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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

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." American Civil Liberties Union v. CIA, 710 F.3d 422, 431 (D.C. Cir. 2013) ("ACLU 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*

s a b o

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

---

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. 22, 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 20, 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

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.

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 "indefensible[]." 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 Panetta PCIP Remarks, and other details from the Brennan Wilson Center Speech, in a comprehensive invalidation 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 stri

> 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

---

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 Dist. 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 offered 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

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), 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 means of manipulating public debate. The FOIA reflects a considered judgment that our democracy is best served when the

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 intended 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) ("We 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 classifies 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 Game, 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

knowledge' where the agency alone possesses, reviews, discloses, and withholds the subject matter of the request. The agency would then 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.8; 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) ("Phillippi 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

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. Id. at Jones 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 exempt 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 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.

"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 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,

"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 "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"

if it was not directly engaged in carrying out targeted killings. Here are some possibilities: The CIA has an intelligence interest in a potential adversary's 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 to exploit against enemy attacks; it has an intelligence interest in assessing the technological capabilities 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 "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 areas. 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

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 secret, the CIA cannot withhold information from a Vaughn index that would reflect that interest, nor may it refuse to provide a Vaughn index 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

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-controlled 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 argued. '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

Feinstein Takeaway Interview. Finally—and equally telling—when the SSCI considered

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,'"

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 Maxwell 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 construct 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.

has relied involved an entirely distinct question, and explicitly left open the possibility that disclosures by members of Congress could not trump 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

---

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 revealed [] 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,

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).

To begin with, neither Exemption 1 nor 3 ha

¶ 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, 808 F. Supp. 2d at 290–92, the agency's interest in the government's use of drones is plainly not—and, in any

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 affecting 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 here in 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 F.2d 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 effect 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

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.

Dated: September 13, 2013

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