

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROGER HALL, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 04-814 (RCL)
)	
CENTRAL INTELLIGENCE AGENCY,)	
)	
Defendant.)	
_____)	

PLAINTIFF ACCURACY IN MEDIA'S MEMORANDUM IN REPLY TO DEFENDANT'S
OPPOSITION TO CROSS-MOTION FOR ENTRY OF SUMMARY JUDGMENT

Plaintiff Accuracy in Media, Inc. ("AIM"), respectfully submits this memorandum in Reply to the Central Intelligence Agency's opposition to Plaintiffs' Motions for Summary Judgment.

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I. Deliberative Process Privilege

A. Extreme Government Misconduct Vitiates Privilege

Defendant posits that "Plaintiffs' allegations here would not amount to illegal acts of the sort recognized in case law regarding bad-faith vitiating of privilege. Plaintiffs aver that the CIA is covering up its participation in knowingly leaving POWs in Southeast Asia post-1973 Operation Homecoming.... Notably, however, they fail to identify any crime allegedly committed or law allegedly violated, much less any concrete reason to believe that the documents at issue here would reveal that criminality." CIA Opposition to Plaintiffs' Cross-Motions for Summary Judgement, ECF 271 ("*CIA Opp.*") at 13. This is an astonishing denial. Abandoning our men in uniform is an enormous crime, as the authoritative work on American POWs abandoned in Southeast Asia is aptly titled. That book was written by plaintiffs' affiant, Bill Hendon. See Affidavit of Hon. Bill Hendon, ECF 95-45 ¶ 2:

Along with co-author Elizabeth A. Stewart, I wrote *An Enormous Crime. The Definitive Account of American POWs Abandoned in Southeast Asia*. The book, ten years in the writing, was published by St. Martin's Press in May 2007. *An Enormous Crime* is based primarily on open-source documents; thousands of pages of now-declassified U.S. government documents and my experiences in dealing with the POW/MIA issue. It is the history of living American POWs left behind in Vietnam and Laos at war's end; an account of the circumstances that left them there and what the intelligence indicates they have endured in the years since.

The record in this matter is replete with evidence of extreme government misconduct. Carol Hrdlicka's "lawyer[] list[ed] [seven] Criminal Violations committed by DOD and CIA agency personnel."¹ *Hrdlicka Aff.*, ECF 261 ¶ 55. Three times the government knowingly correlated the death of a POW with Carol Hrdlicka's husband, David. The third version was that he had died in 1968, while the Laotians displayed David at a press conference in 1969.²

¹ *Hrdlicka Aff.*, ECF 261-2 Exhibit 8 at Bates 21:

- (1) *False Official Statements*: Violation of Article 107, UCMJ; Section 907 Title 10, U.S.C. [For civilians similar violations under Title 18, U.S.C.]
- (2) *Willful Dereliction of Duty*: Violation of Article 92, UCMJ; Section 892 Title 10, U.S.C. [For civilians similar violations under Title 18, U.S.C.]
- (3) *Negligent Dereliction of Duty*: Violation of article 92, UCMJ; Section 892 Title 10, U.S.C. [For civilians similar violations under Title 18, U.S.C.]
- (4) *Accessory After the Fact*: Violation of Article 78, UCMJ; Section 878 Title 10, U.S.C. [For civilians similar violations under Title 18, U.S.C.]
- (5) *Conspiracy To Make False Official Statements*: Violation of Article 81, UCMJ; Section 881 Title 10, U.S.C. [For civilians similar violations under Title 18, U.S.C.]
- (6) *Conspiracy to be Willfully Derelict in Performance of Duties*: Violation of Article 81, UCMJ; Section 881 Title 10, U.S.C. [For civilians similar violations under Title 18, U.S.C.]
- (7) *Conspiracy to be Accessories After the Fact*: Violation of Article 81, UCMJ; Section 881 Title 10, U.S.C. [For civilians similar violations under Title 18, U.S.C.]

² *Id.*, ECF 261-2 ¶ 62:

The government has insisted, for over 20 years now, that David is dead. According to the government, David died in 1966. Next, it claimed that he died in 1967. Lastly, according to the government, David died in 1968. It finally settled on 1968 as the date it "believes" that David died. The press conference that displayed David was held in 1969. The government has no evidence that David is dead. The government's "belief" is not based on any evidence. The absence of any evidence cannot be the basis of declaring someone to have died.

The 1991 resignation letter of Colonel Millard Peck, Chief of the Special Office for Prisoners of War and Missing in Action, is attached to *Hrdlicka Aff.*, as Exhibit 42, ECF 261-6 at Bates 119. Colonel Peck was so disgusted with the cover-up that he requested the DIA to "assist [him] in being retired immediately from active military service." He wrote, "It appears that the entire issue is being manipulated by unscrupulous people in the Government, or associated with the Government.... The sad fact, however, is that this issue is being controlled and a cover-up may be in progress." *Hrdlicka Aff.* Exhibit 42, ECF 261-6 at Bates 119. *See also id.* ¶ 64, citing Exhibit 50, the "1992 DIA Memoranda re Destruction of POW Records by the CIA, written by Investigator John McCreary, at Bates 151-56."

The parties agree that plaintiffs' cited cases establish that where there is concrete, specific evidence of extreme government misconduct, the deliberative process privilege does not shield predecisional communications. But defendant argues that its misconduct does "not amount to illegal acts of the sort recognized in case law regarding bad-faith vitiation of privilege, and that "the scope of 'misconduct' has not been clearly defined," citing *ICM Registry, LLC v. U.S. Department of Commerce*, 538 F. Supp. 2d 133 (D.D.C. 2008). Thus, it would appear that the government does not see abandoning 600 American POWs to their fate in Southeast Asia as sufficiently criminal to vitiate their governmental privilege.

Moreover, while plaintiffs' misconduct allegations appear in their Statement of Material Facts not in Genuine Dispute, ECF 258 (hereafter "*Plaintiffs' Statement of Material Facts*"), defendant declined to respond to those facts, because they were "immaterial." So, the CIA baldly declared that plaintiffs have "fail[ed] to identify any crime allegedly

committed or law allegedly violated," even while asserting that plaintiffs' allegations of extreme misconduct are immaterial.

While defendant claims that there is no "concrete reason to believe that the documents at issue here would reveal that criminality," in fact, virtually all post-Operation Homecoming intelligence will shed light on the Executive Branch knowingly abandoning 600 POWs in Southeast Asia—and open up the particulars of that enormous crime to the light of public scrutiny.

B. Privilege Unavailable for Records 25 Years or Older

Defendant pleads:

Plaintiffs allege that the Agency incorrectly applied Exemption 5 because Section 2(2) of the FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538, 540 (enacted June 30, 2016), provides that Exemption 5 "shall not apply to records created 25 years or more before the date on which the records were requested." *See* AIM Opp. at 18 (ECF No. 258). But they miss a critical point: the FOIA Improvement Act applies only to requests filed after the Act's effective date, *i.e.*, after June 30, 2016. *See* § 6, 130 Stat. 538, 545 ("This Act, and the Amendments made by this Act, . . . shall apply to any request for records . . . made after the date of enactment of this Act."). Because plaintiffs' request was filed in 2003, the FOIA Improvement Act is inapplicable and the Agency's analysis is correct.

CIA Opp., ECF 271 at 9.

Attached hereto as Exhibit 1 is the recent FOIA request, submitted by Accuracy in Media, Inc., seeking disclosure of the very records sought in this action, narrowed, to include only 25-year-old records, generated before April of 1992.

In the absence defendant's waiver, plaintiffs anticipate seeking leave to amend their complaint, based on this FOIA request made since the June 30, 2016 enactment of the FOIA Improvement Act, so that defendant must disclose these hitherto privileged of 25-year-old documents.

II. Plaintiffs' Statements of Material Facts Should be Deemed Admitted

Statements of material fact that defendant did not deny, much less offer specific evidence to prove, should be deemed admitted for purposes summary judgment. The *CIA Response to Material Facts*, ECF 272-2, should have been a paragraph by-paragraph response, much like an answer to a complaint. As the Rule does not explicitly permit the responsive party to object to a statement, and defendant did not move to strike, application of the letter of the rule would result in deeming the statements of fact admitted. Of 180 statements of material facts listed in plaintiffs' pleading,³ defendant chose to "dispute" all but three as "immaterial."

³ Contents of *Plaintiffs' Statement of Material Facts*, ECF 258-5 at 1-2:

Communist policy to hold back POWs.	4
Paris Peace Accords.	5
600 men not repatriated.	7-11
US government to refusal to provide war reparations.	12-14
Motives for declaring dead.	15
Thousands of live sighting reports.	16-18
Policy of withholding records.	19-22
Criminal misconduct, cover-up.	23-26
Secret military signals and codes and messages sent from POWs.	27-31
Other satellite imagery and photographs.	32-50
Offer to repatriate POWs for reward.	51-56
Rescue operations.	57-65
Military Assistance Command, Vietnam—	
Special Operations Group.	66-69
Nhom Marrott.	70-74
David Hrdlicka.	75-79
Other records not produced.	80-109
Other records of POWs in Laos.	110-114
Other records of specific operations and locations.	115-125
Lists of prison sites.	126-127
Additional records of POWs into the 1980s and 1990s.	128-153
POWs transferred to Russia, North Korea, China.	154-159
CIA records.	160-180

Defendant did not admit or deny facts listed in paragraphs 4 through 24 as immaterial, not based on personal knowledge, irrelevant as not related to the adequacy of the search or the bases for withholdings, and improper requests for admissions.⁴ Other responses also added the objection that the documents sought were not among those that the Court already ordered the CIA to locate and disclose.⁵

⁴ Defendant's Response to Plaintiffs' Statement of Material Facts ("*CIA Response to Material Facts*") ECF 272-2 ¶ 5:

Deny. Defendant disputes paragraphs 4 through 24 as immaterial because they do not concern the reasonableness of CIA's search or legal bases for its withholdings under FOIA Exemptions. Indeed, they appear to be little more than improper requests for admission where no discovery has been ordered. Furthermore, these allegations are inadmissible assertions (and not facts) under Fed. R. Civ. P. 56(e) because most are not based on personal knowledge, and they also are inadmissible hearsay because most simply quote from a third-party report for the truth of the matter asserted. To the extent that these paragraphs appear to challenge the adequacy of the CIA's search, in demonstrating that a FOIA search is adequate, "the agency must demonstrate that it has conducted a 'search reasonably calculated to uncover all relevant documents.'" *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999). A search is not inadequate merely because it failed to "uncover every document extant." *SafeCard Servs., Inc. v. S.E.C.*, 926 F.2d 1197, 1201 (D.C. Cir. 1991). The Court is respectfully referred to Ms. Shiner's 13 July 2016 declaration and the Defendant's 13 July 2016 Renewed Motion for Summary Judgment, for a description of the Agency's search. Shiner Decl, at ¶¶ 22-26 (ECF No. 248-2); Defendant's Motion for Summary Judgment (ECF No. 248-1).

⁵ Paragraphs 25 and 26 were alleged to be immaterial and irrelevant, and denied as based on the absence of knowledge needed to either admit or deny. ECF 272-2 ¶ 6. Defendant disputes paragraphs 27 through 46 as immaterial, irrelevant, and as requests for admissions. *Id.* ¶ 6. It "disputes paragraphs 47 through 50 as immaterial... [and] inadmissible assertions (and not facts) under Fed. R. Civ. P. 56(e) because they are not based on Hall's personal knowledge." *Id.* ¶ 8. Paragraphs 51 through 62 are said to be immaterial, inadmissible assertions, and not based on personal knowledge. *Id.* ¶ 9. Statements 65 through 70, and 71 through 73, are immaterial and "not based on Hall's personal knowledge." *Id.* ¶¶ 11-12. Paragraphs 63 through 64, as well as 74 through 180, are immaterial, not based on Hall's personal knowledge, and "the exhibits referenced in these paragraphs are not the documents CIA was directed by the Court to search for missing attachments, enclosures, photographs and reports." *Id.* ¶¶ 12-13.

A. Fact Witnesses

Of the 180 statements in *Plaintiffs' Statement of Material Facts* (ECF 258-5), 82 cite to Hall's affidavit. That affidavit is entirely factual. Hall identifies dozens of responsive CIA records that have not been produced, or identified. Many concern the fate of the 227 MIAs listed in Laos.⁶ Others regard satellite imagery of escape and evasion codes,⁷ intelligence on two American pilots,⁸ on three captured pilots in the Sam Neua province,⁹ a 1973 sighting of 8 to 10 Americans,¹⁰ on 1986 intelligence about seven American POWs,¹¹ reports of another 23 American POWs,¹² 1987 records of POWs,¹³ a Special Forces

⁶ *Plaintiffs' Statement of Material Facts*, ECF 258-5 ¶ 100: "An excerpt of Exhibit 70... reasons that since only three POW's from Laos are confirmed held in North Vietnam... a major effort should be made to locate the remaining 227 who are listed as MIA in Laos and may still be in Laos. The CIA has not provided information identifying the 227 MIAs or related to efforts to locate them...."

⁷ *Id.* ¶ 50: "...Several unusual markings—the letters 'USA' and what resembled a US Air Forces escape and evasion symbol known and a "Walking Kilo" on the ground west of Sam Neua Laos... recently completed analysis gives us a better understanding ..."

⁸ *Id.*: "In May of 1965 two American pilots were being held in the home of Communist General Singkapo in Laos.... "

⁹ *Id.* ¶ 103: "Exhibit 52 is a March 5, 1973 CIA Intelligence Report. It relates (at Bates 220) that "three captured American pilots, three Tai pilots, and four Lao pilots in the Sam Neua province...."

¹⁰ *Id.* ¶ 114: "Exhibit 98 is a CIA Report of a sighting of 8 to 10 Americans in Laos..."

¹¹ *Id.* ¶ 143 quoting Exhibit 101: "There were seven American POWs as of mid-1986 being detained at a camp near Nam Bac town, Luang Prabang Province, Laos..."

¹² *Id.* ¶ 143: "Exhibit 38(a)... is a March 1983 CIA Cable regarding Identification of Possible U.S. Prisoner of War camp... reporting that there were 23 American prisoner of war (POWs) detained in the camp...."

¹³ *Id.* ¶ 145, quoting 1987 CIA record, "POW/MIA Reported presence of American POWs in Houa Phan Province, as of January 1987... [O]ne of the POWs is named [redacted] who was captured on 18 June 1968..."

investigation of a camp,¹⁴ a databank of intelligence on camps,¹⁵ a report on the "Status of PWs in Laos," and a 1991 Memorandum to the Select Committee regarding CIA reconnaissance.¹⁶ Absent records include those associated with Laos include 1990s intelligence on David Hrdlicka, as well as other POWs' locations, a possible rescue attempt,¹⁷ and another such attempt, codenamed "Operation Duck Soup."¹⁸

¹⁴ *Id.* ¶ 45, quoting 1992 Select Committee internal memorandum, "he knew there had been American prisoners in Laos because in 1977 he was part of a Special Forces team which penetrated Laos to photograph and plant listening devices near a supposedly empty prison or POW camp facility [in] Laos."

¹⁵ *Id.* ¶ 101: "1971 CIA Intelligence Report states that 'Three types of material are enclosed herewith for addition to or comparison with the [redacted] databank of intelligence on POW camps in Laos and adjacent areas....'"

¹⁶ *Id.* ¶ 63, citing 1991 Memorandum from Select Committee Investigators regarding CIA involvement in the reconnaissance/rescue operation at a suspected POW camp near Nhom Marrot, Laos.

¹⁷ *Id.* ¶ 59, citing report of US MIA in Laos in 1990, David Hrdlicka's location, other POWs' locations, rescue attempt, other reports, and relating that further intelligence would follow.

¹⁸ *Id.* ¶ 60: "'Duck Soup' was an attempt to rescue then Captain David Hrdlicka and Captain Charles B. Shelton in the Sam Neua area of Laos... with the assistance of CIA assets...."

See also id. ¶ 79, quoting record regarding 1990 Laotian source regarding David Hrdlicka and other POWs, relating that outcome of further conversations with source to follow.

Nor has the CIA released, or acknowledged, any information on Nhom Marrot Detention Facility.¹⁹

¹⁹ *Id.* ¶ 72: "At NARA [Hall] located a document reporting on the Nhom Marrot Detention Facility, Exhibit 16, a January 28, 1981, DIA Memo for Chairman of the Joint Chiefs of Staff regarding POW Intelligence. It states, in part... 'In November 1980, CIA provided information which corroborates the refugee's report. Overhead imagery has verified the existence of a detention facility at the alleged site. At enclosure is a chronological listing with tabs, which support the belief that U.S. PWs may be detained in Laos.... I will request that CIA prepare a topographical model of the site and surrounding area.... CIA agrees to undertake operation inside Laos to verify presence of Americans.' [Plaintiffs] have not been provided the 'information provided by a refugee... [about] the detention of U.S. PWs in Laos,' 'CIA information' that corroborates the report, including '[o]verhead imagery,' ground reconnaissance photography, and reports, or the chronological listing with tabs, which support the belief that U.S. PWs may be detained in Laos, nor photographs of the 'topographical model of the site and surrounding area,' nor the product of the CIA's undertaking of operation[s] inside Laos to verify [the] presence of Americans. In fact, the CIA has never acknowledged or released any information on this facility. *Hall Aff.* ¶ 70."

Id. ¶ 73: "CIA provided information which corroborates the refugee's report. Overhead imagery has verified the existence of a detention facility at the alleged site.... On 17 January 1981, DIA requested that CIA attempt to confirm the presence of U.S. PWs in Laos.' The enclosure is "CHRONOLOGICAL LISTING, SUBJECT: Nhommarath Detention Facility" (*id.* at Bates 60), which recites intelligence on that POW camp. I have not been provided with the imagery referenced, or CIA Memorandum, appearing on tabs A-F. *See* Bates page 61."

Id. ¶ 74: "Exhibit... 1981 heavily redacted CIA Intelligence on Nhom Marrot POW camp, which I obtained from the Library of Congress. It is a CIA document reflecting that, based in part on human intelligence, there was a second operation at Nhom Marrot. The memorandum reflects that a second team was awaiting debriefing of a reconnaissance team, and that a review of 'over 900' items regarding US POWs in Laos... The CIA did not provide me with a copy of this document, nor has it provided me with the other records related to this second Nhom Marrot operation, nor the 900 items reviewed regarding US POWs, unredacted, nor the analysis of those items.' *Hall Aff.* ¶ 76."

Other unproduced records include those associated with a list of POWs,²⁰ the Son Tay Raid,²¹ an interrogation center holding US POWs in 1986,²² another such debriefing site for captured U.S. Pilots,²³ Briefing Board Reports compiled from all source materials,²⁴ a CIA briefing to the Joint Chiefs of Staff,²⁵ a CIA memorandum enclosed with its letter to the Select Committee,²⁶ recommendations for increased cooperation of the Vietnamese,²⁷ CIA Director Casey's having relayed to President Reagan a Vietnamese offer of POWs for

²⁰ *Id.* ¶ 95, reciting that the government maintained a list of POWs, citing deposition of Ambassador to Laos William Sullivan.

²¹ *Id.* ¶ 124, citing Exhibit titled "Son Tay Raid Timetable of Planning."

²² *Id.* ¶ 144, CIA record re "interrogation center still holding US prisoners of war in an unknown location in southwest Ha Nam Ninh province in early 1986."

²³ *Id.* ¶ 97, citing record of 'Preliminary Debriefing Site for Captured U.S. Pilots in... Vietnam."

²⁴ *Id.* ¶ 99, Briefing Board Reports obtained from Library of Congress, from information received from all source reports.

²⁵ *Id.* ¶ 104, citing 1973 Memorandum from Chief of Naval Operations to Chairman, Joint Chiefs, re POWs in Laos, quoting Admiral Zumwalt, "In view of the direct and personal interest the Services have [in the POW] matter," recommended that "the JCS receive a briefing from the CIA on their effort in this area..."

²⁶ *Id.* ¶ 107, quoting 1992 CIA letter to Select Committee, referencing "appended memorandum."

²⁷ *Id.* ¶ 98, quoting conversation with Phoun Supraseuth re POWs, referencing recommendations for changes to help bring about recovery of POWs.

\$4.5 billion,²⁸ President Reagan's direction to investigate a Vietnamese prison,²⁹ a 1992 report on POW markings in Southeast Asia observed in 1976, 1980, 1981 and 1992,³⁰ and 1997 records of POWs "still being held in remote areas of southern Vietnam."³¹

In its *CIA Response to Plaintiffs' Material Facts*, ECF 272-2, the CIA claims that plaintiffs' "allegations are inadmissible assertions (and not facts) under Fed. R. Civ. P. 56(e) because most are not based on personal knowledge, and they also are inadmissible hearsay because most simply quote from a third-party report for the truth of the matter asserted." But Hall's allegations are not hearsay. Plaintiffs' exhibits are not proffered to prove the truth of the intelligence reported. Rather, Hall's attached 148 exhibits demonstrate the existence of associated records. His statements recounting that certain records were not produced is based on his personal knowledge. It is not hearsay.

The same grounds for admissibility and relevance applies to most of Carol Hrdlicka's affidavit's 53 exhibits, ECF 251-1, *et seq.*, to most of the eleven exhibits attached

²⁸ *Id.* ¶ 55, relating that plaintiffs have been "provided no... documents which Syphrit says Casey instructed a CIA employee to take to the White House... President Reagan is reported as having told CIA Director William Casey 'to do something about it [this offer]...' meeting mentioned in the Senate Select Committee Report..."

²⁹ *Id.* ¶ 31, quoting Richard Allen testimony regarding 1981 photograph of escape and evasion codes stamped in the grass at Vietnamese prison, and CIA involvement in the preparation for mission to explore, on President Reagan's orders.

³⁰ *Id.* ¶ 127: "Exhibit 63 at Bates 231 is the first page of an August 10, 1992 'Possible POW/MIA Associated Markings in Southeast Asia... 1976, 1980, 1981, 1992....'"

³¹ *Id.* ¶ 146, quoting exhibit, "Socialist Republic of Vietnam (SRV) official commented in private in late October 1987 that he is certain that there are American Prisoners of War (POW) still being held in remote areas of southern Vietnam....."

to Bill Hendon's Affidavit, ECF 116-46, to Mark Sauter's six exhibits, ECF 258-3, and to both of Lynn O'Shea's affidavit's exhibits, ECF 182-6.³²

Retired U.S. Navy Captain Eugene B. McDaniel, who spent almost six years as a POW, attached one exhibit to his affidavit (ECF 258-1), the November 4, 1991 edition of The Soviet Business Weekly, *Commersant*. Captain McDaniel believes that the article's report of a "U.S. pilot shot down over North Vietnam on May 19, 1967," and taken to the Soviet Union, refers to Kelly Patterson, who was Captain McDaniel's co-pilot, and an "expert in the use of his aircraft's state-of-the-art electronic systems." CIA information on Kelly Patterson's captivity, and transfer, has not been produced.

In fact, despite their having being specifically sought in plaintiffs' FOIA request seeking "records pertaining to... POW/MIAs sent out of Southeast Asia (for example, to China, Cuba, North Korea, or Russia)" (2005 FOIA Request, ECF 114 at 10), the CIA has

³² See *O'Shea Aff.* ¶ 5:

Subsequent, to the filing of our FOIA request and appeal, and their denials, we located a document confirming CIA holds at minimum 20 documents relating to their effort to confirm the presence of American POWs at the Nhom Marrott camp. We offer the following in support of this statement.

Exhibit 1 - Classified letter to J. William Codhina, Chief Counsel Senate Select Committee on POW/MIA Affairs, from Stanley Moskowitz, Director of Congressional Affairs Central Intelligence Agency. The redactors pen made certain no mention of Nhom Marrott was made in this CIA letter designated, for Senate Records as OSS-92- 5076. However the inventory of all Committee records clearly indicates this letter is in response to a request from Senate investigator Robert Taylor for 22 Document relating to Nhommarath.

Exhibit 2 - Inventory of Box 79 – Records of the Senate Select Committee on POW/MIA Affairs. Note item #2 record designated OSS 92-0576 described as "Response To Request For 22 Documents Re: Nhomarath (U)

disclosed no information regarding movement of Vietnam era POWs to China, the Soviet Union,³³ to Cuba, or to North Korea.³⁴

B. Expert Witnesses

Defendant's approach to plaintiffs' experts' opinions is equally dismissive, and unpersuasive.

AIM displays on its website the 100-page 1991 Senate Foreign Relations Staff Report, *An Examination of U. S. Policy Toward POW/MIAs*. See <http://www.aim.org/pdf/Hall-CIA/An-Examination-of-US-Policy-Toward-POW-MIAs-US-Senate-1991-105-pages.pdf>. That authoritative Report illustrates that "the problems which the United States has had in dealing with prisoners of war and the missing in action are not

³³ See, e.g., *Sauter Aff.*, ECF 258-3 ¶¶ 20-21:

POW-related information from CIA debriefings of various Soviet defectors, including MIG-pilot defector Alexander Zuyev, who was moved to the United States and whose POW/MIA knowledge is referenced in 2016 production and limited open-source references. The produced document C06002273 from 1999 also refers to additional information from Soviet sources that has not been produced.

CIA analysis of the statement by Dmitri Volkogonov, Russian head of the U.S. Joint Commission on POW/MIAs, whose widely-publicized comments on a "KGB-assigned mission and plan to 'transfer knowledgeable Americans (POWs in Vietnam) to the USSR'" is also referenced in 2016 production.

See also *Hall Aff.* ¶ 155, quoting CIA Report to the White House Situation Room regarding POWs in Laos mid-1985, 1986, "There had been 12 American POWs at the site but in 1985 five of the Americans POWs were moved to the Soviet Union...."

And see *id.* ¶ 156, citing 1982 CIA report regarding Soviet incarceration of U.S. Vietnam era POWs.

³⁴ *Id.* ¶ 157, quoting CIA Memorandum regarding "alleged Sightings of American POWs in North Korea from 1975 to 1982," and 1986; "about 10 military pilots captured in North Vietnam [that] were brought to North Korea."

the result of chance, but of historic Communist policy." Plaintiffs introduced excerpts of that Report through the Affidavit of James Sanders, who, "for more than 25 years... [has] researched POW/MIA issues, [and has] had a number of articles published.... [and] coauthored the book, *The Men We Left Behind: Henry Kissinger, the Politics of Deceit and the Tragic Fate of POWs After the Vietnam War* [and]... testified, as an expert witness, before the Senate Select Committee on POW/MIA Affairs." *Sanders Aff.*, ECF 258-2 ¶ 1. Mr.

Sanders explains his quotes:

The Report succinctly relates the history of communist regimes holding back POWs in World War I, World War II, the Korean War, and the Second Indochina War, known as the Vietnam War. The Report also accurately summarizes other aspects of the matter. I agree with the conclusions from the Report, quoted below, in paragraphs four through 16.

Id. ¶ 3.

The government responded that the affidavit "contains virtually nothing that Mr. Sanders himself observed; instead, it describes and extensively quotes a 1991 Report by the Senate Committee on Foreign Relations, news media reports, and statements from Henry Kissinger, all of which purport to describe the geopolitics of the 1970s as applied to POWs." *CIA Opp.*, ECF 271 at 9. Mr. Sanders' affidavit cites, and quotes, only the Senate Report. In just eight-pages, he addresses nine topics: (1) Communist policy to hold back POWs, (2) Paris peace talks contemplated reparations, (3) Congress refused to pay, (4) Bureaucratic motives, (5) Laos, (6) Live sightings, (7) News media, (8) Cover-up, and (9) Men held in Laos.

Defendant argues that Mr. Sanders' affidavit "violates the rule that '[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is

competent to testify on the matters stated.' Fed. R. Civ. P. 56(c)(4)." *CIA Opp.*, ECF 271 at 10. Defendant would appear to argue that James Sanders is not competent to render opinion under Rule 702 of the Federal Rules of Evidence,³⁵ and so is prohibited from "bas[ing] an opinion on facts or data in the case that the expert has been made aware of or personally observed," under Rule 703 of the Federal Rules of Evidence.³⁶

Plaintiffs' expert Mark Sauter fares no better, in defendant's view. In his introduction to the *An Examination of U. S. Policy Toward POW/MIAs (infra)*, Senator Jesse Helms had thanked the "dedicated persons who shared their experiences and research," including, by name, Mark Sauter. Defendant summarily dismissed Mr. Sauter's affidavit as "hopelessly riddled with speculation." *CIA Opp.*, ECF 271 at 10. In defendant's view, it need not respond to Mr. Sauter's opinions, either, because those too are "assertions (and not facts) under Fed. R. Civ. P. 56(e) because most are not based on personal knowledge;" similarly ignoring Rule 703's provision that an expert may base his opinion on any facts

³⁵ Federal Rule of Evidence 702, *Testimony by Expert Witnesses*:
A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
(b) the testimony is based on sufficient facts or data;
(c) the testimony is the product of reliable principles and methods; and
(d) the expert has reliably applied the principles and methods to the facts of the case.

³⁶ Federal Rule of Evidence 703, *Bases of an Expert*:
An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

that he has "been made aware of," including, of course, the fruits of his investigative journalism.

Historic Communist policy, and the chronology of Executive Branch's reaction to it, post-Operation Homecoming, is a relevant inquiry, in plaintiffs' view. The genesis of the wrong doing alleged:

On January 17, 1973, the Paris Peace Accords were signed by the United States, South Vietnam, Viet Cong and North Vietnam. They were touted as "An Agreement Ending the War and Restoring Peace in Vietnam." The agreement did not, however, end the war and restore the peace for the hundreds of POWs and MIAs who were not returned from the war, for their families, who have waited for decades for answers, nor for the tens of thousands of South Vietnamese who were murdered or imprisoned in "re-education camps" in the North. "All of our American POWs are on the way home" said Richard Nixon shortly after the signing.

Smith Aff. ECF 258-4 ¶ 2.

"The Senate Select Committee on POW/MIA Affairs was a special committee convened by the United States Senate during the George H. W. Bush administration (1989 to 1993) to investigate the Vietnam War POW/MIA issue, that is, the fate of United States service personnel listed as missing in action during the Vietnam War. [Senator Bob Smith] wrote, and introduced, the Senate Resolution establishing that Committee, to attempt to get the documents and the truth released to the public." *Id.* ¶ 1. He served as the Committee's Vice Chairman.

Six years after the Committee's dissolution, in November of 1998, Senator Smith had issued a detailed, 60-page, "Critical Assessment" of 1998 National Intelligence Estimate (NIE) on "Vietnamese Intentions, Capabilities, and Performance Concerning the POW/MIA Issue," demanding that the that the NIE be retracted. The NIE had disparaged the reliability of the so-called "1205 Document," which exposed that, just months before War's end, the

Vietnamese reported that the number of communists-held American POWs in Southeast Asia was 1,205. It released 527, three months later. Defendant produced only one record in 2016: Senator Smith's 60-page "Critical Assessment," along with its 140 pages of attachments. See <http://www.aim.org/pdf/Hall-CIA/CIA-Production-2016-209-pages.pdf>.

Defendant posits that Senator Smith's "view apparently was not shared by the 'bureaucrats' or Senators McCain and Kerry." *CIA Opp.*, ECF 271 at 10-11. But, because there is nothing in the record of other Select Committee members' views on the 1205, or any other issue, the CIA's point is conjecture.

Plaintiffs submitted with their dispositive motion the affidavits of Roger Hall (ECF 260), Carol Hrdlicka (ECF 261-1), Captain Eugene B. McDaniel (ECF 258-1), James Sanders (ECF 268-2), Mark Sauter (ECF 258-3), and Bob Smith (ECF 258-4). *Plaintiffs' Material Facts* (ECF 258-5) cites these affidavits, as well as the previously proffer of those of Bill Hendon (ECF 116-46), Larry J. O'Daniel (ECF 116-45), Lynn O'Shea (ECF 182-6), Barry Allen Toll (ECF 83-1), and John LeBoutillier (ECF 83-15). But, according to the CIA, plaintiffs' proffer is devoid of material facts.

III. Defendant's Search is Inadequate

In a FOIA case, the Court may award summary judgment solely on the basis of information provided by the department or agency in affidavits or declarations when the affidavits or declarations "are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981); see also *Vaughn*, 484 F.2d at 826-28. Here, the Agency's declarations are controverted by both contrary evidence in the record, and by evidence of agency bad faith in the underlying activities that generated the records at issue, if not in its conduct during

this litigation. "The adequacy of an agency's search is measured by a standard of reasonableness, and is dependent upon the circumstances of the case." *Truitt v. Department of State*, 897 F.2d 540 897 F.2d 540 (D.C.Cir. 1990).

A. Breadth of Undisclosed Records Impugns Adequacy

"In words directly applicable here," according to the CIA, "the D.C. Circuit has instructed that '[a]gency affidavits are accorded a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents.'... Such speculative claims are all that the declarants offer... 'FOIA is not a wishing well; it only requires a reasonable search for records an agency actually has.'" *CIA Opp.*, ECF 271 at 11, citations omitted.

But that authority is misplaced. Here, the extent of undisclosed records impugns defendant's claims of an adequate search. Notwithstanding the fundamental question being not "whether there might exist any other documents responsive to the request, but rather whether the search for those documents was adequate," *Steinberg v. Dep't of Justice*, 23 F.3d 548, 551 6 (D.C. Cir. 1994) (internal citation omitted), the absence of identifications and productions of responsive records is so wide-ranging as to be highly probative of the inadequacy of the government's search.

The breadth of the intelligence gathered on POWs after the end of the war, from 1975 through 1992, is considerable. *See, e.g., Sanders Aff.* ¶ 13, "[Live sighting] reports are firsthand narratives by witnesses who believe that they have seen American military personnel alive in various locations in Southeast Asia. *** For Vietnam, the U.S. Government has at least 1,400 such reports, including reports that have been received up until... May,

1991. In addition, the U.S. Government has received thousands and thousands of second-hand reports—accounts often full of vivid detail."

The array of intelligence records on POWs in Laos and Vietnam includes intelligence associated with rescue operations, offers to repatriate POWs for rewards, relocations to Russia, China, and North Korea, and an array of imagery.

1. No Imagery of Escape and Evasion Codes

An adequate search would have yielded the nineteen photographs of four-digit numbers that matched the four-digit authenticators of known MIAs, as well as the CIA's analysis of those images. *See, e.g., Hendon Aff.*, ECF 95-45 ¶ 24:

Only one of the several known postwar satellite images/photographs showing valid USAF/USN Escape and Evasion codes. Secret authenticators and/or the names of missing Pilots and/or crewmen laid out or constructed on the ground in northern Vietnam and/or Laos has ever been declassified and released to the public. Not one of the satellite images/photographs discussed above has ever been made public. The only postwar satellite image showing a valid USAF/USN Escape and Evasion code that has been released appears on the cover of *An Enormous Crime*. That image, like the imagery of the nineteen four-digit numbers that matched the four-digit authenticators of known MIAs, each laid out or constructed on the ground in remote areas along Lao National Route 4 southeast of the Plain of Jars, and the name of a missing USAF pilot and an accompanying four-digit number laid out or constructed beside a road east of the Sam Neua Valley, was imaged over northern Laos in early 1988. (Declassified satellite image from Inventory of the Records of the Senate Select Committee on POW/MIA Affairs, National Archives). I believe that the CIA is in possession of this imagery.

See also Billy Hendon's descriptions of CIA records of late 1970s imagery of USAF/US and aircrew escape and invasion codes at Tran Phu Prison, Haiphong, North Vietnam (¶¶ 8-9), CIA records of 1981 imagery of US pilot escape and invasion codes at prison near Nhom Marrott, North Vietnam (¶¶ 10-11), CIA records of a 1992 coded message from Lieutenant Colonel Serex, Dong Vai (Dong Mang) Prison), North Vietnam (¶¶

12-15), other U.S. POWs believed held at Dawn they Dong Mang Prison, North Vietnam (¶¶16-24).

The escape and evasion imagery is hardly a "purely speculative claim about the existence" of records. Defendant possesses much undisclosed intelligence associated with the imagery of secret military signals and codes and messages sent from POWs.

2. Absence of Live Sighting Reports and Other Intelligence from CIA Field Stations

""[A]ll live sighting reports that came into the [US] embassy [in Laos] went directly to the CIA Station Chief.' *LeBoutillier Aff.* Docket 83-15 ¶ 12." *Plaintiffs' Statement of Material Facts*, ECF 258-5 ¶ 168. "Witnesses before the Select Committee testified repeatedly to the involvement of CIA field stations in Vietnam, Laos, Cambodia, and Thailand, in the gathering of information about POW/MIAs..." *Id.* citing *Hall Aff.* ¶ 122. "CIA station chiefs testified before the Senate Committee that the CIA had primary responsibility for interviewing all human sources of such intelligence, including refugees during this period. *See* Exhibit 26, October 1991 Select Committee Deposition COS, Vientiane (1970-1973) Bates 111-19." *Id.* ¶ 180, citing *Hall Aff.* ¶ 151.

As AIM observed in its dispositive motion, "[t]hese accounts of live sighting occasioned an initial interview, and an interview report, accompanied, presumably, by hand-written notes. Of the several thousand raw initial interview reports, the CIA has produced exactly zero. It has produced a few hundred summaries—a far cry from the thousands available to the Senate Select Committee looking into the matter." ECF 258 at 13-14.

"Asked who was the dominant collector of information in Laos, the CIA or the Department of Defense (DOD), Secord replied, 'CIA, clearly, because of the resources they

had on the ground.' Asked who had the best information, the Defense Intelligence Agency or the CIA, Secord replied:

The CIA was in charge of the war [in Laos], not the military. The military helped out a little bit on the side, particularly through the provisions of air assets, but the military had very few people on the ground except for forward air controllers, which were very good, and some air attaches, whereas the Central Intelligence Agency had several hundred people on the ground in Laos.

Plaintiffs' Statement of Facts, ECF 258-5 ¶ 173, quoting Select Committee Deposition William Sullivan, Ambassador to Laos.

"Witnesses before the Select Committee testified repeatedly to the involvement of CIA field stations in Vietnam, Laos, Cambodia, and Thailand, in the gathering of information about POW/MIAs..." *Id.*, citing *Hall Aff.* ¶ 122.

"The [Select] Committee has the benefit of Intelligence collection during 19 years and over 1,000 sighting reports of live prisoners." *Id.* ¶ 64, quoting *Hrdlicka Aff.* Other accounts of the numbers of these reports are 1,600 first hand reports, 2,000 second-hand reports, and, according to the Senate Select Committee's 1993 Report (at 178), "[t]he total number of first-hand and hearsay live sighting reports and other related reports is more than 15,000 since 1975."

3. No Records of Information Shared Inter-Agency

Productions of interagency communications are scant, while the CIA shared its intelligence with DOD's DIA, Special Operations Command, National Geospatial Intelligence Agency, and the Joint Chiefs of Staff, as well as in its daily briefings to the President.

The CIA's "referrals" and "coordinations," with, *inter alia*, the Military Assistance Command Vietnam, Studies and Observations Group, or "MACVSOG," should have been

voluminous. But there were none. *See, e.g., Plaintiff's Statement of Material Facts*, ECF 258-5 ¶ 58:

The CIA trained mercenaries for use by the Military Assistance Command Vietnam, Studies and Observations Group, "MACVSOG" or "SOG." Covert SOG teams were routinely inserted into Laos in attempts to locate, and on occasion, to rescue, POWs, from the Laotian "second-tier POW camp system," which held "310 to 350" U.S. POWs after Operation Homecoming. SOG "had extensively detailed, photographed, and ground reconnoissanced throughout the war era." *Toll Aff.* Docket 83-1 at pp. 2-5.

Nor did the CIA produce records of its participation in the Prisoner of War Interagency Intelligence Ad Hoc Committee (IPWIC), "of which CIA is the only non-DOD member." *Id.* ¶ 106.

See also id. ¶ 49, citing a 1980 document referring to a meeting between DIA, the CIA, and NSA, relating that a Vietnamese source had informed the CIA of a North Vietnamese POW camp, with coordinates and photography.

4. No Records into the 1990s

Intelligence into the 1990s is conspicuously absent. The government's apparent position—that all intelligence had ceased—coincided with the extremely damaging publicity it had suffered when just one satellite photograph of an escape and evasion communication made its way into the public domain.

"In 1992, US News & World Report published an article on 1988 satellite imagery, USA walking 'K,' taken in the Sam Neua area, where David was held. The government should have notified me. But I had to read about it in the magazine. I requested the information concerning that report." *Hrdlicka Aff.*, ECF 261-1 ¶ 17.

Billy Hendon's *An Enormous Crime*, recounts *Dateline NBC's* segment following up on that satellite imagery, aired on October 6, 1992, at 452-53. "A portion of the discussion

involving correspondent Jon Scott, Senator McCain, and former SSC intelligence investigator Hendon went as follows:

SCOTT: (Voiceover) DATELINE has obtained this computer-enhanced photograph, taken by an American spy satellite in January, 1988, in a rice paddy in Northern Laos, the letters U-S-A are clearly distinguishable. But what is chilling to some Pentagon analysts is the symbol below.

(Document showing rudimentary U-S-A spelling)

MR. BILLY HENDON: Underneath it is unquestionably what is known as a walking K, and the foot on the K. Again, the foot is the key.

SCOTT: Ex-Congressman Hill Hendon is a controversial POW hunter. A former advisor to the Pentagon and Senate investigators, he had access to some of the government's most sensitive POW files.

MR. HENDON: And I have talked to the people in charge of the compartmented program, that—that deals with the escape and evasion symbol that was in the satellite photography. And they say "Hey, no question. That's an American flier."

SCOTT: This is list of distress signals American flyers were told to display on the ground if shot down—simple alphabet letters, but with modifications only pilots knew. The symbols are so secret that the Pentagon still blacks out the alterations.

(Footage of secret distress signals)

MR. HENDON: That can only be a US pilot telling you, "Get me out of here." That's all it can mean.

SCOTT: And he's saying that in January of 1988?

MR. HENDON: Absolutely.

SCOTT: (Voiceover) In the past, Hendon has been accused of exaggerating his evidence. But independently of Hendon, Dateline has obtained evidence that supports his assertions about the walking K. This memo was prepared by the JSSA, a secret intelligence unit in charge of training American pilots how to use distress symbols. Its conclusion: "Although it is possible for someone other than an American being held against his will could have made these signals, JSSA believes these signals must be considered valid until we know otherwise. The "USA" appears to be the more recently made. The "K" appears to have faded by time. If the crew member received no response to his "K" signal, it is reasonable to expect them to make progressively more blatant signals, including a "USA." If it works, he goes home."

(Footage of Hendon and Scott reviewing a map; declassified documents; memo)

SCOTT: You were a pilot.

SENATOR MCCAIN: Yes.

SCOTT: You were given the same kinds of distress codes.

SENATOR MCCAIN: Yes, we were.

SCOTT: When you see this K, the walking K, doesn't that catch in your throat a little bit?

SENATOR MCCAIN: Oh it caught in my throat enormously. I would say [though] that my experience and knowledge of prison camp is that the guards do not generally allow prisoners to go out and stamp out U-S-A in large letters so that it can be photographed [by] satellite or by airplane. That's not their habit.³⁷

That was the "[o]nly one of the several known postwar satellite images/photographs showing valid USAF/USN Escape and Evasion codes, secret authenticators and/or the names of missing Pilots and/or crewmen laid out or constructed on the ground in northern Vietnam and/or Laos [that] has ever been declassified and released to the public." *Hendon Aff.*, ECF 95-45 ¶ 24.

"These possible distress symbols, several of which match pilot distress symbols used during the war, span a period from 1973 to 1988, and as late as June 1992," according to the Senate Select Committee's 1993 Report, at 200.

³⁷ See also *id.*, under heading, *The October 15 Imagery Hearings*, at 454-55:

When the committee convened in public session on the morning of October 15 to discuss the postwar imagery, only 3 Senators, Kerrie, Smith, and Grassley, were in attendance...

KERRY: There is no trained person that has yet determined them to be a symbol, Senator. I will not be a party to falsely raising hopes. There are no symbols that have yet been determined to be a person made symbols that are in front of the committee. That is just a fact. I do not know why we are struggling with this unless it is of great interest to have everybody hyped up over some imaginary symbols

SMITH: Well, let each Senator speak for himself, Mr. Chairman. I do not agree with that conclusion. I think the evidence is very compelling. I think the laws of probability would indicate to you that if there are series of numbers that identify with an individual or individuals who are missing in action in Southeast Asia and those numbers correlate with individuals, the laws of probability would tell you that in a very high probability that those people are in fact, identified with those numbers.

B. CIA Failed to Search all locations likely to Yield Responsive Records

The CIA's declaration should include the locations of a number of categories of records.

Overseas field stations. "The CIA has not stated that it searched any overseas field stations for responsive records. Witnesses before the Select Committee testified repeatedly to the involvement of CIA field stations in Vietnam, Laos, Cambodia, and Thailand, in the gathering of information about POW/MIAs..." *Plaintiffs' Statement of Material Facts*, ECF 258-5 citing *Hall Aff.* ¶ 122.

Live sighting reports. "[A]ll live sighting reports that came into the [US] embassy [in Laos] went directly to the CIA Station Chief." *LeBoutillier Aff.* Docket 83-15 ¶ 12. *See infra* section III(A)2, *Absence of Live Sighting Reports and Other Intelligence from CIA Field Stations*. The Select Committee had access to 1,400 first-hand live sighting reports, and several thousand second-hand reports. Item 4 of plaintiffs' 2005 FOIA Request is for "Records of the Senate Select Committee on POW/MIA Affairs which were withdrawn from the collection at the National Archives and returned to the CIA for processing." ECF 114-1 at 10. Defendant produced less than a dozen documents associated with post-Operation Homecoming live sighting reports.

President's daily briefings. "Exhibit 38(h), at Bates 189, is a June 1992 Memo to Select Committee re 'President's Daily [CIA] Intel Briefings,' seeking copies of those briefings 'given to the President regarding the possibility of POWs being transferred to the East Bloc after Homecoming.' The author has 'a source who claims to have seen them.' The memo said the CIA had responded that they 'are **not available to anyone...**' The CIA has

provided few President's Daily Intel Briefings..." [emphasis supplied] *Plaintiffs' Statement of Material Facts*, ECF 258-5 ¶ 158.

Documents removed from NARA. In 1992, the CIA "removed four records ... The CIA must have a record of its handling of these classified records, but has failed to reveal the fate of these records;" *id.* ¶ 170 regarding removal of 1980 four-page document from Archives; *id.* ¶ 176 citing 2008 Archivist's letter attaching list of depositions "withdrawn in full" from public access. *Id.* ¶ 169.

Director's files and Executive Registry files. Nor did the CIA respond to plaintiffs' statements based on the Affidavit of Barry Alan Toll. *Plaintiffs' Statement of Facts* ¶ 162-64, citing *Toll Aff.* Docket 83-1 at pp. 12, 18:

[T]he nation's most covert, extensive, and productive strategic intelligence operations... directly flowed their product into the Nixon White House, to George's [Carver] Indochina Committee on Intelligence.... At a meeting in the White House in 1993, George [Carver] proffered CIA documents he'd authored, as late as 1975, going to the Director himself, about Americans still held captive in Indochina in the hundreds. I [Toll] provided CIA documents going to the Director himself, in 1967 and 1969, detailing our certain knowledge of the second tier prison system in Laos, and the numbers of American POWs being held there at the time. Their exact coordinates were noted....

All of those intelligence materials... in the Nixon White House... [went] back to Langley for storage, through... Directorate for Operations in the CIA.... 'usually by courier.... [i]f they moved them out of Operations, historically, they would probably be moved to the Director's files... to the Executive Registry Files of CIA..."

C. CIA's Search Terms are Inadequate

The CIA reports that it searched CADRE and the Office of Congressional Affairs and the Office of the Director of the CIA using only the search terms "Missing in Action", "MIA", "Missing", "POW/MIA", "POW-MIA", "Prisoner(s) of War," "POW", "Prisoners", "War", "Vietnam War," and "Vietnam." *Shiner Decl.* ¶ 26. This is inadequate.

Defendant posits that challenges the adequacy of the CIA's search based solely on the shortcoming of its productions. This is not so. *Plaintiffs' Statement of Material Facts* (ECF 258-5) identifies code names of operations appearing in released records, at ¶ 121:

Bright Light (a DOD collection and reporting system on POWs and prison camps... Trail Watch (a CIA project using, among others, Controlled American Sources and "indigenous personnel" to observe POW and military movements on routes in Laos and elsewhere), Project Alpha (an Air Force mission to track the location of POW/MIAs to protect them against inadvertent US bombings... Operation Pocket Change (a 1981 plan to reconnoiter... and rescue those believed held in Laos), Project Corona (an operation to photograph... troop movements in South East Asia, including along the Ho Chi Min Trail), and Duck Soup (the CINPAC, Air America (a CIA proprietary) name for a supply operation also used to rescue POWs, including Colonel Hrdlicka and others from Laos). In each of these operations, there is publicly available evidence of the CIA's involvement. The CIA should have searched under these names."

The government reasoned that, "[s]ince these codewords are themselves intelligence methods that also protect other intelligence sources and methods, information that would disclose cryptonyms or pseudonyms is appropriately classified..." *DiMaio Decl.*, ECF 109-2 ¶ 26.

And other search terms are appropriate, such as the names of facilities known to house American POWs, as AIM pointed out in its dispositive motion.³⁸

The CIA should be ordered to conduct a search using the codenames, as it "searched CADRE for responsive records on all 1,711 names provided by Plaintiffs" (*CIA Statement of Material Fact*, ECF 258-6 ¶ 9), after being ordered to do so by the Court. The CIA reports that it found 11 individuals by name, six of whom are Air America employees. *Id.* Eleven

³⁸ AIM's Motion for Summary Judgment, ECF 258 n. 19 at 15: *E.g.*, Tran Phu prison in Haiphong, North Vietnam (see *Plaintiffs' Statement of Material Facts* ¶¶ 29, 39), or Dong Vai (Dong Mang) prison (*id.*), or the camp in Sam Neua Laos (*id.* ¶¶ 50, 103), or Tan Lap Prison, Vinh Phu Province, North Vietnam (*id.* ¶ 92), or facilities in the towns of Mahaxy, Pha Kateom, Laos (*id.* ¶ 114), or in Son Tay, Vietnam (*id.* ¶ 119).

out of 1,711 names begs the question, why so few. (The Prisoner of War/Missing Personnel Office's list's identifications of branches of service does not include Air America, or the CIA, yet defendant reports that six of the 11 were so employed.)

Additionally, the CIA should describe, with particularity, how "it was later determined that 114 of those folders had been properly destroyed in accordance with the CIA's records control schedule." *Id.* Were these records destroyed after plaintiffs made their FOIA requests in 2004, in violation of General Records Schedule 14 and CIA Records Schedule NC1-263-85-1, Item 5(d), regarding "Records relating to actual or impending litigation?"

D. The Court's 2012 Order Regarding Missing Attachments does not Help Defendant

CIA Response to Plaintiffs' Facts, ECF 272-2, at ¶¶ 8, 10, 12, and 13, recites that "the exhibits referenced in these paragraphs are not the documents CIA was directed by the Court to search for missing attachments, enclosures, photographs and reports." This would appear to reflect the CIA's position that it need not produce all responsive records in the absence of the Court's order to search for those specific, otherwise, "missing," records.

In any event, defendant's argument cannot be considered for the missing records referenced in or associated with exhibits from the CIA's 2015 productions—made well after the Court directed it to search for specific missing records based on Hall's previous affidavit. These records, on POWs held in Laos, include aerial photography,³⁹ six POWs

³⁹ *Id.* ¶ 48, citing 1992 CIA report on aerial photography in Laos.

held in 1983,⁴⁰ at least four instances of 1986 intelligence (American hiding in Laos,⁴¹ two POWs,⁴² six held in a caves,⁴³ another four,⁴⁴ and another seven),⁴⁵ of two POWs 1987,⁴⁶ of 20 in 1988,⁴⁷ and at least four instances of 1989 intelligence—of ten POWs,⁴⁸ of two,⁴⁹ and of 14 POWs.⁵⁰ Plaintiffs finds it curious that the CIA produced, in 2015, these records regarding POWs in Laos, whereas plaintiffs made the FOIA request in 2003.

⁴⁰ *Id.* ¶ 128, quoting CIA record, "On 25 February 1983, [redacted] information [redacted] that there were four U.S. POW's being held at the Nadeng Prison in the LPDR."

⁴¹ *Id.* ¶ 135-36, citing 1986 CIA Reports regarding American hiding in Laos.

⁴² *Id.* ¶ 134, citing CIA Report regarding two 1986 sightings in Laos.

⁴³ *Id.* ¶ 138, quoting 1986 CIA Report regarding six POWs held in a cave in Laos; *id.* ¶ 141 (same).

⁴⁴ *Id.* ¶ 139, quoting 1986 CIA Report regarding sighting of four POWs held in Laos.

⁴⁵ *Id.* ¶ 140, quoting Memorandum regarding seven POWs held in Laos, "In a private conversation with friends and relatives in mid-April 1986 [redacted] state that in mid-March she had seen seven People's Army of Vietnam (PAVN) guards controlling three Caucasians... Local residents later told her the men were American prisoners captured prior to 1972."

⁴⁶ *Id.* ¶ 142, citing 1987 CIA Report of two live Americans in Laos.

⁴⁷ *Id.* ¶ 147, quoting 1988 Memorandum re three first-hand live sightings, reporting 17, 20, and 27 POWs in Laos.

⁴⁸ *Id.* ¶ 131, quoting Exhibit, "[Redacted] worked at the prison where ten Americans were reportedly being held *** [in] Dang prison since about March 1984."

⁴⁹ *Id.* ¶ 150, quoting 1989 Memorandum regarding two POWs held in Laos, "According to [redacted] two American prisoners of war (POW's) are now being held captive in a Leu village in Xian Khoang province near the Vietnamese border.... guarded by a local village militia group...."

⁵⁰ *Id.* ¶ 152, quoting 1989 Memorandum re 14 POWs held in Laos, "[redacted] told the source that there are 14 American POW's being held at Tham Luang, Nachik-Canton in the Viengxai District (VH2949) of Houaphan Province." *See also Id.* ¶ 151, citing 1989 Memorandum re POWs held in Laos.

IV. Operational Records

The CIA Information Act of 1984, 50 USC 3141, authorizes the Director of the CIA to exempt operational files of the CIA from the publication, disclosure, search, and review provisions of the Freedom of Information Act.⁵¹ The CIA's definition:

Operational files are defined, in turn, to include certain files of the Directorate of Operations, the Directorate of Science & Technology, and the Office of Personnel Security that contain sensitive information about CIA sources and methods

Shiner Decl. ECF 271-1 ¶ 18.

Many records at issue fit the law's definition of operational records. The CIA informs that they are in a "file series," meaning a group. The "scope" of this group is "defined in internal regulations and policies," and there is another, agency-wide, regulation that "details procedures" for designating or eliminating the designation of operational files. Changes in "file series" designations are governed by "written recommendations explain[ing] how the files meet the standards for designation," and are implemented if approved by the Director. The Agency apprises Congress of changes in the "categories of files." *CIA Opp.*, ECF 271 at 4.

⁵¹ 50 USC 3141 defines operational files:

1. Files of the National Clandestine Service that 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 of Science and Technology that document the means by which foreign intelligence or counterintelligence is collected through scientific and technical systems; and
3. Files of the Office of Security that document investigations conducted to determine the suitability of potential foreign intelligence or counterintelligence sources; except that files that are the sole repository of disseminated intelligence are not operational files.

Thus, the Agency has designated a nondescript "file series," whose scope was defined in unidentified policies, which also provide that the Agency can change designations at will. So, defendant discloses only that the records are grouped.

[Ms. Shiner] cannot provide additional detail about the designated file series in an unclassified Setting, I can assure the Court that they are carefully and tightly defined to ensure that they serve the specific operational purposes

CIA Opp., ECF 271 at 4, citing *Shiner Decl.*, ECF 271-1 ¶ 17.

The fact that the CIA has regulations, policies, and procedures, is unilluminating. Ms. Shiner's declaration provides no description whatsoever of the file series. It may be large, encompassing all Southeast Asia operations for a number of years, or more specific, covering Vietnam War POWs. There may even be a series containing intelligence on POWs in Laos 1992 to present, or specific series of records relating to specific POW events, camps, raids, etc.

A. Defendant Must Produce Records corresponding to "Officially Disclosed" Information

"[W]hen information has been 'officially acknowledged,' its disclosure may be compelled even over an agency's otherwise valid exemption claim." *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990). In *Wolf v. CIA*, 473 F.3d 370 (2007), this Circuit addressed the official acknowledgment doctrine in the *Glomar* context, holding that the CIA had waived its right to issue a *Glomar* response because a former CIA director had publicly acknowledged the existence of certain CIA records in congressional testimony. The court remanded the case to the district court to "determine whether the contents—as distinguished from the existence—of the officially acknowledged records" were exempt from disclosure. *Id.* at 380. Here, the CIA has "officially acknowledged," to Congress and the public, a great deal of otherwise exempt information.

The Senate Select Committee on POW/MIA Affairs, in existence from August 2, 1991 to January 2, 1993, was convened by the Senate during the George H. W. Bush administration (1989 to 1993), to investigate the Vietnam War POW/MIA issue. In all, the committee would conduct over 1,000 interviews, take over 200 sworn depositions, hold over 200 hours of public hearings, and review tens of thousands of pages of Executive Branch records. It released its Report on January 13, 1993.

That Report relies on voluminous records provided to the Committee that remain withheld, regarding such items as rescue operations, offers to repatriate POWs for rewards, POWs transferred to Russia, and to records on POWs sited in Vietnam and Laos, including at Nhom Marrott. The Report's Table of Contents is attached hereto as Exhibit 2.

B. Defendant Must Disclose Records Corresponding to Information Appearing in Non-exempted Files

Aftergood v. Nat'l Reconnaissance Office, 441 F.Supp.2d 37, 46 n.12 (D.D.C. 2006), applied 50 U.S. Code § 3141(d), *Operational files of the Central Intelligence Agency*. (Citing 50 U.S.C. § 432a, editorially reclassified as 50 U.S. Code § 3141). Paragraph (d), *Information Derived or Disseminated from Exempted Operational files*, states:

- (1) Files that are not exempted under subsection (a) of this section which contain information derived or disseminated from exempted operational files shall be subject to search and review.
- (2) The inclusion of information from exempted operational files in files that are not exempted under subsection (a) of this section shall not affect the exemption under subsection (a) of this section of the originating operational files from search, review, publication, or disclosure.
- (3) Records from exempted operational files which have been disseminated to and referenced in files that are not exempted under subsection (a) of this section and which have been returned to exempted operational files for sole retention shall be subject to search and review.

In *Aftergood*, the National Reconnaissance Office (NRO, one of the "big five" U.S. intelligence agencies) declined to disclose information sought by a FOIA request seeking unclassified portions of the NRO's annual budget request to Congress, the "Congressional Budget Justification Book." Defendant asserted the record was an operational file. In its *de novo* review, the Court interpreted § 432a(a)(4)(D) (now § 3141(d)(3)) to require search of operational files containing information that had been disclosed in a nonexempt file.

50 U.S.C. § 3141(d)(3)'s exception for "[r]ecords from exempted operational files which have been disseminated to and referenced in files that are not exempted," mandates that all records of intelligence upon which otherwise disclosed records are based, must be searched.

Here, there are numerous operational records at issue that formed the basis for otherwise disclosed records. A majority of the 220 exhibits submitted by plaintiffs are based on raw intelligence contained in records that remain undisclosed, and the Report of the Senate Select Committee on POW/MIA Affairs is rife with references to withheld records. All such records are subject to search and review under the FOIA.

C. Noncompliance with Executive Order 13526

CIA asserts that "the Agency properly considered the appropriate procedural and substantive requirements of Executive Order 13526, which governs classification. *See Supp. Shiner Decl.* ¶ 3. Specific clarifications follow." *CIA Opp.* ECF 271 at 5. But no clarifications followed. And the CIA did not properly consider the appropriate procedural and substantive requirements of Executive Order 13526. It violated Section 1.7:

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.

"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 258-4 ¶ 8.

The Senate Select Committee's 1993 Report relates that, "[w]hen the Committee started its work, there was little evidence that... any government agency or department was systematically reviewing classified POW/MIA related information... This apparent government-wide failure to even consider declassifying POW/MIA information was inconsistent with the requirements of Executive Order 13526, in effect since 1982."

This failure to declassify was the catalyst for E.O. 12812.

D. Noncompliance with Executive Order 12812

In February of 1992, Senate Resolution 125 memorialized Congress's intent to enact legislation directing federal departments and agencies to declassify POW/MIA information relating to, *inter alia*, the Vietnam War. Later, in July of 1992, after it had issued its Report, the Senate Select Committee on POW/MIA Affairs sent a letter to President Bush, relating 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." That declassification request was memorialized in Senate Resolution 324, which passed by unanimous a vote, and was the catalyst for Executive Order 12812—"Declassification and Release of Materials Pertaining to Prisoners of War and Missing in Action."

E.O. 12812, issued on July 22, 1992, recites that the Senate had by Resolution asked for an "Executive order requiring all executive branch departments and agencies to

declassify and publicly release without compromising United States national security all documents, files, and other materials pertaining to POWs and MIAs," with the exception of where (1) "release of classified material could jeopardize continuing United States Government efforts to achieve the fullest possible accounting of Vietnam-era POWs and MIAs," or (2) release could constitute a clearly unwarranted invasion of personal privacy of returnees, family members of POWs and MIAs or (3) release "would impair the deliberative processes of the executive branch."

In the year 2000, the Office of the Assistant Secretary of Defense, Prisoner of War/Missing Personnel Office, FOIA Division, issued its "Vietnam War PNOK 'YES' Casualty List," by which 1,711 primary-next-of-kin authorized release of records concerning those POW/MIA's. The List, a part of plaintiffs' FOIA request, ECF 114-1 at 58-87, was issued eight years after President Bush issued E.O. 12812, which authorized nondisclosures on grounds of invasion of the personal privacy of family members. And the government's deliberative processes privilege is no longer available, at least insofar as records 25-years or older are concerned. Thus, the import of the CIA's having searched the records that had been released in 1993 under E.O. 12812 is negligible.

The government withheld material based on its view that disclosure "could have "jeopardiz[ed] continuing United States Government efforts to achieve the fullest possible accounting." But those "efforts" are no longer "continuing," if they ever were. *See, e.g.*, February 1991 resignation letter of Colonel Millard Peck, Chief of the Special Office for Prisoners of War and Missing in Action, Exhibit 42 to *Hrdlicka Aff.*, 261-6 at Bates 119-20, "Rarely has there been any effective, active follow through on any of the sightings, nor is there a responsive 'action arm' to routinely and aggressively pursue leads."

The CIA's Declaration's discussion of the matter recites that, "as plaintiffs further indicate, former CIA Director James Woolsey noted that review conducted pursuant to Executive Order 12812 had 'included a thorough, exhaustive search of operational files, finished intelligence reports, memoranda, background studies and open source files.'" *Shiner Decl.* ECF 271-1 ¶ 21. But Director Woolsey's letter, Exhibit 1 to the *Hall Aff.*, ECF 260-1, was cited for the Director's report that 574 documents had been withheld, and that "[t]he CIA has not indicated that it has provided the referenced 574 documents." *Hall Aff.* ECF 260 ¶ 118. Here, there is no indication that the CIA has reviewed, much less released, any of the 574 documents withheld in their entirety in 1993.

Moreover, the circumstances have now changed. The CIA should disregard considerations of privacy of the POW's families, and the deliberative process privilege is no longer available for the pre-1993 records.

The government's declaration recites that the E.O. "is not intended to create any right or benefit, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person." *Id.* This may be so, but the government's performance in implementing E.O. 12812 is a relevant inquiry here.

E. Noncompliance with Presidential Decision Directive NSC 8

Presidential Directives, better known as Presidential Decision Directives, or PPDs, are a form of an executive order issued by the President of the United States with the advice and analysis of the National Security Council. The directives articulate the executive's national security policy and carry the "full force and effect of law." On June 10, 1993 President Clinton directed the CIA, among other departments and agencies:

In accordance with my Memorial Day Announcement of May 31, 1993, all executive agencies and departments are directed to complete 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.

It would appear that President Clinton was not satisfied with CIA Director Woolsey's work-product. Did the CIA complete by Veterans Day, November 11, 1993, their review, declassification and release, and if so, with what result? Defendant's pleadings say nothing on the subject of Presidential Decision Directive/NSC 8.

F. Decennial Review

The CIA Information Act of 1984, 50 USC Title 3141, requires that the decennial review "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."

The CIA asserts that the Agency "conducted the required decennial review of its operational files," and that plaintiffs offer no proof that it did not. *CIA Opp.*, ECF 272 at 3, citing *Shiner Decl.*:

Plaintiffs question whether the decennial review of operational files, required by the National Security Act, has been conducted. The Agency undertook a decennial review of the exempt operational files designations in 2015 and has completed the review in accordance with the process described below.

ECF 271-1 ¶ 10.

But this paragraph is the only mention of the decennial review. There is no description of any "process," including the number of files reviewed, whether it was conducted page-by-page, or document-by document, or any description of the records produced, or of the records withheld.

The CIA's assertion that plaintiffs have "adduced no evidence" impugning "the timing, scope, or thoroughness of the decennial review" (*CIA Opp.* ECF 271 at 4) would seek to incorrectly place that burden on plaintiffs.

V. The Court Should Review Records *In Camera*

Our Court of Appeals in *Allen v. Central Intelligence Agency*, 636 F.2d 1287, 1298-99 (D.C. Cir. 1980) provided guidelines for *in camera* inspection of records. It listed six factors:

- (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.

Whether or not Court employs the services a special master, plaintiffs believe that *in camera* review is warranted. In the absence of the Court's appointment of a special master, plaintiffs seek leave to select documents for *in camera* review, as a means of checking the accuracy of the CIA's *Vaughn* declarations and the validity of its claims regarding the absence of segregable, nonexempt portions.

There are many documents at issue in this lawsuit, and judicial economy, the first factor, would seem to favor the Court's review *in camera*. The second factor, conclusory nature of the CIA's affidavits, is very clear. For example, its Exemption 1 claims perfunctorily assert that disclosure would harm the national security.

The third factor, bad faith, is present in the underlying activities that generated the records at issue, as amply demonstrated. Its conduct in this litigation also demonstrates a dearth of good faith. Defendant denied that AIM is a member of the news media, sought a \$50,000 deposit and liability for another half million dollars before agreeing to begin its

search, even while attempting to limit the administrative record's inclusion of materials submitted in support of news media status. It refused to search for records concerning the 1,711 POW/MIA's whose primary next-of-kin had authorized release, claiming such a search was "unduly burdensome."

The fourth factor also favors *in camera* inspection. There are disputes over the extent to which multiple different exemption claims cover the same, or different, information, disputes over whether Exemption 2 information is "trivial" administrative data, and whether Exemption 5 material is properly exempt under a privilege or the privilege either does not apply or has been waived or otherwise vitiated. *In camera* inspection would alleviate otherwise unnecessary speculation and inference as to the contents of the records, and firmly resolve the competing assertions made by the parties.

While the fifth factor does not apply, the sixth, public interest, is very strong, given the congressional and news media interest in the records, the massive withholding of information that is decades old, and given that the information at issue seeks to demonstrate the impropriety of the Agency's actions.

In view of these considerations, the Court should employ *in camera* inspection.

VI. The Court Should Appoint a Special Master to Select Records for the Court's *In Camera* Review

In *In Re United States Department of Defense, Petitioner*, 848 F.2d 232 (D.C. Cir. 1988), the Court of Appeals denied the DOD's mandamus petition that had sought to direct District Judge Louis Oberdorfer to revoke the appointment of a special master, in a FOIA case seeking disclosure of documents relating to the 1980 attempts to rescue United States hostages in Iran. The DOD had withheld in whole or in part, on national security grounds,

under Exemption 1 (5 U.S.C. § 552(b) (1)), approximately 2,000 documents, totaling around 14,000 pages.

The DOD had submitted to the district court a classified document index along with an unclassified one, and proposed to prepare a random sample of the withheld documents, for the district court's *in camera* review. Judge Oberdorfer rejected DOD's proposal, instead holding that a representative sample, prepared by a master, would be more appropriate, because, based on "several years" experience with the case, "the integrity of sampling" by the government would be uncertain.

The DOD had argued that there was no "exceptional condition" under Federal Rule of Civil Procedure 53(b), *Order Appointing Master*, which states in pertinent part that "a court may appoint a master only to... hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by... some exceptional condition..." The appellate Court disagreed:

Our circuit has recognized the propriety under Rule 53(b) of designating masters in certain exceptional FOIA cases. In *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977, 94 S. Ct. 1564, 39 L. Ed. 2d 873 (1974), we surveyed the options available to a judge overseeing a FOIA lawsuit. In cases where a judge, after considering the option of himself reviewing indexed documents, concludes that dealing with "the raw material of an FOIA lawsuit may still be extremely burdensome," we wrote,

it is within the discretion of the trial court to designate a special master to examine documents and evaluate an agency's contention of exemption... to assist the adversary process by assuming much of the burden of examining and evaluating voluminous documents that currently falls on the trial judge."

Id. at 233.

Judge Oberdorfer had "resorted to appointment of a master to ensure a prompt, thorough, and independent look at all the documents. ..." The appellate court cited *Lame v.*

United States Department of Justice, 654 F.2d 917 (3d Cir. 1981), which had "described as an 'obvious danger' that 'the government may choose to submit information on 'representative' documents for which its claims of exemption fare the most persuasive.'" *Id.*

In conclusion, the court held, "where the judge has reasonably concluded that alternative methods of document review are infected with serious problems, appointment of a master to structure the judge's review of these documents is appropriate so long as the judge retains decisional authority over the issue in question." *Id.*

Here, the Court should order the CIA to estimate the number of pages in the relevant series of operational files, and, thereafter, to submit that collection to a master, for assembly of a representative sample to be submitted to the Court, for *in camera* review. Should the Court be so inclined, plaintiffs would endeavor to raise funds to help defray the costs of the master's services.

That master should also review the 45 documents that the CIA has withheld in full, totaling 380 pages. *See* Exhibit A to AIM's Cross-Motion for Summary Judgement, ECF 258 at 27-44.

The Court's reference would promote the prompt resolution of this case, and assist in the formulation of timely and effective relief. The burden of examining and evaluating voluminous documents would otherwise fall on the trial Court.

CONCLUSION

Vietnam insisted that reparations be included in any peace settlement. The U.S. eventually agreed, but, in lieu of including that aspect of the bargain in the Paris Peace Accords, reduced that portion of the bargain in writing in a side letter. The Communists agreed to release all POWs, but declined to reveal the number of men held, until after the

Accords had been signed. Given the historic Communist policy of holding back POWs upon the cessation of hostilities, the result was, or should have been, expected. The Vietnamese released roughly half of the 1,205 American POWs, and kept the other half as ransom for the promised billions. The money was not paid, and around 600 POWs remained imprisoned. Contrary to the CIA's view, plaintiffs aver that this history surrounding the abandonment of these Americans is relevant here.

So too with the history of the government's conduct since Operation Homecoming. The veracity and thoroughness of the CIA's declarations should be evaluated in this greater context. Defendant's perfunctory proclamation that it adhered to various legislative and Executive directives mandating disclosure is plainly false. Had it done so, and properly considered the historical value and public interest in declassifying records during its Decennial Reviews, the CIA would have long since released the 4,000 pages released in this lawsuit. Defendant should explain.

The CIA's declarations should also include, *inter alia*, the locations of records of the overseas field stations, of live sighting reports, the President's daily briefings, and documents removed from the National Archives. It should state whether it searched these locations, and whether that search included the Director's files and Executive Registry files.

In 1992, during the testimony of government officials before the Senate Select Committee on POW/MIA Affairs, Vice Chairman Bob Smith quoted a government official as having testified "there is no evidence to suggest that any U.S. personnel were not released from captivity." Senator Smith continued:

Now that's just, I mean, I just don't understand people in responsible positions coming up here to the Hill and saying that, that kind of thing, and I, I don't want to dispute it because I've been through that for eight years with you people, I don't have the desire to dispute it, as I said in my opening

statement the facts speak for themselves, the evidence speak for themselves, for itself, and it's time for you people to come up here to accept that evidence and begin to move to the next step, which is to find out what happened to these people and where they are. That's what we gotta start doing. So why don't you just admit that you've got the evidence.

That was 25 years ago.

According to government disclosures, the most recent intelligence collected was in 1992, of imagery of escape and evasion codes. *See Hendon Aff.*, ECF 95-45 ¶ 12. Given the CIA's 40-year history of recalcitrance in disclosing the records sought, and its clear motive of not wanting the public to know that it was collecting intelligence on these American POWs into the 1990s, and likely beyond, the CIA should be ordered to search its operational records, and to disclose what it knows about "what happened to these people and where they are."

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Respectfully submitted,

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