No. 11-55754

IN THE UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

CENTER FOR HUMAN RIGHTS & CONSTITUTIONAL LAW,
Appellant,

v.

National Geospatial Intelligence Agency,
Appellee.

ON APPEAL FROM A FINAL ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. Civ-10-03375

REPLY BRIEF OF APPELLANT

CENTER FOR HUMAN RIGHTS
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Appellee/defendant National Geospatial Intelligence Agency ("NGA" or "defendant"), defends the result below on ground that the Barlow public affidavit is enough to carry its burden of showing that the mere existence of images responsive to appellant/plaintiff's ("plaintiff") FOIA request is information properly withheld under 5 U.S.C. § 552(b)(1) and (3).

Yet in ways both large and small, the NGA's unilateral and outsized claims to secrecy in the case at bar go far beyond those intelligence agencies have made in every pertinent reported decision. Here, there is no plausible claim that revealing the existence of the requested photographs could reveal intelligence "sources" or "methods." That the NGA's satellites—its "sources"—are able to photograph the whole of the Earth's surface—its "method"—is hardly secret: it is a self-proclaimed fact, and indeed, the NGA's very *raison d'être*. Defendant's counter-arguments to this Court, like the Barlow declaration itself, are based on precious few actual facts, but are instead larded with speculations that appeal more to credulity than logic.

Yet even were defendant's factual case persuasive, the decision of the court below would remain unsound as a matter of law. Defendant bears the burden on demonstrating that its Glomar response is fully consistent with all requirements of FOIA Exemptions 1 or 3, yet it has failed to make a plausible showing that disclosing the bare existence of the photographs

plaintiff seeks would reveal intelligence "sources" or "methods" or harm national security or foreign relations.

Further, it will be seen, § 102A(i)(1) the National Security Act ("NSA") authorizes only the "Director of National Intelligence" ("DNI") to protect intelligence sources and methods from unauthorized disclosure. Congress confined such authority to the DNI alone for a reason: in a democracy, information should not lightly be concealed from the governed. Had defendant sought DNI authorization for its Glomar response, as § 102A(i)(1) requires, this action may never have been necessary. This Court should reverse.

I. FOIA EXEMPTION 3 DOES NOT AUTHORIZE THE NGA TO INVOKE A GLOMAR RESPONSE UNILATERALLY ON SPECULATION THAT REVEALING THE MERE EXISTENCE OF THE REQUESTED PHOTOGRAPHS MIGHT DISCLOSE ITS "INTERESTS."

As it must, defendant concedes that § 102A(i)(1) the NSA authorizes the "Director of National Intelligence" to "protect intelligence sources and methods from unauthorized disclosure." Brief for Appellee ("Appellee Br.") at 4.

The statute accordingly sets out two conditions that must be met if an agency is to withhold information: First, the DNI must elect to protect the requested information from disclosure; second, the requested information must concern an intelligence "source" or "method."

Defendant has never alleged, much less established, that the DNI played any part whatsoever in authorizing its Glomar response. Defendant's declaration also fails to establish that the requested photographs' bare existence is either an intelligence "source" or "method." The district court accordingly erred in upholding the NGA's Glomar response pursuant to FOIA Exemption 3.

A The NGA bears the burden of establishing that it meets all requirements for a FOIA Exemption 3; plaintiffs were under no obligation to remind it that § 102A(i)(1) the National Security Act authorizes only the DNI to protect intelligence sources and methods.

Defendant preliminarily argues that plaintiff "waived" the agency's complying with the plain language of NSA § 102A(i)(1). Appellee Br. at 30.

The FOIA, however, burdens *defendant* to show that its Glomar response meets the requirements of Exemption 3, and indeed, of any FOIA exemption. *Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence*, 639 F.3d 876, 883 (9th Cir. 2010).

Plaintiff was accordingly under no obligation to remind the Government that the unambiguous text of NSA § 102A(i)(1) vests the DNI alone with authority to protect information regarding intelligence sources and methods from unauthorized disclosure. *Cf. Ramada Dev. Co. v. Rauch*, 644 F.2d 1097, 1111 (5th Cir. 1981) (party who denies an issue upon which opponent has burden of proof does not waive or admit the issue by failing to include it in pretrial stipulation); *Pacific Indem. Co. v. Broward County*, 465

F.2d 99, 104 (5th Cir. 1972) (requiring party to remind opponent that it had failed to meet its burden of proof "would strain the logic of our adversarial system…"); *Catholic Soc. Servs. v. Napolitano*, 2011 U.S. Dist. LEXIS 131561, 31 n.7 (E.D. Cal. Nov. 14, 2011) (where government bears burden of proving its position substantially justified, applicant for attorney's fees under Equal Access to Justice Act does not concede such justification by failing to contest it in all particulars); *see also August v. FBI*, 328 F.3d 697, 701 (D.C. Cir. 2003) (despite bearing burden of proof, no waiver of FOIA exemption where government fails to assert it before trial court because of "simple human error.").

The authorities defendants cite in support of their waiver argument are not to the contrary.[1]

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[1] In *Singleton v. Wulff*, 428 U.S. 106 (1976), the Court held that where a district court dismisses for lack of standing without addressing the merits of the plaintiffs' constitutional claim, a court of appeals should generally not decide the merits of that claim. 428 U.S. at 120.

Even so, the Court cautioned, "there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt …" *Id*. at 121.

In *Broad v. Sealaska Corp.*, 85 F.3d 422 (9th Cir. 1996), the trial court entered summary judgment against the plaintiffs on all claims. On appeal, the plaintiffs for the first time asserted an additional affirmative claim under the Due Process Clause of the Fifth Amendment. *Id*. at 426. This Court held the new claim not properly before it. *Id*.

Neither *Broad* nor *Singleton* says anything at all regarding the FOIA, much less the burden a government agency bears to establish affirmatively that it is entitled to an exemption.

Defendant next urges the Court to disregard the unambiguous text of NSA § 102A(i)(1), which, as has been seen, confers authority solely on the DNI to protect intelligence information from unauthorized disclosure. This, according to defendants, (1) because it "strains credulity to suggest that Congress … intended for the Director to become personally involved" in every instance where § 102A(i)(1) is invoked; and (2) because the "Freedom of Information Act does not specify the particular government official that must justify the government's exemption claims…" Appellee Br. at 30-31. Neither argument furnishes a credible basis for this Court to ignore the plain text of the NSA.

First, plaintiff's suggesting that Congress meant what it said in § 102A(i)(1) strains credulity far less than does defendant's suggesting the opposite. Congress is generally deemed to mean what it says. *Brower v. Evans*, 257 F.3d 1058, 1056 (9th Cir. 2001) (courts "presume that the ordinary meaning of the words chosen by Congress accurately express its legislative intent.").

Defendant's argument is in any event wholly illusory. Plaintiff does not contend that the DNI must "personally" exercise his authority under § 102A(i)(1) piecemeal, but the unambiguous text of the statute demands

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In all events, as discussed below, whether the NGA may exercise authority the NSA vests exclusively in the DNI is clearly "beyond any doubt" and there is accordingly no bar to this Court's so deciding.

some showing that the DNI has authorized the NGA to conceal the bare existence of the photographs plaintiff seeks. *See, e.g., Talbot v. CIA*, 578 F. Supp. 2d 24, 29 n3 (D. D.C. 2008) (statute satisfied where the "DNI ... [had] requested the State Department take all necessary and appropriate measures to ensure the protection of intelligence sources and methods.").

Eschewing any effort to show such authorization, defendant instead argues that its failing to meet an explicit requirement of NSA § 102A(i)(1) is immaterial because the FOIA does not internally require that any specific official authorize withholding. That argument is all but frivolous.

The *sin qua non* of a valid Exemption 3 claim is that an agency's withheld information is "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3); *see also Fitzgibbon v. CIA*, 911 F.2d 755, 761-62 (9th Cir. 1990) (to invoke Exemption 3, an agency must establish that the withheld material is "within the statute's coverage."); *Hunt v. CIA*, 981 F.2d 1116, 1119 (9th Cir. 1992) (agency's affidavits "must … demonstrate that the information withheld logically falls within the claimed exemptions ….").

All agree that the relevant statute here is NSA § 102A(i)(1). If the requirements of NSA § 102A(i)(1) are not met, the statute does not, *a fortiori*, afford a valid ground for withholding material pursuant to FOIA Exemption 3.

Defendant lastly offers that heeding the plain text of NSA § 102A(i)(1) would depart from "decades" in which officials other than the DNI have

invoked § 102A(i)(1) as a foundation for Exemption 3 claims, and faults plaintiff for not citing precedent in which an Exemption 3 claim has been disapproved because the DNI did not "personally" determine to protect the withheld material. Appellee Br. at 33. But as has been said, defendant simply mischaracterizes plaintiff's position as insisting upon some "personal" involvement of the DNI.

More importantly, the NGA ignores that it bears the burden of showing that all requirements of a Exemption 3 claim are met. For its part, defendant cites *no* case in which any court has held the NGA an implicit proxy for the DNI under § 102A(i)(1), nor does it point to *any* reported decision sustaining its having invoked Exemption 3 based on *any* other external statute.

As plaintiff pointed out in its opening brief, that in the past some courts may have *assumed* that the CIA or NSA was equivalent to the DNI within the meaning of § 102A(i)(1), does nothing to excuse the NGA's failure to satisfy the requirements of an Exemption 3 claim in this case. Brief of Appellant ("Appellant Br.") at 30 & n.18. For all that appears in the several cases defendant cites, the DNI did in fact authorize the officials in those cases to exercise authority under NSA § 102A(i)(1) in his stead. *See, e.g., Talbot v. CIA*, *supra*, 578 F. Supp. 2d at 29 n3. Defendant has clearly failed to show it is entitled to withhold the requested information under Exemption 3.

B The NGA has failed to carry its burden of showing a rational relationship between its Glomar response and protecting intelligence "sources" or "methods."

Defendant next reiterates the myriad speculations presented to and credulously adopted by the court below about what foreign adversaries "might" learn about U.S. intelligence gathering were the NGA to disclose the mere existence of the photographs plaintiff seeks. Though multifarious, these speculations fall into two conceptual categories:

1) Anything but a Glomar response would reveal the NGA's intelligence *methods*. *E.g.*, Appellee Br. at 25 (disclosing photographs' existence would reveal whether the NGA's technology is "capable of capturing images on the particular scale (whether large or small) or specific image quality sought by a FOIA requester; or whether it was capable of capturing images in certain (known) weather conditions.").

2) Anything but a Glomar response would reveal whether the NGA had "an intelligence *interest*" in Cuba and its surrounding waters. *Id*. at 21 (emphasis added).

Examining the first category, were this appeal about whether plaintiff is entitled to the actual photographs it seeks, defendant's points would at least be worthy of serious consideration. But those assertions are wholly nonsensical when it comes to justifying a *Glomar* response in this case. Whatever the risks of disclosing the requested photographs themselves,

divulging whether they exist could obviously reveal *nothing* about their "scale," "quality," or the "weather conditions" in which they were taken.

In any event, as plaintiff explained in detail in its opening brief, the NGA itself has made very public its core purpose, its methods (satellite missions), its interests, and its capabilities including its ability to image things anywhere on earth as detailed as "tire tracks." Appellant Br. at 15-17. This information provides anyone with access to the internet or newspapers thousands of times more detailed information about the agency's methods than would its revealing whether or not the requested images exist.

Defendant concedes that to invoke Exemption 3 it must offer more than speculation; it must "establish that confirming or denying whether it has documents responsive to plaintiff's FOIA request 'can *reasonably* be expected to lead to unauthorized disclosure of intelligence sources and methods.'" Appellee Br. at 19, *quoting Halperin v. CIA*, 629 F.2d 144, 147 (D.C. Cir. 1980) (emphasis added). Its explanation must be plausible and logical. *Hunt v. CIA*, 981 F.2d 1116, 1119 (9th Cir. 1992); *Wolf v. CIA*, 473 F.3d 370, 374-75 (D.C. Cir. 2007).

The agency's Barlow declaration neither logically nor plausible shows that revealing the existence of the requested photographs could reasonably be expected to disclose anything at all about the methods the NGA uses to collect images, and certainly nothing even close to what is

already known in immeasurably more detail by information the NGA makes public.[2]

Finally, plaintiffs' affidavits both controverted the NGA's general assertions and refuted the existence of any plausible factual basis to support those assertions. *See* Appellant's Br. at 20-21; *see also* 6 ER at ¶¶ 3-12 ("Confirming the existence or nonexistence of the requested records therefore also would not have any adverse results suggested in the Barlow declaration. Indeed, releasing images and analysis from 1996, with redactions or segregation as appropriate if at all necessary, would not reveal the NGA's … intelligence gathering capabilities, sources or methods.").

The NGA's second category of assertions likewise fails to posit a reasonable basis for concluding that only a Glomar response will prevent the disclosure of the NGA's intelligence sources or methods.

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[2] Yet assume the NGA were to reveal that it does *not* possess any of the requested images. All one could deduce from that fact is that the NGA did not preserve any satellite imagery taken on February 24, 1996, over or near the north coast of Cuba, or that for any number of reasons it elected not to capture imagery of the sliver of ocean where the incident took place. It would be impossible to say whether it did not do so because no satellite was focused in that small area at the time of the incident, or because the NGA lacked interest, or because some meteorological or other transient condition prevented photography, or because a satellite malfunctioned that day at that time. The only thing such a response could disclose is that the NGA does not possess such images. It would disclose absolutely nothing about the NGA's interests or its "intelligence sources and methods."

As a matter of fact, revealing that the NGA did or did not photograph an area of the ocean between Florida and Cuba some 16 years ago tends neither to prove nor disprove an obvious historical fact: U.S. intelligence agencies have an "interest" in Cuba and its surrounding waters; they have had this interest for many, many years.[3]

As a matter of law, NSA § 102A(i)(1) protects two types of classified information: intelligence "sources" [4] and "methods." It affords no basis for withholding information about intelligence "interests."[5]

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[3] The United States imposed an economic embargo on Cuba in October 1960, and broke diplomatic relations with that nation on January 3, 1961. Tensions between the two governments peaked during the October 1962 missile crisis, but remain antagonistic to this day. *See* U.S. Dept. of State, Bureau of Western Hemisphere Affairs, BACKGROUND NOTE: CUBA (November 7, 2011), *reprinted at* http://www.state.gov/r/pa/ei/bgn/2886.htm.

The U.S. obviously has an "interest" in Cuba, just as it has a well-known interest in other adversaries around the world.

[4] Defendant does not appear to contend that its Glomar response is required to protect its intelligence "sources"—*i.e.*, someone or something that "provides, or is engaged to provide, information the Agency needs to fulfill its statutory obligations." *CIA v. Sims*, 471 U.S. 159, 177 (1985)—from unauthorized disclosure.

It is no secret that the NGA uses satellites to gather the information it needs to fulfill its statutory obligations. Revealing that it has or doesn't have the requested photographs would accordingly disclose nothing about its "sources" that is not patently obvious. *See* Appellant's Br. at 15-17; *see also* H.R. Rep. No.1380, 93d Cong., 2d Sess. 12 (1974), *reprinted in* (1974) U.S. Code.Cong. & Ad. News, 6272 (FOIA exemption for "investigative techniques and procedures" "should not be interpreted to include routine techniques and procedures already well known to the public").

As any dictionary will advise, "interest" and "method" are distinct. A "method" is "a way of doing anything; mode; procedure; process, especially, a regular orderly definite procedure or way of teaching, investigating, etc… a system in doing things…" WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1134 (2d ed. 1972). An "interest," in contrast, is "a feeling of intentness, concern, or curiosity about something … importance; consequence…" *Id*. at 936.[6]

Thus, even were defendant's interest in Cuba secret in the least, NSA § 102A(i)(1) would protect the methods by which it pursues that interest,

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[5] This does not mean that intelligence interests may not be exempt from disclosure under some other external statute. But unless the term "methods" is to be distended out of all recognition, NSA § 102A(i)(1) does not shield information regarding the NGA's "interests."

[6] As defendant notes, courts have sometimes acknowledged the deleterious potential of revealing intelligence "interests." *E.g., CIA v. Sims*, 471 U.S. 159, 176-77 (1985); *Berman v. CIA*, 501 F.3d 1136, 1144 (9th Cir. 2007).

However, they have done so only in the course of affirming exemptions under NSA § 102A(i)(1) for actual intelligence *sources* or *methods*. *See Sims* at 178 (names and institutional affiliations of CIS researchers exempt intelligence sources); *Berman* at 1141 (CIA presidential briefings released daily and reveal when particular intelligence information became available; foreign intelligence services could use that information to identify its source).

Plaintiff knows of no case, and defendant points to none, in which an exemption under NSA § 102A(i)(1) has been approved purely for intelligence "interests."

And in stark contrast to the case at bar, neither *Sims* nor *Berman* upheld a Glomar response.

not the interest per se. On this count, too, defendant's Exemption 3 claim must fail.

II. THE NGA HAS FAILED TO SHOW THAT CONFIRMING THE EXISTENCE OR NON-EXISTENCE OF THE REQUESTED IMAGES IS EXEMPT UNDER EXEMPTION 1 BY FALLING WITHIN ANY OF THE CATEGORIES OF E.O. 13,526, § 1.4 OR THAT DISCLOSURE REASONABLY COULD BE EXPECTED TO RESULT IN DAMAGE TO THE NATIONAL SECURITY AS REQUIRED BY E.O. 13,526, § 1.1(a).

Exemption 1, 5 U.S.C. § 552(b)(1), shields from disclosure information that is "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and [is] in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b).

Courts have upheld Glomar responses where confirming or denying the very existence of requested records would reveal classified information protected by Exemption 1. *Larson, supra*, 565 F.3d at 861-62 (Exemptions 1 and 3); *Wolf v. CIA, supra*, 473 F.3d at 375-79 (Exemptions 1 and 3). Executive Order 13,526 permits a Glomar response only if the fact of requested records existence or nonexistence "is itself classified." *Wilner*, 592 F.3d at 71 (internal quotation marks omitted); E.O. 13,526, § 3.6(a).

And while substantial weight will be given to an agency's determination, courts play a meaningful role in reviewing asserted Glomar claims under Exemption 1 to determine whether the government's

explanation for its claim "appears 'logical' or 'plausible."' *Wolf*, 473 F.3d at 374-75, *quoting Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982).

To be properly classified under Executive Order 13,526, information must: (1) be classified by an original classification authority; (2) be owned or controlled by the United States Government; (3) fall within one or more of the categories of information listed in section 1.4 of the Executive Order; and (4) its disclosure reasonably could be expected to result in damage to the national security. E.O. 13,526, § 1.1(a).[7]

Under the Executive Order's third condition, the NGA argues that the existence or nonexistence of responsive records falls within E.O. 13,526 §1.4(c), which protects "intelligence activities (including covert action) [and] intelligence sources or methods"; and § 1.4(d), which protects "foreign relations or foreign activities of the United States." Appellee Br. at 35-38, *citing* 5 ER ¶ 23.

However, the Barlow declaration fails to "demonstrate that the information withheld logically falls within the claimed exemptions" under E.O. 13,526 § 1.4(c) or (d), *Berman*, 501 F.3d at 1140, or that disclosure of the

[7] "Damage to the national security" of the United States is defined as "harm to the national defense or foreign relations of the United States from the unauthorized disclosure of information, taking into consideration such aspects of the information as the sensitivity, value, utility, and provenance of that information." E.O. 13,526 § 6.1(l).

existence or non-existence of the requested records reasonably could be expected to result in damage to the national security.

A The NGA has failed to carry its burden of showing a rational relationship between its Glomar response and protecting intelligence "sources" or "methods" under E.O. 13,526 § 1.4(c)

The NGA argues that "Mr. Barlow determined that [the requested] information concerns 'intelligence activities' and 'intelligence sources or methods,'" which are classifiable under EO 13,526 § 1.4(c). Appellee Bf. at 35. The issue remains whether the declaration provides sufficient information to logically support its conclusions. The NGA offers a handful of "example[s]" to establish that the declaration supports its conclusions.

The NGA's first opines that confirming whether or not responsive records exist "could, for example, reveal whether NGA maintains an intelligence interest in a particular area of world, [and] the breadth and scope of any such interest, *by exposing whether NGA intelligence methods have or have not been utilized for a specific target*." Appellee Bf. at 35-36 (emphasis added).

First, as with Exemption 3 discussed *ante*, E.O. 13,526 §1.4(c) protects "intelligence sources or methods," not the intelligence "interests" the Barlow declaration repeatedly refers to and relies upon.

In any event, the Barlow declaration never explains *why* disclosing whether the agency possesses the requested records would show that the agency has an interest "in a particular area of world …" The NGA's

"example" could be offered up for each and every FOIA request the agency ever receives.[8]

As discussed in plaintiffs' opening brief, the NGA's satellites capture imagery worldwide, and whether an image exists of a part of the ocean many years ago before, at the time of, or shortly after the shoot down incident would logically tell no one about the NGA's interests. Appellant's Bf. at 15-17.[9] Confirming that the images exist would tell no one whether the NGA on February 24, 1996 gathered images for the entire southern hemisphere, or the area between any particular longitudes or latitudes, or the entire Caribbean, or anything within 100 miles or 1,000 miles of Miami or Cuba, or everything within 7,810 miles of the South Pole, or anything within 4,620 miles from the North Pole.

The NGA may have captured imagery with no particular interest in the area at all, or its interest, if it had one, may have been with the Northern Hemisphere, or with the Caribbean, or with Florida and its surrounding area, or with any other geographical area which included the ocean where the 1996 incident took place.

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[8] To adopt the NGA's position, every intelligence agency could say that disclosing any record about any particular area of world would disclose that the agency has an "interest" about that "particular area of the world."

[9] Plaintiff's experts confirm that confirming the existence of the requested records would disclose nothing about the NGA's interests in any particular area of the world. *See, e.g.*, 6 ER at ¶ 8 (Declaration of John Pike).

Further, the Barlow declaration nowhere ties this alleged disclosure of an agency interest in a "particular part of the world" to a logically understandable threat of harm to the national defense or foreign relations of the United States, taking into consideration such aspects of the information as "the sensitivity, value, utility, and provenance of that information." E.O. 13,526 § 6.1(l).

The Barlow declaration next claims that confirming the existence or non-existence of the requested photographs would disclose the "basic tools used by NGA to accomplish its mission," its "liaison relationships," or its "identification of targets for intelligence collection." Appellee Br. 20, *citing* ER 1:51-52 (¶25); *see also* ER 1:45-48 (¶¶12, 14, 16). The Barlow declaration similarly asserts that disclosing whether or not the requested records exists could possibly reveal that the United States has a particular "intelligence … capability, or technique…" Appellee Br. at 36, *quoting* ER 1:52 (¶ 26). Revealing that it seeks nothing less than a total and permanent exemption from *any* disclosure under the FOIA, the NGA argues that "[a]ny" admission about the NGA's " past use" of satellites would disclose the agency's capability or technique. *Id*.

But as has been seen, neither the Barlow declaration nor Appellee's brief ever explains in plausible or logical terms how disclosing the mere existence of the requested photographs could not possibly reveal information about the agency's methods or technological capabilities. As

plaintiff explained in its opening, anyone who can use the internet or read newspapers knows that the primary if not sole activity of the NGA is gathering satellite images of the earth. Appellant's Bf. at 15-17. This is not a case in which the NGA's use of satellite imagery is a national security secret. Accepting the NGA's position would be like accepting a claim by the FBI because disclosing whether a particular record exists would reveal that the FBI investigates crime, or a CIA claim that disclosing whether a requested record exists would reveal that the CIA engages in intelligence activities.

Finally, Mr. Barlow states that the need to keep the NGA's sources and methods confidential requires the government to prevent even "indirect references to … a source or method." Appellee Bf. at 37, *quoting* ER 1:53 (1128). He points out that foreign intelligence services have the "ability to gather information from myriad sources, analyze it, and deduce means and methods" of intelligence gathering "from disparate and even seemingly unimportant details" when "juxtaposed with other publicly[] available data." *Id*.

While foreign intelligence services undoubtedly *do* gather information from a "myriad" of sources, including "seemingly unimportant details," and "juxtapose" and "analyze" all data collected, this bears no relationship to whether disclosing the existence or non-existence of the requested records could even "indirect[ly]" reveal the NGA's

sources or methods. Everyone who can read knows that the NGA collects satellite imagery of the earth's surface down to who is standing on street corners. There is no plausible way to explain how knowing that the NGA possesses (or doesn't possess) images of the ocean where the shoot down took place could "indirect[ly]" reveal a single thing about the agency's sources and methods not already made public by the NGA itself.

Having failed to show that confirming that the requested records exist or do not exist would in any way, directly or indirectly, disclose the agency's sources or methods, neither the declaration nor the agency's brief on appeal move to the next required logical showing: *i.e.*, that disclosing whether the requested records exist would harm the national security.

B The NGA has failed to carry its burden of showing a rational relationship between its Glomar response and damage to the "foreign relations or foreign activities of the United States" under E.O. 13,526 § 1.4(d)

Defendant contends it has satisfied the requirement of Executive Order § l.4(d)—namely, that revealing the existence of satellite imagery *of any country on any date* would damage the "foreign relations or foreign activities of the United States"—by asserting that the NGA's confirming the existence of requested records could be "construed by a foreign government … to mean that NGA has collected intelligence information on its citizens or resident aliens." Appellee Bf. at 37, *quoting* ER 1:53-54 (¶ 30);

ER 1:54 (¶ 31) [10]

In its opening brief plaintiff fully answered this point. Appellant's Bf. at 35-39, and the NGA offers little new in support of its having satisfied § l.4(d) of the Executive Order in this case.

The NGA concedes—as it must based upon the massive amount of information about its activities on its own web site, its officials' public speeches, and its routine press releases—that it is "*generally known that the [NGA] collects foreign satellite intelligence and conducts satellite operations in other countries* …" Appellee Bf. at 38 (emphasis supplied). Nevertheless, the Barlow declaration concludes that an acknowledgment that it even possesses the requested records "could suggest [that the] NGA has operated undetected within [a particular] country's borders," *id, quoting* ER 1:54 (¶ 31), which "could well cause the affected or interested foreign

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[10] Defendant argues that plaintiff's complaint demonstrates the potential damage to foreign relations because it alleges that the information plaintiff seeks is relevant to determining whether the incident took place "in Cuban or international airspace," and that this is an issue "which has generated national and international attention." Appellee Bf. at 37 *quoting* ER 1:35 (¶¶ 10-11).

There are no pending disputes or claims between Cuba and the United States in any domestic or international fora that we are aware of or the Barlow declaration references regarding where the 1996 incident. The fact that the location of the incident is of public interest and may be relevant to the conviction of Gerardo Hernandez for the shoot down in international air space (ER 1:35 (¶ 10)), does not mean disclosing whether the records exist or don't exist would in any logical way harm the "foreign relations or foreign activities of the United States …"

government to respond in ways that would seriously damage U.S. national interests …" *Id., quoting* ER 1:53 (¶ 30).

Again the Barlow declaration is high on conclusory and sweeping, but factually unsupported, statements. It definitely is, as the NGA concedes, widely known "that [it] collects foreign satellite intelligence and conducts satellite operations" everywhere on earth, and *only someone living in a coffin for the last several decades could conclude that for some mysterious unfathomable reason the NGA's global imaging has avoided one place on earth, the ocean between Cuba and Florida.*

Requesting parties and the Court are entitled to "plausible" and "logical" justification for exemption, even in the national security area. Suggesting that the government of Cuba believes or may believe that the NGA has *not* collected imagery of Cuba or the ocean around it is Alice-in-Wonderland fantasy, not a reasonable basis from which to infer justification for a claimed exemption.

Courts have certainly acknowledged the harm to foreign relations and national security that could result if the United States were to reveal whether a given foreign national is a CIA informant. *See, e.g., Wolf,* 473 F.3d at 376 (confirming or denying existence of a covert relationship with a foreign national could harm the United States' foreign relations). The Barlow declaration offers nothing even remotely as compelling for concealing the existence of satellite images of open ocean.

Appellant has pointed out that it is well known that the NGA captures images globally and does so using satellites. Appellant's Bf. at 34. It is also well known that the agency can capture images at extreme close range. *Id*. It is also well known that it does so for several reasons, including intelligence gathering, monitoring floods and inclement weather, providing information for use by first responders, aiding navigation, etc. *Id*. The facts regarding the shoot down, including that the shoot down took place, have been fully and publicly disclosed and discussed for over 15 years as a result of court proceedings, public hearings, preserved radio transmissions, Congressional hearings, and probably thousands of media reports. *Id*. at 45. The NGA never denies that its "capabilities … are … 'well known'" or that "the 'shoot- down incident' has been 'fully and publicly disclosed.'" Appellee Bf. at 39 (*quoting* Appellant's Bf. at 34, 45).

The NGA misses the point when it argues that "[t]he question in this case is not whether the NGA possesses reconnaissance satellites, or whether the 'shoot-down' incident in fact occurred." Appellee Bf. at 39. If the U.S. Government had never publicly announced that the NGA's primary mission is the use of satellites to gather imagery for intelligence purposes around the world, then a *logical* showing could perhaps be made that disclosing that the NGA possessed satellite imagery may harm the national security or foreign relations of the United States.

Similarly, if the 1996 shoot down were an intelligence secret, rather

than an event reported widely throughout the world, then a *logical* showing could perhaps be made that disclosing that the NGA possessed satellite imagery of the shoot down could harm the national security or foreign relations of the United States.

In this case the Barlow declaration plainly fails to logically or plausibly explain why confirming or denying the existence of records concerning the 1996 shoot down incident might reveal classified information. It is obviously not enough to simply assert that "the facts that are public are not the same as those the agency seeks to protect with its Glomar response." Appellee's Bf. at 39, *quoting* ER 1:20.

To be sure, courts do regularly find that an intelligence agency's disclosing details about its technical capabilities or intelligence sources could harm national security or foreign relations. *See, e.g., Wolf v. CIA, supra*, 473 F.3d at 376 (confirming or denying the existence of agency records about "'a particular foreign national'" could be expected to affect adversely U.S. foreign relations); *Larson, supra*, 565 F.3d at 867 (disclosing intercepted communications of foreign governments would facilitate counter-measures leading to the loss of intelligence, which would be "'extremely harmful to the national security of the United States'"); *Houghton v. National Security Agency*, 378 Fed. Appx. 235, 238 (3d Cir. 2010) (concluding without analysis that the NSA's refusing to reveal whether it had "documents in which [the requester's] name is mentioned" within

Exemption 1); *ACLU v. United States DOD*, 628 F.3d 612, 625 (D.C. Cir. 2011) (in absence of "evidence in the record to support the opposite conclusion," "both plausible and logical" that disclosure of information regarding the capture, detention, and interrogation of detainees would harm national security by degrading CIA's ability to carry out its mission). But these cases are readily distinguishable.

In *ACLU* , for example, the requesting parties sought Department of Defense and CIA records relating to "high value" detainees held at the U.S. Naval Base in Guantanamo Bay, Cuba. The government released redacted versions of the requested documents, from which "specific information relating to the capture, detention, and interrogation of the detainees" had been withheld. 628 F.3d at 616. The government defended the redactions as justified, *inter alia*, under FOIA Exemption 1.

The court concluded that releasing the withheld information could damage national security because it was "specific and particular to each detainee and *would reveal far more* about the CIA's interrogation process" than previously released records had disclosed. *Id*. (emphasis supplied).

In *Wolf,* the CIA's affidavit contended that its revealing the existence of files on foreign politician would harm national security and foreign relations by raising suspicion that he could be an intelligence source. *Id*. at 376. ("'acknowledgment that the Agency maintains contact with a specific foreign national 'would … undermine CIA's ability to attract potential

intelligence sources in the future."). The agency's affidavit further explained that admitting the existence of a file would suggest "'a covert relationship with a particular foreign national'" and tell a foreign government "'that the CIA has collected intelligence information on or recruited one of its citizens or resident aliens.'" *Id*.

In *Larson*, *supra*, the plaintiffs sought information about past violence in Guatemala from multiple government agencies, including the CIA and the NSA.

Among the plaintiffs' requests was that the CIA and NSA disclose documents relating to the disappearance of family members in Guatemala. The CIA released four documents, 565 F.3d at 862, but the NSA issued a Glomar response.

The court held that the NSA had carried its burden to show that FOIA Exemption 1 applied to the withheld information. *Id*. at 866. The court found the agency had described with "reasonably specific detail" the reason for nondisclosure: the necessity to foreign intelligence-gathering of keeping "targets and foreign communications vulnerabilities" secret. *Id*. Confirming the existence of certain of the requested documents, the court opined, would have disclosed the NSA's role in "intercept[ing] communications of foreign governments," the degree of success in exploiting targets, the vulnerability of particular foreign communications, and the extent of any cryptological successes used by the NSA. *Id*.

Defendant's showing here is not remotely comparable to that of the CIA in *Larson*, *ACLU* or *Wolf*.

In contrast to the NGA's position here, in *ACLU* the intelligence agencies released many of the requested documents, albeit in redacted form. In *ACLU*, for example, the agency redacted only "specific information relating to the capture, detention, and interrogation of the detainees." 628 F.3d at 616. Here, the NGA's stating whether the requested photographs exist could not in any way "reveal far more" about the NGA's sources or methods than is already widely known through the agency's web site and numerous press releases.

In *Wolf*, the agency's confirming the existence of a file on a particular political leader would have suggested he was an informant or had otherwise cooperated with the United States.

In *Larson*, the NSA explained that the loss of "highly prized communications" could reasonably be expected to cause serious damage to national security and foreign relations interests. 565 F.3d at 866. Neither the CIA nor the NSA issued a blanket Glomar response to every request because disclosing that they even possessed the requested documents would disclose that the CIA and NSA gather and analyze intelligence data from other countries, basically the NGA's sweeping claim in this case.

Compared to the NGA's speculations here, the CIA's reasoning in *Larson*, *ACLU* and *Wolf* were models of both detail and logic.

Here, plaintiff does not argue that the *Glomar* claim is not justified because the NGA has already made public some portion of images gathered of the incident in 1996. Rather, plaintiff has argued that the Barlow declaration fails to justify in a plausible and logical manner the NGA's refusal to confirm or deny the existence of images of the area of open ocean because the NGA itself publicly declares that is mission is precisely to capture satellite images world-wide for a wide variety of reasons and its known capabilities (it can image "tire tracks") "reveal[s] far more" than would be revealed by disclosing that it possesses the requested records.

At bottom, the NGA's declaration offers neither "plausible" nor "logical" justifications "demonstrate[ing] that an answer to the query can reasonably be expected to lead to unauthorized disclosure" under Exemption 1, or harm the national security. *Gardels*, 689 F.2d at 1103 (internal quotation omitted).[11]

The NGA next argues that plaintiff errs by suggesting at various points that no harm could come to the United States for disclosing whether or not it possesses records of an event that occurred 15 years ago. Appellee

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[11] *See Wolf*, *supra*, 473 F.3d at 374-77; *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981) (agency must offer a "plausible" explanation that information is properly classified); *Oglesby v. U.S. Dep't of Army*, 79 F.3d 1172, 1184 (D.C. Cir. 1996) (requiring a more detailed explanation of the potential dangers to national security that justify the use of Exemption 1).

Br. at 40 (*citing* Appellant's Bf. at 35-47). The NGA again misses the point.

Plaintiff has never argued that the mere passage of time, standing alone, forecloses damage to national security or foreign relations. *E.g.*, *Oglesby v. U.S. Dep't of Army*, 79 F.3d 1172, 1183 (D.C. Cir. 1996) ("mere passage of time is not a per se bar to reliance on exemption 1."). The government may unquestionably continue to withhold *properly* classified sources and methods of intelligence gathering, even if they are decades old.

Here, however, the Barlow declaration simply fails to establish in plausible and logical terms that confirming the existence or non-existence of the requested records would harm the foreign relations or activities of the U.S. Government. There is no gainsaying, however, that the requested documents' being some 15 years old underscores that conclusion.

The fact that the President has declassified some satellite imagery taken by specific satellite systems used between 1959 and 1972 (Exec. Order No. 12,951, 60 Fed. Reg. 10,789 (Feb. 22, 1995)), and in 2002, the Director of Central Intelligence further declassified other obsolete satellite imagery collected between 1963 and 1980 (see National Archives Releases Recently Declassified Satellite Imagery, October 9, 2002, *available at* http://www.archives.gov/press/press-releases/2003/nr03-02.html), may "demonstrate a good faith effort by the government to release information when the public interest in its disclosure outweighs the continued need for secrecy," Appellee Bf. at 42, but does *not* demonstrate in any way that the

Barlow declaration used in this case offers plausible and logical reasons why Exemption 1 permits a *Glomar* response.

Plaintiff does not argue as the requesting parties did in *Students Against Genocide v. Dep't of State*, 257 F.3d 828 (D.C. Cir. 2001) that "because the government did release numerous [images] … [there are] reason[s] to question its good faith in withholding the remaining [images] on national security grounds." *Id*. at 835. Instead, plaintiff here has consistently argued that the Barlow declaration is highly conclusory and offers no plausible or logical basis upon which the requesting party or a court could reasonably determine that the agency's Glomar claim is properly asserted under Exemption 1.

CONCLUSION

For the foregoing reasons, this Court should reverse.

Respectfully submitted,

Dated: February 6, 2012.

CENTER FOR HUMAN RIGHTS & CONSTITUTIONAL LAW
Peter A. Schey
Carlos R. Holguin

/s/Peter A. Schey_____

/s/Carlos R. Holguín_____

/ / /

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR NO. 11-55754

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, Appellees' Principal and Response Brief is proportionately spaced, has a typeface of 14 point and contains 6,926 words, excluding the parts of the brief exempted by Fed. R. App. P. 37(a)(7)(B)(iii).

Dated: February 6, 2012.

_____-s-_____
Peter A. Schey
One of the Attorneys for Appellants

CERTIFICATE OF SERVICE

I certify that on this date I directed that two copies of the foregoing be served by first class mail, addressed to:

Department of Justice
Office of Immigration Litigation
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044

Dated: February 6, 2012

_____-s-_____
Carlos Holguín

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