Reining in the Glomar Response: Reducing CIA Abuse of the Freedom of Information Act

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INTRODUCTION

The State of California accuses you of killing a former Iranian diplomat who has resided in California since the fall of the Shah of Iran. You believe that many other groups and individuals had motives for killing the diplomat. Furthermore, the U.S. government may have played a role in the diplomat's untimely death. Consequently, you file a Freedom of Information Act[1] (FOIA) request with the U.S. Central Intelligence Agency (CIA) for

[1] 5 U.S.C. § 552 (1988). The Freedom of Information Act constitutes the public information section of the Administrative Procedure Act of 1946, ch. 324, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.). For a general discussion of the FOIA, see 1 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE, 307-436 (2d ed. 1984); 1 JAMES T. O'REILLY, FEDERAL INFORMATION

records[2] about the diplomat's relations with the U.S. and foreign governments. Because other government agencies have already released records on the diplomat, you feel confident that the CIA will honor your request.

Despite the careful wording of your request, the CIA refuses to confirm or deny the existence or nonexistence of records on the Iranian diplomat. The CIA claims that the existence or nonexistence of such records is itself classified as a potential threat to national security. This answer, known as the Glomar response,[3] allows the CIA to deny a request for records without confirming that the records even exist. You have now discovered a unique problem that confronts individuals who request records from the CIA under the FOIA. When the CIA uses the Glomar response to deny your request, it can indefinitely avoid giving you information without publicly justifying its action.

Undaunted by the CIA's hedging, you file an administrative appeal of the CIA's decision, questioning the propriety of the Glomar response in your case.[4] On appeal, the CIA affirms its prior decision. Once again, you have neither the records you want nor any confirmation that these records even exist. You then file a lawsuit against the CIA to compel it to release relevant records.[5] In response, the CIA answers your complaint and moves for summary

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DISCLOSURE (2d ed. 1990); BERNARD SCHWARTZ, ADMINISTRATIVE LAW, 129-32 (2d ed. 1984).

[2] The text of the FOIA does not define the term "record." However, courts have construed this term broadly. *See infra* note 30 (describing broad definition of record under FOIA).

[3] The Glomar response is named for the Hughes Glomar Explorer, the subject of FOIA requests in Phillippi v. CIA, 546 F.2d 1009, 1010 (D.C. Cir. 1976), and Military Audit Project v. Casey, 656 F.2d 724, 727 (D.C. Cir. 1981). An agency "Glomarizes" when it refuses to confirm or deny the existence or nonexistence of the requested records because the response is itself exempt under the FOIA. *Phillippi*, 546 F.2d at 1012; *see infra* notes 89-131 and accompanying text (discussing origin and evolution of Glomar response).

[4] *See* 5 U.S.C. § 552(a)(6)(A)(i) (1988) (providing for administrative appeal of agency decisions).

[5] Section 552(a)(4)(B) provides:

> [T]he district court of the United States in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.

Id. § 552(a)(4)(B).

judgment[6] on the ground that it has correctly used the Glomar response.

To dispute the summary judgment motion, you must show that one or more genuine issues of material fact exist.[7] In FOIA proceedings, such facts might include inadequacy of the agency's search for the records, dilatory tactics which render the information useless, or agency misconduct.[8] The crux of your problem is that you do not have access to any records or specific information with which to demonstrate the existence of a genuine issue of material fact. Moreover, the judge defers to the CIA's claim that any response to your request will harm U.S. national security.[9] Therefore, you lose your information battle with the CIA. If you need CIA information for academic research, journalistic purposes, or a criminal defense, the Glomar response may seriously frustrate your work.[10]

This result is exactly the opposite of what Congress intended when it passed the FOIA. The Act's original purpose was to provide the public with access to information about the performance of federal agencies.[11] When a person seeks information from a federal agency, she can file a FOIA request.[12] She must then wait ten days, the statutorily defined period, for a response.[13] Usually the agency

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6 Summary judgment is a procedural device courts use for prompt disposition of cases in which there is no dispute as to material fact or which involve only a question of law. BLACK'S LAW DICTIONARY 1001 (6th ed. 1990).

7 FED. R. CIV. P. 56(c).

8 O'REILLY, *supra* note 1, at 8-70 to 8-71.

9 *See infra* notes 61-62 and accompanying text (discussing how reviewing courts must afford substantial weight to agency affidavits in national security cases).

10 *See, e.g.*, Hunt v. CIA, 981 F.2d 1116 (9th Cir. 1992) (illustrating Glomar response frustrating criminal defense), *rev'g* No. C92-1388 MHP (N.D. Cal. Sept. 10, 1992); Gardels v. CIA, 689 F.2d 1100 (D.C. Cir. 1982) (illustrating Glomar response frustrating academic research); Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976) (illustrating Glomar response frustrating journalism research).

11 O'REILLY, *supra* note 1, at 2-2. Congress wanted the FOIA to discourage the practice of private law-making in government agencies, as well as to inform and educate the electorate. H.R. REP. No. 1497, 89th Cong., 2d Sess. 2 (1966).

12 *See infra* notes 31-36 and accompanying text (discussing FOIA request process).

13 5 U.S.C. § 552(a)(6)(A)(i). An agency must determine within 10 days of receiving a FOIA request whether to comply with it. *Id.* The agency must immediately notify the requester of the decision, the reasons for it, and the requester's right to appeal. *Id.*

will grant her the information she seeks for a nominal searching charge.[14]

Sometimes, however, the process is not this simple.[15] When the CIA uses the Glomar response to deny a FOIA request, it evades the FOIA's search and review requirements.[16] The requester receives none of the records she wants and no information about whether the records exist.[17] Moreover, the CIA does not reveal whether it searched for the requested records when it uses the Glomar response. Thus, the requester does not have an opportunity to show inadequate search or dilatory tactics on appeal.[18] The

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[14] *Id.* § 552(a)(4)(A). The FOIA limits searching charges to reasonable fees for document search, duplication, and review when the records are requested for commercial use. *Id.* § 552(a)(4)(A)(ii)(I). The same standard applies to requests made for educational or noncommercial purposes. *Id.* § 552(a)(4)(A)(ii)(II). The FOIA requires agencies to furnish records free of charge when their disclosure may contribute to public understanding of how government works. *Id.* § 552(a)(4)(A)(iii).

[15] Prior to the Central Intelligence Agency Information Act of 1984, Pub. L. No. 98-477, 98 Stat. 2209 (codified as amended in scattered sections of 50 U.S.C.), FOIA requests to the CIA often took two to three years to process. H.R. REP. No. 726, 98th Cong., 2d Sess. 10 (1984). Each request required a professional staff member to examine the requested records line by line, resulting in great expense to the agency. *Id.* at 14; *see infra* note 148 (noting large backlog of FOIA requests at CIA).

[16] The National Security Act of 1947 charges the Director of the CIA with protecting intelligence sources and methods. 50 U.S.C. § 403 (1988). To that end, the Act specifically exempts records containing information about intelligence sources and methods from disclosure under FOIA. *Id.* The CIA Information Act amended the National Security Act in 1984 to exempt all CIA operational files from the FOIA's search, review, and disclosure requirements. H.R. REP. No. 726, *supra* note 15, at 20. The operational files include those in the Directorate of Operations documenting the conduct of foreign intelligence or counterintelligence activities, security liaison arrangements, or information exchanges with foreign governments. 50 U.S.C. § 431(b). Operational files also include those in the Directorate of Science and Technology which document technical and scientific intelligence gathering methods of foreign governments and files in the Office of Security which document investigations of potential intelligence sources. *Id.*

[17] The Glomar response may effectively prevent disclosure of any information related to a FOIA request. *See infra* notes 89-131 and accompanying text (illustrating how Glomar response gives plaintiffs no information).

[18] The agency has no impetus to look for records when it uses the Glomar response. Since the FOIA does not refer to the Glomar response, it also includes no requirement that agencies using the Glomar response search for "Glomar" records. *See* Antonelli v. FBI, 721 F.2d 615, 616 (7th Cir. 1983)

requester faces a nearly impossible appeal process because she has no information with which to challenge the CIA.[19]

This Comment discusses the CIA's use of the Glomar response and the problems it creates for requesters and the courts. Part I explains the background and evolution of the FOIA in the context of the law's intended purpose.[20] Part II examines the origin of the Glomar response and the initial scope of its use by the CIA.[21] Part III explores how the CIA has recently abused the Glomar response.[22] Finally, Part IV proposes three amendments to the FOIA which would explicitly narrow the situations in which the CIA can use the Glomar response to thwart a FOIA request.[23]

I. ROOTS OF THE FREEDOM OF INFORMATION ACT

President Johnson signed the Freedom of Information Act into law on July 4, 1966.[24] President Johnson's signature provided executive approval of Congress' commitment to foster open government and end bureaucratic secrecy.[25] The FOIA seeks to achieve

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(noting that FBI declined to search for records when using Glomar response), *cert. denied*, 467 U.S. 1210 (1984).

19 *See infra* notes 136-39 (discussing courts' difficulty reviewing propriety of Glomar response). Requesters face a less difficult appeal process when the CIA denies a FOIA request because records fall into either the national security exemption, 5 U.S.C. § 552(b)(1), or the exemption for matters specifically exempted from disclosure by another statute. *Id.* § 552(b)(3). In both cases, the agency searches for the records, reviews their content, and decides whether to release them. On appeal, the requester can try to show that the agency failed to conduct an adequate search, or responded to the FOIA request long after the statutory period.

20 *See infra* notes 24-84 and accompanying text.

21 *See infra* notes 85-131 and accompanying text.

22 *See infra* notes 132-80 and accompanying text.

23 *See infra* notes 181-221 and accompanying text.

24 *See* Statement by the President Upon Signing the "Freedom of Information Act," 316 PUB. PAPERS 699 (July 4, 1966).

25 *Id.*; *see also* Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 650-52 (1984) (noting public concern about unaccountable bureaucrats and public officials, even in pre-Watergate years). *See generally* O'REILLY, *supra* note 1, at 2-1 to 2-15 (describing origins of FOIA in detail). Congress amended the Administrative Procedure Act in 1966 to increase the amount of government information disclosed to the public. S. REP. NO. 813, 89th Cong., 1st Sess. 3-5 (1965). Congress found that under the previous disclosure statute, 5 U.S.C. § 1002 (1964), government bureaucrats were able to withhold virtually all information under color of law, even to cover up embarrassing mistakes. *Id.*; *see also* SCHWARTZ, *supra* note 1, at 3-17 (stating that prior to FOIA, right to

these lofty goals[26] by allowing any person,[27] for any reason,[28] to file a request with a federal agency[29] for disclosure of an agency record.[30]

Upon receiving a FOIA request, an agency must search for the requested records and retrieve them if they exist.[31] The agency then must review each record to decide whether to release it.[32] The FOIA establishes a presumption that records are disclosable.[33] A federal agency can rebut this presumption by showing that one of

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know was mere journalistic slogan). However, some scholars criticized the early FOIA. *See, e.g.*, Kenneth C. Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 807 (1967) (describing FOIA as shabby product).

26 The goals of open government and free information may be called lofty since most other countries do not have similar provisions. Wald, *supra* note 25, at 657 (noting that FOIA grants right which is virtually unprecedented anywhere else in world). Furthermore, the U.S. experience demonstrates the tenacity of the government in keeping secrets. *Id.* at 654 (noting that debacles of past decades show too much secrecy breeds government irresponsibility).

27 5 U.S.C. § 552(a)(3). The FOIA "any person" provision is quite broad. Any person, regardless of motive, citizenship, or status, can lawfully request and receive documents under the FOIA that do not fall into one of nine exemption categories. Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989); *see* Wald, *supra* note 25, at 655; *see also* Robert L. Saloschin, *The Freedom of Information Act: A Governmental Perspective*, PUB. ADMIN. REV., Jan.-Feb. 1975, at 10-11 (emphasizing that FOIA gives all persons judicially enforceable right to see federal agency records); *see infra* note 36 and accompanying text (discussing nine FOIA exemptions).

28 5 U.S.C. § 552(a)(3). The status or motive of the requester is not a factor in FOIA decisions. O'REILLY, *supra* note 1, at 9-27.

29 5 U.S.C. § 552(f). Federal agencies subject to the FOIA include the executive departments, independent regulatory commissions and boards, military departments, statutory government-controlled corporations, the Office of Management and Budget, and agency subunits. O'REILLY, *supra* note 1, at 4-4 to 4-9. This definition does not include the courts, Congress and its institutions, private individuals, private companies, recipients of federal grants or contracts, or state agencies. *Id.*

30 The text of the FOIA does not specifically define the term "record." However, courts have developed a wide body of case law since 1967 construing it. For example, courts have found that codes, symbols, formulas, photographs, legible and illegible writings, and x-ray film are records. O'REILLY, *supra* note 1, at 4-9 to 4-11.

31 *See* Saloschin, *supra* note 27, at 12.

32 *Id.* Usually an experienced information officer within the agency makes the original decision about whether to release requested records. *Id.* at 12-13.

33 O'REILLY, *supra* note 1, at 9-1.

nine statutory exemptions applies to the records.[34] The agency must promptly disclose requested records[35] unless one of the nine statutory exemptions applies.[36]

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[34] *See* Environmental Protection Agency v. Mink, 410 U.S. 73, 79 (1973) (stating nine exemptions were intended to establish workable standards for determining whether particular material may be withheld or must be disclosed); *infra* note 36 (listing nine exemptions to FOIA).

[35] 5 U.S.C. § 552(a)(3). The FOIA does not define the term "promptly," since many different considerations determine how long a particular disclosure may take. For example, the time an agency requires to disclose a one page document may be different from the time it takes to disclose thousands of pages of scattered materials.

[36] 5 U.S.C. § 552(b) contains exemptions for records 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;
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> (2) related solely to the internal personnel rules and practices of an agency;
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> (3) specifically exempted from disclosure by statute (other than section 552(b) of this title), provided that such statute (A) requires that 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;
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> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
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> (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;
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> (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 enforcement 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 or identify 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)

When an agency denies an individual's request for records, she can file an administrative appeal.[37] If the agency upholds the initial denial in whole or in part, the requester can then seek review in a federal district court.[38] Federal courts must review the agency's denial *de novo*[39] and may examine the contents of the records *in camera*[40] to determine the propriety of the agency's action.[41] To

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> 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.

Id. § 552(b).

37 *Id.* § 552(a)(6)(A)(i). Each agency may develop its own procedures for administrative appeal. *Id.* § 552(a)(6)(A)(ii).

38 *Id.* § 552(a)(4)(B).

39 *Id. De novo* review refers to the reviewing court examining the agency's decision afresh. BLACK'S LAW DICTIONARY 300 (6th ed. 1990); *see* O'REILLY, *supra* note 1, at 3-23 (stating that courts are required to conduct *de novo* review, without deferring to expertise of particular agency or Department of Justice on information law issues); *see also* Ray v. Turner, 587 F.2d 1187, 1202 (D.C. Cir. 1978) (citing S. REP. No. 813, *supra* note 25, at 8, for proposition that *de novo* review power was vested in courts "to prevent review from becoming meaningless judicial sanctioning of agency discretion").

40 A judge uses *in camera* inspection when she examines a document in her private chambers. BLACK'S LAW DICTIONARY 522 (6th ed. 1990); *see infra* note 180 (explaining confidential nature of *in camera* affidavits).

41 The original version of the FOIA did not provide courts with automatic discretion to inspect documents *in camera* to determine the appropriateness of agency action. 5 U.S.C. § 552 (1967) (current version at 5 U.S.C. § 552 (1988)). In 1973, the U.S. Supreme Court limited court review of national security exemption cases to the agency's procedural correctness. *See* Environmental Protection Agency v. Mink, 410 U.S. 73, 95 (1973) (Stewart, J., concurring). If the records were classified pursuant to executive order, the court's review was complete. *Id.* The Supreme Court also stated that reviewing courts should not review the substantive propriety of the agency's classification of the records. *Id.* at 81. In addition, the Court stated that reviewing courts should not pierce the agency's affidavits through *in camera* review of the records. *Id.* Congress amended the FOIA in 1974, over President Ford's veto. Statement by the President on Veto of the "Freedom of Information Act," 316 PUB. PAPERS 374-76 (Oct. 17, 1974). The amendment

make *de novo* review easier for the trial court, agencies submit *Vaughn* affidavits.[42] An agency's *Vaughn* affidavit describes the record and states which exemptions apply to it and why.[43] Furthermore, the agency has the burden of justifying its denial of the FOIA request during *de novo* review.[44]

Congress placed the burden of proof on the withholding agency in a FOIA action because the requester generally does not know the contents of the requested records.[45] To meet this burden, the agency's *Vaughn* affidavits must describe the records and the reasons for nondisclosure in reasonably specific detail.[46] The affidavits must demonstrate that the claimed exemption logically applies to

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specifically provided courts in FOIA cases with *in camera* review power to determine the substantive propriety of an agency's classification claim. S. REP. No. 1200, 93d Cong., 2d Sess. 11-12 (1974). The 1974 revisions modified the national security exemption to its present form. 5 U.S.C. § 552(a)(4)(B). The revisions also provided that "the court shall determine the matter *de novo*, and may examine the contents of such agency records *in camera* to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section." *Id.*

42 The *Vaughn* affidavit is named for the affidavit process adopted by the court in Vaughn v. Rosen, 484 F.2d 820, 826-28 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). The case involved a FOIA request by a law professor to the Civil Service Commission. *Id.* at 821-22. On review, the trial court granted the Commission's motion for summary judgment without describing which exemptions applied to the requested records. *Id.* at 822. On appeal, the D.C. Circuit court noted that the record in the case made it impossible to determine if the information requested was exempt from disclosure. *Id.* To create a more complete public record, and to foster an adversarial process in FOIA cases, the *Vaughn* court mandated that agencies submit affidavits to reviewing courts explaining why an exemption applies to a particular record. *Id.* at 826-28.

43 *Id.*; *see also* Allen v. CIA, 636 F.2d 1287, 1291 (D.C. Cir. 1980) (noting that affidavits must show with reasonable specificity why records fall within particular exemption), *overruled by* Founding Church of Scientology v. Smith, 721 F.2d 828 (D.C. Cir. 1983). In *Founding Church of Scientology*, the D.C. Circuit overruled the *Allen* case solely on its treatment of FOIA exemption 2. *Founding Church of Scientology*, 721 F.2d at 830.

44 5 U.S.C. § 552(a)(4)(B).

45 S. REP. No. 813, *supra* note 25, at 8.

46 Military Audit Project v. Casey, 656 F.2d 724, 738 (D.C. Cir. 1981) (stating that summary judgment on basis of affidavits is warranted only if they describe documents and justifications for nondisclosure with reasonably specific detail). Affidavits must demonstrate that information withheld logically falls within the claimed exemption. *Id.* Furthermore, affidavits must not be controverted either by contradictory evidence in the record or by evidence of agency bad faith. *Id.*

the information withheld and that the agency is acting in good faith.[47] If the agency meets this burden of proof, the reviewing court must grant the agency's summary judgment motion and dismiss the case.[48]

Courts developed the *Vaughn* affidavit process to equalize the status of the parties in FOIA proceedings.[49] Affidavits force agencies to clearly justify withholding, instead of broadly claiming that exemptions apply to the requested records.[50] However, affidavits may not place the plaintiff on equal standing with the agency if the reviewing court allows the agency to submit its affidavits *in camera*.[51] When an agency submits *in camera* affidavits, the plaintiff cannot challenge the agency's withholding because she still does not know why the records fit into the claimed exemptions.[52]

The plaintiff has a particular disadvantage in cases involving the FOIA's national security exemption,[53] in which agencies favor using *in camera* affidavits.[54] The national security exemption allows agen-

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47 *Id.*

48 *Id.*; *see also* Allen v. CIA, 636 F.2d 1287, 1291 (D.C. Cir. 1980) (noting standard for granting summary judgment), *overruled by* Founding Church of Scientology v. Smith, 721 F.2d 828 (D.C. Cir. 1983).

49 Vaughn v. Rosen, 484 F.2d 820, 824 (D.C. Cir. 1973).

50 In *Vaughn*, the D.C. Circuit noted that the typical process of dispute resolution in FOIA cases is impossible. *Id.* at 824-25. Lack of knowledge by the party seeking disclosure seriously distorts the traditional adversarial system. *Id.* at 824.

51 *See Military Audit Project*, 656 F.2d at 734 (indicating that district court, after hearing *in camera* testimony and examining classified affidavits, entered order stating only that "the complaint is dismissed for reasons stated *in camera*.").

52 For example, prior to *Vaughn*, an agency could respond to a judicial challenge of its refusal to disclose records by stating only that the requested records were exempt under the FOIA. *Vaughn*, 484 F.2d at 820. When the agency does not state why the records are exempt, the plaintiff cannot effectively challenge the agency's action. Similarly, when the agency submits *in camera* affidavits, the plaintiff does not know why the records are exempt. Consequently, the plaintiff cannot effectively challenge the agency's action since she does not know the basis for that action.

53 5 U.S.C. § 552(b)(1); *see supra* note 36 (providing text of exemption (b)(1), national security exemption). *See generally* O'REILLY, *supra* note 1, at 11-1 to 11-2 (noting that national security exemption cases are most difficult for plaintiffs).

54 *See, e.g., Military Audit Project*, 656 F.2d at 731 (stating that defendants requested permission to file additional affidavits *in camera* to explain Glomar response); Phillippi v. CIA, 655 F.2d 1325, 1328 (D.C. Cir. 1981) (noting that at district court level, court utilized *in camera* affidavits before creating public record); Schlesinger v. CIA, 591 F. Supp. 60, 67 (D.D.C. 1984) (stating that *in*

cies to refuse to disclose records which are "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy . . . ."[55] In 1974, Congress amended the national security exemption to link exempt status to proper classification under an executive order.[56] Thus, if the current executive order on national security information states that requested records may be classified, and if those records are in fact properly classified, an agency can avoid disclosing them.[57]

Under the current executive order on national security information,[58] an agency has three advantages over the requester. First, the executive order's wording heavily favors the agency.[59] The order states that any unauthorized disclosure of foreign government information is presumed to damage national security.[60] Second, the reviewing court must accord substantial weight to the agency's affidavits in making *de novo* determinations in national security cases.[61] As long as the affidavits describe the documents and the

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camera affidavits elaborated on agency's reasons for nondisclosure); Daily Orange Corp. v. CIA, 532 F. Supp. 122, 126 (N.D.N.Y. 1982) (stating that *in camera* affidavit strengthened conclusion that Glomar response was appropriate). *But see* O'REILLY, *supra* note 1, at 8-44 (stating that use of *in camera* affidavits is not ordinary procedure under FOIA).

55 5 U.S.C. § 552(b)(1). The records must also be properly classified pursuant to executive order to qualify for the national security exemption. *Id.*

56 An executive order is an order or regulation issued by the President for the purpose of interpreting, implementing, or giving administrative effect to a provision of the Constitution or some law or treaty. BLACK'S LAW DICTIONARY 569 (6th ed. 1990); *see, e.g.*, Exec. Order No. 12,356, 47 Fed. Reg. 14,874 (1982) (containing current provisions on classifying national security information); *see also* S. REP. NO. 1200, *supra* note 41, at 12 (stating that linkage between exempt status and proper classification clarifies congressional intent to override U.S. Supreme Court's decision in *Mink* that courts must defer to agencies in cases involving national security).

57 5 U.S.C. § 552(b)(1).

58 Exec. Order No. 12,356, 47 Fed. Reg. 14,874 (1982) (containing current provisions on classifying national security information).

59 *See, e.g., id.* at 1.3(c) (stating that "[u]nauthorized disclosure of foreign government information, the identity of a confidential foreign source, or intelligence sources or methods is presumed to cause damage to the national security.").

60 *Id.*

61 S. REP. NO. 1200, *supra* note 41, at 12 (recognizing special expertise of executive departments in national security and foreign policy matters); *see also* Ray v. Turner, 587 F.2d 1187, 1193 (D.C. Cir. 1978) (per curiam) (noting that legislative history of FOIA states that courts must accord substantial weight to agency's affidavit concerning classified status of disputed record).

justification for nondisclosure with reasonable specificity, the court may grant summary judgment to the agency.[62] In addition, judges tend to defer to the agency's classification of records involving national security.[63] A third advantage for agencies is that they have wide discretion in marking their documents for national security classification.[64]

National security exemption cases are extremely challenging because they involve sensitive records that could harm national security if released. Consequently, reviewing courts have questioned their own competence to review such matters.[65] For a short time following the 1974 FOIA amendments,[66] courts reviewing national security exemption cases persisted in deferring to agency claims that disclosing sensitive information might harm national security.[67] Courts practiced this deference even without conducting *in camera* reviews of disputed documents to verify the alleged harm.[68]

This practice changed, however, when a majority of courts adopted the approach taken by the D.C. Circuit in *Ray v. Turner*.[69] In *Ray*, two individuals requested files on themselves from the CIA.[70] Although the CIA did not have any files on the plaintiffs specifically, it did have files referring to them.[71] The CIA initially claimed that the files fell within the national security exemption

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62 The reasonable specificity standard is broad. In Halperin v. CIA, 629 F.2d 144, 148 (D.C. Cir. 1980), the court held that the agency's affidavits are reasonably specific whenever they avoid purely conclusory statements.

63 O'REILLY, *supra* note 1, at 11-14 to 11-15, 11-33 (stating that courts tend to defer to agencies in national security cases).

64 *Id.* at 11-2.

65 *See* Ray v. Turner, 587 F.2d 1187, 1211 (D.C. Cir. 1978) (Wright, C.J., concurring) (noting that judges lack knowledge and expertise to evaluate effects of releasing potentially sensitive documents); *see also Halperin*, 629 F.2d at 148 (noting that judges lack expertise necessary to second-guess agency opinions in typical national security cases); O'REILLY, *supra* note 1, at 11-32 to 11-33 (noting that courts are so deferential in matters of national security that they rarely overturn agency decisions).

66 *See supra* note 41 (describing 1974 FOIA amendments).

67 O'REILLY, *supra* note 1, at 11-14 to 11-15.

68 *See, e.g.*, Ray v. Turner, 587 F.2d at 1218 (citing Ray v. Bush, No. 76-0903, at JA66 (D.D.C. Jan. 25, 1977)) (stating that district court deferred to agency's conclusory claims in its public affidavits).

69 587 F.2d 1187 (D.C. Cir. 1978).

70 *Id.* at 1189.

71 *Id.*

and thus refused to release them.[72] The plaintiffs exhausted their administrative remedies and sued the CIA in the D.C. District Court.[73]

After the plaintiffs filed suit, the CIA released portions of the requested files and moved for summary judgment.[74] The court granted the CIA's motion.[75] Relying principally on a single, generalized affidavit from the CIA, the court stated that the plaintiffs failed to make any credible challenge to the affidavit.[76]

The D.C. Circuit Court remanded.[77] It found the single affidavit on which the district court relied inadequate to establish how the contested files qualified for the national security exemption.[78] The court then outlined the salient characteristics of *de novo* review in national security cases.[79] First, the *Ray* court stated that the government has the burden of establishing an exemption.[80] Second, it stated that courts must make their determination *de novo.*[81] Third, courts must accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.[82] Finally, courts have discretion to conduct *in camera* examinations of documents in national security cases, as in all others.[83] The *Ray* court's method of *de novo* review in national security cases became the standard as other courts adopted this approach.[84]

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72 *Id.*

73 *Id.*

74 *Id.*

75 *Id.*

76 *Id.*

77 *Id.*

78 *Id.* at 1195-96.

79 *Id.* at 1194.

80 *Id.*

81 *Id.*

82 *Id.*

83 *Id.*; *see* Daily Orange Corp. v. CIA, 532 F. Supp. 122, 127 (N.D.N.Y. 1982) (noting propriety of courts' use of *in camera* affidavits); *see also* Phillippi v. CIA, 546 F.2d 1009, 1013 (D.C. Cir. 1976) (stating that district court may have to examine *in camera* affidavits to satisfy obligation to conduct *de novo* review).

84 O'REILLY, *supra* note 1, at 11-17; *see, e.g.*, Gardels v. CIA, 689 F.2d 1100, 1104 (D.C. Cir. 1982) (citing *Ray de novo* review standard); Halperin v. CIA, 629 F.2d 144, 148 (D.C. Cir. 1980) (citing *Ray de novo* review standard).

II. The Origin and Evolution of the Glomar Response

Despite the judiciary's trend toward disclosing information more liberally under the FOIA,[85] the act falls far short of its disclosure goals in the area of national security information.[86] Courts have difficulty balancing the need for public disclosure against the need for national security secrets when an agency claims the national security exemption.[87] This difficulty becomes even more evident when the court reviews a case involving the Glomar response.[88]

A. Origin of the Glomar Response

The Glomar response was not a product of congressional intent.[89] Rather, it evolved out of the CIA's creative use of lan-

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85 *See, e.g.*, Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973) (involving court creating new *Vaughn* index requirement to give plaintiff some information about requested records).

86 *See generally* O'Reilly, *supra* note 1, at 11-33 (stating that plaintiffs usually lose when they challenge withholding based on national security exemption).

87 This balancing difficulty was particularly true before the 1974 FOIA amendments. Courts exercised restraint on their authority to become involved in national security matters in which disclosing sensitive information might have serious consequences. *See* O'Reilly, *supra* note 1, at 11-8. Following the 1974 amendments, however, courts still had difficulty with the balancing process. *See* Wald, *supra* note 25, at 657 n.28 (noting that difficult balancing questions arise under (b)(1) when conflicts exist between disclosure and government's need to conduct foreign relations and intelligence gathering in secret).

88 *See supra* note 3 and accompanying text (defining Glomar response).

89 The FOIA itself contains no language addressing the propriety of this response. *See* 5 U.S.C. § 552. In 1982, President Reagan included the requirement of a Glomar response in his Executive Order on National Security Information. Exec. Order No. 12,356, 47 Fed. Reg. 14,874 (1982). An agency must use the Glomar response to a FOIA request whenever the fact of the existence or nonexistence of requested records is itself classifiable under Executive Order 12,356. Congress construed the Glomar response narrowly in the Central Intelligence Agency Information Act, 50 U.S.C § 431(c)(2) (1988). Congress agreed that the Glomar response may be necessary, but only for cases involving special activities. H.R. Rep. No. 726, *supra* note 15, at 27-28. Congress defined special activities to include any activity of the U.S. government, other than one intended solely for obtaining necessary intelligence, which is planned and executed without acknowledging government participation. *Id.* at 28. Special activities also encompass functions in support of such activity, but do not include diplomatic activities. *Id.*

guage to avoid disclosure under the FOIA.[90] The CIA first used the Glomar response in *Military Audit Project v. Casey*,[91] in which plaintiffs wanted access to documents about the Glomar Explorer project.[92] The Glomar Explorer was an alleged joint CIA-Department of Defense venture to raise a sunken Russian submarine from the ocean floor.[93]

Initially, both the CIA and the Department of Defense refused to confirm or deny the existence or nonexistence of such records on the ground that any response could compromise national security.[94] The CIA later admitted having records on the Glomar Explorer.[95] However, this admission occurred more than six months after stories about the alleged joint venture appeared in various national newspapers.[96]

Ironically, the CIA did not need to invoke the Glomar response in *Military Audit Project* because the agency eventually admitted the existence of the requested records.[97] Thus, the D.C. Circuit Court did not make a ruling about the propriety of the Glomar response. A few months later, however, the same court specifically approved the CIA's use of the Glomar response in *Phillippi v. Central Intelligence Agency*.[98]

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90 *See* Military Audit Project v. Casey, 656 F.2d 724, 729-30 (D.C. Cir. 1981) (claiming CIA could neither confirm nor deny existence of records because such admission might compromise national security).

91 *Id.*

92 *Id.* at 727. The CIA and the Department of Defense allegedly wanted to retrieve a sunken Russian submarine's torpedoes, nuclear missiles, codes, and code machines. *Id.* at 728. The CIA apparently sought out billionaire Howard Hughes to arrange for construction of a vessel to raise the Russian submarine. *Id.* The vessel may have cost millions of dollars in taxpayer money. *Id.* It ultimately failed to raise the entire submarine. *Id.* at 728-29.

93 *Id.*

94 *Id.* at 729-30.

95 *Id.* at 730.

96 The CIA allegedly attempted to suppress stories about U.S. government involvement in the Glomar Explorer project. *Id.* at 729. The *New York Times*, *Los Angeles Times*, *Washington Post*, *Washington Star*, *Time*, *Newsweek*, and three major television networks agreed to delay reporting a story on the Glomar Explorer. This effort was successful until a mysterious burglary occurred at a Hughes office in Los Angeles. The *Los Angeles Times* obtained information about Hughes' participation in the effort to raise the Russian submarine and published a story on February 8, 1975. *Id.*

97 *Id.* at 730.

98 655 F.2d 1325 (D.C. Cir. 1981). In 1975, Phillippi was a journalist in Washington, D.C. Phillippi v. CIA, 546 F.2d 1009, 1011 (D.C. Cir. 1976). Motivated to untangle the mystery surrounding the Glomar Explorer,

In *Phillippi*, a journalist requested records from the CIA about the Glomar Explorer project to try to uncover the mystery about the vessel.[99] Phillippi was particularly interested in records describing the CIA's attempt to dissuade the news media from revealing any information about the Glomar Explorer.[100] The CIA used the Glomar response, refusing to confirm or deny the existence or non-existence of such records.[101]

Phillippi then sued the CIA in the D.C. District Court.[102] The court immediately reviewed *in camera* affidavits prepared by the CIA and held that the information and any response to Phillippi's request were exempt from disclosure.[103] The D.C. Circuit reversed and remanded the case because the district court resorted to *in camera* affidavits without even requesting public affidavits from the CIA.[104] Moreover, the appellate court acknowledged that plaintiffs face an insurmountable burden trying to appeal a Glomar response when a court resorts to *in camera* affidavits.[105] Therefore, the appellate court ordered the district court to create as complete a public record as possible about the agency's refusal to respond to Phillippi's request.[106]

Following remand of *Phillippi* to the district court, the new Carter Administration changed the federal government's stance on the Glomar Explorer.[107] The Carter Administration acknowledged the CIA's responsibility for the Glomar Explorer and its attempt to dissuade members of the press from publishing stories about it.[108] On remand, Phillippi argued that this acknowledgment made the CIA's continued use of the Glomar response inappropriate.[109] However,

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Phillippi requested all records about the CIA's attempt to persuade the media not to report events related to the Glomar Explorer. *Id.*; *see infra* note 99-113 and accompanying text (discussing *Phillippi*).

99 *Phillippi*, 546 F.2d at 1011.

100 *Id.*

101 *Id.*

102 Phillippi v. CIA, No. 75-1265 (D.D.C. Dec. 1, 1975), *rev'd*, 546 F.2d 1009 (D.C. Cir. 1976).

103 *Id.*

104 Phillippi v. CIA, 546 F.2d 1009, 1015 (D.C. Cir. 1976).

105 *Id.* at 1012-13.

106 *Id.* at 1015.

107 *See* Phillippi v. CIA, 655 F.2d 1325, 1328 (D.C. Cir. 1981) (noting change in administration stance to Glomar Explorer after Carter took office).

108 *Id.*

109 Phillippi v. CIA, No. 75-1265 (D.D.C. June 10, 1980), *aff'd*, 655 F.2d 1325 (D.C. Cir. 1981).

the district court granted the CIA's motion for summary judgment, stating that the CIA had met its burden of showing that the withheld information was exempt from disclosure.[110]

On appeal for the second time, the D.C. Circuit approved the CIA's use of the Glomar response.[111] The court agreed that the distinction between what may be revealed and what may be concealed can itself convey information to foreign intelligence services.[112] The court held that it must defer to the agency's affidavits, reasoning that revealing seemingly innocent facts may harm national security, even when these facts have already been revealed to the public.[113] Despite the court's suspect reasoning, the *Phillippi* decision provided a basis for agencies like the CIA to continue using the Glomar response.

B. Evolution of the Glomar Response

Following *Military Audit Project* and *Phillippi*, the CIA used the Glomar response in two main types of cases.[114] The first type involved FOIA requests to the CIA for information about CIA

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110 *Id.* The district court relied solely on the exemption for matters specifically exempted from disclosure by another statute. 5 U.S.C. § 552(b)(3). This section allows the CIA to exempt some of its most sensitive records. For example, the National Security Act of 1947 charges the Director of the CIA with protecting intelligence sources and methods from unauthorized disclosure. 50 U.S.C. § 403(d)(3). To that end, the act specifically exempts records containing information about intelligence sources and methods from disclosure under the FOIA. 5 U.S.C. § 552(a).

The Central Intelligence Agency Information Act amended the National Security Act in 1984 to exempt all CIA operational files from the FOIA's search, review, and disclosure requirements. H.R. REP. No. 726, *supra* note 15, at 20. The operational files include those in the Directorate of Operations documenting the conduct of foreign intelligence or counterintelligence activities, security liaison arrangements, or information exchanges with foreign governments. 50 U.S.C. § 431(b). Also included are files in the Directorate of Science and Technology that document technical and scientific intelligence gathering methods of foreign governments and files in the Office of Security that document investigations of potential intelligence sources. *Id.*

111 *Phillippi*, 655 F.2d at 1330. The appellate court approved the Glomar response after the CIA admitted having the pertinent records. *Id.* at 1331-33.

112 *Id.* For example, revealing whether the CIA possesses records about its activities at a particular university may give a foreign intelligence service a basis for its own strategic plans. Gardels v. CIA, 689 F.2d 1100, 1105 (D.C. Cir. 1982).

113 *Phillippi*, 655 F.2d at 1331-33.

114 *See infra* notes 115-31 and accompanying text (illustrating two types of cases in which CIA extended its use of Glomar response).

research contacts at U.S. universities.[115] For example, in *Gardels v. Central Intelligence Agency*,[116] Gardels requested records detailing the CIA's past and present relationship with the University of California.[117] The CIA released records related to overt CIA contact with the University of California.[118] However, the CIA refused to confirm or deny the existence or nonexistence of covert CIA contacts with the university.[119]

Gardels sued the CIA in the D.C. District Court.[120] Following the lawsuit, an appeal, remand, summary judgment, and a second appeal, the D.C. Circuit affirmed the district court's grant of summary judgment for the CIA.[121] The appellate court held that the CIA properly used the Glomar response to answer Gardels' request for records about CIA contacts with U.S. universities.[122] It found that the CIA adequately demonstrated that acknowledging covert contacts with a university might reveal an intelligence source or method.[123]

The second type of case involved requests for information about past CIA covert operations.[124] For example, in *Edwards v. Central Intelligence Agency*,[125] a member of the U.S. House of Representatives requested records about a particular book on Marxism in

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115 *See, e.g.*, Gardels v. CIA, 689 F.2d 1100 (D.C. Cir. 1982) (involving request for disclosure of CIA relationship with University of California); Daily Orange Corp. v. CIA, 532 F. Supp. 122 (N.D.N.Y. 1982) (involving request for records about CIA covert activity at Syracuse University).

116 689 F.2d 1100 (D.C. Cir. 1982).

117 *Id.* at 1102.

118 *Id.*

119 *Id.* at 1102-03.

120 *Id.* at 1103.

121 *Id.* at 1100. The D.C. District Court granted the CIA's first motion for summary judgment, but the D.C. Circuit reversed because the CIA filed an inadequate statement of material facts. *Id.* at 1103. On remand, the D.C. District court again granted the CIA's motion for summary judgment. *Id.* Gardels appealed, and the D.C. Circuit affirmed. *Id.* at 1107.

122 *Id.* at 1102.

123 *Id.* at 1105.

124 *See, e.g.*, Miller v. Casey, 730 F.2d 773 (D.C. Cir. 1984) (involving request for records about CIA's alleged placement of intelligence agents in Albania between 1945 and 1953); Edwards v. CIA, 512 F. Supp. 689 (D.D.C. 1981) (involving request for records related to CIA's alleged participation in publishing propaganda about Marxism in Chile).

125 512 F. Supp. 689 (D.D.C. 1981).

Chile.[126] Edwards specifically sought records confirming that the CIA used this book for propaganda purposes within Chile.[127]

The CIA answered Edwards' request with the Glomar response, contending that confirming or denying the existence or nonexistence of information about the book would harm national security.[128] Edwards sued the CIA, challenging the propriety of the Glomar response.[129] The CIA then moved for summary judgment, which the district court granted.[130] The court held that the CIA properly used the Glomar response, because acknowledging the book could reveal an intelligence source or method, or threaten national security.[131]

III. The CIA's Abuse of the Glomar Response

The CIA originally raised the Glomar response in the Glomar Explorer cases,[132] later applying it to cases involving CIA contacts with universities and past covert operations.[133] Arguably, legitimate uses for the Glomar response do exist.[134] However, recently the CIA extended the Glomar response beyond its logical limits in a case involving a foreign national.[135] Since courts have extreme dif-

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126 *Id.* at 691.

127 *Id.*

128 *Id.*

129 *Id.*

130 *Id.* at 695.

131 *Id.* at 694.

132 *See supra* notes 89-113 and accompanying text (describing origin of Glomar response).

133 *See supra* notes 114-31 and accompanying text (describing CIA extension of Glomar response).

134 H.R. Rep. No. 726, *supra* note 15, at 27 (describing permissible use of Glomar response for FOIA requests about special activities); *supra* note 89 (describing Congress' interpretation of legitimate use of Glomar response for FOIA requests about special activities).

135 *See infra* notes 140-62 and accompanying text (discussing CIA abuse of Glomar response).

ficulty determining the propriety of the Glomar response,[136] the CIA can abuse it with little court review.[137]

The CIA can abuse the Glomar response for two reasons. First, the reviewing court has no method for checking the agency's accuracy other than examining public and *in camera* affidavits.[138] Second, the court's *in camera* review of affidavits leaves the agency in control of the case. *In camera* review shuts the plaintiff out of the proceeding and provides no public record to assist her on appeal.[139]

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136 *See* Phillippi v. CIA, 546 F.2d 1009, 1013 (D.C. Cir. 1976) (noting that when CIA refuses to confirm or deny existence of requested records no relevant documents exist for court to examine other than CIA's affidavits). To conduct *de novo* review in Glomar response cases, the court must examine classified affidavits *in camera* without any participation by plaintiff's counsel. *Id.*; *see also* Hunt v. CIA, No. C92-1388 MHP, at 20-21 (N.D. Cal. Sept. 10, 1992) (noting that when agency submits inadequate *in camera* affidavits in Glomar cases, court may be unable to determine propriety of Glomar response), *rev'd*, 981 F.2d 1116 (9th Cir. 1992).

137 *See supra* notes 135-36, *infra* notes 138-62 and accompanying text.

138 *See* Allen v. CIA, 636 F.2d 1287, 1298 n.63 (D.C. Cir. 1980) (stating that in some cases *in camera* affidavits may be appropriate), *overruled by* Founding Church of Scientology v. Smith, 721 F.2d 828 (D.C. Cir. 1983); *Phillippi*, 546 F.2d at 1013; *accord* Schlesinger v. CIA, 591 F. Supp. 60, 64 (D.D.C. 1984).

139 Classified *in camera* affidavits are intended only for unusual cases, but they almost always prevent plaintiffs from winning their FOIA cases when agencies use them. *See supra* notes 50-54 and accompanying text (describing plaintiffs' difficulty in challenging agencies that use *in camera* affidavits). Courts deny plaintiffs' counsel all access to classified *in camera* affidavits. *Phillippi*, 546 F.2d at 1012; *accord Schlesinger*, 591 F. Supp. at 63. Furthermore, when the reviewing court uses classified *in camera* affidavits, it generally must write opinions approving withholding based on conclusory statements contained in the affidavits. *See, e.g.*, Daily Orange Corp. v. CIA, 532 F. Supp. 122, 126 (N.D.N.Y. 1982) (stating that *in camera* affidavit used in case "strengthens the conclusion that the information here, if it exists, would be properly classifiable"); *see also Schlesinger*, 591 F. Supp. at 65 (stating that agency's public and classified affidavits provided court with enough information to justify withholding). These conclusory statements do not provide plaintiffs with adequate information to argue an appeal. The appellate court in Military Audit Project v. Casey, 656 F.2d 724 (D.C. Cir. 1981), recognized this problem after the district court dismissed the requester's complaint "for reasons stated in camera." *Id.* at 734. Theoretically, courts represent the plaintiff's interests when they review *in camera* affidavits. However, because courts defer to agency affidavits in national security cases they inadequately represent the plaintiff's interests. *See supra* notes 61-64 and accompanying text (discussing judicial deference to agency in national security cases).

A. Hunt v. Central Intelligence Agency

A recent case, *Hunt v. Central Intelligence Agency*,[140] illustrates how an agency can abuse the Glomar response. This case involved a prisoner's FOIA request.[141] The prisoner, Hunt, requested information from the CIA about Hedayat Eslaminia,[142] an Iranian national allegedly killed by Hunt.[143] During his criminal trial, Hunt wished to introduce information about Eslaminia's alleged drug

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[140] 981 F.2d 1116 (9th Cir. 1992), *rev'g*, No. C92-1388 MHP (N.D. Cal. Sept. 10, 1992).

[141] *Id.* Hunt is serving a sentence of life without the possibility of parole for committing a prior homicide. Lois Timnick, *Billionaire Boys Club Head Gets a No-Parole Life Term*, L.A. TIMES, July 7, 1987, at Metro 1.

[142] Specifically, Hunt sought:

> (2) Records reflecting the nature, timing, and content of meetings outside the United States (specifically West Germany, France, and Turkey) at which agents or employees of the United States government and Eslaminia were present.
>
> (3) Records compiled by [the CIA] relating to:
>
> (a) Eslaminia's interaction with the United States Embassy or State Department staff prior to November 1, 1979;
>
> (b) [Eslaminia's] activities in Iran prior to November 1, 1979;
>
> (c) [Eslaminia's] efforts to effect a change in the Iranian government after Khomeini came to power;
>
> (d) [Eslaminia's] involvement in drug dealing and/or blackmail;
>
> (e) [Eslaminia's] attempted assistance to the United States;
>
> (f) [Eslaminia's] involvement in expatriate Iranian organizations formed to oppose Khomeini's regime;
>
> (g) [Eslaminia's] activities in the United States; and,
>
> (h) copies of all correspondence with Eslaminia including transcripts, tapes, or reports of any meetings.

Hunt v. CIA, No. C92-1388 MHP, at 2-3 (N.D. Cal. Sept. 10, 1992), *rev'd*, 981 F.2d 1116 (9th Cir. 1992).

[143] Eslaminia was found dead in the Angeles National Forest in 1984. Katherine Bishop, *Two Convicted of Murder in Plot Linked to California Finance Club*, N.Y. TIMES, Jan. 26, 1988, at A25. The prosecution in Hunt's criminal trial alleged that Hunt led a kidnapping scheme in which he and his colleagues took Eslaminia to Los Angeles, forced him to sign over his assets, and then killed him. The prosecution further alleged that Hunt and others kidnapped Eslaminia and that Eslaminia suffocated to death in a steamer trunk during the drive to Los Angeles. Plaintiff's Status Conference Statement Re: Context of FOIA Request, Hunt v. CIA, No. C92-1388 MHP at 6-7 (N.D. Cal. Sept. 10, 1992), *rev'd*, 981 F.2d 1116 (9th Cir. 1992) (copy on file with author).

trafficking[144] and his relationship with the U.S. government.[145] The CIA used the Glomar response to answer Hunt's request, refusing to confirm or deny the existence or nonexistence of any responsive information.[146] Hunt appealed the CIA's Glomar response through the FOIA's administrative appeal process.[147] The CIA again refused to confirm or deny the existence or nonexistence of any records about Eslaminia.[148] Hunt then sued the CIA, asking for a declaratory judgment that the Glomar response was an unlawful

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144 The Drug Enforcement Agency and U.S. Customs Service identified Eslaminia as a major importer of opium and heroin. Plaintiff's Status Conference Statement at 5, Hunt v. CIA (No. C92-1388 MHP). His home in Hillsborough, California, was referred to as the "Opium Distribution Center of Northern California" in documents released by the U.S. Customs Service. *Id.*

145 Eslaminia was a powerful Iranian statesman during the reign of Shah Reza Pahlevi. Marcia Chambers, *Club's Activities Linked to Killings*, N.Y. TIMES, Nov. 6, 1986, at A27. He was a major in the Iranian army and had been elected to the Iranian parliament. Plaintiff's Status Conference Statement at 2, Hunt v. CIA (No. C92-1388 MHP). Prior to the hostage crisis, Eslaminia advised U.S. Embassy officials about the unrest in Iran. *Id.* He also offered to organize and carry through counterrevolutionary activities against the Khomeini regime. *Id.* at 2-5. Eslaminia left Iran for the United States just before the seizure of the U.S. Embassy in Tehran. *Id.* at 3. In the United States, Eslaminia continued counterrevolutionary activities such as founding the Group for the Freedom of Iran. *Id.* at 3-4. This organization actively planned ways to overthrow Khomeini. *Id.*

Judge Hahn declared that information about Eslaminia was "materially relevant" to Hunt's criminal defense. *See* Transcript of Proceedings at 5977, People v. Hunt, No. C15761-01 (N.D. Cal. Feb. 26, 1991). Hunt's criminal trial eventually ended in a mistrial, after the jury deliberated for twenty-six days and divided eight jurors to four jurors in favor of acquittal. Bill Workman, *Jurors Pledge Support for Billionaire Boys Defendant*, S.F. CHRON., Jan. 4, 1993, at A15.

146 Hunt v. CIA, No. C92-1388 MHP, at 3 (N.D. Cal. Sept. 10, 1992), *rev'd*, 981 F.2d 1116 (9th Cir. 1992).

147 *Id.* at 4.

148 Letter from Central Intelligence Agency to Joe Hunt, April 6, 1992, *in* Supplement to App. of Exs. to Complaint at Ex. J, Hunt v. CIA (No. C92-1388 MHP). The CIA specifically cited the national security exemption and the exemption for matters specifically exempt from disclosure by another statute as grounds for refusing to confirm or deny the existence or nonexistence of responsive records. *Id.* In a separate letter on November 5, 1991, the CIA acknowledged Hunt's administrative appeal and informed him that his appeal would be handled on a first-received, first-out basis. Letter from Central Intelligence Agency to Joe Hunt, Nov. 5, 1991, *in* Appendix of Exs. to Complaint at Ex. I, Hunt v. CIA (No. C92-1388 MHP). At that time, the CIA had a backlog of 370 appeals. *Id.*

withholding of agency records.[149] He sought a mandatory injunction compelling the CIA to confirm or deny the existence or nonexistence of responsive records.[150] In addition, Hunt requested that the court compel the CIA to prepare a public *Vaughn* affidavit for any responsive documents.[151] Finally, Hunt requested that the court conduct an *in camera* review of any responsive documents to expedite his case.[152]

The CIA moved for summary judgment on the ground that it correctly used the Glomar response to answer Hunt's request.[153] It claimed it could properly refuse to confirm or deny the existence or nonexistence of records pertaining to Eslaminia or any foreign national.[154] The district court disagreed, stating that the CIA was making an ill-disguised attempt to create a blanket exemption for foreign nationals that Congress never authorized.[155] Noting the inadequacy of the CIA's public and *in camera* affidavits, the district court denied summary judgment and ordered the CIA to reveal whether it had responsive documents within two days.[156]

The Ninth Circuit reversed in favor of the CIA.[157] It held the CIA's *in camera* affidavits sufficiently showed that revealing the existence of records on Eslaminia might reveal intelligence sources or methods.[158] The court relied heavily on the CIA's argument that acknowledging records on Eslaminia might provide a hostile party

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149 Hunt v. CIA, No. C92-1388 MHP, at 2.

150 *Id.*

151 *Id.*

152 *Id.*

153 *Id.* at 1.

154 *Id.* at 7. The CIA claimed that revealing the existence of records pertaining to Eslaminia might damage national security. *Id.* Furthermore, the CIA claimed that the fact of the records' existence was exempt as a matter specifically exempt under another statute because it might reveal intelligence sources or methods in violation of the National Security Act of 1947. *Id.* at 7-8.

155 *Id.* at 8. The CIA argued in its public affidavits that revealing whether it has files on any foreign national could reveal a classified fact, even if the CIA has no intelligence interest in that individual. *Id.* at 9. This argument would therefore exempt requests on all persons but U.S. citizens from the FOIA's search, review, and disclosure requirements. In the present case, the CIA also wanted to extend the blanket exemption to deceased persons. *Id.* at 7.

156 *Id.* at 16, 21.

157 Hunt v. CIA, 981 F.2d 1116 (9th Cir. 1992), *rev'g*, No. C92-1388 MHP (N.D. Cal. Sept. 10, 1992).

158 *Id.* at 1119.

with enough information to gather additional facts about CIA activities.[159]

However, the court of appeals agreed with the district court that its decision would significantly narrow the CIA's responsibilities under the FOIA.[160] The court acknowledged that its decision stopped just short of exempting all CIA records from the FOIA.[161] Accordingly, the court explained that Congress should respond to this incremental creation of a CIA blanket exemption by amending the FOIA to clarify its stance on the Glomar response.[162]

B. Fundamental Problems with the CIA's Abuse of the Glomar Response

Hunt illustrates two fundamental problems with the CIA's abuse of the Glomar response. First, a court may not have enough information to determine the propriety of the CIA's Glomar response if it must base its decision only on public and *in camera* affidavits.[163] The CIA filed not one, but three public affidavits in this case.[164] None of the affidavits specifically addressed what harm to national security would occur if the CIA confirmed or denied having records

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159 *Id.* at 1119-20. This argument, called the mosaic theory, claims that revealing minute bits of CIA information might help hostile intelligence services obtain a clear picture of CIA activities. *See, e.g.*, Halperin v. CIA, 629 F.2d 144, 150 (D.C. Cir. 1980) (stating that each individual piece of intelligence information, like pieces of jigsaw puzzle, may help foreign intelligence services piece together larger picture).

160 Hunt v. CIA, 981 F.2d at 1120.

161 *Id.*

162 *Id.*

163 The CIA claims that the exempt "record" is the fact of the existence or nonexistence of records. *Id.* at 1118. Thus, there are no "records" for the court to examine to determine if they fall into the claimed exemptions. Rather, the court must rely on the CIA's representations that revealing the existence or nonexistence of records about Eslaminia would harm national security.

164 The court ordered the CIA to produce public *Vaughn* affidavits justifying its use of the Glomar response on May 29, June 29, and July 29, 1992. Hunt v. CIA, No. C92-1388 MHP, at 23 (N.D. Cal. Sept. 10, 1992), *rev'd*, 981 F.2d 1116 (9th Cir. 1992). The CIA complied with affidavits from Katherine M. Stricker, the CIA's Information Review Officer for the Directorate of Operations. However, after the judge ruled the first Stricker Declaration inadequate and ordered a second, the CIA refused to comply with the order. Defendant's Statement in Response to Court's Order and Request for Reconsideration at 2-3, Hunt v. CIA (No. C92-1388 MHP). The CIA stated that it would not provide the case-specific affidavit the court ordered on June 29, 1992. *Id.*

on Eslaminia.[165] Furthermore, each affidavit relied on conclusory language about how confirming or denying interest in any foreign national could harm U.S. national security.[166] When all of the CIA's public affidavits proved unsatisfactory, the court requested and reviewed two *in camera* affidavits.[167] However, the *in camera* affidavits proved unsatisfactory as well.[168]

When a reviewing court examines contested records *in camera*, it has the ability to conduct a *de novo* review of an agency's decision. The court can decide if the agency's claimed exemptions fit the records, or if they are a mere pretext for withholding information. Without records to examine, the court has no way to control the agency's zealous protection of its information.[169] When the agency's public affidavits fail to justify its position, the court must resort to *in camera* affidavits. If the *in camera* affidavits also prove inadequate, the court finds itself in the unenviable position of

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165 Hunt v. CIA, No. C92-1388 MHP, at 11. The first public affidavit referred only to confirming or denying information about foreign nationals in general. *Id.* at 12-14. The second public affidavit mirrored the first, but inserted Eslaminia's name. *Id.* Both the first and second affidavits merely speculated in general terms about harm to national security that might occur if the CIA responds to FOIA requests about foreign nationals. The third public affidavit provided no further case-specific justification, and even indicated that the CIA had not searched or reviewed any records to respond to the court's order. *Id.*

166 *Id.* at 12-14. The court characterized the CIA's public affidavits as "[having] an 'Alice in Wonderland' quality tantamount to Alice saying that if she told anyone whether there was a mirror at the end of the hall that would reveal who could be seen in the mirror." *Id.* at 15.

167 *See id.* at 16.

168 *Id.* The CIA's affidavits proved unsatisfactory because they provided conclusory statements about the threat to national security if it acknowledged records on Eslaminia. *See supra* note 165.

169 For example, in *Hunt*, the CIA claimed a blanket exemption for all information requests related to foreign nationals. Hunt v. CIA, No. C92-1388 MHP, at 12-13. The CIA claimed it can never confirm or deny the existence or nonexistence of any information relating to anyone who is not a U.S. citizen with the exception of sitting heads of state. *See* Transcript of Proceedings at 93-94, Hunt v. Department of State, Central Intelligence Agency, Customs Service, Fed. Bureau of Investigation, et al., Nos. C92-1339 MHP, C92-1388 MHP, C92-1389 MHP, C92-1390 MHP (July 29, 1992). Such an exemption is not within the statutory language of the FOIA. 5 U.S.C. § 552. Furthermore, Congress never sanctioned such an expansive interpretation of the CIA's power to skirt the FOIA's mandate for disclosure. Hunt v. CIA, No. C92-1388 MHP, at 18.

either deferring to the agency or risking harm to national security.[170]

Second, the CIA's abuse of the Glomar response leaves the agency, rather than the court, in control of the proceeding. In *Hunt*, the CIA filed public affidavits to satisfy its burden of showing that it correctly used the Glomar response.[171] Ideally, public affidavits will provide a plaintiff with at least some information about the documents she seeks.[172] However, the CIA's approach in *Hunt* shows that agencies may file public affidavits containing useless information.[173]

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170 Courts tend to defer to agency claims about harm to national security. *See, e.g.*, Halperin v. CIA, 629 F.2d 144, 148 (D.C. Cir. 1980) (stating that judges lack expertise necessary to second-guess agency opinions in typical national security cases); Schlesinger v. CIA, 591 F. Supp. 60, 65 (D.D.C. 1984) (stating that absent allegation of agency bad faith, court has no reason to question veracity of agency's affidavit). Although Congress specifically provided courts with the power to review documents *in camera* in national security cases, this power does not help a court faced with the Glomar response. *See supra* note 41 (discussing use of *in camera* review in national security cases). Although the court can review documents to determine if the exemptions fit their content, Congress recognized that the executive branch has unique insight into national security matters. Therefore, Congress specifically stated that in national security cases, the court must accord substantial weight to an agency's affidavit. S. REP. No. 1200, *supra* note 41, at 12. Where documents are not available for review, the balance is loaded in favor of the agency. *See, e.g.*, Hunt v. CIA, No. C92-1388 MHP, at 20 (stating that plaintiff is powerless to present effective opposition to agency exemption claims in Glomar case).

171 Hunt v. CIA, No. C92-1388 MHP, at 11-15.

172 In Vaughn v. Rosen, 484 F.2d 820, 827 (D.C. Cir. 1973), the court described the elements of a *Vaughn* index. A *Vaughn* index subdivides the allegedly exempt records, describes in general terms what each record is or contains, and indicates which exemptions apply and why. *Id.* In Glomar response situations, agencies submit *Vaughn* affidavits justifying why the Glomar response is appropriate. The affidavits usually contain only the most general information. Often the wording of the affidavit is not case-specific. *See supra* notes 166-68 and accompanying text (discussing CIA's tendency to use conclusory language in affidavits).

173 *See* Hunt v. CIA, No. C92-1388 MHP, at 11-15; *see also* Allen v. CIA, 636 F.2d 1287, 1298 (1980) (noting difficulty in conducting *de novo* review where agency affidavits are conclusory and parrot language of FOIA exemption), *overruled by* Founding Church of Scientology v. Smith, 721 F.2d 828 (D.C. Cir. 1983); *supra* notes 164-68 and accompanying text.

The CIA's first public *Vaughn* affidavit in *Hunt* stated only that the CIA relies on foreign nationals for intelligence information[174] and that confirming or denying having records on a foreign national could provide another country with potentially harmful information.[175] Furthermore, the agency described the potential harm to national security in the most general terms.[176] The second and third public *Vaughn* affidavits contained essentially the same language as the first affidavit.[177] These documents did not provide the plaintiff with enough information to support an appeal.

The district court in *Hunt* attempted to create as complete a public record as possible before resorting to *in camera* affidavits.[178] The content of the public record, however, remained largely in the CIA's control. Although the court ordered a case-specific, detailed public affidavit, the agency refused to comply with the order.[179] When the court resorted to *in camera* affidavits to review the CIA's Glomar response, the CIA retained control over what information the court could review. Neither the court nor the plaintiff could question the content of the *in camera* affidavits.[180]

These two problems illustrate how the Glomar response effectively allows the CIA to exempt itself from the FOIA. The Glomar response lets the CIA refuse to search for and review requested documents. Plaintiffs challenging the Glomar response cannot effec-

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174 Declaration of Katherine M. Stricker, May 29, 1992 at ¶¶ 10-12, Hunt v. CIA (No. C92-1388 MHP).

175 *Id.* at ¶¶ 13-21.

176 *Id.* at ¶ 27 (stating that any confirmation or denial of information could jeopardize CIA's intelligence activities).

177 *See* Hunt v. CIA, No. C92-1388 MHP, at 13-15 (stating that second and third declarations of Katherine M. Stricker were as vague and inadequate as first).

178 The court must create as complete a public record as possible before conducting an *in camera* inspection. *See* Phillippi v. CIA, 546 F.2d 1009, 1013 (D.C. Cir. 1976).

179 *See supra* note 164 (noting CIA's refusal to comply with court order to produce detailed public affidavits).

180 By their nature, *in camera* affidavits are confidential between the agency and the court. They are never published or released, and plaintiff's counsel may not participate in their review. BLACK'S LAW DICTIONARY 760 (6th ed. 1990). Thus, the plaintiff remains an outsider in the review process because she cannot challenge the *in camera* affidavits. *See supra* note 139 (indicating difficulty for plaintiffs when courts in Glomar response cases use *in camera* affidavits). The court cannot properly challenge the *in camera* affidavits because the agency may refuse to comply with court orders. *See supra* note 164 (providing example of agency refusal to comply).

tively appeal because they have no information with which to confront the agency. Similarly, the courts are powerless since they have no records or information with which to evaluate the agency's response.

IV. Eliminating the CIA's Abuse of the Glomar Response

In light of these problems, Congress should amend the FOIA to reduce agency abuse of the Glomar response in national security cases.[181] As amended, the FOIA will assist courts in conducting *de novo* review of the propriety of the CIA's use of the Glomar response.[182] Effective *de novo* review will in turn lead to different results in Glomar response cases like *Hunt*.[183]

A. Proposed Amendments to the FOIA

Congress should amend the FOIA in three ways. First, Congress should state that agencies may use the Glomar response only in very limited circumstances.[184] Second, Congress should provide courts reviewing Glomar response cases with the power to coerce compliance from agencies that fail to produce detailed, case-specific public affidavits.[185] Finally, Congress should explicitly state that courts should review *in camera* affidavits only as a last resort.[186]

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181 Although CIA use of the Glomar response receives much of the reviewing courts' attention, other agencies also use the Glomar response. *See, e.g.*, United States Dep't of Justice v. Reporters Comm'n for Freedom of the Press, 489 U.S. 749 (1989) (demonstrating Federal Bureau of Investigation use of Glomar response pursuant to FOIA exemption 7(c)); Benavides v. Drug Enforcement Agency, 769 F. Supp 380 (D.D.C. 1990) (demonstrating Drug Enforcement Agency use of Glomar response pursuant to FOIA exemptions 7(c)-(d)), *rev'd*, 968 F.2d 1243 (D.C. Cir. 1992), *modified*, 976 F.2d 751 (D.C. Cir. 1992).

182 *See infra* notes 184-213 and accompanying text (discussing proposed FOIA amendments).

183 *See infra* notes 216-21 and accompanying text (discussing possible effect of FOIA amendments on *Hunt v. CIA*).

184 *See infra* notes 187-98 and accompanying text (proposing that Congress limit Glomar response to two situations to prevent CIA abuse).

185 *See infra* notes 199-210 and accompanying text (proposing that Congress give courts power to order live testimony to prevent CIA abuse of Glomar response).

186 *See infra* notes 211-14 and accompanying text (proposing that Congress limit situations in which courts use *in camera* review in Glomar response cases to prevent CIA abuse of Glomar response).

1. Limiting CIA Use of the Glomar Response

Congress should amend the FOIA to incorporate its narrow reading of the Glomar response in the Central Intelligence Agency Information Act.[187] In 1984, Congress narrowly construed the circumstances in which the CIA could use the Glomar response.[188] Congress specifically limited this response to cases in which someone makes a FOIA request to the CIA for information about a covert action.[189] Similarly, Congress should now include a subsection in the FOIA stating that any federal agency using the Glomar response pursuant to the national security exemption may use it only to answer FOIA requests about covert activities.[190]

However, if requests about covert activities were the only requests to which the Glomar response applied, then the response might reveal more information than an agency considers desirable.[191] To

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187 *See* H.R. REP. NO. 726, *supra* note 15, at 27-28. Hunt advocated that the 9th Circuit Court of Appeals narrowly construe the Glomar response to maintain the judiciary's independence. Brief of Appellee Joe Hunt at 21-24, Hunt v. CIA, No. 92-16548 (9th Cir. 1992). Hunt suggested that the court limit the Glomar response to FOIA requests about classified covert activities and intelligence sources and methods. *Id.* at 23.

188 H.R. REP. NO. 726, *supra* note 15, at 27-28.

189 *Id.* The report explains that the Glomar response should be limited to requests about CIA "special activities." Congress explained that its use of the term "special activity" was equivalent to "covert action." *Id.*; *see supra* note 89 (describing nonlegislative origins of Glomar response).

190 For example, Congress should insert the following subsection after the FOIA exemptions:

> In response to any implicit or explicit request about information related to a covert operation conducted by the U.S. government, or conducted with U.S. government participation, where a threat to the national security exists, the agency shall respond by refusing to confirm or deny the existence or nonexistence of any information relevant to the request.

This amendment would limit all agency use of the Glomar response pursuant to the national security exemption. However, the amendment would not address agency use of the Glomar response pursuant to other FOIA exemptions. *See supra* note 181 (noting other agencies' use of Glomar response under exemption 7(c)).

191 If a requester knows that the CIA may use the Glomar response only for requests about covert operations, then a Glomar response to a FOIA request would indicate that the request refers to a covert activity. For example, in *Miller v. Casey*, the plaintiff requested information about alleged U.S. efforts to place intelligence agents in Albania between 1945 and 1953. Miller v. Casey, 730 F.2d 773, 774 (D.C. Cir. 1984). The CIA used the Glomar response to the request, claiming that any response would damage U.S. national security and

avoid this problem, Congress should also allow agencies to use the Glomar response when a request seeks confirmation of an intelligence source or method.[192] This amendment would allow agencies to use the Glomar response when appropriate, but not abuse it to escape the FOIA's search, review, and disclosure requirements.

Critics may argue that these limitations pose a serious risk to national security.[193] However, Congress has already addressed this risk through the Central Intelligence Agency Information Act.[194] This statute completely exempts most files in the CIA's Directorate of Operations from the FOIA's search, review, and disclosure obligations.[195] The limitations therefore would not compromise the most sensitive records about intelligence sources and methods because they are already protected.[196] Rather, these limitations

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foreign relations. *Id.* If the CIA could use the Glomar response only when a plaintiff requested information about a covert activity, then the CIA's Glomar response in *Miller* would confirm the plaintiff's suspicion that the U.S. conducted covert activities in Albania.

192 Congress should insert a subsection following the FOIA exemptions which states:

> In response to an explicit request about information related to an intelligence source or method, the agency may respond by refusing to confirm or deny the existence or nonexistence of any information relevant to the request.

In *Hunt*, the plaintiff did not specifically request records that would indicate whether Eslaminia was an intelligence source. *See* Hunt v. CIA, 981 F.2d 1116 (9th Cir. 1992), *rev'g* No. C92-1388 MHP (N.D. Cal. Sept. 10, 1992).

193 *Cf.* Transcript of Proceedings at 93-94, Hunt v. Department of State, Central Intelligence Agency, Customs Service, Fed. Bureau of Investigation, et al., Nos. C92-1339 MHP, C92-1388 MHP, C92-1389 MHP, C92-1390 MHP (July 29, 1992) (stating CIA position that any time it gets FOIA request on foreign national, it must use Glomar response or risk harm to national security).

194 Pub. L. No. 98-477, 98 Stat. 2209 (codified in scattered sections of 50 U.S.C.) (exempting files in CIA's Directorate of Operations from FOIA).

195 H.R. REP. NO. 726, *supra* note 15, at 20. Directorate of Operations files include the most sensitive information about intelligence sources and methods. *Id.* at 6. Nearly all of the information in these files qualifies for both the national security exemption and the exemption for matters specifically exempted by another statute, so the FOIA's search, review, and disclosure process yields little information. *Id.*

196 *Id.* The CIA could attempt to circumvent this FOIA amendment by placing requested records in the Directorate of Operations, outside of the FOIA's reach. *See supra* note 16. However, the CIA would still have to justify its denial of FOIA requests under the CIA Information Act to reviewing courts. 5 U.S.C. § 552(a)(4)(B). Therefore, placing requested records in the Directorate of Operations on an ad hoc basis would not help the CIA avoid lengthy court review.

would prevent an agency such as the CIA from using the Glomar response to claim a blanket exemption for all requests about foreign nationals.[197] If the existence of records about a foreign national might harm national security, an agency can still claim an exemption.[198] Removing the Glomar response simply requires the agency to argue its case more vigorously.

2. Providing Courts with More Power

Congress should also amend the FOIA to provide courts with more power to compel compliance from agencies that refuse to provide adequate public affidavits.[199] As the *Hunt* case illustrates, a court order in a FOIA proceeding may have little effect.[200] When the CIA refused to comply with the court's order for a more complete public affidavit, the court was unable to compel the CIA to comply.[201] Congress should therefore include a new section in the FOIA explicitly granting courts in Glomar response cases the power to order live testimony about a request.[202]

With an explicit live-testimony power, a district court could appoint a federal magistrate[203] to serve as a special master for the case.[204] The magistrate would hear testimony from the agency officials who reviewed the FOIA request about why the agency must use the Glomar response in a particular case. If necessary, the magistrate would question the information officer about the agency's justifications. In this way, the magistrate would gather the additional

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197 *See supra* note 169 (explaining CIA argument for applying Glomar response to all FOIA requests about foreign nationals).

198 5 U.S.C. § 552(b)(1) (exempting records which executive order authorizes agency to keep secret in interest of national defense or foreign policy and which agency has properly classified pursuant to executive order).

199 *See supra* notes 140-62 and accompanying text (discussing *Hunt v. CIA*).

200 *See supra* note 164 (describing CIA refusal to comply with court order to produce detailed, case-specific public affidavit in *Hunt v. CIA*).

201 *See* Hunt v. CIA, No. C92-1388 MHP, at 20-21.

202 Congress could insert a sentence in 5 U.S.C. § 552(a)(4)(B) stating: "Courts may order the agency to sustain its action by providing live testimony from the relevant information officer before a federal magistrate appointed by the district court." *See generally supra* notes 198-201, *infra* notes 203-09 and accompanying text (discussing live testimony power).

203 Federal magistrates are judicial officers with many of the same powers as federal district court judges. BLACK'S LAW DICTIONARY 656 (6th ed. 1990); *see also* 28 U.S.C. § 631 (1988) (authorizing appointment of federal magistrates).

204 28 U.S.C. § 636.

information the district court needs to determine the propriety of the agency's action.

The live-testimony power provides several benefits to the parties. First, if courts can order live testimony, the agency may be more willing to provide detailed public and *in camera* affidavits justifying its position. The CIA already uses highly trained and experienced professional staff to review all of its FOIA requests due to their potentially sensitive nature.[205] Live testimony by information officers would require the CIA's experienced professional staff to divert more time and expense to FOIA issues.[206]

Congress was concerned about this diversion of CIA professional staff when it passed the Central Intelligence Agency Information Act.[207] The Act reduced the number of CIA files subject to the FOIA.[208] The CIA may be more willing to provide useful affidavits about the Glomar response if it wants to avoid even more burdensome live testimony.

Second, a live-testimony power, by helping the court conduct *de novo* review, would also help the plaintiff. The live-testimony power would provide the plaintiff with some of the information she seeks when the CIA satisfies its burden of proving it has used the Glomar response properly.[209] At the very least, live testimony would give the plaintiff enough information to challenge the Glomar response on appeal.[210]

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205 H.R. REP. No. 726, *supra* note 15, at 14.

206 The search and review process under the FOIA already absorbs a considerable amount of the CIA professional staff's time. *Id.* at 5. Live testimony by CIA information officers could aggravate this burden by increasing the amount of time and money spent on each case.

207 Pub. L. No. 98-477, 98 Stat. 2209 (codified in scattered sections of 50 U.S.C.).

208 *Id.*

209 5 U.S.C. § 552(a)(4)(B).

210 A plaintiff may benefit from obtaining information related to her FOIA request, even if she does not obtain the records themselves. For example, in Hunt v. CIA, No. C92-1388 MHP (N.D. Cal. Sept. 10, 1992), *rev'd*, 981 F.2d 1116 (9th Cir. 1992), the plaintiff wished to use information about Eslaminia in his criminal trial. *Id.* at 2. Hunt could have used information linking Eslaminia with the United States or with foreign governments, even if that information did not come in the form of a CIA record. Live testimony by a CIA information officer could have provided Hunt with relevant information for his trial. *See supra* notes 143-45 (describing Eslaminia and Hunt's criminal trial).

3. Reviewing *In Camera* Affidavits Only as a Last Resort

Congress' final FOIA amendment should direct courts to use *in camera* affidavits only as a last resort. *In camera* review presents two problems in Glomar response cases. First, when a court reviews an agency's affidavits *in camera*, it prevents the plaintiff from obtaining any information about her request.[211] Second, *in camera* review forces courts to determine the propriety of an agency's Glomar response without any real records to examine.[212] Congress should eliminate these problems by amending the FOIA to state that courts reviewing Glomar response cases should use *in camera* review only after creating a thorough public record.[213] A thorough public record would include a detailed explanation of why revealing whether an agency has records about a subject would harm national security.

This amendment would command rather than recommend that courts create a complete public record for the plaintiff's benefit.[214] It would also force courts to be less deferential to an agency's claim that it used the Glomar response properly. In addition, it would place greater emphasis on public affidavits in Glomar response cases. An emphasis on public affidavits would help the plaintiff play a more active role in her case by enabling her to use these explanations to challenge the agency on appeal.

B. The FOIA Amendments in Practice

The three proposed amendments to the FOIA would provide different results in cases like *Hunt v. Central Intelligence Agency*.[215] First, the Glomar response limitation would require the CIA to acknowledge whether or not it had records about the deceased Eslaminia, or any foreign national.[216] Even if the CIA's records qualified for

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211 *See supra* notes 50-54 and accompanying text (discussing *in camera* affidavits).

212 *See supra* notes 163-80 and accompanying text (discussing difficulty courts have reviewing agency action in Glomar response cases).

213 Congress should amend 5 U.S.C. § 552(a)(4)(B) to include a sentence stating: "Courts shall resort to *in camera* records only after creating as thorough a public record as possible."

214 A congressional command is necessary because the relevant case law merely requires that district courts attempt to create as complete a public record as possible. Phillippi v. CIA, 546 F.2d 1009, 1013 (D.C. Cir. 1976).

215 No. C92-1388 MHP (N.D. Cal. Sept. 10, 1992), *rev'd*, 981 F.2d 1116 (9th Cir. 1992).

216 The CIA would have to acknowledge whether it had records on Eslaminia if information on Eslaminia were neither related to a covert operation nor revealed intelligence sources and methods. *See supra* notes 187-

an exemption from disclosure, Hunt could benefit from knowing the CIA had such records.[217]

Second, if the CIA still invoked the Glomar response, the reviewing court could order a CIA official to provide live testimony.[218] The reviewing court could directly ask the officer why the Glomar response applies when she resorts to generalized declarations about the government's need for secrecy. Not only would this process assist the reviewing court in making its judgment, it might also provide the plaintiff with some of the information she seeks.[219]

Finally, by limiting the use of *in camera* affidavits in Glomar cases, the proposed FOIA amendments would create a more complete public record justifying the agency's use of the Glomar response.[220] *In camera* affidavits provide no public record at all.[221] A more detailed public record would help plaintiffs like Hunt challenge an agency's rationale for the Glomar response, increasing their chances of winning their appeals.

CONCLUSION

The Freedom of Information Act provides individuals with an important tool for obtaining information about their government.[222] It forces federal agencies to provide information to the public when the public asks for it, unless a statutory exemption applies.[223] If the agency refuses to provide requested information, it must offer detailed reasons that will withstand judicial review.[224]

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98 and accompanying text (describing FOIA amendment limiting situations when CIA can use Glomar response).

217 *See supra* notes 143-45 (noting that Hunt wished to use information about Eslaminia for his criminal defense).

218 *See supra* notes 199-210 and accompanying text (discussing live testimony power).

219 *See supra* notes 163-80 and accompanying text (noting court's difficulty in conducting *de novo* review based only on affidavits).

220 *See supra* notes 163-65 and accompanying text (discussing sparse public record in *Hunt v. CIA*).

221 *See supra* notes 169-80 and accompanying text (discussing confidential nature of *in camera* affidavits).

222 *See supra* notes 27-30 and accompanying text (discussing how individuals use FOIA to obtain government information).

223 *See supra* notes 31-36 and accompanying text (discussing agency obligations under FOIA).

224 *See supra* notes 37-41 and accompanying text (discussing agency's burden of proving that FOIA exemption applies to requested records).

Congress considered access to information vital for producing an informed, intelligent electorate.[225] It entrusted the federal courts with ensuring this access.[226] Yet the Glomar response places federal agencies like the CIA in a position superior to the federal courts.[227] The Glomar response contradicts Congress' intent to provide for liberal information disclosure under the FOIA and allows agencies like the CIA to avoid even searching for records as the FOIA requires.[228] The Glomar response makes *de novo* review of the agency's classification of records almost impossible.[229] Furthermore, it excludes the plaintiff from the review proceeding, making it difficult for her to win her claim or to argue her appeal.[230]

Admittedly, the Glomar response has legitimate uses in certain national security situations.[231] However, the CIA's abuse of the Glomar response in *Hunt v. Central Intelligence Agency* entreats congressional action to narrow its scope.[232] Congress should amend the FOIA to limit CIA use of the Glomar response to requests about covert activities or requests specifically seeking information about intelligence sources or methods.[233]

By amending the FOIA to limit the Glomar response, Congress will achieve several FOIA goals. The proposed FOIA amendments will assist plaintiffs challenging CIA use of the Glomar response in

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225 H.R. REP. No. 1497, *supra* note 11, at 12 (declaring that democratic society requires informed electorate, and intelligence of electorate varies as quantity and quality of its information varies).

226 *See* Ray v. Turner, 587 F.2d 1187, 1200 (D.C. Cir. 1978) (noting important role courts play in implementing FOIA); *see also* S. REP. No. 813, *supra* note 25, at 8 (noting role of federal courts in FOIA process).

227 *See supra* notes 171-80 and accompanying text (demonstrating how Glomar response allows CIA to retain control over what records it releases under FOIA).

228 *See supra* note 18 and accompanying text (noting that Glomar response allows agency to avoid FOIA search, review, and disclosure requirements).

229 *See supra* notes 163-69 and accompanying text (showing court's difficulty conducting *de novo* review of Glomar response in national security cases).

230 *See supra* note 139 and accompanying text (discussing plaintiffs' difficulty appealing Glomar response).

231 *See supra* notes 187-98 and accompanying text (explaining appropriate use of Glomar response).

232 *See supra* note 162 and accompanying text (noting Congress' role in defining scope of Glomar response).

233 *See supra* notes 187-98 and accompanying text (explaining arguments for limiting use of Glomar response).

national security cases.[234] They will help courts evaluate the propriety of CIA use of the Glomar response.[235] Finally, the FOIA amendments will prevent agencies from abusing the Glomar response[236] and will promote the FOIA's goal of liberal public disclosure.[237]

Danae J. Aitchison

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[234] *See supra* notes 211-14 and accompanying text (explaining how amendments will help plaintiffs argue Glomar response appeals more effectively).

[235] *See supra* notes 163-70 and accompanying text (discussing courts' difficulty reviewing Glomar response under current FOIA); *supra* notes 199-210 and accompanying text (discussing how amendments will help courts review CIA use of Glomar response).

[236] *See supra* notes 140-62 and accompanying text (illustrating how CIA abused Glomar response in *Hunt v. CIA*); *supra* notes 187-98 (explaining how amendments will preclude Glomar response in all but two situations).

[237] *See supra* note 25 and accompanying text (discussing FOIA's public disclosure goals).