UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION and AMERICAN CIVIL LIBERTIES UNION FOUNDATION, *Plaintiffs*, v. DEPARTMENT OF DEFENSE, CENTRAL INTELLIGENCE AGENCY, DEPARTMENT OF JUSTICE, and DEPARTMENT OF STATE, *Defendants*.	**Oral Argument Scheduled December 12, 2017, 11:30 a.m.** 17 Civ. 3391 (PAE) **ECF CASE**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

This case concerns a Freedom of Information Act ("FOIA") request filed by the American Civil Liberties Union and the American Civil Liberties Union Foundation (together, the "ACLU") for records concerning a U.S. government raid carried out in al Ghayil, Yemen, on January 29, 2017 (the "Raid"). The Raid left one Navy SEAL and several civilians dead, spurring a public controversy and a multi-pronged Department of Defense ("DOD") investigation. The Raid was the first such operation approved by the newly elected President Trump. In approving the Raid, the president reportedly exempted it from existing rules governing the use of lethal force, which are intended to safeguard against civilian casualties. Although the ACLU filed the FOIA request with four agencies, all of which are Defendants in this case, this motion concerns only the Central Intelligence Agency ("CIA").

Rather than respond to the ACLU's request in the ordinary course, as the other defendant agencies are doing, the CIA issued a so-called *Glomar* response refusing even to confirm or deny whether it possesses responsive records. If upheld, an agency's invocation of *Glomar* fundamentally alters its FOIA obligations. Rather than processing and producing responsive documents and justifying the withholding of individual records, an agency invoking *Glomar* asserts that it cannot respond at all. Under the FOIA, an agency justification for exemptions, including an invocation of *Glomar*, must always be both logical and plausible. But because a successful *Glomar* invocation dramatically curtails an agency's statutory responsibilities, the Second Circuit has explained that *Glomar* responses are permitted only in unusual circumstances and if the justification is particularly persuasive.

The CIA cannot meet that high burden here. First, contrary to the agency's claim, responding to Plaintiffs' FOIA request would not disclose anything about the CIA's own role,

operational or otherwise, with respect to the Raid. Second, any attempt by the agency to justify its response on the basis of the secrecy of its intelligence interest in the Raid is futile, as the government has already officially acknowledged that interest through public statements by then–White House Press Secretary. Finally, even if the government had acknowledged nothing, the CIA's intelligence interest is not properly protected under the exemptions the agency has claimed.

For the reasons that follow, the ACLU respectfully requests that the Court enter partial summary judgment against the CIA; order it to search for, process, and produce responsive records; and provide an index of any records withheld in whole or in part.

STATEMENT OF FACTS[1]

I. The Presidential Policy Guidance

In May 2013, in response to intense and public criticism concerning the government's lethal force operations in places outside of recognized armed conflict, President Obama issued a "Presidential Policy Guidance" containing the government's asserted legal and policy standards governing the use of lethal force in so-called "areas outside of active hostilities."[2] The Policy Guidance was initially kept secret. When the ACLU sought the public release of this document

[1] Plaintiffs recognize that parties ordinarily file Local Rule 56.1 Statements of Material Facts when filing motions for summary judgment. However, in this Circuit, such statements are not required in FOIA cases. *See, e.g.*, *N.Y. Times Co. v. DOJ*, 872 F. Supp. 2d 309, 314 (S.D.N.Y. 2012).

[2] *See* Procedures for Approving Direct Action Against Terrorist Targets Located Outside of 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 ("Policy Guidance") (attached as Diakun Decl., Exhibit 3); *see* President Barack Obama, Remarks by the Pres. at the Nat'l Def. Univ. (May 23, 2013), https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-national-defense-university ("And that's why, over the last four years, my administration has worked vigorously to establish a framework that governs our use of force against terrorists— insisting upon clear guidelines, oversight and accountability that is now codified in Presidential Policy Guidance that I signed yesterday.").

through FOIA litigation, the government claimed that it was exempt from production both because it was classified and because it was subject to the presidential-communications privilege.[3] Subsequently, in the midst of summary-judgment briefing in that FOIA case, the government dropped its principal claim of exemption and eventually released the Policy Guidance in partially redacted form.[4] Among the Policy Guidance's mandates are three key requirements: (1) lethal force is only to be used against a person who poses a "continuing imminent" threat; (2) capture, rather than killing, is the preferred option when "feasible;" and (3) no operation will be undertaken unless there is "near certainty" that it would avoid civilian injuries or deaths.[5]

II. The U.S. Raid in Yemen on January 29, 2017

The Raid—the first lethal-force strike conducted under the new administration—took place on January 29, 2017. Navy SEAL Team 6 carried out what the White House declared to be an "intelligence-gathering raid" in al Ghayil, Yemen, leaving one service member and a significant but disputed number of civilians dead.[6] In advance of the Raid, President Trump had

[3] *See* Consolidated Mem. of Law in Opp. to Pls.' Mot. for Partial S.J., and in Supp. of Defs.' Cross-Mot. for Partial S.J., *ACLU v. DOJ*, No. 15 Civ. 1954 (S.D.N.Y. Oct. 3, 2015), ECF No. 46.

[4] Letter from Sarah S. Normand, Assistant U.S. Att'y, to Hon. Colleen McMahon, *ACLU v. DOJ*, No. 15 Civ. 1954 (S.D.N.Y. Mar. 4, 2016), ECF No. 67.

[5] *See* Policy Guidance § 1.C.8.b.

[6] Press Briefing, White House Off. of Press Sec'y, Press Briefing #9 by Press Secretary Sean Spicer (Feb. 7, 2017), https://www.whitehouse.gov/the-press-office/2017/02/07/press-briefing-press-secretary-sean-spicer-272017-9 ("Spicer Feb. 7 Briefing") (attached as Diakun Decl., Ex. 4); Eric Schmitt & David E. Sanger, *Raid in Yemen: Risky from the Start and Costly in the End*, N.Y. Times, Feb. 1, 2017, https://nyti.ms/2k15LPn.

reportedly declared this area of Yemen to be a temporary "area of active hostilities," exempting the operation from Policy Guidance rules intended to prevent civilian deaths.[7]

Because of the deaths of a U.S. service member and multiple Yemeni civilians, the administration immediately faced accusations that the Raid was a "failure" and that the mission was "botched."[8] During a February 2, 2017 White House press briefing, then–Press Secretary Sean Spicer addressed to such criticisms from the White House podium after a reporter asked him the following series of questions:

> On Yemen, it was initially described, the raid over the weekend, as a successful raid by the administration. There are now some questions and comments raised about the possibility of additional civilian casualties. So I've got a couple of questions for you on this one. Would you still stand by your characterization of the raid as "successful"? Was the President given multiple options about this raid, or just one? And were there consultations with the prior administration's national security officials, military officials about the raid moving forward?[9]

In response, Mr. Spicer laid out a detailed account of the planning and approval process, noting that planning for the Raid began during the Obama administration.[10] According to Mr. Spicer's account, on January 24, shortly after President Trump took office, Defense Secretary James Mattis reviewed the Obama-era proposal and sent it to President Trump for his approval.[11]

Mr. Spicer then explained that the following evening, President Trump convened a dinner meeting to review the planned operation with CIA Director Michael Pompeo, Secretary of

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[7] *See* Charlie Savage & Eric Schmitt, *Trump Administration Is Said to Be Working to Loosen Counterterrorism Rules*, N.Y. Times, Mar. 12, 2017, https://nyti.ms/2mA3euS.

[8] *See, e.g.*, Editorial Board, *Lingering Questions in the Yemen Raid*, N.Y. Times, Feb. 28, 2017, https://www.nytimes.com/2017/02/28/opinion/lingering-questions-in-the-yemen-raid.html.

[9] Press Briefing, White House Off. of Press Sec'y, Press Briefing by Press Secretary Sean Spicer #7 (Feb. 2, 2017), https://www.whitehouse.gov/the-press-office/2017/02/02/press-briefing-press-secretary-sean-spicer-222017-7 ("Spicer Feb. 2 Briefing") (attached as Diakun Decl., Ex. 5).

[10] *Id.*

[11] *Id.*

Defense James Mattis, and other top advisors.[12] Mr. Spicer explained that at this meeting, "the operation was laid out in great extent," and "[t]he indication at that time was to go ahead on Friday the 26th."[13] The next day, President Trump formally "signed the memo authorizing the action," and on January 29, Navy SEAL Team 6 conducted the Raid.[14] Mr. Spicer concluded by describing the planning and approval process for the Raid as a "very, very though[t]-out process" and a "very, very well thought-out and executed effort."[15]

Just days later, Mr. Spicer expanded on his initial account, again from the White House podium, and described the Raid as "an intelligence-gathering raid."[16] He added that "the goal of the raid was intelligence-gathering. And that's what we received, and that's what we got. That's why we can deem it a success."[17] The government has never contested, let alone withdrawn, Mr. Spicer's account.

As questions about the planning, execution, and outcome of the controversial Raid continued, the DOD conducted a three-pronged investigation. Ultimately, the DOD disclosed little information.[18]

III. Procedural History

To provide the public with information about the legal and factual bases for the Raid, the administration's justification for circumventing the Policy Guidance, and the outcome of the

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[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] Spicer Feb. 7 Briefing.

[17] *Id.*

[18] *See* Alex Emmons, *New Evidence Contradicts Pentagon's Account of Yemen Raid, but General Closes the Case*, Intercept (Mar. 9, 2017, 6:06 PM), https://interc.pt/2mGflc7.

DOD's investigation, the ACLU submitted a Freedom of Information Act ("FOIA") request (the "Request") on March 15, 2017, to the CIA, the DOD, the DOD Office of Inspector General, the United States Central Command, the Department of State, and the Department of Justice, including its Office of Legal Counsel. *See* Request (attached as Diakun Decl., Ex. 1). The agencies and components failed to release any responsive records, and the ACLU filed suit on May 8, 2017. *See* Complaint, ECF No. 1.

By letter dated July 31, 2017, the CIA issued a "*Glomar* response" to the ACLU's Request, stating that it could not "confirm or deny the existence or nonexistence of the requested records because to do so would reveal information that is protected by FOIA Exemptions 1 and 3, 5 U.S.C. § 552(b)(1), (b)(3)." Letter from Elizabeth Tulis, Assistant U.S. Att'y, to Hina Shamsi, Director, ACLU National Security Project (July 31, 2017) (attached as Diakun Decl., Ex. 2). The ACLU now moves for partial summary judgment and a declaration that the CIA's *Glomar* response is unlawful.

STANDARD OF REVIEW AND LEGAL FRAMEWORK

I. Standard of Review

Under the FOIA, the government bears the burden of justifying the withholding of responsive records, and the court reviews the legality of any withholdings *de novo*. *See Bloomberg, L.P. v. Bd. of Governors of the Fed. Res. Sys.*, 601 F.3d 143, 147 (2d Cir. 2010). The FOIA creates a "strong presumption in favor of disclosure," *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978), and though it provides for narrow categories of exempted records, those "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). As a result, courts "construe FOIA exemptions narrowly, resolving doubts in favor of disclosure."

Cook v. Nat'l Archives & Rec. Admin., 758 F.3d 168, 173 (2d Cir. 2014); *see Milner v. Dep't of Navy*, 562 U.S. 562, 565 (2011); *Florez v. CIA*, 829 F.3d 178, 182 (2d Cir. 2016); *see also* 5 U.S.C. § 552(a)(4)(B).

"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.'" *ACLU v. CIA* (*Drones FOIA*), 710 F.3d 422, 427 (D.C. Cir. 2013) (quotation marks omitted); *see Wilner v. NSA*, 592 F.3d 60, 73 (2009). An agency may only satisfy its *Glomar* burden by submitting declarations that "explain[] in as much detail as possible the basis for [the agency's] claim that it can be required neither to confirm nor to deny the existence of the requested records." *Wilner*, 592 F.3d at 68 (alterations in original) (quoting *Phillippi v. CIA* (*Phillippi I*), 546 F.2d 1009, 1013 (D.C. Cir. 1976)). "[C]onclusory affidavits that merely recite statutory standards, or are overly vague or sweeping will not . . . carry the government's burden." *Larson v. DOS*, 565 F.3d 857, 864 (D.C. Cir. 2009). Although courts typically accord "substantial weight" to government declarations in FOIA cases, that deference is due only when the government's declarations contain "reasonably detailed explanations" substantiating the exemptions it has invoked, *N.Y. Times Co. v. DOJ* (*N.Y. Times I*), 756 F.3d 100, 112 (2d Cir. 2014) (quotation marks omitted), and when they are not "controverted by contrary evidence in the record or by evidence of bad faith," *Wilner*, 592 F.3d at 68 (alteration and quotation marks omitted).

II. Legal Framework

In 1966, Congress enacted the FOIA "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *DOS v. Ray*, 502 U.S. 164, 173 (1991). To that end, "FOIA mandates the public disclosure of records of federal agencies upon request, unless one of nine statutory exemptions applies." *Cook*, 758 F.3d at 173; *see* 5 U.S.C. § 552(a),

(b)(1)–(9). Ordinarily, in response to a FOIA request, an agency searches for responsive records, releases nonexempt records to the requester, and then provides a detailed justification of any withholdings (in whole or in part) to the requester and the court. *See Vaughn v. Rosen*, 484 F.2d 820, 826–28 (D.C. Cir. 1973).

In exceptional circumstances, an agency may refuse to confirm or deny the existence (or nonexistence) of responsive records. The refusal to confirm or deny is known as a "*Glomar* response," a term born out of the events giving rise to *Phillippi I*, 546 F.2d 1009. "Because *Glomar* responses are an exception to the general rule that agencies must acknowledge the existence of information responsive to a FOIA request and provide specific, non-conclusory justifications for withholding that information, *see Vaughn*, 484 F.2d at 826–28, they are permitted only when 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) (quotation marks omitted); *see Florez*, 829 F.3d at 182 (explaining that a *Glomar* response asserts that merely confirming or denying the existence of records in its possession "is itself a fact exempt from disclosure"); *Drones FOIA*, 710 F.3d at 433.

An agency can only justify a *Glomar* response in "unusual circumstances, and only by a particularly persuasive affidavit." *Florez*, 829 F.3d at 182 (quoting *N.Y. Times I*, 756 F.3d at 122). That is because of the unique and extreme nature of *Glomar*, and its warping effect on agencies' normal FOIA obligations. A *Glomar* response does not implicate any claims of exemption over particular, identified, responsive documents or their contents—rather, it cuts off an agency's FOIA responsibilities at the threshold.

FOIA plaintiffs may challenge a defendant agency's *Glomar* response in two ways.

First, a plaintiff can defeat a *Glomar* response by showing that the government has already disclosed information sufficient to establish "the fact of the existence (or nonexistence) of responsive records, since that is the purportedly exempt information that a *Glomar* response is designed to protect." *Drones FOIA*, 710 F.3d at 427; *see Agility Pub. Warehousing Co. K.S.C. v. NSA*, 113 F. Supp. 3d 313, 326 (D.D.C. 2015). Under the official acknowledgment doctrine, when the government voluntarily discloses information, it waives its right to invoke a FOIA exemption with respect to that information—whether in the context of a *Glomar* response or of an ordinary claim of exemption with respect to a particular record. *See N.Y. Times I*, 756 F.3d at 114; *Drones FOIA*, 710 F.3d at 426. When courts apply the official acknowledgment doctrine to information found in specific responsive records, they ordinarily use a three-pronged test. *See N.Y. Times I*, 756 F.3d at 120 ("The three-part test for 'official' disclosure" is satisfied if the information "is as specific as the information previously released . . . , it matches the information previously disclosed, and was made public through an official and documented disclosure." (some quotation marks omitted) (quoting *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009))). *But see id.* at 120 n.19 ("Although . . . *Wilson* remains the law of this Circuit, we note that a rigid application of it may not be warranted in view of its questionable provenance.").

However, when courts apply the official acknowledgment doctrine to *Glomar* responses, their inquiry is different: "[W]here the official acknowledgment or prior disclosure demonstrates the existence of the records the requester seeks, the prior disclosure necessarily matches both the information at issue—the existence of records—and the specific request for that information." *Smith v. CIA*, 246 F. Supp. 3d 28, 32 (D.D.C. 2017) (quotation marks omitted) (quoting *Wolf v. CIA*, 473 F.3d 370, 379 (D.C. Cir. 2007)); *see Drones FOIA*, 710 F.3d at 426–27. Thus, the official acknowledgment inquiry in *Glomar* cases is not whether the government has officially

acknowledged that it possesses responsive records, in those terms. Rather, the inquiry focuses on whether officially acknowledged facts or information render the government's *Glomar* justification unsustainable because it is neither "logical" nor "plausible." *See N.Y. Times I*, 756 F.3d at 119; *Drones FOIA*, 710 F.3d at 428–29; *see also Wolf*, 473 F.3d at 378.

For example, in *Drones FOIA*, the CIA issued a *Glomar* response to a request for information concerning the United States' use of lethal drones to conduct targeted killings. 710 F.3d at 425–26. But the D.C. Circuit rejected the response as unlawful, holding that because the government had officially acknowledged "that the Agency does have an interest in drone strikes, it beggars belief that it does not also have documents relating to the subject." *Id.* at 431. Likewise, in *Wolf*, 473 F.3d 370, and *Boyd v. Criminal Division of DOJ*, 475 F.3d 381 (D.C. Cir. 2007), the same court rejected agencies' *Glomar* responses because the agencies had officially acknowledged information sufficient to establish the existence of records about the subjects of the requests: a deceased Colombian politician, *see Wolf*, 473 F.3d at 379, and a former government informant, *see Boyd*, 475 F.3d at 389. *See also Nat'l Sec. Archive v. CIA*, No. 99-1160, slip op. at 15–16, 19 (D.D.C. July 31, 2000), ECF No. 26; *Nuclear Control Inst. v. U.S. Nuclear Reg. Comm'n*, 563 F. Supp. 768, 772 (D.D.C. 1983).

Second, a plaintiff may challenge the agency's claim that merely "confirming or denying the existence of records would itself 'cause harm cognizable under an FOIA exception.'" *Drones FOIA*, 710 F.3d at 426; *see Wilner*, 592 F.3d at 68; *see also De Sousa v. CIA*, 239 F. Supp. 3d 179, 190 (D.D.C. 2017). Here, the CIA has tethered its *Glomar* response to FOIA Exemptions 1 and 3. Letter from Elizabeth Tulis, Assistant U.S. Att'y, to Hon. Paul A. Engelmayer 2 (Sept. 11, 2017), ECF No. 31 ("CIA Pre-Motion Letter"). Exemption 1 shields properly classified national security information, while Exemption 3 (insofar as relevant here) shields information protected

by the National Security Act of 1947. The CIA asserts that acknowledging the existence of records would cause harm under FOIA Exemptions 1 and 3 by revealing information that "pertains to intelligence sources or methods." *Id.*

When plaintiffs challenge the basis for agency *Glomar* responses, courts take great care to ensure that the response is not simply an effort by the agency to exempt itself unilaterally from the congressionally mandated FOIA process. *See, e.g.*, *Morley v. CIA*, 508 F.3d 1108, 1126 (D.C. Cir. 2007) (holding that the CIA failed sufficiently to explain why confirming or denying the existence of records about operations by a particular CIA officer would reveal intelligence sources and methods under Exemption 3, and remanding with instructions for the agency to "substantiate its *Glomar* response with 'reasonably specific detail'"); *Phillippi I*, 546 F.2d at 1013 (rejecting the CIA's invocation of the then-novel *Glomar* response and remanding with instructions for the CIA to substantiate its response with a detailed public declaration); *Phillippi v. CIA*, 655 F.2d 1325, 1328 (D.C. Cir. 1981) (on remand, CIA abandoned its *Glomar* response and produced responsive records); *see also, e.g.*, *Military Audit Project v. Casey*, 656 F.2d 724, 734–35 & n.27 (D.C. Cir. 1981).

Indeed, courts have rejected agencies' *Glomar* responses as unsubstantiated by their declarations and required the government to confirm or deny the existence of records. *See, e.g.*, *Roth*, 642 F.3d at 1181 (rejecting government's justifications for *Glomar* response under law-enforcement exemptions); *Jefferson v. DOJ*, 284 F.3d 172, 178–79 (D.C. Cir. 2002) ("[A]s the case giving rise to 'the *Glomar* response' itself makes clear, the Department cannot rely on a bare assertion to justify invocation of an exemption from disclosure . . . . [Here,] a *Glomar* response was inappropriate in the absence of an evidentiary record produced by [the agency] . . . ."); *see also, e.g.*, *Judicial Watch, Inc. v. U.S. Secret Serv.*, 579 F. Supp. 2d 182, 186

(D.D.C. 2008) (rejecting agency's *Glomar* response because its "argument that knowledge of the mere existence or absence of [records] poses a security risk does not hold water"); *ACLU v. DOD*, 389 F. Supp. 2d 547, 561, 566 (S.D.N.Y. 2005) (rejecting CIA *Glomar* response as to one category of requested records because the fact of their existence was not properly classified).

ARGUMENT

I. The CIA's *Glomar* response is unlawful because it is neither logical nor plausible.

The CIA's *Glomar* response is unlawful because it is neither logical nor plausible for several reasons. First, the government has indicated its view that substantively responding to the Request would reveal the agency's "intelligence and/or operational role with respect to the raid." CIA Pre-Motion Letter at 2. But that argument is foreclosed by the D.C. Circuit's reasoning in *Drones FOIA*. Second, the agency may argue—as it did in *Drones FOIA*—that substantively responding to the Request will reveal the agency's "intelligence interest" in the Raid. But the government has already officially acknowledged that interest and cannot rely on it to justify a *Glomar* response, and moreover, that interest is not the kind of information properly protected by Exemptions 1 and 3.

A. A substantive response to the Request would not itself reveal that the CIA played an operational or intelligence role in the Raid.

As explained above, a *Glomar* response is only permitted if it is necessary to protect information properly withheld under a FOIA exemption, such that "confirming or denying the existence of records would itself cause harm cognizable under an FOIA exception." *Roth*, 642 F.3d at 1178; *Drones FOIA*, 710 F.3d at 426. Here, the "harm" the CIA apparently seeks to avoid is public confirmation that the CIA did, in fact, play a role in the Raid—information it claims is

protected by Exemptions 1 and 3. *See* CIA Pre-Motion Letter at 2.[19] However, given the broad nature of the Request, merely disclosing the existence of responsive records would not reveal—either directly or by implication—this specific information. The CIA's *Glomar* therefore cannot be justified based on the assertions in its letter.

The D.C. Circuit's recent decision in *Drones FOIA* is instructive because that case is remarkably similar to this one. There, the CIA issued a *Glomar* response to a FOIA request seeking "records held by the Central Intelligence Agency pertaining to the use of unmanned aerial vehicles ('drones') to carry out targeted killings." 710 F.3d at 425. In response, the agency "asserted and the district court upheld a sweeping *Glomar* response that ended the plaintiffs' lawsuit by permitting the Agency to refuse to say whether it had *any documents at all* about drone strikes." *Id.* at 428. The CIA premised its *Glomar* on the assertion that responding to the request in ordinary fashion "would reveal that the CIA was either involved in, or interested in, drone strikes (while denying that it did would reveal the opposite)." *Id.* at 427.

The D.C. Circuit rejected this reasoning. The court explained that given the subject of the Request—which sought records concerning the *United States*' use of drones, but not "drones operated by the CIA"—an ordinary FOIA response by the agency would not unavoidably implicate the CIA's own activities. *Id.* at 428 ("The CIA has proffered no reason to believe that disclosing whether it has any documents at all about drone strikes will reveal whether the Agency itself—as opposed to some other U.S. entity such as the Defense Department—operates drones."). Although the Court commented in a footnote that hypothetically the CIA's own

[19] For the sake of this argument, the ACLU assumes that the agency could protect the fact of its intelligence or operational *role* in the Raid under Exemptions 1 and 3. However, in its forthcoming motion, the agency must still bear its burden to prove the exemptions are proper, and the ACLU reserves the right to challenge the agency's justifications.

operation of drones could be implicated "if it were unlikely that any entity other than the CIA operates drones," *id.* at 428 n.4, the CIA had not argued that this was the case.

The same analysis applies here. As a matter of logic, a CIA response to the Request would not reveal whether the agency played any particular role in the Raid. *See id.* at 428. The Request—which, as is common, was filed with a number of agencies—did not specifically seek any information concerning the CIA's involvement in or connection to the Raid itself. *See* Request at 5. Indeed, the Request's operative text does not even mention the CIA, or any other agency. Because of this, any responsive record the CIA possesses (and perhaps even all) may well relate only to the U.S. government's involvement in the Raid generally, and not the CIA's operational or intelligence role specifically. That the CIA possesses documents relating to U.S. government activity abroad in which it does not necessarily play a role itself is obvious. *See Drones FOIA*, 710 F.3d at 430. And because the DOD has already publicly acknowledged its own role in the Raid, *see* Missy Ryan, *Yemen Raid Killed Up to a Dozen Civilians, Military Investigation Says*, Wash. Post, Mar. 9, 2017, http://wapo.st/2mqJjQZ, the CIA's operational involvement cannot be gleaned by the process of elimination.

The CIA's argument in this case might have more purchase if the Request had specifically sought information about the CIA. For example, if the Request had asked for documents pertaining to *the CIA's* "operational role" in the Raid, or perhaps its activities in al Ghayil, Yemen, on January 29, 2017, revealing that the CIA possessed responsive records would confirm that the CIA did have an operational role in the Raid. But here, the bottom line is that responding to the Request in normal fashion would not reveal *any* CIA "role" in the Raid whatsoever, whether operational or intelligence-related, and the CIA's proffered justifications for its *Glomar* response fail.

B. The CIA cannot justify its *Glomar* response based on its intelligence interest.

1. The government has officially acknowledged the CIA's intelligence interest.

The CIA has thus far not signaled that it intends to defend its *Glomar* response on any basis other than that an ordinary FOIA response would reveal the agency's operational or intelligence *role* in the Raid. However, it may now seek to defend the *Glomar* by claiming, as it did in the *Drones FOIA* case, that a substantive response would reveal the agency's "intelligence interest" in the Raid. *See Drones FOIA*, 710 F.3d at 427–28 (quoting agency declaration's assertion that "confirm[ing] or den[ying] the existence or nonexistence of records . . . would reveal . . . whether or not the CIA is involved in drone strikes or at least has an intelligence interest in drone strikes" (quotation marks omitted)). But that assertion would fail just like it did in *Drones FOIA*, because the agency's intelligence interest in the Raid has been officially acknowledged. 710 F.3d at 431. Thus, it would be illogical and implausible to permit the agency to refuse to respond to the FOIA Request on the ground that such an interest remains a secret. Moreover, it is unlikely that the agency can bear its burden to demonstrate that its intelligence interest is properly protected under Exemptions 1 and 3.[20]

Once again, the D.C. Circuit's decision in *Drones FOIA* is instructive. The court in that case first rejected the notion that if the CIA responded to a FOIA request concerning the U.S. government's use of drones, it would necessarily reveal details about the agency's own operational role in that use. 710 F.3d at 428. The D.C. Circuit then acknowledged that "[t]here is no doubt, however, that such disclosure would reveal whether the Agency at least has an intelligence interest in drone strikes." *Id.* at 428–29 (quotation marks omitted). The court did not

[20] If the CIA seeks to justify its *Glomar* response on an interest other than those cited in its pre-motion letter and discussed here, the ACLU will address those arguments in its reply brief.

belabor this point, and for good reason. If the CIA admits that it has records on a given subject, it is common sense to infer that the agency has an intelligence interest in that subject. Here, if the CIA were to substantively respond to the Request, the agency would indeed disclose its intelligence interest in the Raid. But like in *Drones FOIA*, that interest is not a secret—and as a result, it cannot sustain the agency's *Glomar* response.

In *Drones FOIA*, the court summarized the question before it as being "whether it is logical or plausible for the CIA to contend that it would reveal something not already officially acknowledged to say that the Agency 'at least has an intelligence interest' in such strikes." *Id.* at 429 (quotation marks and citation omitted). "Given the extent of the official statements on the subject," the court continued, "we conclude that the answer to that question is no." *Id.* at 431; *see id.* ("And more to the point," it wrote, "as it is now clear that the Agency does have an interest in drone strikes, it beggars belief that it does not also have documents relating to the subject."). Should the CIA attempt to justify its *Glomar* response on the basis of its intelligence interest in the Raid, this Court would face the same question—and it should arrive at the same answer.

Mr. Spicer's comments, including his acknowledgment of CIA Director Pompeo's presence at the dinner meeting at which President Trump ultimately approved the Raid, officially acknowledged the CIA's intelligence interest in the Raid. Mr. Spicer's initial account was sufficient to acknowledge that interest, as it placed the CIA Director in the room with the president when the Raid was officially discussed in detail. *See* Spicer Feb. 2 Briefing; CIA Pre-Motion Letter at 2 (conceding that Director Pompeo's presence at this meeting conveys "that the President consulted with him and other advisors before authorizing the raid"). Days later, Mr. Spicer put any potential doubts to rest when he described the Raid from the White House podium as "an intelligence-gathering raid." Spicer Feb. 7 Briefing ("[T]he goal of the raid was

intelligence-gathering. And that's what we received, and that's what we got. That's why we can deem it a success.").

That the CIA had—indeed, given Mr. Spicer's comments, continues to have—an intelligence interest in the Raid is unsurprising, as the relevant context supports this conclusion. *See. N.Y. Times I*, 756 F.3d at 115 (explaining that even public statements that do not rise to the level of official acknowledgments "establish the context in which" other acknowledgments "should be evaluated"). Director Pompeo is, of course, the Director of the Central *Intelligence* Agency. *See* CIA, About the CIA, https://www.cia.gov/about-cia (listing the Director of the CIA's responsibilities as including, among other things, "[p]roviding overall direction for and coordination of the collection of national intelligence outside the United States through human sources by elements of the Intelligence Community authorized to undertake such collection and, in coordination with other departments, agencies, or elements of the United States Government which are authorized to undertake such collection"); *cf. Drones FOIA*, 710 F.3d at 430 (concluding it was illogical and implausible that the CIA would not have an intelligence interest in drone strikes because "[t]he defendant is, after all, the Central *Intelligence* Agency"). Further, according to Mr. Spicer, President Trump "lean[s] on Director Pompeo" "when it comes to seeking out ISIS and other terrorists." Press Briefing, White House Off. of Press Sec'y, Statement by Press Secretary Sean Spicer (Jan. 31, 2017), https://www.whitehouse.gov/the-press-office/2017/01/31/statement-press-secretary-sean-spicer (attached as Diakun Decl., Ex. 6). Moreover, as the Second Circuit held three years ago, it has "been common knowledge for some time" that the CIA conducts counterterrorism and intelligence operations in Yemen. *N.Y. Times I*, 756 F.3d at 118. All told, as the D.C. Circuit held when faced with a similarly unjustifiable *Glomar* response, "it strains credulity to suggest that an agency charged with gathering

intelligence affecting the national security"—and officially known to do so in Yemen—would not have had "an 'intelligence interest' in [the Raid], even if that agency [did not participate in the Raid] itself," *Drones FOIA*, 710 F.3d at 430.[21]

Additionally, there should be no serious question that Mr. Spicer's comments were "official" comments, acknowledging information for the CIA. Whether an acknowledgment is "official" depends on whether the disclosure comes from "one in a position to know of it officially." *ACLU v. DOD*, 628 F.3d 612, 621–22 (D.C. Cir. 2011) (quoting *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1370 (4th Cir. 1975)); *see Schlesinger v. CIA*, 591 F. Supp. 60, 66 (D.D.C. 1984) (defining "official disclosures" as "direct acknowledgements by an authoritative government source"). The Press Secretary is the appointed spokesperson for the President, who heads the entire executive branch. It is true that Mr. Spicer has faced criticism for making various inaccurate statements during his tenure as Press Secretary, but the government has not retracted or refuted Mr. Spicer's descriptions of the Raid, nor is there any other reason to doubt their veracity. Plaintiffs have found no case that has rejected as "unofficial" the statements of officials wielding the imprimatur of the White House, as Mr. Spicer did—indeed, to the contrary. *See N.Y. Times I*, 756 F.3d at 115, 119 (reviewing official acknowledgments by individuals "at the highest levels of the government," including John O. Brennan, then–Assistant to the President for Homeland Security and Counterterrorism); *Drones FOIA*, 710 F.3d at 429 n.7 (holding that a *Glomar* response may be defeated by previous disclosures "made by an

[21] To the extent the CIA's *Glomar* response is proffered to protect the supposed secret that the agency *lacks* an intelligence interest in the Raid (and that a "no records" response would reveal that absence), that argument is plainly illogical and implausible given the factual record here.

authorized representative of the agency's parent," such as the President or "his counterterrorism advisor acting as 'instructed' by the President").[22]

In sum, to suggest that the agency's interest remains a secret would be illogical and implausible—as would be suggesting that the agency had no such interest. As the D.C. Circuit wrote in *Drones FOIA*, asking a court to uphold a *Glomar* response in the face of official disclosures is akin to asking courts "to give their imprimatur to a fiction of deniability that no reasonable person would regard as plausible. 'There comes a point where . . . Court[s] should not be ignorant as judges of what [they] know as men' and women." 710 F.3d at 431 (quoting *Watts v. Indiana*, 338 U.S. 49, 52 (1949) (opinion of Frankfurter, J.)); *see also ACLU v. DOD*, 396 F. Supp. 2d 459, 462 (S.D.N.Y. 2005) ("[T]he CIA, no less than any other governmental agency, is not exempted from responding to a FOIA request, unless it shows that an answer will give away a classified secret."); *ACLU v. DOD*, 389 F. Supp. 2d at 561, 566 (explaining that "[t]he danger of *Glomar* responses is that they encourage an unfortunate tendency of government officials to over-classify information, frequently keeping secret that which the public already knows, or that which is more embarrassing than revelatory of intelligence sources or methods").

2. Even if the government had not officially acknowledged the CIA's intelligence interest, that interest is not protected under Exemptions 1 and 3.

As discussed above, even if the government had not made official acknowledgments about the Raid, the CIA would bear the burden of justifying its *Glomar* response by "logically

[22] A single statement by a single official—here, the Press Secretary—is enough to show official acknowledgment. Under the official acknowledgment doctrine, it is the nature, not the number, of the disclosures that matter—indeed, many official-acknowledgment cases have been decided on the basis of a single government statement, even where other proffered statements fell short. *See, e.g.*, *Wolf*, 473 F.3d at 378–80; *Smith*, 246 F. Supp. 3d at 32–34. Regardless, Plaintiffs do not solely rely on Mr. Spicer's February 2 briefing as the lone source of official acknowledgment in this case.

and plausibly" invoking one of FOIA's exemptions. In its pre-motion letter, the CIA asserted that acknowledging the existence of records would cause harm under FOIA Exemptions 1 and 3 by revealing information that "pertains to intelligence sources and methods." CIA Pre-Motion Letter at 2. But it is highly unlikely that the government could carry its FOIA burden on that basis, though the ACLU reserves its full argument on this point until it has evaluated the CIA's declaration.

Exemption 1 excludes from disclosure matters that are both "(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." 5 U.S.C. § 552(b)(1). Under the relevant executive order, information may be classified if: (1) it is classified by an original classification authority; (2) it is under the control of the government; (3) it "pertains to" a "classification categor[y]" defined in section 1.4 of the order; and (4) its disclosure could be reasonably expected to result in identifiable or describable damage to the national security. Exec. Order No. 13,526 §§ 1.1, 1.4, 75 Fed. Reg. 707 (Dec. 29, 2009). The classification category upon which the CIA relies here is that concerning "intelligence activities (including covert action), intelligence sources or methods, or cryptology." *Id.* § 1.4(c).

Exemption 3 applies to documents withheld pursuant to qualifying withholding statutes. *See* 5 U.S.C. § 552(b)(3). To support an Exemption 3 withholding under a qualifying statute, the government bears the burden of showing that its withholdings fall within the statute's scope. *See N.Y. Times I*, 756 F.3d at 112. The CIA has indicated that its invocation of Exemption 3 in support of its *Glomar* response relies on the National Security Act of 1947, which prohibits the "unauthorized disclosure" of "intelligence sources and methods." 50 U.S.C. § 3024(i).

It is unlikely that the CIA can logically and plausibly contend that its *Glomar* response protects a legitimate "source or method." *See Florez*, 829 F.3d at 182 ("We find a *Glomar* response justified only in unusual circumstances, and only by a particularly persuasive affidavit." (quotation marks omitted)). As explained above, responding to the Request in regular order, rather than with a *Glomar* response, would merely reveal the agency's "intelligence interest" in the Raid. But notwithstanding whether that interest has been officially acknowledged here, an "intelligence interest" is not, in and of itself, an "intelligence source or method" protectable under Exemptions 1 and 3. *See ACLU v. DOD*, No. 15 Civ. 9317, 2017 WL 4326524, *18 (S.D.N.Y. Sept. 27, 2017) (explaining that a blanket invocation of the "sources and methods" exemption did not automatically protect everything in a specific document, and absent sufficient justification, only "information concerning 'foreign liaison services,' 'locations of covert CIA installations and former detention centers,' 'classified code words and pseudonyms,' and 'classification and dissemination control markings'" could be withheld).

It would radically and impermissibly enlarge the scope of the CIA's withholding authority under the FOIA to permit the agency to protect, as a classified intelligence "source or method," its bare intelligence interest in events in which the agency naturally and obviously maintains such an interest.[23] The phrase "intelligence sources and methods" has sometimes been given broad scope, but it does not afford the CIA a categorical exemption from the FOIA. *See, e.g.*, *Weissman v. CIA*, 565 F.2d 692, 694–96 (D.C. Cir. 1977) (holding that the CIA's authority to protect "intelligence sources and methods" did not extend to domestic law-enforcement functions); *Navasky v. CIA*, 499 F. Supp. 269, 274 (S.D.N.Y. 1980) (holding that the CIA's book-publishing propaganda was not an "intelligence source or method" that had been

[23] The ACLU will further develop this argument in its reply brief when it is able to address the agency's declaration.

"contemplated by Congress"); *see also Phillippi I*, 546 F.2d at 1015 n.14 (The reference in the CIA Act to "functions" does not give the CIA license "to refuse to provide any information at all about anything it does"; rather, it exempts the CIA from providing information regarding its "'internal structure.'"). Indeed, when the CIA sought a categorical exemption from the FOIA, Congress refused to supply it. *See* Karen A. Winchester & James W. Zirkle, *Freedom of Information and the CIA Information Act*, 21 U. Rich. L. Rev. 231, 256 (1987) (detailing congressional rejection of the CIA's plea to "exclude totally the CIA . . . from the requirements of FOIA"). Later, when Congress enacted the CIA Information Act to streamline processing of FOIA requests by creating "a limited exemption from the [FOIA] for selected CIA records," it underscored the CIA's broad FOIA obligations and explained that its amendment "represent[ed] a reaffirmation by the Congress that the principles of freedom of information are applicable to the CIA." H.R. Rep. No. 98-726(II), at 6 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3778, 3780.

II. The Government Must Search for Responsive Records and Produce a *Vaughn* Index.

Plaintiffs respectfully request that the Court reject the CIA's *Glomar* response because it is neither logical nor plausible. The Court should then order the agency to search for and process responsive records and produce a *Vaughn* index to Plaintiffs for any records withheld in whole or in part based on claimed exemptions. Such an order would assist in efficient adjudication of this case, consistent with the purposes of the FOIA.

FOIA litigation can present special challenges because requestors rarely know precisely what responsive records contain. In the seminal FOIA case, *Vaughn v. Rosen*, 484 F.2d 820, the D.C. Circuit grappled with those challenges and articulated a set of best practices to which courts across the country adhere to this day. There, the court "conceived of the document now known as the *Vaughn* affidavit as a means of overcoming the institutional difficulties inherent

in FOIA litigation." *Halpern v. FBI*, 181 F.3d 279, 290 (2d Cir. 1999). As the court explained in *Vaughn*, the inherent "lack of knowledge by the party seeing disclosure" concerning what, precisely, they are arguing over "seriously distorts the traditional adversary nature of our legal system's form of dispute resolution." 484 F.2d at 824; *see id.* at 823 ("In light of [FOIA's] overwhelming emphasis upon disclosure, it is anomalous but obviously inevitable that the party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of the concealed information."). Moreover, "the court acknowledged the institutional incentives that might encourage an agency to withhold as much information as possible and to claim the broadest possible exemptions under FOIA, thereby shifting the burden to the courts to sort through a seemingly endless 'morass of material.'" *Halpern*, 181 F.3d at 290 (quoting *Vaughn*, 484 F.2d at 826).[24]

"To correct the adversarial imbalance of information, and to permit more effective factual review," *Halpern*, 181 F.3d at 290, the court held in *Vaughn* that agency FOIA defendants should meet their statutory burden by crafting an index of responsive records that would "(1) assure that a party's right to information is not submerged beneath governmental obfuscation and mischaracterization, and (2) permit the court system effectively and efficiently to evaluate the factual nature of disputed information." 484 F.2d at 826. According to the D.C. Circuit, "[a]n adequate *Vaughn* index serves three functions: [1] it forces the government to analyze carefully any material withheld, [2] it enables the trial court to fulfill its duty of ruling on the

[24] As courts since *Vaughn* have recognized, these concerns are particularly pronounced in the national-security context. As one court in this District explained in rejecting a CIA *Glomar* response, "[t]he danger of *Glomar* responses is that they encourage an unfortunate tendency of government officials to over-classify information, frequently keeping secret that which the public already knows, or that which is more embarrassing than revelatory of intelligence sources or methods." *ACLU v. DOD*, 389 F. Supp. 2d at 561, 566; *see ACLU v. DOD*, 396 F. Supp. 2d at 462 ("[T]he CIA, no less than any other governmental agency, is not exempted from responding to a FOIA request, unless it shows that an answer will give away a classified secret.").

applicability of the exemption, and [3] it enables the adversary system to operate by giving the requester as much information as possible, on the basis of which he can present his case to the trial court." *Keys v. DOJ*, 830 F.2d 337, 349 (D.C. Cir. 1987) (quotation marks omitted). Moreover, a *Vaughn* not only helps balance the informational disparity at the heart of FOIA cases, but allows plaintiffs to intelligently narrow the litigation going forward by evaluating its legal claims to particular records and only pursuing those it deems have merit.

The *Vaughn* requirement is a flexible one concerned more with function than a rigid form. *See Halpern*, 181 F.2d at 291; *Drones FOIA*, 710 F.3d at 432–33. But as the Second Circuit has explained, any version of a *Vaughn* index must meet two principal requirements:

> First, the documentation must include "a relatively detailed analysis [of the withheld material] in manageable segments" without resort to "conclusory and generalized allegations of exemptions." Second, the documentation must also provide "an indexing system [that] would subdivide the [withheld] document under consideration into manageable parts cross-referenced to the relevant portion of the Government's justification."

Halpern, 181 F.3d at 290 (alteration in original) (citation omitted) (quoting *Vaughn*, 484 F.2d at 826–27). Those demands not only serve to assist FOIA plaintiffs, they equally assist judges in doing their jobs. *See Vaughn*, 484 F.2d at 825 ("But where the documents in issue constitute hundreds or even thousands of pages, it is unreasonable to expect a trial judge to do as thorough a job of illumination and characterization as would a party interested in the case.").

The form of a *Vaughn* index can vary, but it traditionally consists of a document-by-document index listing important information (such as dates, titles, authors and recipients, exemptions claimed, etc.). *See Elec. Frontier Found. v. DOJ*, 826 F. Supp. 2d 157, 170–71 (D.D.C. 2011) (rejecting a *Vaughn* submission that did not include information concerning the "names, titles, or positions of the authors or recipients of the documents," or "sufficient detail concerning the withheld 'drafts,'" such as details about their "place in a particular

decisionmaking context"). Under limited circumstances, courts have accepted a so-called "no number no list" response, which the D.C. Circuit termed "a radically minimalist" *Vaughn* index by which an agency "conced[es] . . . that [it] has some documents, but nonetheless argu[es] that any description of those documents would effectively disclose validly exempt information," *Drones FOIA*, 710 F.3d at 433. But this is heavily disfavored: like a *Glomar* response, it will be "justified only in unusual circumstances, and only by a particularly persuasive affidavit." *Id.*; *accord N.Y. Times I*, 756 F.3d at 122. While the CIA has some flexibility to craft its index, it must do so cognizant of its duty "to create as full a public record as possible[] concerning the nature of the documents and the justification for nondisclosure." *N.Y. Times Co. v. DOJ*, 758 F.3d 436, 439 (2d Cir. 2014) (quotation marks omitted).

CONCLUSION

This Court should reject the CIA's *Glomar* response because it is neither logical nor plausible. The Court should then order the agency to search for, process, and produce responsive records, and provide a *Vaughn* index to Plaintiffs for any records withheld in whole or in part based on claimed exemptions.

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Respectfully submitted,

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