**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. )
)
)

# BRIEF FOR APPELLANTS

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

John H. Clarke
1629 K Street, NW
Suite 300
Washington, DC 20006
(202) 344-0776
john@johnhclarkelaw.com
*Counsel for Appellants*

**APPELLANTS' CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1 (a), Appellant POW Investigative Project, Inc., discloses that it is a not-for-profit corporation duly organized and existing under the laws of the State of Maryland, that it is not a publicly held corporation, that it has no parent companies, and no companies have a 10% or greater ownership interest in it.

/s/
John H. Clarke

# TABLE OF CONTENTS

---

ADDENDUM
5 U.S. Code § 552—Exemptions (b)(1) and (b)(3).
Executive Order 13,526 §§ 1.1 (a)(l-4), 1.4 (a-h), 1.7 (a)(l-4), 3.3.
50 U.S. Code § 3141—Operational files of the Central Intelligence Agency, ¶¶ (a), (b), (f) and (g).

## TABLE OF AUTHORITIES

**Cases**

**Statutes**



**Executive Order**

## JURISDICTION

The District Court had subject-matter jurisdiction over this action under the Freedom of Information Act, 5 U.S.C. § 552 *et seq*. This Court has jurisdiction under 28 U.S.C. § 1291.

## STANDARD OF REVIEW

This Court reviews the action of the district court in a Freedom of Information Act case *de novo*. *Summers v. Dep't of Justice*, 140 F.3d 1077, 1079 (D.C. Cir. 1998).

This Court employs the abuse of discretion standard in reviewing the district court's decision not to inspect the records in camera. *Young v. CIA*, 972 F.2d 536 (4th Cir. 1992).

## STATEMENT OF ISSUES

1. Whether evidence of bad faith in the underlying activities that generated the records at issue is relevant to overcome the presumption of good faith accorded to agency affidavits.

2. Whether the District Court erred in holding that plaintiffs had not met their burden to show bad faith.

3. Whether the CIA met its burden to show that aged information provided by the Russians regarding unrepatriated Vietnam War POWs is exempt from disclosure.

4. Whether the District Court erred in denying plaintiffs' motion for in camera inspection.

5. Whether the CIA Act's "improper placement" into operational files should be read to include improper retention after 75 years.

6. Whether the CIA's affidavit must describe (1) its 2025 Decennial Review, and (2) its review under the Executive Order mandating automatic declassification of 25-year-old records.

## STATEMENT OF CASE

This is an action under Freedom of Information Act ("FOIA") against the CIA seeking disclosure of records of unrepatriated American POWs from the Korean and Vietnam Wars.

### A. Plaintiffs

There are 13 plaintiffs/appellants in this action, twelve individuals and The POW Investigative Project, Inc. Eleven of the plaintiffs hope to uncover

information on their family members who were taken captive,[1] and one is an investigative reporter and author.[2]

---

[1] Plaintiffs Robert Moore, Jana Orear, and Christianne O'Malley seek information on Air Force Captain Harry Moore, who piloted an F-51 Mustang that was shot down in 1951 over North Korea, and thereafter held in the Soviet Union. *Compl.* ¶¶ 2-4 JA 12-14. The Moore family produced a documentary on their quest to learn Harry's fate, *Keeping the Promise Alive*, and Moore family members are plaintiffs in other FOIA cases. Thomas and David Logan seek information on their father, Air Force Major Sam Logan, who was shot down over North Korea in 1950, and was also believed to have been shipped to the Soviet Union. *Id*. ¶¶ 5-6. Megan Marx seeks information regarding the 1953 capture, and transfer to China, of her stepfather, Navy Ensign Dwight Angell. *Id*. ¶ 7. Terri Mumley seeks information on her grandfather, Lloyd Smith, Jr., who was aboard the crashed Navy aircraft with Dwight Angell, and who is also believed to have been shipped to China. *Id*. ¶ 8. Michael Driggs is Master Sergeant Robert Bibb's nephew. Sergeant Bibb may have been captured in South Korea in 1952. *Id*. ¶ 9. Carol Hrdlicka, author of the 2012 book *Finding David*, *An American Wife Betrayed by Her Government*, 2012, seeks information on her husband, Air Force Captain David Hrdlicka, who was taken prisoner when his F-105 was shot down over Laos on May 18, 1965. *Id*. ¶ 11. George "Luck" Paterson is seeking information on his brother, Lieutenant James Kelly Patterson, who, while serving as navigator on the Navy A-6 Intruder piloted by Captain Red McDaniel, was shot down over North Vietnam in 1967, taken prisoner, and shipped to the Soviet Union. *Id*. ¶ 12. John Zimmerlee's father, B26C navigator John Henry Zimmerlee, parachuted out of his stricken aircraft and was last seen in the custody of North Korean and Chinese guards. John is the founder and Executive Director of the Korean War POW/MIA Network, and has helped hundreds of the families of missing men during his 20 years researching the issue. John co-authored, together with plaintiff Mark Sauter, *American Trophies, How US POWs Were Surrendered*, 2013. *Id*. ¶ 10.

[2] Mr. Sauter is an investigative journalist and author. In addition to co-authoring *American Trophies*, he authored four other books, including *The Men We Left Behind: Henry Kissinger, the Politics of Deceit and the Tragic Fate of POWs After the Vietnam War*, 1993. *Id*. ¶ 13.

### B. 1205 Document

In December of 1992, Harvard University's Dr. Stephen Morris discovered in the Soviet archives the transcript of the Soviet's surreptitiously-taped debriefing by a top Vietnamese Army General to Vietnam's Politburo. The General reported that the total number of communist-held American POWs in Southeast Asia was 1,205. The debriefing occurred just months before Operation Homecoming. In 1973, 591 POWs were returned, 614 less than the Vietnamese had claimed. The 1205 Document is the most significant record ever unearthed on the number of American POWs held in Vietnam and Laos at the close of the Vietnam War. Senator Smith characterizes it as "[o]ne of the most intriguing documents on the issue." *Smith Aff.* ¶ 10 JA 255.

The English translation of the 1205 Document is attached to the *Clarke Decl*., Exhibit A JA 443-468.

### C. 735 Document

At the end of December 1970 or in early January 1971, Hoang Anh, Central Committee Secretary of the Vietnamese Workers Party, gave a wartime report on various subjects including American POWs. Anh stated in his speech before the 20th Plenary Session of the Central Committee of Vietnam that the North Vietnamese government was holding 735 American pilots—now known as the "735 Document." In 1971, Russia's intelligence directorate, the GRU, obtained

Anh's speech and translated it into Russian. In 1993, the Russians provided it to the U.S. The English translation of the 735 Document is also in the record. *Id*. JA 469-493.

**D. National Intelligence Estimate (NIE)**

In 1998, the DoD and the CIA issued their 33-page *National Intelligence Estimate (NIE) on Vietnamese Intentions, Capabilities, and Performance Concerning the POW/MIA Issue* (hereinafter "NIE"). The NIE attacked the credibility, and reliability, of the numbers provided in the 1205/735 Documents.

**E. Senator Smith's Critical Assessment of the NIE**

In November of 1998, Senator Smith issued his 160-page *Critical Assessment of the 1998 National Intelligence Estimate (NIE) on Vietnamese Intentions, Capabilities, and Performance Concerning the POW/MIA Issue* (hereinafter "*Critical Assessment*"). It supports the reliability of the numbers in the 1205/735 Documents, and critiqued the NIE. The district court characterized the *Critical Assessment* as "Senator Smith's scathing critique." *Mem. Op*. JA 978.

The *Critical Assessment* is Exhibit A to the *Clarke Aff*., JA 282-442.

**F. CIA Response to the Senator's Critical Assessment**

In February of 2000, the DoD and CIA responded with their Joint Report, *A Review of the 1998 National Intelligence Estimate on POW/MIA Issues and the*

*charges Levied by A Critical Assessment of the Estimate* (hereinafter "*Response to the Charges I*").

**G. Redactions at Issue**

The CIA released the aforementioned record, *Response to the Charges I*, in June of 2021, in another FOIA case, *Moore v. CIA*, CA 20-1027 (D.D.C.). This record, released unredacted, is 177 pages long. Exhibit D to the *Clarke Decl*. JA 540-716.

The CIA's *Vaughn* index in *Moore* disclosed that it was withholding in full a classified version of its *Response to the Charges*. So, plaintiffs' FOIA request here sought disclosure of that withheld-in-full record. *See* FOIA Request 27, *Compl.* ¶ 16, JA 35: "The withheld-in-full version of the CIA's February 2000 *Review of the 1998 National Intelligence Estimate on POW/MIA Issues and the Charges Levied by A Critical Assessment of the Estimate*."

The defendant produced it, redacted. This version of the record, hereinafter referred to as *Review of the Charges II*, is 235 pages long, 58 pages longer than the unredacted version.

The 29 redacted, and challenged, pages in the *Review of the Charges II* appears as Exhibit C to the *Clarke Decl*. JA 511-540.

**H. In Camera Inspection**

Plaintiffs sought inspection in camera of the challenged redactions.

### I. Search of Operational Records

Plaintiffs also averred that the defendant was required to search its operational records under an exception provided by the CIA Act.

### J. District Court Orders

On May 21, 2024, the district court issued a Memorandum Order denying plaintiffs' motion seeking an order for the CIA to search its operational files. *Mem. Order* JA 145. By order entered on August 6, 2025, the district court denied plaintiffs' Motion for Summary Judgment and in camera inspection, and granted the defendant's Motion for Summary Judgment. *Mem. Order* JA 959-993; *Order id.* at 994. On October 2, 2025, plaintiffs timely filed their Notice of Appeal. JA 996.

## SUMMARY OF ARGUMENT

***Bad faith as a matter of law***. 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.

In response to Sixth Circuit authority holding to the contrary, the court cited cases analyzing bad faith in ongoing FOIA action. *Mem. Op*. JA 976-80.

But all of these cases involved bad faith in the litigation, not in the activities that generated the records at issue.

Plaintiffs could find no authority for the proposition that evidence of agency malfeasance in the underlying activities could *not* be used to overcome the Agency's presumption of good faith.

Additionally, this distinction between bad faith in the generation of the record at issue, and conduct relating to the present FOIA action, is illusory. Plaintiffs allege that the information was withheld 25 years ago—and is redacted today—because the information contradicts the CIA's position that "the information on the numbers [in the 735/1205 Documents] cannot be accurate." *Review of the Charges II* JA 718. Thus, agency bad faith does, in fact, relate to the present FOIA action.

Moreover, a contrary view would 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.

***Bad faith as a finding of fact***. While the district court held that bad faith in the underlying agency is irrelevant as a matter of law, it did address plaintiffs' proffer, opining that plaintiffs likely had not met the "high standard" of proof of bad faith regarding the underlying activities, as enunciated by the Sixth Circuit.

Plaintiffs ask this Court to review, *de novo*, plaintiffs' evidence. 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.

***Exemptions unavailable to shield Russia-provided information***. Defendant withholds information under FOIA Exemptions (b)(1) and (b)(3). It claims that the information is properly withheld as "specifically authorized" to be withheld under an Executive Order under (b)(1), as well "specifically exempted from disclosure by statute" under (b)(3).

The context of the redactions reveals that the defendant withholds information that the Russians provided.

The burden is on the agency to demonstrate that disclosure would reveal (1) intelligence activities or targets or locations or processes, or (2) intelligence methods, or (3) classified relationships, or (4) sources. Defendant has not met its burden.

Disclosure of accounts by Russians regarding of number of unrepatriated POWs—fifty years ago—does not plausibly implicate any of the interests protected by Exemptions (b)(1) and (b)(3).

***In camera inspection.*** Courts considers six factors in considering whether to review the challenged redacted pages in camera:

(1) judicial economy,
(2) the conclusory nature of the agency's affidavits;
(3) bad faith on the part of the agency;
(4) disputes concerning the contents of the document;
(5) strong public interest in disclosure, and
(6) the agency proposes *in camera* inspection.

Here, five of the six factors are present: (1) Plaintiffs seek inspection of just 29 redacted pages; (2) The agency's affidavits merely state the law, but do not explain how the law applies to the redactions at issue; (3) plaintiffs' proffer of evidence of bad faith is unrebutted; (4) the parties dispute the contents of the document; and (5) there is a strong public interest in disclosure.

***Operational files.*** The CIA Act mandates that operational records are exempt from the search and review provisions of the FOIA. Plaintiffs had sought such a search under an exception provided in the CIA Act. The district court ruled that the exception was inapplicable.

Plaintiffs had sought to follow a 2019 FOIA decision in *Hall v. CIA* (discussed *supra*), a District of Columbia FOIA action seeking Vietnam War POW records. The court in *Hall* had relied on the affidavit of Senator Bob Smith. That court held that, in the absence of the CIA's "explaining why the files ***remain operational***" (emphasis supplied) it must search those records.

The instant plaintiffs also proffered an affidavit by Senator Smith. But here, the district "[c]ourt ruled that an agency's decision to ***maintain aged files as operational records does not trigger*** an exception requiring a search of those records under 50 U.S.C. § 3141, but rather, the proper inquiry was the 'propriety of the agency's decision ***to put*** the requested records into properly exempted files.'" (emphasis supplied) *Mem. Op*. JA 154.

The *Hall* case involved only Vietnam War POW records that were up to 50 years old, whereas this case seeks records also regarding Korean War POWs, generated up to 75 years ago. Plaintiffs posit that the proper reading of § 3141(3)'s "improper placement" into operational files should be read to include improper retention.

***Decennial Review of Operational Records.*** The CIA Information Act requires the CIA, not less than once every ten years, to review the exemptions in force to determine whether such exemptions may be removed from any category of exempted files or any portion thereof.

Count IV of plaintiffs' Complaint is *Improper Considerations of Historical Value and Public Interest in Decennial Reviews of Exempted Operational Files under 50 U.S.C. § 3141(g)(2))*. *Compl*. JA 3. *See also id.* ¶¶ 33-36 JA 21. "The CIA failure to comply with the disclosure provisions of the CIA Act entitle plaintiffs to judicial review." *Id*. ¶ 36 JA 21.

Defendant's affidavits should have, but did not, describe its 2025 decennial review.

***Automatic Declassification***. Under Executive Order 13,526 § 3.3, *Automatic Declassification*, "All classified records shall be automatically declassified on December 31 of the year that is 25 years from the date of origin, except as provided…" The defendant authored the *Review of the Charges II* in 2000.

As § 3.3 will apply to the redacted information at issue on December 31, 2025, defendant's affidavits should describe this review, on remand.

## ARGUMENT

### I. BAD FAITH IN ACTIVITIES THAT GENERATED THE RECORDS AT ISSUE

As the district court observed, "Plaintiffs allege that the CIA exhibited bad faith in the drafting of the National Intelligence Estimate, which, in their view, rebuts any presumption of good faith for the CIA." *Mem. Op*. JA 959. The defendant, on the other hand, argued that "the necessary showing to overcome the presumption of good faith must be a showing of bad faith in the ongoing FOIA action, not during earlier, underlying agency action that led to the generation of the records at issue." *Id*. at 969. The district court agreed with the CIA.

Plaintiffs relied on *Rugiero v. U.S. Department of Justice*, 257 F.3d 534, 544 (6th Cir. 2001):

> Evidence of bad faith on the part of the agency can overcome this presumption [of good faith], even when the bad faith concerns the underlying activities that generated the FOIA request rather than the agency's conduct in the FOIA action itself.

The district court held that "Plaintiffs' invocation of the Sixth Circuit's *Rugiero* case is unavailing—neither its reasoning nor its underlying factual predicate sway the Court." *Mem. Op*. JA 980.

The district court observes that *Rugiero*'s allegations were ultimately determined to have been "routine" conduct, so he had not met the "high standard" of proof of bad faith regarding the underlying activities which generated the records. *Id*. at 969. But absence of *Rugerio's* proof of bad faith is neither analogous, nor germane, to this Court's review.[3]

*Rugiero* had followed *Jones v. FBI*, 41 F.3d 238 (6th Cir. 1994), where the court held that "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." *Jones* held:

---

[3] *See also Mem. Op*. JA 979:

> The D.C. Circuit held that the allegations were "either too generalized or too attenuated from the specific classification decisions at issue to constitute the kind of 'tangible evidence of bad faith' we have required to overcome agency affidavits." *Id*. (quoting *Carter*, 830 F.2d at 393). In other words, the bad faith had to be related to "the specific classification decisions at issue."

> This presumption may be overcome where there is evidence of bad faith in the agency's handling of the FOIA request. 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.

The district court held that "the Fourth Circuit has never adopted this test." *Mem. Op.* JA 969.

However, the Fourth Circuit has never been asked to do so and none of the six cases cited in the court's opinion involve the underlying activities. *Schaerr v. U.S. Department of Justice*, 69 F. 4th at 929 (*Mem. Op*. JA 980) addressed the government's affidavit, holding that it is presumably made in good faith unless "substantially called into question by contrary record evidence or evidence of agency bad faith." The FOIA plaintiff made no charges regarding underlying activities. So too in *Hayden v. Nat 7 Sec. Agency/Cent. Sec. Serv*., 608 F.2d 1381, 1387 (D.C. Cir. 1979), holding that "[m]ere allegations of bad faith, however, will not suffice to overcome the presumption of good faith." *Mem. Op*. JA 977. *Carter v. U.S. Dep't of Commerce*, 830 F.2d 388, 393 (D.C. Cir. 1987) held that only "tangible evidence of bad faith" overcomes the presumption. *Mem. Op*. JA 969. *Simmons v. U.S. Dep't of Just.,* 796 F.2d 709, 712 (4th Cir. 1986)**,** held that

affidavits must be "submitted in good faith," as did *Goland v. CIA*. 607 F.2d 339, 352 (D.C. Cir. 1978). *Id*. And the Fourth Circuit case, *Young v. CIA* 972 F.2d at 539, also applied the bad faith inquiry only to the CIA's declarations. (*Mem. Op*. JA 980).

In sum, the district court cited authorities holding that bad faith in the litigation can overcome the presumption of a good faith affidavit. But the court cited no cases holding that bad faith in the underlying activities *does not* rebut the presumption. There are no such cases.

The district court's conclusion that "the overwhelming weight of the case law supports the CIA's position" (*id*. JA 977) was error.

Here, the conclusion of *Review of the Charges II*—that "the information on the numbers cannot be accurate" (JA 718)—is false, known to be false when made, and still known to be false.

In the district court's view, even if the defendant did, in fact, withhold the information in furtherance of a cover-up 25 years ago, plaintiffs have not met their burden to show that this circumstance continues. "Plaintiffs cite this alleged bad faith drafting to argue that the CIA is engaging in a cover up *today* by not

disclosing the challenged redactions." *Mem. Op*. JA 969 (emphasis in original).[4]

Plaintiffs allege that CIA's withholding of the information today is to prevent embarrassment. The district court held otherwise. "But to the extent that they allege a CIA cover-up in *this* litigation to avoid potential embarrassment to the agency *today*, Plaintiffs provide no more than conclusory allegations." *Mem. Order* JA 981 (emphasis in original). The district court's distinction between bad faith in the generation of the record at issue, and conduct relating to the present FOIA action, is illusory. Plaintiffs allege that the information was withheld 25 years ago, and is redacted today, because the information corroborates the numbers appearing in the 1205/735 Documents. Thus, agency bad faith does, in fact, relate to the present FOIA action. *See, e.g., Carter*, 830 F.2d at 393, where bad faith was related to "the specific classification decisions at issue."

---

[4] *See also Mem. Op.* at 981:

> Based on the weight of the case law, the Court finds that agency bad faith must relate to the present FOIA action in order to defeat the presumption of good faith afforded to agency affidavits. As such, Plaintiffs' allegations concerning the drafting of the NIE over twenty-five years ago cannot, as a matter of law, overcome the presumption of good faith in the CIA's affidavits… But to the extent that they allege a CIA cover-up in this litigation to avoid potential embarrassment to the agency today, Plaintiffs provide no more than conclusory allegations. (Pl. Brief at 11) ("Plaintiffs submit evidence that the CIA's NIE was written in bad faith. Thus, the Plaintiffs have good cause to believe that the CIA redacted information because it corroborates the numbers appearing in the 1205/735 Documents.").

A contrary view would undermine the FOIA's overall goal is "to open agency action to the light of public scrutiny." *Reporters Committee*, 489 U.S. at 772, 109 S. Ct. at 1481 (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352).

Under the FOIA, proof of bad faith in the underlying activities that generated the records at issue is also relevant to overcome claims of the deliberative process privilege. *See, e.g. TriState Hosp. Supply Corp. v. U.S.*, 226 F.R.D. 118, D.D.C., 2005. "The deliberative process privilege yields, however, when government misconduct is the focus of the lawsuit. In such instances, the government may not use the deliberative process privilege to shield its communications from disclosure… Simply put, when there is reason to believe that government misconduct has occurred, the deliberative process privilege disappears..." *See also ICM Registry, LLC v. U.S. Department of Commerce*, 538 F. Supp. 2d 130, 133 (D.D.C. 2008), "In this court, the deliberative process privilege has been disregarded in circumstances of extreme government wrongdoing."

## II. PLAINTIFFS' PROFFER OF EVIDENCE OF BAD FAITH

While the Court held that, as a matter of law, that bad faith in the underlying activities that generated the records was irrelevant, it also opined on plaintiffs' proof, concluding that it is "[un]likely that Plaintiffs meet the high standard specified" in *Rugiero*. *Mem. Op*. JA 980.

While the plaintiff in *Jones* had met the "high standard," *Rugiero* had not. Plaintiffs here posit that, while "high standard" is largely undefined, they have met it.

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. That affidavit recites that "[p]aragraphs 10 through 38 below summarizes much of Senator Smith's 160-page assessment. The opinions in that summary are those of the Senator, not of the undersigned. This affidavit relates only facts that are in the record. The referenced excerpts of the *Critical Assessment*, and of the NIE, appear

in the lengthy endnotes." The ten pages of endnotes, verbatim from the *Critical Assessment*, are to the following of the affidavit's paragraphs:



"The NIE was extremely inaccurate, misleading, speculative and unsupported. It ignored that virtually all other detailed statements in the 1205 were known to be true. Yet the IC singled out only the statements about the 1,205 POWs as being false." *Smith Aff.* ¶ 14 JA 257.

The IC was tasked with scrutinizing the 1205/735 Documents in the NIE, [5] which it did. *See, e.g., id*. JA 253 ¶ 13:

> The POW/MIA issue addressed in the NIE centered on two key questions, as stated in the NIE's Scope Note: (1) Since 1987, to what extent has the leadership of Vietnam demonstrated a commitment to cooperating with the United States to achieve the fullest possible accounting of missing in action personnel, and (2) What is the Intelligence Community's assessment of the so-called "1205" and "735" documents from the Russian archives?

The district court wrote that "the NIE did not closely scrutinize the 735 and 1205 Documents:"

> As the released portion of the Review of the Charges indicates, the NIE did not closely scrutinize the 735 and 1205 Documents; rather, its author "assumed that the NIE would reflect the best judgments of the IC as developed by knowledgeable analysts," who found the documents to be unreliable. (ECF No. 41-5 at 1-2.) Indeed,

---

[5] *Smith Aff*. ¶ 11 JA 253:

> In the spring of 1997, in relation to Senate confirmation of a U.S. Ambassador to Vietnam, the Assistant to the President for National Security Affairs, Samuel R. Berger, directed the U.S. Intelligence Community (IC) to undertake a special National Intelligence Estimate (NIE) on the Vietnam War POW/MIA issue and to provide the ICs updated assessment of the so-called "1205" document from the Russian archives. Mr. Berger further directed the IC to consult with the Senate Select Committee on Intelligence (SSCl) on the terms of reference for the NIE. Mr. Berger's directives followed personal discussions with both myself and the Senate Majority Leader, Senator Trent Lott. Subsequent to Mr. Berger's pledge to have the IC conduct a special NIE, I met personally with the Director of Central Intelligence, George Tenet, and the Director of the Defense Intelligence Agency, Lt Gen. Patrick Hughes, to underscore the importance I attached to the need for this NIE to be thorough and objective.

> addressing the 735 and 1205 Documents in detail was to be "a separate research project." (*Id*. at 1.) Senator Smith's scathing critique reacted, on this read, to a misperception of the NlE's purpose. (*Id*. at 2.)

*Mem. Op*. JA 978.

The court's reference is to a page of the *Review of the Charges II* where the CIA wrote that "the drafter of the NIE did not undertake an in-depth re-evaluation of the 735 and 1205 documents. Instead, he accepted the IC position on the legitimacy and accuracy of the documents as well as the U.S. Government's position."[6]

In other words, it was the CIA analysts, not the NIE author, who is responsible for the NIE's contents. The district court seems to reason that bad faith, if it exists, would have been only on the part of the CIA analysts, not the NIE

---

[6] *Clarke Aff*. Exhibit C *Review of the Charges II* JA 511:

> Whereas Senator Smith expected an in-depth analysis of the 735 and 1205 documents and related issues, the assumptions of the IC, the NIE drafter, and the IC were quite different. They assumed that the NIE would reflect the best judgments of the IC as developed by knowledgeable analysts; they did not plan to undertake basic research and analysis. As a result of his perception of the task, the drafter of the NIE did not undertake an in-depth re-evaluation of the 735 and 1205 documents. Instead, he accepted the IC position on the legitimacy and accuracy of the documents as well as the U.S. Government's position on the basic question of numbers of POWs held by the Vietnamese. The combination of this acceptance of previous positions and the limited time allocated to completing the project prevented the NIE drafter from taking a fresh look at a number of contentious issues.

author. This view is necessarily premised on the conclusion that the NIE author was unaware that CIA analysts had been "extremely inaccurate, misleading, speculative and unsupported… [and] ignored that virtually all other detailed statements in the 1205 were known to be true…" *Smith Aff.* ¶ 14 JA 253. Moreover, even if the only bad faith actors were CIA analysts—and not the NIE author—this circumstance would not undermine plaintiffs' position of bad faith in the underlying activities that generated the records at issue.

Contrary to the district court's views, the NIE addressed the 735 and 1205 Documents, there was no "separate research project," and "Senator Smith's scathing critique" was not based on "a misperception of the NIE's purpose" (*Mem. Op*. JA 978).

Here, plaintiffs aver that the CIA's redactions violates Executive Order 13,526 § 1.7., *Classification Prohibitions and Limitations*:

> (a) In no case shall information be classified, continue to be maintained as classified, or fail to be declassified in order to:
> (1) conceal violations of law, inefficiency, or administrative error;
> (2) prevent embarrassment to a person, organization, or agency;
> (3) restrain competition; or
> (4) prevent or delay the release of information that does not require protection in the interest of the national security.

## III. CIA FAILS TO MEET ITS BURDEN TO SHOW REDACTED INFORMATION EXEMPT FROM DISCLOSURE

### A. Information Provided by Russians Withheld

American POWs held in Russia is a focus of significant efforts to unearth records on the matter. *See, e.g.*, *Kass Aff.* ¶ 1 JA 908:

> The U.S.–Russia Joint Commission on POWs/MIAs (USRJC) was established in 1992 by the Presidents of the United States and the Russian Federation, George H. W. Bush and Boris Yeltsin. The USRJC was established to determine the fates of the United States's and the Soviet Union's unaccounted-for service personnel from World War II, the Korean War, the Cold War, and the Vietnam conflict (Vietnam, Laos and Cambodia).

Seven of the plaintiffs in this action are particularly interested in this aspect of the inquiry, as they are family members of POWs who were shipped to Russia: Harry Moore, Sam Logan, Dwight Angell, Lloyd Smith, Jr., and Kelly Patterson. *See* note 1 *infra*.

The context of the redactions reveals that most of the challenged redactions withhold information that the Russians provided.

***Russian information redacted***. The table of contents in *Review of the Charges II* has one redaction. JA 514. Under the heading, ASSESSMENT OF COMMENTS BY RUSSIAN SOURCES ON THE 735 AND 1205 DOCUMENTS, an entire heading is redacted, so that even the subject is hidden. The corresponding nine pages, 81 through 89, are also redacted. *Id*. at 516-524.

Page two of *Review of the Charges II* begins, "Following are excerpts of comments made by current and former Russian officials regarding the 735 or 1205 documents at various meetings or during interviews," followed by mostly redacted pages. JA 526.

***Chart of accounts by Russians redacted***. A chart of Russian officials' credibility, omitted from the *Review of the Charges* I, is redacted from *Review of the Charges II*.

Annex F in *Review of the Charges I*, COMMENTS BY RUSSIAN SOURCES, is a one-page chart that quantifies the ability of unnamed Russian officials to assess the credibility of the 1205 and 735 documents (*Clarke Aff.* Exhibit D JA 697), whereas Annex F in *Review of the Charges II* contains an additional 13 pages, mostly redacted. *Clarke Aff*. Exhibit E JA 607-624.

Senator Smith's *Critical Assessment* discusses information provided by Russians, but omitted from the NIE, at length.[7]

---

[7] *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.

### B. CIA Failed to Meet its Burden to Show Applicability of Exemptions (b)(1) and (b)(3)

The challenged redactions withhold information that the Russians provided.

Exemptions are to be "narrowly construed," *Department of Air Force v. Rose*, 425 U.S. at 361, 96 S. Ct. at 1599, and the burden is on the defendant "agency to demonstrate, not the requester to disprove, that the materials sought may be withheld due to an exemption." *Vaughn v. United States*, 936 F.2d at 866 (citing 5 U.S.C. § 552(a) (4) (B)).

Defendant withholds information under 5 U.S. Code § 552, Exemptions (b)(1) and (b)(3).

Exemption (b)(1):

> (b) This section does not apply to matters that are—
> (1)
> (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

The CIA invokes Executive Order 13,526 as the relevant order authorizing its redactions.[8] "As relevant here," the district court explained, "Section 1.4(c)

---

[8] E.O. 13,526 § 1.1 (a)(l-4). This Order permits classification of documents if:
(1) an original classification authority is classifying the information;
(2) the information is owned by, produced by or for, or is under the control of the United States Government;
(3) the information falls within one or more of the categories of information listed in section 1.4 of this order; and
(4) the original classification authority determines that the unauthorized

allows classification of information that pertains to intelligence activities (including covert action), intelligence sources or methods, or cryptology,' while Section 1.4(d) permits classification of information pertaining to 'foreign relations or foreign activities of the United States, including confidential sources.'" E.O. 13,526 § l.l (a)(l-4)." *Mem. Op*. JA 984. The court cited the government's affidavit, approvingly, regarding intelligence activities and methods, and classified relationships.

Exemption (b)(3) states:

> (b) This section does not apply to matters that are—
>
> * * *
>
> (3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—
> (A)
> (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or
> (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

The CIA invokes 50 U.S.C. § 3024(i)(l), *Protection of intelligence sources and methods*, "The Director of National Intelligence shall protect, and shall establish and enforce policies to protect, intelligence sources and methods from unauthorized disclosure." Defendant also invokes 50 U.S. Code § 3507, *Protection*

---

> disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe that damage.

*of nature of Agency's functions*, which protects "disclosure of the organization or functions of the Agency." [9]

Absent from the government's declaration is any explanation of how this disclosure could possibly implicate the protections contemplated by the exemptions asserted.

Additionally, it does not appear that the U.S. intelligence officials were concerned with public disclosure upon its receipt of the information. *See, e.g.* Affidavit of Norman D. Kass, former Executive Secretary of the *U.S.–Russia Joint Commission on POWs/MIAs*, relaying that no "Russian Intelligence official or American Intelligence or other official expressed any concerns or reservations to

---

[9] 50 U.S. Code § 3507:

> In the interests of the security of the foreign intelligence activities of the United States and in order further to implement section 3024(i) of this title that the Director of National Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, the Agency shall be exempted from the provisions of sections 1 and 2 of the Act of August 28, 1935 (49 Stat. 956, 957; 5 U.S.C. 654), and the provisions of any other law which require the publication or disclosure of the organization or functions of the Agency, or of the names, official titles, salaries, or numbers of personnel employed by the Agency: Provided, That in furtherance of this section, the Director of the Office of Management and Budget shall make no reports to the Congress in connection with the Agency under section 607 of the Act of June 30, 1945, as amended (5 U.S.C. 947(b)).

me or to the USRJC about the public release of any information provided by the Russians." *Kass Aff*. ¶ 7. JA 908.

Nor does the government explain how, if at all, the passage of time figures into its position. The Secretary of the Vietnamese Workers Party Secretary reported that 735 American pilot POWs were being being held by the North Vietnamese in 1971, 54 years ago. The speech to Vietnam's Politburo reporting 1,205 POWs was delivered in 1972, 53 years ago. In 1973, 52 years ago, the Paris Peace Accords were signed and President Nixon announced that "all of our American POWs are on the way home." The CIA wrote the NIE in 1998, 27 years ago. Senator Smith responded with his *Critical Assessment* in 1998, also 27 years ago. Defendant responded 25 years ago, in 2000.

The defendant 's entire discussion of the age of the redacted material is that the information "remains classified" "despite the age of the report:"

> Despite the age of the report and date of events described in the Joint Report, "this information remains currently and properly classified because the release of this information could significantly impair the CIA's ability to carry out its core missions of gathering and analyzing foreign intelligence and counterintelligence and conducting intelligence operations, thereby damaging the national security."

*Williams Decl*. ¶ 17. JA 174.

Moreover, defendants' affidavits are conclusory and lacking in the required specificity. Excerpts of the defendant's affidavit justifying its nondisclosure appears in notes 10-12 below, with emphasis added on the operative language. All

justifications fall into one of four categories: (1) intelligence activities or targets or locations or processes, or (2) intelligence methods enabling adversaries to learn how the CIA operates, or (3) classified relationships, or (4) sources.

Defendant repeats the law, but does not state how it applies to the redactions withholding information that the Russians provided. The court cited the government's affidavit, approvingly, regarding intelligence activities,[10] methods,[11]

---

[10] *Mem. Op*. JA 985-86 (emphasis supplied):
Regarding intelligence activities, the affidavit declares that the

> redactions conceal **the means, policies, and processes used to collect and analyze certain CIA intelligence** interests and activities. Although it is widely acknowledged that the CIA is responsible for conducting intelligence collection and analysis for the United States, the CIA generally does not disclose the **targets** of specific intelligence collection activities or the operations it conducts or supports. Such disclosure would allow intelligence targets to circumvent the CIA's collection efforts, damaging the Agency's ability to carry out its intelligence mission. The [Review of the Charges] reflects certain priorities of specific U.S. intelligence targets, the **locations of CIA activities**, the targets of specific CIA operations and analysis, and **Agency processes** for handling intelligence information. Disclosing this type of detail could reasonably be expected to **damage national security** because it would **greatly impair effective collection of foreign intelligence**.
> (*Id*. 118.)

[11] *Id*. at 986 (emphasis supplied): The affidavit provides a similarly detailed account concerning the need to protect intelligence methods:

> Intelligence methods must be protected **to prevent foreign adversaries, terrorist organizations, and others from learning the ways in which the CIA operates**, which would allow them to take measures to hide their activities from the CIA or target Agency

and classified relationships.[12]

The court in *Allen,* 636 F.2d 1287 at 1292 held that simply reciting statutory standards is insufficient:

---

> officers. The more information the CIA discloses about its **operational tradecraft,** the more difficult it becomes for the CIA to actually collect foreign intelligence around the world. Clandestine information **collection methods** are valuable from an intelligence-gathering perspective only so long as they remain unknown and unsuspected. Once the nature of an intelligence method or the fact of its use in a certain situation is **discovered,** its usefulness in that situation is neutralized and the CIA's ability to apply that method in other situations is significantly degraded. Here, the **documents contain specific types of intelligence methods**, as well as policies and processes for utilizing those intelligence methods. Disclosure of these details would likely impair the CIA's ability to continue to collect intelligence and conduct operations.
> (*Id*. ¶ 19.)

[12] *Id*. (emphasis supplied): Finally, regarding the need to protect classified relationships, the affidavit describes the following:

> The redactions here protect the process and policies for working with foreign services, foreign individuals, and/or clandestine assets and cooperative sources who aided the CIA in its intelligence gathering mission. These details have been withheld because their disclosure would **reveal intelligence priorities, and the CIA's information-sharing relationships with specific foreign individuals and governments**… Revelation of these relationships could hurt the Agency's relationship with these entities — entities that often agree to cooperate with the CIA on **the understanding that the relationship will remain secret**. Disclosing the details of these relationships could reasonably be expected to harm national security because it would **reveal certain interests and activities of the U.S. Government**, and could lead to the deterioration of relationships, thereby decreasing the CIA's access to information and **potentially impacting U.S. diplomatic relations.** (*Id*. ¶ 20.)

> The affidavit's reliance on such expansive phrases as "intelligence sources and methods," "sequence of events," and "process" falls far short of providing the "reasonable specificity" that this court has held is required for summary judgment without in camera inspection.
>
> * * *
>
> The CIA's affidavits do little more than parrot the language of Section 403(d)(3) by stating that "intelligence sources and methods" will be compromised if the document is disclosed.

## IV. IN CAMERA INSPECTION

The court in *Allen v. Central Intelligence Agency*, 636 F.2d 1287, 1298-99 (D.C. Cir. l980) laid down guidelines for in camera inspection of records. It listed these six factors for a district court to consider: (1) judicial economy, (2) the conclusory nature of the agency's affidavits; (3) bad faith on the part of the agency; (4) disputes concerning the contents of the document; (5) the agency proposes in camera inspection; and (6) strong public interest in disclosure. The court reversed the district court's summary judgment ruling, holding that the district court must conduct an inspection in camera of the 15-page document that the CIA had withheld under Exemptions 1 and 3.

Here, five of the six factors are present.

***Dispute Concerning the Contents of the Document.*** Plaintiffs have demonstrated good cause to question the CIA's explanation for the contested redactions to *Review of the Charges II*.

Plaintiffs believe that the redacted information is withheld because the redacted information further undermines the NIE's thesis—that the numbers provided in the 1205/735 Documents are unreliable.

"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.* ¶ 19. JA 253.

In camera inspection would resolve the competing assertions made by both sides.

***Judicial Economy.*** Plaintiffs challenge redactions appearing on 29 pages of the CIA's February 2000 *Review of the Charges II*. *Clarke Aff.* Exhibit C JA 511-540.

An examination of the redactions would typically involve less time than would be expended to be necessary in presentation and evaluation of further evidence, as in *Allen*:

> Where the examination of the requested documents requires herculean labors because of their volume the reluctance to conduct such inspection is understandable. But when the requested documents are few in number and of short length, such reluctance frequently exacts a cost from the parties and the courts in time and money. An examination of the documents themselves in those instances will typically involve far less time than would be expended in presentation and evaluation of further evidence.

*Id.* at 1298.

***Strong Public Interest in Disclosure.*** "In cases that involve a strong public interest in disclosure there is also a greater call for in camera inspection." *Id.* at 1299. The 1205 Document is regarded as the most illuminating record on the issue of the number of POWs remaining in communist hands at war's end.

This lawsuit is part of a much larger advocacy, spanning 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 of the fates of unrepatriated American POWs from the Vietnam War. Calls for public disclosure of information on these unrepatriated POWs has been ongoing for decades.

***Bad Faith.*** "Where there is evidence of bad faith on the part of the agency, the representations of the agency lose all trustworthiness." *Shaw v. U.S. Dep't of State, 559 F. Supp*. 1053, 1056 (D. D.C. 1983) (citations omitted); cited in *Young v. CIA*, 972 F.2d 536 (4th Cir. 1992).

Here, Plaintiffs aver that Senator Bob Smith's 160-page *Critical Assessment* proves bad faith.

***Conclusory nature of the agency's affidavits.*** Defendants' affidavits are conclusory and lacking in the required specificity, as set forth above.

## V. OPERATIONAL RECORDS

### A. Search of Operational Records

In *Hall v. CIA*, CA 04-814 ECF No. 340 at 2-3, USDC DC, Aug. 2, 2019, seeking disclosure of Vietnam era POW records, the court ordered the CIA to search its operational files, based on—"among other things—an affidavit by former Congressman Bob Smith:"

> But § 3141 does not categorically absolve CIA from searching its operational records. When a FOIA requester "disputes" the adequacy of CIA's search "with a sworn written submission based on personal knowledge or otherwise admissible evidence" suggesting "improper exemption of operational files," a court can order CIA "to review the content of any exempted operational file or files" and to submit a "sworn written submission" supporting the claimed exemption. § 3141(f)(2), (f)(4)(A)-(B); *accord, e.g., Judicial Watch, Inc. v. Cent. Intelligence Agency,* 310 F. Supp. 3d 34, 41-42 (D.D.C. 2018) (Jackson, K.B., J.). Plaintiffs do so here with—among other things—an affidavit by former Congressman Bob Smith swearing "without any equivocation that [CIA is] still holding documents that should be declassified'; and that "could and should be released as they pose no national security risk." *Aff. Bob Smith* ¶¶ 8, 20, ECF No. 258-4. Yet CIA never comes close to explaining why the files remain operational, offering only generalized explanations of § 3141 and its mandatory decennial review. *See, e.g., Decl. Antoinette B. Shiner*, ECF No. 335-1. That's not enough. To satisfy§ 3141, CIA must review its operational files and explain with specificity whether any additional responsive records exist and, if so, why they must be exempt from FOIA.
>
> *Hall v. CIA*, CA 04-814 ECF No. 340 at 2-3, USDC DC, Aug. 2, 2019, rev'd on other grounds *Accuracy in Media v. CIA*, 2025 WL1198024 (D.C. Cir. Apr. 25, 2025). *Unpub. Mem. Order*.

The plaintiffs here rely on the personal knowledge of that same affiant that the court in *Hall* relied on—Senator Smith. Plaintiffs also submitted the affidavit of an expert, former CIA officer and intelligence and counterterrorism expert, Kevin Shipp, who held classification authority. *Shipp Aff.* JA 118-120. Both affidavits proffered by plaintiffs in this case are "based on personal knowledge or otherwise admissible evidence" under § 3141(f)(2).

Senator Smith's exposure to classified records on unrepatriated American POWs include those held back at the conclusion of the Korean conflict.[13] As he did in *Hall*, Senator Smith wrote that he has "personally have seen hundreds of classified documents that could and should be released as they pose no national security risk." *Id.* ¶ 5 JA 68.[14]

---

[13] Senator Smith's November 10, 1992 Report, *Chronology of Policy and Intelligence Matters Concerning Unaccounted For U.S. Military Personnel at End of the Korean Conflict and During the Cold War*, is reprinted in its entirety in his Affidavit. *Smith Aff.* ¶¶ 15-281 JA 67-117.

[14] While the redactions at issue here regard unrepatriated POWs from the Vietnam War, plaintiffs' FOIA requests also sought information on unrepatriated POWs from the Korean War. *Compl.* ¶ 16 JA 14-19. This Korean War era information had also been sought in another FOIA action, *Moore v. CIA*, CA 20-1027 (D.D.C.). Plaintiffs in that action voluntarily dismissed that suit when that court denied the plaintiffs leave to amend their Complaint to include a count alleging "Improper Withholding of Operational Files under 50 U.S.C. § 3141(f)." The *Moore* court held that the proposed pleading was unduly delayed and that it would have been futile. That court considered Kevin Shipp's affidavit, but was silent on Senator Smith's affidavit. *See Moore et al. v. CIA*, Memorandum Order JA 122, 125. (The District Court did not approve of plaintiffs having proceeded in this manner.

The district court held that § 3141(f)(2)'s provision for a "sworn written submission" set forth the pleading standard for a challenge of noncompliance under § 3141, but not proof of failure to comply with any provision of § 3141. "[The] Court ruled that an agency's decision to maintain aged files as operational records does not trigger an exception requiring a search of those records under 50 U.S.C. § 3141, but rather, the proper inquiry was the 'propriety of the agency's decision to put the requested records into properly exempted files.'" *Mem. Op*. JA 154.

The district court held that the CIA was in compliance with § 3141 as plaintiffs had not alleged that Korean War records were improperly categorized as exempt from disclosure—75 years ago.[15] JA 148-149.

---

*See, e.g*., *Mem. Order* n. 7 JA 969: "Based on its own concerns about potential procedural gamesmanship by Plaintiffs, the Court raised the question of collateral estoppel in the March 13, 2024 pretrial conference and expressed its view that Plaintiffs shall not secure 'a second bite at the apple.' (Hr'g Tr. 7:22-23.)"

[15] *Mem. Op*. JA 154:

> But whether a document should remain classified has nothing to do with whether the CIA has "improperly withheld requested records because of failure to comply with any provision of [50 U.S.C. § 3141]." 50 U.S.C. § 3141(f)(6)… Indeed, even if Plaintiffs provided evidence that the CIA had withheld any records at all, and even if it were true that the documents at issue do not warrant classification, that assertion would not say even a word about the proper subject of a § 3141 (f)(3) attack - "the propriety of the agency's decision to put the requested records into properly exempted files." *Judicial Watch,* 310 F. Supp. 3d at 41.

The *Hall* case involved POW records that were up to 50 years old, whereas this case seeks records that are up to 75 years old. Plaintiffs posit that the proper reading of § 3141(3)'s "improper placement" into operational files should be read to include improper retention.

**B. Decennial Review of Operational Records**

The CIA Information Act of 1984 requires that, not less than once every ten years, the Director of the CIA to review the exemptions in force to determine whether such exemptions may be removed from any category of exempted files or any portion thereof. Defendant's Declarations are silent regarding its 2025 decennial review, notwithstanding Count IV of plaintiffs' Complaint: *Improper Considerations of Historical Value and Public Interest in Decennial Reviews of Exempted Operational Files under 50 U.S.C. § 3141(g)(2))*. *Compl*. JA 3. Plaintiffs allege:

> The CIA Act requires the CIA, every ten years, to review its files to consider "the historical value or other public interest in the subject matter of the particular category of files or portions thereof and the potential for declassifying a significant part of the information contained therein." 50 U.S. Code § 3141 (g), *Decennial Review of Exempted Operational Files.*
>
> The CIA Act requires the CIA to review the exemptions in force to "determine whether such exemptions may be removed from any category of exempted files or any portion thereof." *Id*.
>
> The CIA Act provides that "a complainant who alleges that the Central Intelligence Agency has improperly withheld records because of

> failure to comply with this subsection may seek judicial review." 50 U.S. Code § 3141(g)(3).
>
> The CIA failure to comply with the disclosure provisions of the CIA Act entitle plaintiffs to judicial review.

*Id.* ¶¶ 33-36 JA 21.

Federal courts are authorized to review whether CIA has, in fact, performed the decennial review and, in doing so, considered the historical value or other public interest. The CIA did not recite whether it conducted a decennial review, and whether it considered the historical value or other public interest in the files and the potential for declassifying a significant part of the information. On remand, it should be required to do so.

Here, the information concerns events which have both been the subject of official congressional investigations and extensive news, book, and film publicity, for decades. Thus, the subject records are of historical value and widespread public interest.

### C. Automatic Declassification

Under Executive Order 13,526 § 3.3, *Automatic Declassification*, "All classified records shall be automatically declassified on December 31 of the year

that is 25 years from the date of origin, except as provided…"[16] The CIA authored the *Review of the Charges II* in 2000. Thus, § 3.3 will apply to the redacted information at issue on December 31, 2025, as the district court observed. *Mem. Op*. JA 988.

Here too, defendant's affidavits should describe this review, on remand.

## CONCLUSION

WHEREFORE, Plaintiffs/Appellants respectfully pray that this Court:

I. Hold, as a matter of law, that bad faith in the underlying agency activities that led to the generation of the records at issue is relevant to overcome the Agency's presumption of good faith;

II. Review, *de novo*, the proffered evidence of bad faith, and to find that the Plaintiffs' proffer meets the standard to show bad faith;

III. Remand this case to the District Court with instructions that it review, in camera, the redacted pages at issue;

---

[16] Executive Order 13,526, Sec. 3.3(a), *Automatic Declassification:*

(a) Subject to paragraphs (b)–(d) and (g)–(j) of this section, all classified records that
  (1) are more than 25 years old and
  (2) have been determined to have permanent historical value under title 44, United States Code, shall be automatically declassified whether or not the records have been reviewed. All classified records shall be automatically declassified on December 31 of the year that is 25 years from the date of origin, except…

(b) An agency head may exempt from automatic declassification…

IV. Order Defendant to search its operational records for information responsive to all of Plaintiffs' FOIA requests; and

V. Order Defendant to include in its affidavits a description of:
   A. The CIA's 2025 decennial review, to include:
      (1) Whether the Director of the CIA reviewed the exemptions in force to determine whether such exemptions may be removed from any category of exempted files or any portion thereof;
      (2) A description of the Agency's consideration of historical value or other public interest in the records of unrepatriated American POWs from the Vietnam and Korean Wars;
      (3) The potential for declassifying a significant part of the information contained therein; and
   B. Its search for responsive 25-year-old records.

Respectfully submitted,

/ s/ John H Clarke
John H. Clarke (VSB No. 023842)
1629 K Street, NW, Suite 300
Washington, DC 20006
(202) 344-0776
john@johnhclarkelaw.com
*Counsel for Appellants*

## REQUEST FOR ORAL ARGUMENT

Appellants respectfully ask that the Court grant them the opportunity to argue the matter orally.

**CERTIFICATE OF COMPLIANCE FRAP 27(d)(2)(A)**

The text for this Brief for Appellant was prepared using Times New Roman, 14 point, and contains 9,900 words as counted by Microsoft Word.

/s/ John H. Clarke

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on November 18, 2025, I have caused the foregoing Appellant's Brief to be served on Appellee's counsel by filing the Certificate on the Court's CM/ECF system. Counsel is a registered user.

/s/ John H. Clarke

# ADDENDUM



---

**5 U.S. Code § 552—Public information; agency rules, opinions, orders, records, and proceedings—Exemptions (b)(1) and (b)(3)**

(b) This section does not apply to matters that are—
(1)
(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;
(2) related solely to the internal personnel rules and practices of an agency;
(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—
(A)
(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or
(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

**Executive Order 13,526**
**§ 1.1 (a)(l-4)**
**§ 1.4 (a-h)**
**§ 1.7 (a)(l-4)**
**§ 3.3**

Sec. 1.1, *This Order permits classification of documents if*:

(1) an original classification authority is classifying the information;
(2) the information is owned by, produced by or for, or is under the control of the United States Government;
(3) the information falls within one or more of the categories of information listed in section 1.4 of this order; and
(4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe that damage.

Sec. 1.7. *Classification Prohibitions and Limitations.*

(a) In no case shall information be classified, continue to be maintained as classified, or fail to be declassified in order to:
    (1) conceal violations of law, inefficiency, or administrative error;
    (2) prevent embarrassment to a person, organization, or agency;
    (3) restrain competition; or
    (4) prevent or delay the release of information that does not require protection in the interest of the national security.

Sec. 3.3, *Automatic Declassification:*

(a) Subject to paragraphs (b)–(d) and (g)–(j) of this section, all classified records that
    (1) are more than 25 years old and
    (2) have been determined to have permanent historical value under title 44, United States Code, shall be automatically

declassified whether or not the records have been reviewed. All classified records shall be automatically declassified on December 31 of the year that is 25 years from the date of origin, except as provided in paragraphs (b)– (d) and (g)–(j) of this section. If the date of origin of an individual record cannot be readily determined, the date of original classification shall be used instead

(b) An agency head may exempt from automatic declassification under paragraph (a) of this section specific information, the release of which should clearly and demonstrably be expected to:

* * *

(1) reveal the identity of a confidential human source, a human intelligence source, a relationship with an intelligence or security service of a foreign government or international organization, or a nonhuman intelligence source; or impair the effectiveness of an intelligence method currently in use, available for use, or under development;

* * *

(6) reveal information, including foreign government information, that would cause serious harm to relations between the United States and a foreign government, or to ongoing diplomatic activities of the United States…

**50 U.S. Code § 3141—Operational files of the Central Intelligence Agency, ¶¶ (a), (b), (f) and (g).**

(a) EXEMPTION BY DIRECTOR OF CENTRAL INTELLIGENCE AGENCY
The Director of the Central Intelligence Agency, with the coordination of the Director of National Intelligence, may exempt operational files of the Central Intelligence Agency from the provisions of section 552 of title 5 (Freedom of Information Act) which require publication or disclosure, or search or review in connection therewith.

(b) "OPERATIONAL FILES" DEFINED
In this section, the term "operational files" means—
(1) files of the National Clandestine Service which document the conduct

of foreign intelligence or counterintelligence operations or intelligence or security liaison arrangements or information exchanges with foreign governments or their intelligence or security services;

(2) files of the Directorate for Science and Technology which document the means by which foreign intelligence or counterintelligence is collected through scientific and technical systems; and (3) files of the Office of Personnel Security which document investigations conducted to determine the suitability of potential foreign intelligence or counterintelligence sources; except that files which are the sole repository of disseminated intelligence are not operational files.

(3) files of the Office of Personnel Security which document investigations conducted to determine the suitability of potential foreign intelligence or counterintelligence sources; except that files which are the sole repository of disseminated intelligence are not operational files.

* * *

(f) ALLEGATION; IMPROPER WITHHOLDING OF RECORDS; JUDICIAL REVIEW

Whenever any person who has requested agency records under section 552 of title 5 (Freedom of Information Act), alleges that the Central Intelligence Agency has improperly withheld records because of failure to comply with any provision of this section, judicial review shall be available under the terms set forth in section 552(a)(4)(B) of title 5, except that—

(1) in any case in which information specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign relations which is filed with, or produced for, the court by the Central Intelligence Agency, such information shall be examined ex parte, in camera by the court;

(2) the court shall, to the fullest extent practicable, determine issues of fact based on sworn written submissions of the parties;

(3) when a complaint alleges that requested records were improperly withheld because of improper placement solely in exempted operational files, the complainant shall support such allegation with a sworn written submission, based upon personal knowledge or otherwise admissible evidence;

(4)

(A) when a complainant alleges that requested records were improperly withheld because of improper exemption of operational files, the Central Intelligence Agency shall meet its burden under section 552(a)(4)(B) of title 5 by demonstrating to the court by sworn written submission that exempted operational files likely to contain responsive records currently perform the functions set forth in subsection (b) of this section; and

(B) the court may not order the Central Intelligence Agency to review the content of any exempted operational file or files in order to make the demonstration required under subparagraph (A) of this paragraph, unless the complainant disputes the Central Intelligence Agency's showing with a sworn written submission based on personal knowledge or otherwise admissible evidence;

(5) in proceedings under paragraphs (3) and (4) of this subsection, the parties shall not obtain discovery pursuant to rules 26 through 36 of the Federal Rules of Civil Procedure, except that requests for admission may be made pursuant to rules 26 and 36;

(6) if the court finds under this subsection that the Central Intelligence Agency has improperly withheld requested records because of failure to comply with any provision of this section, the court shall order the Central Intelligence Agency to search and review the appropriate exempted operational file or files for the requested records and make such records, or portions thereof, available in accordance with the provisions of section 552 of title 5 (Freedom of Information Act), and such order shall be the exclusive remedy for failure to comply with this section; and

(7) if at any time following the filing of a complaint pursuant to this subsection the Central Intelligence Agency agrees to search the appropriate exempted operational file or files for the requested records, the court shall dismiss the claim based upon such complaint.

(g) DECENNIAL REVIEW OF EXEMPTED OPERATIONAL FILES

(1) Not less than once every ten years, the Director of the Central Intelligence Agency and the Director of National Intelligence shall review the exemptions in force under subsection (a) to determine whether such exemptions may be removed from any category of exempted files or any portion thereof.

(2) The review required by paragraph (1) shall include consideration of the historical value or other public interest in the subject matter of the particular category of files or portions thereof and the potential for declassifying a significant part of the information contained therein.

(3) A complainant who alleges that the Central Intelligence Agency has improperly withheld records because of failure to comply with this subsection may seek judicial review in the district court of the United States of the district in which any of the parties reside, or in the District of Columbia. In such a proceeding, the court's review shall be limited to determining the following:

(A) Whether the Central Intelligence Agency has conducted the review required by paragraph (1) before October 15, 1994, or before the expiration of the 10-year period beginning on the date of the most recent review.

(B) Whether the Central Intelligence Agency, in fact, considered the criteria set forth in paragraph (2) in conducting the required review.