

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH, INC.,)	
)	
<i>Plaintiff,</i>)	
v.)	Case No. 18-300-TJK
)	
U.S. DEPARTMENT OF STATE,)	
)	
<i>Defendant.</i>)	

**PLAINTIFF’S CONSOLIDATED BRIEF IN OPPOSITION TO
MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF
CROSS-MOTION FOR SUMMARY JUDGMENT**

Defendant’s *Glomar* response in this FOIA lawsuit is facially proper, but it does not hold up under examination. According to multiple media accounts, former U.S. Ambassador to the United Nations Samantha Power made many “unmasking” requests to other intelligence agencies, asking those agencies to “unredact” the names of U.S. citizens who were targets of Russian espionage activities. These redactions are made to protect the privacy of targets of espionage whose identity is otherwise of limited or no intelligence value. The “unmasking” requests were made even though the U.N. Ambassador is not a counterintelligence official and has no known role in investigating espionage. Plaintiff’s FOIA request asked for records about these unmasking requests from the U.N. Ambassador’s office.

A *Glomar* defense is intended to allow agencies to refuse to admit or deny the existence of records when doing so would itself reveal exempt and sensitive information. Defendant State Department has claimed that admitting or denying the existence of records in this case would reveal such information. However, considering the unusual media reports about the unmasking requests from the U.N. Ambassador, and because the U.N. Ambassador is not an intelligence

official, Defendant has not met its burden to show that admitting or denying the existence of these records would reveal unknown and exempt information which would harm national security.

Factual Background

When intelligence agencies monitor and intercept communications from foreign agents attempting to infiltrate U.S. groups or steal information, the agencies will incidentally collect information about U.S. persons targeted by the foreign agents. Before passing that intelligence on to other government officials, intelligence agents will make redactions to the material to protect the privacy of U.S. persons. Officials in national security review this redacted correspondence to determine the scope and purpose of foreign espionage activities, not to spy on American targets of foreign agents. When a government official needs a greater level of understanding of espionage activities which might be revealed by the names of the U.S. targets, they request that the redaction be removed, a procedure known informally as “unmasking.”

As the investigation into Russia’s efforts to influence the 2016 U.S. election unfolded, it was revealed that both National Security Advisor Susan Rice and U.S. Ambassador to the United Nations Samantha Power made several unmasking requests to learn the identities of U.S. political campaign targets of Russian espionage. While not unprecedented, the nature of these unmasking requests nevertheless inspired speculation about whether they might have been made to obtain political intelligence instead of foreign intelligence. These questions in turn led to efforts to seek greater transparency about the unmasking requests, including the present lawsuit. *See e.g. Judicial Watch, Inc. v. United States Dep’t of Homeland Sec.*, No. 16-5339, 2018 U.S. App. Lexis 19605, *46 (D.C. Cir. July 17, 2018) (“A democratic society requires an informed

citizenry—not only to check against corruption and to hold government accountable, but also to dispel misconceptions and fallacies that secrecy feeds.”) (Pillard, concurring).

The circumstances surrounding the unmasking requests by Samantha Power were unusual. Congressman Trey Gowdy has revealed that multiple requests for the identities of U.S. citizen targets of Russia espionage activities came from Samantha Power or her office.¹ Troublingly, and as widely reported in the press, Congressman Gowdy disclosed that some of the unmasking requests for citizen names made by Ambassador Power’s office were not authorized by her.² Furthermore, Defendant’s *Glomar* response is also questionable in this case because, unlike the National Security Advisor, the U.N. Ambassador position has “no clear intelligence-related function.”³

Standard of Review

In FOIA litigation, as in all litigation, summary judgment is appropriate only when the pleadings and declarations demonstrate that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); Fed.R.Civ.P. 56(c). In reviewing a motion for summary judgment under FOIA, the court must view the facts in the light most favorable to the requester. *Weisberg v. U.S. Dep’t of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). Also in FOIA litigation, but unlike

¹ WASHINGTON EXAMINER, *Trey Gowdy: Samantha Power testified that intel officials made 'unmasking' requests in her name*, Pete Kasperowicz, October 17, 2017 available at <https://www.washingtonexaminer.com/trey-gowdy-samantha-power-testified-that-intel-officials-made-unmasking-requests-in-her-name> and attached hereto as Exhibit A to Plaintiff’s Statement of Material Facts.

² FOX NEWS, *Gowdy: Former UN Ambassador Samantha Power claims others unmasked in her name*, Bret Baier and Catherine Herridge, October 18, 2017, available at <http://www.foxnews.com/politics/2017/10/18/gowdy-former-un-ambassador-samantha-power-claims-others-unmasked-in-her-name.html> and attached hereto as Exhibit B to Plaintiff’s Statement of Material Facts.

³ WALL STREET JOURNAL, *Unmasking Samantha Power*, Editorial Board, August 11, 2017, available at <https://www.wsj.com/articles/unmasking-samantha-power-1502492067> and attached hereto as Exhibit C to Plaintiff’s Statement of Material Facts.

most other litigation, a defendant agency moving for judgment bears the burden of proof – *not* the plaintiff challenging defendant’s compliance with FOIA. 5 U.S.C. § 552(a)(4)(B) (“the burden is on the agency to sustain its action”); *Military Audit Project v. Casey*, 656 F.2d 724, 739 (D.C. Cir. 1981). Finally, agency decisions to “withhold or disclose information under FOIA are reviewed *de novo*” by the district court and are not subject to deference. *Judicial Watch, Inc. v. U.S. Postal Service*, 297 F. Supp. 2d 252, 256 (D.D.C. 2004).

Argument

The Highly Unusual Public Record About Samantha Power’s Unmasking Requests Renders State’s Standard *Glomar* Defense Inadequate

Facially, Defendant’s brief meets all the standard criteria for establishing a *Glomar* defense, and Plaintiff will not dwell on those factors. In any normal case, the government’s brief and declaration would likely be sufficient to obtain judgment in its favor. However, Defendant’s *Glomar* claims fail here because State has not met the preliminary burden applicable somewhat uniquely to this case to show that the specific alleged counter-espionage activities of the former U.N. Ambassador would be considered ordinary government intelligence activity. Unlike the National Security Advisor, the U.N. Ambassador does not have a known intelligence function that would necessitate learning the names of U.S. persons targeted by Russian espionage.⁴

The subject of Plaintiff’s FOIA complaint is *not* records about the U.N. Ambassador receiving briefings about Russian election interference, but records about the U.N. Ambassador

⁴ WALL STREET JOURNAL, *Unmasking Samantha Power*, Editorial Board, August 11, 2017, available at <https://www.wsj.com/articles/unmasking-samantha-power-1502492067> and attached hereto as Exhibit C to Plaintiff’s Statement of Material Facts.

asking for the names of specific U.S. citizen targets of Russian espionage.⁵ Moreover, media reports have indicated that the U.N. Ambassador's requests for names of U.S. targets of foreign intelligence were not even being made by Ambassador Power, but were being made by other interested persons in her name, perhaps without authorization.⁶ The government has not addressed these particulars about this case, and has therefore not met its burden to assert the *Glomar* defense with adequate justification. Considering its arguments, the government likely cannot satisfy its *Glomar* burden here without at a minimum submitting an *in camera* declaration adequately accounting for the somewhat unusual public record in this case. *Military Audit Project v. Casey*, 656 F.2d 724, 732 (D.C. Cir. 1981) (*in camera* declaration may be submitted "if the public record is not sufficient to justify the *Glomar* responses").

There is a substantial difference between this case, which concerns the former U.N. Ambassador, and *Judicial Watch v. DOJ and NSA*, where Plaintiff ultimately dismissed its lawsuit after the government briefed its *Glomar* defense for the former National Security Advisor's records. Case No. 17-1002-CKK (D.D.C.), ECF 20 (joint stipulation of dismissal filed March 19, 2018); *see* Brown Decl., ECF 8-1 at 6-7, ¶ 12, fn. 2. Defendant's brief in this case does not adequately support a *Glomar* defense because, unlike the National Security Advisor, there is no ordinary presumption that U.N. Ambassadors are routinely conducting counter-espionage investigations that would necessitate knowing the names of U.S. citizen targets. Defendant has not submitted an *in camera* declaration, and therefore not met its burden to

⁵ FOX NEWS, *Gowdy: Former UN Ambassador Samantha Power claims others unmasked in her name*, Bret Baier and Catherine Herridge, October 18, 2017, available at <http://www.foxnews.com/politics/2017/10/18/gowdy-former-un-ambassador-samantha-power-claims-others-unmasked-in-her-name.html> and attached hereto as Exhibit B to Plaintiff's Statement of Material Facts.

⁶ WASHINGTON EXAMINER, *Trey Gowdy: Samantha Power testified that intel officials made 'unmasking' requests in her name*, Pete Kasperowicz, October 17, 2017 available at <https://www.washingtonexaminer.com/trey-gowdy-samantha-power-testified-that-intel-officials-made-unmasking-requests-in-her-name> and attached hereto as Exhibit A to Plaintiff's Statement of Material Facts.

establish the *Glomar* defense. *Cozen O'Connor v. U.S. Dep't of Treasury*, 570 F. Supp. 2d 749, 786-87 (E.D. Pa. 2008) (explaining that the “court may examine classified affidavits *in camera* if the public record is not sufficient to justify the *Glomar* responses”); *El Badrawi v. DHS*, 583 F. Supp. 2d 285, 315 (D.Conn. 2008) (finding that FBI had not supported its *Glomar* response and directing it to submit an *in camera* affidavit).

State is also wrong to argue that its *Glomar* claim here is justified in part due to risk of publicizing a mosaic of intelligence information when combined with Plaintiff's separate FOIA lawsuit for the NSA records. ECF 8 at 18-19; ECF 8-1 at 6-7, ¶ 12, fn. 2. State argues that the admission or denial of these records' existence combined could create a public “mosaic” of information jeopardizing national security. ECF 8 at 19. However, this argument ignores the fact that the government has already asserted a *Glomar* defense in the lawsuit for former NSA Susan Rice's records, and Plaintiff ultimately dismissed its claims in that case without piercing that *Glomar* defense. *Judicial Watch v. DOJ and NSA*, Case No. 17-1002-CKK (D.D.C.), ECF 20 (joint stipulation of dismissal filed March 19, 2018). Accordingly, whatever harms might come from an admission or denial in this lawsuit, those harms cannot be compounded by a lawsuit which has already been dismissed.

Defendant's explanation does not persuasively make the case that confirmation of involvement of the former U.N. Ambassador will be harmful. *Military Audit Project v. Casey*, 656 F.2d 724, 732 (D.C. Cir. 1981) (agency asserting *Glomar* must establish “why official confirmation of the involvement of the particular agencies in question was undesirable.”); ECF 8 at 16-17. Everyone knows about the Russian election investigation. A sitting Congressman has

confirmed the former U.N. Ambassador was involved in unmasking requests.⁷ No more harm can result from admission of the existence of these records. *See e.g. Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 514 (S.D.N.Y. 2010) and *ACLU v. DOD*, 406 F. Supp. 2d 330, 333 (S.D.N.Y. 2005) (weighing impact of reported media disclosures on potential further harm of acknowledgement in evaluating *Glomar* defense).

Defendant's arguments all appear more properly asserted as standard Exemption 1 or 3 claims rather than *Glomar*, because the arguments all rely on what the records might reveal to foreign adversaries about the Russian election interference investigation. Defendant's claim that acknowledgement of the State Department's involvement in the Russian investigation would harm national security simply does not appear to be a factually strong one. *ACLU v. CIA*, 710 F.3d 422, 427, 432 (D.C. Cir. 2013) (finding that "it strains credulity to suggest that an agency charged with gathering intelligence affecting the national security does not have an 'intelligence interest' in drone strikes..."); ECF 8 at 16-17. Accordingly, the government's *Glomar* assertion here is inappropriate. *Ctr. for Human Rights and Constitutional Law v. Nat'l Geospatial-Intelligence Agency*, 506 F. App'x 547, 548 (9th Cir. 2013) (remanding case because public declaration failed to demonstrate harm of acknowledging existence of records sufficient to support *Glomar* defense).

A court's rejection of an agency's *Glomar* response does not mandate disclosure of the records themselves but requires the agency to process the records in the usual manner under FOIA. Specifically, the agency must inform the requester of the number of records and either release the records or justify its withholding with a privilege log or "*Vaughn* index" pursuant to

⁷ FOX NEWS, *Gowdy: Former UN Ambassador Samantha Power claims others unmasked in her name*, Bret Baier and Catherine Herridge, October 18, 2017, available at <http://www.foxnews.com/politics/2017/10/18/gowdy-former-un-ambassador-samantha-power-claims-others-unmasked-in-her-name.html> and attached hereto as Exhibit B to Plaintiff's Statement of Material Facts.

FOIA's exemptions. *American Civil Liberties Union v. Central Intelligence Agency*, 109 F. Supp. 3d 220, 225 (D.D.C. 2015) (after a *Glomar* response was rejected by the appellate court, the district court still upheld CIA's withholding of thousands of classified documents). In this case, the government, relying on its *Glomar* defense, has failed to acknowledge the existence of records and has therefore not produced a *Vaughn* index of information properly withheld pursuant to Exemptions 1 and 3. Accordingly, the government has not met its burden of proof and the Court should order Defendant to produce any non-exempt records and justify any withholdings with a satisfactory *Vaughn* index. If the government is correct and release of many of these records would harm national security, it can make its case based on the documents' content.

Conclusion

Defendant's motion for summary judgment should be denied. The Court should grant Plaintiff's motion for summary judgment and order Defendant to release all non-exempt portions of the records at issue along with a proper *Vaughn* index of any withholdings of information under Exemptions 1 and 3.

Dated: July 26, 2018

Respectfully submitted,

s/ Chris Fedeli

Chris Fedeli

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**PLAINTIFF’S COUNTER-STATEMENT TO DEFENDANT’S STATEMENT OF
UNDISPUTED MATERIAL FACTS, AND STATEMENT OF MATERIAL FACTS IN
SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiff Judicial Watch, Inc., by counsel and pursuant to Local Civil Rule 7.1(h), respectfully submits this Response to Defendant’s Statement of Material Facts Not in Dispute (ECF 8 at 3-5) and Statement of Material Facts in Support of Cross-Motion for Summary Judgment:

I. Plaintiff’s Counter-Statement to Defendants’ Statement of Undisputed Material Facts

1. Not disputed.
2. Not disputed.
3. Not disputed.
4. Not disputed.
5. Not disputed, except that Plaintiff lacks sufficient knowledge about Catherine

Brown’s classification authority to confirm or deny. *Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (discussing the asymmetrical distribution of knowledge between a requester and an agency in FOIA litigation).

6. Plaintiff does not dispute the first sentence of this paragraph. The remainder of this paragraph consists of legal conclusions to which no response is required. To the extent a response is required – denied.

II. Plaintiff’s Statement of Undisputed Material Facts

1. Defendant Department of State has asserted a *Glomar* response to Plaintiff’s FOIA request, claiming that to admit or deny the existence of the requested records would release information that is exempt from FOIA under Exemptions 1 or 3.

2. A WASHINGTON EXAMINER article titled *Trey Gowdy: Samantha Power testified that intel officials made ‘unmasking’ requests in her name* by Pete Kasperowicz was published on October 17, 2017 and is attached hereto as Exhibit A.

3. A FOX NEWS article titled *Gowdy: Former UN Ambassador Samantha Power claims others unmasked in her name* by Bret Baier and Catherine Herridge was published on October 18, 2017 and is attached hereto as Exhibit B.

4. A WALL STREET JOURNAL editorial titled *Unmasking Samantha Power* by the newspaper’s editorial board was published August 11, 2017 and is attached hereto as Exhibit C.

Dated: July 26, 2018

Respectfully submitted,

s/ Chris Fedeli

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Exhibit A

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Monday, May 07, 2018

Trey Gowdy: Samantha Power testified that intel officials made 'unmasking' requests in her name

by Pete Kasperowicz | October 17, 2017 10:07 PM



House Intelligence Committee member Rep. Trey Gowdy, R-S.C. walks on Capitol Hill in Washington, Tuesday, July 25, 2017, prior to the arrival of White House senior adviser Jared Kushner to meet behind closed doors before the committee on the investigation into possible collusion between Russian officials and the Trump campaign. (AP Photo/Andrew Harnik)

Andrew Harnik

House Oversight & Government Reform Committee Chairman Trey Gowdy said Tuesday that President Obama's former United Nations ambassador has testified that not all of the "unmasking" requests made in her name were directed by her.

before her appearance that she was thought to have made as many as 260 requests to "unmask" Americans caught up in the surveillance of non-U.S. citizens.

But Tuesday evening, Gowdy told Fox News that Power told his committee that she was not the official requesting that unmasking in every case.



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"I think if she were on your show, she would say those requests to unmask may have been attributed to her, but they greatly exceed by an exponential factor the requests she actually made," Gowdy said.

"So, that's her testimony, and she was pretty emphatic in it," he added. "The intelligence community has assigned this number of requests to her. Her perspective, her testimony is, they may be under my name, but I did not make those requests."

"So, we've got to get tot he bottom of that," Gowdy said. "If there is someone else making requests on behalf of a principal in the intelligence community, we need to know that because we're getting ready to reauthorize a program that's really important to the country, but also has a masking component to it."

Gowdy was referring to Section 702 of the Foreign Intelligence Surveillance Act. Pressure is building on Congress to reauthorize that language, but Republicans are wary of doing so, in part because of the suspicion that the Obama administration unfairly unmasked people, including those on President Trump's transition team.

- National Security
- Pete Kasperowicz
- News
- FISA
- Samantha Power
- Foreign Policy
- Trey Gowdy
- Surveillance
- United Nations
- Congress

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Exhibit B

WHITE HOUSE · October 18th, 2017

Gowdy: Former UN Ambassador Samantha Power claims others unmasked in her name

Fox News



President Obama's ambassador to the United Nations has testified that others made so-called unmasking requests in her name, House Oversight Committee Chairman Trey Gowdy said Tuesday. (Reuters)

Former President Barack Obama's ambassador to the United Nations has testified that others made so-called unmasking requests in her name, House Oversight Committee Chairman Trey Gowdy said Tuesday.

"Her testimony is they may be under my name, but I did not make those requests," Gowdy said of former Ambassador Samantha Power during an interview with Fox News' Bret Baier on "Special Report with Bret Baier."

Power is among the Obama administration figures who made requests to identify Americans whose names surfaced in foreign intelligence reporting, known as unmasking.



Gowdy: Samantha Power claims others unmasked in her name

Last month, Fox News reported that Power was unmasking at such a rapid pace in the final months of the Obama administration that she averaged more than one request for every working day in 2016 – and even sought information in the days leading up to President Trump’s inauguration.

SAMANTHA POWER SOUGHT TO UNMASK AMERICANS ON ALMOST DAILY BASIS

"I think if she were on your show, she would say those requests to unmask may have been attributed to her, but they greatly exceed by an exponential factor the requests she actually made," Gowdy said. "So, that's her testimony, and she was pretty emphatic in it."

The South Carolina Republican added, "So, we've got to get to the bottom of that. If there is someone else making requests on behalf of a principal in the intelligence community, we need to know that because we're getting ready to reauthorize a program that's really important to the country, but also has a masking component to it."

Power visited Capitol Hill on Friday for a closed-door interview with House investigators looking into the 'unmasking' of Trump associates under the Obama administration.

The questioning involved House Intelligence Committee investigators.

Fox News' Bret Baier and Catherine Herridge contributed to this report.

Conversation (3,094)

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celestialsue ★ Leader · 5 Feb



People were unmasking in her name???? This is the next memo.

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Exhibit C

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REVIEW & OUTLOOK

Unmasking Samantha Power

We still don't know why Obama officials needed to know the names of so many Trump officials.



Former United States Ambassador to the United Nations Samantha Power in New York, September 3, 2014. PHOTO: GETTY IMAGES

By The Editorial Board

Aug. 11, 2017 6:54 p.m. ET

Of all the Russia storms raging around Donald Trump —the Christopher Steele dossier, the email to Don Jr. promising dirt on Hillary Clinton —there is still only one clear felony we know about: the leaking of former National Security Adviser Michael Flynn's name after someone had identified him from a classified intelligence report. Funny how this is a scandal no one seems interested in.

Well, almost no one. The chairman of the House Intelligence Committee, Devin Nunes, recently sent a letter to the Director of National Intelligence with some startling information. The committee has learned that “one official, whose position had no apparent intelligence-related function, made *hundreds* of unmasking requests during the final year of the Obama administration.”

Unmasking is simply an official requesting the identity of an American whose name has been redacted from an intelligence report. There is nothing inherently wrong with unmasking, and law enforcement, intelligence operatives and policy makers can have a legitimate need to know who these Americans are.

But protecting the privacy rights of American citizens as well as not revealing which foreigners U.S. intelligence is targeting is also crucial, which is why U.S. government officials are supposed to give good and specific reason for seeking the identity of a redacted American. Yet in all but

one of the requests for names from top-level Obama officials, Mr. Nunes writes, the language was “boilerplate” and did not specify why the official needed to know the names.

The House committee has not identified the Trump people who were unmasked. Nor has it identified the “one official” who made those hundreds of requests. But it’s pretty obvious this was Samantha Power, Barack Obama’s ambassador to the United Nations. In May the House Intelligence Committee subpoenaed the unmasking requests from Ms. Power, former CIA director John Brennan and former National Security Adviser Susan Rice.

Ms. Power is the only one of those three whose job had no clear intelligence-related function. The plot got even thicker when the committee asked for the same unmasking records for Ben Rhodes. He was the hyper-political Obama Deputy National Security Adviser who last year gleefully boasted to the New York Times how he’d manipulated reporters to sell Mr. Obama’s nuclear deal with Iran.

In Washington, this is one story most people want to dismiss. During a recent interview report, for example, Senate Intelligence Chairman Richard Burr told CNN “the unmasking thing was all created by Devin Nunes.”

Mr. Burr’s comment came before Mr. Nunes released his letter revealing the hundreds of requests from a single Obama official. A spokeswoman for Mr. Burr says her boss’s comments have been misinterpreted by the press. She further noted that in the CNN interview he had also said the names of some unmasked people had improperly become public and his committee intends to get to the bottom of it.

That’s more than Democrats are doing. When Mr. Nunes first raised the issue, he was accused of leaking classified information, and activist groups including MoveOn.org filed complaints with the House Ethics Committee. But rather than resolve what are plainly politically motivated complaints, it looks like Democrats on the committee are more interested in keeping a cloud hanging over Mr. Nunes as a way of keeping a cloud over the investigation.

Some are now calling for all the unmasking information to be declassified so we can know whose names were unmasked and who asked for those names. But there may still be good reasons not to do so, out of respect for the privacy rights of those unfairly unmasked, and to avoid making public any details about intelligence operations that might tip off foreigners being watched.

Americans certainly need to find out anything Vladimir Putin did to interfere in the presidential election. But if high-level members of the Obama Administration were abusing intelligence to spy on Trump people during that same campaign, the American people deserve answers on that too.

Appeared in the August 12, 2017, print edition.

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