

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**UNITED STATES OF AMERICA**

**v.**

**JAMES F. HITSSELBERGER,**

**Defendant.**

**Criminal Action 12-cr-231 (RC)**

**ORDER FOR SUPPLEMENTAL BRIEFING**

On April 11, 2011, defendant James Hitselberger was stopped by Master Sergeant Michael Alan Holden shortly after Mr. Hitselberger left the restricted access area in which they both worked. Master Sergeant Holden had seen Mr. Hitselberger print official documents from a Secret computer and place those documents into his backpack. After stopping Mr. Hitselberger, Master Sergeant Holden told him to open his bag and remove the documents; at first Mr. Hitselberger removed one document, and then he removed the other. His bag was never physically inspected.

I. Mr. Hitselberger has now moved to suppress those documents as the fruits of an unconstitutional search. “A ‘search’ occurs when an expectation of privacy that society is prepared to consider reasonable is infringed,” *United States v. Jacobsen*, 466 U.S. 109, 113 (1984), and “the Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view,” *United States v. Ross*, 456 U.S. 798, 822–23 (1982). Assuming that Mr. Hitselberger had a reasonable expectation of privacy in his backpack, was that expectation violated simply because he was required to unzip the bag? Or would a violation only occur if a government agent actually saw (or otherwise sensed) the contents of the bag? Did any government agent see or sense the contents of Mr. Hitselberger’s backpack, apart from

the documents that he produced?

If Mr. Hitselberger's bag was not searched when he was ordered to open it, did a search occur when he was forced to remove two documents from the bag and hand them to Master Sergeant Holden? Did Mr. Hitselberger have a reasonable expectation of privacy either in the fact that he was carrying those official documents—which he had been seen to print and place in his backpack minutes before—or in the contents of the documents themselves? Put differently, did Master Sergeant Holden's viewing of official documents that he knew to be within Mr. Hitselberger's backpack violate a constitutionally protected privacy interest?

II. Mr. Hitselberger has also moved to suppress evidence seized when his living quarters were searched. In response to both suppression motions, the government argues that Mr. Hitselberger implicitly consented to any search of his backpack and quarters by choosing to live and work on a closed military installation in Bahrain, where a sign indicated (as the government argues) that entry onto the base implied consent to search at any time. In support of its argument, the government has cited a number of cases in which civilian visitors to military installations were subject to search. *See, e.g., United States v. Jenkins*, 986 F.2d 76 (4th Cir. 1993) (civilian husband of female servicemember searched at gate); *United States v. Rountree*, 2008 WL 4327365 (N.D. Fla. Sept. 17, 2008) (apparently intoxicated civilian who claimed to be lost searched at gate); *Sanders v. Nunley*, 634 F. Supp. 474 (N.D. Ga. 1985) (civilian searched after shopping in base store). Does this line of cases apply with equal force to Mr. Hitselberger who, although a civilian, was not a visitor to the base? Do members of the military also implicitly consent to search in the same circumstances, or are such searches governed by a different body of law?

To assist the court in resolving the pending suppression motions, the parties are

**ORDERED** to submit briefs addressing the questions set out above. The parties shall submit their initial briefs on or before November 16, 2013, and any reply briefs on or before November 23, 2013.

**SO ORDERED** this 31st day of October 2013.

Rudolph Contreras  
United States District Judge