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 19, 2017, 2:00 p.m.

17 Civ. 3391 (PAE)

ECF CASE

CONSOLIDATED MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT CENTRAL INTELLIGENCE AGENCY'S CROSS-MOTION FOR SUMMARY JUDGMENT & IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

In its opening brief, the ACLU explained why the CIA's *Glomar* response refusing to either confirm or deny that it has records responsive to the ACLU's Freedom of Information Act ("FOIA") request (the "Request") concerning a U.S. intelligence-gathering raid conducted in al Ghayil, Yemen (the "Raid") was not logical or plausible. Given the government's official acknowledgments about the Raid, as well as a wealth of other relevant evidence, the CIA's brief does nothing to change this conclusion, and the agency's declaration fails to meet the Second Circuit's high standard in *Glomar* cases, which requires agency support to be "particularly persuasive." *Florez v. CIA*, 829 F.3d 178, 182 (2d Cir. 2016).

The CIA's bid for extreme deference to its own assertions and conclusions is overstated. It urges implausible readings of government statements concerning the CIA's intelligence interest in the Raid, and it fails in its attempts to distinguish the D.C. Circuit's highly relevant and instructive opinion in *ACLU v. CIA* (*Drones FOIA*), 710 F.3d 422 (D.C. Cir. 2013). And when the agency asserts that its acknowledgment of records here would lead to the disclosure of specific information—primarily intelligence sources—the information it identifies is not protectable under FOIA Exemptions 1 or 3, has no logical connection to the incremental step of acknowledging the existence of records, or has already been revealed by the government.

For these reasons and those that follow, the Court should grant the ACLU's motion for partial summary judgment and deny the CIA's cross-motion for summary judgment.

ARGUMENT

I. The Court does not owe deference to CIA claims that are illogical and implausible.

The CIA correctly represents that courts give deference "to the Executive's predictions of national security harm that may attend public disclosure of classified records, so long as such

predictions appear logical or plausible." CIA Memo. in Opp. to Pls.' Mot. for Partial S.J. and in Supp. of CIA's Cross-Mot. for Partial S.J. 5, ECF No. 43 ("CIA Br."). But the CIA's gloss on judicial deference does not account for the exceptional nature of *Glomar* cases, in which the agency's burden is not a "light" one, CIA Br. 6. To the contrary, in *Glomar* cases, the Second Circuit requires agency affidavits to be "particularly persuasive"—including in the national-security context. *Florez*, 829 F.3d at 182. Indeed, in *Florez*, the Second Circuit rejected the CIA's *Glomar* response despite the CIA's and the dissent's arguments that deference was owed to the agency's affidavits and therefore they were sufficient to carry the agency's burden. *See id.* at 194 n.6 (Livingston, J., dissenting).

Even in the context of judicial deference to executive-branch assertions of harm, the D.C. Circuit has explained that agency recitations of deference do not obviate the need for *de novo* judicial review of claims of FOIA exemptions. *See Goldberg v. DOS*, 818 F.2d 71, 76–77 (D.C. Cir. 1987). Fundamentally, "deference is not equivalent to acquiescence," and "[a]mong the reasons that a declaration might be insufficient are lack of detail and specificity, bad faith, and failure to account for contrary record evidence." *Campbell v. DOJ*, 164 F.3d 20, 30 (D.C. Cir. 1998). Moreover, there is a pivotal difference between the reasonable deference owed to logical and plausible agency predictions of harm, *see, e.g.*, *Wilner v. NSA*, 592 F.3d 60, 76 (2d Cir. 2009), and agency assertions of an entitlement to a FOIA exemption. As to the latter, the Second Circuit has recently underscored that an "agency's decision that the information is exempt from disclosure receives no deference; accordingly, the district court decides *de novo* whether the agency has sustained its burden." *Bloomberg, L.P. v. Bd. of Governors of Fed. Reserve Sys.*, 601 F.3d 143, 147 (2d Cir. 2010).

Critically, judicial scrutiny in *Glomar* cases related to national security plays an essential

role in checking against the very kind of abuses of secrecy that Congress enacted the FOIA to prevent. ACLU Memo. in Supp. of Mot. for Partial S.J. 7–8, 11–12, ECF No. 36 ("ACLU Br."); *see also, 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 Act Source Book: Legislative Materials, Cases, Articles, at 59 (1974). Indeed, when Congress concluded that Exemption 1 of FOIA was being interpreted too narrowly, it amended the statute to make clear that courts had the obligation to ensure—including through *in camera* review—that agencies were not wrongly withholding improperly classified information. *See CIA v. Sims*, 471 U.S. 159, 189 n.5 (1985) (Marshall, J., concurring).

For the reasons set forth in the ACLU's previous brief and further explained in this one, no deference is due to the agency declaration here because the CIA's *Glomar* response is neither logical nor plausible.

II. Because the government has officially acknowledged the CIA's intelligence interest in the Raid, it is neither logical nor plausible that the agency would not have any responsive records.

The CIA identifies the information it seeks to protect through its *Glomar* invocation as records that "would tend to confirm that the CIA either did or did not have an intelligence interest and/or operational role with respect to the Raid." CIA Br. 8. As the ACLU has explained, though, acknowledging the existence of records would not logically or plausibly reveal any CIA "role" in the Raid. *See* ACLU Br. 12–14; *see also Drones FOIA*, 710 F.3d at 427–28.[1] The

[1] For this reason, there is no need to address the question of whether Mr. Spicer's statements and other evidence establish whether the CIA had more than an intelligence interest in the Raid, including an operational role.

parties agree that responding to the Request would divulge the CIA's *intelligence interest* in the Raid. But that is because the existing official acknowledgments and other contextual evidence establish the agency's intelligence interest. The Court should reject the CIA's *Glomar* response.

A. The record establishes the CIA's intelligence interest in the Raid.

The CIA unpersuasively argues that the official acknowledgments in this case "do not come close" to establishing the agency's intelligence interest in the Raid, CIA Br. 22. According to the agency, none of the record evidence shows "*any connection* between the CIA and the [R]aid," CIA Br. 25 (emphasis added), but that assertion is simply not credible. Mr. Spicer specifically asserted that President Trump approved the Raid as part of a "very, very though[t]-out process" that culminated in a White House dinner meeting attended by CIA Director Pompeo at which "the [Raid] was laid out in great extent." 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"); *see* ACLU Br. 4–5, 15–19. Mr. Spicer further acknowledged that the Raid's object was "intelligence-gathering," and that it was a success. 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"). Indeed, the CIA itself acknowledged in this very litigation—in a statement the CIA entirely ignores in its brief—that "the President consulted with [Director Pompeo] and other advisors before authorizing the [R]aid." CIA Response to ACLU Pre-Mot. Letter 2 (Sept. 11, 2017), ECF No. 31 ("CIA Pre-Mot. Letter") (quoted at ACLU Br. 16).[2]

[2] The CIA does not challenge that Mr. Spicer's statements were "official" for the purposes of the

The official acknowledgments here establish the CIA's intelligence interest in the Raid. CIA Director Pompeo—who "manages intelligence, collection, analysis, covert action, counterintelligence and liaison relationships with foreign intelligence services," Decl. of Antoinette B. Shiner ¶ 11, ECF No. 44 ("Shiner Decl.")—was part of the group of officials present when the Raid was discussed in detail and then approved. *See Drones FOIA*, 710 F.3d at 430 ("The defendant is, after all, the Central *Intelligence* Agency."). The Raid was intended to produce, and—according to the government—did in fact yield foreign intelligence concerning terrorist groups operating in Yemen. *See, e.g.*, Feb. 7 Spicer Briefing; Matt Spetalnick, *Trump: Yemen Raid Was Success, Gathered Vital Intelligence*, Reuters, Feb. 28, 2017, http://reut.rs/2AgfnMF (attached as Second Diakun Decl., Ex. 1). Despite all of this, the agency would have the Court believe that the CIA had *nothing to do* with the Raid. The CIA's argument—and its declarant's bald assertion that Mr. Spicer's statements "do[] not constitute an official confirmation or denial of CIA's interest . . . in the [R]aid," Shiner Decl. ¶ 11—are simply not credible. *Cf. Drones FOIA*, 710 F.3d at 430 (explaining that "it strains credulity to suggest that an agency charged with gathering intelligence affecting the national security does not have an 'intelligence interest' in drone strikes, even if that agency does not operate the drones itself").

The CIA also implies that the official acknowledgments in this case are somehow insufficient under the test set out in *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009), but that argument is misplaced. As an initial matter, the Second Circuit's most recent case interpreting the *Wilson* test cast doubt on its lasting legitimacy even as it found no need to depart from it in that case. *See N.Y. Times Co. v. DOJ* (*N.Y. Times I*), 756 F.3d 100, 120 & n.19 (2d Cir. 2014) ("A FOIA requester would have little need for undisclosed information if it had to match

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official-acknowledgment doctrine.

precisely information previously disclosed. . . . Although we conclude that the three-part test of *Wilson* has been satisfied, and *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."). More importantly here, *Wilson* was not a FOIA case, let alone a *Glomar* one. The Second Circuit has not applied the *Wilson* test to a *Glomar* response, and the D.C. Circuit in *Drones FOIA* and other courts have indicated that the official-acknowledgment inquiry in *Glomar* cases is simply different. *See* ACLU Br. 9–10; *Drones FOIA*, 710 F.3d at 429–30 (considering whether it was "logical [or] plausible for the CIA to maintain that it would reveal anything not already in the public domain to say that the Agency 'at least has an intelligence interest'" in drone strikes without applying the three-prong test). Unlike in typical official-acknowledgment cases, this inquiry does not necessarily involve the direct comparison between a specific redacted fact and the text of an acknowledgment. When it comes to applying the elements of *Wilson* to the existence or nonexistence of records, the test is simply a poor fit.

Moreover, in evaluating whether the agency has met its "logical and plausible" burden, including in *Glomar* cases, official acknowledgments must not only be read together, rather than in isolation, but against a backdrop of publicly known facts, other relevant evidence, and common sense. *See, e.g.*, *Drones FOIA*, 710 F.3d at 430; *N.Y. Times I*, 756 F.3d at 115. The contextual facts and evidence need not themselves be "official acknowledgments." *See, e.g.*, *Florez*, 829 F.3d at 186–87; *N.Y. Times I*, 756 F.3d at 115. The Second Circuit recently reaffirmed this principle in *Florez*, in which it held that evidence deemed "relevant" under the Federal Rules of Evidence may be brought to bear on evaluating the legitimacy of an agency's *Glomar* response. 829 F.3d at 186–87. There, the court addressed the relevance of the affidavits of *other* agencies to its "logical and plausible" evaluation of the CIA's *Glomar* response, and

refused to "place an arbitrary limitation on the range of evidence a district court may consider in assessing the sufficiency of an agency affidavit filed in support of a *Glomar* response." *Id.* at 187; *see id.* ("It defies reason to instruct a district court to deliberately bury its head in the sand to relevant and contradictory record evidence solely because that evidence does not come from the very same agency seeking to assert a *Glomar* response in order to avoid the strictures of FOIA."); *see also Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982) ("The test is not whether the court personally agrees in full with the CIA's evaluation of the danger—rather, *the issue is whether on the whole record* the Agency's judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility . . . ." (emphasis added)).

Here, the relevant context of Mr. Spicer's official acknowledgments about the CIA's interest in the Raid confirms the illogic and implausibility of accepting the agency's arguments to the contrary. *See* ACLU Br. 17–18 (discussing the functions of the CIA, the CIA Director's role in the Trump administration, and past acknowledged CIA activities in Yemen). Indeed, the agency agrees with the ACLU that it is "not surprising" that Director Pompeo attended the approval dinner, given his and the CIA's roles in national-security matters, CIA Br. 23 (citing Shiner Decl. ¶ 11); *see* ACLU Br. 17, but it illogically argues that the Director's presence says little about the agency's connection to any aspect of the Raid. To the contrary, the reason that Director Pompeo's presence at the dinner is unsurprising is that the agency's intelligence interest in operations like the Raid, and in the Raid itself, is obvious.[3]

The CIA's attempts to minimize the significance of particular acknowledgments are

[3] Contrary to the CIA's suggestion, CIA Br. 24, the ACLU does not contend that "any and all intelligence-related governmental activity must be conducted by the CIA." Nor does it suggest that any acknowledged intelligence activity conducted by the U.S. government would, as a matter of logic and plausibility, involve a CIA "intelligence interest" sufficient to defeat an agency *Glomar* response. But where, as here, both official acknowledgments and the relevant context confirm the CIA's interest, the agency cannot meet its *Glomar* burden.

beside the point. For example, with respect to Mr. Spicer's acknowledgements, the CIA argues that "[n]one of those comments even refers to the CIA at all (except in using Director Pompeo's title)," CIA Br. 22, and that Mr. Spicer's February 2 press briefing only referenced Director Pompeo once, *see* CIA Br. 23. If the agency means to suggest that Director Pompeo's presence at the dinner meeting bore no connection to agency business, that is not plausible, and it is belied by the agency's concession that Director Pompeo was there to "consult" with the president about the Raid, CIA Pre-Mot. Letter at 2.[4] Similarly, although the CIA attempts to downplay Director Pompeo's participation in the approval meeting by pointing out that other agencies and officials were also involved in the approval process, CIA Br. 23, this instead simply proves that multiple agencies had equities in the Raid. And although the CIA asserts that Mr. Spicer's description of the Raid's "intelligence-gathering" purpose contained "no reference whatsoever to the CIA or even Director Pompeo" and therefore cannot be "an official acknowledgment with respect to the CIA," CIA Br. 23–24, that argument is misleading. The ACLU did not offer that comment as a *direct* acknowledgment about the CIA's involvement in the Raid. Rather, the acknowledgment goes to the *character* of the Raid as an intelligence-gathering operation—and, in conjunction with the remainder of the record, helps establish why it is implausible that the CIA does not have an intelligence interest in it. *See* ACLU Br. 16–17.

[4] Curiously, in its brief, the CIA appears to avoid admitting that Director Pompeo attended the meeting. *See, e.g.*, Shiner Decl. ¶ 10–11 (discussing the "Director's possible attendance at a meeting in which the raid was discussed"). But the agency does not actually contest Mr. Spicer's statement, and, in fact, it already conceded this fact in this litigation. *See* CIA Pre-Mot. Letter 2 (arguing that Director Pompeo's "presence at the dinner meeting conveys no more than that the President consulted with him and other advisors before authorizing the raid").

The CIA further explains that it conducted a search for records reflecting Director Pompeo's attendance at the Raid approval dinner, created before or after the fact, and found none. *See* Shiner Decl. ¶ 10. This is an unusual practice in a *Glomar* case. As explained below, the fact that the CIA pierced its own *Glomar* veil to perform a limited search here only undercuts the logic and plausibility of its claim that harm would result from providing an ordinary FOIA response in this case.

Likewise, the CIA fails in its efforts to dispute the fact that its ongoing general interest and operation in Yemen has long been common knowledge. In 2015, then–CIA Director John O. Brennan explained that CIA analysts "monitor[] developments" in a number of "hotspots," specifically mentioning Yemen. John Brennan, Director, CIA, Speech at the Council on Foreign Relations (Mar. 13, 2015), https://www.cia.gov/news-information/speeches-testimony/2015-speeches-testimony/director-brennan-speaks-at-the-council-on-foreign-relations.html (attached as Second Diakun Decl., Ex. 2). In 2014, Brennan explained that the activities of Al-Qaeda in the Arabian Peninsula ("AQAP") "[i]n Yemen"—the acknowledged organizational target of the Raid at issue here—are among the "challenges that cause us the greatest concern." John Brennan, Director, CIA, Remarks at the President's Associates Dinner at the University of Oklahoma (Feb. 26, 2014), https://www.cia.gov/news-information/speeches-testimony/2014-speeches-testimony/remarks-by-cia-director-john-brennan-as-prepared-for-delivery-at-the-presidents-associates-dinner-at-the-university-of-oklahoma.html ("Brennan 2014 Remarks") (attached as Second Diakun Decl., Ex. 3). And in 2011, then–CIA Director David H. Petraeus specifically addressed "[p]olitical unrest in Yemen [that] has helped AQAP co-opt local tribes and extend its influence," explaining that "counterterrorism cooperation with Yemen has, in fact, improved," and that "we clearly have to intensify our collaboration and deny AQAP the safehaven that it seeks to establish." David H. Petraeus, Director, CIA, Statement on the Terrorist Threat Ten Years After 9/11 (Sept. 13, 2011), https://www.cia.gov/news-information/speeches-testimony/speeches-testimony-archive-2011/statement-on-the-terrorist-threat-after-9-11.html (attached as Second Diakun Decl., Ex. 4).[5]

[5] The CIA suggests that the Second Circuit's determination that it is "common knowledge" that the agency "had an operational role in the drone strike that killed [Anwar] al-Awlaki," *N.Y. Times I*, 756 F.3d at 118, is *dicta*. CIA Br. 24. But far from being *dicta*, that holding was integral

Finally, the CIA argues that "even if the CIA itself avowed a 'general' interest in Yemen, that would not be an official acknowledgment of the agency's specific interest or involvement in a particular operation." CIA Br. 25. But the ACLU's argument here is not that a "general acknowledgment" can defeat a *Glomar* response to a request for more specific information. Rather, it is that the CIA's intelligence interest in the Raid has been officially acknowledged, and its "'general' interest in Yemen" is relevant to the question of whether the CIA's *Glomar* response is logical and plausible. *See Florez*, 829 F.3d at 186–87 (courts may evaluate "relevant evidence . . . bearing upon the sufficiency of the justifications set forth by the CIA in support of its *Glomar* response"). The cases the CIA cites in support of the proposition that a more general fact does not necessarily reveal a more specific fact are thus inapposite here. *See* CIA Br. 25 (citing *Wilner*, 592 F.3d 60; *Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479 (S.D.N.Y. 2010)).

B. The CIA's attempts to distinguish *Drones FOIA* are unpersuasive.

The CIA's attempts to minimize the similarities between this case and the D.C. Circuit's decision in *Drones FOIA* fail. The agency first argues that the D.C. Circuit's analysis in *Drones FOIA* is unhelpful to the ACLU because the FOIA request in *Drones FOIA* was "very broad," whereas the Request here is "more specific." CIA Br. 11. It further argues that the official acknowledgments in *Drones FOIA* "far outstrip" those at issue here. CIA Br. 12. Those are overstatements.

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to the Second Circuit's rejection of the CIA's argument that two pieces of information "merit[ed] secrecy," *N.Y. Times I*, 756 F.3d at 118: (1) the CIA had an "'operational role' in the use of targeted lethal force," CIA Br. 25; and (2) that it played that role in the strike against al-Aulaqi in Yemen, *N.Y. Times I*, 756 F.3d at 118. As with other contextual evidence described above, the ACLU does not suggest that this acknowledgment *directly* relates to the Raid, but rather that it supports the conclusion that the CIA can neither logically nor plausibly deny its intelligence interest. *See Florez*, 829 F.3d at 186–87 (explaining that courts may evaluate "relevant evidence . . . bearing upon the sufficiency of the justifications set forth by the CIA in support of its *Glomar* response").

Just like the Request in this case, the request in *Drones FOIA* included various specific requests for particular records—such as legal memoranda, civilian casualties, and after-action assessments—rather than a generic and broad request for information. For example, the *Drones FOIA* request included records concerning "the verification, both in advance of a drone strike and following it, of the identity and status or affiliation of individuals killed." Request Under Freedom of Information Act by Jonathan Manes at 6, ACLU, Jan. 13, 2009, https://www.aclu.org/files/assets/2010-1-13-PredatorDroneFOIARequest.pdf ("Drones FOIA Request") (attached as Second Diakun Decl., Ex. 5). That request is closely analogous to the ACLU's fifth request here. *See* Request at 5, ECF No. 37-1 (requesting records relating to "[t]he number and identities of individuals killed or injured in the al Ghayil Raid, including but not limited to the legal status of those killed or injured"). The CIA attempts to distinguish the two requests by describing the records the ACLU seeks here as "core operational records" (as opposed to what it calls general records in *Drones FOIA*), arguing that its possession of them "would obviously be more likely if [the CIA] played a substantive role in the Raid itself." CIA Br. 11–12. But the CIA's possession of records concerning drones was "obviously . . . more likely" if the CIA played a "substantive" role in the government's targeted-killing program, too. Moreover, the CIA's contention that the records requested here are so specific and operational in nature that a regular FOIA response is impossible ignores that the ACLU seeks records that describe the very approval process that Mr. Spicer's official acknowledgments (and the CIA's pre-motion letter) have already tied to the agency and its Director. Finally, the CIA argues that the acknowledgments at issue in *Drones FOIA* were more significant and direct than the acknowledgements here of the CIA's role or interest in the Raid—but that is incorrect. The two central acknowledgments in *Drones FOIA*, which the D.C. Circuit found sufficient on their own

to defeat the agency's *Glomar* response, did not mention the CIA *at all*. *See* 710 F.3d at 430 ("Given these official acknowledgments *that the United States has participated in drone strikes*, it is neither logical nor plausible for the CIA to maintain that it would reveal anything not already in the public domain to say that the Agency 'at least has an intelligence interest' in such strikes." (emphasis added)).

Even if CIA's contentions were accurate, they would be distinctions without difference. The central insight of the D.C. Circuit's holding and reasoning in *Drones FOIA* is that the CIA's mere acknowledgment that it possesses records responsive to a request does not, on its own, communicate more than an "intelligence interest" in the subject of the request. *See* ACLU Br. 13–14; *see Drones FOIA*, 710 F.3d at 428 (concluding that piercing the CIA's *Glomar* would not reveal whether the CIA played an operational role in the government's targeted-killing program). That intelligence interest may be in a relatively broad topic, like drones strikes generally, or in one that is relatively narrow, like the Raid. But regardless, *Drones FOIA* holds that if the government has acknowledged its intelligence interest in a subject—general or particular—it cannot later lawfully issue a *Glomar* response to hide that interest. *See* 710 F.3d at 429 ("The question before us, then, is 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. Given the extent of the official statements on the subject, we conclude that the answer to that question is no." (quotation marks and citation omitted)).

C. The CIA cannot logically and plausibly maintain that it does not possess records responsive to the Request.

Just as in *Drones FOIA*, the fact that the CIA's intelligence interest in the Raid has been officially acknowledged defeats the agency's *Glomar* response because if an agency has an established intelligence interest in a topic, "it beggars belief that it does not also have documents

relating to the subject," *Drones FOIA*, 710 F.3d at 431. The CIA, which bears the burden in this case, essentially asks this Court to accept that the nation's foremost foreign-intelligence agency had so little to do with the Raid (before, during, and in the eight months after) that it does not have a single page related to it—despite the fact that the president consulted the agency's Director about the Raid; despite the fact that the agency's Director attended a White House meeting during which the Raid was approved; despite the fact that the government asserts the Raid yielded the very kind of foreign intelligence information that was its objective; despite the fact that the agency has an intelligence interest in Yemen and has conducted an acknowledged operation there in the recent past. The Court should decline the CIA's invitation.

When it comes to *Glomar* invocations, the official-acknowledgment doctrine exists to preserve the *plausible deniability* of sensitive records exempted by the FOIA. *See, e.g.*, *Military Audit Project v. Casey*, 656 F.2d 724, 745 (D.C. Cir. 1981) (rejecting official-acknowledgment argument concerning a congressional report because, due to its lack of specificity, the "CIA still has something to hide" or could credibly "hide from our adversaries the fact that it has nothing to hide"); *cf. Wilson*, 586 F.3d at 195 (explaining that critical to the official-acknowledgment question is whether the disclosure leaves "some increment of doubt"). The doctrine does not exist to permit agencies to foist implausible fictions on courts and the public. *Cf. Drones FOIA*, 710 F.3d at 431 ("In this case, the CIA asked the courts to stretch that doctrine too far—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." (quoting *Watts v. Indiana*, 338 U.S. 49, 52 (1949) (opinion of Frankfurter, J.))). This Court should not permit the CIA to do so here.

III. The CIA's *Glomar* response is unlawful because acknowledging whether it possesses responsive records would not reveal information protected by FOIA Exemptions 1 or 3 or cause harm to national security.

The CIA claims that a number of "secret" facts would be revealed merely by disclosing the existence of responsive records. According to the CIA, piercing the *Glomar* would reveal information about its activities in Yemen generally, as well as its role in the Yemen Raid specifically—such as "whether or not the CIA may possibly have relationships with foreign liaison partners in or connect to Yemen." CIA Br. 15. The agency's arguments fail for several reasons. First, even if the CIA had not officially acknowledged its intelligence interest in the Raid, it could not protect that interest under Exemptions 1 or 3. Second, given the nature of the Request, merely acknowledging the existence or nonexistence of records would *not* logically or plausibly reveal the specific facts the CIA lists. Third, a number of the purportedly secret facts the CIA seeks to protect are not in fact secret, and have already been acknowledged by the CIA or Mr. Spicer. Finally, the willingness of other defendant agencies to search for responsive records—and the CIA's inability to explain why its substantive response would reveal classified information while the DOJ and State Department's responses would not—further demonstrates the impropriety of the CIA's *Glomar* response. The CIA's *Glomar* response is not necessary to prevent harm cognizable under Exemption 1 or Exemption 3, and it is therefore improper.

A. Even if the CIA had not officially acknowledged its intelligence interest in the Raid, that interest is not protectable under Exemptions 1 or 3 as an "intelligence source or method."

The CIA's *Glomar* response should also be rejected because an "intelligence interest" does not constitute an "intelligence source or method" within the meaning of Executive Order 13,526 or the National Security Act of 1947. Under Exemptions 1 and 3, the CIA may withhold information—or issue a *Glomar* response—if it is necessary to protect legitimate "intelligence

sources or methods." Exec. Order No. 13,526 § 1.4(c); 50 U.S.C. § 3024(i). The CIA now argues that "intelligence interests are, in fact, synonymous with intelligence sources and methods." Shiner Decl. ¶ 17. But this argument is not just illogical and implausible, it would radically and impermissibly expand the definition of sources and methods beyond what FOIA allows and courts have permitted. The Court should reject this broad argument, and in any event, need not accept it in order to find that, as discussed above, the agency's intelligence interest in the Raid has been officially acknowledged.

Based on plain meaning alone, the CIA's argument fails because an "interest" is a far broader and more inchoate concept than a "source" or a "method," and would swallow the limits imposed by the more concrete terms. *Cf. Harris v. Sullivan*, 968 F.2d 263, 265 (2d Cir. 1992) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979))). An "interest" is generally an abstract desire for or openness to information, while a "source" or "method" is more concrete. *Compare Interest*, Oxford English Dictionary, https://en.oxforddictionaries.com/definition/interest (last visited Nov. 28, 2017) ("The feeling of wanting to know or learn about something or someone."), *with Source*, Oxford English Dictionary, https://en.oxforddictionaries.com/definition/source (last visited Nov. 28, 2017) ("A person who provides information" or "[a] place, person or thing from which something originates or can be obtained."); *Method*, Oxford English Dictionary, https://en.oxforddictionaries.com/definition/method (last visited Nov. 28, 2017) ("A particular procedure for accomplishing or approaching something, especially a systematic or established one."). As the Supreme Court has explained, an "intelligence source" encompasses "all sources of intelligence that provide, or are engaged to provide, information the Agency needs to perform

its statutory duties with respect to foreign intelligence." *Sims*, 471 U.S. at 169–70 (majority op.). But the breadth of the phrase "intelligence sources and methods" is not boundless and is cabined by its plain meaning. *Id*. at 167. An "intelligence interest" falls outside of that definition. Moreover, the CIA's broad interpretation of "interest"— i.e., any topic "upon which the Agency chooses to focus" Shiner Dec. ¶ 17—would, if deemed synonymous with "sources and methods," swallow any limits to Agency secrecy claims. This, FOIA does not permit.

Unsurprisingly, the CIA cites no cases to support its extreme argument, and courts have rejected even less extreme variants. For example, in *Berman v. CIA*, 501 F.3d 1136 (9th Cir. 2007), the Ninth Circuit rejected the CIA's argument that editions of the President's Daily Brief—a daily memorandum summarizing the latest, most important intelligence analysis—were themselves intelligence methods. As the court explained, "accept[ing] the CIA's logic" would mean that "every written CIA communication—regardless of content—would be a protected 'intelligence method,'" and "[t]he CIA would then be able to avoid entirely our requirement that it provide a specific justification that explains why the particular document requested fits within exemption 3." *Id.* at 1146. Indeed, courts have rejected such unbounded constructions of the CIA's asserted withholding authority. *See* ACLU Br. 21–22*; see, e.g.*, *Navasky v. CIA*, 499 F. Supp. 269, 274 (S.D.N.Y. 1980); *N.Y. Times I*, 756 F.3d at 119 ("In fact, legal analysis is not an intelligence source or method." (quotation marks omitted)); *see also ACLU v. DOD*, 389 F. Supp. 2d 547, 565 (S.D.N.Y. 2005) (explaining that a "memorandum from DOJ to CIA interpreting the Convention Against Torture does not, by its terms, implicate"—let alone constitute—"intelligence sources or methods").

Indeed, the CIA overstates the cases it says establish that the agency can effectively determine for itself whether information can be protected as an intelligence source or method,

see CIA Br. 17. Those cases were concerned core intelligence sources, and did not even remotely sanction the kind of broad secrecy invocation the CIA argues here. In *Sims*, the Supreme Court addressed only whether a "source or method" included "the identities of individual . . . researchers" involved in a CIA-financed clandestine research project. 471 U.S. at 161–62, 181. In *Hunt v. CIA*, 981 F.2d 1116 (9th Cir. 1992), the Ninth Circuit held only that "the disclosure of the existence or non-existence of records pertaining to [a specific Iranian national] is tantamount to a disclosure whether or not he was a CIA source or intelligence target." *Id.* at 1119. And in *Gardels*, the D.C. Circuit analyzed only a *Glomar* request concerning "covert contacts for foreign intelligence purposes between the Agency and individuals at a specific university in the United States." 689 F.2d at 1102. That the phrase "intelligence sources and methods" encompasses these types of matters says very little about the radical expansion the CIA proposes in this case. *See, e.g.*, *Weissman v. CIA*, 565 F.2d 692, 694–96 (D.C. Cir. 1977) (adopting a limited definition of "intelligence sources and methods").

These cases show that it may be true in *some* circumstances that acknowledging a particular CIA intelligence interest would necessarily *reveal* a protectable CIA source or method, but such sources and methods are more akin to a particular individual than an entire topic. *See, e.g.*, *Wolf v. CIA*, 473 F.3d 370, 376 (D.C. Cir. 2007) (concluding that "revealing that the CIA maintains records regarding specific foreign nationals could potentially reveal targets of CIA surveillance and, thus, CIA methods"). As discussed below, *see infra* Part III.B., given the nature of this FOIA Request, no alleged sources or methods that the CIA claims are at risk of disclosure would actually be newly revealed by disclosing the CIA's intelligence interest in the Raid.

The CIA's argument that "intelligence interests are, in fact, synonymous with intelligence sources and methods," Shiner Decl. ¶ 17, fails to grapple with the plain meaning—and court-

recognized bounds—of the latter phrase. Critically, the consequences of accepting the agency's argument would be extraordinary, effectively granting the CIA a vastly-expanded exemption from the FOIA—something Congress and the courts have both considered and rejected. *See* ACLU Br. 21–22. This Court should do the same here.

B. Disclosure of the CIA's intelligence interest would not logically or plausibly reveal intelligence sources, methods, or activities protected by Exemptions 1 or 3 or cause harm to national security.

The CIA claims that acknowledging the existence or nonexistence of records would tend to reveal various facts that the agency claims are protectable under Exemptions 1 and 3 and have not been officially acknowledged. But the CIA is wrong on every count. None of the agency's claims meet the "logical and plausible" test—let alone the Second Circuit's instruction that such assertions be "particularly persuasive" in *Glomar* cases. *Florez*, 829 F.3d at 182.

The CIA claims that acknowledging the existence or nonexistence of records would somehow reveal or tend to reveal: (1) whether "the CIA operates in Yemen"; (2) whether "the CIA communicated or coordinated with other agencies about the Raid"; (3) whether "the CIA may possibly have relationships with foreign liaison partners in or connected to Yemen"; (4) whether "the Raid was an intelligence priority for the CIA"; and (5) whether "the CIA was able to, or did, provide intelligence support in connection with the Raid." CIA Br. 15. The agency claims that these revelations, in turn, would lead to various consequences: they would enable "a foreign intelligence service or terrorist organization . . . to redirect its resources to identify particular CIA sources, circumvent the CIA's monitoring efforts, and generally enhance its intelligence or deception activities at the expense of the United States." CIA Br. 13–14. According to the CIA, this would not only "reveal the targets of the CIA's collection efforts," but also "the requirements placed upon it by the government consumers of the Agency's intelligence

products." CIA Br. 13–14; Shiner Dec. ¶ 17. Finally, the CIA argues that "showcasing the topics upon which the Agency chooses to focus" would "be revealing of the U.S. Government's policy objectives." CIA Br. 13. All of this, it claims, will "reduc[e] the CIA's effectiveness, requir[e] a diversion of CIA resources, and result[] in a loss of valuable intelligence," CIA Br. 14, and "cause damage to national security," CIA Br. 10.

The CIA's claims do not hold up to scrutiny. It is difficult to imagine how merely revealing the existence of responsive records could logically or plausibly result in *any* of these harms under the FOIA, or in harm to national security under Exemption 1.

First, because of the nature of the Request, acknowledging the existence of records at this stage in the case would at most reveal whether the CIA has an intelligence interest in the Raid—not whether it played any sort of role, much less the specifics of that role. *See supra* Part II.A; ACLU Br. 12–14 (citing *Drones FOIA*, 710 F.3d at 427–28). Acknowledging that the CIA possesses a responsive record would not reveal the prong (or prongs) of the Request to which that record relates. A responsive record might relate to the Raid's approval process, or its legal basis, or the resulting death of the Navy SEAL or Yemeni civilian casualties. *See* Request at 5 (prongs 1, 2, 4, and 5). It might not even relate to the Raid at all. *See id.* (prong 3). It might not even relate to the CIA at all. *See* ACLU Br. 14. Although the CIA weakly claims in a footnote that it is "far from obvious" that the CIA could possess records responsive to the request if it did not play a role in the Raid itself, CIA Br. 13–14, this argument conflicts with the CIA's acknowledged intelligence activities in Yemen, including the former CIA Director's acknowledgment that the agency's analysts "monitor[] developments" there. *See supra* Part II.A. It is plainly conceivable that the CIA possesses records related to the Raid even if its personnel

did not participate in it, and even if it did not actually provide intelligence to support it.[6]

Indeed, the CIA's own brief acknowledges the failure of the agency's logic when it argues that a more general fact cannot serve to acknowledge a more specific fact. *See* CIA Br. 25. Yet in defending its claims of harm, the agency contends that acknowledging the mere existence of records about, for example, the decision-making process for the Raid, *see* Request at 5 (prong 2), would not only somehow reveal particular CIA sources, but also enable an adversary to circumvent monitoring efforts. *See* CIA Br. 15. In order to justify its *Glomar* response, the agency must demonstrate that merely saying it does or does not have a record would inevitably reveal something other than its acknowledged intelligence interest in the Raid. But as a matter of logic, its various attempts to do so here fail. In short, possessing a responsive record could mean any number of things, but it only means one thing for certain, and that thing is already known: that the CIA has an intelligence interest in the Raid.

When courts *have* concluded that disclosure of the existence of records would lead to the revelation of a particular CIA source or method, it has typically been because the FOIA request

[6] In its opening brief, the ACLU argued that the CIA might possess responsive records that "relate only to the U.S. government's involvement in the Raid generally, and not the CIA's operational or intelligence role specifically." ACLU Br. 14. Such records could logically and plausibly include, for example, a CIA memorandum about the results of a Department of Defense ("DOD") lethal strike. The CIA disputes this argument, but in so doing, it misleadingly quotes its own regulations to assert that the CIA would not process such records as its own. *See* CIA Br. 13 n.3 ("[I]f, in searching for documents responsive to the Request[s], the CIA located '[r]ecords originated by other federal agencies or CIA records containing other federal agency information,' CIA regulations direct that such information 'shall be forwarded to such agencies . . . for action under their regulations and direct response to the requester.' 32 C.F.R. § 1900.22(b); *see also* EO 13526 § 3.6(b).").

It is true that the CIA would forward both types of records—CIA records originated by other agencies, and CIA records containing other-agency information—for review by the relevant agencies. But the CIA's selective quotation of its regulations obscures the fact that the agency must still process the latter group of records—CIA records that merely *contain* information about other agencies—as its own. *See* 32 C.F.R. § 1900.22(b) (records "shall be forwarded to such agencies . . . for action under their regulations and direct response to the requester *(for other agency records) or return to the CIA (for CIA records)*" (emphasis added)).

was designed to obtain records *about the specific source or method itself*. *See supra* Part III.A; *see, e.g.*, *Wolf*, 473 F.3d at 376 (concluding that revealing the existence of CIA records "regarding specific foreign nationals could potentially reveal targets of CIA surveillance and, thus, CIA methods"); *Hunt*, 981 F.2d at 1119 (similar).

Just as disclosing the existence of records would not logically or plausibly reveal facts the CIA might legitimately keep secret or cause harm to national security under Exemption 1, neither would revealing the nonexistence of records disclose those facts. For example, the CIA argues that revealing the nonexistence of records would reveal that the CIA "did not have some role in the operation or outcome" or that the CIA was "[unable] to successfully carry out the purported operational activities." CIA Br. 10; Shiner Decl. ¶ 16, 18. But this is not what a lack of records would logically reveal. After all, the CIA could have had a role in the Raid not captured by the Request or the universe of responsive records. Revealing that no records exist says nothing about the success of the agency's operational activities; perhaps the agency was capable of participating in the Raid, but chose not to. There are a host of possibilities that are not confirmed or denied by revealing the nonexistence of records, and the agency's justifications are thus neither logical nor plausible. But more importantly, on this record, it is simply not plausible that the agency does not have any responsive records.

In fact, the failure of the CIA to demonstrate that harm would flow from an acknowledgment that it did not possess responsive records is underscored by the fact that it already conducted a limited search for records in this case. That search turned up no "records about the Director's attendance at different meetings [or] any related background material relevant to a particular meeting"—presumably, but not explicitly, the January 25 White House dinner meeting. Shiner Decl. ¶ 10. The fact that the CIA pierced its own *Glomar* veil to perform

this search undermines the logic and plausibility of its claim that harm would result from providing an ordinary FOIA response in this case. If the CIA can, without causing harm, acknowledge the nonexistence of a subset of records responsive to the Request, it has essentially defeated its own response.

At bottom, there is only a highly tenuous connection between the *Glomar* response and the facts the CIA claims are at risk of disclosure. Ultimately, the controlling inquiry is whether the *Glomar* response is "logical or plausible," *Florez*, 829 F.3d at 191, and none of the cases the CIA cites support the expansive and attenuated *Glomar* response it seeks to invoke here. *See ACLU v. DOJ*, 681 F.3d 61, 70 (2d Cir. 2012) (upholding the redaction of specific "limited material" from OLC memoranda under Exemption 1); *Ctr. for Const. Rights v. DOD*, 968 F. Supp. 2d 623, 638 (S.D.N.Y. 2013) (upholding a *Glomar* response to records concerning a specific individual because it would "necessarily reveal whether the CIA has ever had any interest" in that individual).

Second, many of the purportedly protected facts that the CIA claims would be revealed have already been publicly acknowledged. For example, the agency claims that it cannot respond because doing so would reveal "whether or not . . . the CIA operates in Yemen." CIA Br. 15. But as explained above, that is no secret according to the agency itself. *See supra* Part II.A. Similarly, that "the CIA communicated or coordinated with other agencies about the Raid," CIA Br. 15, was specifically acknowledged by Mr. Spicer when he disclosed that the CIA Director was part of the interagency meeting where the Raid was approved. *See* Feb. 2 Spicer Briefing. And to the extent that acknowledging that the CIA possesses records responsive to the Request would acknowledge "the U.S. Government's policy objectives," CIA Br. 13 (quoting Shiner Decl. ¶ 17), these objectives have been publicly discussed at length by a number of government

statements. *See, e.g.*, *id.*; Press Release, Dep't of Defense, U.S. Service Member Killed in Raid on Terrorists in Yemen (Jan. 29, 2017), https://www.defense.gov/News/Article/Article/1063593/us-forces-kill-14-al-qaida-in-the-arabian-peninsula-terrorists-in-yemen (attached as Second Diakun Decl., Ex. 6). These facts are not secrets, and no harm can result from their disclosure.

In sum, the CIA has plainly not provided the kind of "particularly persuasive affidavit" that is required to justify a *Glomar* response in this Circuit. *See Florez*, 829 F.3d at 182.

C. The willingness of other defendant agencies to search for and produce records demonstrates the impropriety of the CIA's *Glomar* response.

In response to the Court's inquiry at the September 18, 2017 conference, the CIA attempts to explain why it is the only defendant agency that took the extreme position of invoking a *Glomar* response. Its reasoning with respect to the other agencies applies equally to the CIA, highlighting the agency's failure to meet its *Glomar* burden.

The CIA explains that the Defense Department publicly acknowledged the Raid, and so its confirmation of the existence of records "would not in itself necessarily reveal a heretofore unacknowledged, classified fact." CIA Br. 20. Significantly, though, the CIA does not likewise argue that Justice and State Departments also publicly acknowledged the Raid. *See id.* Indeed, according to Mr. Spicer's account, representatives from those agencies were not even present at the meeting where the Raid was approved, unlike the CIA Director. *See* Feb. 2 Spicer Briefing.

Instead, the CIA argues that "it is public knowledge that components within the Departments of Justice and State might be consulted and might provide advice to other agencies, including on global military activities and operations." CIA Br. 20. Tellingly, the CIA does not suggest that any public acknowledgement of these agencies' activities in Yemen, specifically, is relevant to this analysis. According to the CIA, the fact that the Justice and State Departments consult with other agencies on global military activities—in conjunction with the fact that "one

executive agency (DOD) has publicly acknowledged the military operation at issue"—means that "confirmation by" those agencies "of the existence or nonexistence of responsive records would . . . not in itself necessarily disclose a heretofore unacknowledged, classified fact." *Id.*

The CIA is correct, and its explanation with respect to the Justice and State Departments also applies to itself and undercuts the agency's *Glomar* invocation: it, too, consults with other agencies on global military (and intelligence) activities. *See* Michael Pompeo, Director, CIA, Aspen Security Forum 2017: The View from Langley (July 20, 2017), https://aspensecurityforum.org/wp-content/uploads/2017/07/The-View-from-Langley.pdf ("[M]y team understands that our task is to provide information not only to the Commander-in-Chief but to the secretary of defense, the secretary of state and policymakers across a broad spectrum.") (attached as Second Diakun Decl., Ex. 7); Brennan 2014 Remarks ("[The CIA's] intelligence is a cornerstone of almost every aspect of national security policy, from military action to diplomacy to international law enforcement."); *About CIA: What We Do*, CIA, https://www.cia.gov/about-cia/todays-cia/what-we-do (last visited Nov. 28, 2017) ("It is important to know that CIA analysts only report the information and do not make policy recommendations—making policy is left to agencies such as the State Department and Department of Defense. These policymakers use the information that CIA provides to help them formulate US policy toward other countries.") (attached as Second Diakun Decl., Ex. 8). In short, the CIA's own reasoning demonstrates that its *Glomar* response is improper.

IV. The CIA must search for records before determining what type of substantive FOIA response it can justify.

The ACLU does not dispute the CIA's representation of the agency's possible next steps if the Court rejects its *Glomar* response. *See* CIA Br. 19 (describing potential options including "declarations providing categorical descriptions of documents, to a no-number, no-list response,

to a typical *Vaughn* index, which lists the titles and descriptions of the responsive documents that the Government contends are exempt from disclosure . . . with cites to claimed FOIA exemptions for each document listed" (quotation marks and citation omitted)). But until the CIA searches for and processes records responsive to the Request, it is impossible for the agency, the ACLU, or the Court to determine how it should proceed. In theory, all of the CIA's potential options are available, but regardless of which one the agency employs, it will still be obliged to provide "as much information as possible without thwarting [a FOIA] exemption's purpose." *King v. DOJ*, 830 F.2d 210, 224 (D.C. Cir. 1987); *see Mead Data Central v. U.S. Dep't of Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977) (explaining that an agency must provide "a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply"). Moreover, the CIA has an obligation to justify its withholdings as far as possible on the *public* record, rather than through *ex parte* filings and classified declarations. *See N.Y. Times Co. v. DOJ*, 758 F.3d 436, 439 (2d Cir. 2014) (explaining that it is an agency's duty "to create as full a *public* record as possible, concerning the nature of documents and the justification for nondisclosure" (quotation marks omitted)); *accord Halpern v. FBI*, 181 F.3d 279, 291, 295 (2d Cir. 1999). If the Court grants the ACLU's motion, then in order to avoid delays caused by potentially incomplete or inadequate agency filings, the ACLU respectfully requests that the Court engage with the parties to determine the appropriate form for the CIA's FOIA response.

CONCLUSION

The ACLU respectfully asks the Court to reject the CIA's *Glomar* response and 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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