughly undercut, all three Defendants' asserted justifications for their Glomar responses. The Report places two facts beyond doubt: first, that the PSP exists; second, that the PSP supersedes the PPG. Thus, the Report "makes it implausible for any reasonable person to truly doubt the existence of" a Trump administration policy on the use of force abroad that supersedes the Obama administration's 2013 PPG. *Leopold v. CIA*, No. CV 19-978 (RC), 2019 WL 5814026, at *8 (D.D.C. Nov. 7, 2019).[31] No amount of quibbling over recondite classification regimes can obscure that simple and obvious truth.

As the D.C. Circuit put it when rejecting yet another implausible claim of secrecy in the form of a Glomar response, "there comes a point where courts should not be ignorant as judges of what they know as men and women." *Drones FOIA*, 710 F.3d at 431 (cleaned up) (quoting *Watts v. Indiana*, 338 U.S. 49, 52 (1949) (opinion of Frankfurter, J.)). Here, we passed that point no later than June 5, 2019, when the Defense Department published and distributed the Report.

CONCLUSION

The ACLU respectfully requests that this Court (1) reject Defendants' Glomar responses, and (2) order Defendants to search for responsive records and either produce such records or provide the ACLU with a *Vaughn* index of any records withheld (in whole or in part) based on claimed exemptions.

[31] The declaration also asserts, without elaboration, that "foreign governments may feel compelled to respond to official White House statements of policy." Knight Decl. ¶ 23. But that is mere speculation, as the declarant does not even make an effort to logically explain why a foreign government could, in the spirit of "plausible deniability," ignore General Waldhauser's confirmation of the PSP—which, again, is record evidence—yet feel compelled to "respond" to confirmation by the NSC."

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Respectfully submitted,

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