
**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 25-2177
(C.A. No. 23-01124)

MICHAEL DRIGGS, *et al.*, APPELLANTS,

v.

CENTRAL INTELLIGENCE AGENCY, APPELLEE.

Appeal from the United States District Court for the Eastern
District of Virginia, at Alexandria. David J. Novak, District Judge.

APPELLANT'S PETITION FOR REHEARING

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B. Hendon and E Stuart, 2007. 13

PETITION FOR PANEL REHEARING

COME NOW Appellants, under Rule 40 of the Federal Rules of Appellate Procedure, *Panel Rehearing; En Banc Determination*, and respectfully ask that the Court reconsider an aspect of its decision. Under Local Rule 40(b), *Statement of Purpose*, counsel asserts that, in his judgment, a material factual matter was overlooked in the decision.

I. BACKGROUND

Appellants (hereinafter "plaintiffs") seek disclosure of redacted portions of the *Review of the 1998 National Intelligence Estimate on Prisoner of War and Missing in Action Issues and the Charges Levied by A Critical Assessment of the Estimate* ("*Response to the Charges II*"). JA 35. The CIA and Department of Defense ("DoD") drafted it in response to then-U.S. Senator Robert Smith's criticism of the agencies' National Intelligence Estimate about prisoners of war. *Opinion* at 11.

A. Issue

The Court held that it need not reach the question of whether bad faith in the underlying activities that generated the records at issue was relevant to impugn the veracity of agency affidavits, because plaintiffs' proffer did not meet the high standard to trigger review of past agency action. *Id.* at 12. Plaintiffs respectfully ask the Court to reconsider that conclusion.

B. Law

Plaintiffs rely on the three FOIA cases that discuss the issue: *Ingle v. Department of Justice*, 698 F.2d at 267 (6th Cir. 1983), *Jones v. FBI*, 41 F.3d 238, 242–43 (6th Cir. 1994), and *Rugiero v. United States Dept. of Justice*, 257 F.3d at 547 (6th Cir. 2000).

Ingle held:

[A]ctual agency bad faith—where it becomes apparent that the subject matter of a request involves activities which, if disclosed, would publicly embarrass the agency or that a so-called "cover up" is presented, government affidavits lose credibility... where the effect of disclosure or exemption clearly extends to the public at large, such as a request which may surface evidence of corruption in an important government function, there may be a reason to give lesser weight to [other] factors...

Jones held:

Even where there is no evidence that the agency acted in bad faith with regard to the FOIA action itself there may be evidence of bad faith or illegality with regard to the underlying activities which generated the documents at issue. Where such evidence is strong, it would be an abdication of the court's responsibility to treat the case in the standard way and grant summary judgment on the basis of *Vaughn* affidavits alone. It would risk straining the public's ability to believe—not to mention the plaintiff's—that the courts are neutral arbiters of disputes whose procedures are designed to produce justice out of the clash of adversarial arguments.

* * *

This does not prove that the FBI acted in bad faith with regard to the FOIA request, but it does mean that the courts of this circuit should not process this case in the same manner as they

would a request for documents regarding a routine FBI investigation.

Rugiero recognized *Jones* as the correct approach and cited *Ingle*:

"Where it becomes apparent that the subject matter of a request involves activities which, if disclosed, would publicly embarrass the agency or that a so-called '*cover up*' is presented, government affidavits lose credibility." *Jones*, 41 F.3d at 243 (quoting *Ingle*, 698 F.2d at 267) (emphasis added).

Thus, a review of the underlying activities is proper, according to the Sixth Circuit, when there is bad faith with regard to the underlying activities which generated the documents at issue, a cover-up exists, or where disclosure would publicly embarrass the agency.

While plaintiffs cite out-of-circuit cases, there is no authority for the proposition that bad faith in the underlying activities is irrelevant under the FOIA.¹ Moreover, a contrary view would seem to undermine the FOIA's overall goal of opening "agency action to the light of public scrutiny." *Reporters Committee*, 489 U.S. at 772, 109 S. Ct. at 1481.

¹ *Cf. Opinion* at 11, citing *Hayden v. Nat'l Sec. Agency/Cent. Sec. Serv.*, 608 F.2d 1381, 1387 (D.C. Cir. 1979) which did not involve any issue of bad faith in the underlying activities. (There is a split of authority on whether bad faith in the underlying activities that generated the records at issue is relevant to overcome the governmental deliberative process privilege under FOIA Exemption 5.)

C. Holding

The Court held:

We haven't endorsed either approach. And even assuming it's proper to assess an agency's conduct outside of the present FOIA context, Driggs doesn't make that showing here. He argues there is evidence suggesting the CIA's Estimate was "extremely inaccurate, misleading, speculative and unsupported." Appellants' Br. at 9 (quoting J.A. 257). But even if that were so, a disagreement about the rigor and merits of the CIA's work is not enough to show agency bad faith.

And even assuming it's proper to assess an agency's conduct outside of the present FOIA context, Driggs hasn't met the "very high standard" to trigger review of past agency action. *Rugiero*, 257 F.3d at 547. The Sixth Circuit instructed courts to do so only in extreme cases, such as when an agency engaged in "well-documented infringements of civil liberties whose disclosure threatened public embarrassment of the [agency]." *Id.* at 546 (citing *Jones v. FBI*, 41 F.3d 238, 242–43 (6th Cir. 1994)).

Opinion at 12.

II. ARGUMENT

A. History

The Court's analysis should include a review of the accepted, and well known, history of the matter.

1. Government policy

On January 23, 1973, the government's position, or policy, on the issue of unrepatriated American POWs in Vietnam and Laos was established, and announced. "All our boys are on the way home," President Nixon announced on national television, as the Paris Peace Accords had brought a close to the Vietnam

War. The President stated that "[w]ithin 60 days, all American prisoners of war throughout Indochina will be released. There will be the fullest possible accounting of all those missing in action."

Today, it is universally accepted that the statement was false.

Article 21 of the 1973 Paris Peace Accords stated that the U.S. would help rebuild Vietnam after the war and Henry Kissinger had written a letter agreeing to pay \$3.5 billion in war reparations. POWs were held as collateral. The money never came, and the POWs never came home. The facts are well-known, and universally accepted.

The question of how many POWs were abandoned is the subject of ongoing discourse. This action centers around the reliability of the 1,205.² If it is accurate, the Communists had held back 678 American POWs.

² **1,205 Document.** In December of 1992, Harvard University's Dr. Stephen Morris discovered in the Soviet Union archives the transcript of the Soviet's surreptitiously taped debriefing by a top Vietnamese Army General to Vietnam's Politburo reporting that the total number of communist-held American POWs in Southeast Asia was 1,205—just months before Operation Homecoming returned 591 POWs. (hereinafter "1,205") JA 443. **May 1998.** DoD and the CIA issued their 33-page *National Intelligence Estimate (NIE) on Vietnamese Intentions, Capabilities, and Performance Concerning the POW/MIA Issue* ("NIE"), attacking the reliability of the number 1,205. **November 1998.** Senator Bob Smith issued his 160-page Critical Assessment of the NIE supporting the reliability of the 1,205. JA 396. (Released redacted 18 years later, in 2016)

2. Repatriation efforts

Efforts at repatriation began immediately upon the North Vietnamese's release of their list of returnees, in February of 1973.³

Calls for public disclosure of information on these unrepatriated POWs has been ongoing for decades. Public interest spiked in the 1980s and 1990s; more so in the latter, primarily due to the hearings before the *Senate Select Committee on POW/MIA Affairs*, from August 2, 1991 to January 2, 1993.

3. Senate Policy Report re Executive's knowledge

In May of 1991, the Senate Foreign Relations Committee issued its report *An Examination of U.S. Policy Toward POW/MIAs*, ("*Senate Policy Report*") summarized the communist policy of holding back POWs at the end of hostilities with the U.S., as well as the Executive's full knowledge that the communists had not deviated from this practice in Vietnam and Laos.

February 2000. CIA wrote *Response to the Charges* (Released 21 years later, in 2021, when CIA revealed that it was withholding, in full, a classified version of this Review.)

November 2024. CIA released *Review of the Charges II*, redacted, 26 years later. These redactions are the subject of the instant petition. JA 443.

³ See, e.g., *Wash Post* Sept. 22, 1992, *Nixon Knew of POWs, Aids Say*:

Admiral Thomas Moorer, chairman of the Joint Chiefs of Staff, had ordered a halt to the U.S. troop withdrawal because North Vietnam had not given a full accounting of the prisoners. But the order was rescinded overnight.

4. Chief of POW/MIA Office confirms cover-up

In February of 1991, six months before the *Select Committee* hearings commenced, the government's position—that no men were left behind—was undermined with the publication of the resignation letter of Colonel Millard Peck, the DoD's Chief of *Special Office for Prisoners of War and Missing in Action*.

The *Senate Policy Report* recounted that the resignation letter "confirms that a 'cover-up' has been in progress," and that "these are serious charges put forth by... one of the few who have intimate knowledge of the way the U.S. Government's POW/MIA policy operates." Colonel Peck wrote that he "feel[s] strongly that this issue is being manipulated and controlled at a higher level... to obfuscate the question of live prisoners."

5. Leaked satellite imagery

Another embarrassment occurred in 1992 when *US News & World Report* published satellite imagery of a POW distress symbol in Laos. *NBC Dateline* followed up with a segment featuring the view that the symbol "absolutely" "can only be a US pilot." The satellite imagery was taken in 1988 in the Sam Neua area of Laos, where David Hrdlicka was being held. "The government should have notified me," writes his wife, Carol, "But I had to read about it in the magazine."

6. Select Committee

Those hearings revealed the consensus that men had been abandoned. *See, e.g., Wash Post* Sept. 22, 1992, *Nixon Knew of POWs, Aids Say*, reporting on the testimony of Secretary of Defense James Schlesinger, and Secretary of Defense Melvin Laird, both of whom confirmed that Nixon "had strong evidence that some Americans were left behind, probably in Laos, when the war ended." It also related:

For most of a long day of testimony before the Senate Select Committee on POW-MIA Affairs, no Nixon administration official challenged an idea that once seemed almost unthinkable but is rapidly becoming the accepted view: Some Americans known to have been alive in Vietnamese or Laotian custody did not come home with their comrades in the spring of 1973...

* * *

"Had I been Secretary of Defense at the time" of the prisoner release in March 1973, said Laird, who left his post two months earlier, "I would have gone public."

See also Smith Aff. ¶ 5 JA 156, relating that "[t]wo former Secretaries of Defense testified under oath before the Select Committee, that men were left behind."

By the time the 1991 *Select Committee* hearings began, the government's steadfast position—that "all our boys" were on their way home—had been undermined.

For decades now, the question remaining is the number of abandoned POWs. The 1205 is the most significant document on this issue.

7. Congressional and Executive branch efforts

Governmental efforts to obtain records disclosure include the McCain Bill (1991 NDAA § 1082 *et seq.*) and three Presidential directives; by President Bush in 1992 (Executive Order (“E.O.”) 12812—*Declassification and Release of Materials Pertaining to Prisoners of War and Missing in Action*⁴), by President Clinton in 1993 (Presidential Decision Directive NSC-8, directing all agencies to complete review and release by Veterans Day, 1993⁵), and by President Obama in 2009 (E.O. 13526, mandating automatic declassification of aged records and prohibiting continued classification to prevent embarrassment⁶).

⁴ In July of 1992, after *Select Committee* issued its Report, it wrote to President Bush that its "investigation has convinced us that the vast majority of materials related to the POW/MIA issue now protected by the National Security Classification System could be released to the public in full with absolutely no harm or risk to national security." The Senate followed with Resolution 324, which passed by unanimous a vote. President Bush then issued E.O. 12812.

⁵ As the government failed to comply with E.O. 12812, a year later, on June 10, 1993, President Clinton issued Presidential Directive NSC-8, *Declassification Of POW/MIA Records* directing all executive agencies to complete its review, and release, by Veterans Day, November 11, 1993, "their review, declassification and release of all relevant documents, files pertaining to American POW's and MIA's missing in Southeast Asia in accordance with Executive Order 12812."

⁶ In December of 2009 President Obama issued E.O. 13526, *Classified National Security Information*, mandating automatic declassification of 25-year-old, and 50-year-old, records, with a higher standard for withholding the latter. And it prohibits continued classification "in order to," *inter alia*, "prevent embarrassment to a person, organization, or agency."

These efforts continue. The *Bring Our Heroes Home Act*, S 3226, is proposed legislation designed to expedite the declassification, collection, and public disclosure of government records concerning POWs and MIAs. It would require, *inter alia*, that the records "carry a presumption of declassification." Sec. 2(a)(2).

B. Panel's evaluation of proffer

The district court held that, as a matter of law, bad faith in the underlying agency action that led to the generation of the records at issue cannot be used to overcome the Agency's presumption of good faith. Rather, the only proper bad faith "inquiries must relate to the agency's actions while producing the documents, not earlier agency activity." *Mem. Op.* JA 970.

This Court declined to address the question of whether bad faith in the underlying activities was relevant, holding that the conduct alleged was not extreme enough to trigger a review of past agency action, unlike *Jones*, which sought records of COINTELPRO, involving "well-documented infringements of civil liberties." *Opinion* at 12.

Had the Court viewed plaintiffs proffer as demonstrating that the NIE had falsely, and knowingly, impugned the reliability of the 1205, it would have addressed the issue of whether to affirm the district court's view, or the Sixth

Circuit's view. But the Court characterized plaintiffs' challenge as "a disagreement about the rigor and merits of the CIA's work." *Opinion* at 3.

C. No analysis of evidence

The Court's view:

Driggs argues there is evidence suggesting the CIA's Estimate was "extremely inaccurate, misleading, speculative and unsupported." Appellants' Br. at 9 (quoting J.A. 257). But even if that were so, a disagreement about the rigor and merits of the CIA's work is not enough to show agency bad faith.

Opinion at 12.

However, the full quote from the *Brief*:

Plaintiffs aver that the NIE is "extremely inaccurate, misleading, speculative and unsupported. [It] ignored that virtually all other detailed statements in the 1205 were known to be true [and] singled out only the statements about the 1,205 POWs as being false," as Senator Bob Smith alleges. *Smith Aff.* ¶ 14 JA 257.

Brief at 9.

The fact that the CIA "ignor[ed] virtually all other detailed statements in the 1205 that were known to be true and single out only the statements about the 1,205 POWs as being false" is evidence that it sought to unjustifiably impugn the reliability of the 1205, in bad faith.

Here, Plaintiffs aver that Senator Bob Smith's 160-page *Critical Assessment* proves bad faith. Plaintiffs respectfully suggest that the Court need analyze plaintiffs' proffer precedent to characterizing it as merely a disagreement, as

opposed to evidence of bad faith. But neither the Court, nor the government, addressed plaintiffs' proffer. *See Brief* at 18-19:

Senator Smith's *Critical Assessment* proves that the NIE

- (1) misrepresents, and omits, evidence corroborating the 1205/735 numbers,
- (2) falsely portrays Vietnamese cooperation as excellent,
- (3) unjustifiably impugns the credibility of sources,
- (4) ignores, and omits, evidence of POW transfers to the USSR,
- (5) misrepresents, and omits, evidence of second prison system,
- (6) misrepresents, and omits, corroborative accounts by Russian sources,
- (7) unjustifiably disparages the genuineness of the documents, neglecting to reveal that numerous intelligence reports attest to their authenticity,
- (8) posits that the date, and length, is wrong, and
- (9) even questions whether there ever existed a transcript in the Vietnamese language.

The *Critical Assessment* cites 40 passages of the NIE, followed by evidence undermining all 40 passages. *See generally Clarke Aff.* ¶¶ 9-38 JA 260-281... The ten pages of endnotes, verbatim from the *Critical Assessment*, are to the following of the affidavit's paragraphs:

II.	SUMMARY OF SENATOR SMITH'S CRITIQUE. . . .	9-11
A.	Numbers misrepresented, omitted evidence, misrepresents context.	12-17
B.	Vietnamese cooperation falsely represented.	18-20
C.	Questioned authenticity illogical and unsupported.	21
D.	Challenge to the date of the record speculative.	22
E.	Challenge to the length of the record speculative.	23
F.	Challenge to existence of a Vietnamese version unsound.	24-25
G.	Attempt to impugn source omits contrary evidence.	26
H.	Omitted evidence of transfers to the USSR.	27-29
I.	Misrepresented and omitted evidence of second prison system.	30-31
J.	Evidence of Russian corroboration misrepresented and omitted.	32-38

Nor did the Court consider whether disclosure would embarrass the CIA. Former U.S. Rep. Billy Hendon (R-NC)'s book, subtitled *The Definitive Account of American POWs Abandoned in Southeast Asia*, is aptly named, *An Enormous Crime*. Here, disclosure inculcates the government in covering up the number of POWs it abandoned in 1973.

"What is really at risk are the reputations and careers of the intelligence officials who participated in and perpetrated this sorry chapter in American history." *Smith Aff.* ECF No. 258-4 ¶ 8 JA 158.

D. Information provided by Russians withheld

The context of the redactions reveals that most of the challenged redactions withhold information that the Russians provided. *See Brief* at 23-24.

The *Critical Assessment* recites information provided by Russians, but omitted from the NIE, at length—including information provided to the CIA by Senator Smith. The *Critical Assessment* is unassailable.⁷

⁷ *Brief* n. 7 at 24:
See, e.g., Clarke Aff. Critical Assessment Exhibit A at JA 318:
Moreover, the NIE inexplicably ignores statements by credible Russian officials since 1993, (which were provided to the NIE principal author in early 1998), indicating their judgment that the total number of referenced US POWs was true or plausible. As examples—

- In September 1996, the Russian Chairman of the U.S.-Russia POW/MIA Commission, General-Major Vladimir Zolotarev, stated “*We consider the number of American POWs given in that report quite plausible.*”

-
- In August, 1995, the Chief State Archivist of the Russian Federation, Dr. Rudolf Pikhoya, stated, *"I am absolutely certain that the numbers cited in the 1205 report are true. I believe that data still exists in Vietnam which deals specifically with US POWs."*
 - Also, in August 1995, Captain 1st Rank Alexander Sivets of the Main Intelligence Directorate (GRU) of the General Staff of the Russian Federation stated, *"We consider that the Vietnamese leaders, in their desire to exploit the POW problem for their own interests, would publicly cite a lower figure than the real one. This is something that we do not doubt...we believe there were more American POWs than Vietnam was publicly admitting to"* as the 1205/735 documents claim.
 - In a conversation with Gen. Vessey on June 22, 1993, Russian General Volkogonov stated *"the Vietnamese would naturally not keep those prisoners the US knew were in captivity,"* thus lending credibility to the fact that, with the exception of 16 individuals, all POWs captured during the Vietnam War prior to the date of the 1205 report, were, in fact, known to be POWs and so listed by the Pentagon prior to their release.

Id. at 347-48: In this section, quoted above, the NIE lists [redacted] Russians as having commented on the authenticity of the 1205 document since 1993, and there is no caveat that these are *only* examples, as was done elsewhere on different subjects in other portions of the NIE. Inexplicably, the NIE *neglected* to include statements by other key Russian officials since 1993 which were provided to the principal NIE drafter in early 1998. These other Russian officials commented on *both* the authenticity *and* the number of POWs referenced in the document itself (see footnote #35).

Id. at 350-53: NIE does not mention the relevant testimony on this specific subject by... former USSR Central Committee Secretary... told US officials during my visit to Moscow in July, 1997 that the GRU had "good channels and connections" and he had no reason to doubt that the 1205 document was not what it purports to be.

See also Clarke Aff., Evidence of Russian corroboration misrepresented and omitted ¶¶ 32-38 JA 268-69, notes 39-44 JA 279-80.

CONCLUSION

This lawsuit is part of a much larger advocacy, spanning over 50 years, by family members, journalists, authors, organizations, Congressional Committees, at least three Administrations, and an Act of Congress—all seeking to prompt the government to reveal what it knows about these unrepatriated Americans.

Senator Smith does not allege a disagreement. Rather, he alleges bad faith:

The American government wrote off all pending POW/MIA cases at war's end to close the books on this ugly foreign policy disaster. After decades of FOIA requests, emotional appeals from family members, senators and congressmen, and House and Senate Committee investigations, the intelligence agencies still keep numerous documents classified under the guise of national security.

Smith Aff. ¶ 9 JA 160.

His critique is not a disagreement about the rigor and merits of the CIA's work. Rather, he recites a plethora of evidence of bad faith in furtherance of the government's decades-long policy that all our boys were on their way home. In other words, it is, as the Chief of the DoD POW/MIA Office described it, a cover-up.

Here, the conclusion of *Review of the Charges II*—that "the information on the numbers cannot be accurate" (JA 718)—is false and was known to be false when made. This issue cannot be meaningfully adjudicated without refuting, or otherwise addressing, the evidence in the record. And, because the evidence is

irrefutable, plaintiffs have overcome the presumption of good faith otherwise accorded to agencies under the FOIA.

WHEREFORE, Plaintiffs/Appellants respectfully pray that this Court reconsider, *de novo*, the proffered evidence of bad faith, to find that the evidence overcomes the presumption of good faith accorded to agency affidavits under the FOIA, and to remand the case accordingly.

September 18, 2026.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE FRAP 40 (d)(3)

The text for this *Petition for Panel Rehearing* was prepared using Times New Roman, 14-point, and contains 3,883 words as counted by Microsoft Word.

/s/ John H. Clarke

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 18, 2026, I have caused the foregoing *Petition for Panel Rehearing* to be served on Appellee's counsel by filing on the Court's CM/ECF system. Counsel is a registered user.

/s/ John H. Clarke