

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF ACCURACY IN MEDIA'S MOTION TO RECONSIDER
THE COURT'S NOVEMBER 30, 2020 ORDER AND JUDGMENT

COMES NOW plaintiff Accuracy in Media, Inc., by counsel, and respectfully asks the Court to reconsider its November 30, 2020 Order and Judgment.

Background

On January 23, 1973, government policy on the issue was established, on national television, with President Nixon's announcement that the Paris Peace Accords had brought a close to the Vietnam War, and that "all our boys are on the way home."¹ But it was not true. Communists withheld 678 POWs² as collateral for payment of the approximately \$3.5 billion in war reparations that President Nixon had promised.³ The money never came, and the POWs never came home.

"The total number of first-hand and hearsay live sighting reports and other related reports is more than 15,000 since 1975."⁴ Pilots and navigators were particularly targeted never to be repatriated, some of whom were transferred to Russia.⁵ The CIA has records of at least a dozen reconnaissance or rescue operations.⁶ It has imagery,⁷ including distress signals known only to the POWs.⁸ Its intelligence includes information on the communist's two-tier prison system.⁹ The CIA tracked POWs.¹⁰ It used mercenaries to gather

intelligence.¹¹ It collaborated with other agencies.¹² And it has records of communist offers to sell POWs back to America.¹³

Plaintiffs are particularly interested in the extensive records that the CIA collected¹⁴ on POWs incarcerated in Laos,¹⁵ the existence of whom was admitted by both governments.¹⁶

In 1992, satellite imagery was leaked that undermined the government's long-standing position, or policy, very publicly. There has been no disclosure of any intelligence gathered since 1992. In his book, *An Enormous Crime, The Definitive Account of American POWs Abandoned in Southeast Asia*, former U.S. Rep. Billy Hendon (R-NC) recounts the October 6, 1992, *NBC Dateline* segment, at 452-53:

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. 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...

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.

See generally Hendon Aff., ECF 95-45.

The story in *US News & World Report* included an image of a "walking K" distress symbol, taken in the Sam Neua area of Laos, where David Hrdlicka was being held. "The government should have notified me," writes his wife, Carol, "But I had to read about it in the magazine." *Hrdlicka Aff.*, ECF 261-1 ¶ 17. According to the Senate Select Committee's

1993 Report, at p. 200, "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."

Argument

In the 48 years since Operation Homecoming, numerous individuals, including former POWs, organizations, Congressional Committees, and journalists, have advocated for the government to reveal what it knows of the fate of these Americans. Congressional members who have personally seen the records are among those who opine that there is no legitimate reason for continued nondisclosure.¹⁷

The CIA reports that it "conducted a supplemental search of its operational files and located no responsive records with respect to '1400 live sighting reports that were reportedly displayed at Congressional briefings attended by CIA employees, as well as records of imagery and reconnaissance and rescue operations.' Order dated March 31, 2020." *CIA Status Report*, ECF 352.

The Record in this Case. A great deal of intelligence on the matter has been disclosed. The existence of much that has not been disclosed is amply proven by the record in this case. The CIA provided 1,400 first-hand live-sighting reports to the Select Committee (note 4 *infra*), but it claims it cannot locate them. Its possession of imagery is well-documented (note 8 *infra*), but it cannot find a single image. It claimed to have located no records of any of the dozen or more reconnaissance or rescue operations, or of the two-tier prison system, or its use of mercenaries, or its collaboration with other agencies, or offers to sell POWs back to America. Notes 6-13 *infra*.

Vaughn index. Defendant provided no declaration regarding its search of operational records. Did it use the codenames of these operations in its search? Did it search its records of its collaborations with the Defense Intelligence Agency, or Military Assistance Command Vietnam-Special Operations Group (MACVSOG), or the National Security Council, or the State Department (note 12 *infra*)? And the CIA has yet to provide any description of the organization of its POW/MIA records.¹⁸

Additionally, defendant provided no *Vaughn* index regarding its 2019 production, totaling 2,012 pages, hundreds of which are redacted, and dozens of which are withheld in full.

The CIA ran the war in Laos.¹⁹ "[I]n both Bangkok and Vientiane all live sighting reports that came into the embassy went directly to the CIA Station Chief." *LeBoutillier Aff.*, ECF 83-13 ¶12. Defendant has twice committed to addressing the issue of live-sighting reports in its *Vaughn* index,²⁰ but has failed to submit any *Vaughn* index at all.

Post 1992 Records. The older the records, the higher the justification needed to withhold them from public view. But the more recent the intelligence on these abandoned Americans, the keener the public's interest, also mandating a heightened justification for non-disclosure.

The CIA's robust intelligence-gathering on POWs did not cease in 1973 with establishment of the government policy—"all our boys are on the way home." Defendant now claims that its search of its operational records reveals that it has obtained no intelligence whatsoever on the 678 Americans since 1992, 28 years ago. Would the CIA assert that all intelligence gathering ceased in 1992, when the leaked imagery so embarrassed it?

One example of a more recent record is presumably the CIA's brief to President Obama before he addressed the Lao National Cultural Hall, in Vientiane, in 2016. He remarked, "And I'm pleased that, as a result of this visit, we will increase our efforts and bring more of our missing home to their families in America."²¹ And the CIA likely has records on Special Forces Green Beret Master Sgt. John Hartley Robertson, who was declared dead after being shot down over Laos on a classified mission in 1968, but who is now living in Laos. *See Unclaimed*, 2013 documentary.

Motives for withholding. Here, every one of defendant's disclosures on the issue inculcates the government in knowingly abandoning its citizens—*An Enormous Crime*—as Rep. Billy Hendon aptly named his book.

Another motive for withholding the records sought is the demoralizing effect it would have on the Armed Forces. *See, e.g., Hendon Aff.*, ECF 95-45 ¶ 18, quoting October 1992 speech by Deputy Assistant Secretary of Defense:

The basic lie is that the U.S. Government knowingly left Americans behind and is now covering up. If this lie lives, then it will tear at the guts of our military. If future Americans become convinced that their country won't stand behind them when the chips are down, then they won't stand on the front lines for their county.

Practice of Over-classification. The CIA is required to consider in the "historical value or other public interest in the subject matter of the particular category of files" in conducting its Decennial reviews. There have been four. Over the course of this case, defendant has produced around 8,000 pages of records, the vast majority of which should have been disclosed upon the four Decennial reviews, beginning in 1985. As plaintiffs observed in their *Motion for Stay*, ECF 278 at 2, the CIA's over-classification is evidenced by

the 33 records that were released only upon its completion of its 2015 Decennial review. The records are dated from 1974 to 1990, up to 45 years after Operation Homecoming.

So too with its 2,012-page production in 2019. Attached hereto is the Affidavit of researcher Bethany Hendershot, together with her itemization of the 392 records. "152 [of these] records are from the sixties, and 149 are from the seventies." After four Decennial reviews. Nor has defendant complied Executive Orders 13526 or 12812.²²

One of the more telling belated disclosures was the CIA's only production in 2016, the *Critical Assessment of 1998 National Intelligence Estimate (NIE) on Vietnamese Intentions, Capabilities, and Performance Concerning the POW/MIA Issue*. (Note 2 infra, records posted <http://johnhclarkelaw.com/pdf/Hall-CIA/CIA-Production-2016-209-pages.pdf>.) It is the most illuminating record ever released on the issue of the number of POWs remaining in communist hands at war's end. It unequivocally establishes the reliability of the so-called "1205 Document," discovered in Soviet archives. It is a transcript of a Vietnamese Politburo meeting just months before War's end, recorded by the Soviets, secretly. The Vietnamese reported that the number of communist-held American POWs in Southeast Asia was 1,205. Defendant disclosed this 1998 record in 2016, having declined to do so upon its Decennial review in 2005, and in 2015.

Conclusion

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.

(Emphasis supplied.)

Plaintiffs agree with the Senator. Plaintiffs seek, *inter alia*, to find out what happened to these people.

WHEREFORE, plaintiff Accuracy in Media, Inc., respectfully asks that the Court reconsider its November 30, 2020, Order and Judgment, and order Defendant CIA to submit declarations regarding its searches.

Date: April 20, 2021.

Respectfully submitted,

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1 The President stated:

Within 60 days, all American prisoners of war throughout Indochina will be released. There will be the fullest possible accounting of all those missing in action...

In particular, I would like to say a word to some of the bravest people I have ever met. The wives, children and family of our prisoners of war and missing in action. When others called on us to settle on any terms, you had the courage to stand for the right kind of peace.

2 *Plaintiff's Motion for Summary Judgment*, ECF 312 at 23:

In 2016, the year *after* its 2015 Decennial review, the CIA released... the most illuminating record ever released on the issue of the number of POWs remaining in communist hands at war's end.

In November of 1998, six years after the conclusion of the Senate Select Committee's probe, Senator and former Committee Vice-Chairman Bob Smith issued, *Critical Assessment of 1998 National Intelligence Estimate (NIE) on Vietnamese Intentions, Capabilities, and Performance Concerning the POW/MIA Issue*. (aim.org/pdf/Hall-CIA/CIA-Production-2016-209-pages.pdf). The report unequivocally establishes the reliability of the so-called "1205 Document," which exposed that, just months before War's end, the Vietnamese reported that the number of communist-held American POWs in Southeast Asia was 1,205. Three months later, the Vietnamese government released 527, holding some 678 Americans. ***

[I]n 2016, thirteen years after plaintiffs submitted their FOIA request, the CIA disclosed the 1998 record that authoritatively establishes the number of POWs remaining in Vietnam and Laos after Operation Homecoming in February of 1974.

3 *Plaintiff's Motion for Summary Judgment*, ECF 258 at 23:

In accordance with their "long-standing communist policy holding back POWs in furtherance of political and economic goals," the Vietnamese and Laotian governments held back approximately 600 POWs, as collateral for the approximately \$3.5 billion in war reparations that President Nixon had promised. The money never came, and the POWs never came home. *Id.* ¶¶ 4, 7, 10.

Sanders Aff., ECF 258-2 ¶ 7:

"The Vietnamese believed that they had a deal--a dirty deal, to be sure, in which prisoners would be exchanged for cold cash. It was a deal brokered by Secretary of State Henry Kissinger via a secret hand-carried letter. It would be perfectly consistent with the historical Communist policy to hold back

prisoners against their will, and even the remains of the dead, to exchange for dollars at a later date. The evidence of this investigation, therefore, must be weighed against the probabilities of the historical background." Report at 14.

- 4 *See Plaintiff's Motion for Summary Judgment*, ECF 312 at 4:
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." The Senate had access to at least 1,400 first-hand reports, and as many as 2,000 second-hand reports.

See also id. note 17 at 9, quoting *Sanders Aff.* ¶ 13, quoting 1991 *Senate Foreign Staff Report, An Examination of U.S. Policy Toward POW/MIAs*:

The original plan of the Minority Staff was to review the U.S. government's handling and evaluation of "live-sighting" reports. These 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 the publication of this report in May, 1991. In addition, the U.S. Government has received thousands and thousands of second-hand reports--accounts often full of vivid detail...

And see id. at 13, quoting *Smith Aff.* ¶ 9:

"Investigators on the Senate Select Committee found literally thousands of live-sighting reports over the years from the end of the war into the 1990s."

- 5 *See Sanders 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 McDaniel Aff., ECF 258-1 ¶¶ 10-11:

It was not long after I began to "speak out" in 1986 that I received a late-night phone call from a National Security Council official confirming that we did indeed still have living American POWs in Southeast Asia. I was admonished to "be patient" and advised that we would have them home "in two or three years, plus" ...

Shortly after the fall of the USSR, an investigative reporter in the respected Moscow newspaper *Commersant* wrote in an article published on November 4, 1991, that a "U.S. second pilot shot down over North Vietnam on May 19, 1967, was taken overland through a 'window' in the China-Soviet border to Saryshagansk on Lake Balkash in the then Soviet Socialist Republic of Kazakhstan during the fall of 1967." A copy of that article is attached.

6 *Plaintiff's Motion for Summary Judgment*, ECF 312 at 7:

For examples, the CIA withholds records on *Sage Brush I* and *Sage Brush II*, code names for rescue attempts using CIA paid and trained Provincial Reconnaissance Units. *Plaintiffs' Statement of Material Facts*, Oct. 21, 2016, ECF 258-5 ¶ 61. Defendant withholds records on *Operation Thunderhead*, a 1972 White House-approved escape plan from the "Hanoi Hilton." *Id.* ¶ 62. It withholds records concerning *Operation Pocket Change*, the planned rescue of POWs held in Laos, and the 1972 *Son Tay* raid, a plan to try to rescue up to 60 POWs held in Laos, but cancelled because of the then pending Peace Agreement. *Id.* ¶ 65.

Disclosure would reveal a wealth of information on David Hrdlicka. *Duck Soup* was a CIA run attempt to rescue him. There was a "raft of CIA cables" concerning Hrdlicka, and a June 1990 report on his sighting. *Id.* ¶¶ 57, 59. There is a great deal of intelligence regarding multiple reconnaissance and rescue attempts at a POW camp near Nhom Marrot, Laos, including a 1981 attempt, preceded by an inter-agency meeting that included the CIA. *Id.* ¶¶ 63, 64. *See also id.* ¶ 71:

Nor has the CIA disclosed any information on Operation Blackbeard, Oak, Nantucket, Vesuvius One, Sunstune Park, Gunboat, Bright Light, Project Alpha, or Project Corona. *Id.* ¶ 115.

See also Plaintiff's Statement of Material Facts, ECF 258-5 ¶ 64:

A December 5, 1991 DIA memorandum states that JSOC (Joint Special Operations Command) was involved in planning the 1981 operation for the reconnaissance in support of a rescue of POWs at Nhom Marrot.... Later on, an inter-agency meeting was held to discuss what actions to take. "JSOC, JCS, CIA, and NSA attended." *Id.* at Bates 62. When JSOC argued that Delta should perform the reconnaissance for this mission, the CIA insisted that it had jurisdiction over the reconnaissance. *Hrdlicka Aff.*, ECF 258-5 ¶ 75.

7 *Plaintiff's Motion for Summary Judgment*, ECF 258, at 7:

The government had "vast studies of these camps in Laos, derived from SOG operations, Imagery Intelligence (IMINT, satellite, low and high altitude aircraft), and much agent reporting from... operations and CIA operatives reporting on the Americans held in these camps in Laos." Particularly illuminating was the "unreleased SOG archives and the satellite imagery

showing secret authenticator symbols for dozens of missing men, since 1975 to late 1992," some of which are "newly emerged intelligence documents... since the Senate Select Committee closed up shop in January, 1993." *Id.* at 13. One such camp was Nhom Marrott, Laos.
(Footnotes omitted)

The Central Intelligence Agency (CIA) holds never released documents relating to American servicemen Prisoners of War and Missing in Action in Southeast Asia, and at least one camp believed to hold these servicemen after March 1973. During the period March 1979-June 1981, the CIA gathered intelligence, including human intelligence reporting, and imagery of a prison camp located in the Nhom Marrott District of Khammouane Province Laos. According to intelligence reports approximately 18- 30 American Prisoner of War were held at this camp from September 1980-May 1981 and perhaps beyond. Between January and May 1981 the CIA dispatched a least one reconnaissance team to the camp location to photograph the inmates and gather intelligence. The CIA continues to withhold information on the preparation for the mission, team progress reports, photographs taken at the camp and the debriefing of reconnaissance team members. *O'Shea Aff.* Docket 182-6 ¶¶ 1-2.

8 *Id.* note 13 at 7:

See Hrdlicka Aff. ¶ 19: "In 1992, I then called Lorenzo Burroughs, a government satellite imagery expert, about this imagery. I asked him whether any authenticator codes were picked up with it. He responded that there were around ten." *See also Hendon Aff.*, Docket 95-45 ¶ 21: "During the closed briefings... Dussault explained to the senators what the CIA personnel had said about the June 5, 1992, SEREX imagery.... and then stunned those present by declaring that, while recently reviewing 1988 imagery of Laos, he and his associates had discovered nineteen four-digit numbers that matched the four-digit authenticators of known MIAs..."

Plaintiff's Statement of Material Facts, ECF 258-5 ¶ 36:

"Satellite imagery imaged in 1975 and analyzed in mid-1976 had shown what CIA and DOD photo interpreters believed at the time was a valid USAF/USN Escape and Evasion code at this same Dong Vai (Dong Mang) prison.... In addition, approximately a half dozen postwar HUMINT (human intelligence) reports had told of US POWs being detained at the prison both during and after the war...." in 1976, 1979, and 1982. *Hendon Aff.* Docket 95-45 ¶ 16.

Id. ¶ 31:

Richard V. Allen... testified to the Senate Committee about seeing in 1981 a photograph of escape and evasion codes stamped in the grass at what was understood to be a Vietnamese prison.... President Reagan launched an operation to investigate the site. Despite Mr. Allen's testimony about CIA

involvement in the preparation for and conduct of this mission, the CIA has failed to release any records pertaining to it." *Hall Aff.* ¶ 81

Id. ¶ 35:

Before the Senate Select Committee, twenty-six-year veteran Robert G. Dussault testified that "while studying recent (June 5, 1992) satellite imagery of the Dong Val (Dong Mang) Prison north of Hon Gai, he and one of his associates discovered a valid escape and evasion code in a field just west of the prison and above it the name of a missing USAF flight officer. The deputy director would later testify formally what he and his associate had seen: A. I saw up at the CIA, very clearly to me there was the name S-E-R-E-X. Q. Capital letters? A. Yes, and it was in a field just outside the...[Dong Vai Prison], and there was a number above it and there was the name SEREX, and below it, as I remember now, 72/TA/88. *Hendon Aff.* Docket 95-45 ¶ 12.

Id. ¶ 36:

"Satellite imagery imaged in 1975 and analyzed in mid-1976 had shown what CIA and DOD photo interpreters believed at the time was a valid USAF/USN Escape and Evasion code at this same Dong Vai (Dong Mang) prison.... In addition, approximately a half dozen postwar HUMINT (human intelligence) reports had told of US POWs being detained at the prison both during and after the war...." in 1976, 1979, and 1982. *Hendon Aff.* Docket 95-45 ¶ 16.

Id. ¶ 37:

"During the closed briefings, held on October 2 and 5 1992, Dussault... stunned those [Senators] present by declaring that, while recently reviewing 1988 imagery of Laos, he and his associates had discovered nineteen four-digit numbers that matched the four-digit authenticators of known MIAs..." Hendon "believes that the CIA is in possession of this imagery." *Hendon Aff.* Docket 95-45 ¶ 22.

⁹ *Plaintiff's Motion for Summary Judgment*, ECF 258, at 17:

Additionally, plaintiffs' affidavits include proof that the Director of Operations maintained files "detailing our certain knowledge of the second tier prison system in Laos, and the numbers of American POWs being held there," and that these files may have thereafter been relocated to the "Executive Registry Files of CIA." But the Agency declined to search those records.

Id. at 6:

"Overtly, [the government] search[ed] for remains of Americans missing, or last known held prisoner there, while covertly, standing ready to affect their rescue in the known, second-tier POW camp system operating in Northern Cambodia and Laos, that [had been] extensively detailed, photographed, and ground reconnoissanced throughout the war era." *Toll Aff.* Docket 83-1, p. 6.

10 *Plaintiff's Statement of Material Facts*, ECF 258-5 ¶ 112:

"While searching for records in the Library of Congress, [Mrs. Hrdlicka] found a report that the government had been tracking 23 POWs in 1984... 'Number of persons in custody: 23 American Prisoners of War.' Another 1984 report... reflects that the CIA believed the number to be 20, not 23." *Hrdlicka Aff.* ¶¶ 41-42, citing Exhibits 32, 45.

11 *Plaintiff's Motion for Summary Judgment*, ECF 312 at 8:

Defendant has released no records of the activities of the *Military Assistance Command Vietnam, Studies and Observations Group*, which routinely used CIA trained mercenaries to insert into Laos for reconnaissance on the "second-tier POW camp system." *Id.* ¶ 58. The CIA has a large volume of records on its mercenaries, in its "indigenous personnel" files, also known as "Controlled American Source" files (*id.* ¶ 65), so a sufficient *Vaughn* index would address its search of those records.

12 *Id.* note 4 at 4:

See Affidavit of Carol Hrdlicka ("Hrdlicka Aff.") ¶¶ 37, 46: "There are numerous intelligence reports showing live POWs all over Laos after Homecoming 1973. Before operation homecoming, in 1971, there were at least 50 POWs in Laos. *See, e.g.*, Exhibit 38, Intelligence Report of 50 to 100 POWs in Laos, at Bates 107-09:

DIA is collaborating closely where appropriate with CIA in regard to the current situation in Laos... At present there are proximately 350 US military and civilians listed as missing in action in Laos. Of this total, approximately 215 were lost under such circumstances that the Patriotic Laotian Front (PLP) probably has information regarding their fate...

Plaintiff's Statement of Material Facts, ECF 258-5 ¶ 66:

"MACVSOG was the Military Assistance Command, Vietnam-Special Operations Group... provided intelligence information... The government denied for years the existence of MACVSOG.... Yet, another family member received a letter from DPMO stating that MACVSOG daily summaries are being reviewed for declassification. There was information on POWs in the daily summaries." *Hrdlicka Aff.* ¶ 60.

Id. ¶ 132:

"[I]n 1986... the National Security Council... confirm[ed] that we did indeed still have living American POWs in Southeast Asia." *McDaniel Aff.* ¶ 10.

Id. ¶ 49:

"A DIA document dated December 30, 1980 refers to a meeting held that same day at which representatives of the DIA, the CIA, and the NSA were present.... It also related that a Vietnamese source had informed the CIA of a

North Vietnamese POW camp, with coordinates, photography, and Americans, in August 1980. Although the CIA was present at this meeting concerning POWs, I have received no CIA records regarding this meeting, including the referenced 'overhead photography.'" *Hall Aff.* ¶ 72.

13 *Sanders Aff.*, ECF 258-3 ¶ 23:

CIA analysis and support of the effort in 1984-5 (detailed by the US Senate Select Committee on POW/MIA Affairs, declassified State Department records and other sources) to respond to an alleged Vietnamese offer to sell American POW/MIA remains and, potentially, living POWs to the United States. Assistant Secretary of State Paul Wolfowitz informed Secretary of State George Shultz of a plan to pay for remains and "possible live POWs" (also called "breathers", according, the Senate noted, to a January 1985 memo marked "super-sensitive.") NSC staffer Richard Childress, with the concurrence of the National Security Advisor, traveled to Vietnam and "intended to fund the initiative with either CIA or private funds," according to the Senate, which reported "the Committee could not conclusively determine whether individuals in the government of North Vietnam discussed the possibility of there being live POWs in 1984; the Select Committee does find that the sale of remains was discussed." In my experience, such a sensitive foreign policy initiative could not have occurred without CIA documentation being produced, especially as the White House was considering the use of "CIA funds" for the transaction.

14 *Sanders Aff.*, ECF 258-2 ¶ 12:

"The United States did not receive the list of Americans POWs whom North Vietnamese admitted they were holding in captivity until after the peace accords were signed." Report at 64. "[I]t was widely known that the Pathet Lao were holding many other U.S. POWs. The absence of names on the U.S. POW list handed over by the North Vietnamese of Americans captured in Laos and held by the Pathet Lao was one of the great blunders of the Paris Peace Accord negotiations and caused great confusion and emotional duress among family members of missing and captured personnel." *Ibid.*

Plaintiff's Motion for Summary Judgment, ECF 258, at 13:

"[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.

"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." *Hall Aff.* ¶ 122.

Smith Aff., ECF 258-4 ¶ 5:

Secretary Laird went into even more detail saying that the Pentagon had "solid information, such as letters or direct contacts, with about 20 airmen who survived in Laos after their planes were shot down."

15 *Plaintiff's Statement of Material Facts*, ECF 258-5 ¶ 131:

"Exhibit 141 (2015) is a Memorandum regarding ten POWs held, February 1989, at Bates 412-14. It states, in part: '[Redacted] worked at the prison where ten Americans were reportedly being held. *** [Redacted] learned that the American had been in [unintelligible] Dang prison since about March 1984.'" The CIA withholds additional records regarding these POWs, including their probable identities, and fates." *Hall Aff.* ¶ 110.

Id. ¶ 134:

Exhibit 127 (2015) is a CIA Intelligence Report regarding a 1986 sighting of POW in Laos, December 23, 1986... The CIA has failed to provide any further information on this POW." *Hall Aff.* ¶ 89.

Id. ¶ 128:

Exhibit 126 (2015) is a CIA Memorandum re six POWs held in Laos, 1983, at Bates 387-88... 'On 25 February 1983, [redacted] information [redacted] that there were four U.S. POW's being held at the Nadeng Prison in the LPDR.'" The CIA has failed to provide any information regarding these live POWs held in Laos. *Hall Aff.* ¶ 86.

Id. ¶ 129:

Exhibit 124 (2015) is a Memorandum re six POWs held in Laos, undated, at Bates 381-83: 'Circa March 1983, [redacted] a militia chief claimed that there is a Prisoner of War (POW) camp located at the foot of Ngoua Mountain (NCA), approximately 25 kilometers south of Kadon Village. According to [redacted] there were 23 American prisoners of war (POW's) detained in the camp.' The CIA has failed to provide any information regarding these 23 live POWs held in Laos." *Hall Aff.* ¶ 84.

Id. ¶ 130:

Exhibit 125 (2015) is a CIA Memorandum re six POWs held in Laos, undated, November 2, 1983, at Bates 384-86: 'In late April 1982, [redacted] saw a total of six alleged U.S. prisoners of war (POW's) at a detention camp in a small valley of Thao La Hamlet, Houa Phan Province, in northern Laos (grid coordinates 20 degrees north latitude, 104 degrees east meridian). ... He said the camp held about 50 such POW's who had recently been transferred to the camp from an unknown location.' The CIA has failed to provide any information regarding these live POWs held in Laos." *Hall Aff.* ¶ 85.

Plaintiff's Motion for Summary Judgment, ECF 258, Note 14 at 7:

See Affidavit of Lynn O'Shea Docket 182-6 ¶¶ 1, 3, 5: "The Central Intelligence Agency (CIA) holds never released documents relating to... at least one camp believed to hold these servicemen... [In] 1981, the CIA gathered intelligence, including human intelligence reporting, and imagery of a prison camp located in... Laos [where] 18-30 American Prisoner of War were held... from September 1980-May 1981 and perhaps beyond.... [T]he CIA dispatched a

least one reconnaissance team to the camp location to photograph the inmates and gather intelligence. The CIA continues to withhold information on the preparation for the mission, team progress reports, photographs taken at the camp and the debriefing of reconnaissance team members... 'The CIA can neither confirm or deny' ... [Attached is] 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."

Plaintiff's Statement of Material Facts, ECF 258-5 ¶ 133:

Exhibit 38(a) at Bates 177 is a March 1983 CIA Cable regarding Identification of Possible U.S. Prisoner of War camp in Saravanc Province, Lao People's Democratic Republic, reporting that there were '23 American prisoner of war (POWs) detained in the camp....' Exhibit 38(b) at Bates 178 is an undated CIA Cable, which states, in part, 'Identification of Possible U.S. Prisoner of War camp in Saravanc Province, Lao People's Democratic Republic' ... The CIA has provided no records regarding the referenced '23 American prisoner of war (POWs)' in Saravanc Province, Laos." *Hall Aff.* ¶ 87.

16 *Plaintiff's Motion for Summary Judgment*, ECF 258 at 4:

Of the 50 or so POWs known to be held in Laos, only nine were repatriated. The Laotians themselves admitted that they were holding American POWs.

Sanders Aff., ECF 258-2 ¶ 18:

Dr. Kissinger sent a cable to Le Duc Tho on March 20, 1973 saying in part that the U.S. side had become increasingly disturbed about the question of American prisoners how old or missing in Laos. The U.S. side made it clear on many occasions that the list of only nine American prisoners presently presented belatedly by the Pathet Lao is clearly incomplete. During the first 60 days while the American troop withdrawal was underway, the Nixon administration contacted North Vietnamese officials repeatedly to express concern about the incomplete nature of the prisoner lists that had been received. Soon thereafter, Dr. Kissinger presented DRV officials with 19 case folders of Americans who should have been accounted for, but who were not.

Plaintiff's Motion for Summary Judgment, ECF 258 note 5, at 4:

See Hrdlicka Aff. ¶ 48: "Lao officials admitted that there were "that some tens of prisoners were held" by Pathet Lao. See, e.g., Exhibit 51, an undated Working Papers of Dr. Kissinger..."

Sanders Aff., ECF 258-2 ¶ 17:

Leaders of the Pathet Lao claimed throughout the war that they were holding American prisoners in Laos. U.S. defense and intelligence officials hoped that 40 servicemen captured in Laos would be released at operation homecoming, instead of the less than a dozen who were actually repatriated.

17 *Plaintiff's Motion for Summary Judgment*, ECF 258, at 24:

The CIA's long-standing policy is to withhold post Operation Homecoming POW records, such as satellite imagery and photographs, live sighting reports, radio intercepts, correspondence, communist broadcasts, analysis, studies, memoranda, briefings, and testimony. As Vice Chairman of the Senate Select Committee on POW/MIA Affairs wrote, he has "personally seen hundreds of classified documents that could and should be released as they pose no national security risk. 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.* ¶ 8.

Id. at 14:

Former Congressman John LeBoutillier has "personal knowledge of several POW-related incidents where the CIA has had documents that have not been publicly acknowledged or released." *LeBoutillier Aff.* Docket 83-15 ¶ 7. Former Congressman Billy Hendon has "personal knowledge of several incidents where the CIA has had intelligence on living POWs that has not been publicly acknowledged and/or released." *Hendon Aff.* Docket 95-45 ¶ 4. Senator Smith has "personally have seen hundreds of classified documents that could and should be released as they pose no national security risk.... I can state without any equivocation that they are still holding documents that should be declassified." *Smith Aff.* ¶¶ 8, 20.

18 *Plaintiff's Motion for Summary Judgment*, ECF 312 at 11, under heading, No description of database:

Nor has the government provided any description of the organization of the records said to have been reviewed *five* times, most recently in 2015, for possible declassification. The sum total of information provided is that these records are organized into an unknown number of categories—neither named nor described—and that the categorized records are further divided into an unknown number of subcategories, also unidentified and undescribed. The CIA avers that it "cannot provide additional detail about the designated file series in an unclassified setting, [but] I can assure the Court that they are carefully and tightly defined to ensure that they serve the specific operational purposes." *CIA Motion for Summary Judgment*, Jan. 30, 2017, ECF 271 at 4, citing *Shiner Decl.*, ECF 271-1 ¶ 17. A description of any search here would not be complete absent some description of the organization of the databases.

19 *Plaintiffs' Statement of Material Facts*, ECF 258-5 ¶ 173: Ambassador to Laos William Sullivan testified:

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.

20 Status hearing transcript August 21, 2017, ECF 292 at 8-9:

MR. CLARKE: Your Honor, briefly. Other than what's been discussed, I would just ask, is the Government going to be required to file an affidavit regarding the search for the 1,400 live sighting reports? I think that their affidavit was deficient in that area.

MR. TAAFFE: I think this falls into the category of the things Your Honor wanted clarification on. So to the extent we're filing a declaration with respect to other things, it would also deal with those in some manner.

Status hearing transcript Sept. 26, 2017, ECF 293 at 8:

MR. CLARKE: Yes, Your Honor. I would just suggest that the Government's affidavits include its search regarding the imagery that was mentioned in the Court's order and also the 1,400 live sighting reports. We've gotten none of those. So I would just hope that the affidavits would include those.

THE COURT: Okay.

See also Plaintiffs' Statement of Material Facts, Oct. 21, 2016, ECF 258-5 ¶ 122:

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...

21 *See, e.g., Plaintiff's Motion for Summary Judgment*, ECF 312 note 6, at 14:

The only visit to Laos from an American president was Barak Obama, on September 6, 2016, at the Lao National Cultural Hall, Vientiane, Laos. His remarks included:

I realize that having a U.S. president in Laos would have once been unimaginable. Six decades ago... the U.S. government did not acknowledge America's role. It was a secret war, and for years, the American people did not know. Even now, many Americans are not fully aware of this chapter in our history, and it's important that we remember today. Over nine years—from 1964 to 1973—the United States dropped more than two million tons of bombs here in Laos—more than we dropped on Germany and Japan combined during all of World War II. It made Laos, per person, the most heavily bombed country in history.

* * *

I thank the government and the people of Laos for your humanitarian cooperation as we've worked together to account for Americans missing in action. And I'm pleased that, as a result of this visit, we will increase our efforts and bring more of our missing home to their families in America.

22 The Senate Select Committee's 1993 Report states that the CIA had not adhered to E.O. 13526:

When 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 the next Executive Order, 12812, memorialized in Senate Resolution 324. E.O. 12812—*Declassification and Release of Materials Pertaining to Prisoners of War and Missing in Action*, 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."

The CIA did not comply, again. 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.

The CIA did not comply, again.