UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ARON DiBACCO, et al.,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	C. A. No. 87-3349 (CKK)
	:	
U. S. DEPARTMENT OF THE ARMY, et al.,	:	
	:	
Defendants	:	

REPLY TO DEFENDANTS' OPPOSITION TO SECOND RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT, ETC.

PRELIMINARY STATEMENT

As the Government notes, the issues now before the Court have been dealt fairly extensively in previous rounds of briefing. Like defendants, plaintiffs will rely largely on these previous briefs and evidentiary submissions, which are incorporated herein by reference. Because plaintiffs have now obtained the transcript of the oral argument before the U.S. Court of Appeals on December 12, 2014, plaintiffs will make some use of that to clarify issues now before this Court.

What is particularly notable about the Government's brief renewed Opposition ("Ren. Opp.") is that it devoted in great part to a discussion of the newly obtained information that a convicted Nazi assassin was present in Dallas, Texas near the time of President Kennedy's assassination, but the Government is

unable to come to grips with that information. Since plaintiffs previously raised this issue, they have obtained new and additional information which they now call to the Court's attention in the section which follows.

A. A Further Consideration of the Public Benefit Factor in Light of Additional Information Concerning Werner von Alvensleben and D. Harold Byrd

The government concedes that FBI Director J. Edgar Hoover assured the Warren Commission that the assassination of President John F. Kennedy would remain open for all time, and that all new information would be thoroughly investigated so as to prove or disprove it. Yet the government avoids doing anything to investigate the new information presented by plaintiffs in this case. Here, that new evidence, if proven, may be anything but inconsequential, given that it places a convicted Nazi assassin in the company of D. Harold Byrd, the owner of the Texas School Book Depository Building, near the time Kennedy was murdered. Moreover, the convicted Nazi assassin von Alvensleben was the guest of the owner of the building in Dallas after the assassination. And this convicted assassin came from a family in which his father was reported to U.S. intelligence to be a specialist in political assassinations in Germany after World War I.[1] The

[1] The father, also named Werner von Alvensleben ("von Alvensleben, Sr."), appears in the authoritative work on Nazi Germany, "The Rise and Fall of the Third Reich" by William L. Shirer. The father was present with Adolf Hitler in Berlin the night in 1933 when Hitler was informed he would be named Chancellor of Germany. Von Alvensleben Sr. precipitated a crisis by inaccurately informing

Court should instruct the government to comply with Director Hoover's commitment to investigate new information related to the assassination of the President.

The government has access to the records needed to investigate this information, such as visa information from 1963. Werner von Alvensleben and D. Harold Byrd's CIA and State Department records should be reviewed. As a valuable double agent for OSS[2] during World War II, Werner von Alvensleben would have been a prime candidate to serve as a CIA asset in Portuguese East Africa (Mozambique) after the war. D. Harold Byrd was a defense contractor who was a principal of the Ling Temco Vaught conglomerate ("LTV") in the 1960's. LTV was a large scale defense contractor that likely had CIA contracts as part of its business portfolio. Byrd was a close personal friend and safari partner of General Jimmy Doolittle,[3] who in 1954 was called upon by President Eisenhower

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Hitler that a coup was being undertaken to prevent Hitler from coming to power. Hitler called out the SA Brown Shirts and the police to prevent such a coup, according to Shirer, and Hitler then took power as Chancellor the next day. Page 182, "The Rise and Fall of the Third Reich", William L. Shirer, Simon and Schuster, New York 1960.

[2]A copy of the OSS cable which triggered the link to von Alvensleben's presence in Dallas near the time of the JFK assassination is reproduced as Exhibit 1 hereto in a more legible form than the undersigned counsel previously had.

[3] "I'm an Endangered Species: The Autobiography of a Free Enterpriser", David Harold Byrd, Pacesetter Press, Houston, Texas, 1978, page 40.

to conduct a Top Secret study of CIA covert operations with a purpose to strengthening them. The Doolittle Report called for increased CIA covert operations and warned that the American public might have to be educated that American values of fair play needed to be dispensed with in the Cold War ("[t]here are no rules in such a game"). The Doolittle Report called for a CIA "more ruthless than a ruthless enemy, if necessary." Doolittle Report, Exhibit 2 hereto, Introduction, pages 2-3.

Plaintiffs have requested information about von Alvensleben and Byrd from the government, but the government refuses to comply. The Court should order the agencies to search their records for responsive information and provide it to plaintiffs.

ARGUMENT

A. Defendant Has Not Met Its Burden of Proof as to Exemption 1

DiBacco has argued that under the plain language of Exemption 1, both the requirement that a document be properly classified procedurally and the requirement that it be properly classified substantively must be read disjunctively. Each provision must be met separately or the classification claim fails. The Supreme Court's decision in *Milner v. Dept. of Navy*, 562 U.S. 562 (2011) unequivocally supports the proposition that FOIA's exemption claims are to be interpreted according to their plain meaning and narrowly construed.

The Government responded in its earlier briefs by citing contrary authority and in its current opposition tries to discredit DiBacco's citation of Judge Bazelon's dissent in *Goland v. Central Intelligence Agency*, 607 F.2d 339 (D.C.Cir. 1978) for the proposition that both prongs of Exemption 1 must be met in order to comply with the requirements of the Executive Order in question. The Government argues that Chief Judge Bazelon's dissent was concerned with "a procedural deficiency in the agency's affidavit, not with a procedural problem with the classified markings themselves." Ren.Opp. at 5 (emphasis in original). Yes, but the point of Judge Bazelon's dissent was that to be valid the affidavit had to show that certain classified markings had been properly applied. Thus, Bazelon's underlying point was that if the documents lacked the classification markings required by the E.O., then the documents could not be withheld under Exemption 1. That same point remains here, except that here we have some documents which fail to show proper classification markings on them.

Regardless of how Chief Judge Bazelon's dissent may be characterized, the overriding principle is clear: If any circumstances justify the continued classification of material that is not properly classified procedurally, they must be extraordinary. No such demonstration has been made here.

At oral argument before the Court of Appeals, AUSA Fred Haynes argued that President Obama's Executive Order, E.O. 13526, did not apply, rather "we're

relying on the orders that were in effect when the material was classified. Which was not President Obama's order." Oral Argument Transcript ("OA Tr.") at 46 **(Exhibit 3).** When Chief Judge Garland pursued the issue of whether if a new request were made contemporaneously the materials would still be classified procedurally under Sec. 3.3(h) in light of the automatic declassification after 50 years, AUSA Haynes replied that there was a "stay patch" under Obama's order. Id. 46-47. Judge Garland responded: "Yes, in extraordinary cases agency heads may within five years of the onset of automatic declassification propose to exempt additional, we're past that, too." Id. at 47, lines 2-5.

The Government now concedes that E.O. 13526 is ~~now~~ the applicable order. It has not shown any action by an agency head within five years of 50-year automatic declassification to continue the classified status of the records at issue. It has not shown that "extraordinary circumstances" warrant continued classification. If the classification system is to have any integrity at all, in these circumstances the information must be declassified. Otherwise, the classification procedures have become meaningless.

The Government cites *Bigwood v. Department of Defense*, 132 F.Supp. 3d 134, 151-152 (D.C.C. 2015) for "the current status of the law on this issue. . . ." But *Bigwood* is inapposite. It deals, with Sec. 1.6 of E.O. 13526, not Sec. 3.3(h), which is at issue here. Moreover, since the records requested concern the 2008

coup d'etat in Honduras, it doesn't begin to raises issues dealing with classification/declassification procedures involving records which were automatically declassified after 50 years.

The Government wants this Court to grant substantial deference to the declarations filed in this case. In his extremely frank dissent in *Center for National Security Studies v. DOJ*, 331 F.3d 918 (D.C.Cir. Nos. 02-54, 02-5300. 2003), Judge Tatel observed: "In any event, the government's case fails even under the heightened deference we have applied in Exemption 1 and National Security Act cases. No matter the level of deference, our review is not 'vacuous'." Id., quoting *Pratt v. Webster*, 673 F.2d 408, 421 (D.C. Cir. 1982). He further asserted that even when reviewing Exemption 1's applicability to classified materials, "we have made it clear that no amount of deference can make up for agency allegations that display, for example, `a lack of detailed specificity, bad faith [or] failure to account for contrary record evidence,' since deference is not equivalent to 'acquiescence'." Id., quoting *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998).

Judge Tatel also noted that the claims of government officials cannot simply be accepted at face value: ". . . the public has a fundamental interest in being able to examine the veracity of such claims." Id. Here, the release on remand by declarant Mary E. Wilson, ECF #296-4, of records previously withheld by declarant Martha Lutz, and Wilson's continued reliance on Lutz, have undermined

the credibility of both CIA officers. See DiBacco's initial Motion for Partial Summary Judgment, Etc., ECF #313, pp. 17-18.

The Government's "substantial deference" (or beyond that) argument relies on the "mosaic" theory. A recent article by David E. Pozen, "The Mosaic Theory, National Security, and the Freedom of Information Act," 115 YLJ 628 (2005), examines the theory in depth. While he concludes that there is a sound basis for the theory, but he cautions:

> Highly speculative mosaic claims will always provide a challenge to a reviewing court, but delegation exacerbates the theory's potential for misuse. It is hard to see in delegation much more than courts' "acquiescence" or to reconcile it with FOIA's text and purpose. It is hard to miss in *North Jersey Media*'s abdication approach the acquiescence; the opinion flaunts it.

Id. at 679 (footnote omitted).

Pozen's article was written before the issuance of E.O. 13526 in 2009. The Obama order reflects an extraordinary change in both the procedural and substantive standards governing information subject to automatic declassification after 50 years. In light of that change, which favors disclosure of such records to an extremely high degree, the mosaic theory needs to be applied in reverse. That is, the potential benefit stemming from the disclosure of seemingly isolated pieces of information must be considered greatly heightened once such information is subject to automatic disclosure after fifty years. The disclosure of the bits of information which ultimately link up the presence of convicted Nazi assassin

Werner von Alvensleben with the owner of the Texas School Book Depository Building near the time of the assassination of President Kennedy is a case in point.

After offering suggestions for courts to modulate review of mosaic theories, Pozen concludes by recommending "the use of extrajudicial assistants such as special masters. . . ." Id. The Government has ignored Dibacco's suggestion that a special master be used here. As will be set forth below in more detail, use of a special master would be appropriate here.

C. THE CIA HAS NOT SUSTAINED ITS EXEMPTION 3 CLAIMS

The Opposition has a brief paragraph at the end under the caption "Other Points" in which it refers to DiBacco's argument that Exemption 3 does not apply to "deceased" employees. It contends that "the language of the statute is controlling, and it supports defendants' reading." Ren. Opp. at 9. First, the plain meaning of "employee" is a person who is working for someone. A CIA employee who is no longer working for the CIA is no longer an employee. The statute is stated in the present tense. It does not refer to past employees. Second, if the plain meaning of the language does control, as Dibacco agrees it should, then any ambiguity must be construed narrowly, as the FOIA itself provides and as the Supreme Court said in *Milner*.

The Government also responds to DiBacco's argument that it failed to respond to her claim that "the withholding [of] CIA filing information was

improper." Id. It says these issues are "foreclosed," "out of the case." Id. However, this contention must be read in light of the Court of Appeals' remand decision. Under the remand, this Court is obligated to determine the validity of Exemption 1 and 3 claims that were asserted with respect to the remand materials.

The obvious reason why the Government has to meet its burden of justifying exemption claims for withholdings in the remand materials is that DiBacco had no opportunity to challenge them because they were never turned over to her. This same principle would apply, of course, to any withheld information in materials located as a result of any search for non-provided materials that are identified as possibly being responsive to Oglesby's request. This would include the "dossiers" and other records referred to in the Top Secret Replacement Sheets, as well as other links to missing records. This would necessarily include the 9,000 plus pages that the Army is said to have transferred to NARA, as Dibacco has not been able to challenge any release of these records subsequent to 1997 unless they were part of the 2,863 records transferred to NARA.

At oral argument, DiBacco's counsel called attention to a letter written in 1949 to John J. McCloy, who was German High Commissioner at the time. The letter, which appeared in the Joint Appendix ("JA") at 1145-1146, is attached hereto as Exhibit 4. The entire two pages were deleted pursuant to Exemptions 1 and 3 except for address. OA Tr. at 21. Referring to the redactions in this

document, Judge Garland stated that "no one could describe [them] as minor." Id. at 25. Whether this document was in the possession of the Army or CIA or both, DiBacco is unable to find a match in any of the CIA or Army *Vaughn* indices for this document. Thus DiBacco also has had no opportunity to challenge the alleged exemption claims for this document. As DiBacco's counsel noted at oral argument, there is good reason to believe this record is potentially embarrassing to the Government because of the role McCloy played in liberating convicted Nazis who were tried at Nurenberg. OA Tr. at 21. As pointed out in the Public Benefit section above, McCloy also sat on the Warren Commission and asked probing questions of the FBI firearms expert designed to established whether the bullets allegedly fired by Lee Harvey Oswald were designed to be fired in a Mannlicher Carcano or a Mannlicher Schoenauer rifle.

After the remand, the CIA conducted a mandatory declassification review at the request of NARA. This review resulted in the release of Exemption 1 and/or Exemption 3 materials that had previously been withheld. This undermined the credibility of the CIA's prior representations in this case and require that DiBacco be allowed to revisit the validity of the exemption claims asserted in connection with the several Meek indices which were submitted when this case was last before this Court. "Judicial economy" is not a statutory mandate but a matter of judicial discretion. The purpose and text of the FOIA mandate that nonexempt information

be made "promptly available." This Court's duty under the statute is to obey that command, not to delay or end further disclosures. To hold that the CIA should not be relieved to justify the withholdings it asserted in its prior *Vaughn* indices is to turn the FOIA on its head, precluding it from doing what it is supposed to do as quickly as nonexempt information becomes available.

There are equitable principles also at play here. "Equity sees that as done which ought to be done." "Equity will not suffer a wrong to be without a remedy." The Army misrepresented to this Court that it did not have any records in its possession pertaining to Carl Oglesby's request. The United States Attorney's Office repeatedly endorsed that claim. Under these circumstances, the finality of this Court's prior determinations on exemption claims should be lifted.

D. THE SEARCH ISSUE

The Government basically contends that there is no search issue left in this case. The first problem with this is that this Court's November 20, 2015 Order meticulously laid out the terms of the Court of Appeal's remand order. Paragraph 2 states:

> (2) descriptions of the nature of any documents identified in paragraph 17 of the Murphy declaration that have been replaced by documents bearing the caption "Top Secret Document Replacement Sheets," as well as descriptions of any efforts to obtain any such missing documents;

This passage initially implies a search—the documents cannot be described until they have been located through a search—then it expressly directs that searches must be made: NARA must provide "descriptions of any efforts to obtain any such missing documents." ECF #289 at 2. Numbered paragraph 3 repeats the same instructions with regard to the G-3 worksheets.

NARA has in fact performed some searches pursuant to the Court's November 20, 2015 Order. It has, therefore, waived objections to doing further searches.

During the oral argument members of the Court of Appeals panel, particularly Judge Judith Rogers, repeatedly questioned AUSA Fred Haynes about whether the Army possessed any records outside its FOIA Unit. Judge Rogers observed that the FOIA Officer

> has a limited field of knowledge, and now[he] knows what she or he has, but has any as it were search been done beyond that to determine what the Army may have as, you know, a bureaucracy that normally keeps copies of everything that's surrendered?

OA Tr. at 27. Neither the Army nor NARA has put in an appropriate affidavit testifying to a search.

Sec. 3.3 of E.O. 12958 and Sec. 3.2 of E.O. 13526 require that an agency "take all reasonable steps to declassify classified information in records determined to be of permanent historical value before they are accessioned into the National

Archives." A search needs to be done to see if this provision was complied with in order to determine what materials were transferred to NARA, when they were transferred, and whether they were responsive to his request.

E. Defendants' Comment on the Public Benefit Factor

Defendants have a special section lamenting "the tragedy" that they have been put to such great expense over the decades by Oglesby and his successors but there "has been no concomitant benefit to the public by explaining to them what their government has been up to." Ren. Opp. at 7. This requires a reality check. It ignores the glowing Report and Recommendation of Magistrate Judge Facciola praising to the skies Oglesby's achievements in benefiting the public. It is also amazing out of touch with the facts set forth in this brief and in prior pleadings about the Werner von Alvensleben/D. Harold Byrd linkage.

Along the way, defendants' counsel once again casts blame on Oglesby for not having received 9,000 pages in 1997 and on his successors' counsel for "only now entering into discussions about creating a digitized version of the documents. . . ." Id. at 7-8. All Oglesby and his successors had to do to benefit the public was to obtain the release of a single significant new document. They did that repeatedly. Nothing more was required. They have wished, and continue to do more, but they have been impeded at every turn by an oppressive Government

which stalled matters until Oglesby died before he could publish a book, which continues to throw up impediments to further progress.

F. Discovery, *In Camera* Inspection, and Appointment of a Special Master

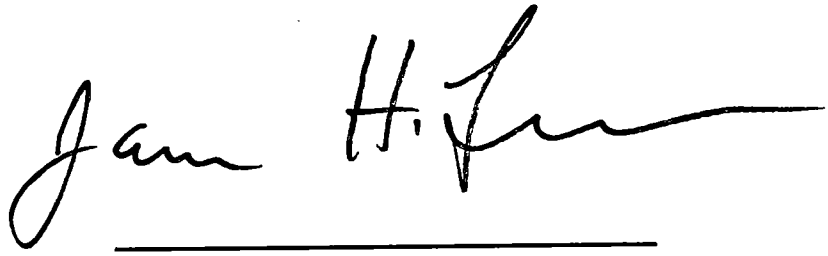
Throughout this lawsuit, plaintiffs have suggested that discovery, *in camera* inspection and appointment of a special master have been suggested by plaintiffs. Each is a valuable tool which could advance the resolution of this lawsuit. *In camera* could be used to test some of the claims regarding a relatively limited number of documents. For example, examination of the 1949 letter to John J. McCloy, Exhibit 4 hereto would be especially important. Plaintiffs could submit to the Court copies of say, 20 documents which the Court could inspect. The criteria for *in camera* inspection set forth in *Allen v. FBI,* 636 F.2d 1287 (D.C.Cir.1980) are fully met here.

Appointment of a Special Master would be required if an effort is to be made that is commensurate with several substantial unresolved issues that need to be dealt with authoritatively and promptly without impinging upon the resources of this Court. This approach was applied very successively in *In re U.S. Dept. of Defense*, 848 F.2d 232 (D.C. Cir. 1988)(per curiam). In light of the important and complex issues in this case, it is time to employ this tool again.

CONCLUSION

For the reasons set forth above, the Court should grant Plaintiffs' Second Renewed Motion for Partial Summary Judgment and Other Relief, including discovery *in camera* inspection and/or appointment of a special master. The Court should also order the defendants to provide a digitized copy of the 2863 pages of records that were transferred to NARA by the Army.

Respectively submitted,



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