ORAL ARGUMENT NOT YET SCHEDULED

No. 20-5045

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY

Plaintiff,

COMMITTEE TO PROTECT JOURNALISTS,

Plaintiff-Appellant,

-against-

CENTRAL INTELLIGENCE AGENCY, FEDERAL BUREAU OF INVESTIGATION, NATIONAL SECURITY AGENCY, OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE,

Defendants-Appellees,

UNITED STATES DEPARTMENT OF STATE

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR PLAINTIFFS-APPELLANTS

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July 6, 2020

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties And Amici

Plaintiff-Appellant is the Committee to Protect Journalists. The Committee to Protect Journalists is a nonprofit organization that promotes press freedom and defends the right of journalists to report the news safely and without fear of reprisal. Appellees are elements of the Intelligence Community of the United States government: the Central Intelligence Agency, the Department of Justice, the National Security Agency, and the Office of the Director of National Intelligence. Each of the Appellees is subject to the Freedom of Information Act, 5 U.S.C. § 552. There were no amici before the District Court.

B. Ruling Under Review

CPJ appeals the Order and Memorandum Opinion (424 F. Supp. 3d 36 (2020)) issued by the Hon. Trevor N. McFadden, United States District Judge, granting the Appellees' Motion for Summary Judgment and denying CPJ's Cross-Motion for Summary Judgment, entered on January 6, 2020. Copies of the Order and Memorandum Opinion are included in the Appendix. J.A. at 339, 352.

C. Related Cases

This case has not previously been up on appeal before this Court and there are no related cases.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, Plaintiff-Appellant the Committee to Project Journalists submits this Corporate Disclosure Statement. The Committee to Protect Journalists is a nonprofit, nonpartisan organization that promotes press freedom worldwide. The Committee to Protect Journalists has no parent company, and no publicly held company has a 10% or greater ownership interest in the Committee to Protect Journalists.

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GLOSSARY

CIA	Central Intelligence Agency
DEA	Drug Enforcement Administration
DNI	Director of National Intelligence
FBI	Federal Bureau of Investigation
FOIA	Freedom of Information Act
IC	U.S. Intelligence Community
NSA	National Security Agency
ODNI	Office of the Director of National Intelligence
OPM	Office of Personnel Management
OSJI	Open Society Justice Initiative

JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this action pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(4)(B), and pursuant to 28 U.S.C. § 1331. Plaintiff-Appellant the Committee to Protect Journalists ("CPJ") served FOIA requests on five elements, or member agencies, of the Intelligence Community, all of which are subject to FOIA: the Central Intelligence Agency, the Federal Bureau of Investigation, the National Security Agency, the Office of the Director of National Intelligence, and the Department of State. The requests sought documents related to the duty, under Intelligence Community Directive 191, to warn a person under a known threat—in this case, the journalist Jamal Khashoggi, prior to his murder by the Saudi Arabian government. All the agencies, except the Department of State, responded by invoking the *Glomar* doctrine—*i.e.*, asserting that merely to acknowledge the existence or nonexistence of documents responsive to CPJ's requests would compromise national security. The District Court upheld the *Glomar* responses, granting summary judgment for the government and issuing a final order that disposed of all parties' claims on January 6, 2020. J.A. at 352 (Order). Plaintiffs filed a timely Notice of Appeal on March 4, 2020 as to the four defendants that provided *Glomar* responses. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Given that the Intelligence Community operates by presidential directive as an "integrated" whole and the FOIA requests here go to its members' shared interagency responsibilities under Intelligence Community Directive 191, when one IC element (the Department of State) stated "definitively" that "the United States" lacked advance knowledge of Jamal Khashoggi's disappearance, should the other elements still have been allowed to invoke the *Glomar* doctrine? The District Court said yes. CPJ asks this Court to say no.
2. Were the agencies' conclusory declarations—which offered no meaningful detail as to how non-*Glomar* responses purportedly would compromise national security, reveal intelligence sources and methods, or disclose information related to the NSA or communications intelligence—legally sufficient to support *Glomar* responses? The District Court said yes. CPJ asks this Court to say no.

STATEMENT OF THE CASE

I. BACKGROUND

This case arises from the brutal murder of journalist Jamal Khashoggi by the Saudi Arabian government. Mr. Khashoggi, a Saudi Arabian dissident and U.S. resident, was a prominent journalist who often wrote critically about, and

criticized, the Saudi Arabian government.[1] In one of his columns for *The Washington Post*, Mr. Khashoggi wrote: "I can speak when so many cannot. I want you to know that Saudi Arabia has not always been as it is now. We Saudis deserve better."[2] The central issue in the case is what, if anything, the IC Elements knew in advance about the threat to Mr. Khashoggi, and what, if anything, they did to meet their duty to warn him if they had knowledge of the threat.

A. The U.S. Intelligence Community And Its Duty To Warn Under IC Directive 191

1. The Integrated Intelligence Community

The U.S. Intelligence Community ("IC") is a group of agencies that, by presidential directive, "***operate as part of an integrated Intelligence Community, as provided in law or this order***." *See* Exec. Order No. 12,333 § 1.7, 46 Fed. Reg. 59,941, 59,952 (Dec. 8, 1981), *reprinted as amended in* 50 U.S.C. § 3001 note (emphasis added). As stated on its own official website, the IC "relies heavily on collaboration among its constituent elements."[3]

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[1] *See* Jamal Khashoggi, *Jamal Khashoggi: All you need to know about Saudi journalist's death*, BBC (June 19, 2019), https://www.bbc.com/news/world-europe-45812399.

[2] Jamal Khashoggi, *Saudi Arabia wasn't always this repressive. Now it's unbearable*, THE WASH. POST (Sept. 18, 2017), https://www.washingtonpost.com/news/global-opinions/wp/2017/09/18/saudi-arabia-wasnt-always-this-repressive-now-its-unbearable.

[3] *Collaboration*, INTEL.GOV, https://www.intelligence.gov/index.php/mission/our-values/344-collaboration (last visited June 27, 2020).

Confirming the notion of the IC as an "integrated" whole, the IC repeatedly speaks of itself in the first-person plural: "Our customers include the president, policy-makers, law enforcement, and the military."[4] "The Intelligence Community is made up of 17 elements that each focus on a different aspect of our common mission."[5] The IC describes itself as "a multi-agency community working on behalf of our fellow Americans" and refers to the 17 elements as "our organizations."[6]

Five of those 17 organizations received FOIA requests from CPJ, and four are now before this Court as appellees: the Office of the Director of National Intelligence ("ODNI"); the Central Intelligence Agency ("CIA"); the National Security Agency ("NSA"); and the Federal Bureau of Investigation ("FBI") (collectively, the "IC Elements"). The fifth IC element to receive FOIA requests from CPJ was the Department of State. Those requests were resolved by agreement, leading to CPJ's voluntary dismissal of the Department of State as a defendant below.

2. Intelligence Community Directive 191

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[4] *Mission*, INTEL.GOV, https://www.intel.gov/mission (last visited June 27, 2020).

[5] *How the IC Works*, INTEL.GOV, https://www.intel.gov/how-the-ic-works (last visited June 27, 2020).

[6] *Home*, INTEL.GOV, https://www.intel.gov/; *Our Organizations*, INTEL.GOV, https://www.intel.gov/how-the-ic-works#our-organizations (last visited June 27, 2020).

More than three years before Mr. Khashoggi's murder, the Director of National Intelligence issued Intelligence Community Directive 191 ("IC Directive 191"). IC Directive 191 provides that "[a]n IC element that collects or acquires credible and specific information indicating an impending threat of intentional killing, serious bodily injury, or kidnapping directed at a person . . . shall have a duty to warn the intended victim." IC Directive 191 § E.1.

IC Directive 191 expressly calls for cooperation and information sharing among IC elements, as well as documentation of any threats and warnings. IC elements are required under the Directive to "***document and maintain records*** on":

- "[t]he method, means, and substance of any warning given by the IC element";
- "[s]enior officer reviews of threat information and determinations";
- "[j]ustifications not to warn an intended victim based on waiver criteria identified in [IC Directive 191]";
- "[c]oordination with the FBI, or CIA . . . to determine how best to pass threat information to the intended victim";
- "[d]ecisions to inform the intended victim in light of exigent circumstances that preclude prior consultation";
- "[c]ommunication of threat information to another IC element or U.S. government agency for delivery to the intended victim"; and

- "[n]otification to the originating IC element of how and when threat information was delivered to the intended victim."

Id. § F.13 (emphasis added).

Given these requirements, if the IC Elements had advance information about the threat to Mr. Khashoggi's life, then they not only had a legal duty to warn him—they would necessarily have documents about how they executed on, or failed in, that duty. The IC Elements also would have documents about their related dealings with one another.

B. The State-Sponsored Killing Of Journalist Jamal Khashoggi And Its Aftermath

1. Saudi Agents' Murder And Dismemberment Of Mr. Khashoggi

The key facts about Mr. Khashoggi's death have been widely reported by U.S. and non-U.S. government agencies, human rights organizations, and leading media organizations, and are subject to this Court's judicial notice. *See, e.g.*, *Wash. Post v. Robinson*, 935 F.2d 282, 291 (D.C. Cir. 1991) (citing *Agee v. Muskie*, 629 F.2d 80, 81 n.1, 90 (D.C.Cir.1980)) (taking judicial notice of facts generally known as a result of newspaper articles); *Reporters Comm. for Freedom of Press v. FBI*, 369 F. Supp. 3d 212, 215 n.2 (D.D.C. 2019) (taking judicial notice of news articles); *see generally* Fed. R. Evid. 201(b), (c). On October 2, 2018, Mr. Khashoggi went to the Saudi consulate in Istanbul, Turkey to obtain

documentation required for his upcoming marriage.[7] A team of 15 Saudi agents grabbed Mr. Khashoggi, injected him with an unknown heavy sedative, and began suffocating him with a plastic bag.[8] Audio transcriptions released by Turkish intelligence showed that Mr. Khashoggi struggled and repeatedly pled for his life.[9] After the Saudi agents killed Mr. Khashoggi, they mutilated his body with a bone saw.[10]

Once the news of Mr. Khashoggi's death emerged, reports began to circulate almost immediately that Crown Prince Mohammed bin Salman of Saudi Arabia had personally ordered the killing.[11] U.S. and international scrutiny to this day

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[7] J.A. at 202 (Bethan McKernan, *Jamal Khashoggi Was Worried About Consulate Visit, Says Fiancée*, THE GUARDIAN (Oct. 26, 2018, 10:22 PM), https://www.theguardian.com/world/2018/oct/26/jamal-khashoggi-was-worried-about-consulate-visit-says-fiancee).

[8] Ben Hubbard & David D. Kirkpatrick, *Saudis Shift Account of Khashoggi Killing Again, as 5 Agents Face Death Penalty*, N.Y. TIMES (Nov. 15, 2018), https://www.nytimes.com/2018/11/15/world/middleast/saudi-arabia-khashoggi-death-penalty.html; Jackie Northam, *U.N. Report Implicates Saudi Crown Prince in Killing of Jamal Khashoggi*, NPR (June 19, 2019, 5:06 PM), https://www.npr.org/2019/06/19/734157980/u-n-report-implicates-saudi-crown-prince-in-killing-of-jamal-khashoggi.

[9] Abdurrahman Şimşek & Nazif Karaman, *Saudi Hit Squad's Gruesome Conversations During Khashoggi's Murder Revealed*, DAILY SABAH (Sept. 9, 2019, 2:49 PM), https://www.dailysabah.com/investigations/2019/09/09/saudi-hit-squads-gruesome-conversations-during-khashoggis-murder-revealed.

[10] Ben Hubbard, *One Killing, Two Accounts: What We Know about Jamal Khashoggi's Death*, N.Y. TIMES (Oct. 20, 2018), https://www.nytimes.com/2018/10/20/world/middleeast/khashoggi-turkey-saudi-narratives.html.

[11] Patrick Wintour, *Evidence Suggests Crown Prince Ordered Khashoggi Killing, Says Ex-MI6 Chief*, THE GUARDIAN (Oct. 19, 2018, 10:08 AM),

continues to focus on the possibility that this was state-sanctioned murder implicating the highest levels of the Saudi government.

2. The Global Demand For Accountability

"[Mr.] Khashoggi's disappearance, and the facts or allegations regarding his killing in Saudi custody, have continued to be a matter of intense interest among the public, legislators, other policymakers, and journalists." J.A. at 318-19 (*Open Soc'y Justice Initiative v. CIA*, 399 F. Supp. 3d 161, 167 (S.D.N.Y. 2019)). The plaintiff in *Open Society Justice Initiative v. CIA*, a leading human rights organization, made FOIA requests to the Department of State and the Department of Defense, seeking "all records relating to the killing of U.S. resident Jamal Khashoggi, including but not limited to the CIA's findings on and/or assessment of the circumstances under which he was killed and/or the identities of those responsible." J.A. at 311 (*id.* at 162).

The *Open Society* court rejected a government request to slow the rate of production of responsive documents. The court cited the "paramount public importance and urgency to OSJI's request for records bearing on the information known to the federal agencies regarding Khashoggi's disappearance." J.A. at 319 (*id.* at 167). In that litigation, the CIA and the ODNI have publicly acknowledged

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https://www.theguardian.com/world/2018/oct/19/crown-prince-mohammed-jamal-khashoggi-killing-mi6-sir-john-sawers.

that they have "records relating to the killing of U.S. resident Jamal Khashoggi, including but not limited to the CIA's findings on and/or assessment of the circumstances under which he was killed and/or the identities of those responsible." J.A. at 311 (*id.* at 162); *see also* J.A. at 325 (Joint Status Letter, *Open Soc'y Justice Initiative v. CIA*, 19-cv-00234-PAE, ECF No. 99 (S.D.N.Y. Sept. 24, 2019)).

The "intense interest" noted by the *Open Society* court began immediately after Mr. Khashoggi's murder. The Senate Foreign Relations Committee promptly urged President Trump to make "a determination on the imposition of sanctions pursuant to the Global Magnitsky Human Rights Accountability Act with respect to any foreign person responsible for . . . a [human rights] violation related to Mr. Khashoggi."[12] The Global Magnitsky Human Rights Accountability Act requires the President to determine whether a foreign person is responsible for an extrajudicial killing, torture, or other gross violation of internationally recognized human rights against an individual exercising freedom of expression.[13]

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[12] J.A. at 224 (Press Release, U.S. Sen. Comm. on Foreign Relations, Corker, Menendez, Graham, Leahy Letter Triggers Global Magnitsky Investigation Into Disappearance of Jamal Khashoggi (Oct. 10, 2018), https://www.foreign.senate.gov/press/chair/release/corker-menendez-graham-leahy-letter-triggers-global-magnitsky-investigation-into-disappearance-of-jamal-khashoggi)

[13] *Id.*

On October 22, 2018, over 50 Members of Congress wrote to then-Director of National Intelligence Daniel Coats, inquiring about what actions had been taken regarding IC Directive 191 and Mr. Khashoggi.[14] The following week, another group of Senators wrote to Director Coats: "Directive [191] is a clear message to the American people that the U.S. government takes targeted threats seriously and prioritizes the protection of individuals as a matter of national security. Consequently, questions regarding whether Mr. Khashoggi was notified of known threats to his life have raised serious concerns."[15]

Senators of both parties have reinforced the need for transparency and accountability. Bob Corker, Republican of Tennessee, then-chair of the Senate Foreign Relations Committee, said, "I think a price needs to be paid . . . . I, along with others in the Senate, requested the administration conduct a thorough Global Magnitsky sanctions determination regarding the murder of Jamal Khashoggi."[16] Senator Ben Sasse, Republican of Nebraska, said that Mr. Khashoggi's

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[14] Press Release, More than 50 Members of Congress Call on the Trump Administration to Release Evidence of Prior U.S. Awareness of the Saudi Plot to Capture Khashoggi (Oct. 22, 2018), https://pocan.house.gov/media-center/press-releases/more-than-50-members-of-congress-call-on-the-trump-administration-to.

[15] J.A. at 227 (Letter from Richard Blumenthal et al., U.S. Senators, to Daniel Coats, Dir. Of Nat'l Intelligence (Oct. 30, 2018)).

[16] Press Release, U.S. Senate Comm. on Foreign Relations, Corker Statement on U.S. Sanctions Against Saudi Arabian Officials For Murder of Jamal Khashoggi (Nov. 15, 2018), https://www.foreign.senate.gov/press/chair/release/corker-statement-on-us-sanctions-against-saudi-arabian-officials-for-murder-of-jamal-khashoggi.

disappearance would not be "swept under the rug," and that he believed there should be an "international investigation" into what happened.[17] Senator Cory Booker, Democrat of New Jersey, said, "I'm worried about efforts to cover this up and I'm worried about our administration willing to just go along and get along because of a lot of the financial interests that we might have."[18]

On December 13, 2018, the Senate unanimously passed a resolution that held the Crown Prince personally responsible for the death of Mr. Khashoggi.[19] In the same session, the Senate also, for the first time in its history, invoked the War Powers Act, and voted to end U.S. military assistance to Saudi Arabia over Mr. Khashoggi's execution.[20]

In December 2018, CIA Director Gina Haspel briefed leaders of Senate committees on the matter.[21] Immediately afterward, Senator Corker publicly stated

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[17] Mick Krever, *Republican Senator: Khashoggi Disappearance Won't Be "Swept Under the Rug"*, CNN (Oct. 17, 2018, 2:42 PM), https://www.cnn.com/2018/10/17/politics/khashoggi-sasse-amanpour/index.html.

[18] Hunter Walker, *Cory Booker Says the U.S. Needs to "Reexamine" Its "Entire Relationship" with Saudi Arabia*, YAHOO NEWS (Oct. 18, 2018), https://www.yahoo.com/news/cory-booker-says-u-s-needs-re-examine-entire-relationship-saudi-arabia-211344667.html.

[19] *See* J.A. at 231 (Julie Hirschfeld Davis & Eric Schmitt, *Senate Votes to End Aid for Yemen Fight Over Khashoggi Killing and Saudis' War Aims*, N.Y. TIMES (Dec. 13, 2018), https://www.nytimes.com/2018/12/13/us/politics/yemen-saudi-war-pompeo-mattis.html).

[20] *Id.*

[21] J.A. at 237 (Olivia Gazis, Bo Erickson, Camilo Montoya-Galvez, *Lindsey Graham After CIA Briefing on Jamal Khashoggi Murder: "There's a Smoking Saw"*, CBS NEWS (Dec. 4, 2018, 12:19 PM),

that "[i]f the crown prince went in front of a jury, he would be convicted in 30 minutes."[22] Referring to the killers' use of a bone saw to dismember Mr. Khashoggi, Senator Lindsay Graham stated: "There's not a smoking gun—there's a smoking saw."[23]

The demand for transparency and action has been international. On October 25, 2018, the European Parliament adopted a resolution emphasizing "the need for a continued thorough, credible and transparent investigation, in order to shed proper light on the circumstances of the murder of Jamal Khashoggi and to ensure that all those bearing responsibility are held fully to account."[24]

The United Nations commissioned an investigation by Special Rapporteur Agnès Callamard. The Special Rapporteur determined that Mr. Khashoggi's murder "represent[ed] no less than six violations" of international human rights law.[25] Her office also appealed to the UN Human Rights Council, the UN Security Council, and the UN Secretary-General for an "international criminal

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https://www.cbsnews.com/news/khashoggi-murder-cia-director-gina-haspel-briefs-senators-on-killing-today-live-updates/).

22 J.A. at 236 (*id.*).

23 J.A. at 236 (*id.*).

24 Resolution of 25 October 2018 on the Killing of Journalist Jamal Khashoggi in the Saudi Consulate in Istanbul, EUR. PARL. DOC. PV 13.18 (2018).

25 *Khashoggi Murder "an International Crime", Says UN-Appointed Rights Investigator: Special In-Depth UN News Interview*, UN NEWS (June 20, 2019), https://news.un.org/en/story/2019/06/1040951.

investigation."[26] Almost one year after her report, Ms. Callamard urged, "The US Congress must continue to push for the administration to release secret findings on the full extent of Prince Mohammed Bin Salman's role in the brutal killing of Jamal Khashoggi. Such findings must be made public."[27]

Despite the global and nonpartisan call for investigation and transparency, the U.S. government has remained largely unresponsive. The tone has been set at the top. President Trump has said, for example, that the United States would favor continued arms sales to the Saudi government over additional investigation.[28] Secretary of State Mike Pompeo has said he simply did not "want to talk about any of the facts," and "[the Saudi government] didn't want to either."[29] In December 2019, Congress passed a law requiring the ODNI to submit an unclassified report

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[26] *Id*.

[27] Agnès Callamard, *Jamal Khashoggi: The Latest Act in a Parody of Justice but not the Final Act for Justice*, COLUM. U. GLOBAL FREEDOM OF EXPRESSION (May 22, 2020), https://globalfreedomofexpression.columbia.edu/updates/2020/05/jamal-khashoggi-the-latest-act-in-a-parody-of-justice-but-not-the-final-act-for-justice/.

[28] J.A. at 270 (Chuck Todd, *President Trump's Full, Unedited Interview with Meet the Press*, NBC NEWS (June 23, 2019), https://www.nbcnews.com/politics/meet-the-press/president-trump-s-full-unedited-interview-meet-press-n1020731).

[29] Megan Keller, *Pompeo: Saudis Didn't Want to Discuss "Any of the Facts" in Khashoggi Disappearance*, THE HILL (Oct. 17, 2018, 12:06 PM), https://thehill.com/homenews/administration/411848-pompeo-saudi-arabia-didnt-want-to-discuss-any-of-the-facts-in.

on Mr. Khashoggi's murder to Congress. Instead, in February of 2020, the ODNI submitted only a classified version.[30]

C. The Department of State, An IC Element, Publicly And "Definitively" Confirms That "The United States Had No Advance Knowledge Of Jamal Khashoggi's Disappearance"

Shortly after the assassination of Mr. Khashoggi, on October 10, 2018, the U.S. Department of State repeatedly said, publicly and "definitively," that "the United States" had lacked advance knowledge of the threat to Jamal Khashoggi's life.[31] The context was an official Department of State press briefing—an on-the-record public event regularly staged by the Department and archived on its website. A journalist asked about a report "that said that the U.S. had intelligence, overheard or intercepted communications, suggesting that there was a threat to Mr. Khashoggi should he go [to Turkey]."[32] The Department of State's response was: "[A]lthough I cannot comment on intelligence matters, ***I can say definitively the***

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[30] Ellen Nakashima, *Lawmakers Want the DNI to Make Public the Intelligence Community's Assessment of Who's Responsible for Killing Jamal Khashoggi*, THE WASH. POST (Mar. 3, 2020, 9:48 AM), https://www.washingtonpost.com/national-security/lawmakers-want-the-dni-to-make-public-the-intelligence-communitys-assessment-of-whos-responsible-for-killing-jamal-khashoggi/2020/03/03/aafa70ee-5d07-11ea-9055-5fa12981bbbf_story.html.

[31] Office of the Spokesperson, *Department Press Briefing*, U.S. DEP'T OF STATE (Oct. 10, 2018), https://www.state.gov/briefings/department-press-briefing-october-10-2018/.

[32] *Id.*

United States had no advanced knowledge of Jamal Khashoggi's disappearance."[33]

The Department of State proceeded to confirm the point twice more. A journalist asked again: "[D]id you have any advance knowledge that there might be some kind of threat to [Mr. Khashoggi] should he go into the consulate in Istanbul?"[34] The State spokesman again said a clear and unequivocal no: "***We*** had no advanced knowledge."[35] Asked a third time, the spokesman said again: "***I can definitively say that we had no knowledge in advance of Mr. Khashoggi's disappearance***."[36] Notably, the statements asserted a lack of knowledge by the United States government as a whole—not just the Department of State.

These three Department of State statements stand in sharp contrast to reports by leading news organizations that U.S. intelligence agencies did, in fact, have advance knowledge of the threat to Mr. Khashoggi. According to one major newspaper, information about threats against Mr. Khashoggi's life had "been disseminated throughout the U.S. government and was contained in reports that are routinely available to people working on U.S. policy toward Saudi Arabia or

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33 *Id.* (emphasis added).
34 *Id.*
35 *Id.* (emphasis added).
36 *Id.* (emphasis added).

related issues."[37] According to another major newspaper, in a conversation intercepted by U.S. intelligence agencies in August 2017, the Crown Prince told an aide he would use "a bullet" on Mr. Khashoggi.[38] Intercepted communications also reportedly helped the CIA conclude, after the fact, that the Crown Prince had likely ordered Mr. Khashoggi's execution.[39]

The tension between these published reports and the Department of State's statements highlighted the need for greater transparency. CPJ is a U.S.-based nonprofit organization that advocates for the safety of journalists like Mr. Khashoggi, and for accountability when journalists are harmed or killed.[40] As CPJ has noted in support of its Global Campaign Against Impunity: "Murder is the ultimate form of censorship, yet the perpetrators are seldom held to account. In

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[37] Philip Bump, *What We Know About What the Government Knows About Jamal Khashoggi' s Disappearance*, WASH. POST (Oct. 17, 2018, 10:53 AM), https://www.washingtonpost.com/politics/2018/10/17/what-we-know-about-what-government-knows-about-jamal-khashoggis-disappearance/.

[38] *See* Mark Mazzetti, *Year Before Killing, Saudi Prince Told Aide He Would Use "a Bullet" on Jamal Khashoggi*, N.Y. TIMES (Feb. 7, 2019), https://www.nytimes.com/2019/02/07/us/politics/khashoggi-mohammed-bin-salman.html.

[39] J.A. at 206 (Warren Strobel, *CIA Intercepts Underpin Assessment Saudi Crown Prince Targeted Khashoggi*, WALL ST. J. (Dec. 1, 2018, 1:33 AM), https://www.wsj.com/articles/cia-intercepts-underpin-assessment-saudi-crown-prince-targeted-khashoggi-1543640460).

[40] *See, e.g.*, *What We Do*, COMMITTEE TO PROTECT JOURNALISTS, https://cpj.org/about/ (last visited June 21, 2020); Lukas I. Alpert, *Coronavirus Consequence: Crackdown on Press Freedom World-Wide*, WALL ST. J. (Apr. 2. 2020, 10:43 AM), https://www.wsj.com/articles/coronavirus-consequence-crackdown-on-press-freedom-world-wide-11585838608 (citing CPJ as authority on global press freedom).

nine of 10 cases where a journalist has been targeted for murder, their killers go free."[41] In furtherance of its mission, CPJ proceeded to serve its FOIA requests.

II. FOIA REQUESTS AND RESPONSES

A. The FOIA Legal Framework

In serving its FOIA requests, CPJ was invoking settled statutory rights in the public interest. FOIA expressly provides that agencies must produce requested documents within 20 days unless an exemption enumerated in the statute applies. 5 U.S.C. § 552(a)(6)(A)(i) (2018).

FOIA Exemptions 1 and 3 are relied on by the government here. Exemption 1 provides for withholding of documents that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." *Id.* § 552(b)(1).

Exemption 3, in turn, applies to documents that are specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—

> (A)
> (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or
> (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and
> (B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

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[41] *Global Campaign Against Impunity*, COMMITTEE TO PROTECT JOURNALISTS, https://cpj.org/campaigns/impunity/ (last visited June 30, 2020).

Id. § 552(b)(3).

Also relied on here by the government is the so-called "*Glomar*" form of response to a FOIA request. This is the name given when an agency refuses to acknowledge whether responsive documents even exist or not. The *Glomar* approach is found nowhere in FOIA's statutory text or any government regulation. Rather, it was invented by the CIA in *Phillippi v. CIA*, where the CIA refused to confirm or deny its ties to a submarine retrieval ship called the Glomar Explorer. 546 F.2d 1009, 1013 (D.C. Cir. 1976). As this Court has made clear, a *Glomar* response is an extreme agency action that should only be used in "rare situation[s]." *Bartko v. U.S. Dep't of Justice*, 898 F.3d 51, 63 (D.C. Cir. 2018).

B. CPJ's Requests For Documents Related To The Duty To Warn And Mr. Khashoggi

CPJ served FOIA requests on each of the ODNI, the FBI, the CIA and the NSA, as well as the Department of State—all five agencies being members of the U.S. Intelligence Community. CPJ's requests were as follows:

> Request 1: Procedures or guidance for determining whether to warn, or for delivering a warning to, an intended victim or those responsible for protecting the intended victim, pursuant to Directive 191.
>
> Request 2: Records concerning the duty to warn under Directive 191 as it relates to Jamal Khashoggi, including any records relating to duty to warn actions taken with respect to him.
>
> Request 3: Records concerning any issue arising among [IC] elements regarding a determination to warn Khashoggi or waive the duty to

> warn requirement, or regarding the method for communicating threat information to him.
>
> Request 4 (for the ODNI only): Records relating to any dispute referred to the ODNI regarding a determination to warn Khashoggi or waive the duty to warn requirement, or regarding the method for communicating threat information to him.

CPJ's requests followed identical requests made to the same agencies by co-plaintiff below, the Knight First Amendment Institute ("Knight Institute"); in fact, CPJ's request took the form of a cover letter, attaching the Knight Institute's requests and requesting the same for CPJ. J.A. at 38 (CPJ FOIA Request Cover Letter); J.A. at 21-36 (Knight Institute FOIA Requests).

C. The IC Elements' *Glomar* Responses, Refusing To Admit Or Deny The Existence Of Responsive Documents

Each of the five agencies failed to respond to CPJ's or the Knight Institute's FOIA requests within the statutorily mandated time period. The Knight Institute then initiated this lawsuit to compel the five agencies to produce responsive documents. CPJ joined as a plaintiff on January 17, 2019. J.A. at 10 (Amended Complaint). The parties negotiated a production schedule.

With regard to CPJ's FOIA Request 1, the Department of State and the four other IC Elements conducted and completed a search for responsive records, determined if any such records existed, and took steps to produce those records, in part or in full. Those responses are not at issue here. Nor is the Department of State's response at issue as it conducted searches on Requests 2, 3, and 4, and in

due course CPJ voluntarily dismissed its claims against it. J.A. at 56-57 (Consent Motion to Dismiss Defendant U.S. Department of State), 333 (Letter from Susan C. Weetman, U.S. Department of State, to Kathleen Carroll, Committee to Protect Journalists).

This appeal focuses instead on the ODNI, the FBI, the CIA and the NSA (together, the four "IC Elements") and their *Glomar* responses to Requests 2, 3, and 4. Each of the IC Elements responded to the requests by stating that they could neither confirm nor deny the existence of responsive records. Each of the four IC Elements invoked FOIA Exemptions 1 and 3 as the bases for these *Glomar* responses.

ODNI: On February 14, 2019, the ODNI asserted that, pursuant to FOIA Exemptions 1 and 3, it could neither confirm nor deny the existence of records responsive to Requests 2, 3, or 4. J.A. at 65 (Declaration of Patricia Gaviria ("ODNI Decl.")). The ODNI contended that the fact of the existence or nonexistence of such records "is itself currently and properly classified, and could reveal intelligence sources and methods information that is protected from disclosure pursuant to Section 102A(i)(1) of the National Security Act of 1947." J.A. at 83 (ODNI Decl., Ex. C).

NSA: On March 11, 2019, the NSA asserted that, pursuant to FOIA Exemptions 1 and 3, it could neither confirm nor deny the existence of records

responsive to Requests 2 and 3. J.A. at 89-90 (Declaration of Linda M. Kiyosaki ("NSA Decl.")), 105 (NSA Decl., Ex. B). The NSA contended that the fact of the existence or nonexistence of such records "is a currently and properly classified matter," and that "the existence or non-existence of the information" is protected from disclosure by 18 U.S.C. § 798, 50 U.S.C. §§ 3024(i), 3605. J.A. at 105 (NSA Decl., Ex. B).

CIA: On March 15, 2019, the CIA asserted that, pursuant to FOIA Exemptions 1 and 3, it could neither confirm nor deny the existence of records responsive to Requests 2 and 3. J.A. at 111 (Declaration of Antoinette B. Shiner ("CIA Decl.")), 143-44 (CIA Decl., Ex. C). The CIA contended that the fact of the existence or nonexistence of such records "is itself currently and properly classified and relates to CIA intelligence sources and methods information that is protected from disclosure by Section 6 of the CIA Act of 1949, 50 U.S.C. § 3507, and Section 102A(i)(1) of the National Security Act of 1947, 50 U.S.C. § 3024(i)(1)." J.A. at 143-44 (CIA Decl., Ex. C). The CIA did not rely on Section 6 of the CIA Act, however, as a basis for its *Glomar* response in its declaration in support of summary judgment. *See* J.A. at 126 (CIA Decl.).

FBI: On March 29, 2019, the FBI asserted that, pursuant to Exemptions 1 and 3, it could neither confirm nor deny the existence of records responsive to Requests 2 and 3. J.A. at 154 (Declaration of David M. Hardy ("FBI Decl.")).

The FBI contended that "the mere acknowledgement of such records' existence or nonexistence would in and of itself trigger harm to national security interests per Exemption (b)(1) and/or reveal intelligence sources and methods per Exemption (b)(3); 50 U.S.C. § 3024(i)(1)." J.A. at 154 (FBI Decl.), 171 (FBI Decl., Ex. C).

Exemption 1 protects records that are specifically authorized by an Executive Order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order. 5 U.S.C. § 552(b)(1)(A). Each of the four IC Elements claims that the fact of the existence or nonexistence of records regarding the duty to warn Mr. Khashoggi is exempt from disclosure pursuant to Section 3.6 of Executive Order No. 13,526, as it meets the criteria for classification set forth in Section 1.4 of the Executive Order. J.A. at 67-71 (ODNI Decl.), 90-94 (NSA Decl.), 112-15 (CIA Decl.), 156-60 (FBI Decl.). Per the Executive Order, "[i]nformation shall not be considered for classification unless its unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security in accordance with section 1.2 of this order, and it pertains to . . . (c) intelligence activities (including covert action), intelligence sources or methods." Exec. Order No. 13,526 § 1.4, 3 C.F.R. 298, 300 (2010).

With regard to Exemption 3, the IC Elements all claim that the fact of the existence or nonexistence of documents regarding the duty to warn Mr. Khashoggi

is exempt from disclosure pursuant to Section 102A(i)(1) of the National Security Act, which provides that the DNI "shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 3024(i)(1) (2018); J.A. at 83 (ODNI Decl., Ex. C); J.A. at 105 (NSA Decl., Ex. B); J.A. at 143-44 (CIA Decl., Ex. C); J.A. at 171 (FBI Decl., Ex. C). The NSA also invokes Section 6 of the National Security Agency Act, which provides that no law "shall be construed to require the disclosure of the organization or any function of the [NSA], or any information with respect to the activities thereof," 50 U.S.C. § 3605(a) (2018), and 18 U.S.C. § 798(a)(3), which makes illegal the sharing of classified information "concerning the communication intelligence activities of the United States." 18 U.S.C. § 798(a)(3) (2018).

III. THE DISTRICT COURT DECISION AND DOCKETING OF THE APPEAL

On August 28, 2019, the IC Elements filed a motion for summary judgment. J.A. at 59-60. CPJ opposed the IC Elements' motion and filed its own motion for summary judgment on September 26, 2019. J.A. at 185-86.

On January 6, 2020, the District Court granted the IC Elements' motion for summary judgment and denied CPJ's motion for summary judgment. J.A. at 352. CPJ timely appealed the order. J.A. at 353.

SUMMARY OF THE ARGUMENT

A *Glomar* response is an extreme agency action that should only be used in "rare situations," *Bartko*, 898 F.3d at 63, and is not supported on the thin record made by the four IC Elements in this exceptionally important case. "The basic purpose of FOIA is 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 Co.*, 437 U.S. 214, 242 (1978). Allowing *Glomar* responses here defeats this purpose. The opinion below extends a degree of deference to the IC Elements that is not warranted by the record, the FOIA statute, or this Court's precedents. The specific errors supporting reversal and remand are these:

First, *Glomar* responses are unavailable here under the official acknowledgment doctrine. That doctrine provides that when the existence or nonexistence of the responsive documents has been publicly acknowledged by the relevant government authority, *Glomar* responses become unavailable as a matter of law. Precedent provides that when one constituent member of a larger government entity makes an official acknowledgment, its fellow members are bound by that acknowledgment.

In the circumstances of this case, the Department of State's multiple "definitive" statements that "the United States" lacked knowledge of the threat to

Mr. Khashoggi are binding on the other IC Elements now before this Court. CPJ's FOIA requests go to a matter of shared legal responsibility cutting across the entire IC: The duty to warn that applies to all IC members under IC Directive 191. On the face of the IC Directive, that duty requires cooperation, communication, and documentation across IC member agencies. Accordingly, when a leading agency, such as the Department of State, speaks for the entire IC (indeed, the entire federal government) on a matter of responsibility shared across the IC, that statement should be treated as making *Glomar* responses unavailable to other IC Elements.

Second, the four IC Elements' declarations in support of their *Glomar* responses were so thin and conclusory as to be legally insufficient. The law requires that *Glomar* responses be supported by detailed evidence demonstrating that the *Glomar* approach is logical or plausible in the specific circumstances. The IC Elements' *Glomar* responses here fell far short of that legal standard:

- The Department of State's "definitive" statements that "the United States" lacked advance knowledge of Mr. Khashoggi's disappearance are alone enough to render the other IC Elements' *Glomar* responses illogical and implausible. If the Department of State's statements are true, then the IC Elements' contention that acknowledging the existence or nonexistence of responsive documents would harm national security is plainly wrong. Simple logic dictates that there can be no harm to

national security from the four IC Elements simply saying, in substance, what their fellow IC member, the Department of State, has already said, in substance: "The U.S. government had no advance knowledge, therefore we have no records." But if the Department of State's statements were false, then the *Glomar* responses are impermissible for a very different reason: The Department of State has misled the American people, and the public interest urgently demands further scrutiny. The District Court entirely failed to weigh the probative value of the Department of State's official statements against the other four IC Elements' *Glomar* justifications. That alone is reversible error—and, to be clear, it is reversible error even if the Department of State's statements are not treated as an official acknowledgment that is formally binding across the IC.

- The declarations also lack the detail required to pass muster under the demanding legal standard for *Glomar* responses. Across the board, each IC Element has simply said in conclusory fashion that non-*Glomar* responses would compromise national security. The declarations provide no detail that would allow scrutiny of the IC Elements' position. The IC Elements have not explained and cannot explain how merely acknowledging the sheer existence or nonexistence of documents would,

by itself, necessarily reveal any intelligence sources or methods, or the identity of individuals under surveillance.

For the foregoing reasons, this Court should reverse the District Court's order and remand for further proceedings.

STANDARD OF REVIEW

This Court reviews summary judgment orders *de novo*. "Under the FOIA, 'the burden is on the agency to sustain its action,' and [the court] reviews de novo the agency's use of a FOIA exemption to withhold documents." *Am. Civil Liberties Union v. CIA*, 710 F.3d 422, 427 (D.C. Cir. 2013); *See* 5 U.S.C. § 552(a)(4)(B).

ARGUMENT

I. ALL THE *GLOMAR* RESPONSES ARE LEGALLY IMPERMISSIBLE BECAUSE OF THE OFFICIAL ACKNOWLEDGMENT THAT "THE UNITED STATES" LACKED KNOWLEDGE OF THE THREAT TO MR. KHASHOGGI

The IC Elements attempt to do here what settled law forbids: *i.e.*, to "rely on an . . . exemption claim to justify withholding information that has been 'officially acknowledged' or is in the 'public domain.'" *Davis v. U.S. Dep't of Justice*, 968 F.2d 1276, 1279 (D.C. Cir. 1992); *see also Am. Civil Liberties Union v. CIA*, 710 F.3d at 426-27. Here, when the Department of State denied advance knowledge of the murder of Mr. Khashoggi on behalf of "the United States," it necessarily admitted a lack of documents responsive to CPJ's FOIA requests across the Executive Branch. For if there was no "advance knowledge," then logically there

could have been no duty to warn. That means, in turn, that there could be no documentation of how such a duty was or was not discharged. The Department of State is a member of the IC; the IC is by law meant to operate as an integrated whole; and the Department of State's statements went squarely to a matter of shared responsibility among IC members under Directive 191. Accordingly, as a matter of law, the Department of State's statements deprived the CIA, the FBI, the NSA, and the ODNI—as fellow members of the IC—of the ability to shelter behind *Glomar* responses.

A. *Glomar* Responses Are Legally Impermissible Because The Government-Wide Nonexistence Of The Information Sought Has Been Officially Acknowledged

The IC Elements cannot rely on *Glomar* responses given the legal rule settled across the circuits that "[a]n agency . . . loses its ability to provide a *Glomar* response when the existence or nonexistence of the particular records covered by the *Glomar* response has been officially and publicly disclosed." *Wilner v. NSA*, 592 F.3d 60, 70 (2d Cir. 2009); *see also, e.g.*, *Broward Bulldog, Inc. v. U.S. Dep't of Justice*, 939 F.3d 1164, 1185 (11th Cir. 2019) (recognizing the official acknowledgment doctrine); *Janangelo v. Treasury Inspector Gen. for Tax Admin.*, 726 F. App'x 660, 661 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 490 (2018) (recognizing the official acknowledgment doctrine); *Am. Civil Liberties Union v. U.S. Dep't of Justice*, 640 F. App'x 9, 11 (D.C. Cir. 2016) (same); *Venkataram v.*

Office of Info. Policy, 590 F. App'x 138, 139 (3d Cir. 2014) (same); *Herrick v. Garvey*, 298 F.3d 1184, 1193 (10th Cir. 2002) (same). In the circumstances of this case, the Department of State's public statements provide the binding official acknowledgment.

This case readily meets this Circuit's three-part test for when an agency's statement amounts to an official public acknowledgment. "Information is officially acknowledged by an agency where: (1) 'the information requested [is] as specific as the information previously released,' (2) the requested information 'match[es] the information previously disclosed,' and (3) the requested information was already 'made public through an official and documented disclosure.'" *See BuzzFeed, Inc. v. DOJ*, 344 F. Supp. 3d 396, 407 (D.D.C. 2018) (quoting *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990)). Each prong of the test is met here.

The Department of State statements easily meet the first two prongs of the waiver test—which, as this Court has noted, collapse into one in the *Glomar* context. *See Wolf v. CIA*, 473 F.3d 370, 379 (D.C. Cir. 2007) ("[I]f the prior disclosure establishes the existence (or not) of records responsive to the FOIA request, the prior disclosure necessarily matches both the information at issue—the existence of records—and the specific request for that information."). The Department of State's statements necessarily match and speak with specificity to

the information that CPJ seeks: Across the Executive Branch, there can be no "duty to warn" records if the United States had no prior knowledge of threats to Mr. Khashoggi's life. *See* IC Directive 191.

The third prong is met as well, *i.e.*, the Department of State's statements were an "official and documented disclosure." *Fitzgibbon*, 911 F.2d at 765. The statement was made through an "official and documented" channel, *id.*, an official Department of State press conference. *See* Office of the Spokesperson, *Our Mission*, U.S. DEP'T OF STATE, https://www.state.gov/bureaus-offices/under-secretary-for-public-diplomacy-and-public-affairs/bureau-of-global-public-affairs/office-of-the-spokesperson/ (last visited June 29, 2020) (the mission of the Department of State's Bureau of Public Affairs is "[t]o communicate U.S. foreign policy objectives to the American public."). The Bureau of Public Affairs' press briefings are transcribed, and an archive of the transcripts—including the statements at issue here—is maintained on the Department of State's official website. Office of the Spokesperson, *Department Press Briefing*, U.S. DEP'T OF STATE (Oct. 10, 2018), https://www.state.gov/briefings/department-press-briefing-october-10-2018/.

B. Because CPJ's FOIA Requests Go To A Matter Of Shared Interagency Responsibility Under IC Directive 191, The Department Of State's Statements Bind Its Fellow IC Elements For FOIA Purposes Here

Both CPJ's FOIA requests and the Department of State's denial of knowledge by "the United States" go squarely to matters of IC responsibility—not any one agency's responsibility—under IC Directive 191. As noted above, by presidential directive, "***Intelligence Community elements within executive departments . . . shall operate as part of an integrated Intelligence Community, as provided in law or this order***." *See* Exec. Order No. 12,333 § 1.7, 46 Fed. Reg. 59,941, 59,952 (Dec. 8, 1981), *reprinted as amended in* 50 U.S.C. § 3001 note (emphasis added). The IC describes itself as having a joint mission to "collect, analyze, and deliver foreign intelligence and counterintelligence information"; toward that end, the IC "relies heavily on collaboration among its constituent elements." *Mission*, INTEL.GOV, https://www.intelligence.gov/mission (last visited June 29, 2020); *see also How the IC Works*, INTEL.GOV, https://www.intelligence.gov/how-the-ic-works (last visited June 29, 2020) ("The Intelligence Community collaborates regularly to produce some key intelligence products to that [sic] inform policy-makers and the president, using both classified and open source information.").

Intelligence Community Directives, like IC Directive 191 at issue here, are meant to establish a "consistent, coordinated approach" to matters of intelligence

across IC member agencies. IC Directive 191 § B.1. IC Directive 191 itself contemplates information sharing and coordination among elements. *See* IC Directive 191 §§ F.11, F.12 (requiring IC elements that have duty-to-warn information to consult with other IC elements under certain circumstances as well as requiring notification of warning to other IC elements if consultation is not feasible).

This Circuit's law permits one IC member to bind another in the circumstances of this case. The situation here compares favorably to *Marino v. Drug Enforcement Agency*, where this Court held that a disclosure by a U.S. Attorney's office was binding for FOIA purposes on the Drug Enforcement Administration ("DEA"). *Marino v. DEA*, 685 F.3d 1076, 1082 (D.C. Cir. 2012). The U.S. Attorney's Office was deemed capable of binding the DEA simply because they were both "component[s] within the Department of Justice." *Id.* In *Marino*, one government office was allowed to bind another simply because they sat in distant corners of the same Department of Justice organization chart, with the Attorney General at the top. This Court reinforced that principle in *Ctr. for Pub. Integrity v. U.S. Dep't of Energy*, 287 F. Supp. 3d 50, 68 (D.D.C. 2018) by finding that an "official disclosure by one component binds another component of the same agency." There, a statement by the National Nuclear Security Administration, a subcomponent of the Department of Energy, triggered an

official-acknowledgment waiver on behalf of the Office of the Inspector General of the Department of Energy. *Id.*

The principle fairly carries over to this case, with the IC here in a position analogous to the Department of Justice in *Marino* and the Department of Energy in *Center for Public Integrity*. If anything, the case here is more compelling: Rather than relying on a mechanical organization-chart approach, here there are crucial reasons of substance and policy to favor recognizing a binding effect. The matters at issue here deal squarely with duties and responsibilities imposed by IC Directive 191 that the Department of State and the IC Elements share ***specifically in their capacity as IC elements***. Moreover, the Department of State's statements at issue expressly purported to speak for the entire IC and, indeed, the entire federal government. Office of the Spokesperson, *Department Press Briefing*, U.S. DEP'T OF STATE (Oct. 10, 2018), https://www.state.gov/briefings/department-press-briefing-october-10-2018/ ("I can say definitively ***the United States*** had no advanced knowledge of Jamal Khashoggi's disappearance.") (emphasis added).

The District Court declined to follow this Court's guidance in *Marino*, and instead applied a mistakenly rigid reading of *Frugone v. CIA*, 169 F.3d 772 (D.C. Cir. 1999). It was reversible error to interpret *Frugone* as stating a bright-line rule that an agency can only be bound, for FOIA public acknowledgment purposes, by its very own statements. *See generally N.Y. Times Co. v. U.S. Dep't of Justice*, 756

F.3d 100, 120 n.19 (2d Cir. 2014), *opinion amended on denial of reh'g*, 758 F.3d 436 (2d Cir. 2014), *supplemented*, 762 F.3d 233 (2d Cir. 2014) (noting that "[a] rigid application of [the official acknowledgment doctrine] may not be warranted.").

Frugone involved a *Glomar* response issued by the CIA to a person seeking his own employment records; the Office of Personnel Management ("OPM") had told the person that the CIA had the records. *Frugone*, 169 F.3d at 773. This Court upheld the CIA's *Glomar* response. *Id.* This was unsurprising, given the lack of relationship between the CIA and the OPM, and the fact that the FOIA request at issue did not speak to any duties and responsibilities that the two agencies shared. As this Court noted in *American Civil Liberties Union v. CIA*, *Frugone* stands for the limited proposition that one agency may be allowed to rely on *Glomar* "despite the prior disclosure of another, ***unrelated*** agency." 710 F.3d 422, 430 n. 7 (D.C. Cir. 2013) (emphasis added). Fellow members of the IC are hardly "unrelated" for purposes of their shared responsibilities under IC Directive 191.

The District Court's reliance on *Mobley v. CIA*, 806 F.3d 568 (D.C. Cir. 2015) was also misplaced. In *Mobley*, the plaintiff argued that a disclosure made by private litigants in a foreign court proceeding could somehow constitute official acknowledgment on the part of the FBI. 806 F.3d at 583. This Court ruled that a

foreign government could not waive a federal agency's ability to provide a *Glomar* response. *Id.* Additionally, the FOIA requester "conceded" that the CIA's prior disclosure was a mistake, and this Court understandably held that "a simple clerical mistake in FOIA processing" could not be used to satisfy the official acknowledgment test. *Id.* As this case neither involves a foreign court nor a clerical mistake, the District Court erred in relying on *Mobley* to foreclose a waiver of *Glomar* here.

II. THE IC ELEMENTS' DECLARATIONS ARE SO VAGUE AND CONCLUSORY THAT THEY ARE LEGALLY INSUFFICIENT TO SUPPORT *GLOMAR* RESPONSES

Reversal is in order in light of the legal rule that "*Glomar* responses are an exception to the general rule that agencies must acknowledge the existence of information responsive to a FOIA request and provide ***specific, non-conclusory*** justifications for withholding that information." *Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1178 (D.C. Cir. 2011) (citation omitted) (emphasis added); *see Halpern v. FBI*, 181 F.3d 279, 295 (2d Cir.1999) ("Absent a sufficiently specific explanation from an agency, a court's *de novo* review is not possible and the adversary process envisioned in FOIA litigation cannot function."); *King v. U.S. Dep't of Justice*, 830 F.2d 210, 219 (D.C. Cir. 1987) ("To accept an inadequately supported exemption claim 'would constitute an abandonment of the trial court's obligation under the FOIA to conduct a *de novo* review.'" (quoting *Allen v. CIA*,

636 F.2d 1287, 1293 (D.C. Cir. 1980))). This case does not present the "unusual circumstances" in which a *Glomar* response is appropriate, nor do the IC Elements' declarations meet the legal standard of being "particularly persuasive." *Florez v. CIA*, 829 F.3d 178, 182 (2d Cir. 2016). The opinion below is marked by three principal errors, each of them an independent ground for reversal.

First, the District Court committed reversible error by giving no consideration at all to the legal impact of the Department of State's "definitive" assertions that "the United States" lacked knowledge of threats to Mr. Khashoggi. Even if the Department of State's statements are not accepted as an official acknowledgment on behalf of the IC Elements, they still so seriously undercut the IC Elements' *Glomar* responses that the IC Elements' own *Glomar* responses cannot meet the legal test of being "logical" or "plausible." *See Am. Civil Liberties Union v. CIA*, 710 F.3d 422, 427 (D.C. Cir. 2013) (quoting *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007)) (citations and internal quotation marks omitted).

Second, the District Court ignored the superficial nature of the IC Elements' declarations, in substance granting absolute deference to the IC Elements' conclusory claims of harm to national security, when the law only affords "substantial weight" and that only where the government provides "details." *See id.*

Third, the District Court failed to consider whether national security or intelligence sources and methods, or other legitimate FOIA exemption interests can be protected by less restrictive means than *Glomar* responses. The IC Elements seem to assume that any non-*Glomar* response necessarily ***must*** result in the disclosure of intelligence details, sources and methods. Common sense dictates that is obviously not the case. Some responsive records may not disclose such information at all. Those that do can be redacted, or the IC Elements can acknowledge their existence but argue for them to be withheld altogether. Any issues CPJ may have regarding the appropriateness of future redactions or withholdings would be for the District Court to resolve in the first instance.

A. On The Basis Of The Department Of State's Statements Alone, The IC Elements' *Glomar* Responses Fail The Legal Test Of Being Logical Or Plausible

As set forth in Part I above, the Department of State's "definitive" statements that "the United States" had no advance knowledge of the threat to Mr. Khashoggi should be accepted as an official acknowledgment on behalf of the IC Elements. Office of the Spokesperson, *Department Press Briefing*, U.S. DEP'T OF STATE (Oct. 10, 2018), https://www.state.gov/briefings/department-press-briefing-october-10-2018/. Even if they are not, they still support reversal because they directly contradict the IC Elements' position and leave them unable to demonstrate that their *Glomar* responses are logical or plausible. *Cf. Am. Civil Liberties Union*

v. CIA, 710 F.3d 422, 429 (D.C. Cir. 2013) (finding that the CIA's *Glomar* justifications were neither logical nor plausible in light of public statements by the President and the CIA Director).

Even where Agency A's statement does not ***bind*** Agency B under FOIA, it can so contradict Agency B that the statement has "appreciable probative value in determining, under the record as a whole, whether the justifications set forth . . . are logical and plausible[.]" *Florez v. CIA*, 829 F.3d 178, 184-85 (2d. Cir. 2016) (quoting *Ctr. for Constitutional Rights v. CIA*, 765 F.3d 161, 167 (2d Cir. 2014)). In *Florez*, the district court had accepted a *Glomar* response from the CIA even though the FBI had made public disclosures that were directly contradictory. The court of appeals remanded, holding that the public disclosures by the FBI undercut the CIA's argument "that the mere acknowledgement that it does or does not have [responsive documents] would harm the national security, or otherwise disclose Agency methods, functions, or sources." *Id.* at 185.

This is exactly the situation here. If the Department of State was telling the truth, then by definition none of the IC Elements could have responsive documents (at least none pre-dating the murder)—that is, none of them had prior knowledge of the threat and therefore they could have had no duty to warn or any documentation of the duty in the context of this particular event. It defies common sense to say that national security would be compromised if the IC Elements were

to respond to CPJ's FOIA requests by saying what, in substance, the Department of State has already said.

The District Court's failure to not even consider this point was reversible error. As this Court has said, in FOIA cases, "[s]ummary judgment may be granted on the basis of agency affidavits if they contain reasonable specificity of detail rather than merely conclusory statements, and ***if they are not called into question by contradictory evidence in the record***.") (emphasis added). *Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 215 (D.C. Cir. 2013). "It defies reason [for] a district court to deliberately bury its head in the sand to relevant and contradictory record evidence solely because that evidence does not come from the very same agency seeking to assert a *Glomar* response in order to avoid the strictures of FOIA." *Florez*, 829 F.3d at 187.

The District Court likewise erred in not considering that the Department of State's statements, if nothing else, create a need for particularly rigorous scrutiny of the IC Elements' position. For this case presents the distinct possibility that the IC Elements are relying on *Glomar* not to protect national security, but to avoid embarrassment to themselves or other government actors:

- If the Department of State's statements were false (as investigative reports by leading media organizations suggest, *see, e.g.*, Philip Bump, *What We Know About What the IC Elements Know About Jamal Khashoggi's*

Disappearance, THE WASH. POST (Oct. 17, 2018), https://www.washingtonpost.com/politics/2018/10/17/what-we-know-about-what-government-knows-about-jamal-khashoggis-disappearance/), then the American people have been misled and the IC Elements would surely be looking to avoid scrutiny of that fact.

- Even if the Department of State's statements were true, there is plainly a serious risk of embarrassment to the IC Elements in going beyond giving a *Glomar* response. For to admit that they have no responsive documents would be to admit a serious failure of intelligence, in that the IC Elements did not detect a grave threat to a prominent U.S.-based Saudi dissident.
- The only remaining plausible possibility, CPJ respectfully submits, is that the IC Elements ***did*** detect the threat but ***did not*** warn Mr. Khashoggi. They might have failed to warn out of negligence. They also might have deliberately turned a blind eye to human rights and the rule of law in what they, or the White House, judged to be the higher priority of supporting an ally that is a source of oil and of weapons purchases.[42] This possibility too

[42] *See* J.A. at 272-73 (Chuck Todd, *President Trump's Full, Unedited Interview with Meet the Press*, NBC NEWS (June 23, 2019), https://www.nbcnews.com/politics/meet-the-press/president-trump-s-full-unedited-interview-meet-press-n1020731 (in response to the questions about the Khashoggi killing, President Trump states, "I only say [the Saudis] spend $400 to $450 billion over a period of time . . . all money, all jobs, buying equipment . . . . I'm not like a fool that says, 'We don't want to do business with them.'")).

suggests that avoidance of embarrassment, rather than risk to national security, explains the IC Elements' *Glomar* responses.

Common sense suggests that each of these explanations for the *Glomar* responses is both eminently plausible and, if true, deeply embarrassing to the United States government. Precedent makes plain that these explanations are legally insufficient. It is crystal clear that information may not be classified to "prevent embarrassment to a person, organization, or agency." Exec. Order No. 13,526 § 1.7(a)(2), 3 C.F.R. 298, 302 (2010); *cf. Elec. Frontier Found. v. Dep't of Justice*, 384 F. Supp. 3d 1, 9 (D.D.C. 2019) (citing *SafeCard Servs. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir.1991) (while "[a]gency affidavits are entitled to a presumption of good faith," that presumption may be "called into question"—as it is here—"by contradictory record evidence or evidence of bad faith").

The District Court also failed to consider how the government's posture in the related *Open Society* litigation in the U.S. District Court for the Southern District of New York further weakens the legal basis for the IC Elements' *Glomar* responses here. J.A. at 309 (*Open Soc'y Justice Initiative v. CIA*, 399 F. Supp. 3d 161 (S.D.N.Y. 2019)). In *Open Society*, the CIA and the ODNI did not issue *Glomar* responses. Instead they publicly acknowledged that they have "records relating to the killing of U.S. resident Jamal Khashoggi, including but not limited to the CIA's findings on and/or assessment of the circumstances under which he

was killed and/or the identities of those responsible," J.A. at 311 (*Open Soc'y Justice Initiative v. CIA*, 399 F. Supp. 3d at 167); *see also* J.A. at 325 (Joint Status Letter, *Open Soc'y Justice Initiative v. CIA*, 19-cv-00234-PAE, ECF No. 99 (S.D.N.Y. Sept. 24, 2019)). It defies logic for the CIA and the ODNI to acknowledge in a separate litigation that they have "records relating to the killing of U.S. resident Jamal Khashoggi, including but not limited to the CIA's findings on and/or assessment of the circumstances under which he was killed and/or the identities of those responsible," J.A. at 311 (*Open Soc'y Justice Initiative v. CIA*, 399 F. Supp. 3d at 167), yet claim that acknowledging the existence or nonexistence of records related to the duty to warn Mr. Khashoggi would jeopardize national security or reveal information about intelligence sources or methods.

In short, the statements by the Department of State at its press briefing, and by the ODNI and the CIA in the *Open Society* litigation not only contradict the IC Elements' position here, but suggest that the IC Elements have relied on the *Glomar* doctrine in bad faith. The District Court therefore should have either ordered the IC Elements to acknowledge the existence or nonexistence of responsive records or, at the very least, to submit more detailed declarations. *See Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 37 (D.C. Cir. 1998) *as amended on denial of reh'g* (1999) ("Accordingly, we reverse the grant of summary judgment

and remand the case to the district court so that the FBI can . . . justify its defenses under exemptions 1, 7(C), and 7(D) in sufficient detail to permit meaningful judicial review . . .”); *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 214 (D.C. Cir. 1987) (“remand[ing] in order that the District Court secure a fuller elaboration” from the FBI on its claimed exemption).

Another approach well supported by precedent would be for this Court to require the IC Elements to submit more detailed declarations and/or responsive records, should they exist, for review *in camera* by the District Court. *See* 5 U.S.C. § 552(a)(4)(B) (granting courts discretion to review responsive records *in camera*); *Mobley*, 806 F.3d at 588 (this Court makes clear that “in some circumstances, district courts should conduct *in camera* review of allegedly FOIA-exempt documents, as, for example, where the affidavits are too conclusory to permit *de novo* review of the agency exemption decision or where there is tangible evidence of agency bad faith.”); *Larson v. Dep't of State*, 565 F.3d 857, 869-70 (D.C. Cir. 2009) (noting that *in camera* review is available to the district court if . . . “it is needed ‘to make a responsible *de novo* determination on the claims of exception’” and citing the failure to “provide specific information sufficient to place the documents within the exemption category,” contradictory record evidence, and evidence of bad faith as reasons that may warrant inspection *in camera*) (quoting *Juarez v. Dep’t of Justice*, 518 F.3d 54, 60 (D.C. Cir. 2008) and

Hayden v. Nat'l Sec. Agency/Cent. Sec. Serv., 608 F.2d 1381, 1387 (D.C. Cir. 1979)). *In camera* review could be part of the relief ordered by this Court if it does not simply reverse.

B. The IC Elements' Conclusory Declarations Fall Short Of The Legal Standard That *Glomar* Reliance Should Be Limited, Exceptional, And Supported By Persuasive Details

1. Across The Board, The District Court Simply Accepted The Government's Conclusory Assertions Without Applying The Legally Required Scrutiny

Whatever deference may be due in appropriate FOIA cases to an intelligence agency's claim of potential harm to national security, such "deference is not equivalent to acquiescence"—yet such acquiescence is what the District Court essentially extended here. *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998). The legal errors below in this regard were numerous:

First, the legally appropriate approach is to provide some deference and "substantial weight" only if the agencies have provided specific details to support their positions. *Campbell v. U.S. Dep't of Justice*, 164 F.3d at 30 (noting that to warrant substantial weight, the agency declarations must be sufficient "to afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding" (internal quotation marks omitted)). Here, the agency declarations are illogical, conclusory, and lacking in detail. Accordingly, the IC Elements have not earned even the

"substantial weight" degree of deference that this Court has said is sometimes justified. As explained above, the IC Elements fail to address the contradictory statements made by the Department of State, the CIA, and the ODNI which suggests bad faith. *See id.* (noting a declaration is insufficient for the purposes of applying substantial weight on the issue of national security if it "lack[s] of detail and specificity," was made in "bad faith," or "fail[s] to account for contrary record evidence."). The IC Elements also completely fail to explain why, given the many plausible factual scenarios that would produce responsive records and yet would not entail disclosure of specific intelligence details, *Glomar* responses are warranted and are not overly broad or extreme. For example, agency employees may have emailed to share a news article inquiring about the duty to warn Mr. Khashoggi. *See, e.g.,* Josh Meyer, *The CIA Sent Warnings to at Least 3 Khashoggi Associates About New Threats From Saudi Arabia*, TIME (May 9, 2019), https://time.com/5585281/cia-warned-jamal-khashoggi-associates/. Similarly, assume that an employee at one of the agencies wrote an email that referenced the duty to warn Mr. Khashoggi, or mentioned in general terms a prior awareness of the threat to his life. Any purported harm to national security or intelligence interests from disclosure of such emails would easily be addressed through redaction of sensitive details. Accordingly, there should have been no "substantial weight" applied in favor of the IC Elements.

Second, even assuming such weight was warranted, the District Court's unquestioning acceptance of the agencies' bare, conclusory arguments on the issue of harm to national security is more akin to absolute deference than substantial weight. *Campbell v. U.S. Dep't of Justice*, 164 F.3d at 30 (stating that in the national security context, declarations merit "substantial weight," yet noting that "deference is not equivalent to acquiescence") (internal citation omitted). The District Court here applied no serious scrutiny; instead it merely restated and adopted the IC Elements' arguments. For example, with respect to the FBI, the District Court stated:

> And the FBI says it and the other Intelligence Agencies' positions are necessary because once the use or non-use of a source or method "in a certain situation or against a certain target" is public, "its continued successful use is seriously jeopardized." . . . So the Intelligence Agencies have shown "the untoward consequences that could ensue were [they] required either to confirm or deny statements made by another agency." . . . This assessment is due "substantial weight."

J.A. at 350 (internal citations omitted).

Here and throughout its opinion, the District Court treated the IC Elements' mere mention of national security as an impenetrable shield.

Glomar responses are impermissible here because they are "justified only in unusual circumstances, and only by a particularly persuasive affidavit." *Florez v. CIA*, 829 F.3d 178, 182 (2d Cir. 2016) (internal quotation marks omitted); *see also Am. Civil Liberties Union v. CIA*, 710 F.3d 422, 426 (D.C. Cir. 2013) (quoting

Roth v. U.S. Dep't of Justice, 642 F.3d 1161, 1178 (D.C. Cir. 2011)) ("*Glomar* responses are an exception to the general rule . . . [and] are permitted only when confirming or denying the existence of records would itself cause harm cognizable under a FOIA exception." (internal quotation marks omitted)). Each IC Element's declaration must "explain[] in as much detail as possible the basis for [the agency's] claim that it can be required neither to confirm nor to deny the existence of the requested records." *Wilner v. NSA*, 592 F.3d 60, 68 (2d Cir. 2009) (quoting *Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976)). "[C]onclusory affidavits that merely recite statutory standards, or are overly vague or sweeping will not . . . carry the government's burden." *Larson v. Dep't of State*, 565 F.3d 857, 864 (D.C. Cir. 2009). The IC Elements have failed to provide sufficient explanation here.

2. Declaration-By-Declaration Review Confirms That The IC Elements Did Not Carry Their Burden Of Supplying Persuasive Details

CPJ asks only that this Court apply fair and objective scrutiny to each of the IC Elements' declarations. That objective review demonstrates that none of the declarations here satisfy the IC Elements' burden to demonstrate, with persuasive details, why the mere acknowledgment of the existence or nonexistence of responsive records would reveal intelligence activities, sources, or methods, cause harm to national security, or otherwise fall within one of the FOIA exemption statutes. *See* 5 U.S.C. § 552(a)(4)(B) ("[T]he burden is on the agency to sustain its

action [of withholding a record under the stated exemption]"); *Am. Civil Liberties Union v. U.S. Dep't of Def.*, 628 F.3d 612, 619 (D.C. Cir. 2011) (summary judgment is only warranted, on the basis of an affidavit alone, "[i]f an agency's affidavit describes the justifications for withholding the information with specific detail, demonstrates that the information withheld logically falls within the claimed exemption, and is not contradicted by contrary evidence in the record or by evidence of the agency's bad faith"); *Elec. Frontier Found. v. Dep't of Justice*, 384 F. Supp. 3d 1 (D.D.C. 2019) (demanding supplemental briefing on a *Glomar* response as the FBI had failed to adequately justify it under the claimed exemption).

(a) ODNI

In the ODNI's declaration, the District Court erred in accepting the ODNI's assertions "that confirming the existence of records related to Khashoggi could alert targets that 'specific elements' of the Intelligence Community are employing 'certain intelligence sources or methods . . . to collect information on them'" and that confirming the nonexistence of documents "confirms the success of any evasive techniques" by identifying areas in which the ODNI and the IC may lack interest. J.A. at 349-50. The ODNI declaration lacks any detail to support these assertions.

With respect to Exemption 1, it is simple logic that acknowledging that responsive records do or do not exist would not necessarily disclose any information that "could reasonably be expected to cause identifiable or describable damage to the national security." Exec. Order No. 13,526 § 1.4, 3 C.F.R. 298, 300 (2010). The ODNI asserts that acknowledging the existence or nonexistence of records could somehow alert an individual who "mentioned Mr. Khashoggi and very specific information about him . . . that they were being surveilled during a specific period of time and what method the IC was using to surveil them," J.A. at 70 (ODNI Decl.), without explaining why. Particular information cannot be intuited by a general acknowledgment that a document with unknown contents exists. Responsive records, should they exist, could have been developed from numerous sources, and could be disclosed or described in a manner that does not compromise any legitimate national security interests. To the extent that such information may be revealed in the *contents* of such documents (should they exist), then the ODNI may make redactions or withhold the documents as appropriate. As such, the ODNI may not rely on Exemption 1 as a basis for its *Glomar* response.

For the same reasons, with respect to Exemption 3, the ODNI does not provide any detail as to how acknowledging the existence or nonexistence of records related to the duty to warn Mr. Khashoggi would reveal any information

about the types of intelligence sources and methods Section 102A(i)(1) of the National Security Act is meant to protect.

(b) NSA

The District Court erred in describing the NSA Declaration as "not[ing] the specific threat to its Signals Intelligence activities, sources, and methods if a confirmation or denial is required." J.A. at 350 (citing J.A. at 92 (NSA Decl.)). On objective review, the declaration provides no such specificity. Rather, it simply asserts in entirely conclusory fashion that confirmation or denial of the existence of responsive records "would necessarily indicate the existence of underlying intelligence information relating to a threat to a particular individual (Jamal Khashoggi) during a particular time frame (the period preceding his death)." J.A. at 92 (NSA Decl.).

Yet all the NSA describes, as that statement on its face concedes, is the "existence of underlying intelligence" on threats to Mr. Khashoggi, not the particular intelligence activities, sources, or methods used to gain that intelligence. *Id.* The NSA's claim that to acknowledge even in general terms the existence of that underlying intelligence could "reasonably be expected to cause 'exceptionally grave damage,'" to national security, as is implied by its reliance on Executive Order No. 13,526, is likewise conclusory—and far-fetched at best, coming over

one year after Mr. Khashoggi's death, and in an environment where his death and related intelligence activities have already received enormous public scrutiny. *Id.*

For the same reason, the NSA cannot rely on Exemption 3 to support its *Glomar* response. It is utterly implausible for the NSA to assert that particular "intelligence sources and methods" would necessarily be revealed by acknowledging the existence or nonexistence of documents as required under Section 102A(i)(1) of the National Security Act. 50 U.S.C. § 3024(i). Furthermore, CPJ has not even requested information on "any function of the National Security Agency, or any information with respect to the activities thereof, or the names, titles, salaries, or number of the persons employed by such agency." 50 U.S.C. § 3605(a) (2018); *see Founding Church of Scientology v. NSA*, 610 F.2d 824, 829 (D.C. Cir. 1979) (internal citations omitted) (while "the legislation's scope must be broad in light of the [NSA's] highly delicate mission . . . a term so elastic as 'activities' should be construed with sensitivity to the 'hazard(s) that Congress foresaw'").

The NSA's argument that it need not confirm or deny the existence of responsive records to Part 2 of CPJ's FOIA requests because 18 U.S.C. § 798 makes it illegal to "make[] available to an unauthorized person . . . any classified information . . . concerning the communication intelligence activities of the United States or any foreign government," is likewise unavailing. 18 U.S.C. § 798(a)(3).

The statute defines "communication intelligence" (also known as COMINT) as "all procedures and methods used in the interception of communications and the obtaining of information from such communications by other than the intended recipients." 18 U.S.C. § 798(b) (2018) . The NSA Declaration asserts that the existence or nonexistence of responsive records "would necessarily confirm that NSA collected relevant COMINT" or conversely "a lack or dearth of COMINT." J.A. at 97-98. The broad nature of Part 2 of CPJ's FOIA Requests makes it implausible that acknowledging the existence or nonexistence of responsive documents would itself reveal any information about the NSA's COMINT capabilities as information about threats to Mr. Khashoggi could have been gathered in ways other than through communication interception. The NSA could have received a tip, a direct report, or a referral from another IC element.

(c) CIA

The District Court also erred in its cursory review of the CIA Declaration. The CIA may not rely on FOIA Exemption 1 as a basis for its *Glomar* response, because acknowledging the existence of records would not "tend to reveal . . . targets of intelligence collection at a given point in time," as the CIA asserts, given that the CIA could have come across intelligence in a number of ways beyond affirmative targeted intelligence collection. J.A. at 125 (CIA Decl.). For example, it is possible that information about threats to Mr. Khashoggi's life could have

come into the CIA as a tip or direct report. It does not follow that the only way for the CIA to have gained intelligence is through surveillance or targeted intelligence collection.

Furthermore, the CIA cannot shield the mere fact that it has intelligence relevant to the threats to Mr. Khashoggi's life, as the agency has already publicly confirmed the existence of CIA intelligence on the Khashoggi killing. The CIA's Press Secretary Timothy Barrett already publicly confirmed that the agency briefed both "the Senate Select Committee on Intelligence and congressional leadership on the totality of the compartmented, classified intelligence" related to Mr. Khashoggi.[43] The CIA report to the U.S. Senate led Republican Senator Lindsey Graham to tell reporters, "[y]ou have to be willfully blind not to come to the conclusion that this was orchestrated and organized by people under the command of [Crown Prince Mohammed bin Salman]."[44] Therefore, the mere acknowledgement of records related to the duty to warn Mr. Khashoggi of Plaintiff's request would not disclose additional non-public details about the CIA's

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[43] *See* Rebecca Kheel, *Graham threatens to abstain from voting until CIA briefs Senate on Khashoggi killing*, THE HILL (Nov. 28, 2018, 2:19 PM), https://thehill.com/policy/defense/418730-graham-threatens-to-withhold-vote-until-cia-briefs-senate-on-khashoggi-killing.

[44] *See* Patricia Zengerale, *Top Senators Briefed by CIA Blame Saudi Prince for Khashoggi Death*, REUTERS (Dec. 4, 2018), https://www.reuters.com/article/us-saudi-khashoggi-cia/top-senators-briefed-by-cia-blame-saudi-prince-for-khashoggi-death-idUSKBN1O32BR.

intelligence activities, sources, or methods and is unlikely to cause damage or harm to national security.

With regard to FOIA Exemption 3, the CIA Declaration merely asserts, but does not show, how "the existence or non-existence of records reflecting a classified connection to the CIA in this matter would reveal information that concerns intelligence sources and methods." J.A. at 126. The CIA has not demonstrated how confirming or denying that responsive records exist would itself reveal any information about specific intelligence sources and methods as required for invoking Section 102A(i)(1) of the National Security Act as a basis for FOIA Exemption 3.

(d) FBI

The District Court also erred by accepting the FBI Declaration, in particular its statement that "once the use or non-use of a source or method 'in a certain situation or against a certain target' is public, 'its continued successful use is seriously jeopardized.'" J.A. at 350 (citing J.A. at 158 (FBI Decl.)). That conclusory argument might be appropriate for defending the non-production or redaction of a document that actually identifies a source or method, but it makes little sense as the justification for a *Glomar* response. Merely confirming or denying the existence of responsive documents does not make information public at all.

With respect to Exemptions 1 and 3, the District Court unquestioningly accepted the FBI's assertion that merely acknowledging the existence or nonexistence of responsive records, without more, "would tend to confirm or disprove the use of a specific intelligence method to collect information concerning Jamal Khashoggi." J.A. at 157 (FBI Decl.). Yet the FBI's assertion is, with respect, simply lacking in any logical sense. The FBI does not and cannot explain how specific intelligence methods could be gleaned from acknowledging the fact that documents do or do not exist. A meaningful response to CPJ's FOIA requests does not require the disclosure of any intelligence activity, method, or source; CPJ only requested documents related to the duty to warn. Since acknowledging the existence or nonexistence of documents would not reveal any actual information in possession (or not in possession) of the FBI, it is implausible that a person could infer "the FBI's acquisition and reliance on a ***particular*** intelligence activity, source, or method." J.A. at 158 (FBI Decl.) (emphasis added). Therefore, the FBI may not rely on FOIA Exemption 1 nor may it rely on Exemption 3 in support of its *Glomar* response.

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It should be underscored that reversal and remand here would not require that the IC Elements dump out their files indiscriminately to CPJ. This Court could direct the District Court to order the IC Elements to submit more detailed

declarations, with instructions to the District Court to apply the appropriate scrutiny. Depending on the level of detail that the IC Elements provide in revised declarations, it may be appropriate for the District Court to review the declarations *in camera* along with responsive records, should they exist.

This Court could also direct the District Court to order the IC Elements to acknowledge the existence or nonexistence of responsive records and/or release responsive records, should they exist. If responsive records are released, any legitimate national security interests in this case could be protected by the IC Elements redacting or withholding specific documents. Such redaction and withholding are time-honored tools in an agency's FOIA toolkit. *See, e.g.*, *People for the Ethical Treatment of Animals v. U.S. Dep't of Health and Human Servs.*, 901 F.3d 343 (D.C. Cir. 2018) (affirming that the agency's redactions were appropriate to protect confidential information); *Judicial Watch, Inc. v. Nat'l Archives & Records Admin.*, 876 F.3d 346 (D.C. Cir. 2017) (affirming that the agency's withholding of records was appropriate given the serious privacy concerns); *Clemente v. FBI*, 867 F.3d 111 (D.C. Cir. 2017) (affirming that the agency's withholding of records was appropriate under the law-enforcement exemption). They are the proper tools for the circumstances of this case.

CONCLUSION

For the foregoing reasons, the District Court's judgment should be reversed and remanded. On remand, the District Court should be instructed to direct the four IC Elements to acknowledge the existence or nonexistence of responsive records to each of CPJ's FOIA Requests 2,3, and 4; to release responsive records (should they exist); and to submit *Vaughn* indices explaining any redactions or withholdings. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974) (defining *Vaughn* indices requirements). Alternatively, the District Court should be instructed to require the IC Elements to submit more detailed declarations in support of their *Glomar* responses, particularly in light of the Department of State's statements. The District Court also should be instructed to preserve CPJ's ability to challenge further withholdings or redactions and the sufficiency of additional declarations.

[signature page follows]

Dated: New York, New York
July 6, 2020

Respectfully submitted,

By: */s/ Jeremy Feigelson*

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CERTIFICATE OF COMPLIANCE

Jeremy Feigelson hereby certifies under penalties of perjury pursuant to 28 U.S.C. § 1746:

1. The foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i). The brief contains 12,801 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).
2. The foregoing brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). The brief is composed in proportionally spaced typeface using Microsoft Word 2010, in Times New Roman 14-point font.

Respectfully submitted,

By: */s/ Jeremy Feigelson*
Jeremy Feigelson

ADDENDUM

ADDENDUM

5 U.S.C. § 552. Public information; agency rules, opinions, orders, records, and proceedings A-2

Executive Order No. 13,526..... A-4

Intelligence Community Directive 191 ..... A-6

5 U.S.C. § 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

***

(3)

(A) *** [E]xcept as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

***

(4)

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

***

(b) This section does not apply to matters that are—

(1)

(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—

(A)

(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes a particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

Executive Order No. 13,526

December 29, 2009

This order prescribes a uniform system for classifying, safeguarding, and declassifying national security information, including information relating to defense against transnational terrorism. Our democratic principles require that the American people be informed of the activities of their Government. Also, our Nation's progress depends on the free flow of information both within the Government and to the American people. Nevertheless, throughout our history, the national defense has required that certain information be maintained in confidence in order to protect our citizens, our democratic institutions, our homeland security, and our interactions with foreign nations. Protecting information critical to our Nation's security and demonstrating our commitment to open Government through accurate and accountable application of classification standards and routine, secure, and effective declassification are equally important priorities.

NOW, THEREFORE, I, BARACK OBAMA, by the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1.1. *Classification Standards.*

(a) Information may be originally classified under the terms of this order only if all of the following conditions are met:

(1) an original classification authority is classifying the information;
(2) the information is owned by, produced by or for, or is under the control of the United States Government;
(3) the information falls within one or more of the categories of information listed in section 1.4 of this order; and
(4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage.

(b) If there is significant doubt about the need to classify information, it shall not be classified. This provision does not:

(1) amplify or modify the substantive criteria or procedures for classification; or

(2) create any substantive or procedural rights subject to judicial review.

(c) Classified information shall not be declassified automatically as a result of any unauthorized disclosure of identical or similar information.

(d) The unauthorized disclosure of foreign government information is presumed to cause damage to the national security.

***

Section 1.4. *Classification Categories*. Information shall not be considered for classification unless its unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security in accordance with section 1.2 of this order, and it pertains to one or more of the following:

***

(c) intelligence activities (including covert action), intelligence sources or methods, or cryptology;

Intelligence Community Directive 191

***

B. (U) PURPOSE

1. (U) This Directive establishes in policy a consistent, coordinated approach for how the Intelligence Community (IC) will provide warning regarding threats to specific individuals or groups of intentional killing, serious bodily injury, and kidnapping.

2. (U) This Directive is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, by any party against the United States (U.S.), its departments, agencies, or entities, its officers, employees, or agents, or any other person.

C. (U) APPLICABILITY

1. (U) This Directive applies to the IC as defined by the National Security Act of 1947, as amended; and to such elements of any other department or agency as may be designated an element of the IC by the President, or jointly by the Director of National Intelligence (DNI) and the head of the department or agency concerned.

***

D. (U) DEFINITIONS

1. (U) ***Duty to Warn*** means a requirement to warn U.S. and non-U.S. persons of impending threats of intentional killing, serious bodily injury, or kidnapping.

2. (U) ***Intentional Killing*** means the deliberate killing of a specific individual or group of individuals.

3. (U) ***Serious Bodily Injury*** means an injury which creates a substantial risk of death or which causes serious, permanent disfigurement or impairment.

4. (U) ***Kidnapping*** means the intentional taking of an individual or group through force or threat of force.

E. (U) POLICY

1. (U) An IC element that collects or acquires credible and specific information indicating an impending threat of intentional killing, serious bodily injury, or kidnapping directed at a person or group of people (hereafter referred to as intended victim) shall have a duty to warn the intended victim or those responsible for protecting the intended victim, as appropriate. This includes threats where the target is an institution, place of business, structure, or location. The term *intended victim* includes both U.S. persons, as defined in EO 12333, Section 3.5(k), and non-U.S. persons.