UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION & AMERICAN CIVIL LIBERTIES UNION FOUNDATION, *Plaintiffs,* v. CENTRAL INTELLIGENCE AGENCY, *Defendant*.	No. 1:10-cv-00436 (RMC)

MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT & CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

Arthur B. Spitzer (D.C. Bar No. 235960)
American Civil Liberties Union
of the Nation's Capital
4301 Connecticut Avenue, N.W., Suite 434
Washington, D.C. 20008
T: 202.457.0800
F: 202.452.1868
artspitzer@aclu-nca.org

Jameel Jaffer
Hina Shamsi
Brett Max Kaufman (*pro hac vice*)
American Civil Liberties Union Foundation
125 Broad Street—18th Floor
New York, NY 10004
T: 212.519.2500
F: 212.549.2654
jjaffer@aclu.org

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INTRODUCTION

When Plaintiffs filed the Freedom of Information Act request at issue in this case, the Central Intelligence Agency ("CIA") offered a "Glomar response," contending that even the very existence (or not) of records concerning the use of drones to carry out "targeted killings" was a classified fact. But over the course of the subsequent three years, senior government officials made a slew of selective disclosures about the drone program's lawfulness, effectiveness, and oversight. The CIA Director supplied on-the-record statements about the program to the media. The White House's top counterterrorism official delivered speeches about it. The President spoke about it on national television. In court, however, the CIA's position remained the same: The existence (or not) of responsive records was an official secret.

Now, after more than two years of litigation, the D.C. Circuit has categorically rejected the CIA's position, labeling it "indefensible" and rebuking the agency for having constructed "a fiction of deniability that no reasonable person would regard as plausible." *Am. Civil Liberties Union v. CIA*, 710 F.3d 422, 431 (D.C. Cir. 2013) ("*Drones FOIA II*"). It has ordered the agency to supply what it should have supplied two years ago—"a *Vaughn* index or other description of the kind of documents the Agency possesses." *Id.* at 432.

Quite remarkably, however, the CIA's position on remand is not much different than it was when Plaintiffs first filed this suit. The agency has produced no *Vaughn* index. And although the agency now acknowledges the bare, obvious fact that it possesses records about the drone program, it refuses to describe these records, or even enumerate them.

The CIA's blanket "no number no list" response is utterly deficient—indeed, it is so plainly inadequate that it verges on the frivolous. To justify a "no number no list" response, the agency must establish that *not even one* responsive document can be described, *in any way*,

without revealing information that falls within FOIA's exemptions. The CIA cannot carry this burden, and its brief barely makes the attempt. The agency's "no number no list" response is so obviously deficient that one can only assume that the CIA's goal is not to prevail on this motion but simply to delay as long as possible the day on which the agency will finally be required to explain what documents it is withholding and why.

This Court should reject the CIA's "no number no list" response and require the agency to provide the *Vaughn* index that the D.C. Circuit ordered it to provide six months ago. To avoid drawn-out litigation over the adequacy of the agency's *Vaughn* index, Plaintiffs respectfully submit that the Court should (i) make specific, on-the-record findings as to what facts about the drone program the government has officially acknowledged;[1] (ii) require the CIA to provide Plaintiffs with a *Vaughn* index that describes each withheld document by type, date, length, author, recipient, and subject matter; and (iii) require the CIA, to the extent it withholds any of this descriptive information from its *Vaughn* index, to justify in a publicly filed declaration, on a document-by-document basis, why this information is being withheld.

FACTUAL & PROCEDURAL HISTORY

I. The Government's Disclosures About the Targeted-Killing Program

Throughout this litigation, the government has steadfastly maintained that almost every detail about its targeted-killing program is officially a secret. Yet as this Court is aware, *see Al-Aulaqi v. Panetta*, No. 12-cv-1192 (D.D.C. filed July 18, 2012) (Collyer, J.); *Am. Civil Liberties Union v. DOJ*, 808 F. Supp. 2d 280 (D.D.C. 2011) (Collyer, J.) ("*Drones FOIA I*"), *rev'd and remanded sub nom.*, 710 F.3d 422 (D.C. Cir. 2013), a significant amount of information about the program is in the public domain. The sources of this public information vary. For example, in

[1] Plaintiffs would welcome the opportunity to submit proposed findings of fact.

the executive branch's public defenses of the program, senior officials have summarized the program's legal basis and disclosed myriad facts about the program—including the fact of U.S. responsibility for particular drone strikes.[2] Indeed, on-the-record government disclosures are what prompted Plaintiffs to file the FOIA request that is the subject of this litigation.[3] Leon Panetta publicly discussed many aspects of the drone program, both when he was Director of the CIA and after becoming Secretary of Defense.[4] More recently, the Secretary of State specifically discussed the drone "program" in Pakistan.[5]

Additionally, while publicly debating the use of drones in targeted-killing strikes abroad, high-ranking members of Congress have spoken openly about their oversight of the targeted-killing program as well as about the ongoing, operational roles that different agencies—

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[2] *See, e.g.*, Office of the Press Secretary, White House, Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities (May 23, 2013), http://wh.gov/hCwI ("Presidential Policy Guidance"); Letter from Eric H. Holder, Jr., Attorney General, to Patrick J. Leahy, Chairman of the Senate Committee on the Judiciary (May 22, 2013), http://1.usa.gov/11bGJZi; U.S. Dep't of Justice, Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operation Leader of Al-Qa'ida or an Associated Force (Nov. 8, 2011), http://bit.ly/Wv7Cdh ("TK White Paper"); John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Ethics and Efficacy of the President's Counterterrorism Strategy, Address at the Woodrow Wilson International Center for Scholars (Apr. 30, 2012), http://bit.ly/IqdX4R ("Brennan Wilson Center Speech").

[3] *See* Request Under Freedom of Information Act by Jonathan Manes, ACLU, at 4–5, Jan. 13, 2010, http://bit.ly/QBIBbR (the "Request") (citing, e.g., Leon Panetta, Director, CIA, Remarks at the Pacific Council on International Policy (May 18, 2009), http://1.usa.gov/15sidh ("Panetta PCIP Remarks")).

[4] *See, e.g.*, *This Week* (ABC News television broadcast June 27, 2010), http://abcn.ws/13ldzN6 ("Panetta ABC Tr."); David S. Cloud, *U.S.: Defense Secretary Refers to CIA Drone Use*, L.A. Times World Now Blog (Oct. 7, 2011 1:27 PM), http://lat.ms/roREDq ("Panetta Italy Comments").

[5] *See* Eyder Peralta, *Kerry Says U.S. Plans To Stop Drone Strikes in Pakistan*, NPR Two-Way Blog (Aug. 1, 2013 2:21 PM), http://n.pr/13yHEp0; Cora Currier, *How Does the U.S. Mark Unidentified Men in Pakistan and Yemen as Drone Targets?*, ProPublica, Mar. 1, 2013, http://bit.ly/XocxM0 (collecting press accounts attributing information about "signature strikes" to, among others, "[h]igh-level American official[s]" and "[s]enior U.S. intelligence official[s]").

specifically, the CIA and the military's Joint Special Operations Command ("JSOC")—play in the program.[6] And finally, the investigative press has published an ever-growing stack of books and articles about the drone program, many of which have been based on what a member of this Circuit's Court of Appeals called a "pattern of strategic and selective leaks at very high levels of the Government," Tr. of Oral Argument at 12:19–21 (question of Griffith, J.), *Drones FOIA II*, No. 11-5320 (D.C. Cir. Sept. 20, 2012).[7] However else these sources might be characterized, it is indisputable that they are voluminous.

Thus, the public has a basic understanding of what the government's targeted-killing program entails: Since 2001, the CIA and JSOC have used drones to carry out targeted killings in at least half a dozen countries—not just in areas of armed conflict, like Iraq and Afghanistan, but also in areas far from any battlefield, such as Yemen and Somalia.[8] In the course of those operations, the government has killed American citizens.[9] It has also killed at least hundreds of civilian bystanders, including children, breeding local resentment and anger in countries like Pakistan and Yemen, where drone strikes frequently occur.[10] The government's reliance on

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[6] *See, e.g.*, *Senator Dianne Feinstein on Drones, Assault Weapons Ban*, The Takeaway, Mar. 20, 2013, http://bit.ly/147GbKB ("Feinstein Takeaway Interview"); *Face the Nation* (CBS News television broadcast Feb. 10, 2013), http://cbsn.ws/ZgBg9R ("Rogers CBS Tr."); *Open Hearing on the Nomination of John O. Brennan to be Director of the Central Intelligence Agency Before the S. Select Comm. on Intelligence*, 113th Cong. (2013), http://1.usa.gov/15fr1Sx ("Brennan Hearing Tr.").

[7] *See, e.g.*, Mark Mazzetti, *The Way of the Knife* (2013); Mark Bowden, *The Killing Machines*, Atlantic, Aug. 14, 2013, http://bit.ly/17vOcGm ("Bowden Drones Feature"); Karen DeYoung, *A CIA Veteran Transforms U.S. Counterterrorism Policy*, Wash. Post, Oct. 24, 2012, http://wapo.st/RkL6zx ("DeYoung Brennan Profile").

[8] *See, e.g.*, Jo Becker & Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, N.Y. Times, May 29, 2012, http://nyti.ms/JKJjiM.

[9] *See* Letter from Eric H. Holder, Jr., Attorney General, to Patrick J. Leahy, Chairman of the Senate Committee on the Judiciary (May 22, 2013), http://1.usa.gov/11bGJZi.

[10] *See* Jack Serle & Alice K. Ross, *August 2013 Update: US Covert Actions in Pakistan, Yemen and Somalia*, Bureau of Investigative Journalism, Sept. 2, 2013, http://bit.ly/18yiits; Gregory

drone strikes in U.S. counterterrorism operations has increased dramatically in recent years, resulting in escalating public and congressional concern about those operations and their legal and factual underpinnings.[11]

In May 2013, the United States publicly announced guidelines that, the executive branch represented, place policy restrictions on the government's use of drones to conduct targeted killings around the world.[12] As detailed in this Presidential Policy Guidance and contemporaneously characterized in the press by administration officials, the guidelines generally conformed to the legal justifications for U.S. targeted killings that government officials presented in a series of public speeches over the course of several years, as well as to legal analysis in an officially disclosed white paper authored by the Department of Justice in 2011.[13] Around the same time, administration officials told reporters that the United States had already "begun transferring authority for drone strikes from the CIA to the Pentagon," in part to "open them up to greater congressional and public scrutiny."[14] Of late, however, administration

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Johnsen, *How We Lost Yemen*, For. Pol'y, Aug. 6, 2013, http://atfp.co/16xgZNC; Ahmed Al-Haj & Aya Batrawy, *As US Drone Strikes Rise in Yemen, So Does Anger*, Associated Press, May 2, 2013, http://bit.ly/160rxVv; Scott Neuman, *Sen. Graham Says 4,700 Killed in U.S. Drone Strikes*, NPR News Two-Way Blog (Feb. 21, 2013 12:04 PM), http://n.pr/157whqC.

[11] *See, e.g.*, Steve Coll, *Remote Control: Our Drone Delusion*, New Yorker, May 6, 2013, http://nyr.kr/13y1H8g; David Cole, *How We Made Killing Easy*, N.Y. Rev. Books Blog (Feb. 6, 2013, 11:13 AM), http://bit.ly/11VUhcG; *see also* Scott Shane & Thom Shanker, *Yemen Strike Reflects U.S. Shift to Drones in Terror Fight*, N.Y. Times, Oct. 1, 2011, http://nyti.ms/qd0L4Q.

[12] *See* Presidential Policy Guidance; *see also* Barack Obama, President, Remarks by the President at the National Defense University (May 23, 2013), http://wh.gov/hrTq.

[13] *See* TK White Paper; Brennan Wilson Center Speech; Eric Holder, Attorney General, Address at Northwestern University School of Law (Mar. 5, 2012), http://1.usa.gov/y8SorL ("Holder Northwestern Speech"); Jeh Charles Johnson, General Counsel, U.S. Dep't of Def., National Security Law, Lawyers and Lawyering in the Obama Administration, Address at Yale Law School (Feb. 22, 2012), http://on.cfr.org/19QrHPj; Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, The Obama Administration and International Law, Address at the American Society of International Law (Mar. 25, 2010), http://1.usa.gov/culIbD.

[14] Bowden Drones Feature.

officials have made clear that the executive branch can and has deviated from the policy restrictions it presented to the public as hard limitations several months ago.[15]

II. Plaintiffs' FOIA Request & the CIA's Response

Plaintiffs filed the Request on January 13, 2010, seeking various "records pertaining to the use of unmanned aerial vehicles ('UAVs')—commonly referred to as 'drones' and including the MQ-1 Predator and MQ-9 Reaper—by the CIA and the Armed Forces." Request at 2. The Request sought, principally:[16]

1. "the legal basis in domestic, foreign and international law upon which [drones] can be used to execute targeted killings," including "who may be targeted" (i.e. distinction between legitimate targets and civilians), where, and why;

3. "the selection of human targets for drone strikes and any limits on who may be targeted by a drone strike";

4. "civilian casualties in drones strikes, including but not limited to measures regarding the determination of the likelihood of civilian casualties, measures to limit civilian casualties, and guidelines about when drone strikes may be carried out despite a likelihood of civilian casualties";

5. "the assessment or evaluation of individual drone strikes after the fact";

6. "geographical or territorial limits on the use of UAVs to kill targeted individuals";

7. the "number of drone strikes that have been executed for the purpose of killing human targets, the location of each such strike, and the agency of the government or branch of the military that undertook each such strike";

8. "the number, identity, status, and affiliation of individuals killed in drone strikes," including information about deaths in particular strikes and in total;

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[15] *See* Eric Schmitt, *Embassies Open, But Yemen Stays on Terror Watch*, N.Y. Times, Aug. 11, 2013, http://nyti.ms/1crSPJB ("Schmitt Yemen Article").

[16] Plaintiffs abandoned categories 1(B) and 2 of their Request, relating to the cooperation of foreign governments with the U.S. drone program, during the previous summary-judgment briefing before this Court. *See Drones FOIA I*, 808 F. Supp. 2d at 285.

9. "who may pilot UAVs, who may cause weapons to be fired from UAVs, or who may otherwise be involved in the operation of UAVs for the purpose of executing targeted killings"; and

10. "the training, supervision, oversight, or discipline of UAV operators and others involved in the decision to execute a targeted killing using a drone."

Request at 5–8 (emphases removed).

Importantly, while Plaintiffs' Request was by necessity directed at specific agencies, its scope was not limited to any particular agency.[17] *See id.*; *Drones FOIA II*, 710 F.3d at 428 n.3. Thus, insofar as the Request was addressed to the CIA, it sought any and all records in the agency's possession about the matters listed above, not just records relating to the CIA's involvement in those matters.

Nearly three months after Plaintiffs filed the Request, the CIA issued a so-called "Glomar response" contending that "[t]he fact of the existence or nonexistence of requested records is currently and properly classified and is intelligence sources and methods information that is protected from disclosure by section 6 of the CIA Act of 1949, as amended." Letter from Dolores M. Nelson, CIA Information and Privacy Coordinator, to Jonathan Manes, ACLU, Ex. B to Decl. of Mary Ellen Cole ("Cole Decl."), *Drones FOIA I* (D.D.C. Oct. 1, 2010); *see Drones FOIA II*, 710 F.3d at 425–26 & n.1 (discussing the judicial origins of the Glomar response). After exhausting administrative appeals, Plaintiffs filed suit in this Court against the Departments of Justice, Defense, and State on March 16, 2010; they filed an amended complaint that added the CIA as a defendant on June 1, 2010.

[17] Plaintiffs submitted the Request to the Departments of Defense, Justice (including the Office of Legal Counsel), and State, as well as to the CIA. *See* Request at 1.

III. Prior Proceedings

In October and November 2010, Plaintiffs and the CIA filed cross-motions for summary judgment, which this Court resolved in a September 9, 2011 memorandum opinion that upheld the CIA's Glomar response in full. *See Drones FOIA I*, 808 F. Supp. 2d at 301.[18] The Court determined that drone strikes constitute both "functions" of CIA personnel under the Central Intelligence Agency Act of 1949 ("CIA Act"), 50 U.S.C. § 3507, and "intelligence sources and methods" under the National Security Act of 1947, 50 U.S.C. § 3024. *See Drones FOIA I*, 808 F. Supp. 2d at 287–93. Therefore, the Court held, the CIA had justified its Glomar response under FOIA Exemption 3. The Court also found the CIA's response to be "proper" under Exemption 1. *Id.* at 298. Last, the Court concluded that various public statements by then–CIA Director Leon Panetta had not "officially acknowledged either the CIA's involvement in a drone strike program or the existence or nonexistence of pertinent agency records," and that the agency had therefore "not waived its ability to issue a broad Glomar response" to the Request. *Id.* at 297–98.

Plaintiffs timely appealed this Court's ruling to the D.C. Circuit. After the parties completed substantive briefing in the Court of Appeals, but before oral argument, the CIA moved the Circuit Court to remand the case in light of disclosures the government had made in another FOIA case brought by Plaintiffs pending before the Southern District of New York. *See* Motion to Remand for Further Proceedings, *Drones FOIA II*, No. 11-5320 (D.C. Cir. June 20, 2012); *see also Drones FOIA II*, 710 F.3d at 431. In its motion, the CIA stated that the agency had "determined that it could acknowledge officially, without harming national security, its

[18] Plaintiffs' and the CIA's summary-judgment briefing proceeded while the other defendant agencies—the Departments of Justice, Defense, and State—continued their searches for records. *See* Joint Status Report and Proposed Schedule 2–3, *Drones FOIA I* (D.D.C. July 16, 2010). One month after this Court resolved the summary-judgment motion, Plaintiffs and the remaining three defendant agencies entered a joint stipulation of dismissal. *See* Stipulation Regarding Voluntary Dismissal of Claims Against Certain Parties, *Drones FOIA I* (D.D.C. Oct. 26, 2011).

possession of some responsive records regarding the legal basis for the use of targeted lethal force against U.S. citizens and the process by which citizens can be designated for targeted lethal force." Motion to Remand at 2 (citing only the Brennan Wilson Center Speech and the Holder Northwestern Speech); *see Drones FOIA II*, 710 F.3d at 431 ("The motion went on to hint that the Agency might abandon its *Glomar* response in favor of something less absolute, if only slightly less."). The court denied the remand motion.

After hearing oral argument, the D.C. Circuit resolved the appeal in a March 2013 opinion that found the CIA's Glomar response to be "indefensib[le]." 710 F.3d at 431. Chief Judge Garland, writing for a unanimous panel, concluded that "[g]iven the extent of official statements" by executive-branch officials that unmistakably acknowledged the CIA's "intelligence interest" in drone strikes, the agency's Glomar response was neither "'logical or plausible.'" *Id.* at 429 (quoting *Wolf v. CIA*, 473 F.3d 370, 374–75 (D.C. Cir. 2007)). Citing comments by the President during a live internet video forum and the Brennan Wilson Center Speech, the Court declared that there was "no doubt that some U.S. agency" operates drones for targeted killing. *Id.* Those comments alone justified the rejection of the CIA's Glomar response—"[b]ut," as the Circuit put it, "there is more." *Id.* at 430; *see id.* at 431 ("But again, there is more."). The Court went on to cite the Panetta PCIP Remarks, and other details from the Brennan Wilson Center Speech, in a comprehensive refutation of the declaration that the CIA had submitted to this Court on summary judgment. *See id.* at 431. Because the agency's intelligence interest in drone strikes was "clear," Chief Judge Garland wrote, the notion that the agency did not have responsive records "beggar[ed] belief." *Id.*[19] The Court concluded:

[19] In its brief, the CIA concedes (as it must) that the D.C. Circuit concluded that the agency had officially acknowledged an "interest" in the use of drones to carry out targeted killings. The agency contends, however, that the D.C. Circuit "explicitly rejected" Plaintiffs' argument that

> In this case, the CIA asked the courts to stretch [the Glomar] 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. We are at that point with respect to the question of whether the CIA has any documents regarding the subject of drone strikes.

Id. (first alteration added) (quoting *Watts v. Indiana*, 338 U.S. 49, 52, (1949) (opinion of Frankfurter, J.)).[20]

IV. The D.C. Circuit's Instructions on Remand

After dispensing with the CIA's "unqualified, across-the-board *Glomar* response," the D.C. Circuit provided guidance for the remanded proceedings in this Court: "With the failure of the CIA's broad *Glomar* response, the case must now proceed to the filing of a *Vaughn* index or other description of the kind of documents the Agency possesses, followed by litigation regarding whether the exemptions apply to those documents." *Drones FOIA II*, 710 F.3d at 434, 432 (citing *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973)). The Court of Appeals observed

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the agency had acknowledged its actual involvement in drone strikes. CIA Br. 29; *see* CIA Br. 1 ("The D.C. Circuit determined that . . . these statements did not acknowledge that the CIA itself operated drones . . . ."), 6 ("The D.C. Circuit refused to adopt the ACLU's position."). This contention is baseless, and indeed it misrepresents quite fundamentally the D.C. Circuit's decision. The D.C. Circuit did not "reject" Plaintiffs' argument; it simply found that Plaintiffs' appeal could be resolved on narrower grounds. *Drones FOIA II*, 710 F.3d at 431. The only thing the circuit court "rejected" was the CIA's claim that its Glomar response was lawful.

[20] In the related FOIA case referred to above, the Southern District of New York granted summary judgment to three defendant government agencies in January 2013. *See N.Y. Times v. DOJ*, 915 F. Supp. 2d 508 (S.D.N.Y. 2013) ("*Targeted Killing FOIA I*"). Plaintiffs' appeal is now pending before the Second Circuit, and oral argument is scheduled for October 1, 2013. *See Am. Civil Liberties Union v. DOJ*, No. 13-445 (2d Cir. appeal docketed Feb. 6, 2013) ("*Targeted Killing FOIA II*"). This week, the Second Circuit ordered the government to produce three withheld legal memoranda for *in camera* inspection prior to oral argument. *See* Letter from Catherine O'Hagan Wolfe, Clerk of Court, to Counsel, *Targeted Killing FOIA II* (Sept. 9, 2013). The circuit court also "direct[ed] that the Government have available" at oral argument several categories of withheld documents (including additional legal memoranda and agency email communications) as well as "[t]he information that is at issue in the No-Number, No List context and apparently withheld under Exemptions 1 and 3, traditionally appearing in a *Vaughn* index." *Id.* (alteration and quotation marks omitted).

that, in the S.D.N.Y. litigation, the CIA had filed a so-called "no number no list" response acknowledging possession of responsive records but refusing to enumerate or describe those records in any way. The Court expressed a degree of skepticism that such a response was legitimate. *See id.* at 433 (stating that a "no number no list" response could "only be justified in unusual circumstances, and only by a particularly persuasive affidavit"). It also observed that "[a]lthough the CIA's New York filings speak as if the notion of a 'no number, no list' response is well-established," the D.C. Circuit has not yet addressed its propriety, and the government has in fact only proffered the response in a handful of cases across the country. *Id.* at 433. The Court wrote, moreover, that even if the agency could justify a "no number no list" response with respect to "a limited category of documents"—and the Court did not suggest that the agency could do so in this case—there was no reason why the agency could not provide "a *Vaughn* index for the remainder." *Id.* at 434; *see id.* (stating that there is not "any reason" to regard a "no number no list" or Glomar response as "subject to an on/off switch").

V. The CIA's Position on Remand

Back before this Court, the CIA essentially disregards the D.C. Circuit's decision and submits the same response it submitted in the New York litigation (and virtually the same response that it submitted here in 2010). While the CIA acknowledges (finally) that it possesses documents responsive to the Request, it maintains that "the details of those records, including the number and nature" of them, "remain currently and properly classified facts exempt from disclosure under FOIA Exemptions 1 and 3." CIA Br. 7. It also maintains that "no authorized Executive Branch official has disclosed the precise nature of the CIA's involvement in the use of targeted lethal force," *id.* (citing Lutz Decl. ¶ 48), and that the "disclosure of such details would reveal sensitive national security information concerning intelligence activities, intelligence

sources and methods, and the foreign activities of the United States," *id.* at 8 (citing Lutz Decl. ¶¶ 43–47).

The central question before the Court on the parties' new cross-motions for summary judgment is whether the CIA has justified its "no number no list" response. It has not.

DISCUSSION

I. Any "No Number No List" Response Can Be Justified Only in the Most Extraordinary Circumstances.

A. The government's selective disclosures about the targeted-killing program require this Court to assess the CIA's "no number no list" response with particular skepticism.

Congress enacted the FOIA "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); *see* Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in James Madison: Writings 1772–1836*, at 790, 790 (1999) ("A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps, both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."). Congress's enumeration of nine limited exemptions in the FOIA does "not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Pub. Citizen, Inc. v. Rubber Mfrs. Ass'n*, 533 F.3d 810, 813 (D.C. Cir. 2008) (quoting *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002)) (quotation marks omitted); *accord Am. Civil Liberties Union v. Dep't of Def.*, 543 F.3d 59, 66 (2d Cir. 2008), *vacated on other grounds and remanded*, 130 S. Ct. 777 (2009) (mem.). The Supreme Court recently reaffirmed that the FOIA's exemptions be given "a narrow compass." *Milner v. Dep't of Navy*, 131 S. Ct. 1259, 1265 (2011) (quotation marks omitted).

The courts' obligation to enforce the public's right of access to government records is more important, not less, where the information in question relates to national security policy. The Congress that enacted the FOIA almost fifty years ago voiced pointed concerns about the tendency of government officials to provide the public with selective and misleading statements about national security policies, and it explicitly crafted the legislation to enable the public to evaluate those policies—and the government's assertions about them—for itself. *See, e.g.*, Republican Policy Committee Statement on Freedom of Information Legislation, S. 1160, 112 Cong. Rec. 13020 (1966) ("In this period of selective disclosures, managed news, half-truths, and admitted distortions, the need for this legislation is abundantly clear."), *reprinted in* Subcomm. on Admin. Practice, S. Comm. on the Judiciary, 93d Cong., *Freedom of Information Act Source Book: Legislative Materials, Cases, Articles*, at 59 (1974) ("*FOIA Source Book*"); *see also* 112 Cong. Rec. 13031 (1966) (statement of Rep. Rumsfeld), *reprinted in FOIA Source Book* at 70 ("Certainly it has been the nature of Government to play down mistakes and to promote successes. . . . [This] bill will make it considerably more difficult for secrecy-minded bureaucrats to decide arbitrarily that the people should be denied access to information on the conduct of Government . . . ."). Thus, in enacting the FOIA, Congress meant to curtail the government's ability to use selective disclosure and overbroad withholding as a means of manipulating public debate. The FOIA reflects a considered judgment that our democracy is best served when the public can evaluate for itself whether its government's national security policies are lawful, effective, and wise.

Underscoring that judgment, eight years after enacting the FOIA, Congress amended the statute to reinforce the courts' obligation to review any government claim that national security requires that records otherwise releasable under the statute must be withheld for reasons relating

to national security. *See* S. Rep. No. 93-1200 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6267, 6723; *accord CIA v. Sims*, 471 U.S. 159, 188–89 (1985) ("At one time, this Court believed that the Judiciary was not qualified to undertake this task. Congress, however, disagreed, overruling both a decision of this Court and a Presidential veto to make clear that precisely this sort of judicial role is essential if the balance that Congress believed ought to be struck between disclosure and national security is to be struck in practice." (citation omitted)); *see also* 120 Cong. Rec. 9334 (1974) (statement of Sen. Muskie) ("It should not have required the deceptions practiced on the American public under the banner of national security in the course of the Vietnam war or since to prove to us that Government classifiers must be subject to some impartial review."). Since then, the Judiciary has frequently emphasized that, while the executive branch is entitled to a degree of deference in its factual claims about the harms that might result from disclosure, courts cannot "relinquish[] their independent responsibility" to review an agency's withholdings. *Goldberg v. U.S. Dep't of State*, 818 F.2d 71, 77 (D.C. Cir. 1987).

As the D.C. Circuit's opinion makes clear, there is particular reason for judicial skepticism in this case. As Judge Griffith noted during the appellate oral argument, the position that the CIA has taken before this Court stands in glaring contrast to the "pattern of strategic and selective leaks at very high levels of the Government" that continues to this day. Tr. of Oral Argument at 12:19–21 (question of Griffith, J.), *Drones FOIA II*, No. 11-5320 (D.C. Cir. Sept. 20, 2012).[21] That pattern has only intensified since the D.C. Circuit ruled. Just days after the Court of Appeals published its opinion, "senior U.S. officials" disclosed to the press that the

[21] *See* Jack Goldsmith, *Drone Stories, the Secrecy System, and Public Accountability*, Lawfare (May 31, 2012 8:03 AM), http://bit.ly/KMoGni (discussing *Drones FOIA II* and remarking that "none of the previous Glomar cases involved such extensive and concerted and long-term government leaking and winking"); *see also* Daniel Swift, *Drone Knowns and Drone Unknowns*, Harper's Mag. The Stream (Oct. 27, 2011), http://harp.rs/3qr0opk (explaining how anonymous "CIA leaks create a useful illusion of disclosure").

White House was considering a "phased-in transition in which the CIA's drone operations would be gradually shifted over to the military." Daniel Klaidman, *Exclusive: No More Drones for CIA*, Daily Beast, Mar. 19, 2013, http://thebea.st/11h4i9d; *see* Schmitt Yemen Article (citing "[s]enior American counterterrorism and intelligence officials" discussing recent drone strikes in Yemen against a "broaden[ed]" list of targets). That anonymous government officials continue to proffer detailed statements about the drone program to the press counsels against affording the agency declaration deference here. The CIA's claim that the agency can provide no information at all about the records it seeks to withhold warrants exacting scrutiny.

B. A "no number no list" response is a "radical" response that is virtually never legitimate.

In a typical case, an agency presented with a FOIA request searches its files for responsive records, releases those records it believes it is required to release, and then supplies the requester with an index—a "*Vaughn* index"—justifying the withholding of any records that have been withheld. *See Vaughn*, 484 F.2d at 823–26; *see also Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) ("[T]he burden is on [the agency] to establish [its] right to withhold information from the public."). A *Vaughn* index normally includes "elements . . . such as the date of the document(s), the type of document, the general subject matter and the number of pages." *Boggs v. United States*, 987 F. Supp. 11, 22 (D.D.C. 1997). The *Vaughn* index was the courts' solution to the problem of "transform[ing] a potentially ineffective, inquisitorial proceeding against an agency that controls information into a meaningful adversarial process" by giving judges a "reasonable basis to evaluate . . . claim[s] of privilege." *Abdelfattah v. U.S. Dep't of Homeland Sec.*, 488 F.3d 178, 183 n.3 (3d Cir. 2007) (quotation marks omitted); *accord Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 146 (D.C. Cir. 2006) ("When a party submits a FOIA request, it faces an 'asymmetrical distribution of

knowledge' where the agency alone possesses, reviews, discloses, and withholds the subject matter of the request. The agency would therefore have a nearly impregnable defensive position save for the fact that the statute places the burden 'on the agency to sustain its action.'" (citation omitted) (quoting *King v. DOJ*, 830 F.2d 210, 218 (D.C. Cir. 1987); 5 U.S.C. § 552(a)(4)(B))); *Delaney Migdail & Young, Chartered v. IRS*, 826 F.2d 124, 128 (D.C. Cir. 1987) (explaining that detailed government FOIA submissions are required to "overcome the applicant's natural handicap—an inability to argue intelligibly over the applicability of exemptions when he or she lacks access to the documents").

In extraordinary circumstances, an agency may be unwilling to supply a *Vaughn* index because doing so would require it to disclose information that is (in its view) protected by one of the FOIA's exemptions. *See Drones FOIA II*, 710 F.3d at 425–26 & n.1; *Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1178 (D.C. Cir. 2011); *accord Wilner v. NSA*, 592 F.3d 60, 68 (2d Cir. 2009); *see generally Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976) ("*Phillipi I*"). The agency may believe that providing a *Vaughn* index would confirm the existence (or non-existence) of some set of sensitive records, or confirm sensitive details about some set of records. In the first of these situations, the agency may provide a Glomar response; in the second, it may provide a "no number no list" response. In either situation, however, the agency's response is lawful only if the agency establishes that the information it seeks to protect is actually covered by one of FOIA's exemptions. *See Drones FOIA II*, 710 F.3d at 431.

Though some courts have likened Glomar and "no number no list" responses,[22] the two are in fact conceptually and functionally distinct.[23] As the D.C. Circuit noted, while a Glomar

[22] *See, e.g.*, *Bassiouini v. CIA*, 392 F.3d 244, 247 (7th Cir. 2004); *Targeted Killing FOIA I*, 915 F. Supp. 2d at 551.

response *preempts* the *Vaughn* requirement, a "no number no list" response is in practice a "radically minimalist" *Vaughn*—a *Vaughn* index devoid of any information whatsoever. *Drones FOIA II*, 710 F.3d at 433. Once an agency's Glomar response "collapse[s]," then, "there are a variety of forms that subsequent filings in the district court may take," with "a pure 'no number, no list' response . . . at one end of that continuum" and "a traditional *Vaughn* index . . . at the other." *Id.* at 432–33.

Two crucial points warrant emphasis. First, a categorical "no number no list" response can be justified only if *no responsive document* can be described on a *Vaughn* without the disclosure of information protected by one of the FOIA's exemptions. If *any* document can be described on a *Vaughn* index without disclosure of exempted information, the FOIA requires the agency to describe that document. Second, in assessing whether the description of a document would require the agency to disclose exempted information, the agency (and ultimately the court) must consider the various ways in which the document could be described. If, for example, the agency has a legitimate interest in declining to describe a particular document in detail (and Plaintiffs do not concede that this is the case here), could the document be described more generally? If a document's date is legitimately exempted from disclosure (and, again, Plaintiffs do not concede that such is the case here), could the dates be omitted? As the D.C. Circuit has repeatedly observed, the *Vaughn* requirement is functional, not formal. *Id.* at 432 ("[T]here is no fixed rule establishing what a *Vaughn* index must look like, and a district court has considerable latitude to determine its requisite form and detail in a particular case."); *accord Judicial Watch*, 449 F.3d at 145–46. To justify a "no number no list" response with respect to a specific

[23] To say that the responses are conceptually different is not to say that the CIA's response has substantially changed—both its defeated Glomar response and its proffered "no number no list" response are bids for total secrecy.

category of records, the agency must demonstrate that there is *no feasible way* to describe *any* of the documents in that category without disclosing information protected by one of the FOIA's exemptions. Put another way, "[t]he description and explanation the agency offers should reveal as much detail as possible as to the nature of the document, without actually disclosing information that deserves protection." *See Oglesby v. U.S. Dep't of Army*, 79 F.3d 1172, 1176 (D.C. Cir. 1996).[24]

The CIA's submission of a pure "no number no list" response in this case amounts to a singular, extreme claim: that providing Plaintiffs and the Court with *any* information about *any* document or category of documents would implicate information protected by FOIA Exemptions 1 and 3 that the government has not already officially acknowledged. As Plaintiffs demonstrate below, the CIA has plainly failed to justify that radical position.

II. The CIA Cannot Justify Its "No Number No List" Response Because the Government Has Officially Acknowledged a Vast Amount of Information that Could Be Reflected in a *Vaughn* Index.

The CIA's refusal to provide any *Vaughn* information at all is legally deficient—and it is not a close question. As the D.C. Circuit held, the CIA has officially acknowledged its intelligence interest in the use of drones to carry out targeted killings. Given this acknowledged interest, it is not remotely plausible that the agency cannot describe, in even general terms, any of the documents responsive to Plaintiffs' request. Even if the *only* thing the CIA had disclosed was an intelligence interest in the use of drones, the CIA's "no number no list" response would be unlawful.

[24] As Chief Judge Garland suggested, sometimes the most appropriate agency response might be a hybrid approach might, with a Glomar or "no number no list" response shielding "a limited category of documents, coupled with a *Vaughn* index for the remainder." *Drones FOIA II*, 710 F.3d at 434.

"But," to borrow the D.C. Circuit's phrase, "there is more." *Drones FOIA II*, 710 F.3d at 430. The government has acknowledged information that goes well *beyond* the CIA's intelligence interest in the targeted-killing program. Through countless public statements and press interviews, senior government officials have disclosed, officially, that the CIA operates drones. They have also revealed information about the program's legal basis, oversight structure, and effectiveness, as well as information about specific strikes and targets. In contending that none of this already-disclosed information can be disclosed here, the CIA asks this Court to give its "imprimatur to a fiction of deniability that no reasonable person would regard as plausible." *Drones FOIA II*, 710 F.3d 431; *accord Watts*, 338 U.S. at 52 (opinion of Frankfurter, J.).

A. The CIA's "no number no list" response is unlawful because the agency has officially acknowledged an intelligence interest in the targeted-killing program.

In the words of the Court of Appeal, "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." *Drones FOIA II*, 710 F.3d at 430; *see id.* ("The defendant is, after all, the Central *Intelligence* Agency."). Because it has already officially acknowledged its intelligence interest in drone strikes, the CIA cannot lawfully withhold information from a *Vaughn* index—or withhold the *Vaughn* index altogether—in order to avoid disclosing that interest. Yet that is precisely what the agency's response here seeks to do.

Part of the CIA's error lies in its premise that providing a *Vaughn* would necessarily disclose something *more* than its intelligence interest in the use of drones. It argues, for example, that disclosing its possession of a large number of responsive records would reveal that the agency has a central role in the program, and perhaps even that the CIA operates drones itself. *See* CIA Br. 17 (citing Lutz Decl. ¶¶ 31–32) (contending that if the CIA revealed that it

"possess[ed] thousands of records responsive to the ACLU's request, that response would tend to reveal that the Agency is either engaging in drone strikes or is directly involved in their execution; conversely, a small volume of records would be more consistent with the a [sic] passive role"); *see also* Lutz Decl. ¶ 34 (suggesting that "if the CIA possessed several hundred or even thousands of records on the piloting of drones . . . , that would tend to reveal that the CIA itself is operating them, whereas minimal documentation would indicate that it is not").

But this is not true. As the D.C. Circuit observed, the CIA is an *intelligence* agency; whether it operates drones itself or not, any reasonable person would assume—would *know*—that the CIA possesses records about the drone program. Indeed, any reasonable person would know that the CIA possesses a *large volume* of records about the program, if only because the declaration filed by the CIA in this case explains that the CIA has been "privy" to "considerable" discussions about "topics such as the legality of drone strikes and civilian casualties." Lutz Decl. ¶ 27. The CIA's declaration, in other words, confirms the unsurprising fact that the CIA's intelligence interest in drones is substantial—and it surely follows from this that the CIA possesses a substantial volume of records. *See Drones FOIA II*, 710 F.3d at 431 ("[A]s 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.").

Thus, any reasonable observer would assume that the CIA possesses records about the use of drones, even if the agency does not itself use them to carry out targeted killings. *See id.* at 430. This is particularly true because, as the CIA observes, multiple government agencies have a disclosed intelligence interest in drone strikes. *See* Lutz Decl. ¶ 27 (acknowledging that "many agencies" have been "privy" to drone-program discussions). And in fact there are many reasons why the CIA might possess a large number of records about the government's use of drones even

if it was not directly engaged in carrying out targeted killings. Here are some possibilities: The CIA has an intelligence interest in a potent, lethal technology possessed by the U.S. and foreign governments; it has an intelligence interest in apprehending vulnerabilities of drones that it could use to advise U.S. drone-operating agencies and to exploit against enemy attacks; it has an intelligence interest in assessing the technological capacities of allied governments. The CIA claims that disclosing the number of records responsive to Plaintiffs' Request would disclose exempt information, but the information in question—that the CIA has a substantial intelligence interest in the drone program—is not exempt and has already been acknowledged.

When applied to particular categories of the Request, the agency's claims are equally unpersuasive. For example, the agency has an obvious intelligence interest in "the piloting of drones (Categories No. 9 and 10)," as well as in "who may be targeted by drones and where (Categories No. 3 and 6), assessments of the effectiveness of strikes and civilian casualties (Categories No. 4 and 5), [and] compilations of [specific] strikes over time (Categories No. 7 and 8)." Lutz Decl. ¶ 34. The agency contends that to disclose its possession of records in these categories (or to describe those records in a *Vaughn* index) would be tantamount to disclosing its operational involvement in targeted killings. But, again, this is simply not true. The CIA could—surely, would—have records on these subjects even if the drones were operated entirely by, for example, the Department of Defense.

The CIA argues that the inclusion of certain other details on a *Vaughn* index would also disclose exempt information. For example, it suggests that providing dates of responsive records could lead to the construction of a "timeline of when the Agency's authority and/or ability to participate in drone strikes did nor did not exist," or to the association of the agency with particular covert operations, targets, or places. Lutz Decl. ¶¶ 38, 39, 46. As discussed above,

however, and as the CIA itself concedes, a *Vaughn* index is a flexible instrument. *See* Lutz Decl. ¶ 14 (recognizing that the D.C. Circuit in *Drones FOIA II* "discussed the range of potential options for the CIA's supplemental response"); *see Drones FOIA II*, 710 F.3d at 432–44. If the disclosure of certain details that would ordinarily be included in a *Vaughn* index would disclose information covered by one of the FOIA's exemptions, the CIA can provide that information in more general form (for example, by providing the specific month and year of a document, but not the specific date)—or even, if necessary, simply omit that information from the index. The notion that the CIA cannot provide *any* detail about *any* document, however, is absurd.

Thus, the CIA's "no number no list" response would be illegitimate even if the agency had not disclosed anything more than an intelligence interest in the drone program. That the agency has disclosed an intelligence interest in the program—inescapably, a *substantial* interest—means that it can list and describe responsive records without disclosing any properly withheld information. Even if the Court concludes (despite the discussion below, *see infra* Discussion § II.B) that the CIA has not officially acknowledged its operational role in the drone program, the agency can enumerate and describe records concerning specific U.S. drone strikes abroad without signaling which (if any) the agency conducted itself. It can enumerate and describe records detailing numbers of civilian casualties resulting from U.S. drone strikes without indicating which (if any) it caused itself. And it can enumerate and describe legal memoranda setting out the government's authority to use drones for targeted killing without revealing which (if any) it solicited itself.

The CIA's "no number no list" response is unlawful, and this Court should reject it.

B. The government has officially acknowledged that the CIA uses drones for targeted killing.

The discussion above is based on the premise that the CIA has not disclosed anything more than an intelligence interest in the drone program. In fact, it has disclosed much more.[25] Senior government officials have made significant disclosures about the program's legal basis, oversight structure, and effectiveness, as well as information about specific strikes and targets. Because the agency's use of drones is not a secret, the CIA cannot withhold information from a *Vaughn* index that would reflect that interest, nor may it refuse to provide a *Vaughn* entirely.

1. Members of the executive and legislative branches have officially acknowledged details about the CIA's use of drones.

a. *Disclosures by the executive branch*

On multiple occasions as Director of the CIA, Leon Panetta acknowledged that the agency carries out targeted killings; he also discussed the agency's role in specific strikes. Specifically, in a June 2010 interview with ABC News, Mr. Panetta addressed a drone strike in Pakistan that had reportedly killed al-Qaeda's third-most-important leader:

> [T]he more we continue to disrupt Al Qaida's operations, and we are engaged in the most aggressive operations *in the history of the CIA* in that part of the world, and the result is that we are disrupting their leadership. . . . We just took down number three in their leadership a few weeks ago.

Panetta ABC Tr. Mr. Panetta continued to discuss the CIA's operational participation in the

[25] Plaintiffs respectfully request that the Court make specific findings identifying information about the CIA's interest in and use of drones that has been officially acknowledged. Such findings would facilitate both the agency's long-delayed production of a *Vaughn* index, the release of documents responsive to the Request, and—if pursued—any appeal to the D.C. Circuit. Plaintiffs would welcome the opportunity to provide the Court with proposed findings of fact.

targeted-killing program after he became Secretary of Defense.[26] In a speech at the U.S. Navy's 6th Fleet Headquarters in Naples, Italy, he said: "Having moved from the CIA to the Pentagon, obviously I have a hell of a lot more weapons available to me in this job than I had at the CIA, although Predators aren't bad." Panetta Italy Comments. Later that same day, Mr. Panetta noted that a recent military operation in Libya had involved "the use of Predators, which is something I was very familiar with in my past job." *Id.* The significance of Mr. Panetta's comments is unmistakable: The CIA operates armed drones for use in targeted-killing operations.[27]

Mr. Panetta is not the only senior official to have discussed the CIA's active role in the targeted-killing program. In an October 2012 interview with *The Washington Post*, Mr. Brennan—then the President's chief counterterrorism advisor—discussed his "efforts to curtail the CIA's primary responsibility for targeted killings" and "described a future in which the CIA is eased out of the clandestine-killing business." DeYoung Brennan Profile (reporter's paraphrase); *see id.* ("'What we're trying to do right now is to have a set of standards, a set of criteria, and have a decision-making process that will govern our counterterrorism actions—we're talking about direct action, lethal action—so that irrespective of the venue where they're

[26] Mr. Panetta's term as CIA Director stretched from February 13, 2009, to June 30, 2011. He then served in the same administration as Secretary of Defense from July 1, 2011, to February 27, 2013.

[27] Even earlier, Mr. Panetta—speaking as CIA Director in response to questions about drone strikes—referred to drone-strike "operations" and claimed credit for the killing of a high-value al-Qaeda target in a drone strike in Pakistan. *See* Panetta PCIP Remarks; Siobhan Gorman & Jonathan Weisman, *Drone Kills Suspect in CIA Suicide Bombing*, Wall St. J., Mar. 18, 2010, http://on.wsj.com/r2wLyt.

Though this Court previously rejected Plaintiffs' argument that several of the statements made by Mr. Panetta acknowledged the CIA's use of drones, *see Drones FOIA I*, 808 F. Supp. 2d at 294, 296–97, the Court should reevaluate the statements in light of the D.C. Circuit's remand.

taking place, we have a high confidence that they're being done for the right reasons in the right way.'" (direct quotation)).

Former high-ranking officials, too, have confirmed the CIA's use of drones. Ross Newland—a senior CIA official at the time the targeted-killing program was first developed—told *The New York Times* (in the newspaper's paraphrase) that "the agency had grown too comfortable with remote-control killing," "drones ha[d] turned the C.I.A. into the villain in countries like Pakistan," and (in his own words) the CIA's program was "just not an intelligence mission." Mark Mazzetti, *A Secret Deal on Drones, Sealed in Blood*, N.Y. Times, Apr. 6, 2013, http://nyti.ms/10FLtIB. Mr. Newland's comments echoed those of the CIA's former General Counsel, John Rizzo, in a February 2011 interview with *Newsweek* discussing the CIA's use of Predator drones to carry out targeted killings: "The Predator is the weapon of choice, but it could also be someone putting a bullet in your head." Tara McKelvey, *Inside the Killing Machine*, Newsweek, (Feb. 13, 2011), http://thebea.st/rfU2eG. And months after leaving his post as U.S. Ambassador to Pakistan, Cameron Munter spoke on the record about the use of drones in that country, recounting a specific disagreement with then–CIA Director Panetta over their use. Tara McKelvey, *A Former Ambassador to Pakistan Speaks Out*, Daily Beast, Nov. 20, 2012, http://thebea.st/VrrdIj ("Munter wanted the ability to sign off on drone strikes—and, when necessary, block them. Then–CIA director Leon Panetta saw things differently. Munter remembers one particular meeting where they clashed. 'He said, "I don't work for you," and I said, "I don't work for you,"' the former ambassador recalls."); *accord* Bowden Drones Feature (elaborating on the incident).

b. *Disclosures by congressional leadership*

The most recent acknowledgments that the CIA operates drones were made by leaders of the congressional committees that oversee the CIA—and those acknowledgments are unambiguous. In an interview with CBS News, House Select Committee on Intelligence Chairman Mike Rogers told the American public: "Monthly, I have my committee go to the CIA to review [drone strikes]. I as chairman review every single air strike that we use in the war on terror, both from the civilian and the military side when it comes to terrorist strikes." Rogers CBS Tr. During the interview, Representative Rogers referred to "both" civilian (i.e. CIA) and military (i.e. JSOC) drone strikes. *Id.* One month later, in February 2013, SSCI Chairwoman Dianne Feinstein publicized her committee's "robust and ongoing oversight of counterterrorism targeted killings," which included "35 monthly, in-depth oversight meetings with government officials to review strike records (including video footage) and question every aspect of the program." Press Release, Sen. Dianne Feinstein, Chairman, U.S. Sen. Select Comm. on Intelligence, Feinstein Statement on Intelligence Committee Oversight of Targeted Killings (Feb. 13, 2013), http://1.usa.gov/14UCBBr ("Feinstein Press Release"). In a more recent radio interview, Sen. Feinstein addressed a proposal to shift responsibility for targeted-killing strikes from the CIA to JSOC by favorably and explicitly comparing the CIA's drone-strike record to the military's with regard to civilian casualties:

> Here's my concern: We [i.e. the members of the SSCI] watch the intelligence aspect of the drone program, those [i.e. drones] that are used by the Intelligence Agency, very carefully. Literally, dozens of inspections following the intelligence, watching the Agency exercise patience and discretion specifically to prevent collateral damage. The military program has not done that nearly as well. I think that's a fact, I think we even hit our own base once. So, that causes me concern.

Feinstein Takeaway Interview. Finally—and equally telling—when the SSCI considered Mr. Brennan's nomination to become CIA Director, the members spent a substantial portion of the hearing discussing targeted killing, including the "rules and procedures for the conduct of drone strikes" and the future "role" of Mr. Brennan "as CIA director in [the] approval process" for targeted killings. *See, e.g.*, Brennan Hearing Tr. at 31:13–15 (question of Sen. Feinstein).[28]

2. These executive- and legislative-branch disclosures are official acknowledgments of the CIA's use of drones.

The unambiguous congressional disclosures of the CIA's use of drones for targeted killing—as well as the statements made by Mr. Panetta as Secretary of Defense and Mr. Brennan as White House counterterrorism advisor—plainly meet the legal standard for official acknowledgment. A FOIA requester challenging a withholding on the basis of official acknowledgment must satisfy three criteria: "First, the information requested must be as specific as the information previously released. Second, the information requested must match the information previously disclosed . . . . Third, . . . the information requested must already have been made public through an official and documented disclosure." *Wolf*, 473 F.3d at 378 (ellipses in original) (quotation marks omitted). The phrase "official and documented disclosure" has not been given a specific definition, but certain principles have informed its treatment in this and other circuits. The touchstone for official acknowledgment is whether the disclosure in question leaves "some increment of doubt," or whether, by contrast, it will be understood as reliable, credible, and official. *Wilson v. CIA*, 586 F.3d 171, 195 (2d Cir. 2009); *see Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982) ("Official acknowledgment ends all doubt . . . ."); *see*

[28] Though Mr. Brennan answered with respect to his role in the "counterterrorism program" and did not mention drone strikes, he made clear that he was addressing actions that involved the use of lethal force. *See* Brennan Hearing Tr. at 31:16–32:13.

also United States v. Marchetti, 466 F.2d 1309, 1318 (4th Cir. 1972) ("Rumor and speculation are not the equivalent of prior disclosure, however, and the presence of that kind of surmise should be no reason for avoidance of restraints upon confirmation from one in a position to know officially."). In other words, the question is whether the disclosure comes from "'*one in a position to know of it officially*,'" *Am. Civil Liberties Union v. U.S. Dep't of Def.*, 628 F.3d 612, 622 (D.C. Cir. 2011) ("*Guantánamo FOIA*") (emphasis added) (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 acknowledgments by an authoritative government source").

In this and related litigation, the government has disputed that certain disclosures by former executive-branch officials and current legislators constitute official acknowledgments. *See, e.g.*, CIA Br. 29–31. Rather than seriously grapple with the implications of the disclosures, the government has proposed that the courts should simply disregard them—because the disclosures were made too recently, *see* Br. for Defendants–Appellees 46, *Targeted Killing FOIA II*, No. 13-445 (2d Cir. June 14, 2013); because they were made by officials of the wrong branch of government, *see* CIA Br. 29–30; Br. for Defendants–Appellees 34–36 & n.10, *Targeted Killing FOIA II*, No. 13-445 (2d Cir. June 14, 2013); because they were made by officials of the right branch of government but from the wrong agencies, *see* CIA Br. 29–30; Br. for Defendants–Appellees 36–37, *Targeted Killing FOIA II*, No. 13-445 (2d Cir. June 14, 2013); or because they were made by former government officials, *see* CIA Br. 29–30. Each of these arguments fails to stand up to scrutiny.

As an initial matter, it is clear that this Court may consider official disclosures made after the agency record was complete—just as the D.C. Circuit did, without any objection from the

CIA. *See Drones FOIA II*, 710 F.3d at 431 n.10. While judicial review of agency decisions in FOIA cases normally "focuses on the time the determination to withhold is made," *Bonner v. Dep't of State*, 928 F.2d 1148, 1152, 1153 n.10 (D.C. Cir. 1991), the courts have applied a more flexible rule where "post-decision disclosure . . . goes to the very heart of the contested issue." *Scheer v. Dep't of Justice*, 35 F. Supp. 2d 9, 13 (D.D.C. 1999) (citing *Powell v. U.S. Bureau of Prisons*, 927 F.2d 1239, 1242–43 (D.C. Cir. 1991)).

On the merits, while it is generally true that statements made by legislators, executive-branch officials of other agencies, or former agency officials are insufficient to effect official acknowledgement, *see, e.g.*, *Frugone v. CIA*, 169 F.3d 772, 774 (D.C. Cir. 1999), the categorical rule suggested by the government here and elsewhere is not the law.[29] Indeed, the D.C. Circuit has explicitly eschewed such a construction of the official-acknowledgment doctrine. *See Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990) (expressly declining to reach the question whether members of Congress can effect official acknowledgments); *see also Hoch v. CIA*, No. 88-5422, 1990 WL 102740, at *1 (D.C. Cir. July 20, 1990) (per curium) ("We cannot so easily disregard the disclosures by congressional committees. . . . This circuit has never squarely ruled on this issue, but we need not do so to decide this case." (footnotes omitted)). The D.C. Circuit's recent decision in *Ameziane v. Obama*, 699 F.3d 488 (D.C. Cir. 2012), is instructive. There, the circuit court held that both the district court itself and a Guantánamo detainee's lawyer constituted sources of official acknowledgment. *See id.* at 492 (observing that the "district court

[29] In *Frugone*, the court held that a letter from the Office of Personnel Management ("OPM") acknowledging a prior relationship between the CIA and former CIA employee did not defeat an exemption claim by the CIA because compelled disclosure of the requested records through the FOIA "could cause greater diplomatic tension" than "the informal, and possibly erroneous, statements already made by the OPM." *See* 169 F.3d at 775. That holding supports Plaintiffs here, as it underscores the rationale justifying the "official acknowledgment" doctrine explained in this subsection.

order itself . . . would *clearly* constitute an official acknowledgment of [the detainee's] cleared status" (emphasis added)); *id.* at 493 (explaining that because the detainee's attorney was "an officer of the court, subject to the serious ethical obligations inherent in that position," any representations made by him "would be tantamount to, and a sufficient substitute for, official acknowledgment by the U.S. government"); *see also id.* at 493 ("Although foreign governments would be unlikely to rely on a claim by a third party—or even by [the detainee] himself—that [the detainee] has been cleared for transfer, the same is not true with respect to a similar representation made by counsel.").[30]

The government has cited (both here and elsewhere) a handful of cases in which the courts found disclosures of legislators or former agency officials insufficient to constitute official acknowledgements, *see* Br. for Defendants–Appellees 34–36, *Targeted Killing FOIA II*, No. 13-445 (2d Cir. June 14, 2013), but the facts of those cases do not even remotely resemble those presented here.[31] Indeed, almost all of the cases the government has cited turned on the question whether the disclosures were sufficiently *specific* to constitute official acknowledgments—not on the question whether the person disclosing the information was capable, given his or her position, of effecting an official acknowledgement.[32] One of the cases on which the government

[30] Courts have held that even *private* actors may make official acknowledgments of "state secrets" when they are "considered reliable because they come directly from persons in a position to know whether or not the supposedly covert activity is taking place." *See Terkel v. AT & T Corp.*, 441 F. Supp. 2d 899, 913 (N.D. Ill. 2006) (citing *Hepting v. AT & T Corp.*, 439 F. Supp. 2d 974, 993 (N.D. Cal. 2006)).

[31] *See also* Jack Goldsmith, *The Significance of DOJ's Weak Response to Rogers' Acknowledgment of CIA Drone Strikes*, Lawfare (Feb. 15, 2013, 10:09 AM), http://bit.ly/YnEqmj (characterizing as "weak" the government's argument, in a Rule 28(j) letter to the D.C. Circuit, that disclosures of officials of coordinate branches cannot accomplish official acknowledgements, and observing that the cases cited by the government "do not stand for the proposition" for which the government cites them).

[32] *See Moore v. CIA*, 666 F.3d 1330, 1333 n.4 (D.C. Cir. 2011) (holding that FBI agent's declaration did not constitute an official acknowledgment because it did not "identify *specific*

has relied involved an entirely distinct question, and explicitly left open the possibility that disclosures by members of Congress could render otherwise-applicable FOIA exemptions inapplicable.[33] Another did not discuss official acknowledgments at all.[34]

The official acknowledgments cited by Plaintiffs here clearly satisfy the prevailing standard. The disclosures made by the leaders of the congressional intelligence committees are surely understood to be official by the general public, foreign governments, and enemies of the United States. Senator Feinstein and Representative Rogers are the chairpersons of the congressional committees that oversee the CIA, *see* 50 U.S.C. § 413b, and they have made clear that they have first-hand information about the CIA's involvement in monitoring the agency's targeted-killing operations. The CIA cannot credibly contend that Senator Feinstein and Representative Rogers are uninformed, or even that they are perceived to be uninformed by the

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records or dispatches *matching* [a] FOIA request" directed at the CIA (emphases added)); *Wilson v. CIA*, 586 F.3d 171, 195–96 (2d Cir. 2009) (determining that "bureaucratic transmittal" of a letter acknowledging plaintiff's CIA employment did not constitute official acknowledgment because additional "disclosure of the information presently censored by the CIA would . . . facilitate the identification of particular sources and methods"); *Fitzgibbon*, 911 F.2d at 765–66 (holding that simply because a congressional committee had revealed the existence of a CIA station on a certain date did not defeat exemption claim as to existence of the station prior to that date); *Afshar v. Dep't of State*, 702 F.2d 1125, 1133 (D.C. Cir. 1983) (rejecting argument that revelations in books by former CIA officers constituted official acknowledgments because "none of the[] books *specifically reveal*[*ed*]" the information sought through the FOIA (emphasis added)); *Military Audit Project v. Casey*, 656 F.2d 724, 745 (D.C. Cir. 1981) (concluding that Senate committee report did not defeat exemption claim because "either . . . the CIA still has something to hide or . . . it wishes to hide from our adversaries the fact that it has nothing to hide"); *Earth Pledge Found. v. CIA*, 988 F. Supp. 623, 627–28 (S.D.N.Y. 1996) (concluding that disclosures made in a congressional report were not specific enough to defeat an exemption claim).

[33] *See Murphy v. Dep't of Army*, 613 F.2d 1151, 1158 (D.C. Cir. 1979). The *Murphy* court held that—in part because of the FOIA's carve-out for the dissemination of information to Congress—a single Member's *receipt* of an executive-branch memorandum did not waive the Exemption 5 privilege where the Member did not *reveal* the document to any third party. *See id.* at 1158.

[34] *See Phillippi v. CIA*, 655 F.2d 1325, 1331–32 (D.C. Cir. 1981).

public. Nor can the agency plausibly contend that the public is likely to disregard their statements until and unless those statements are confirmed by executive-branch officials. In other words, Senator Feinstein and Representative Rogers are the quintessential "one[s] in a position to know . . . officially." *Alfred A. Knopf, Inc.*, 509 F.2d at 1370.

Any CIA effort to dismiss the sufficiency of certain executive-branch disclosures similarly fails. The agency has elsewhere suggested that Mr. Panetta's explicit and unambiguous statements as Secretary of Defense about the CIA's role in targeted killings must be disregarded because, at the time he made them, he had begun to occupy a different chair during Cabinet meetings. If a private attorney can effect an official acknowledgement, *see Ameziane*, 699 F.3d at 492–93, surely a Cabinet official can do so, too. Likewise, it would be futile to claim that Mr. Brennan's statements about the CIA's role in the targeted-killing program have been uninformed or speculative. The agency could not seriously contend that Mr. Brennan was speaking on the basis of second-hand knowledge, that he was speculating about facts unknown to him, or that his statements were (or should have been) understood by any observer as anything other than official. And though Mr. Newland, Mr. Rizzo, and Mr. Munter made their statements after leaving government service, it is indisputable that they would have intimate knowledge of the CIA's use of drones, given their former positions. Each spoke for attribution, and each gave unambiguous confirmation of facts that the American public, allies, and enemies alike could not treat as anything other than authoritative. Particularly when read with the litany of other acknowledgments in this case, the statements of former officials can, and should, bear weight in the court's analysis. *See, e.g.*, Jack Goldsmith, *Thoughts on Today's Important Drone FOIA Oral Argument in DC Circuit*, Lawfare (Sept. 20, 2012 6:34 AM), http://bit.ly/P2wOBB ("If one considers the official statements that come close to the line . . . in combination with (a) the many

purposeful leaks to the press by unnamed senior officials that contain many (often self-serving) details about CIA involvement in deploying drones, and (b) the many (un-denied and unpunished) overt statements by former officials about CIA involvement in the drone program (collected in the ACLU brief), the *only* reasonable conclusion is that the CIA is involved in the drone program.").

Accepting the CIA's fiction that its use of drones is still officially unacknowledged would lead to a truly perverse result. It would mean that details about the targeted-killing program could be discussed and debated openly in Congress and on television by members of the congressional committees tasked with overseeing the program—as they have been—but still be considered secrets in federal courts tasked with enforcing the nation's public-information laws. And it would mean that executive-branch officials with the most knowledge of controversial programs could promote and defend those programs to the public and selectively disclose information about them without ever triggering disclosure obligations under the FOIA. Precedent does not require this result, and this Court should not abide it.

III. The CIA Cannot Justify Its "No Number No List" Response Under FOIA Exemptions 1 and 3.

The CIA's "no number no list" response would be unlawful even if the government had not officially acknowledged the agency's use of drones to carry out targeted killings. An agency may invoke a FOIA exemption only if its justification "appears logical or plausible." *Wolf*, 473 F.3d at 375 (quotation marks omitted). The CIA seeks to justify its "no number no list" response by reference to FOIA Exemptions 1 and 3.[35] *See* CIA Br. 11–27. For the reasons given below, the CIA has failed to bear its burden.

[35] The CIA represents that "Plaintiffs did not appeal the applicability of" Exemptions 1 and 3, "only the issue of waiver." CIA Br. 16. More accurately, in challenging the agency's Glomar

To support a FOIA Exemption 3 withholding, the government bears the burden of showing that its withholdings fall within the scope of a qualifying statute. *See* 5 U.S.C. § 552(b)(3); *Am. Civil Liberties Union v. Dep't of Def.*, 389 F. Supp. 2d 547, 559 (S.D.N.Y. 2005). The CIA cites both the CIA Act and the National Security Act as relevant withholding statutes. *See* CIA Br. 14. Section 6 of the CIA Act exempts from disclosure information that would reveal "intelligence sources and methods" or would reveal the "organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency." 50 U.S.C. § 3507. Independently, the National Security Act prohibits the "unauthorized disclosure" of "intelligence sources and methods." 50 U.S.C. § 3024(i)(1). More narrowly, FOIA 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) 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 "[c]lassification [c]ategor[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. E.O. 13526 §§ 1.1, 1.4. The classification categories relevant here are "intelligence activities (including covert action)" and "intelligence sources or methods," and "military plans, weapons systems, and operations." *Id.* § 1.4.

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response—which, of course, was rejected on appeal—Plaintiffs did not pursue the argument that "the mere existence or nonexistence of records responsive to [their] requests was not exempt under FOIA Exemption 1 or 3." *Drones FOIA II*, 710 F.3d at 428. As that particular argument is no longer at issue in this litigation, Plaintiffs have not waived the ability to challenge "the applicability of" Exemptions 1 and 3 to the information the CIA now seeks to withhold by its "no number no list" response.

To begin with, neither Exemption 1 nor 3 has the broad scope that the CIA gives it. Indeed, the government's construction of those exemptions here would give the CIA a virtually categorical exemption from the FOIA. On the government's theory, what activities of the CIA would *not* constitute a method or function of the agency? Whatever the exemptions mean, they cannot be allowed to swallow the FOIA's rule—which is transparency. *See, e.g.*, *Phillippi I*, 546 F2d 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.'"). Notably, 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"). Further, in 1984, 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) (1984), *reprinted in* 1984 U.S.C.C.A.N. 3778, 3780.

The information that the CIA endeavors to protect here—that is, the information that would have to be included in a *Vaughn* index—does not fall "logically or plausibly" within Exemptions 1 and 3.

Sources and Methods. The agency declares that the "number and nature" of responsive records *themselves* constitute "intelligence sources and methods." Lutz Decl. ¶ 20; *accord id.*

¶ 30.[36] But it would preposterous to consider the number of responsive records to be an "intelligence source or method"—especially once the agency's interest in a given subject is established. That the CIA possesses twenty-five drones for targeted killing might constitute a protected method (though Plaintiffs do not concede it is); that the CIA possesses twenty-five documents on the subject of drones is plainly not. Moreover, it will almost always be true that enumerating and describing records responsive to a FOIA request will reveal something about the depth or breadth of an agency's interest in the subject of the request. If "number and nature" information is exempt from FOIA disclosure as a source or method, anything beyond "mere" interest will always be exempt, opening a massive loophole in the FOIA.

The agency's supplemental argument that "number and nature" information about its responsive documents would *reveal* "intelligence sources methods" again overstates its case. *See* Lutz Decl. ¶¶ 23–24. To prevail, the CIA must convince the Court that *any* disclosure of information about responsive documents "could reasonably be expected to lead to unauthorized disclosure of . . . intelligence sources and methods." *Halperin v. CIA*, 629 F.2d 144, 147 (D.C. Cir. 1980). One problem with this argument is that even if the CIA's *use* of drones for targeted killing is properly understood to be a source or method, *see Drones FOIA I*, 808 F. Supp. 2d at 290–92, the agency's *interest* in the *government*'s use of drones is plainly not—and, in any

[36] Because it did not have a "no number no list" response before it at the time, this Court had no occasion to consider whether the "number and nature" of responsive records could constitute "intelligence sources or methods" in its previous opinion. There, the Court addressed only the CIA's Glomar response, concluding that "[c]onfirming the existence or nonexistence of pertinent agency records on drone strikes could reasonably be expected to lead to the unauthorized disclosure of intelligence sources and/or methods." *Drones FOIA I*, 808 F. Supp. 2d at 292.

As the D.C. Circuit held last March, the CIA's intelligence interest has been officially acknowledged, and as Plaintiffs explain above, what might "reasonably be expected" to follow from the rejection of an agency's Glomar response is fundamentally different than what might follow from rejection of a "no number no list" response. The Court should therefore address the "intelligence source and methods" question anew here; the same is true for the other questions of FOIA-exemption applicability in this subsection.

event, that interest is already established. As discussed above, *see supra* Discussion § II.A, that distinction moots many of the CIA's concerns about what enumeration or description of its responsive records might reveal. *See, e.g.*, Lutz Decl. ¶ 29 ("Whether active or passive, extensive or circumscribed, the CIA's precise role in these activities remain exempt from disclosure."). Another is that while it is conceivable that the disclosure of information about a specific document could reveal the agency's operational role in the drone program, it is inconceivable that the disclosure of information about *any* document would have the same effect. The CIA's burden here, however, is to demonstrate exactly that.

Functions. With respect to Exemption 3, the agency contends that the CIA Act "protects information that would reveal the functions of the CIA, which the agency explains include "the nature of the CIA's role in drone strike operations" and "intelligence activities, sources and methods." CIA Br. 16; *see id.* at 17 ("[T]he request seeks to discover specific functions of CIA personnel—whether they are involved specifically in piloting, target selection, or post-strike assessments and whether that role is active, passive, extensive or circumscribed." (citing Lutz Decl. ¶ 42)). The CIA also cites legal "authorities and operational involvement in this area" as "functions" under the CIA Act. *Id.* at 18. However, as this Court recently observed after an extensive and thorough review of authority, the agency's "proposed construction" of the CIA Act is "inappropriately broad." *Nat'l Sec. Counselors v. CIA*, No. 11–443, 2013 WL 4111616, at *55 (D.D.C. Aug. 13, 2013). The statute's plain text protects from disclosure only the agency's functions and organization "pertaining to or about personnel, . . . not to all information that *relates* to such functions and organization." *Id.* (citation omitted); *accord Baker v. CIA*, 580 F.2d 664, 670 (D.C. Cir. 1978) ("We should emphasize before closing that section 403g creates a very narrow and explicit exception to the requirements of the FOIA. Only the specific information on

the CIA's personnel and internal structure that is listed in the statute will obtain protection from disclosure."); *Phillippi I*, 546 F2d at 1015, n.14; *Nat'l Sec. Counselors*, 2013 WL 4111616, at *58 ("The CIA Act does not protect *all* information about CIA functions generally; it more narrowly protects information that would reveal that a given function is one 'of personnel employed by the Agency.'" (quoting 50 U.S.C. § 3507)). The CIA overreaches in its attempt to shelter "the nature of the CIA's role in drone strike operations" in the CIA Act's narrow coverage of CIA "functions."

Harm. Under Exemption 1, the CIA must establish that "public disclosure of the withheld information will harm national security." *Guantánamo FOIA*, 628 F.3d at 624; *see* E.O. 13526 §§ 1.1. The CIA has fallen far short of demonstrating that foreseeable and identifiable harm to the national security would result were the agency required to furnish *any* further information about its responsive documents. For that reason alone, the agency has not satisfied its burden under Exemption 1. But even as to particular information, the CIA's justifications are woefully inadequate. For example, the agency claims that "if it was officially confirmed that the CIA possesses this extraordinary authority [to effectuate targeted killings using drones], it would reveal that the CIA had been granted authorities against terrorists that go beyond traditional intelligence-gathering activities." Lutz Decl. ¶ 44. But, in 2013, the revelation that the CIA possesses (or has possessed) "authorities . . . that go beyond traditional intelligence-gathering activities" is not a revelation at all. *See, e.g.*, Scott Shane, *U.S. Engaged in Torture After 9/11, Review Concludes*, N.Y. Times, Apr. 16, 2013, http://nyti.ms/10Zh4os (discussing the CIA's use of torture). The agency also contends that information about CIA involvement in drone strikes "could lead to the belief by other governments and their people, rightly or wrongly, that the CIA was responsible for certain suspicious activities carried out within their countries, which could

harm the foreign affairs of the United States and also reduce the effectiveness of future CIA operations." Lutz Decl. ¶ 44. But failing to snuff out conspiracy theories about CIA involvement in "suspicious activities carried out within their countries" simply cannot be a cognizable Exemption 1 harm—and if it were, it might well be raised in every case. An argument based on these types of unbounded suppositions would create an exception to disclosure far beyond what the exemption protects. Finally, the agency worries that "if it was officially confirmed that the CIA did not have this authority, it would allow terrorists in certain areas to operate more freely and openly knowing that they could not be targeted by the CIA via drones or other non-traditional intelligence activities." Lutz Decl. ¶ 44. But given that the entire world knows that the U.S. government uses drones in "certain areas," it is simply implausible that actual terrorists in those areas would be preoccupied with which particular agency is operating the drones, rather than with the fact that they are being operated in the first place.

CONCLUSION

For the foregoing reasons, this Court should deny summary judgment to the CIA and grant partial summary judgment to Plaintiffs. Specifically, the Court should (i) make specific, on-the-record findings as to what facts about the drone program the government has officially acknowledged; (ii) require the CIA to provide Plaintiffs with a *Vaughn* index that describes each withheld document by type, date, length, author, recipient, and subject matter; and (iii) require the CIA, to the extent it withholds any of this descriptive information from its *Vaughn* index, to justify in a publicly filed declaration, on a document-by-document basis, why this information is being withheld.

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Respectfully submitted,

/s/ Hina Shamsi

Arthur B. Spitzer (D.C. Bar No. 235960)
American Civil Liberties Union
of the Nation's Capital
4301 Connecticut Avenue, N.W., Suite 434
Washington, D.C. 20008
T: 202.457.0800
F: 202.452.1868
artspitzer@aclu-nca.org

Jameel Jaffer
Hina Shamsi
Brett Max Kaufman (*pro hac vice*)
American Civil Liberties Union Foundation
125 Broad Street—18th Floor
New York, NY 10004
T: 212.519.2500
F: 212.549.2654
jjaffer@aclu.org