No.

In the Supreme Court of the United States

THOMAS WILNER, ET AL., PETITIONERS
v.
NATIONAL SECURITY AGENCY
AND DEPARTMENT OF JUSTICE.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In an action seeking agency records under the Freedom of Information Act, may a court uphold an agency's invocation of the "*Glomar*" doctrine—thereby allowing the agency to avoid confirming or denying the existence of records in order to keep secret aspects of an agency program—where the Executive Branch has officially acknowledged the existence and contours of the program, and where records, if they exist, necessarily evidence agency conduct that is illegal and unconstitutional?

PARTIES TO THE PROCEEDINGS

The following parties, all individuals, were plaintiffs in the district court and appellants in the court of appeals, and are petitioners in this Court: Thomas Wilner, Gitanjali S. Gutierrez, Michael J. Sternhell, Joshua Colangelo Bryan, Brian J. Neff, Joseph Margulies, Scott S. Barker, James E. Dorsey, Asmah Tareen, Richard A. Grigg, Thomas R. Johnson, George Brent Mickum IV, Stephen M. Truitt, Jonathan Hafetz, Jonathan Wells Dixon, Tina M. Foster, Alison Sclater, Marc D. Falkoff, David H. Remes, H. Candace Gorman, Charles Carpenter, John A. Chandler, Clive Stafford Smith.

The following parties, each a governmental agency, were defendants in the district court and appellees in the court of appeals, and are respondents in this Court: National Security Agency and Department of Justice.

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The opinion of the court of appeals (App. 1a-32a) is reported at 592 F.3d 60 (2d Cir. 2009). The opinion of the district court granting summary judgment on the *Glomar* claims (App. 33a-49a) is unreported and is available at 2008 WL 2567765, 2008 U.S. Dist. LEXIS 48750 (S.D.N.Y. June 25, 2008). The district court's opinion and order entering final judgment as to the *Glomar* issues pursuant to Federal Rule of Civil Procedure 54(b) (App. 50a-53a) is unreported and is available at 2008 WL 2949325, 2008 U.S. Dist. LEXIS 58095 (S.D.N.Y. July 31, 2008).

JURISDICTION

The judgment of the court of appeals was entered on December 30, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rule 12.5 of the Rules of the Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Freedom of Information Act Exemption 1 provides in pertinent part for the nondisclosure of records relating to matters 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." 5 U.S.C. § 552(b)(1). Freedom of Information Act Exemption 3, at the time this suit was filed, provided in pertinent part for nondisclosure of records relating to matters that are "specifically exempted from disclosure by statute ... provided that such statute (A) requires that the matters be withheld from the public

in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." *Id.* § 552(b)(3), amended by Pub. L. No. 111-83, § 564(b), 123 Stat. 2142, 2184 (Oct. 28, 2009).[1] The relevant statutory provisions are reprinted in the Appendix. (App. 54a-57a)

STATEMENT

Thomas B. Wilner, Esq., a former partner at Shearman and Sterling LLP, and the twenty-two other petitioners are lawyers who are representing or have represented Guantánamo detainees. Petitioners brought this Freedom of Information Act ("FOIA") case to obtain records showing whether the National Security Agency ("NSA") has engaged in warrantless surveillance of their electronic communications. The possibility that the NSA has targeted these lawyers for surveillance has made them reluctant and, in some cases, unable to engage in communications via telephone, e-mail, and facsimile. The threat of surveillance has obstructed their access to witnesses and other sources of evidence, and undermined their representation of their clients.

Petitioners' fear of surveillance is well-grounded. High-level Administration officials have acknowledged that the NSA engaged in warrantless interception of electronic communications of individuals alleged to have

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[1] The current version of Exemption 3 reads "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 [which was enacted on Oct. 28, 2009], specifically cites to this paragraph." The amendments are immaterial to the matters at issue in this petition.

connections to terrorist organizations *and* that the Guantánamo detainees' lawyers may have been targeted. The NSA and the Department of Justice ("DOJ") have argued that the zone of privacy that ordinarily safeguards the attorney-client relationship does not apply to Guantánamo detainees and their lawyers, and the executive maintained that it has a legal right to eavesdrop on lawyers without judicial oversight.

A. Factual Background

In the aftermath of the terrorist attacks of September 11, 2001, hundreds of men were detained by the Department of Defense and the Central Intelligence Agency ("CIA") at the U.S. Naval Base at Guantánamo Bay, Cuba. Nearly six hundred detainees have since been released or transferred without being formally charged. Many of the remaining detainees have filed and are actively litigating habeas corpus petitions challenging their detention. Detainees have prevailed in 34 of the 46 cases decided on the merits to date.[2]

Petitioners currently represent or have represented Guantánamo detainees in habeas challenges. These lawyers are partners and associates at prominent law firms, law professors, and attorneys for established nonprofit organizations who also represent individual and corporate clients with no relation to Guantánamo. Petitioners began representing detainees only after the Federal Bureau of Investigation ("FBI") conducted an extensive security clearance review and deemed them to pose no threat to national security. *See, e.g.,* Gutierrez Decl. ¶ 39,

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[2] *See* Charlie Savage, *Obama Team is Divided on Anti-Terror Tactics*, N.Y. Times (Mar. 28, 2010), *available at* http://www.nytimes.com/2010/03/29/us/politics/29force.html?hp=&pagewanted=all (last visited Mar. 29, 2010).

App. 77a; Chandler Decl. ¶ 8, App. 94a-95a; Gorman Decl. ¶ 14, App. 852a.

On December 17, 2005, after extensive disclosures in the media, President Bush confirmed that he had approved a warrantless surveillance program, the Terrorist Surveillance Program ("TSP" or "NSA Program"), conducted by the NSA in the wake of September 11th.[3] Notwithstanding the explicit command of the Fourth Amendment, and Congress's enactment of the Foreign Intelligence Surveillance Act ("FISA"), the NSA did not seek judicial approval for its surveillance activities under the TSP,[4] and, from 2001 to 2007, President Bush reauthorized the TSP more than 30 times.[5] Once the President acknowledged the TSP's existence, the Executive Branch engaged in an extensive media campaign to describe the program's scope and to defend its legitimacy.[6]

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[3] President George W. Bush, Radio Address (Dec. 17, 2005) ("*Bush Radio Address*") transcript available at http://georgewbush-whitehouse.archives.gov/news/releases/2005/12/20051217.html (last visited Mar. 30, 2010).

[4] *Id.*

[5] President George W. Bush, News Conference (Dec. 19, 2005) ("*Bush Press Conference*") *transcript available at* http://georgewbush-whitehouse.archives.gov/news/releases/2005/12/20051219-2.html (last visited Mar. 30, 2010). Attorney General Gonzales announced the suspension of the program in 2007, while the President maintained the continued threat of surveillance by reserving the right to reinstitute it without notice. Attorney General Gonzales Ltr. to Senate Committee on Judiciary (Jan. 17, 2007), *available at* http://www.fas.org/irp/agency/doj/fisa/ag011707.pdf (last visited Mar. 30, 2010).

[6] President George W. Bush, *Remarks on the War on Terror* (Sept. 5, 2006) *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/09/05/AR2006090500656.html (last visited Mar. 30, 2010); Vice President Richard Cheney, *Commencement Address at the United States Naval Academy* (May 26, 2006), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/05/26/AR2006052601166.html (last visited Mar. 30, 2010); Attorney

NSA Director General Michael V. Hayden, Attorney General Alberto Gonzales, and many other senior Administration officials publicly described and defended the program.[7]

Senior officials conceded that the standards the NSA employed for approval of surveillance under the TSP were less rigorous than the procedures required by FISA. Under FISA, the NSA must obtain judicial approval for any and all electronic surveillance for foreign intelligence and must employ mitigation procedures when the intercept might involve U.S. persons and privileged information.[8] Attorney General Gonzales acknowledged that the surveillance carried out by the TSP was within the defined field of "electronic surveillance" regulated by FISA.[9] Nonetheless, the TSP was used "in lieu

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General Alberto Gonzales, *Ask the White House* (Jan. 25, 2006) ("*Gonzales Ask the White House*") *available at* http://www.whitehouse.gov/ask/20060125.html (last visited Dec. 3, 2008); Transcript of Attorney General Alberto Gonzales' Morning Show Interviews (Dec. 19, 2005), *available at* http://www.usdoj.gov/ag/readingroom/surveillance2.pdf (last visited Mar. 30, 2010).

[7] General Michael V. Hayden, Press Briefing by Attorney General Alberto Gonzales and General Michael V. Hayden (Dec. 19, 2005) ("*Gonzales/Hayden Press Briefing*"), *available at* http://www.fas.org/irp/news/2005/12/ag121905.html (last visited Mar. 30, 2010); *see also* U.S. Department of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan. 19, 2006) ("*DOJ White Paper*") *available at* http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf (last visited Mar. 30, 2010).

[8] General Michael V. Hayden, *What American Intelligence & Especially the NSA Have Been Doing To Defend the Nation*, Address to the National Press Club (Jan. 23, 2006) ("*Hayden Address to the Nat'l Press Club*"), *available at* http://www.fas.org/irp/news/2006/01/hayden012306.pdf (last visited Mar. 30, 2010); *see also Gonzales/Hayden Press Briefing*, *supra* note 7.

[9] See *Gonzales/Hayden Press Briefing*, *supra* note 7 ("Now, in terms of legal authorities, the Foreign Intelligence Surveillance Act

of" the procedures specified under FISA.[10] Under the TSP, an NSA shift supervisor selected and approved the individuals whose communications were intercepted; neither the President nor the Attorney General, nor anyone in DOJ reviewed the specific target selections or the nature of the communications to be intercepted.[11]

Official announcements made clear that the TSP likely included the surveillance of Guantánamo lawyers. As described by senior members of the Bush Administration, the TSP allows monitoring of any electronic communications when one party is outside the United States and one party is suspected of being "link[ed]" to or "associated" with al Qaeda or "related terrorist organizations."[12] DOJ confirmed the details of the NSA surveillance program in a 42-page White Paper, issued on January 19, 2006, which attempted to justify the program's legality.[13] As the Ninth Circuit explained in *Al-Haramain*, "[t]hat the Department of Justice even thought it necessary to explain to the public 'in an unclassified form, the legal basis for the NSA activities described by the President,' ... suggests that the government both knew that details of the surveillance program were in the public sphere and recognized that the Surveillance Program was already the subject of significant public discussion and interest." *Al-Haramain Islamic*

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provides—requires a court order before engaging in this kind of surveillance that I've just discussed and the President announced on Saturday").

10 *Id.* (quoting Michael Hayden).

11 *Gonzales/Hayden Press Briefing*, *supra* note 7.

12 *Bush Press Conference*, *supra* note 5; *Gonzales Ask the White House*, *supra* note 6. Hayden also acknowledged that, although the NSA surveillance program targets communications where one party is outside the United States, if a purely domestic call were intercepted, that "incident ... would be recorded and reported." *Hayden Address to the Nat'l Press Club*, supra note 8.

13 *DOJ White Paper*, *supra* note 7.

Found., Inc. v. Bush, 507 F.3d 1190, 1199-1200 (9th Cir. 2007) (quoting *DOJ White Paper*, *supra* note 7, at 1).

The Executive Branch has officially acknowledged (in a submission to Congress) that attorneys are not categorically excluded from these definitions of surveillance targets under the NSA Program,[14] and has argued that it has a right to target them. Philip Shenon, *Lawyers Fear Monitoring in Cases on Terrorism*, N.Y. TIMES, Apr. 28, 2008, at A14. Although Executive agencies refuse to officially confirm whether they have actually eavesdropped on lawyers, Transcript of Proceedings, *Al-Haramain Islamic Found., Inc. v. United States Dep't of the Treasury*, CV-07-1155, at 31 (D. Or. Apr. 14, 2008) ("*Al-Haramain* Transcript"), published opinions from federal courts have adverted to the possibility that attorneys were subject to surveillance. *See, e.g.*, *Al-Haramain*, 507 F.3d at 1193. In the *Al-Haramain* case, the Treasury Department inadvertently sent an attorney summaries of phone calls between her law firm's attorneys and their client, a charity in Saudi Arabia, which the plaintiffs in that case allege demonstrates that attorney-client conversations had been intercepted and recorded. Patrick Radden Keefe, *State Secrets: A Government Misstep in a Wiretapping Case*, THE NEW YORKER, Apr. 28, 2008, at 28.

Lawyers for the Guantánamo detainees fit the officially-acknowledged profile of those subject to surveillance under the TSP. The Administration announced that the program targeted people "with known links to al Qaeda and related terrorist organizations,"[15] and peti-

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[14] Assistant Attorney General William E. Moschella, *Responses to Joint Questions from House Judiciary Committee Minority Members* (Mar. 24, 2006) ("*Moschella Ltr.*"), ¶ 45, *available at* http://www.fas.org/irp/agency/doj/fisa/doj032406.pdf (last visited Mar. 30, 2010).

[15] *See Bush Radio Address*, *supra* note 3.

tioners *represent* the Guantánamo detainees whom the government describes as suspected "terrorists" and "enemy combatants." Government officials have twice informed Thomas Wilner that he is "probably the subject of government surveillance." Wilner Decl. ¶ 5, App. 98a.

The widespread acknowledgement that Guantánamo attorneys are possible targets of surveillance has caused "many prominent criminal defense lawyers [to] say [there] is a well-founded fear that all of their contacts are being monitored by the United States government." Shenon, *supra*, at A14. Instead of quelling attorneys' concerns, the Executive Branch fueled the perception that the concerns are grounded in fact. According to *The New York Times*, "The Justice Department does not deny that the government has monitored phone calls and e-mail exchanges between lawyers and their clients as part of its terrorism investigations in the United States and overseas." *Id.* The *Times* reports that "[t]wo senior Justice Department officials" admitted that "they knew of ... a handful of terrorism cases ... in which the government might have monitored lawyer-client conversations." *Id.*

The looming threat of surveillance, unsupervised by the courts and not subject to judicially-monitored minimization to protect privileged communications, has chilled the petitioners' representation of clients. The likelihood of NSA interception of petitioners' telephone calls, e-mails, and facsimile transmissions has undermined their ability to engage in candid communications necessary to obtain evidence and investigate their clients' cases. *See, e.g.*, Chandler Decl. ¶ 5, App. 92a-93a; Dixon Decl. ¶ 20, App. 107a; Gutierrez Decl. ¶¶ 24-25, App. 74a; Wilner Decl. ¶ 8, App. 99a-100a. Official announcements of the TSP have put persons outside the U.S. on notice that conversations with petitioners may be recorded by the NSA. Many such persons reasonably

fear that intercepted information could be used against their detained family members. As a result, petitioners have struggled to obtain information from witnesses who no longer speak freely, and some witnesses are no longer willing to speak with petitioners at all. *See, e.g.*, Chandler Decl. ¶ 5, App. 92a-93a; Gutierrez Decl. ¶ 24, App. 74a.

The threat of surveillance also has interfered with petitioners' representation of their non-detainee clients: individuals, governments, and entities wholly unrelated to Guantánamo. Lawyers typically rely on electronic channels to communicate with foreign clients, but, as petitioner Thomas Wilner explains, "[n]o one in good conscience can freely identify or discuss possible plans for a case while the other side may be listening in. Because of the possibility that the government is monitoring my communications, I regularly refrain from discussing in my phone calls and emails with my foreign clients key issues that should be discussed to protect their interests." Wilner Decl. ¶ 8, App. 99a-100a. Because she could not ensure that her communications were confidential, petitioner H. Candace Gorman first stopped accepting new clients and eventually took a leave of absence from her litigation practice. Gorman Decl. ¶¶ 18, 20, 22, App. 87a-89a. Petitioner Gitanjali Gutierrez explains that for almost a year she was unable to obtain information critical to her client's enemy combatant status determination because she could not assure herself or her client's family that their telephone or e-mail communications would be confidential. Gutierrez Decl. ¶ 24, App. 74a; *see also* Dixon Decl. ¶ 20, App. 107a.

B. Procedural Background

Petitioners, in letters to the NSA and DOJ dated January 18, 2006, requested pursuant to FOIA several categories of records, only the first of which is relevant

here: "records obtained or relating to ongoing or completed warrantless electronic surveillance or physical searches regarding, referencing or concerning any of the plaintiffs."[16] The agencies refused to confirm or deny whether they possessed records responsive to this request.

Petitioners consequently filed a complaint against both the NSA and the DOJ in the United States District Court for the Southern District of New York on May 17, 2007. (The basis for federal jurisdiction in the district court was 5 U.S.C. § 552(a)(4)(B).) With the agreement of the parties, the district court bifurcated the case into two separate tracks. The first track concerned the NSA and DOJ's *Glomar* response to petitioners' request for records reflecting whether they had been subject to surveillance under the TSP. (The second track, not at issue in the subsequent appeal or this petition, addressed the NSA and DOJ's assertion of FOIA exemptions in response to petitioners' other requests.) After the bifurcation of the *Glomar* and non-*Glomar* issues, the NSA and DOJ filed a Motion for Partial Summary Judgment on the *Glomar* issue, which petitioners opposed. The district court granted the Motion for Partial Summary Judgment on the *Glomar* issue on June 25, 2008. App. 33a-49a.

In its ruling, the district court began by accepting the *Glomar* framework and noting that the "[d]efendants need only proffer one legitimate basis for invoking the Glomar Response in order to succeed on their motion for summary judgment." App. 40a. Although the NSA and DOJ had argued that responsive records, if they existed, would be subject to withholding under both Exemption 1 and Exemption 3, the district court focused only on Ex-

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[16] The relevant portions of the request are reproduced in the Amended Complaint, ¶ 8, App. 61a.

emption 3. The claim was based on section 6 of the National Security Agency Act of 1959 ("NSAA"), which shields from public disclosure "any function" or "information with respect to the activities" of the National Security Agency, *see* 50 U.S.C. § 402, App. 56a, and the Act's direction that the agency "protect intelligence sources and methods from unauthorized disclosure." *See* 50 U.S.C. § 403-1(i)(1). App. 56a.

Relying on declarations submitted by the NSA and DOJ, the district court ruled that the disclosure of the records sought by petitioners might divulge NSA's intelligence-gathering capabilities and intelligence sources. Although the court acknowledged petitioners' argument that FOIA cannot be invoked to conceal illegal activity and that the TSP is unconstitutional and violates FISA, the court determined that it "need not address plaintiffs' substantive arguments concerning the TSP's legality because the language of Exemption 3 and Section 6 of the NSAA makes clear that the defendants may permissibly refuse to disclose the information requested by the plaintiffs." App. 44a. In so ruling, the district court did not mention, let alone address, petitioners' main argument that warrantless surveillance of *lawyers* raises legal questions separate and apart from the more general questions about the TSP's legality. Nor did the district court address the consequence of a ruling that gives the NSA free rein to conceal evidence of its own illegal or unconstitutional conduct.

Petitioners filed a notice of appeal on September 24, 2008 from the district court's judgment. The matter was argued on October 9, 2009. At oral argument, the Government refused to make any argument in defense of the legality of the NSA Program, stating "[w]e take no position on the merits of the [legality of the] TSP."

The court of appeals issued both its opinion and judgment affirming the judgment of the district court on

December 30, 2009. Because the Court of Appeals for the Second Circuit had never recognized the availability of the *Glomar* response prior to this ruling, the court first proceeded with an analysis of the doctrine as recognized in several other circuits, ultimately concluding along with them that "'an agency may refuse to confirm or deny the existence of records where to answer the FOIA inquiry would cause harm cognizable under a[] FOIA exception,'" but cautioning that a proper invocation of the *Glomar* doctrine must be "'tether[ed]' … to one of the nine FOIA exemptions." App. 10a-11a. The court only considered the applicability of Exemption 3, adopting the district court's analysis in full in finding that section 6 of the NSAA was a statute exempting the records at issue here from disclosure. The court of appeals further concluded that while the withholding agency nominally bears the burden to show that the invoked FOIA exemption precludes even confirming or denying the existence of records, in this case that burden is limited because section 6 broadly "exempts from disclosure *any* 'information with respect to the activities' of" the NSA. App. 24a (emphasis added). The court of appeals rejected petitioners' suggestion of *ex parte in camera* review of the responsive records or indeed of "any classified materials the agency might present in justification of its response." App. 26a.

Finally, the court of appeals found the question of whether the NSA Program was illegal to be "beyond the scope of this FOIA action" and declined to address it in any way, beyond noting that at oral argument the government stated its intention to continue to assert state secrets privilege in several pending non-FOIA cases

challenging the legality of the Program. App. 28a-29a, 28a n.8.[17]

REASONS FOR GRANTING THE PETITION

At issue in this case is whether lower courts may sanction an agency invocation of the *Glomar* doctrine to conceal patently illegal conduct. Indeed, the NSA Program's illegality is so well acknowledged that the Government refused to defend its legality in the court of appeals. That illegal conduct should be of particular concern to this Court because of its corrosive effect on legal challenges to other illegal behavior of the executive branch. Petitioners here are attorneys who have spent years vindicating the public and private interests in representation of individuals held in unlawful indefinite detention. They have done so in the face of concerted efforts by the government to interfere with that representation. This suit was brought as an attempt to remedy some of the damage the NSA Program did to that representation in the face of numerous warning signs that petitioners may have been subject to surveillance under it. Instead of resolving whether these attor-

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[17] The court of appeals opinion is incorrect to state that petitioners agreed the court "need not reach the legality" of the NSA Program "*because* that question is beyond the scope of this FOIA action" as a whole. App. 28a (emphasis added). As petitioners made clear, "the question for the Court is whether the district court erred in concluding that illegality is *irrelevant* because the FOIA exemptions invoked by the government apply *even if* the surveillance was illegal." Reply Br. of Appellants at 1. While the court of appeals need not have resolved that the NSA Program was illegal before remanding, the question of the NSA Program's illegality would not have been irrelevant to the case on remand. Of course, notwithstanding the government's refusal to take a position on its legality below, the NSA Program was patently illegal and unconstitutional for the reasons noted above.

neys have been subject to such surveillance, the government claims that it is free to keep them guessing. The court of appeals agreed.

In so ruling, the Second Circuit relied for the first time on the *Glomar* doctrine—a narrow, judicially-created exception to FOIA's general mandate in favor of disclosure. *See Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976). Several other circuits have accepted *Glomar* claims permitting agencies to refuse to confirm or deny the existence of records. But they have done so when, and only when, three conditions have been met: (1) the records relate to a *secret* program the existence of which is properly classified pursuant to an Executive Order, or to the NSA's intelligence-gathering activities or intelligence sources or methods; (2) FOIA's national security exemptions are found to apply to the withheld records—assuming that they exist—so the court is assured that application of *Glomar* will not authorize the withholding of non-exempt records; and (3) the government is not invoking *Glomar* to conceal activities that violate the Constitution or are otherwise illegal. The Second Circuit's acceptance of the agencies' *Glomar* claim in this case exceeded these limits recognized by the other circuits.

Extensive detail about the NSA Program has been officially acknowledged by the President of the United States, the Attorney General, and the National Security Advisor. Senior Executive Branch officials have confirmed not only the program's existence, but also details about the program's operations, including the criteria used to target individuals for surveillance. *See* Statement, *supra*, at 5-7; *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1198 (9th Cir. 2007) ("government officials have made voluntary disclosure after voluntary disclosure about the TSP"). Requiring the NSA and DOJ to disclose whether the petitioners have been targeted

cannot jeopardize this publicly-acknowledged and since-terminated program.

If records of surveillance of the petitioners exist, neither of the FOIA exemptions claimed will justify their concealment, as Exemptions 1 and 3 may not be invoked to hide illegal conduct. *See* Exec. Order No. 13,292 § 1.7(a)(1), 68 Fed. Reg. 15318 (Mar. 28, 2003) ("In no case shall information be classified in order to … conceal violations of law…"); *Founding Church of Scientology v. NSA*, 610 F.2d 824, 830 n.49 (D.C. Cir. 1979); *Hayden v. NSA/Cent. Sec. Serv.*, 608 F.2d 1381, 1389 (D.C. Cir. 1979). Courts have not approved the invocation of FOIA Exemption 3 to conceal illegal or unconstitutional activities. *Terkel v. At&T*, 441 F. Supp. 2d 899, 905 (N.D. Ill. 2006); *ACLU v. DoD*, 389 F. Supp. 2d 547, 564-65 (S.D.N.Y. 2005); *cf. People for the American Way Found. v. NSA*, 462 F. Supp. 2d 21, 30-31, 33 (D.D.C. 2006); *Navasky v. CIA*, 499 F. Supp. 269, 272-74 (S.D.N.Y. 1980). Exemption 3, relied upon by the court of appeals below, shields documents "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3). "[W]here [an NSA] function or activity is authorized by statute *and not otherwise unlawful*, NSA materials integrally related to that function or activity fall within ... Exemption 3." *Hayden*, 608 F.2d at 1389 (emphasis added). However, "NSA would have no protectable interest in suppressing information [under Exemption 3] simply because its release might uncloak an illegal operation...." *Founding Church of Scientology*, 610 F.2d at 830 n.49. The court of appeals' ruling that the NSA may withhold records *even if* they reveal illegal conduct cannot be reconciled with precedent or harmonized with FISA.[18]

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[18] The court of appeals erred in holding that the illegality of the NSA Program was irrelevant to the question of whether Section 6 of the NSA Act would have allowed application of the *Glomar* doctrine recognized by other circuits to the records sought here. App. 24a,

The court of appeals failed to engage with petitioners' main argument—that the *Glomar* doctrine recognized by other circuits may not be invoked to conceal illegal and unconstitutional conduct. If the NSA targeted the Guantánamo lawyers for warrantless surveillance as potential "sources" of intelligence, the constitutional intrusions would be so grave and pervasive that they would be difficult even to catalogue. Such warrantless eavesdropping would not only violate the FISA statute and the Fourth Amendment, but it would also infringe on petitioners' First and Fifth Amendment rights, as well as

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27a-28a. Properly read, Section 6 directs non-disclosure only of information relating to those "functions" and "activities" of the agency that are *authorized* by the Act. An agency has no authority to act outside of the scope of the powers delegated to it by Congress. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125-26 (2000) (explaining that an agency may not exercise its authority "in a manner that is inconsistent with the administrative structure that Congress enacted into law.") (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)). The same is true with respect to the NSA's duty to protect "intelligence sources and methods." Properly read, that provision safeguards "intelligence sources and methods" obtained in a manner consistent with the Constitution and laws of the United States.

The court of appeals appears to have reasoned that FOIA plaintiffs must show that an agency asserting a *Glomar* response "was acting *for the purpose of* concealing illegal or unconstitutional actions" before considering the illegality of the underlying action as a factor in rejecting the *Glomar* defense. App. 24a-25a (emphasis added). That holding would effectively rewrite the statute to read "intelligence sources and methods, *even if the intelligence was obtained by means that are unauthorized, illegal or unconstitutional*." That reading cannot be sustained. Although this Court in *CIA v. Sims*, 471 U.S. 159 (1985) read the term "intelligence sources and methods" broadly, it nowhere suggested that Congress authorized (or could authorize) the NSA to dispense with the requirements of applicable law in gathering intelligence from "sources" or "methods."

the detainees' due process rights and privilege of habeas corpus.

FISA regulates all electronic surveillance conducted for foreign intelligence purposes and sets out "the *exclusive* means by which electronic surveillance ... and the interception of domestic wire, oral, and electronic communications may be conducted." 18 U.S.C. § 2511(2)(f) (emphasis added). As the NSA recognized, the FISA Court would never have authorized blanket wiretapping of attorneys engaged in litigation against the federal government such as petitioners here—for a multitude of reasons. *See* Statement, *supra*, at 5-6. FISA would prevent the NSA from targeting petitioners' communications unless the NSA procured a warrant under judicial supervision and followed minimization procedures to protect attorney-client privilege.[19] At the threshold, the

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[19] The FISA statute mandates that minimization measures be implemented in every FISC order. *See* 50 U.S.C. § 1801(h) (defining required "minimization" procedures); § 1804(a)(5) (application must set forth "proposed minimization procedures"); § 1805(a)(4) (minimization procedures in any FISA order must meet requirements of § 1801(h)); *see also id.* § 1806(a) ("[n]o otherwise privileged communication obtained in accordance with, or in violation of, the provisions of this subchapter shall lose its privileged character"); 18 U.S.C. § 2518(5) (equivalent for Title III). These statutory minimization provisions were created by Congress to implement the *constitutional* particularity requirement for wiretapping warrants. *See Berger v. United States*, 388 U.S. 41, 55-60 (1967) (setting forth constitutional concerns underlying modern minimization requirement); *United States v. Daly,* 535 F.2d 434, 440 (8th Cir. 1976) (Title III minimization provision "was passed by Congress in order to comply with the constitutional mandate … that wiretapping must be conducted with particularity."); *see also United States v. Scott*, 436 U.S. 128, 135-39 (1978) (conflating Fourth Amendment and statutory standards for minimization). Minimization requirements include a duty to institute procedures to protect the confidentiality of privileged communications. *See, e.g.*, *United States v. Rizzo*, 491 F.2d 215, 217 (2d Cir. 1974) (minimization requirement met where

NSA would have failed to meet the probable cause, minimization, and procedural hurdles the statute imposes. *See id.* § 1805(a)(1)-(5). Under FISA, the Executive may not target a "United States person" unless he or she is a "foreign power" or an "agent of a foreign power." § 1804(a)(3)(A). However, "[n]o United States person may be considered a foreign power or an agent of a foreign power *solely upon* the basis of activities protected by the first amendment to the Constitution of the United States." 50 U.S.C. § 1805(a)(2)(A) (emphasis added). Any FISA application directed against these attorney-petitioners based on their associations with clients and witnesses—which are acceptable criteria for targeting under the TSP—would have collided with this injunction, which Congress included expressly to prevent a repeat of the intelligence agencies' history of targeting American citizens for their political activities. 50 U.S.C. § 1805(a)(2)(A). Association for the purposes of advocacy on behalf of "unpopular persons" is "core" First Amendment activity. *See, e.g.*, *In re Primus*, 436 U.S. 412, 427-28, 432-33 (1978); *NAACP v. Button*, 371 U.S. 417, 430-31 (1963); *NAACP v. Alabama, ex rel. Patter-*

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officers instructed not to monitor, record or spot-check privileged conversations, and where "none of the approximately 50 privileged conversations were either monitored, recorded or spot-checked"); *United States v. Bynum*, 485 F.2d 490, 501 (2d Cir. 1973) (minimization met where "monitoring agents were specifically instructed not to intercept privileged conversations" and "no serious argument is made here that privileged calls were intercepted"), *vacated on other grounds*, 417 U.S. 903 (1974); *United States v. DePalma*, 461 F. Supp. 800, 818-19 (S.D.N.Y. 1978) (procedures in place to minimize interception of privileged calls, including daily review of surveillance logs by supervisory agents and review once every five days by judges). By definition, any surveillance compliant with any valid orders lawfully issued by the FISA court must be implemented with *judicially-supervised* minimization in place.

son, 357 U.S. 449, 460 (1958). Moreover, the government scrutinized petitioners' individual backgrounds and found they posed no security risk in the course of investigating them for the security clearances required to litigate Guantánamo cases, which further undermines any suggestion that the lawyers themselves could be legitimate targets for surveillance. *See* Statement, *supra*, at 8-9 (citing petitioners' declarations).

Warrantless eavesdropping on the Guantánamo lawyers would also constitute an affront to the judiciary. Targeting counsel for surveillance—indeed, the mere threat of targeting them—chills their communications, significantly impeding the gathering of evidence and presentation of arguments to courts. Interference with lawyers' representation undermines the adversarial process, subverts fundamental notions of separation of powers, and cripples the ability of the judiciary to fulfill its constitutional mandate. *See Legal Services Corp. v. Velazquez*, 531 U.S. 533, 545 (2001) (citing *Marbury v. Madison*, 5 U.S. (1 Cr.) 137, 177 (1803)). *Glomar* may not be invoked as a shield to conceal records demonstrating illegality of the sort that threatens to undermine the judicial function within our constitutional structure.

The court of appeals failed to recognize that *Glomar*, a judicially-created exemption to FOIA, must—if it is recognized at all—be narrowly construed and sparingly applied, lest it become a catch-all "Tenth Exemption" for intelligence records. In this case, the court of appeals applied *Glomar* in a manner inconsistent with the doctrine as recognized in the other circuits and at odds with Congress' pro-disclosure mandate as expressed in FOIA.

Congress enacted FOIA in order to shine light on the actions of federal agencies—to enable citizens, as this Court has stated, to know what their government is "up to." *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) (citation omit-

ted). A key role of FOIA is to empower citizens to unearth illegal conduct exactly like that which may have occurred here. *See ACLU v. DoD*, 543 F.3d 59, 66 (2d Cir. 2008) (citing *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)). FOIA "accords" "special importance" "to information revealing government misconduct.... 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." *ACLU v. DoD*, 543 F.3d at 87 (internal citation omitted); *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976)) (FOIA was designed "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny."). In ruling that the legality of the NSA's conduct was irrelevant to FOIA analysis, the lower courts impermissibly shortchanged FOIA's goal of rendering the political branches accountable to the electorate.

* * *

For these reasons, petitioners seek to have the judgment below reversed and this case remanded for further proceedings as to the validity of the underlying exemption claims. The further proceedings petitioners envisage would not pose any harm to the national security. Given the fact that the government has already claimed the right to eavesdrop on lawyers *and* that it has the technical capacity to do so, disclosure of the fact that these lawyers were subject to surveillance could not possibly harm the NSA's intelligence-gathering function. To be sure, there may be *records* responsive to petitioners' request that contain sensitive information. But rejecting a *Glomar* defense simply sets the stage for normal FOIA litigation to proceed. On remand, the agencies would have to set forth their exemption claims and submit declarations to the district court (*in camera*, if necessary) establishing that the records are properly withheld. *See*

5 U.S.C. § 552(a)(4)(B); *see also Patterson v. FBI*, 893 F.2d 595, 599 (3d Cir. 1990) (concluding *sua sponte* that *in camera* inspection of certain documents was necessary to ascertain whether the FBI conducted its investigation in good faith, complied with all relevant government regulations, and engaged in illegal conduct). The agencies will claim, as they have throughout, that the records are exempt under Exemption 1 and Exemption 3. The district court will then consider the merits of those claims. Of course, it is doubtful that the agencies could sustain either of their exemption claims for all of the withheld records, given that warrantless surveillance of these attorney petitioners would be illegal, and thus, while records relating to NSA's surveillance capabilities and other targeting decisions might be properly withheld under Exemption 1 or Exemption 3, records relating to whether petitioners were targeted may not.

The narrowness of the question before the Court bears particular emphasis. As discussed above, the government has publicly disclosed the existence of, and many of the details of, its warrantless surveillance program. The *only* additional information sought by petitioners is whether the government has illegally intercepted *their* communications. Admitting or denying this would not reveal the identities of parties to the communications other than their own. Nor would it reveal sources or methods. Nothing in the *Glomar* doctrine recognized by the other circuits, or the policies behind it, authorizes the government to conceal that information.

* * *

Meaningful judicial review is especially important here, where the claim is that one of our nation's intelligence agencies has exceeded its authority and engaged in illegal domestic surveillance. Congress has recognized that the NSA and CIA have a history of abuses when not checked by judicial oversight. FISA was enacted in re-

sponse to such excesses, and to put an end, once and for all, to unauthorized surveillance by the NSA and CIA. The decision of the court of appeals runs directly counter to Congress' judgment on that score.

To summarize a complicated history, in 1976 Congress released the Church Committee Report detailing "a massive record of intelligence abuses" by the NSA and other intelligence agencies. *In re NSA Telecommunications Litig.*, 564 F. Supp. 2d at 1115-17 (citing S. Select Comm. to Study Governmental Operations with Respect to Intelligence Activities ("Church Comm. Rep."), Book II: Intelligence Committees and the Rights of Americans, S. Rep. No. 94- 755 ("Book II"), at 290). The Report revealed that, using "intrusive techniques—ranging from simple theft to sophisticated electronic surveillance—the Government ha[d] collected, and then used improperly, huge amounts of information about the private lives, political beliefs and associations of numerous Americans." *Id.* The NSA and other agencies had spied on Americans in the name of national security with no judicial oversight. Book II at 21; *see also The National Security Agency and Fourth Amendment Rights*: Hearing on S. Res. 21 Before the Select Comm. to Study Governmental Operations with Respect to Intelligence Agencies, 94th Cong. (1975).

Two examples of NSA operations that went too far should suffice. Under "Operation Shamrock," "the largest governmental interception program affecting Americans" in the Cold War, the NSA intercepted *all* international telegrams sent to or from the United States. Church Comm. Book III: Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans, at 740. Later on, in the 1960s and 70s, the NSA intercepted communications of individuals and groups put on "watch lists" for "involve[ment] in antiwar and civil rights activities." *Id.* at 739. The agency was not

just undeterred by its wholesale violation of the targets' First Amendment rights; on the contrary, the exercise of such rights were cited as a justification for surveillance. James Bamford, *The Puzzle Palace: Inside the National Security Agency, America's Most Secret Intelligence Organization* 322 (1983).

To guard against the abuses identified by the Church Committee, Congress intervened and enacted the Foreign Intelligence Surveillance Act in 1978. *See* 95th Cong., Pub L. 95-511, 92 Stat. 1783 (1978). Congress intended FISA to put a stop to "the practice by which the Executive Branch may conduct warrantless electronic surveillance on its own unilateral determination that national security justifies it." S. Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, S. Rep. No. 95-604 (I) (1976), at 7-8, *reprinted at* 1978 U.S.C.C.A.N. 3904, 3910; *see id* at 3908 ("This legislation is in large measure a response to the "revelations that warrantless electronic surveillance in the name of national security has been seriously abused"). Congress aimed to counter the "formidable" chilling effect that warrantless surveillance created for Americans' perceptions of themselves as potential targets of surveillance, and to encourage the American people to engage freely in First Amendment pursuits of "public activity" and "dissent from official policy." *Id.* This goal was made operational by Congress's determination that the FISA procedures, along with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, would be "*the exclusive* means by which electronic surveillance" may be conducted. 50 U.S.C. § 1812; 18 U.S.C. § 2511(2)(f); *see* 18 U.S.C. § 2510 *et seq*.[20] By announcing that petitioners

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[20] Congress recognized that the TSP flouted the requirements of FISA and acted to prevent future circumvention. In the Foreign Intelligence Surveillance Act Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (2008), Congress reaffirmed, in no uncertain

fit the definition of those targeted under the NSA's warrantless surveillance program, stating that the Executive believes it has the right to target attorneys, and refusing to confirm or deny whether in fact these lawyers have been targeted, the NSA contravenes FISA's purpose and perpetuates the very fear that Congress hoped to end.[21]

Petitioners have good reason to fear the same constitutional violations have occurred once again. FOIA was designed to open government abuse to the light of day, and while other circuits have applied *Glomar* to permit the shielding of programs that are both secret and legitimate, there is no basis for refusing to admit or deny whether these lawyers have been caught in the NSA's publicly-acknowledged and patently illegal net of warrantless surveillance.

Threatening to engage in warrantless surveillance is of a piece with the Executive Branch's pattern of systematic interference with the Guantánamo detainees' constitutionally-based right of access to counsel. After

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terms, that FISA is the exclusive means for all electronic foreign intelligence surveillance activities. 2008 FISA Amendments §102(a). Notably, the 2008 FISA Amendments did not retroactively authorize the warrantless surveillance conducted under the TSP, and thus the amendments provide no defense to the NSA or DOJ in this case.

[21] President Truman created the NSA by secret directive in 1952 to engage in electronic surveillance during the Cold War. Church Committee Book III, at 736. Throughout most of the Cold War, the NSA operated without any statutory control; until 1992, it had no legislative charter, and, until 1981, no publicly available Executive Order defined its responsibilities or limited its power. Intelligence Authorization Act for Fiscal Year 1993, Pub. L. 102-496, 106 Stat. 3180, 3186 (1992); Exec. Order No. 12,333, 46 Fed. Reg. 59,941, 59,947 § 1.12(b) (Dec. 4, 1981), *reprinted at* 50 U.S.C. § 401 *note*. The NSA could therefore engage in vast, sweeping, indiscriminate surveillance beyond that authorized for the regulated intelligence agencies. Book III, at 735.

this Court's decision in *Rasul v. Bush*, 542 U.S. 466 (2004), the Executive Branch proposed procedures sharply limiting detainees' access to counsel. Ultimately, the courts rejected the Executive's most aggressive positions, including the assertion that it could conduct warrantless audio and video monitoring of in-person meetings between habeas counsel and detainees. *See Al Odah v. United States*, 346 F. Supp. 2d 1, 8-9 (D.D.C. 2004); *see also Adem v. Bush*, 425 F. Supp. 2d 7, 11-12 (D.D.C. 2006) (mem. op.) ("The Government took the position that detainees' access to counsel existed solely at the pleasure of the Government, with restrictions to be imposed as it saw fit.") (citing *Al Odah*, 346 F. Supp. 2d at 3). Formal Executive efforts to limit detainees' access to counsel and courts were also supplemented by less visible, less formal means of undermining the availability and effectiveness of counsel.[22] As petitioners' legal ethics expert in the courts below, Professor David Luban, recounts, agency officials told lawyers that their clients did not wish to see them, while telling the clients that the lawyers were agency interrogators; agency officials punished detainees who sought access to counsel by leaving them in isolation for days on end, without bathroom facilities; agency investigators posed as attorneys; and agency officials told detainees that their lawyers were homosexual or Jewish (when neither was the case). *See* David Luban, *Lawfare and Legal Ethics in*

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[22] This approach even extended to a Defense Department effort to persuade corporate clients to boycott the law firms representing detainees. *See* Interview by Jane Norris with Charles Stimson, Deputy Assistant Secretary of Defense for Detainee Affairs, in Washington, D.C. (Jan. 11, 2007), *audio available at* http://www.federalnewsradio.com/index.php?sid=1029698&nid=250 (last visited Mar. 30, 2010), *transcript of relevant portions available at* http://www.democracynow.org/2007/1/17/top_pentagon_official_calls_for_boycott.

Guantánamo, 60 Stan. L. Rev 1981 (2008). Threatening lawyers with warrantless surveillance appears to be part and parcel of these efforts.

Preserving meaningful access to the courts for the detainees depends on the confidentiality of their lawyers' communications in the course of investigating and analyzing their cases. *See Bounds v. Smith*, 430 U.S. 817, 822 (1977); *Hicks v. Bush*, 452 F. Supp. 2d 88, 99-100 (D.D.C. 2006). Allowing such executive limitations on the scope and effectiveness of the writ to go unremedied would raise "troubling separation-of-powers concerns," *Boumediene v. Bush*, 128 S. Ct. 2229, 2258 (2008), and undermine the right to judicial review in habeas that this Court found constitutionally mandated in *Boumediene*.

In the instant litigation, the executive has prevented judicial oversight of a program that, when applied to lawyers, would be illegal, unconstitutional, and corrosive of our adversary system of justice. This Court should not allow the government to hide behind *Glomar* to, yet again, prevent judicial review of a surveillance program the legality of which the government refuses to defend on the merits.

CONCLUSION

For the reasons set forth above, the Court should grant petitioners' petition for a writ of certiorari.

Dated: March 30, 2010

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 08-4726-cv

THOMAS WILNER, GITANJALI GUTIERREZ, MICHAEL J. STERNHELL, JONATHAN WELLS DIXON, JOSHUA COLANGELO BRYAN, BRIAN J. NEFF, JOSEPH MARGULIES, SCOTT S. BARKER, JAMES E. DORSEY, ASMAH TAREEN, RICHARD A. GRIGG, THOMAS R. JOHNSON, GEORGE BRENT MICKUM IV, STEPHEN M. TRUITT, JONATHAN HAFETZ, TINA M. FOSTER, ALISON SCLATER, MARC D. FALKOFF, DAVID H. REMES, H. CANDACE GORMAN, CHARLES CARPENTER, JOHN A. CHANDLER and CLIVE STAFFORD SMITH,
PLAINTIFFS-APPELLANTS,

v.

NATIONAL SECURITY AGENCY and DEPARTMENT OF JUSTICE,
DEFENDANTS-APPELLEES.[*]

August Term, 2009

[*] The Clerk of Court is directed to amend the official caption in this case to conform to the listing of the parties above.

(Argued October 9, 2009 Decided: December 30, 2009)

KATHRYN A. SABBETH, Georgetown University Law Center Institute for Public Representation (David C. Vladeck, Georgetown University Law Center, on the brief; James R. Rubin, Karen Borg, Mark A. Schwartz, Butler Rubin Saltarelli & Boyd LLP; Shayana Kadidal, Emilou MacLean, Center for Constitutional Rights, of counsel) for Plaintiffs-Appellants Thomas Wilner et al.

THOMAS M. BONDY, Department of Justice, Civil Division, Appellate Staff (Michael F. Hertz, Acting Assistant Attorney General, Lev L. Dassin, United States Attorney, of counsel, Douglas N. Letter, Department of Justice, Civil Division, Appellate Staff, on the brief) for Defendants-Appellees National Security Agency and Department of Justice.

Mark H. Lynch, Jennifer L. Saulino, Covington & Burling LLP, Washington, D.C., Meredith Fuchs, National Security Archive, Washington D.C., for Amicus Curiae National Security Archive.

Before: CABRANES and LIVINGSTON, Circuit Judges, and KORMAN, District Judge. **

** The Honorable Edward R. Korman, of the United States District Court for the Eastern District of New York, sitting by designation.

[*64] JOSE A. CABRANES, *Circuit Judge*.

Plaintiffs-appellants Thomas Wilner, et al., attorneys representing individuals detained by the United States government at Guantanamo Bay, Cuba, appeal from a July 31, 2008 judgment of the United States District

Court for the Southern District of New York (Denise Cote, *Judge*) entered after a June 25, 2008 opinion and order granting the motion for summary judgment of defendants-appellees the National Security Agency ("NSA") and the Department of Justice ("DOJ") in plaintiffs' Freedom of Information Act ("FOIA") case. Plaintiffs submitted FOIA requests to the NSA and DOJ seeking records showing whether the government has intercepted plaintiffs' communications relating to the representation of their detainee clients. The NSA and DOJ served and filed so-called *Glomar* responses—neither confirming nor denying the existence of such records—pursuant to FOIA Exemptions 1 and 3; the FBI also filed a similar response pursuant to FOIA Exemption 1.[1] Whether, as a general matter, agencies may invoke the *Glomar* doctrine and whether, in particular, the NSA may invoke the *Glomar* doctrine in response to a FOIA request for records obtained under the Terrorist Surveillance Program ("TSP" or "program") are both questions of first impression for our Court.

We affirm the judgment of the District Court upholding the NSA's *Glomar* response and hold that (1) agencies may [*65] invoke the *Glomar* doctrine when responding to FOIA requests, and thus may refuse to con-

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[1] Exemption 1 permits the nondisclosure of records relating to matters 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." 5 U.S.C. § 552(b)(1). Exemption 3, at the time this suit was filed, permitted nondisclosure of records relating to matters that are "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." *Id.* § 552(b)(3), *amended by* Pub. L. No. 111-83, § 564(b), 123 Stat. 2142, 2184 (Oct. 28, 2009).

firm or deny the existence of the requested records to prevent cognizable harm under a FOIA exemption; (2) *Glomar* responses are available, when appropriate, to agencies when responding to FOIA requests for information obtained under a "publicly acknowledged" intelligence program, such as the TSP, at least when the existence of such information has not already been publicly disclosed; (3) the NSA properly issued a *Glomar* response to plaintiffs' request for information pursuant to FOIA Exemption 3 (specifically, pursuant to section 6 of the National Security Agency Act of 1959); (4) the government's affidavits sufficiently support its invocation of the *Glomar* doctrine in this case and we therefore decline to review ourselves or require the District Court to review *ex parte* and *in camera* any classified affidavits the NSA might proffer in further support of its *Glomar* response; and (5) we find no evidence in this record that the NSA invoked *Glomar* for the purpose of concealing illegal or unconstitutional activities. We agree with counsel for all parties that we need not determine the legality of the TSP because that question is beyond the scope of this FOIA action.

BACKGROUND

Plaintiffs[2] are law professors and attorneys at "prominent law firms" and "established nonprofit organizations," who represent individuals detained by the United States government at Guantanamo Bay, Cuba, for suspected terrorist activity. Appellants' Br. 5. Plain-

[2] The parties submitted a stipulation dated October 13, 2009, withdrawing claims of appellant Anne Castle without costs and without attorneys' fees pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure, as a result of her appointment to the position of Assistant Secretary of the Interior for Water and Science. The claims of the other remaining appellants are unaffected by the stipulation.

tiffs note that they began representing detainees after undergoing security clearance. Defendants are the NSA and the DOJ. The NSA is an agency within the Department of Homeland Security that is charged with, among other tasks, collecting, processing, and disseminating signals intelligence ("SIGINT") information for national foreign intelligence purposes. NSA's SIGINT work includes intercepting communications necessary to national defense, national security, and the conduct of the foreign affairs of the United States. The DOJ is the cabinet department charged with law enforcement relevant to this case.

In the aftermath of the September 11, 2001 attacks on the United States by al Qaeda, President George W. Bush secretly authorized the TSP, which empowered the NSA "to intercept the international communications of people with known links to Al Qaeda and related terrorist organizations." George W. Bush, President's Radio Address (Dec. 17, 2005), excerpted in *Bush on the Patriot Act and Eavesdropping*, N.Y. Times, Dec. 18, 2005, at 43 (full transcript available at http://www.nytimes.com/2005/12/17/politics/17text-bush.html (last visited Oct. 28, 2009)) ("President Bush's Address"). President Bush described the TSP as "a highly classified program that is crucial to our national security. Its purpose is to detect and prevent terrorist attacks against the United States, our friends and allies." *Id.* It is not disputed that TSP surveillance was conducted without warrants and without oversight by the Foreign Intelligence Surveillance Court ("FISC"). The FISC is a United States court that was established by the Foreign Intelligence Surveillance Act of 1978 ("FISA") and has "jurisdiction to hear applications for and grant orders [*66] approving electronic surveillance anywhere within the United States under the procedures set forth" in the FISA, 50 U.S.C. § 1803 (a)(1),

and "to hear applications for and grant orders approving a physical search for the purpose of obtaining foreign intelligence information anywhere within the United States under the procedures set forth" in the FISA. 50 U.S.C. § 1822 (c).

The TSP served as an "early warning" system intended to detect and prevent further terrorist attacks by intercepting communications between known and potential terrorists and their affiliates. To intercept a communication under the TSP, one of the parties to the communication had to be located outside of the United States, and there had to be a reasonable basis to conclude that one party to the communication was a member of al Qaeda, affiliated with al Qaeda, or a member of an affiliated organization. The NSA conducted TSP surveillance in secret until, following news reports revealing the program, President Bush publicly acknowledged the existence of the TSP in a radio address on December 17, 2005. On January 17, 2007, Attorney General Alberto Gonzales announced that TSP electronic surveillance would henceforth be subject to the approval of the FISC and that the President's original authorization of the TSP had lapsed. The TSP itself has ceased to exist and, as counsel for the government noted at oral argument, to the extent that any similar electronic surveillance is taking place, that activity "shifted under the rubric of the FISA court." Tr. 12-13.

By separate letters to the NSA and the DOJ dated January 18, 2006, plaintiffs requested, pursuant to FOIA, seven categories of records.[3] Only the first of

[3] As the District Court summarized:

> FOIA was enacted in 1966 "to improve public access to information held by government agencies." *Pierce & Stevens Chem. Corp. v. U.S. Consumer Prod. Safety Comm'n*, 585 F.2d

plaintiffs' FOIA requests ("Request No. 1") is at issue on this appeal.[4] Request No. 1 sought "records obtained or relating to ongoing or completed warrantless electronic surveillance or physical searches regarding, referencing or concerning any of the plaintiffs."

In response to plaintiffs' Request No. 1, the NSA invoked the *Glomar* doctrine—meaning [*67] that it refused to confirm or deny whether the agency possessed records responsive to the request. This lawsuit followed. Plaintiffs' complaint alleged that they "have a statutory

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1382, 1384 (2d Cir. 1972). It "expresses a public policy in favor of disclosure so that the public might see what activities federal agencies are engaged in." *A. Michael's Piano, Inc. v. F.T.C.*, 18 F.3d 138, 143 (2d Cir. 1994). FOIA requires a federal agency to disclose records in its possession unless they fall under one of nine enumerated and exclusive exemptions. 5 U.S.C. § 552(a)(3)-(b); *see also Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976). The statutory exemptions "do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Dep't of the Interior and Bur. of Indian Affairs v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (citation omitted). The exemptions are thus to be "given a narrow compass." *Id.* (citation omitted); *see also Nat'l Council of LA Raza v. Dep't of Justice*, 411 F.3d 350, 356 (2d Cir. 2005).

Wilner v. Nat'l Sec. Agency, No. 07 Civ. 3883, 2008 U.S. Dist. LEXIS 48750, 2008 WL 2567765, at *2 (S.D.N.Y. June 25, 2008).

[4] The NSA responded to plaintiffs' other requests by claiming that the records that plaintiffs sought were exempt under FOIA. Plaintiffs challenged both the NSA's refusal to disclose those records under FOIA as well as its *Glomar* response to Request No. 1. Upon plaintiffs' motion, the District Court bifurcated the two claims and temporarily suspended its consideration of plaintiffs' *non-Glomar* challenges. The District Court then granted certification under Rule 54(b) of the Federal Rules of Civil Procedure on plaintiffs' *Glomar* challenge so that plaintiffs could pursue this appeal. *Wilner v. Nat'l Sec. Agency*, No. 07 Civ. 3883, 2008 U.S. Dist. LEXIS 58095, 2008 WL 2949325 (S.D.N.Y. July 31, 2008).

right to the records that they seek, and there is no legal basis for the defendants' refusal to disclose them," and sought principally a declaration that defendants' refusal to disclose the requested records was unlawful and an order compelling defendants to produce the records without further delay. J.A. 8 (Second Am. Compl. for Declaratory and Injunctive Relief). The NSA and DOJ filed a Motion for Partial Summary Judgment on the *Glomar* issue.

In an opinion and order of June 25, 2008, the District Court granted defendants' motion for partial summary judgment, holding that (1) the NSA was permitted to provide a *Glomar* response to plaintiffs' FOIA requests for information potentially acquired through electronic surveillance because the requested records, if they exist, are protected under FOIA Exemption 3 (specifically, pursuant to section 6 of the National Security Agency Act of 1959[5]); (2) revealing whether or not the requested documents exist would not only violate particular statutes, but would also undermine national security; (3) the NSA did not provide a *Glomar* response for the purpose of concealing illegality; and (4) any challenge to the legality of the underlying TSP was beyond the scope of plaintiff's FOIA suit.

DISCUSSION

The issues on appeal are whether, in a FOIA action, a court may uphold an agency's invocation of the *Glomar* doctrine where the Executive Branch has officially acknowledged the existence and contours of a program

[5] Section 6 states that no "law . . . shall be construed to require the disclosure . . . of any information with respect to the activities" of the NSA. National Security Agency Act of 1959, Pub. L. No. 86-36, § 6, 73 Stat. 63, 64 (codified at 50 U.S.C. § 402 note).

concerning which records are sought and where the agency claims the specific documents requested fall under, or would fall under, identified FOIA exemptions. Accordingly, we consider first whether to adopt the *Glomar* doctrine in our Circuit and second, if it is in fact available, whether the *Glomar* doctrine was properly invoked in this case.

I. The *Glomar* Doctrine

As the District Court noted in its opinion, "[t]he Second Circuit has never opined on the *Glomar* Response." *Wilner*, 2008 U.S. Dist. LEXIS 48750, 2008 WL 2567765, at *2 n.2. We take this opportunity now to address the availability of the *Glomar* doctrine to an agency when it responds to a FOIA request.

The *Glomar* doctrine originated in a FOIA case concerning records pertaining to the Hughes Glomar Explorer, an oceanic research vessel. *See Phillippi v. CIA*, 546 F.2d 1009, 178 U.S. App. D.C. 243 (D.C. Cir. 1976). In *Phillippi*, the Central Intelligence Agency ("CIA") claimed that the "existence or nonexistence of the requested records was itself a classified fact exempt from disclosure under . . . FOIA." *Id.* at 1012. The CIA then responded to the plaintiff's FOIA request by asserting that, "in the interest of national security, involvement by the U.S. government in the activities which are the subject matter of [plaintiff's] request can neither be confirmed nor denied." *Id.* This principle—that an agency may, pursuant to FOIA's statutory exemptions, refuse to confirm or deny the existence of certain records in response to a FOIA request—has since become known as the *Glomar* doctrine. *See, e.g., Hunt v. CIA*, 981 F.2d 1116, 1117-18 (9th Cir. 1992). The government urges us to adopt the *Glomar* doctrine as Circuit law, and plaintiffs do not object to our doing so. Mindful [*68] that mere stipulation by the parties, standing alone, cannot

serve as the basis for our conclusions of law, we turn to that question.

The *Glomar* doctrine and government use of the *Glomar* response is firmly established in other Circuits. *See, e.g., Larson v. Dep't of State*, 565 F.3d 857, 861-62, 870, 385 U.S. App. D.C. 394 (D.C. Cir. 2009) (upholding the NSA's use of the *Glomar* response to plaintiffs' FOIA requests regarding past violence in Guatemala pursuant to FOIA Exemptions 1 and 3); *Bassiouni v. CIA*, 392 F.3d 244, 246 (7th Cir. 2004) (noting that the *Glomar* doctrine is well established); *Minier v. CIA*, 88 F.3d 796, 800-02 (9th Cir. 1996) (permitting the CIA to invoke the *Glomar* doctrine in response to a FOIA request seeking employment records of an alleged CIA operative); *cf. Carpenter v. U.S. Dep't of Justice*, 470 F.3d 434, 436-37 (1st Cir. 2006) (endorsing the *Glomar* doctrine though evaluating the case as an ordinary FOIA suit after assuming the existence of documents that plaintiff requested under FOIA). The *Glomar* doctrine is well settled as a proper response to a FOIA request because it is the only way in which an agency may assert that a particular FOIA statutory exemption covers the "existence or nonexistence of the requested records" in a case in which a plaintiff seeks such records. *Phillippi*, 546 F.2d at 1012; *see also Larson*, 565 F.3d at 861 ("[FOIA's] exemptions cover not only the content of the protected government records but also the fact of their existence or nonexistence, if that fact itself properly falls within the exemption.")

We now join our sister Circuits in holding that "an agency may refuse to confirm or deny the existence of records where to answer the FOIA inquiry would cause harm cognizable under a [] FOIA exception." *Gardels v. CIA*, 689 F.2d 1100, 1103, 223 U.S. App. D.C. 88 (D.C. Cir. 1982). To properly employ the *Glomar* response to a

FOIA request, an agency must "tether" its refusal to respond, *Wilner*, 2008 U.S. Dist. LEXIS 48750, 2008 WL 2567765, at *3, to one of the nine FOIA exemptions—in other words, "a government agency may . . . refuse to confirm or deny the existence of certain records . . . if the FOIA exemption would itself preclude the *acknowledgment* of such documents." *Minier*, 88 F.3d at 800 (emphasis added).

An agency "resisting disclosure" of the requested records "has the burden of proving the applicability of an exemption." *Id.* "The agency may meet its burden by submitting a detailed affidavit showing that the information logically falls within the claimed exemptions." *Id.* (internal quotation marks and citation omitted). As the *Phillippi* Court explained, a responsive affidavit should "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." *Phillippi*, 546 F.2d at 1013.

In evaluating an agency's *Glomar* response, a court must accord "substantial weight" to the agency's affidavits, "provided [that] the justifications for nondisclosure are not controverted by contrary evidence in the record or by evidence of . . . bad faith." *Minier*, 88 F.3d at 800 (internal quotation marks omitted). The court should "attempt to create as complete a public record as is possible. . . . The [a]gency's arguments should then be subject to testing by [plaintiff], who should be allowed to seek appropriate discovery when necessary . . . . Only after the issues have been identified by this process should the District Court, if necessary, consider arguments or information [*ex parte* and *in camera*] which the [a]gency is unable to make public." *Phillippi*, 546 F.2d at 1013.

II. The *Glomar* Doctrine in This Case

Although plaintiffs do not take issue with the *Glomar* doctrine as a general rule [*69] or as a permissible response to some FOIA requests, they contend that the NSA's invocation of the *Glomar* doctrine in this particular case was inappropriate because (1) the TSP is no longer a "secret" national security program, (2) any responsive records, if they exist, are not exempt under FOIA, and (3) the NSA's affidavits in support of its invocation of *Glomar*, which are part of the public record, are insufficient to sustain the agency's burden of proof.

We review *de novo* a district court's grant of summary judgment in FOIA litigation. *See, e.g., Tigue v. Dep't of Justice*, 312 F.3d 70, 75 (2d Cir. 2002). We also "conduct *de novo* review when a member of the public challenges an agency's assertion that a record being sought is exempt from disclosure." *A. Michael's Piano, Inc. v. FTC*, 18 F.3d 138, 143 (2d Cir. 1994). The agency asserting the exemption bears the burden of proof, and all doubts as to the applicability of the exemption must be resolved in favor of disclosure. *See id.; see also Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994) ("[T]he defending agency has the burden of showing . . . that any withheld documents fall within an exemption to the FOIA."). "Affidavits or declarations . . . giving reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency's burden." *Carney*, 19 F.3d at 812. The "[a]ffidavits submitted by an agency are accorded a presumption of good faith." *Id.* (internal quotation marks omitted).

A. *Glomar* Response to Requests for Information Gathered Pursuant to the TSP

Plaintiffs first argue that *Glomar* may be invoked "only to preserve the secrecy of a covert intelligence program or secret intelligence sources and methods," Appellants' Br. 12, and that the NSA inappropriately provided a *Glomar* response in this case because the TSP is no longer a secret program in light of the government's public acknowledgment of its existence and purpose following its controversial disclosure by the news media and ensuing public controversy. Whether the *Glomar* doctrine may be invoked in response to a FOIA request for records obtained under the TSP is also an issue of first impression for our Court.

We now hold that, as a general rule, (1) an agency may provide a *Glomar* response to FOIA requests for information gathered under a program whose existence has been publicly revealed, and may do so specifically with respect to information gathered under the TSP, and (2) that such a response will be reviewed in the same manner as any other *Glomar* response to a FOIA request. The government's decision to make public the existence of the TSP does not alter the rationale for allowing an agency to provide a *Glomar* response—namely, to prevent the sort of harm that a FOIA exemption is designed to prevent.

The record is clear that, although the general existence of the TSP has been officially acknowledged, the specific methods used, targets of surveillance, and information obtained through the program have not been disclosed. President Bush announced that he had authorized the NSA to "intercept the international communications of people with known links to Al Qaeda and related terrorist organizations." President Bush's Address, *su-*

pra. Additionally, CIA Director[6] Michael Hayden noted that the general procedures the [*70] NSA implements in conducting electronic surveillance were also applicable to the TSP. He also indicated that, under the TSP, the NSA was targeting communications where one party is outside of the United States. General Michael V. Hayden, What American Intelligence & Especially the NSA Have Been Doing To Defend the Nation, Address to the National Press Club (Jan. 23, 2006), *available at* http://www.dni.gov/speeches/20060123_speech.htm (last visited Dec. 22, 2009). However, at no time have the President or other members of the national government in either the Bush or Obama Administrations publicly confirmed or denied that particular persons were targeted or subject to surveillance.

The *Glomar* doctrine is applicable in cases "where to answer the FOIA inquiry would cause harm cognizable under a [] FOIA exception," *Gardels*, 689 F.2d at 1103—in other words, in cases in which the existence or nonexistence of a record is a fact exempt from disclosure under a FOIA exception.

An agency is therefore precluded from making a *Glomar* response if the existence or nonexistence of the specific records sought by the FOIA request has been the subject of an official public acknowledgment. If the government has admitted that a specific record exists, a government agency may not later refuse to disclose whether that same record exists or not. *See Wolf v. CIA*, 473 F.3d 370, 378-79, 374 U.S. App. D.C. 230 (D.C. Cir.

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[6] At the time of the cited speech, January 23, 2006, Gen. Hayden was the Principal Deputy Director of National Intelligence. *See* What American Intelligence & Especially the NSA Have Been Doing To Defend the Nation, Address to the National Press Club (Jan. 23, 2006), *available at* http://www.dni.gov/speeches/20060123_speech.htm (last visited Dec. 22, 2009).

2007); *cf. Hudson River Stoop Clearwater, Inc. v. Dep't of the Navy*, 891 F.2d 414, 421 (2d Cir. 1989).

Here, although the public is aware that the TSP exists, the government has found it necessary to keep undisclosed the details of the program's operations and scope—the subject of plaintiffs' FOIA request in this case. The fact that the public is aware of the program's existence does not mean that the public is entitled to have information regarding the operation of the program, its targets, the information it has yielded, or other highly sensitive national security information that the government has continued to classify. Indeed, the fact that the TSP's existence has been made public reinforces the government's continuing stance that it is necessary to keep confidential the details of the program's operations and scope.

We therefore hold that, as a threshold matter, and as a general rule, an agency may invoke the *Glomar* doctrine in response to a FOIA request regarding a publicly revealed matter. An agency only 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. We hold, in particular, that an agency may invoke the *Glomar* doctrine with respect to the TSP, at least with respect to those aspects of the program that have not been the subject of such disclosures. Accordingly, we now turn our attention to the question of whether the NSA in this particular case has met its burden to justify its *Glomar* response.

B. The NSA's Invocation of *Glomar* Pursuant to FOIA Exemptions in the Instant Case

Plaintiffs contend that even if the *Glomar* doctrine may be invoked in the context of a TSP-related FOIA

request, the records plaintiffs seek here are not exempt from public disclosure under [*71] FOIA. Accordingly, plaintiffs argue, confirming or denying the existence of these records is not exempt from public disclosure. We agree with the District Court that, in order to invoke the *Glomar* response to a FOIA request, an agency must "tether" its refusal, *Wilner*, 2008 U.S. Dist. LEXIS 48750, 2008 WL 2567765, at *3, to one of the nine FOIA exemptions. In other words, "a government agency may . . . refuse to confirm or deny the existence of certain records . . . if the FOIA exemption would itself preclude the acknowledgment of such documents." *Minier*, 88 F.3d at 800. We adopt the District Court's careful and well-reasoned analysis, and affirm its judgment, including the holding that NSA's *Glomar* response was properly "tethered" to FOIA Exemption 3, under section 6 of the National Security Agency Act of 1959.

The NSA tied its *Glomar* response to FOIA Exemptions 1 and 3. Exemption 1 permits the nondisclosure of records 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." 5 U.S.C. § 552(b)(1). In invoking Exemption 1, the NSA specifically relies on Executive Order 12,958, 60 Fed. Reg. 19,825 (Apr. 17, 1995), as amended by Executive Order 13,292, 68 Fed. Reg. 15,315 (Mar. 25, 2003), which provides that an agency may classify records relating to, *inter alia*, "intelligence activities (including special activities), intelligence sources or methods, or cryptology," and "vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security, which includes defense against transnational terrorism." 68 Fed. Reg. at 15,317. Under Executive Order 12,958, as amended, an agency may classify information when it

"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." *Id.* at 15,315. As the District Court noted, "the Executive Order specifically countenances the *Glomar* Response, permitting a classifying agency to 'refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified under this order or its predecessors.' *Id.* at 15324." *Wilner*, 2008 U.S. Dist. LEXIS 48750, 2008 WL 2567765, at *3.

FOIA Exemption 3 applies to records "specifically exempted from disclosure by statute," provided that the statute "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue." 5 U.S.C. § 552(b)(3). In invoking Exemption 3, the NSA relies on three statutes that preclude disclosure of the documents plaintiffs seek. First, the NSA argues that the documents are exempt under section 6 of the National Security Agency Act of 1959 ("NSAA"), Pub. L. No. 86-36, § 6, 73 Stat. 63, 64 (codified at 50 U.S.C. § 402 note), which provides that:

[N]othing in this Act or any other law . . . shall be construed to require the disclosure of the organization or any function of the National Security Agency, of any information with respect to the activities thereof, or of the names, titles, salaries, or number of persons employed by such agency.

Second, the NSA relies on section 102(A)(i)(1) of the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (codified at 50 U.S.C. § 403-1(i)(1)), which requires the Director of National Intelligence to "protect intelligence sources and methods from [*72] unauthorized disclosure." Third,

the NSA invokes section 798 of Title 18 of the U.S. Code, which criminalizes disclosure of information "concerning, *inter alia*, the communication intelligence activities of the United States."

Because defendants need only proffer one legitimate basis for invoking the *Glomar* response and FOIA Exemptions 1 and 3 are separate and independent grounds in support of a *Glomar* response, we consider only the applicability of FOIA Exemption 3. *See Larson*, 565 F.3d at 862-63, ("[A]gencies may invoke the exemptions independently and courts may uphold agency action under one exemption without considering the applicability of the other."). The District Court held that the NSA's "affidavits provide the requisite detailed explanations for withholding the documents requested in FOIA Request No. 1 under FOIA Exemption 3. Specifically, defendants have demonstrated that acknowledging the existence or nonexistence of the information entailed in FOIA Request No. 1 would reveal the NSA's organization, functions, and activities, in contravention of Section 6 of the NSAA." *Wilner*, 2008 U.S. Dist. LEXIS 48750, 2008 WL 2567765, at *4. We agree with the District Court's holding with respect to FOIA Exemption 3, and we adopt its thorough analysis, which for convenience we set forth in full below:

> In *CIA v. Sims*, 471 U.S. 159, 105 S. Ct. 1881, 85 L. Ed. 2d 173 (1985), the Supreme Court adopted a two-pronged approach to evaluating an agency's invocation of FOIA Exemption 3: First, the court must consider whether the statute identified by the agency is a statute of exemption as contemplated by Exemption 3. Second, the court must consider whether the withheld material satisfies the criteria of the exemption statute. *Id.* at 167; *see Fitzgibbon v. C.I.A.*, 911 F.2d 755, 761, 286 U.S. App. D.C. 13 (D.C. Cir. 1990).

As the D.C. Circuit has observed, "[e]xemption 3 presents considerations distinct and apart from the other eight exemptions" inscribed in FOIA. *Ass'n of Retired R.R. Workers v. U.S.* R.R. *Retirement Bd.*, 830 F.2d 331, 336, 265 U.S. App. D.C. 183 (D.C. Cir. 1987):

> Exemption 3 differs from other FOIA exemptions in that its applicability depends less on the detailed factual contents of specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage.

Id.

Defendants argue, and plaintiffs do not dispute, that Section 6 of the NSAA qualifies as an exemption statute under Exemption 3. The D.C. Circuit—the only circuit court to have considered this question—concurs. *See Founding Church of Scientology, Inc. v. NSA*, 610 F.2d 824, 828, 197 U.S. App. D.C. 305 (D.C. Cir. 1979); *Hayden v. NSA*, 608 F.2d 1381, 1389, 197 U.S. App. D.C. 224 (D.C. Cir. 1979). Indeed, the language of Section 6 makes quite clear that it falls within the scope of Exemption 3. Section 6 states that no "law . . . shall be construed to require the disclosure . . . of any information with respect to the activities" of the NSA. Pub. L. No. 86-36, § 6, 73 Stat. 63, 64, codified at 50 U.S.C. § 402. Section 6 thus "specifically exempt[s]" certain information "from disclosure." 5 U.S.C. § 552(b)(3).

Wilner, 2008 U.S. Dist. LEXIS 48750, 2008 WL 2567765, at *4 (alterations in original).

C. Sufficiency of the NSA's Affidavits

1. The NSA's Affidavits in This Case

As we stated above, the agency resisting disclosure has the burden of proving the applicability of a FOIA exemption and may "may meet its burden by [*73] submitting a detailed affidavit showing that the information logically falls within the claimed exemptions." *Minier*, 88 F.3d at 800 (internal quotation marks omitted). At oral argument before our Court, plaintiffs argued that the NSA had not met its burden and that the government's declarations were inadequate to support its invocation of *Glomar*. We are not entirely convinced that plaintiffs preserved this argument,[7] but even if we were to reach the merits of whether the government's affidavits are sufficient, we agree with the District Court that the NSA has met its burden in this case.

An agency that has withheld responsive documents pursuant to a FOIA exemption can carry its burden to prove the applicability of the claimed exemption by affidavit, and we review the agency's justifications therein

[7] The District Court noted in its opinion that "[p]laintiffs do not challenge the legal basis for defendants' Glomar Response, nor do they challenge the sufficiency—either in form or substance—of defendants' affidavits in support of their reliance on FOIA Exemption 3 and Section 6 of the NSAA." *Wilner*, 2008 U.S. Dist. LEXIS 48750, 2008 WL 2567765, at *6. In response to our request that plaintiffs provide citations to the record showing where they had made these arguments in proceedings before the District Court, plaintiffs submitted a supplemental letter dated October 14, 2009. Although plaintiffs provide citations to places in the record where they stated the rule that the burden of proof rests with the agency resisting disclosure, it seems that plaintiffs did not preserve their specific argument that the NSA's affidavits were insufficient to sustain its burden in this case. However, because the District Court addressed the matter thoroughly in its opinion, we rely on its disposition of the merits.

de novo. Ctr. for Nat'l Sec. Studies v. Dep't of Justice, 331 F.3d 918, 926, 356 U.S. App. D.C. 333 (D.C. Cir. 2003); *see also* 5 U.S.C. § 552(a)(4)(B). "Summary judgment is warranted on the basis of agency affidavits when the affidavits describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith. Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible." *Larson*, 565 F.3d at 862 (internal quotation marks and citations omitted).

In evaluating an agency's *Glomar* response, a court must accord "substantial weight" to the agency's affidavits." *Minier*, 88 F.3d at 800 (internal quotation marks omitted). In according such weight to the affidavits on which the District Court relied, we conclude that they provide sufficient detail that the question of the existence or nonexistence of the requested records falls within Exemption 3 of FOIA. The NSA asserts that it cannot provide any more information without doing cognizable harm, and we agree. The affidavits sufficiently establish that nondisclosure is appropriate—perhaps essential—for reasons of national security and confidentiality. "Minor details of intelligence information may reveal more information than their apparent insignificance suggests because, much like a piece of jigsaw puzzle, [each detail] may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself." *Larson*, 565 F.3d at 864 (alterations in original).

In the interest of thoroughness, the District Court provided a detailed explanation and analysis of the affidavits submitted by the NSA to support its claim that

even confirming or denying the existence of the requested records would cause a harm that the exemptions to FOIA seek to avoid. We adopt that analysis as follows:

> [*74] Defendants contend that "[a]cknowledging the existence or non-existence of the information requested by Plaintiffs' FOIA Request No. 1 would unquestionably reveal NSA's organization, functions and activities by revealing the success or failure of NSA's activities." In support of this contention, they have submitted affidavits from Joseph J. Brand, Associate Director, Community Integration, Policy and Records for the NSA; J. Michael McConnell, Director of National Intelligence; and David M. Hardy, Section Chief of the Record/Information Dissemination Section, Records Management Division, Federal Bureau of Investigation.
>
> In his affidavit, Brand avers that the TSP is a SIGINT program "that [is] critical to the national security of the United States." Operation of the TSP "depends upon the collection of electronic communications, which can be easily compromised if targets are made aware of NSA capabilities and priorities." Giving the Glomar Response to FOIA Request No. 1 was essential, Brand attests, because
>
> > [a]cknowledging the existence or non existence of those individuals or organizations subject to surveillance would provide our adversaries with critical information about the capabilities and limitations of the NSA, such as the types of communications that may be susceptible to NSA detection. Confirmation by NSA that a person's activities are not of foreign intelligence interest or that NSA is unsuccessful in collecting foreign intelligence information on their activities on a case-by-

> case basis would allow our adversaries to accumulate information and draw conclusions about NSA's technical capabilities, sources, and methods.

Similarly, McConnell states that "[t]o confirm or deny whether someone is a target of surveillance . . . would reveal to our adversaries that an individual may or may not be available as a secure means for communicating or, more broadly, the methods being used to conduct surveillance." The disclosure of such information would run afoul of Section 6 of the NSAA, Brand contends, because it "would reveal the sources of intelligence . . . and would tend to reveal the methods by which such intelligence is collected . . . ." Further, "confirmation or denial of this information would reveal the limitations of NSA SIGINT capabilities." Even the disclosure of "what appears to be the most innocuous information about the TSP" poses a threat to national security, McConnell avers, because it might permit our adversaries "to piece together sensitive information about how the Program operated, the capabilities, scope and effectiveness of the Program and our current capability, which would be utilized by the enemy to allow them to plan their terrorist activities more securely."

These affidavits demonstrate that the documents sought in FOIA Request No. 1 relate to "the organization or any function of the National Security Agency" and seek "information with respect to the activities thereof," Pub. L. No. 86-36, § 6, 73 Stat. 63, 64, codified at 50 U.S.C. § 402, all of which are exempted from disclosure by Section 6 of the NSAA. The affidavits aver that the TSP is a SIGINT program, and "signals intelligence is one of [NSA's] primary functions"; the release of the SIGINT information would

> "disclose information with respect to [NSA] activities, since any information about an intercepted communication concerns an NSA activity." *Hayden*, 608 F.2d at 1389. Moreover, [*75] the affidavits explain in "detailed, nonconclusory" fashion, *Wood v. FBI*, 432 F.3d 78, 85 (2d Cir. 2005), why the Glomar Response is appropriate. The affidavits thus "giv[e] reasonably detailed explanations why any withheld documents fall within an exemption," and are therefore "sufficient to sustain the agency's burden." *Carney*, 19 F.3d at 812.

Wilner, 2008 U.S. Dist. LEXIS 48750, 2008 WL 2567765, at *4-5.

2. NSA's Burden of Proof Under Section 6 of the NSAA Generally

An agency invoking *Glomar* must show not only that the requested records would be exempt from disclosure, but also that "the FOIA exemption would itself preclude the acknowledgment [even confirming or denying the existence] of such documents." *Minier*, 88 F.3d at 800. Congress's broad language in section 6 of the NSAA eases that burden for the agency, as it exempts from disclosure any "information with respect to the activities" of that agency. Pub. L. No. 86-36, § 6. Confirming or denying the *mere existence* of specific records in a general surveillance program would logically be both confirming or denying that the NSA was targeting a specific individual *and* confirming or denying that the NSA is conducting a general surveillance program. Either disclosure would be "information with respect to the activities" of the NSA and therefore exempt under FOIA. *Id.* Even if the NSA affidavits, standing alone, are insufficient, as plaintiffs argue, the very nature of their request—which seeks records concerning whether their communications

were monitored by the NSA—establishes that *any response would* reveal "information with respect to the activities" of the NSA. Because the NSA is exempt under the NSAA from revealing such information, FOIA Exemption 3 also applies and the NSA's *Glomar* response was therefore justified.

3. Bad Faith Invocation of the *Glomar* Doctrine

Having concluded that the affidavits more than sufficiently support the NSA's claim that FOIA Exemption 3 encompasses confirmation or denial of the existence of the requested records, we now consider plaintiffs' claims that the NSA invoked the *Glomar* doctrine for the purpose of concealing illegal or unconstitutional actions. We cannot base our judgment on mere speculation that the NSA was attempting to conceal the purported illegality of the TSP by providing a *Glomar* response to plaintiffs' requests. A finding of bad faith must be grounded in "evidence suggesting bad faith on the part of the [agency]." *Larson*, 565 F.3d at 864. "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible." *Id.* at 862 (internal quotation marks omitted). After reviewing the record before us, we agree with the District Court that the agency's affidavits and justification are both logical and plausible. We do not find any evidence that even arguably suggests bad faith on the part of the NSA, or that the NSA provided a *Glomar* response to plaintiffs' requests for the purpose of concealing illegal or unconstitutional actions.

III. *Ex Parte, In Camera* Review of Responsive Records, If Any Exist

Plaintiffs argue that, even if the government cannot publicly produce any responsive records, a court presented with a *Glomar* response should conduct *ex parte*

and *in camera* review of any records (assuming they exist) to provide a more "probing" judicial review. We disagree. A court should only consider information *ex parte* and *in camera* that the agency is unable to make public if questions remain after the relevant issues have been identified by the agency's public affidavits and [*76] have been tested by plaintiffs. *See Phillippi*, 546 F.2d at 1013.

We are mindful of our legal system's preference for open court proceedings, *see, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980); *see also In re N.Y. Times Co.*, 577 F.3d 401, 410 n.4 (2d Cir. 2009) (noting that although there are circumstances in which a nonpublic proceeding is appropriate, "courts seek to balance the need for transparency in the judiciary with the effective protection of sensitive information"), and there is no compelling reason in this case to deviate from this general practice by conducting or requiring an *ex parte, in camera* review of any classified materials the agency might present in justification of its response. We join our sister Circuit in holding that, "[i]f an agency's statements supporting exemption contain reasonable specificity of detail as to demonstrate that the withheld information logically falls within the claimed exemption and evidence in the record does not suggest otherwise . . . the court should not conduct a more detailed inquiry to test the agency's judgment and expertise or to evaluate whether the court agrees with the agency's opinions." *Larson*, 565 F.3d at 865.

When, as here, a court finds that the government's public affidavits sufficiently allege the necessity of a *Glomar* response, *ex parte* and *in camera* review of additional, confidential material is unnecessary and beyond the role assigned to the judiciary by applicable law. "[W]e have consistently deferred to executive affidavits

predicting harm to the national security, and have found it unwise to undertake searching judicial review." *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 927. We affirm our "deferential posture in FOIA cases regarding the uniquely executive purview of national security." *Larson*, 565 F.3d at 865 (internal quotation marks omitted). Recognizing the relative competencies of the executive and judiciary, we believe that it is bad law and bad policy to "second-guess the predictive judgments made by the government's intelligence agencies," *id.* (internal quotation marks omitted), regarding questions such as whether disclosure of terrorist-related surveillance records would pose a threat to national security.

In any event, a "searching review" of the kind suggested by plaintiffs would not provide plaintiffs with the information they seek—knowledge of whether they were or are being surveilled in their interactions with their detainee clients. Plaintiffs claim that the purpose of gaining this information is to determine whether or not to alter the way in which they represent and interact with their clients. Appellant's Br. 9; Tr. 4-5. Whether the NSA asserts in public affidavits, or whether the court finds *in camera*, that the NSA's *Glomar* response was indeed sufficient (as it invariably would do, given the breadth of the NSAA), plaintiffs in the end would have the same answer—neither confirmation nor denial of whether any responsive records exist. We conclude that the government's affidavits were sufficiently specific in this case and we therefore decline plaintiffs' invitation to conduct an *ex parte, in camera* review of any classified material of the agency providing further justification for failing to confirm or deny the existence of any records pertaining to plaintiff attorneys' communications with their detainee clients.

IV. Legality of the Underlying Terrorist Surveillance Program

Finally, plaintiffs argue that the *Glomar* doctrine may not be invoked to conceal illegal or unconstitutional activities. As we have stated, we are unaware of any evidence that the NSA invoked the *Glomar* [*77] doctrine in order to conceal illegal or unconstitutional activities; nor do we have reason to believe that the NSA was acting in bad faith in providing a *Glomar* response. *See Minier*, 88 F.3d at 800.

In their briefs, plaintiffs contend the NSA's refusal to disclose whether it obtained any records under the TSP related to plaintiffs is unlawful because any such records, if they exist, would have been obtained in violation of the U.S. Constitution. Specifically, plaintiffs argue that (1) the warrantless interception of plaintiff lawyers' communications violates the First, Fourth, and Fifth Amendments, (2) the threat of monitoring attorney-client conversations violates the constitutional rights of the detainees, and (3) warrantless surveillance violates the separation of powers. Defendants respond that the legality of the TSP is a separate matter from a FOIA challenge,[8] Appellee's Br. 32-36; Tr. 11, a point that plaintiffs

[8] The legality of the TSP was challenged in a separate litigation in the United States District Court for the District of Oregon (the District Court certified a portion of the litigation for appeal to the Ninth Circuit but, as noted hereafter, the Court of Appeals found that the plaintiff lacked standing to challenge the TSP), in which the government asserted the state-secrets privilege. *Al-Haramain Islamic Found., Inc. v. Bush*, 451 F. Supp. 2d 1215 (D. Or. 2006). There is also litigation pending in the Northern District of California which consolidates a number of TSP-related cases. *In re NSA Telecomm. Records Litig.*, MDL No. 06-1791 (N.D. Cal). At oral argument in this case, counsel for the government stated its intention, with respect to those issues, to continue to assert the state-secrets privilege.

conceded at oral argument, Tr. 23 ("And again, we are not asking this Court to reach the question of [the merits of the argument that the TSP is illegal]. We don't think that's necessary here.").

We agree with counsel for all parties that we need not reach the legality of the underlying Terrorist Surveillance Program because that question is beyond the scope of this FOIA action. In declining to address the legality of the program in the context of suits seeking disclosure of secret records, we are not alone; several of our sister Circuits have entertained TSP-related cases and have declined to reach the merits of the TSP itself. *See, e.g., Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1205 (9th Cir. 2007); *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007) (dismissing the case because plaintiffs could not establish their standing to sue without obtaining classified information, the disclosure of which would jeopardize national security); *cf. United States. v. Abu Ali*, 528 F.3d 210, 257-58 (4th Cir. 2008) (not reaching the issue of the legality of the TSP in the context of a criminal challenge to warrantless surveillance under the program).

CONCLUSION

We affirm the judgment of the District Court and hold that: (1) a *Glomar* response is available to agencies as a valid response to FOIA requests; (2) an agency may issue a *Glomar* response to FOIA requests seeking information obtained under a "publicly acknowledged" intelligence program such as the Terrorist Surveillance Program at least when the existence of such information has not already been publicly disclosed; (3) the NSA properly invoked the *Glomar* doctrine in response to plaintiffs' request for information pursuant to FOIA Exemption 3; (4) the government's affidavits sufficiently

allege the necessity of a *Glomar* response in this case, making it unnecessary for us to review, or to require the District Court to review, *ex parte* and *in camera* any classified affidavits that the NSA might provide to support its *Glomar* response; and (5) there is [*78] no evidence in this record that suggests, much less shows, that the NSA invoked *Glomar* for the purpose of concealing activities that violate the Constitution or are otherwise illegal. We agree with counsel for all parties that we need not reach the legality of the underlying Terrorist Surveillance Program because that question is beyond the scope of this FOIA action.

Accordingly, the judgment of the District Court is **AFFIRMED**.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 30th day of December, two thousand and nine.

PRESENT: Jose A. Cabranes,
Debra Ann Livingston,
Circuit Judges,
Edward R. Korman,
District Judge.[*]

Thomas Wilner, Gitanjali Gutierrez, Michael J. Sternhell, Jonathan Wells Dixon, Joshua Colangelo Bryan, Brian J. Neff, Joseph Margulies, Scott S. Barker, Anne Castle, James E. Dorsey, Asmah Tareen, Richard A. Grigg, Thomas R. Johnson, George Brent Mickum IV, Stephen M. Truitt, Jonathan Hafetz, Tina M. Foster, Alison Sclater, Marc D. Falkoff, David H. Remes, H. Candace Gorman, Charles Carpenter, John A. Chandler and Clive Stafford Smith,

Plaintiffs-Appellants,

v.

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[*] The Honorable Edward R. Korman; of the United states District Court for the Eastern District of New York, sitting by designation.

National Security Agency and Department of Justice,
Defendants-Appellees.[**]

JUDGMENT
Docket Number: 08-4726-cv

The appeal in the above-captioned case from a judgment of United States District Court for the Southern District of New York having been argued on the district court record and the parties' briefs. On consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that the judgment of the District Court is AFFIRMED in accordance with the opinion of this Court.

FOR THE COURT,
Catherine O'Hagan Wolfe,
Clerk
By: /s/
Judy Pisnanont Motions Staff Attorney

[**] The Clerk of Court is directed to amend the official caption in this case to conform to the listing of the parties above.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 07 Civ. 3883 (DLC)

THOMAS WILNER, et al.,
Plaintiffs,

v.

NATIONAL SECURITY AGENCY, et al.,
Defendants.

June 25, 2008

[*1] For Plaintiffs: Kathryn A. Sabbeth, David C. Vladeck, Washington, D.C.; Shayana Kadidal, Emilou MacLean, New York, New York; James R. Rubin, Julie P. Shelton, Karen Borg, Mark A. Schwartz, Butler Rubin Saltarelli & Boyd LLP, Chicago, Illinois.

For Defendants: Jeffrey S. Bucholtz, Joseph H. Hunt, Elizabeth A. Shapiro, Alexander K. Haas, Federal Programs Branch, Civil Division United States Department of Justice, Washington, DC.

OPINION AND ORDER

DENISE COTE, District Judge:

This Opinion addresses the partial motion for summary judgment filed by the defendant United States

government agencies in this Freedom of Information Act ("FOIA") case. Plaintiffs are attorneys representing individuals detained by the United States government (the "Government") at Guantanamo Bay, Cuba. Defendants rejected their FOIA requests for records showing whether the Government has intercepted communications relating to their representation of their clients. On their motion for summary judgment, defendants claim that they rightly refused to confirm or deny the existence of the requested records. For the following reasons, defendants' motion is granted.

BACKGROUND

The [*2] following facts are undisputed. Plaintiffs are partners and associates at prominent law firms, law professors, and attorneys for established non-profit organizations. They represent individuals detained by the Government at Guantanamo Bay, Cuba, on suspicion of terrorist activity. Defendant National Security Agency ("NSA") is an agency within the Department of Homeland Security and is charged with, among other tasks, collecting, processing, and disseminating signals intelligence information for national foreign intelligence purposes. NSA's signals intelligence ("SIGINT") work includes intercepting communications necessary to the national defense, national security, or the conduct of foreign affairs of the United States. Defendant Department of Justice is the cabinet department charged with law enforcement.

In the aftermath of the September 11, 2001 attacks by al Qaeda on the United States, President George W. Bush secretly authorized the Terrorist Surveillance Program ("TSP"), under the auspices of which the NSA was empowered "to intercept the international communications of people with known links to al Qaeda and related terrorist organizations." George W. Bush, President's

Radio Address [*3] (Dec. 17, 2005), http://www. whitehouse.gov/news/releases/2005/12/20051217.html (last visited June 2, 2008). President Bush described the TSP as "a highly classified program that is crucial to our national security. Its purpose is to detect and prevent terrorist attacks against the United States, our friends and allies." *Id.* Surveillance under the TSP was conducted without warrants, and without oversight by the Foreign Intelligence Surveillance Court ("FISC"). The TSP was conducted in secret until President Bush publicly acknowledged its existence on December 17, 2005. On January 17, 2007, Attorney General Alberto Gonzales announced that electronic surveillance conducted under the TSP would be subject to the approval of the FISC.

By separate letters to the NSA and Department of Justice dated January 18, 2006, plaintiffs submitted FOIA requests seeking seven categories of records. Only the first of these ("FOIA Request No. 1") is at issue on this motion. FOIA Request No. 1 sought "records obtained or relating to ongoing or completed warrantless electronic surveillance or physical searches regarding, referencing or concerning any of the plaintiffs." Defendants refused to confirm or deny [*4] whether they possessed records responsive to the request.

This lawsuit followed. Plaintiffs filed their complaint on May 17, 2007 and amended it twice thereafter. The Second Amended Complaint, which is the operative pleading, was filed on November 2. Claiming that they "have a statutory right to the records that they seek, and there is no legal basis for the defendants' refusal to disclose them," plaintiffs sought principally a declaration that defendants' refusal to disclose the requested records was unlawful, and an order compelling defendants to produce the records without further delay. As discussed above, the motion presently under consideration

concerns plaintiffs' FOIA Request No. 1 and defendants' refusal to confirm or deny the existence of records concerning specific alleged targets of the TSP.[1]

DISCUSSION

I. [*5] FOIA Framework

FOIA was enacted in 1966 "to improve public access to information held by government agencies." *Pierce & Stevens Chem. Corp. v. U.S. Consumer Prod. Safety Comm'n,* 585 F.2d 1382, 1384 (2d Cir. 1972). It "expresses a public policy in favor of disclosure so that the public might see what activities federal agencies are engaged in." *A. Michael's Piano, Inc. v. F.T.C.,* 18 F.3d 138, 143 (2d Cir. 1994). FOIA requires a federal agency to disclose records in its possession unless they fall under one of nine enumerated and exclusive exemptions. 5 U.S.C. § 552(a)(3)-(b); *see also Dep't of the Air Force v. Rose,* 425 U.S. 352, 361 (1976). The statutory exemptions "do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Dep't of the Interior and Bur. of Indian Affairs v. Klamath Water Users Protective Ass'n,* 532 U.S. 1, 8 (2001) (citation omitted). The exemptions are thus to be "given a narrow compass." *Id.* (citation omitted); *see also Nat'l Council of La Raza v. Dep't of Justice,* 411 F.3d 350, 356 (2d Cir. 2005).

A federal court must "conduct *de novo* review when a member of the public challenges an agency's assertion that a record being [*6] sought is exempt from disclo-

[1] Defendants filed two motions for partial summary judgment on the Second Amended Complaint. The parties jointly requested that the second motion be placed on the Court's suspense calendar pending decisions by other courts on related motions. The Court denied the second motion for summary judgment without prejudice to its renewal following the resolution of the related litigation.

sure." *A Michael's Piano,* 18 F.3d at 143. "The burden of proof, upon such review, rests with the agency asserting the exemption, with doubts resolved in favor of disclosure." *Id.*

On a motion for summary judgment, "the defending agency has the burden of showing . . . that any withheld documents fall within an exemption to the FOIA." *Carney v. U.S. Dep't of Justice,* 19 F.3d 807, 812 (2d Cir. 1994). "Affidavits or declarations . . . giving reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency's burden." *Id.* Absent any showing to the contrary, "[a]ffidavits submitted by an agency are accorded a presumption of good faith." *Id.* (citation omitted).

II. The Glomar Response

In rejecting FOIA Request No. 1, defendants gave what is commonly known as the "Glomar Response," which derives from a FOIA case concerning records pertaining to the Glomar Explorer, an oceanic research vessel. *See Phillippi v. CIA,* 546 F.2d 1009 (D.C. Cir. 1976). In *Phillippi,* the CIA asserted that the "existence or nonexistence of the requested records was itself a classified fact exempt from disclosure under . . . FOIA," *id.* at 1012, [*7] and therefore responded to plaintiff's FOIA request by stating that, "in the interest of national security, involvement by the U.S. Government in the activities which are the subject matter of [Phillippi's] request can neither be confirmed nor denied." *Id.* Following *Phillippi,* courts have found in favor of the Government where it refused to offer a substantive response to a FOIA request, if doing so "would remove any lingering doubts that a foreign intelligence service might have on the subject, and [where] the perpetuation of such doubts may be an important means of protecting national secu-

rity." *Frugone v. CIA,* 169 F.3d 772, 774-75 (D.C. Cir. 1999) (citation omitted).[2]

The Glomar Response does not stand alone; rather, defendants must tether it to one of the nine FOIA exemptions, and explain why the requested documents fall within the exemption identified. Here, defendants invoked the Glomar Response under FOIA Exemptions 1 and 3. Exemption 1 permits the nondisclosure of records 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." 5 U.S.C. § 552(b)(1). As the D.C. Circuit has recognized, "Exemption 1 in this way establishes a specific exemption for defense and foreign policy secrets, [*9] and delegates to the President the power to establish the scope of that exemption by executive order." *Military Audit Project v. Casey,* 656 F.2d 724, 737 (D.C. Cir. 1981).

In invoking Exemption 1, defendants rely on Executive Order 12958, 60 Fed. Reg. 19825 (Apr. 17, 1995), *as amended by* Executive Order 13292, 68 Fed. Reg. 15315

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[2] The Second Circuit has never opined on the Glomar Response. Because plaintiffs' do not challenge the general availability of the Glomar Response—but rather the applicability of the Glomar Response to their FOIA Request No. 1—the Court need not rule on its legal basis, which is firmly established in other circuits. *See, e.g., Carpenter v. U.S. Dep't of Justice,* 470 F.3d 434, 436-37 (1st Cir. 2006); *Bassiouni v. CIA,* 392 F.3d 244, 246 (7th Cir. 2004); *Hunt v. CIA,* 981 F.2d 1116, 1117 (9th Cir. 1992). Indeed, [*8] the Second Circuit has evidenced a willingness to look to the law of other circuits—particularly the D.C. Circuit—in the area of FOIA, even when it has not specifically adopted other circuits' law. This is especially the case when the Second Circuit defines the contours of the FOIA exemptions. *See, e.g., Inner City Press/Community on the Move v. Bd. of Governors of Federal Reserve Sys.,* 463 F.3d 239, 244-45 (2d Cir. 2006); *Tigue v. U.S. Dep't of Justice,* 312 F.3d 70, 77-78 (2d Cir. 2002).

(Mar. 25, 2003), which provides that an agency may classify records relating to, *inter alia,* "intelligence activities (including special activities), intelligence sources or methods, or cryptology," and "vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security, which includes defense against transnational terrorism." 68 Fed. Reg. at 15317. Executive Order 12958 permits a classifying agency such as the NSA to classify information when it "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." *Id.* at 15315. Further, the Executive Order specifically [*10] countenances the Glomar Response, permitting a classifying agency to "refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified under this order or its predecessors." *Id.* at 15324.

Exemption 3 applies to records "specifically exempted from disclosure by statute," provided that the statute "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue." 5 U.S.C. § 552(b)(3). In invoking Exemption 3, defendants identify three statutes which they allege encompass the documents sought by plaintiffs, and therefore preclude disclosure. First, Section 6 of the National Security Agency Act of 1959 ("NSAA"), Pub. L. No. 86-36, § 6, 73 Stat. 63, 64,, *codified at* 50 U.S.C. § 402, provides that:

> [N]othing in this Act or any other law . . . shall be construed to require the disclosure of the organization or any function of the National Security

> Agency, of any information with respect to the activities thereof, or of the names, titles, salaries, or number of persons employed by such agency.

Second, Section 102(A)(i)(1) of the Intelligence Reform and Terrorism [*11] Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (Dec. 17, 2004), *codified at* 50 U.S.C. § 403-1(i)(1), requires the Director of National Intelligence to "protect intelligence sources and methods from unauthorized disclosure." Third, Section 798 of Title 18, U.S.C., criminalizes disclosure of information "concerning the communications intelligence activities of the United States."

III. Analysis

Defendants need only proffer one legitimate basis for invoking the Glomar Response in order to succeed on their motion for summary judgment. Defendants' affidavits provide the requisite detailed explanations for withholding the documents requested in FOIA Request No. 1 under FOIA Exemption 3. Specifically, defendants have demonstrated that acknowledging the existence or nonexistence of the information entailed in FOIA Request No. 1 would reveal the NSA's organization, functions, and activities, in contravention of Section 6 of the NSAA. Accordingly, their motion for summary judgment is granted.

In *CIA v. Sims*, 471 U.S. 159 (1985), the Supreme Court adopted a two-pronged approach to evaluating an agency's invocation of FOIA Exemption 3: First, the court must consider whether the statute [*12] identified by the agency is a statute of exemption as contemplated by Exemption 3. Second, the court must consider whether the withheld material satisfies the criteria of the exemption statute. *Id.* at 167; *see Fitzgibbon v. C.I.A.*,

911 F.2d 755, 761 (D.C. Cir. 1990). As the D.C. Circuit has observed, "[e]xemption 3 presents considerations distinct and apart from the other eight exemptions" inscribed in FOIA. *Association of Retired R.R. Workers v. U.S. R.R. Retirement Bd.,* 830 F.2d 331, 336 (D.C. Cir. 1987):

> Exemption 3 differs from other FOIA exemptions in that its applicability depends less on the detailed factual contents of specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage.

Id.

Defendants argue, and plaintiffs do not dispute, that Section 6 of the NSAA qualifies as an exemption statute under Exemption 3. The D.C. Circuit—the only circuit court to have considered this question—concurs. *See Founding Church of Scientology, Inc. v. NSA,* 610 F.2d 824, 828 (D.C. Cir. 1979); *Hayden v. NSA,* 608 F.2d 1381, 1389 (D.C. Cir. 1979). Indeed, the language of Section 6 makes quite clear [*13] that it falls within the scope of Exemption 3. Section 6 states that no "law . . . shall be construed to require the disclosure . . . of any information with respect to the activities" of the NSA. Pub. L. No. 86-36, § 6, 73 Stat. 63, 64,, *codified at* 50 U.S.C. § 402. Section 6 thus "specifically exempt[s]" certain information "from disclosure." 5 U.S.C. § 552(b)(3).

The second part of the Exemption 3 inquiry under *Sims* probes whether the withheld material satisfies the criteria of the exemption statute. Defendants contend that "[a]cknowledging the existence or nonexistence of the information requested by Plaintiffs' FOIA Request No. 1 would unquestionably reveal NSA's organization,

functions and activities by revealing the success or failure of NSA's activities." In support of this contention, they have submitted affidavits from Joseph J. Brand, Associate Director, Community Integration, Policy and Records for the NSA; J. Michael McConnell, Director of National Intelligence; and David M. Hardy, Section Chief of the Record/Information Dissemination Section, Records Management Division, Federal Bureau of Investigation.

In his affidavit, Brand avers that the TSP is a SIGINT program "that [*14] was critical to the national security of the United States." Operation of the TSP "depends upon the collection of electronic communications, which can be easily compromised if targets are made aware of NSA capabilities and priorities." Giving the Glomar Response to FOIA Request No. 1 was essential, Brand attests, because

> [a]cknowledging the existence or non-existence of those individuals or organizations subject to surveillance would provide our adversaries with critical information about the capabilities and limitations of the NSA, such as the types of communications that may be susceptible to NSA detection. Confirmation by NSA that a person's activities are not of foreign intelligence interest or that NSA is unsuccessful in collecting foreign intelligence information on their activities on a case-by-case basis would allow our adversaries to accumulate information and draw conclusions about NSA's technical capabilities, sources, and methods.

Similarly, McConnell states that "[t]o confirm or deny whether someone is a target of surveillance . . . would reveal to our adversaries that an individual may or may not be available as a secure means for communicating or,

more broadly, the methods [*15] being used to conduct surveillance." The disclosure of such information would run afoul of Section 6 of the NSAA, Brand contends, because it "would reveal the sources of intelligence . . . and would tend to reveal the methods by which such intelligence is collected . . . ." Further, "confirmation or denial of this information would reveal the limitations of NSA SIGINT capabilities." Even the disclosure of "what appears to be the most innocuous information about the TSP" poses a threat to national security, McConnell avers, because it might permit our adversaries "to piece together sensitive information about how the Program operated, the capabilities, scope and effectiveness of the Program and our current capability, which would be utilized by the enemy to allow them to plan their terrorist activities more securely."

These affidavits demonstrate that the documents sought in FOIA Request No. 1 relate to "the organization or any function of the National Security Agency" and seek "information with respect to the activities thereof," Pub. L. No. 86-36, § 6, 73 Stat. 63, 64,, *codified at* 50 U.S.C. § 402, all of which are exempted from disclosure by Section 6 of the NSAA. The affidavits aver [*16] that the TSP is a SIGINT program, and "signals intelligence is one of [NSA's] primary functions"; the release of the SIGINT information would "disclose information with respect to [NSA] activities, since any information about an intercepted communication concerns an NSA activity." *Hayden,* 608 F.2d at 1389. Moreover, the affidavits explain in "detailed, nonconclusory" fashion, *Wood v. FBI,* 432 F.3d 78, 85 (2d Cir. 2005), why the Glomar Response is appropriate. The affidavits thus "giv[e] reasonably detailed explanations why any withheld documents fall within an exemption," and are therefore "sufficient to sustain the agency's burden." *Carney,* 19 F.3d at 812.

Plaintiffs do not challenge the legal basis for defendants' Glomar Response, nor do they challenge the sufficiency—either in form or substance—of defendants' affidavits in support of their reliance on FOIA Exemption 3 and Section 6 of the NSAA. Instead, plaintiffs challenge defendants' refusal to produce the requested information primarily by arguing that the TSP is illegal, violating both the United States Constitution[3] and FISA, and that FOIA exemptions cannot be invoked to facilitate the concealment of unlawful activity. [*17] The Court need not address plaintiffs' substantive arguments concerning the TSP's legality, however, because the language of FOIA Exemption 3 and Section 6 of the NSAA makes clear that the defendants permissibly refused to disclose the information requested by plaintiffs.

FOIA Exemption 3 states without exception that the disclosure requirements of FOIA do not apply to information "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3). Section 6 of the NSAA, in turn, requires the non-disclosure of information concerning "the organization or any function of the National Security Agency" or "information with respect to the activities [*18] thereof." As the D.C. Circuit has observed, this language is "unequivocal[]," *Linder v. Nat'l Sec. Agency,* 94 F.3d 693, 696 (D.C. Cir. 1996). Plaintiffs' assertion that the TSP is illegal proves an insufficient retort to these clear statutory directives. *See People for the*

[3] Specifically, plaintiffs claim that the TSP—or, more specifically, the Government's possible surveillance of their communication with their clients and the Government's refusal to confirm that plaintiffs are not being surveilled—violates their First Amendment right and duty to raise all reasonable arguments on their clients' behalf, their clients' Fifth Amendment due process right to a meaningful opportunity to present a complete defense, and plaintiffs' own Fifth Amendment liberty right to pursue their chosen occupation as attorneys.

Am. Way v. Nat'l Sec. Agency, 462 F. Supp. 2d 21, 31 (D.D.C. 2006).

Plaintiffs' argument rests primarily on dicta in the D.C. Circuit's decision in *Hayden v. CIA* and a handful of district court cases, none of which actually endorsed plaintiffs' theory.[4] In *Hayden*, the D.C. Circuit considered a FOIA request for foreign intelligence reports concerning the plaintiffs. Plaintiffs did not allege that the reports derived from any unlawful activity. The court nonetheless opined that, "[c]ertainly where the function or activity is authorized by statute *and not otherwise unlawful*, NSA materials integrally related to that function or activity fall within [the predecessor statute to Section 6 of the NSAA] and Exemption 3." *Hayden*, 608 F.2d at 1389 (emphasis added). Plaintiffs attempt to cast this line of dicta as a prohibition on using FOIA to avoid disclosure of allegedly unlawful government activity, but it is clear that [*19] the D.C. Circuit eschewed that question in *Hayden* and did not opine on the availability

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[4] Plaintiffs also cite the D.C. Circuit's decision in *Founding Church of Scientology*. In that case, the court observed,

> Although NSA would have no protectable interest in suppressing information simply because its release might uncloak an illegal operation, it may properly withhold records gathered illegally if divulgence would reveal currently viable information channels, albeit ones that were abused in the past.

610 F.2d at 829 n.49. In this case, plaintiffs have not alleged that the NSA has refused to disclose the information requested in FOIA Request No. 1 "simply because its release might uncloak an illegal operation." Indeed, as plaintiffs themselves [*20] argue, members of President Bush's administration have publicly acknowledged the existence of the TSP. Further, defendants' detailed affidavits describe the ways in which disclosing the information sought by plaintiffs would compromise ongoing SIGINT activities, and plaintiffs have not challenged defendants' assertions.

of FOIA amidst allegations of illegality. Indeed, the D.C. Circuit held that "all that is necessary" for the NSA to successfully resist disclosure under Exemption 3 is to explain how the requested documents "would reveal information integrally related to . . . NSA activity." *Id.* at 233. Given the clear language of the statutes at issue, plaintiffs' creative interpretation of the D.C. Circuit's dicta in *Hayden* is insufficient to vindicate their position.

Further, as plaintiffs correctly observe, a number of district courts confronting requests for information concerning President Bush's war on terror have expressed concern that the Government might refuse to disclose requested information in order to conceal unlawful activity. Indeed, some have cited the *Hayden* dicta to underscore their point. *See, e.g., People for the Am. Way,* 462 F. Supp. 2d at 33; *Terkel v. AT&T Corp.,* 441 F. Supp. 2d 899, 905 (N.D. Ill. 2006). Nonetheless, none of these courts has resolved the question in plaintiffs' favor. In *Terkel,* plaintiffs sued AT&T under the Electronic Communications Privacy Act, 18 U.S.C. § 2702(a)(3), alleging that AT&T had released records of its customers telephone calls to the NSA and seeking production of those records in discovery. The NSA intervened and moved to dismiss, arguing that the plaintiffs' allegations implicated [*21] matters vital to national security and therefore that production of AT&T's records would violate Section 6 of the NSAA. The district court explicitly refused to "definitively determine the thorny issue of the proper scope of section 6" because the Government provided an alternative, independent basis for withholding the records requested by the plaintiff. *Terkel,* 441 F. Supp. 2d at 905. In *ACLU v. Dep't of Defense,* 389 F. Supp. 2d 547 (S.D.N.Y. 2005), the district court considered plaintiff's FOIA request for documents concerning the Government's treatment of detainees at Guantanamo Bay. The Government gave the Glomar Response with

respect to plaintiff's request for information concerning interrogation techniques being used on the detainees. The court expressed "concern . . . that the purpose of the CIA's Glomar responses is less to protect intelligence activities, sources or methods than to conceal possible violations of law in the treatment of prisoners, or inefficiency or embarrassment of the CIA." *Id.* at 564-65 (citation omitted). Nonetheless, observing the "small scope for judicial evaluation in this area," *id.* at 565, the court accepted the Government's Glomar Response under [*22] FOIA Exemption 3. Finally, in *People for the American Way,* the district court considered plaintiff's FOIA request for information concerning the TSP and the Government's Glomar Response. In the most cogent rebuke to the position advanced by plaintiffs here, the Honorable Ellen Segal Huvelle explicitly recognized the *Hayden* dicta as such, and wrote that the "potential illegality [of the TSP] cannot be used in this case to evade the unequivocal language of Section 6 [of the NSAA], which prohibits the disclosure of information relating to the NSA's functions and activities." *People for the Am. Way,* 462 F. Supp. 2d at 31 (citation omitted).[5]

Plaintiffs also argue that the Glomar Response is an inappropriate reply to FOIA Request No. 1 because

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[5] Plaintiffs also cite an earlier case, *Navasky v. CIA,* 499 F. Supp. 269 (S.D.N.Y. 1980), which was unrelated to the war on terror. In that case, plaintiffs sought records related to the CIA's "clandestine book publishing activities." *Id.* at 271. The CIA claimed such records were exempt from disclosure under FOIA Exemption 3. Plaintiffs argued that because such activities were "ultra vires the CIA charter," *id.* at 273, and therefore illegal, the CIA could not invoke the FOIA exemption. After reviewing the language of FOIA and a handful of D.C. Circuit [*23] cases concerning allegations of illegal government activity, the district court drew "[t]he inference . . . that illegality is not a bar to an otherwise valid justification under exemption 3," *id.,* and ruled in the CIA's favor. This case plainly does not support plaintiffs' position.

high-ranking officials have publicly disclosed certain aspects of the TSP. Through these disclosures, plaintiffs contend, defendants waived their right to assert the Glomar Response. For the purposes of this motion, defendants do not appear to dispute that officials in the presidential administration have publicly acknowledged the existence of the TSP, as well as certain details about the program. But, as they rightly argue, "the Glomar response in this case has been exceedingly narrow and covers only confirming or denying whether particular individuals were targeted by or otherwise subject to surveillance under the TSP." Defendants' affidavits sufficiently explain why disclosure of this additional information would violate Section 6 of the NSAA. The law is clear that limited voluntary disclosures by the [*24] Government do not necessarily require further disclosures sought through FOIA requests where those disclosures fall within a FOIA exemption. *See Salisbury v. United States,* 690 F.2d 966, 971 (D.C. Cir. 1982).[6]

Finally, plaintiffs emphasize the "narrowness of the question before the Court." They contend that, because the Government has disclosed much information about the TSP, "[t]he *only* additional information sought by the plaintiffs is whether the government has illegally intercepted *their* communications." This argument is misguided for two reasons. First, as defendants' unchallenged affidavits demonstrate, confirming or denying whether plaintiffs' communication with their clients has been intercepted would reveal information about the NSA's capabilities and activities, in contravention of Section 6 of the NSAA. Second, the identity of the person

[6] Plaintiffs' reliance on the Ninth Circuit's decision in *Al-Haramain Islamic Foundation, Inc. v. Bush,* 507 F.3d 1190 (9th Cir. 2007), is misplaced. That case did not concern FOIA, but rather the state secrets doctrine, which has its own substantive standards that differ from those under FOIA.

making a FOIA request is irrelevant to the FOIA [*25] inquiry, and the agency must not consider the requester's identity. See Dep't of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 771 (1989); NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975). If, as a matter of law, defendants are required to respond to plaintiffs' FOIA requests, they must do so no matter who is requesting the information. This might allow potential malfeasants to access sensitive information. Moreover, according to Brand, the accretion of progressively disclosed information "would disclose the targets and capabilities (sources and methods) of the TSP and inform our adversaries of the degree to which NSA is aware of some of their operative or can successfully exploit particular communications."

CONCLUSION

Defendants' March 18 motion for partial summary judgment is granted.

SO ORDERED:

Dated: New York, New York June 25, 2008

/s/ Denise Cote

DENISE COTE

United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

No. 07 Civ. 3883 (DLC)

THOMAS WILNER, et al.,
Plaintiffs,

v.

NATIONAL SECURITY AGENCY, et al.,
Defendants.

July 31, 2008

Appearances:

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For Defendants:

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MEMORANDUM OPINION & ORDER

DENISE COTE, District Judge:

Plaintiffs filed their complaint in this case on May 17; 2007, alleging that defendants wrongfully withheld documents sought by plaintiffs under the Freedom of Information Act ("FOIA"). The action was bifurcated. The first track concerned only plaintiffs' FOIA Request No. 1 and the Glomar response issued by defendants. The second track concerned plaintiffs' other FOIA requests and defendants' non-Glomar responses to them. By Opinion and Order dated June 25, 2008, defendants' motion for partial summary judgment was granted. That Opinion addressed plaintiffs' FOIA Request No. 1 and defendants' Glomar response. The parties have agreed to suspend temporarily their prosecution of the non-Glomar

part of this litigation, pending decisions by other courts on related motions.

By motion dated July 30, 2008, plaintiffs seek entry of a final judgment as to this action's Glomar track, pursuant to Federal Rule of Civil Procedure 54(b). Plaintiffs represent that defendants do not oppose the motion. Under Rule 54(b), "a district court may certify a final judgment where: (1) there are *multiple claims or parties; (2) at least one claim or the rights* and liabilities of at least one party has been determined; and (3) there is an express determination that there is no just reason for delay." Transp. Workers Union, Local 100 v. N.Y. City Transit Auth., 505 F.3d 226, 230 (2d Cir. 2007). A partial judgment should not be entered without careful consideration of the strong federal policy against piecemeal appeals. The power to make a Rule 54(b) certification "should be used only in the infrequent harsh case where there exists some danger of hardship or injustice through delay which would be alleviated by immediate appeal." Grand River Enters. Six Nations, Ltd. v. Pryor, 425 F.3d 158, 165 (2d Cir. 2005) (citation omitted). The power is to "be exercised sparingly." O'Bert ex. rel. O'Bert v. Vargo, 331 F.3d 29, 41 (2d Cir. 2003).

There are claims based on two FOIA requests in this case; the response to one request implicates the Glomar response, the other response does not. The issues arising from the Glomar response were determined by the June 25, 2008 Opinion granting defendants' motion for summary judgment on the Glomar response. Thus, the rights of the parties as to one of the two FOIA requests have been finally determined.

The Court expressly finds that there is no just reason for delay. The action [*4] is bifurcated and the non-Glomar track is in suspense for the time being. When that portion of the *litigation resumes it will not require*

further adjudication of a Glomar response. There is no good reason to delay resolution of the questions presented by the Glomar track. This action concerns timely issues of great importance to the public, which would benefit from expeditious resolution by the Court of Appeals. Further, defendants have interposed no objection to plaintiffs' request for Rule 54(b) certification.

CONCLUSION

Plaintiffs' July 29 unopposed motion for Rule 54(b) certification is granted. The Clerk of Court shall enter partial judgment in defendants' favor on the claims associated with FOIA Request No. 1.

SO ORDERED:

Dated: New York, New York

July 31, 2008

/s/ Denise Cote

DENISE COTE

United States District Judge

APPENDIX D

1) The Freedom of Information Act, 5 U.S.C. § 552(b), provides in pertinent part as follows:

(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;

(2) related solely to the internal personnel rules and practices of an agency;

(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 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 [enacted Oct. 28, 2009], specifically cites to this paragraph.

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforce-

ment proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological or geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the

deletion is made, shall be indicated at the place in the record where such deletion is made.

2) Section 6 of the National Security Agency Act of 1959, P.L. 86-36 (May 29, 1959) provides in pertinent part:

Sec. 6. (a) Except as provided in subsection (b) of this section, nothing in this Act or any other law (including, but not limited to, the first section and section 2 of the Act of August 28, 1935 (5 U.S.C. 654)) shall be construed to require the disclosure of the organization or any function of the National Security Agency, of any information with respect to the activities thereof, or of the names, titles, salaries, or number of the persons employed by such agency.

(b) The reporting requirements of section 1582 of title 10, United States Code, shall apply to positions established in the National Security Agency in the manner provided by section 4 of this Act.

3) 50 U.S.C. § 403-1(i) provides in pertinent part:

(i) Protection of intelligence sources and methods.
(1) The Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure.
(2) Consistent with paragraph (1), in order to maximize the dissemination of intelligence, the Director of National Intelligence shall establish and implement guidelines for the intelligence community for the following purposes:
(A) Classification of information under applicable law, Executive orders, or other Presidential directives.
(B) Access to and dissemination of intelligence, both

in final form and in the form when initially gathered.

(C) Preparation of intelligence products in such a way that source information is removed to allow for dissemination at the lowest level of classification possible or in unclassified form to the extent practicable.

(3) The Director may only delegate a duty or authority given the Director under this subsection to the Principal Deputy Director of National Intelligence.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 07-CIV-3883

THOMAS WILNER, GITANJALI GUTIERREZ, MICHAEL J. STERNHELL, JONATHAN WELLS DIXON, JOSHUA COLANGELO BRYAN, BRIAN J. NEFF, JOSEPH MARGULIES, SCOTT S. BARKER, JAMES E. DORSEY, ASMAH TAREEN, RICHARD A. GRIGG, THOMAS R. JOHNSON, GEORGE BRENT MICKUM IV, STEPHEN M. TRUITT, JONATHAN HAFETZ, TINA M. FOSTER, ALISON SCLATER, MARC D. FALKOFF, DAVID H. REMES, H. CANDACE GORMAN, CHARLES CARPENTER, JOHN A. CHANDLER and CLIVE STAFFORD SMITH,
PLAINTIFFS-APPELLANTS,

v.

NATIONAL SECURITY AGENCY and DEPARTMENT OF JUSTICE,
DEFENDANTS-APPELLEES.

Judge Denise L. Cote

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to compel the

production of agency records improperly withheld from plaintiffs by defendants National Security Agency ("NSA") and Department of Justice ("DOJ").

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B).

Parties

3. Plaintiffs are lawyers who provide or have provided legal representation to individuals detained at Guantánamo Bay Naval Station, Cuba (hereinafter referred to as "detainees"). Thomas Wilner is an attorney at Shearman & Sterling LLP, an international law firm based in New York. Jonathan Hafetz is a New York resident and an attorney at the Brennan Center for Justice at New York University School of Law. Gitanjali Gutierrez is a New York resident and an attorney at the Center for Constitutional Rights, a New York-based non-profit legal organization. Michael J. Sternhell is a New York resident and an attorney at Kramer Levin Naftalis & Frankel LLP in New York. Jonathan Wells Dixon is a New York resident and an attorney at the Center for Constitutional Rights; at the time of the FOIA request, Plaintiff Dixon was an attorney at Kramer Levin Naftalis & Frankel LLP. Joshua Colangelo-Bryan is a New York resident and an attorney at the New York office of Dorsey & Whitney LLP, an international law firm. Tina M. Foster is a New York resident and an attorney at the International Justice Network, a non-profit legal organization; at the time of the FOIA request, Plaintiff Foster was an attorney at the Center for Constitutional Rights. Brian J. Neff is an attorney in the New York office of Schiff Hardin LLP. Alison Sclater is a New York resident and an attorney and the New York Program Coordinator for Pro Bono Net, Inc.; at the time of the FOIA

request, Plaintiff Sclater was an attorney at Kramer Levin Naftalis & Frankel LLP. Marc D. Falkoff is an attorney and assistant professor at Northern Illinois University College of Law; at the time of the FOIA request, he was an attorney at the New York office of Covington & Burling LLP, an international law firm. Joseph Margulies is an attorney employed by the MacArthur Justice Center at the Northwestern University School of Law. Scott S. Barker and Anne J. Castle are attorneys in the Denver office of Holland & Hart LLP. James E. Dorsey and Asmah Tareen are attorneys in the Minneapolis office of Fredrikson & Byron P.A., an international law firm. Richard A. Grigg is an attorney at Spivey & Grigg LLP in Austin, Texas. Thomas R. Johnson is an attorney in the Portland, Oregon office of Perkins Coie LLP, an international law firm. George Brent Mickum IV is an attorney at Spriggs & Hollingsworth LLP in Washington, D.C.; at the time of the FOIA request, Plaintiff Mickum was an attorney with the Washington, D.C. office of Keller & Heckman LLP, an international law firm. Stephen M. Truitt is an attorney engaged in private practice in Washington, D.C. David H. Remes is an attorney with the Washington, D.C. office of Covington and Burling LLP, an international law firm. H. Candace Gorman is an attorney engaged in private practice in Chicago, Illinois. Charles Carpenter is an attorney in the Washington, D.C. office of Pepper Hamilton LLP. John A. Chandler is an attorney with the Atlanta, Georgia office of Sutherland, Asbill and Brennan LLP. Clive Stafford Smith is a dual U.S. and British citizen and an attorney and the Legal Director for the U.K. branch of Reprieve, a non-profit legal organization.

4. Defendants NSA and DOJ are federal agencies within the meaning of 5 U.S.C. § 552(f) and have possession of the records requested by plaintiffs.

Statement of Facts

5. In the wake of the September 11, 2001 terrorist attacks, the U.S. Government began warrantless eavesdropping on the electronic communications, including telephone and email, of thousands of individuals, including U.S. citizens, both within and outside the United States. The program collects identifying information about the communicants and the contents of those communications through recording and/or transcripts of phone calls and/or the text of email correspondence.

6. The U.S. Government's warrantless eavesdropping became public knowledge through media reports in December 2005, and subsequent U.S. Government acknowledgement. President Bush and Attorney General Gonzales have stated that the program is intended to intercept and monitor communications between a party outside the United States and a party inside the United States when one of the parties to the communication is believed to have links to Al Qaeda, groups supportive of al Qaeda, or to terrorist activity generally.

7. Plaintiffs represent men detained at the U.S. Naval base in Guantánamo Bay, Cuba as part of the "war on terror." Upon information and belief, plaintiffs' electronic and/or telephonic communications have been monitored by defendant agencies and records of those communications have been compiled and retained by the defendant agencies because of plaintiffs' representation of detainees and plaintiffs' international communications with clients, released detainees, family members of detainees and/or organizations, business and individuals affiliated with detainees outside of the United States.

8. By separate letters to NSA and DOJ dated January 18, 2006, plaintiffs submitted FOIA requests for, among other records:

> FOIA Request No. 1:
> A list of records obtained or relating to ongoing or completed warrantless electronic surveillance or physical searches regarding, referencing or concerning any of the plaintiffs; and
>
> FOIA Request No. 3:
> All policies, procedures, guidelines or practices for the interception of communications pursuant to the previously described warrantless surveillance program.

National Security Agency Request

9. By facsimile received on April 21, 2006, the NSA produced only two "Director's Message" documents that had been publicly released and referred one document to an unidentified agency for processing. The NSA refused to produce any other documents.

10. By letter dated May 1, 2006, plaintiffs filed an administrative appeal with the NSA challenging its refusal to disclose the records the plaintiffs requested.

11. By letter dated August 31, 2006, the NSA denied plaintiffs' appeal.

Department of Justice Request

12. By letter dated October 16, 2006, the DOJ Office of Information and Privacy released 85 pages of

documents without excision and two documents with excisions, and stated it was withholding 84 pages and an electronic email in full.

13. By letter dated December 14, 2006, plaintiffs filed an administrative appeal with the DOJ Office of Information and Privacy challenging its refusal to disclose the records the plaintiffs requested.

14. By letter dated November 16, 2006, the DOJ Criminal Division stated it had no records reflecting warrantless electronic surveillance or physical searches in the United States from September 11, 2001, to the date of the plaintiffs' FOIA request.

15. By letter dated January 13, 2007, plaintiffs filed an administrative appeal challenging the DOJ Criminal Division's denial of records.

16. By separate letters dated February 5, 2007, the DOJ denied both of plaintiffs' appeals.

Claims for Relief

17. To date, neither the NSA nor the DOJ have provided the plaintiffs with all of the records they requested.

18. Plaintiffs have a statutory right to the records that they seek, and there is no legal basis for the defendants' refusal to disclose them.

WHEREFORE, plaintiffs respectfully request this Court to:

(1) Declare that defendants' refusal to disclose the records requested by plaintiffs is unlawful;

(2) Order defendants to make the requested records described in Paragraph 8 above available to plaintiffs without further delay;

(3) Award plaintiffs their costs and reasonable attorneys' fees in this action as provided by 5 U.S.C. § 552(a)(4)(E); and

(4) Grant such other and further relief as this Court may deem just and proper.

Respectfully submitted,

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Dated: June 28, 2007 *Attorneys for Plaintiffs*

APPENDIX F

1. DECLARATION OF GITANJALI S GUTIERREZ

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 07-CIV-3883 (DLC)
THOMAS WILNER, ET AL., PETITIONERS
v.
NATIONAL SECURITY AGENCY AND
DEPARTMENT OF JUSTICE.

DECLARATION OF GITANJALI S. GUTIERREZ

I, Gitanjali S. Gutierrez, declare as follows:

1. I am a citizen of the United States and an attorney at the Center for Constitutional Rights (CCR), 666 Broadway, New York, NY, 10012. Upon graduating magna cum laude from Cornell Law School, I clerked for the Honorable Guido Calabresi of the United States Court of Appeals for the Second Circuit and then taught international human rights law at Cornell University Law School. I have been engaged in constitutional, human rights and civil rights practice since 2003, first in my capacity as a Gibbons Fellow in Public Interest and Constitutional Law and now as an attorney at CCR.

2. CCR was founded in 1966 by civil rights attorneys, and has grown as a reputable nonprofit legal and educational organization that works to protect people's constitutional and human rights. Over the last four decades, CCR has been involved in virtually every popular social

movement in the United States, and has brought over one hundred major human rights and civil liberties cases into United States courts.

3. Over the years, CCR has been recognized for its progressive use of law. It has received honorary awards from the City University of New York Public Interest Law Association (1999), the New York University Public Interest Law Foundation (1996 and 2004), the National Lawyers Guild (1999), the International Law Section of the District of Colombia Bar (2004), the Benjamin N. Cardozo School of Law (2004) and the City University of New York University School of Law (2007).

4. Since 9/11, CCR has been at the forefront of work to defend victims of abuses committed in the name of the "war on terror." For these efforts CCR has received various honors and awards. CCR received the *Lennon Ono Grant For Peace* in 2006, particularly for its 2004 Supreme Court victory in *Rasul v. Bush*, which established that detainees held at Guantánamo Bay were entitled to the right of habeas corpus. In 2006, CCR was awarded the *Raphael Lemkin Human Rights Award* by the Rabbis for Human Rights, as well as Global Exchange's *Domestic Human Rights Award* in recognition of CCR's central position in the movement to hold the United States government legally accountable for torture and human rights violations post-9/11 in Guantánamo and elsewhere. Also in 2006, the Institute for Policy Studies awarded CCR with the *Letelier-Moffitt Human Rights Award*, honoring CCR for our work in *Arar v. Ashcroft,* in which CCR demanded justice for a victim of the U.S. policy known as "extraordinary rendition." In 2007, the Southern Center for Human Rights presented CCR with the *Frederick Douglass*

Human Rights Award, for CCR's outstanding contribution to human rights.

5. CCR serves as co-counsel in habeas or Detainee Treatment Act (DTA) petitions on behalf of several hundred men who are detained or who have been detained at Guantanamo.

6. I am listed as counsel for many of these cases. I have been directly involved with client meetings for over forty men from over ten different countries. In addition, I have assisted with obtaining next friend authorizations and with maintaining family communications with foreign citizens in numerous additional cases.

7. After the United States Supreme Court's decision in *Rasul v. Bush*, in June 2004, I was the first habeas attorney to conduct an attorney client meeting at Guantanamo. I have been involved with the direct representation of Guantanamo detainees beginning in July 2004 when I filed a habeas petition on behalf of U.K. citizens Feroz Abassi and Moazzam Begg.

8. I continue to represent citizens from Saudi Arabia, Libya, Pakistan, Qatar, Syria, and Somalia currently detained at Guantanamo in their habeas and/or DTA petitions in the United States District Court for the District of Columbia, the United States Court of Appeals for the District of Columbia and the United States Supreme Court. My colleagues and I also represent one of the seventeen men who were transferred to Guantanamo from CIA secret detention, Majid Khan, who is a Baltimore area resident, U.S. asylum-holder and citizen of Pakistan.

9. I have made over twenty trips to Guantanamo for client meetings, with each trip lasting an average of two weeks.

10. On January 18, 2006, I filed a Freedom of Information Act (FOIA) request with the National Security Agency (NSA) and the Department of Justice (DOJ), seeking information regarding the NSA warrantless surveillance program, including whether, and to what extent, the federal government is engaged in warrantless electronic surveillance of communications involving me or my law office, CCR. Alongside 23 other attorneys who represent current or former Guantánamo detainees, I am now a Plaintiff in *Wilner et al. v. NSA et al.*

11. Despite the detailed information that I provided in my FOIA request concerning the obstacles to my representation created by the NSA's potential monitoring of my communications, the NSA and DOJ provided a "Glomar" response and refuse to confirm or deny whether they have records related to whether the NSA is monitoring my electronic communications.

12. Under the President's warrantless surveillance program, the Executive asserts that the federal government may target for surveillance not only suspected terrorists but also any person in the United States communicating with any person outside the United States if the government believes that one party to the communication is affiliated with a terrorist organization. I understand that, under this program, government agencies have been engaged in, and may in the future engage in, surveillance through listening to telephone calls, reading e-mails and faxes, and otherwise monitoring and recording electronic communications.

13. While I understood that the federal government was engaged in the surveillance of some international communications prior to the initiation of the warrantless surveillance program, I also knew that there were important limitations to the extent of that communication that I believe would have likely prevented the government from monitoring my communications. Safeguards — including judicial review and judicially–supervised minimization requirements preventing the monitoring and recording of privileged communications — protected against the interception of privileged attorney client communications in surveillance governed by the Foreign Intelligence Surveillance Act (FISA).

14. It is my understanding that similar restrictions do not, have not and will not govern the surveillance of my international communications with clients, family members, and other litigation participants in the course of my litigation under the warrantless surveillance program. Indeed, the Executive has made official assertions that attorney-client communications are not categorically excluded from the scope of the program. See *Responses to Joint Questions from House Judiciary Committee Minority Members* (Mar. 24, 2006) at 15, ¶45, *available at* http://judiciary.house.gov/media/pdfs/responses032406.pdf. As an attorney, I find this shocking.

15. After learning that the NSA was engaged in monitoring of international communications involving U.S. citizens and reviewing the official description of the program's targets, I became concerned about the possibility of the NSA monitoring or having monitored my communications without a warrant because of my communications with my clients' families and potential foreign witnesses, experts or sources.

16. I believe that, based on the description of the program and the untried assertions that U.S. officials have made about my clients, there is a great likelihood that some of my communications for the purpose of litigation may have been, or may in the future be, monitored without judicial review. High-ranking officials in the U.S. government have repeatedly asserted that the men imprisoned at Guantánamo are "enemy combatants" or "terrorists." Government officials have insisted publicly that many detained there are affiliated with Al Qaeda, or organizations affiliated with Al Qaeda. Though only a very small minority has been charged, and little evidence has been released to substantiate these assertions, the U.S. government has alleged that the majority of the men detained at Guantánamo in 2004 were affiliated with Al Qaeda and/or the Taliban. Mark Denbeaux & Joshua Denbeaux, *Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data*, Seton Hall Public Law Research Paper No. 46, February 2006.

17. More specifically, the President and various Department of Defense personnel have made official statements to the media claiming that some of my clients are affiliated with or supportive of al Qaeda, despite the fact that none of my clients at Guantanamo has been tried by the United States for any crime.

18. I have reason to believe that, on the basis of my representation of individuals such as British citizen Feroz Abassi, Uzbek citizen Zakirjan Hassam, Saudi citizen Mohammed al Qahtani, Pakistani citizen – and former CIA "ghost" detainee – Majid Khan, Libyan citizen Abdul Ra'ouf Ammar Mohammad Abu Al Qassim, and other Guantanamo detainees, the NSA may have targeted me

for surveillance and engaged in warrantless surveillance of my electronic communications.

19. Since July 2004, I have been engaged in confidential and privileged international communications with my clients' families and other individuals related to their cases. I continue to engage in international communications for my current clients detained in Guantanamo.

20. Because my clients' families and other investigative sources and experts are in countries halfway across the globe, I engage in a variety of international communications at all hours, throughout the day or weekend. As a result, in the course of my representation of men currently or formerly detained in Guantanamo, I communicate internationally via my work and personal emails (including using my Blackberry and home and work laptop computers), work phone, home landline, personal cell phone, including for text messages, and CCR fax machine.

21. I communicate with foreign national clients (primarily family-member next friends in the habeas or Detainee Treatment Act (DTA) petitions); foreign experts or investigators; foreign co-counsel; and foreign witnesses and potential witnesses or other sources of litigation information. Since July 2004, I have had regular international communications on at least a weekly basis with these litigation participants primarily from the United Kingdom, Saudi Arabia, Pakistan, Switzerland, Yemen and Afghanistan. I have also on occasion engaged in international telephonic or email communications with litigation participants in Kuwait, Qatar and Albania.

22. It is critical for me to communicate with foreign nationals in various countries for the purposes of my litiga-

tion in order to adequately and vigorously represent my clients. I rely upon these communications to discuss the development of the cases, pursue investigative leads, develop case strategies, learn information that may be of assistance to my client, and keep clients apprised of the legal strategy and case developments, among other things. The confidentiality of this communication is important in order to effectively represent my clients, and to gain the trust of those with whom I communicate. My clients and clients' families in politically-repressive foreign countries often have a deep-seeded fear of government entities. I must be able to ensure them that the United States will not use their communications with me, as their attorney, against them or their detained relative. Absent this assurance, it is extremely difficult to persuade them to disclose fully critical information.

23. The delay in communication when I am forced to rely on postal mail or in-person meetings can sometimes be damaging to the litigation. There are other practical limitations to effective representation when I am forced to rely on other forms of communication aside from telephonic and email communication, including the inability to communicate simultaneously with multiple people in different locations. It is also significantly more expensive – sometimes prohibitively so – to engage in international communications without resort to phone or email because of the cost of courier service and airfare to Pakistan, Yemen, Albania or other countries in the Middle East. The Saudi government has also repeatedly denied our request for a visa to travel to Saudi Arabia to meet with a client's family and conduct an investigation. In that case, for example, we must rely exclusively upon international communications to develop our Saudi client's case.

24. More specifically, for almost a year, we were unable to obtain critical factual information about Majid Khan's detention from his brother in Pakistan – who had first-hand knowledge of Majid Khan's kidnapping and initial detention – because we could not assure ourselves or our client's family of confidential telephonic or email communications. Ultimately, I had to travel to Pakistan in 2007 to conduct a full witness interview.

25. In addition, for several clients' families, including Mr. Khan's family, I have only been able to conduct limited interviews via telephone because of my concern that I could not guarantee the potential witnesses confidential communications. I was required to withhold sensitive questions and send these inquiries via written mail and wait weeks for the responses. This process precluded my ability to ask clarifying or follow-up questions in a timely manner and was extremely burdensome. This resulted in delays for filings as we waited for the information to arrive via mail.

26. I also had to explain to my clients the risk that our telephonic or email communications might be monitored by the U.S. government. These conversations undermined my ability to investigate my clients' cases and work with litigation participants in foreign countries.

27. In the case of another client, Mr. Mohammed al Qahtani, we are only able to communicate with his family via telephonic or written communications because the Saudi government has refused to grant CCR attorneys visas. It took several months for us to arrange for his family in several different Saudi cities to use CCR's account with an international courier as a means of providing us with confidential information in writing. In addition to the delay while we made these arrangements, this

form of communication is slow and burdensome. We are unable to engage in the back and forth conversation critical to developing factual information.

28. The NSA's possible warrantless surveillance of my communications would not only interfere with my representation of Guantanamo detainees, but also such surveillance would compromise the privacy interests of all of my clients. This would also violate the privacy interests of potential witnesses and others with whom I need to communicate as part of my practice. Needless to say, warrantless surveillance of my telephone calls, emails, faxes, and text messages would also violate my privacy during personal communications.

29. NSA surveillance of my faxes would also violate the privacy interests of all attorneys in my office and those with whom they communicate. I note that at CCR, we have one fax line that serves the entire office. Any surveillance of this machine would necessarily include surveillance of all CCR staff's international fax communications. As a human rights organization, the majority of our staff – from development personnel to litigators to communications staff – engage in communications that may include international facsimiles.

30. My business communications are solely for the furtherance of my legitimate representation of my clients, which includes upholding the Constitution of the United States. I have never been charged with criminal activity or sanctioned for professional misconduct.

31. Since the initial detention of my clients in Guantanamo, the government has imposed numerous barriers to my effective and vigorous representation of them. This regular interference makes it clear to me that moni-

toring the attorney-client communication in connection with this litigation would be consistent with the government's past policies and practices.

32. The U.S. government has interfered with Guantánamo representation in various ways since the litigation began. Although the protective order entered by the district court required the government not to unreasonably interfere with attorney access to clients, the government has routinely attempted to intimidate detainees and persuade them not to work with lawyers. In multiple instances, military personnel have told detainees they should not work with their lawyers because the lawyers were Jewish or homosexual.

33. Early on in the representation, the government invoked national security concerns in an unsuccessful attempt to justify conducting real-time monitoring of attorney-client meetings at Guantanamo.

34. Detainees have routinely been told they are being taken to interrogations when in fact they are being moved for attorney visits; the detainee's resistance to being moved is then conveyed to his lawyer as a refusal of the legal visit.

35. Detainees have been held in solitary confinement for up to 11 days prior to a legal visit in Camp Echo (where many attorney-client visits took place); one detainee reported that he was told the stay in isolation was "the lawyer's fault" and could have been avoided had no legal visit been scheduled.

36. The government has frequently challenged next-friend authorizations by prisoners, in one case delaying for many months a visit with a detainee who had been

cleared for release, and in another case delaying visit approval for eight months, shortly after which the detainee (who had also been cleared for release) died.

37. The government's refusal to allow attorneys to communicate with detainees directly to offer them representation (without the intervention of next friends) has required attorneys to engage in international communications subject to surveillance under the NSA program or to undertake burdensome travel to the detainees' home countries. Twice attorneys have been detained by home country security police during such travel.

38. Communications with detainees have also been interfered with. Written materials that attorneys wish to (and are entitled to) bring into client meetings are routinely read by military officials, going well beyond the rules allowing security personnel to rifle through them for contraband. On some occasions, soon after a legal visit, the military has interrogated detainees about the precise issues that were the subject of privileged conversations with their lawyers, leading us to suspect that our client visits themselves were somehow monitored.

39. Like all counsel who have represented clients at Guantanamo, I was required to complete a security clearance application, provide affidavits concerning the source of my funding for the representation and consent to "counsel access procedures" that the district court later found violated, in part, the detainees' right to confidential and meaningful attorney–client communications.

40. For one of my most recent clients, former CIA ghost detainee Majid Khan, we sought client access for over a year in his habeas petition. Though I began my representation of him in September 2006, it was not until Oc-

tober 2007—over one full year after our representation began—that I was able to meet Mr. Khan for the first time.

41. Even then, I was required to obtain a higher level of clearance – "Top Secret / Sensitive Compartmentalized Information" (TS/SCI) – and sign an even more restrictive Protective Order, the legality of which has not yet been litigated, in order to secure access to him. The justifications advanced by the government for this particularly restrictive access included that there needed to be added protections to prevent the disclosure of the kinds of "enhanced interrogation techniques" to which my client was subjected in CIA detention.

42. All of this is demonstrative of the government's consistently–manifested intent to subvert the attorney–client relationship in these cases.

43. I did not bring this action as a general challenge to the legality of the warrantless surveillance program, nor to obtain information concerning the sources or methods the government uses under the warrantless surveillance program. I seek only to know the extent to which my own communications, especially my communications with clients or potential witnesses, are, have been, or will in the definite future be subject to warrantless surveillance. My ability to effectively serve my clients as their attorney requires me to seek assurances that my privileged communications arc not being monitored and to provide my clients with guarantees that their communications with me and my work in furtherance of their representation are confidential.

I declare under penalty of perjury that the foregoing is true and correct.

Signed this 5th day of May 2008

GITANJALl S. GUTIERREZ (Bar No. GG0122)
Attorney
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway
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2. DECLARATION OF H. CANDACE GORMAN

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 07-CIV-3883 (DLC)
THOMAS WILNER, ET AL., PETITIONERS
v.
NATIONAL SECURITY AGENCY AND
DEPARTMENT OF JUSTICE.

DECLARATION OF H. CANDACE GORMAN

I, H. Candace Gorman, declare as follows:

1. I am the principal in the law firm of H. Candace Gorman which is located in Chicago, Illinois. I have been an attorney for twenty-five years. My firm concentrates in civil rights and human rights. I graduated from the University of Wisconsin with a BA in Philosophy in 1976 and from John Marshall Law School with a JD in January 1983. I am a natural born US citizen and a member in good standing of the bar of the State of Illinois, the United States District Court for the Northern District of Illinois, the Seventh Circuit Court of Appeals, the Circuit Court of Appeals for the District of Columbia and the United States Supreme Court (where I argued and won a unanimous decision in *Jones vs.* R.R. *Donnelley*), 541 US. 369 (2004) (changing the Statute of Limitations in § 1981 cases to four years across the country.)

2. I served on the Board of Directors and as President of the Women's Bar Association of Illinois; the Board of Di-

rectors for the Federal Bar Association in the Northern District of Illinois; the Merit Selection Panel for United States Magistrates; and the Task Force Planning Committee for the Illinois Supreme Court's Study of Gender Bias in the Courtroom. I was the Legislative Chair and Commissioner on the Chicago Commission on Women, and am a member of the National Employment Lawyers Association where I sat on the Board of Directors for the Illinois Division from approximately 1992-99. I am also a member of the American Trial Lawyers Association and the American Constitution Society. At present, I am on leave from my firm and am a Visiting Professional at the International Criminal Court at The Hague. I have lectured widely on the subject of human rights and civil rights, including about Guantanamo. I am currently representing two detainees who are being held at Guantanamo Bay. I write about the experience of representing Guantanamo prisoners for various publications both online and in print.

3. On January 18, 2006, I filed a Freedom of Information Act (FOIA) request seeking information regarding the NSA warrantless surveillance program, including whether, and to what extent, the federal government is engaged in warrantless electronic surveillance of communications involving me or my law office. I am now a Plaintiff in *Wilner et al. v. NSA et al.*

4. I currently represent two individuals being held prisoner at Guantanamo Bay, Abdul Hamid Al-Ghizzawi and Abdal Razak Ali. Mr. Al-Ghizzawi is a Libyan man who lived many years in Afghanistan, is married to an Afghani woman and has a young child. Mr. Al-Ghizzawi has been held prisoner at Guantanamo since 2002. I represent Mr. AI-Ghizzawi in a habeas petition filed in the District Court for the District of Columbia in 2005, an

aspect of that Petition is now on appeal at the Circuit Court of the District of Columbia. I also represent Mr. Al-Ghizzawi in a petition filed under the Detainee Treatment Act (DTA) in the D.C. Circuit Court of Appeals, pending since 2007. Additionally, I represent Mr. Al-Ghizzawi in an original habeas petition that has been pending in the Supreme Court since July 2007. Mr. Razak Ali, an Algerian who was visiting Pakistan in 2002, when he was taken into U.S. custody, has been held prisoner at Guantanamo since 2002. I have represented him since early 2006 in a habeas petition that was filed in the District Court of the District of Columbia in 2005 an aspect of that Petition is now on appeal in the Circuit Court of the District of Columbia. To date I have been to Guantanamo approximately thirteen times.

5. Neither of my clients has ever been charged with any crime or caught anywhere near a battlefield. In fact, Mr. Al-Ghizzawi was affirmatively found to not be an enemy combatant when the government in 2004 first conducted a cursory review of the detention of Guantanamo detainees, a procedure (called the combat status review tribunal "CSRT') that the government established in order to avoid the habeas hearings that had been ordered by the Supreme Court in *Rasul v. Bush* (U.S. 2004).[15] Extremely ill at Guantanamo, Mr. Al-Ghizzawi was subjected to a *second* (CSRT) within weeks of being found not to be an enemy combatant, so that the government could secure an enemy combatant determination and justify his unwarranted detention. Al-Ghizzawi was

[15] Lt Col. Stephen Abraham, a member of Mr. Al-Ghizzawi's first Combatant Status Review Tribunal (CSRT) panel which found him to *not* be an enemy combatant, provided an affidavit to the US. Supreme Court describing in detail the paucity of evidence against Mr. Al-Ghizzawi and the failed CSRT process.

never informed of that second CSRT until I received the documents in 2006 and informed him during one of our visits.

6. Despite never having been charged with a crime or tried, my clients – like all of the other men at Guantanamo - have been labeled "enemy combatants" and have been declared by high-ranking government officials, including Vice President Dick Cheney and former Secretary of Defense Donald Rumsfeld, to be "the worst of the worst" and affiliated with Al Qaeda or organizations affiliated with Al Qaeda.

7. As soon as I learned of the NSA surveillance program and of the government's refusal to state the extent of its surveillance of U.S. citizens, I became concerned I might be a target because of the nature of my law practice, and in particular because of my representation of my two Guantanamo clients. In response to my FOIA request, the NSA and DOJ have refused to confirm or deny whether they have records related to monitoring of my electronic communications without judicial review.

8. Because of official statements about the warrantless surveillance program, and my legal work, including the representation of two Guantanamo prisoners, I have reason to believe the NSA may have intercepted or is intercepting my communications without a warrant. I also have reason to believe that the surveillance might include my law office, home and cellular telephones. I believe I may also be a target of surveillance because I have spoken and written publicly about the gross and unfair litigation techniques and processes utilized by the government to try to maintain the upper hand in the Guantanamo litigation.

9. In my legal practice, for both domestic and international communications, my primary modes of communication are email, fax and telephone (cell and landlines). I share and have shared space with several other independent attorneys. We share a fax machine and an internet system. These other attorneys have expressed concern about our shared resources especially after it became public knowledge that the current administration has undertaken warrantless surveillance of US citizens.

10. Because of the international scope of my practice, telephonic and/ or electronic communication is preferable and necessary in relation to any other form of communication. Telephone and email allow a two way dialogue which is not possible with postal mail. Meeting face-to-face is very time consuming and prohibitively expensive to be used for all communication and postal mail is also too slow and does not allow more than two people to participate. Although I have on occasion used postal mail and courier services to try to obtain confidentiality for my communications I learned in a speech by President Bush that he believes those communications can also be intercepted without court order so I no longer rely on those communications as private either. I have visited and/or attempted to visit many of the individuals in international countries that I communicate with in order to avoid the limitations of telephonic or written communications, but travel to some of these countries is particularly difficult due to the high cost of travel and security or access situations in those countries.

11. The international communications related to my Guantanamo representation include, but are not limited to, family members of my Guantanamo clients, witnesses or potential witnesses, foreign government officials, attorneys, non-governmental organizations, translators

and investigators, media outlets, and others relevant to my practice. I also engage in international communications related to other clients and for personal matters. The countries I have communicated with include, but are not limited to, Germany, Spain, Libya, Great Britain, Afghanistan, Denmark, Pakistan, Netherlands, Switzerland, Algeria, France and Italy. The regularity of these communications varies depending on the issues at the time.

12. In my legal practice, it is an essential for me to communicate with foreign nationals in various countries in order to adequately and vigorously represent my clients and the legal issues I am pursuing. This communication is necessary in order to investigate facts, learn information that may help my clients, pursue investigative leads, develop legal strategy, keep litigation participants apprised of case developments, and engage with the foreign media. It is vital that the people I talk to understand our communications are confidential so I can gain their trust.

13. In addition to international communications related to my representation of my two Guantanamo clients, I am currently engaged in international communications for my work in the area of victim's participation and reparations with the International Criminal Court. The nature of my communications while in this position is extremely sensitive and involves several African nations. I also communicate internationally for personal matters.

14. The U.S. government has introduced numerous barriers to the effective representation of my clients at Guantanamo. Before being allowed to visit or communicate with my clients through the legal mail system, I had to obtain government security clearance - a process which took months during which time my neighbors, col-

leagues, former classmates and unknown others were contacted by the US government regarding my character and fitness. When I obtained my clearance in early 2006, the government fought to keep me from communicating or visiting with my clients by not agreeing to the entry of the requisite Protective Order allowing attorneys to travel to the military base and communicate through the legal mail system. Even after entry of the Protective Order, my clients often do not receive legal mail that I have sent them.[16]

15. I was finally allowed to visit Mr. AI-Ghizzawi in July 2006. Despite the fact that I had also obtained a court order to visit my second client, Mr. Razak Ali, during that same visit, I was prevented from seeing Mr. Ali and I was forced to obtain a second court order later that summer. During that July 2006 visit I was told by an official at the base that "judges' orders don't work here, we consider those only *advisory."* During that same first visit to the base, one of my military escorts referred in conversation to personal information about my family that I had not disclosed to him leaving me to wonder what kind of file the military had on me and who was privy to the information. Since the highly contentious hearing with the government regarding my inability to visit with Mr. Razak Ali in July 2006 despite having a court order I have been subjected to extraordinary procedures while visiting the base including, but not limited to, being separated from the other habeas counsel and individually escorted at the base, most times by a JAG

[16] For several months in the summer and fall of 2007, Mr. AI Ghizzawi received no letters from me, even though I sent more than six letters. Mr. Al-Ghizzawi sent me desperate letters wondering if I had decided not to represent him any further and begging me to help him find another attorney if indeed I was no longer representing him.

officer. I was finally allowed to visit with my second client Mr. Razak Ali in November 2006.

16. There was a definite change in my legal practice after it became clear that the US government felt free to eavesdrop on anyone it felt was a "threat," with neither a transparent process nor a court order. I remain very concerned that possible past or future surveillance of my communications in the course of representing Mr. Al-Ghizzawi and Mr. Razak Ali may interfere with my legal representation of these and other clients. NSA's possible surveillance of my communications, and its refusal to confirm or deny whether it is engaged in such surveillance, makes it impossible for me to ensure my communications with clients, potential witnesses, and others are confidential. This substantially interferes with my ability to zealously represent my clients. If it is learned that these communications are not confidential, I will never gain or retain the trust of those with whom I communicate.

17. By refusing to confirm or deny whether it has intercepted or is intercepting my communications, the NSA is interfering with my ability to represent my clients in accordance with my practice and the most basic ethical duties of the legal profession. This possible intrusion compromises the privacy interests of all of my clients - not only Guantanamo detainees. It also violates the privacy interests of potential witnesses and others with whom I communicate as part of my practice. Warrantless surveillance of my telephone calls, e-mails, faxes, and text messages also violates my own privacy during personal communications.

18. Once it became clear to me that the government may be intercepting my communications, I stopped taking on

new cases because I could no longer ensure that communications with my clients and others were confidential. I also felt like I was putting the attorneys who practiced in the same physical location as me at risk. As much as possible, I stopped discussing confidential issues on the telephone or in emails and, for a time, I tried to maintain as many communications as I could through written materials. However I could not stop all international calls and emails because such drastic measures would make my practice a nullity.

19. Several clients and attorneys, who knew I was representing Guantanamo detainees, asked me point blank if I thought our communications were confidential based on public knowledge of government surveillance. I could only answer honestly and tell those individuals that I had no idea whether or not I was being surveilled. I do not know if individuals ceased communicating with me, or limited the quantity or substance of their communications, because of fear that the federal government might be eavesdropping on our communications. There were many jokes and innuendo and there were fewer referrals.

20. I eventually decided not to renew my lease at my office. I ultimately decided to seek an appointment at the International Court because I was concerned about upholding my ethical and fiduciary duties to clients when their confidential communications might be intercepted. I was also concerned about negatively affecting other lawyers with whom I shared space.

21. I became a plaintiff in this action because I need to know as an attorney whether or not my communications with clients and others in my practice are in fact confidential. If my communications are not confidential then I

cannot practice law until I can figure out a way to make those communications confidential. It really is as simple as that.

22. I have practiced law for twenty-five years. I am from a family of attorneys and I am proud to be an attorney. The system of law that I have proudly been a part of honors those principles that include the right to communicate with our clients in a confidential manner. When I call a client or a witness or other individual related to a case on the telephone I need for them to know that they can talk to me openly and freely. When I send an email, I need to know that the email is a private communication and my work product is protected. I need to know that individuals can trust me and trust that what they say to me will go no farther than our personal exchange. I no longer have that trust; I no longer even have the ability to earn that trust. I have not stopped representing my Guantanamo clients but at the same time I could not subject unwitting individuals to the possible surveillance of the US government, so I stopped taking other cases in 2007. I sought and received my current position with the International Court to give myself some distance from what I deem to be illegal practices of the US government. I am attempting to figure out how I can honor my ethical obligations as an attorney at a time when I am uncertain about whether or not my communications are being surveilled. It is a very troubling situation.

I declare under penalty of perjury that the foregoing is true and correct.

Signed this 5th day of May 2008

H. CANDACE GORMAN
Law Office of H. Candace Gorman

3. DECLARATION OF JOHN A. CHANDLER

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 07-CIV-3883 (DLC)
THOMAS WILNER, ET AL., PETITIONERS
v.
NATIONAL SECURITY AGENCY AND
DEPARTMENT OF JUSTICE.

DECLARATION OF JOHN A. CHANDLER

John A. Chandler, a plaintiff in this lawsuit, pursuant to 28 U.S.C. § 1746, declares:

1. I am an attorney practicing as a partner with Sutherland, Asbill & Brennan, LLP in Atlanta, Georgia. I am admitted to practice in Georgia and the District of Columbia and have been licensed for 35 years. I am head of Sutherland's litigation group, where I try business cases. *Chambers* Guide to "America's Leading Lawyers for Business" says I am recommended as "'probably the best lawyer for financial disputes in Georgia.'" I have been recognized in the International Who's Who for Lawyers, a Top 100 super lawyer by *Atlanta Magazine* and have been named to *Georgia Trend* Magazine's Legal Elite since its inception. For the past two years, I have been chosen as one of the top ten lawyers in Georgia. I graduated with a B.S. from the University of Tennessee in 1966, served just short of two years in the United States Army, and graduated from Vanderbilt University Law School in 1972. I have served as Presi-

dent of the Atlanta Bar Association, the Atlanta Council of Younger Lawyers, the Atlanta Legal Aid Society, Atlanta Volunteer Lawyers Foundation, Travelers Aid of Metropolitan Atlanta, Chair of the Fulton County Ethics Board and Chair of the City of Atlanta Board of Ethics. I was a member of the Board of Governors of the State Bar of Georgia for 20 years. I am also a member of the International Association of Defense Counsel, Past President of the Bleckley American Inn of Court, a Master of the Lumpkin American Inn of Court, a member of the Board of Visitors of the University of Tennessee College of Arts and Sciences, a Trustee of the Lawyers Foundation of Georgia, a Fellow of the American Bar Foundation and a Fellow of the American College of Trial Lawyers. I am citizen and resident of the United States of America. I have never been charged with any crime (apart from traffic citations) and have never been the subject of professional discipline.

2. On January 18, 2006, I filed a Freedom of Information Act (FOIA) request with the National Security Agency (NSA) and the Department of Justice (DOJ), seeking information regarding the NSA warrantless surveillance program, including whether, and to what extent, the federal government is engaged in warrantless electronic surveillance of communications involving me or my law office. I represent six current Guantanamo detainees from Yemen and have established attorney client relationships with each of them and with their next friends in Yemen. I filed suit in the District of Columbia seeking the release from Guantanamo of the six men imprisoned there and for their next friends. I am a Plaintiff in the instant case.

3. In response to my FOIA request, the federal government has refused to say whether they have monitored

my telephones and e-mail or whether they have any records of their surveillance.

4. I agreed to be a Plaintiff in this lawsuit because of my conviction that I am subject to warrantless wiretapping by our government. The official explanation by the government for its program is to intercept communications between people in the United States and those "associated with terrorism" in foreign countries. I represent Fahmi Salem Al Assani, Suleiman Awadh Bin Aqil Al-Nahdi, Muhammed Ali Abdullah Bawazir, Zahir Omar Khamis Bin Hamdoon, Muhammad Al-Adahi, and Sharkawi Abda Al-Haag. Each of my clients is from Yemen. The first five named have entered their seventh year of illegal confinement in Guantanamo, despite the fact that two have been officially cleared for release. The sixth, Sharqwai, was kidnapped by the CIA and Pakistani intelligence services in Karachi and sent to Amman, Jordan where he was tortured for nine months, imprisoned for two years and then sent by CIA chartered aircraft to Afghanistan and then to Guantanamo. The men have been improperly found to be "enemy combatants" in Combatant Status Review Tribunals.

5. If the NSA believes my clients are terrorists, they are likely to believe that their families and friends are "associated" with terrorism. If so, my communications with my clients' families fit the description of what the NSA says it is surveilling, despite the imperative for these communications in defending my clients. The next friends and families of my clients in Guantanamo are also clients and authorized the filing of our petition for habeas corpus. I met with those clients in Yemen in September 2005. In that meeting we began to talk about the issues relevant to the defense of my clients held in Guantanamo. A first meeting, however, has inherent limita-

tions. On my return to the United States, I continued to talk on the telephone with my client-families. As they developed a degree of trust in me, I learned that the government may be listening to our calls. It was apparent to me that they too thought their calls were monitored, whether by the government of Yemen or by the government of the United States or both. In fact, on the telephone and by letter, they refused to give even the most mundane information when I asked about births, deaths, etc. I had the impression they feared personal information being used against the Guantanamo clients. I therefore concluded that I could ask no specific questions-questions of the sort that an attorney would normally ask in preparing a defense. If the government was listening to these calls, I could not ask for frank and candid information of the sort needed. It would be a terrible disservice to the families in Yemen to tell them to trust me and then have them reveal information that might be misconstrued or otherwise used against the Guantanamo clients. Because of government surveillance I also concluded that I could not talk to third party witnesses in Yemen at all. While I understand the NSA has not disavowed listening to privileged communications, I had even more concern about non-privileged communications with potential witnesses. Thus, the concern about the government listening to my conversations has interfered substantially with the representation of the men in Guantanamo.

6. My concerns about warrantless wiretapping are even broader, however. While my practice is mostly domestic, I do from time to time talk with clients overseas. The idea that the government may be listening to my privileged conversations is unsettling to me and to them. I am a member of a firm with approximately 450 lawyers and other professionals. Many communicate with their over-

seas clients regularly. Because I do not know the scope of the NSA program, I do not know whether the NSA is listening to just my calls and the other Sutherland Guantanamo lawyers or whether they are listening to the attorney client privileged calls of all Sutherland lawyers. Indeed, my partner and fellow Guantanamo lawyer Richard G. Murphy has, as one of his principal clients, an entity owned by a company domiciled in a foreign country, but heavily regulated by government. That client has the right to expect confidential communications with its lawyers in the United States, but given the limited information that has been provided about the warrantless surveillance program, and the refusal of the government to disclose whether or not our communications are being surveilled, I do not know whether we can guarantee that.

7. My understanding of the government's warrantless eavesdropping program is gained from press reports of government officials speaking about the program. The warrantless surveillance program apparently is targeted in part at any person in the United States communicating with any person outside the United States, if the government believes that one party to the communication is "a member of al Qaeda, affiliated with al Qaeda, a member of an organization affiliated with al Qaeda, or working in support of al Qaeda." Presumably, that definition would include what the government erroneously concludes about the men held in Guantanamo. Consequently, as discussed above, if the government is doing or has done what it says it has the right to do, I presume that my phone calls, faxes, e-mails and all other electronic communications are monitored illegally.

8. If am being monitored, as I believe I am, this illegal program coupled with my representation of men in Guantanamo exposes me to risks I would not otherwise

encounter. I have a regular big firm civil litigation practice. I cannot imagine the government being interested in me apart from this illegal warrantless surveillance program, and its unsubstantiated assertions about my Guantanamo clients. When I was in the Army, I received a Secret security clearance and have been investigated by the FBI and received the necessary security clearances to view classified information in connection with Guantanamo. To gain a security clearance to meet with my clients in Guantanamo, I completed an application, including fingerprints, required by the Department of Defense revealing all information that interested them. I was visited by the FBI as were several of my neighbors and colleagues. The FBI asked for a copy of my "file" at my law firm and presumably saw whatever they wanted.

9. I understand that there have been official assertions that attorney client communications are not categorically excluded from the scope of the program. By surveilling my communications, the NSA would violate both the attorney client privilege of my clients as well as the protections afforded my work product.

10. I or other lawyers working with me write, call and e-mail our clients' families in Yemen thirty or more times a year. We must communicate by mail, e-mail and telephone because trips to Yemen are inordinately time consuming and expensive. I have been to Guantanamo more than twelve times to visit with my clients.

11. The NSA's refusal to confirm or deny whether it has engaged in surveillance of my communications infringes on my ability to function as a zealous advocate. It is quite important to me that I receive the information sought about government surveillance of my communications. My belief that I am a subject of surveillance has caused

me to be quite cautious concerning communications with individuals in Yemen who may have information helpful to my clients. The defendants in my cases are the President of the United States, the Secretary of the Department of Defense and the commander of the base at Guantanamo. I fear that the NSA might communicate the information obtained to the lawyers for the respondents in my case. If I learned for certain that I am the subject of surveillance, I would heighten my caution in developing my case; if I found that I was not, justice would be better served because I could use all means available to develop the factual basis needed to free my clients from their illegal jailing in Guantanamo.

I declare under penalty of perjury that the foregoing is true and correct.

Signed this 24th day of April 2008

John A. Chandler
Partner
Sutherland, Asbill & Brennan LLP

4. DECLARATION OF THOMAS B. WILNER

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 07-CIV-3883 (DLC)
THOMAS WILNER, ET AL., PETITIONERS
v.
NATIONAL SECURITY AGENCY AND
DEPARTMENT OF JUSTICE.

DECLARATION OF THOMAS B. WILNER

I, Thomas B. Wilner declare as follows:

1. I am a citizen of the United States of America. I have practiced law for more than 35 years, and am a member of the Bars of the District of Columbia, the State of New York, the Commonwealth of Pennsylvania and the Supreme Court of the United States. I am a partner of Shearman & Sterling LLP in Washington, D.C., where I am managing partner of the firm's international trade litigation and government relations practice.

2. On May 1, 2002, I filed suit in the United States District Court for the District of Columbia on behalf of 12 Kuwaiti citizens detained by the United States at the Guantanamo Bay Naval Base seeking basic due process rights for those detainees and, most importantly, a fair hearing before an impartial tribunal to determine whether there is sufficient cause to detain them. *Al-Odah* v. *United States,* Cir. No. 02-828 (D.D.C.) (CKK). I was counsel of record for Guantanamo detainees in the

cases decided in their favor by the United States Supreme Court in June, 2004, *Rasul* v. *Bush, Al-Odah* v. *United States,* 542 U.S. 466 (2004), and am counsel of record for Guantanamo detainees in the cases now pending before the United States Supreme Court, *Boumediene* v. *Bush, Al-Odah* v. *United States,* Nos. 06-1195 and 06-1196.

3. On January 18, 2006, I filed a Freedom of Information Act (FOIA) request with the National Security Agency (NSA) and the Department of Justice (DOJ), seeking information regarding the NSA warrantless surveillance program, including whether, and to what extent, the federal government is engaged in warrantless electronic surveillance of communications involving me or my law office. I am now a Plaintiff in *Wilner et al.* v. *NSA et al.*

4. I understand that, in response to my FOIA request, the NSA and DOJ have refused to confirm or deny whether they have records relating to whether the NSA has or is monitoring my electronic communications.

5. Based on the official descriptions of the scope of the government's warrantless surveillance program, and my representation of Guantanamo detainees and my communications with their families in order to represent them, I have reason to believe that the NSA may have targeted me for surveillance and engaged in warrantless surveillance of my electronic communications. Indeed, I have been informed on two occasions by government officials, on the condition that I not disclose their names, that I am probably the subject of government surveillance and should be careful in my electronic communications with others.

6. The government previously asserted the right, and the need in order to protect United States national security, to monitor and eavesdrop on my conversations with at least certain of my clients at Guantanamo Bay. Although the U.S. district court rejected the government's right to do so, *Al Odah* v. *United States,* 346 F. Supp. 2d 1 (D.D.C 2004), I believe certain government officials continue to believe it would further national security to monitor my communications and that, in the absence of court supervision preventing it, they would do so.

7. I am engaged primarily in an international legal practice, representing for the most part non-U.S. individuals, governments and entities in connection with transactions, litigations and other matters in which they are involved in the United States. Because most of my clients are located outside the United States, we cannot depend on in-person meetings to communicate. It is essential that I be able to communicate with them by telephone, fax and email to provide and receive timely information, discuss issues and provide advice in order to be able to fulfill my obligations to adequately and vigorously represent their interests. It is also essential that those communications be private and confidential. Effective representation depends on the ability of attorney and client to be able to communicate freely and privately without fear of disclosure. See *Al-Odah* v. *United States,* 346 F. Supp. 2d 1, supra, and cases cited therein.

8. The belief that my conversations and other electronic communications with my foreign national clients are being monitored has made it far more difficult for me to carry out my obligations as a lawyer. This is so not only in the Guantanamo litigations, but in my normal international practice as well. At the very least, the government's refusal to confirm or deny whether it is engaging

in such surveillance of my communications deprives me and my clients of the ability to ensure the confidentiality of our communications and, by itself, substantially interferes with our ability to communicate candidly and freely. It has hampered me in my ability to communicate information freely, to identify legal and strategic options that should be considered on the clients' behalf, and to advise the clients of those options. No one in good conscience can freely identify or discuss possible plans for a case while the other side may be listening in. Because of the possibility that the government is monitoring my communications, I regularly refrain from discussing in my phone calls and e-mails with my foreign clients key issues that should be discussed to protect their interests. The possibility that the government is monitoring my communications has therefore significantly compromised my ability to represent my clients effectively.

9. In that connection, I did not bring this action as a facial challenge to the legality of the government's warrantless surveillance program or to inquire into the general methodology the government uses under its program. At this juncture, to be able to conduct my practice and represent my clients effectively, I seek only to know whether my communications have been, are or will in the future be, subject to warrantless surveillance and, if so, the extent of that surveillance. That basic information is important to enable me to conduct my practice and represent my clients effectively.

I declare under penalty of perjury that the foregoing is true and correct.

Signed this 1st day of May 2008

Thomas B. Wilner

5. DECLARATION OF J. WELLS DIXON

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 07-CIV-3883 (DLC)
THOMAS WILNER, ET AL., PETITIONERS
v.
NATIONAL SECURITY AGENCY AND
DEPARTMENT OF JUSTICE.

DECLARATION OF J. WELLS DIXON

I, J. WELLS DIXON, pursuant to 28 U.S.C. § 1746, declare as follows:

I. I am an attorney at the Center for Constitutional Rights, 666 Broadway, 7th Floor, New York, New York 10012 ("CCR"). I am licensed to practice law in the State of New York, and have been admitted to practice before this Court and several other federal courts including the United States Supreme Court. I am a plaintiff in the above-captioned action. I respectfully submit this declaration in support of my request, pursuant to the Freedom of Information Act, U.S.C. § 552 *et seq.,* for information regarding the warrantless surveillance program operated by the National Security Agency ("NSA"), including information concerning whether and to what extent the government has engaged or is engaged in warrantless electronic surveillance of communications relating to me.

2. I graduated from Johns Hopkins University and the University of Colorado School Of Law, where I was Editor of the *Law Review.* I clerked for U.S. District Judge Christopher F. Droney in the District of Connecticut for two years. I then worked at the law firm Kramer Levin Naftalis & Frankel LLP, 1177 Avenue of the Americas, New York, New York 10036 ("Kramer Levin"), where my practice involved complex securities litigation and white collar criminal defense. I joined CCR full-time in the spring of 2007.

3. I am a United States citizen, and currently hold a national security clearance at the "Top Secret//Sensitive Compartmented Information" level.

4. I am married to Alison Sclater, who is also a plaintiff in this case. She graduated from George Washington University and New York University School of Law; she clerked for Senior U.S. District Judge 1. Leo Glasser in the Eastern District of New York; and she also worked as an attorney at Kramer Levin. She is currently Director of Pro Bono at the New York Legal Assistance Group in New York City. She is a United States citizen, and holds a national security clearance at the "Secret" level.

5. I currently represent more than a dozen men imprisoned at the United States Naval Station at Guantanamo Bay, Cuba ("Guantanamo"). I represent these men in all matters relating to their imprisonment at Guantanamo, including their federal habeas cases and cases filed under the Detainee Treatment Act of 2005 ("DTA"), as well as in efforts to repatriate these men to their home countries or resettle them safely in third countries where they will not face persecution. Each of my clients has been determined by a Combatant Status Review Tribunal ("CSRT") at Guantanamo to be an "enemy combat-

ant" based on some purported affiliation with the Taliban or al Qaeda. I am also involved in the representation of three detainees who have been charged or may be charged by military commission with alleged acts of terrorism or other purported war crimes.

6. Among my current clients is Majid Khan, ISN 10020, a citizen of Pakistan. Unlike other Guantanamo prisoners, Khan grew up in the suburbs of Baltimore, Maryland, and has political asylum in the United States. His family still resides legally in the United States; and some of his family members are United States citizens.

7. As set forth in unclassified, publicly available documents, Khan was captured in Karachi, Pakistan, on March 5, 2003. He was forcibly disappeared by the Central Intelligence Agency ("CIA"), and did not reemerge until September 6, 2006, when he was transferred to Guantanamo. Although Khan has not been charged with any offense, the government has alleged that he was a member or associate of al Qaeda.

8. Khan was subjected to an aggressive CIA detention and interrogation program notable for its elaborate planning and ruthless application of torture. The CIA program can only be characterized as state-sanctioned torture. However, according to the government, virtually all details about the program are highly classified. As a result, any information that I may learn from Khan is presumptively classified as "Top Secret//Sensitive Compartmented Information," and subject to severe restrictions on its handling, dissemination, storage, and use in court filings.

9. As indicated above, I represent Khan in his federal habeas case, his DTA case challenging his "enemy com-

batant" designation, and all other matters relating to his imprisonment. I have also recently been approved by the Department of Defense, Office of the Chief Defense Counsel, to represent Khan before the Military Commissions at Guantanamo, if he is charged before the Commissions.

10. I am also involved in the representation of Guantanamo prisoner Mohammed al Qahtani, ISN 63, who the government has alleged was a member or associate of al Qaeda. Al Qahtani was the subject of the so-called "First Special Interrogation Plan," personally approved by Defense Secretary Donald Rumsfeld, which resulted in al Qahtani's well-publicized torture at Guantanamo beginning in December 2002.

11. In addition, I have been involved in the representation of Guantanamo prisoner Ahmed al Darbi, ISN 768, who the government has alleged was a member or associate of al Qaeda. Al Darbi was severely tortured by American forces while imprisoned at Bagram Air Base in Afghanistan before his transfer to Guantanamo.

12. I also represent the following Guantanamo prisoners, among others:

(a) Djamel Ameziane, ISN 310, a citizen of Algeria, who cannot return safely to his home country for fear of persecution;

(b) Mohammed Sulaymon Barre, ISN 567, a citizen of Somalia, who is an internationally recognized refugee under the mandate protection of the United Nations High Commissioner for Refugees;

(c) Mohammed Ahmed Taher, ISN 679, a citizen of Yemen, who is the brother of one of the Guantanamo prisoners who died there in June 2006; and

(d) Four ethnic Uighurs, who are citizens of China, and each of whom appears to have been cleared for release from Guantanamo as long ago as 2003:

(i) Ahmad Turson, ISN 201

(ii) Abdur Razakah, ISN 219

(iii) Abdulghappar Abdulrahman, ISN 281; and

(iv) Adel Noori, ISN 584

As indicated above, each of these men has been detained by a CSRT to be an "enemy combatant" based on some purported affiliation with the Taliban or al Qaeda - even the Uighurs, who the United States has sought to release since before the creation of the CSRT process in 2004.

13. My wife, plaintiff Alison Sclater, also worked at Kramer Levin. Kramer Levin is co-counsel for my Uighur clients Ahmad Turson, Abdur Razakah, Abdulghappar Abdulrahman, and Adel Noori, who remain in Guantanamo.

14. While at Kramer Levin, my wife and I, along with other Kramer Levin attorneys, represented three Uighur prisoners at Guantanamo who were determined by the CSRTs not to be "enemy combatants." These men were released from Guantanamo in May 2006, and were transferred to a refugee camp outside of Tirana, Albania. They now live in apartments in or near Tirana. The men have political asylum status in Albania, and remain under surveillance by Albanian authorities. The United States Embassy in Tirana also continues to monitor these men.

15. After their transfer to Albania, the United States government provided our three Uighur clients with cell phones. The men used these cell phones to communicate with me at my Kramer Levin office, as well as at my home which I share with my wife, and to conduct multi-party conference calls with me, my wife, other Kramer Levin attorneys, and their families in Europe, China, and elsewhere throughout Central Asia.

16. These former prisoners have also communicated with me and other Kramer Levin attorneys occasionally by email.

17. Notwithstanding their exoneration, their non-"enemy combatant" status, and their ultimate release, the United States government continues to claim publicly that my three Uighur clients who were transferred to Albania are among a group of former Guantanamo prisoners who have "returned to militant activities, participated in anti-US propaganda or other activities through intelligence gathering and media reports." Former Guantanamo Detainees Who Have Returned to the Fight, *available at* http://www.defenselink.mil/news/d20070712formergmo.pdf.

18. During the course of my representation of current and former Guantanamo prisoners, I have communicated and continue to communicate with co-counsel located inside and outside the United States; consultants and experts located inside and outside the United States; family members of my clients located inside and outside the United States; news media located inside and outside the United States; non-governmental organizations located inside and outside the United States; United States government officials located inside and outside the United

States; and foreign government officials located inside and outside the United States.

19. My overseas communications have included telephone calls, faxes, and emails with individuals and organizations in the following countries, among others: Afghanistan, Albania, Algeria, Canada, China, Egypt, Finland, France, Germany, Kazakhstan, Malaysia, Norway, Pakistan, Saudi Arabia, Somalia, Sudan, Sweden, United Kingdom, and Yemen.

20. As a direct and proximate result of what I know to be true and believe to be true about the warrantless surveillance program, as described below, I have had to limit and censor my communications with individuals and organizations overseas in order to ensure privilege and confidentiality. This has significantly hindered my ability to represent my Guantanamo clients vigorously and effectively, and has increased the costs of these representations to me and to my employer, CCR, a small nonprofit organization. For instance, I have had to forego entirely certain substantive discussions with family members of Guantanamo prisoners by telephone, fax or email because of concerns that my communications are monitored. I have instead traveled long distances to meet with these individuals in person, or opted to communicate with them in writing through more costly overnight mail, to ensure privilege and confidentiality. I have also thus far had to refrain from hiring certain overseas investigators because I have not yet been able to communicate with them in person and do not believe that I could do so in a privileged and confidential manner by telephone, fax or email because of the likelihood that my communications are monitored.

21. In connection with my representation of Khan, in particular, I have communicated and continue to communicate with counsel for other detainees, each of whom is alleged to be connected to al Qaeda. I have also communicated and continue to communicate with military defense counsel assigned to represent detainees charged before the Military Commissions. Again, because of concerns that my communications may be subject to warrantless surveillance, I have had to limit and censor my communications with these counsel in order to ensure privilege and confidentiality. Indeed, whenever I do communicate with these individuals by telephone, fax or email, I assume that the substance of our discussions is monitored and that information about our defense strategies will be transmitted not only to the NSA but also to our litigation adversaries at the Department of Justice ("DOJ"), CIA and Military Commissions.

22. My personal privacy and the privacy of my wife have also been directly impacted by the likelihood that our telephone, fax and email communications are subject to warrantless surveillance. Because we have used our personal, home accounts during the course of our representation of Guantanamo prisoners, we have assumed and continue to assume that our communications, particularly communications with each other and with friends and relatives located overseas in countries like Australia, Iraq, Ivory Coast, Nigeria and the United Kingdom, are monitored. We have had to inform our friends and relatives accordingly, thus inevitably restricting our communications. My wife and I have even had to have our home telephone number unlisted in order to limit its use.

23. In sum, because of the identities of the clients I represent and the nature of my international communications in connection with their representation, I have as-

sumed and continue to assume that all my communications are monitored, especially my overseas communications. I have notified and continue to notify individuals and organizations with whom I communicate that they also must assume that our communications are monitored.

24. I understand that the President secretly authorized, and later reauthorized, the NSA to conduct a warrantless electronic surveillance program commonly known as the "Terrorist Surveillance Program." I also understand that the government has determined that pursuant to this program it may target for warrantless surveillance not only suspected terrorists and terrorist organizations, but also communications between persons or organizations within the United States and persons or organizations outside of the United States, if the government believes that one party to the communication is "linked," "affiliated with," or "working in support of' al Qaeda, or an organization affiliated with al Qaeda. I understand that the government has engaged in and may continue to engage in such surveillance by listening to telephone calls, reading emails and faxes, and otherwise monitoring electronic communications without warrants.

25. I understand that the Department of Justice, for its part, has advised the NSA and other government agencies and officials concerning the legality of the warrantless surveillance program, suggested modifications to the program, and authorized or reauthorized the program, and may continue to do so. Moreover, it appears that the Office of Legal Counsel at DOJ has advised the President that he is not bound by the Fourth Amendment to the United States Constitution while engaged in domestic military operations against suspected terrorists or terrorist organizations. *See* Memorandum for Wil-

liam J. Haynes II, General Counsel of the Department of Defense, from Deputy Assistant Attorney General John C. Yoo, U.S. Department of Justice, Office of Legal Counsel, Re: Military Interrogation of Alien Unlawful Enemy Combatants Held Outside the United States at 8 n.10 (March 14, 2003), *available at* http://www.dod.mil/pubs/foi/detainees/OLCmemoI4mar203.pdf.

26. I further understand that the President has asserted his purported right as Commander-in-Chief under the United States Constitution to carry out warrantless surveillance whenever he determines it is necessary, regardless of any limitations or restrictions on the warrantless surveillance program, and regardless of whether the program continues to exist and operate in any fashion.

27. In light of the widespread public disclosures and official government acknowledgements concerning the warrantless surveillance program, as well as the identities of the clients I represent and the nature of my international communications in connection with their representation, I am concerned that the NSA has targeted or may target me for surveillance, and has engaged or may engage in warrantless surveillance of electronic communications relating to me. I am especially concerned because the NSA and DOJ have refused to confirm or deny such surveillance, and the government has refused to exclude from the warrantless surveillance program attorney-client conversations or other privileged and confidential communications.

28. My concern about warrantless surveillance is heightened by what I perceive to be an ongoing pattern and practice of government attempts to interfere with my representation of Guantanamo prisoners. For example, officials at Guantanamo have routinely informed my cli-

ents that they have "reservations" - *i.e.,* interrogations - when they are actually scheduled to meet with me, which has sometimes resulted in their refusals to see me. In one particular instance, a military officer lied to me directly about a client's willingness to meet with me, which was later discovered by me and by other counsel during our meetings with separate Guantanamo prisoners who witnessed that client's purported refusal- all at a time when my client's case was pending before the United States Supreme Court. I am further informed and believe that government officials record privileged communications between me and my clients during our meetings at Guantanamo, and review our privileged legal mail, without warrants. Finally, government officials have attempted to threaten and intimidate me in connection with my representation of Majid Khan in a transparent effort to chill my advocacy on his behalf.

29. Despite my concern about warrantless surveillance, I continue my work on behalf of current and former Guantanamo prisoners because I believe that ensuring basic due process rights for anyone detained by the Executive Branch is consistent with traditional principles of American justice and the highest standards of our legal system.

30. For all of the foregoing reasons, I am concerned that the government has engaged or is engaged in warrantless electronic surveillance of communications relating to me, including without limitation electronic communications involving: (a) my former Kramer Levin telephone, fax (which I shared with numerous other attorneys), email and Blackberry accounts; (b) my CCR telephone, fax (which I share with numerous other attorneys), email and Blackberry accounts; (c) my home tele-

phone and Skype accounts; and (d) my personal email and cellular phone accounts.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed: New York, New York
May 5, 2008

J. Wells Dixon (JD – 5055)