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

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| **UNITED STATES OF AMERICA** | : | |
| | : | |
| **v.** | | **12-CR-231 (RC)** |
| | : | |
| **JAMES HITSELBERGER** | : | |

**DEFENDANT'S REPLY TO GOVERNMENT'S SUPPLEMENTAL MEMORANDUM**

The government emphasizes throughout its Supplemental Memorandum that "[t]he touchstone of any Fourth Amendment analysis is reasonableness." Gov't Supp. at 1, 3 (quoting *United States v. Robinette*, 519 U.S. 33, 38 (1996)). As the Supreme Court has emphasized "[o]ver and again," however, "the mandate of the [Fourth] Amendment requires adherence to judicial processes . . . and . . . searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967) (first alteration in original) (internal citation, footnotes, and quotation marks omitted). Despite the government's emphasis on security concerns to claim that the search at issue here was reasonable, no such exception to the warrant requirement applies and the search was not reasonable. Mr. Hitselberger had a reasonable expectation of privacy in his backpack. Despite the nature of the base and security concerns in the area, the evidence before the Court demonstrates that such expectations of privacy are routinely recognized and respected on the base, as required by the Fourth Amendment. As the Supreme Court and the D.C. Circuit have repeatedly held, a warrant is required for the search of a closed container. Mr. Hitselberger did

not consent (implicitly and explicitly) to the search of his backpack, no exigent circumstances justified the search (rather than the seizure) of the backpack, and no other exception authorized the warrantless search of a closed backpack. For these reasons, the evidence obtained as a result of the search of the backpack must be suppressed.

## I. MR. HITSELBERGER HAD A REASONABLE EXPECTATION OF PRIVACY IN *HIS BACKPACK*, WHICH WAS VIOLATED WHEN MASTER SERGEANT HOLDEN ORDERED HIM TO OPEN IT AND REMOVE DOCUMENTS.

As the defense asserted in its Supplemental Memorandum, Mr. Hitselberger had a reasonable expectation of privacy with regard to the contents of *his backpack*, even if the contents were illegal contraband. *See* Def. Supp. at 5. The focus of the Fourth Amendment inquiry is on the backpack itself, not its contents, as "[c]losed packages or containers, such as [a] backpack, 'are in the general class of effects in which the public at large has a legitimate expectation of privacy,' making warrantless search of them 'presumptively unreasonable.'" *United States v. Young*, 573 F.3d 711, 721 (9th Cir. 2009) (quoting *United States v. Jacobsen*, 466 U.S. 109, 114-15 (1984)).

Implicitly acknowledging that it is sunk by the case law governing closed packages and containers, the government attempts to distract the Court by redefining the privacy interest in this case. Instead of focusing on Mr. Hitselberger's interest in the object of the search (his backpack), the government focuses on what was ultimately found (the documents/alleged contraband). *See, e.g.*, Gov't Supp. at 11 ("Defendant had no reasonable expectation of privacy *in the classified documents* in his backpack." (emphasis added)); *id.* at 12 (because documents "were government property of the most sensitive nature," "[n]o reasonable person could expect privacy *in such papers*." (emphasis added)). But as the D.C. Circuit has recognized, "as to the reasonableness of

a privacy expectation, the innocence or evil of the goods concealed cannot determine the Fourth Amendment protection. . . . One has no greater or lesser expectation of privacy in a bag when it contains drugs prescribed by a physician for an embarrassing ailment than when it contains contraband." *United States v. Ross*, 655 F.2d 1159, 1171 (D.C. Cir. 1981) (internal citation omitted), *reversed on other grounds*, 456 U.S. 798 (1982); *see also United States v. Di Re*, 332 U.S. 581, 595 (1948) ("[A] search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success."). The government's slight of hand should be rejected.

The government's attempt to shoehorn this case into the plain view doctrine is also unavailing. The documents taken from Mr. Hitselberger were not in plain view. They were in Mr. Hitselberger's backpack — a closed, opaque container. The fact that the documents were at one time outside the backpack is of no moment. Indeed, no item is "born" in a container — all items found inside a container were once outside; but that does not vitiate the owner's Fourth Amendment rights once he evidences an intent to keep the items private.[1] As the Supreme Court

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[1] The government cites *Holt v. United States*, 675 A.2d 474 (D.C. 1996), in support of its contention that once an object is displayed in public, an individual forever loses his privacy interest in that object, even if he later evidences an intent to keep it private by placing it in an opaque, closed container. *Holt* does not sustain such a claim; indeed, it supports the very opposite position. In *Holt*, the defendant admitted himself into a hospital emergency room where, in order to receive treatment, his clothes were removed by hospital personnel and placed in a visible, unsealed plastic bag under his gurney. 675 A.2d at 477. The D.C. Court of Appeals held that the defendant had no reasonable expectation of privacy "in the outward appearance of Holt's clothing when he admitted himself to the hospital emergency room." *Id.* at 479. The court reasoned:

> There is no indication that Holt ever asked to secure his clothes in a secured locker or in some other manner consistent with a desire to remove them from public view. Moreover, the emergency nature of his treatment objectively distinguishes the situation from the patient who comes to the hospital for elective

has recognized, even where a government agent has "probable cause to believe that a container holds contraband or evidence of a crime," the Fourth Amendment permits only seizure of the container; an examination of its contents must await the issuance of a warrant. *United States v. Place*, 462 U.S. 696, 701 (1983); *see also United States v. Taylor*, 497 F.3d 673, 679 (D.C. Cir. 2007) ("[A]s a rule, even when officers may lawfully *seize* a package, they must obtain a warrant before examining its contents."); *United States v. Repress*, 9 F.3d 483, 486 (D.C. Cir. 1993) (practice of seizing container based on probable cause in order to get warrant approved long before *Place*).[2]

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> surgery and reasonably expects — and is given — a private storage space, with lock and key, for all personal belongings including clothing. The emergency also objectively distinguishes the case from one in which an injured person goes home, deliberately puts all clothes in a dresser or private hamper, and calls the doctor. Nor is this a case involving a search inside the clothing for concealed items in the wearer's pockets or lining.

*Id.* at 480. Because Holt had "fail[ed] to insist that he, rather than hospital personnel, keep control over his clothing (e.g., in a locker), Holt did not 'firmly desire[] to keep secret' from anyone, including the police, the outward appearance of his clothing." *Id.* at 481 (quoting *United States v. Ramapuram*, 632 F.2d 1149, 1155 (4th Cir. 1980)). Here, Mr. Hitselberger evidenced his intention to keep the contents of his backpack private by affirmatively placing them inside the backpack and zipping it up. Under the reasoning of *Holt*, the evidence found in Mr. Hitselberger's backpack should be suppressed.

[2] It is important to note that "the 'plain-view' doctrine provides an exception to the warrant requirement for the *seizure* of property, but it does not provide an exception for a search." *United States v. Jackson*, 131 F.3d 1105, 1108 (4th Cir. 1997) (emphasis in original). This is because "[v]iewing an article that is already in plain view does not involve an invasion of privacy and, consequently, does not constitute a search implicating the Fourth Amendment." *Id.* (citing *Horton v. California*, 496 U.S. 128, 133 n.5 (1990)). Because the documents at issue were not in plain view when they were seized from Mr. Hitselberger, but were instead contained in his zippered backpack, a *search* occurred and the plain-view doctrine does not apply.

The government misconstrues the "foregone conclusion" corollary to the plain-view doctrine. Gov't Supp. at 14. That exception applies only where a container's "contents can be inferred from [its] outward appearance." *Taylor*, 497 F.3d at 680. The only facts that could be

The government ultimately concedes that "[i]f defendant is deemed to have had some reasonable expectation of privacy in his backpack[,] . . . in taking the documents, the two soldiers executed a 'seizure' of them." Gov't Supp. at 16. Nevertheless, the government contends that "whatever search and seizure occurred was perfectly reasonable[ b]ased on exigent circumstances." *Id.* But even assuming Master Sergeant Holden had probable cause to believe that Mr. Hitselberger's backpack contained classified documents, the record clearly demonstrates that he could have seized the backpack and obtained a search warrant (or CASS) with no danger to anyone. Because he did not do so, the warrantless search of Mr. Hitselberger's backpack was unlawful.[3]

## II. MR. HITSELBERGER DID NOT CONSENT (IMPLIEDLY OR OTHERWISE) TO THE SEARCH OF HIS BACKPACK OR LIVING QUARTERS.

The government concedes, as it must, that "[w]hile at NSA Bahrain, Mr. Hitselberger, as a civilian, retain[ed] those substantive rights guaranteed by the Fourth Amendment," Gov't Supp. at 3 (internal quotation marks omitted), but maintains nevertheless that, based on "the totality of the circumstances," *id.* at 11, "[a]ny expectation of privacy on NSA Bahrain would certainly be low, if not non-existent." *Id.* at 6. Such an argument is directly at odds, however, with the government's express acknowledgment that "the normal practice under the Military Rules of

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inferred from the outward appearance of Mr. Hitselberger's backpack were (1) it was a backpack and (2) it was zippered. While probable cause that the backpack contained classified documents would have authorized seizure, it does not excuse Master Sergeant Holden's warrantless search. *Id.* at 679.

[3]The Court also should not be distracted by the government's references to Master Sergeant Holden's lack of training as a law enforcement officer. He was a government agent. Once a government agent undertakes to invade an individual's right to privacy or search personal property, he must abide by the Constitution, regardless of his training or lack of training.

Evidence, where evidence of a crime is being sought, is to obtain command search authorization for a search" unless a recognized Fourth Amendment exception applies. *Id.* at 8; *see also* Tr. 203:1-10 (SJA Peck testimony regarding CASS practice and procedure at NSA Bahrain). In light of this, Mr. Hitselberger — a civilian, who had no lesser expectation of privacy than a member of the military, Gov't Supp. at 3, 8-9, 11 — could reasonably expect that the military would follow its "normal practice" — indeed, its required/mandated procedure — of obtaining a CASS before searching his backpack for evidence of a crime.[4] If Mr. Hitselberger (or members of the military for that matter) had a "non-existent" expectation of privacy at NSA Bahrain as the government claims, *id.* at 6, no CASS procedure would exist. The government's witness, SJA Peck, specifically testified as to the recognition of privacy interests on the base and the use of the CASS procedure. This testimony and the CASS procedure undermines entirely the government's "totality of the circumstances" argument with respect to the warrantless search of Mr. Hitselberger's backpack.[5]

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[4] As the Court is aware, a CASS was obtained prior to searching Mr. Hitselberger's living quarters, but not before the search of his backpack. Mr. Hitselberger's challenge to the CASS that was obtained before the living quarters search is the subject of Defendant's Motion to Suppress Tangible Evidence Seized Following Execution of Command Authorization (Dkt. #38) and is also addressed in his reply to the government's consolidated response (Dkt. #58). The government acknowledges in its Supplemental Memorandum that "compliance with Military Rules [i.e., the CASS procedure] would not excuse a violation of Mr. Hitselberger's Fourth Amendment rights as a civilian." Gov't Supp. 11.

[5] The government argues that "Mr. Hitselberger can be said to have even lower privacy expectations than a temporary visitor would have, since he voluntarily chose to live and work on the base." Gov't Supp. at 7. First, there is no record evidence that Mr. Hitselberger's "choice" to live on the military base was anything more than a required condition of his employment; i.e., there is nothing to suggest that Mr. Hitselberger could in fact have lived elsewhere, yet still retain his job. Second, the government's claim that a temporary visitor to the base would have a greater privacy interest than Mr. Hitselberger is absurd. As Mr. Hitselberger explained in his Supplemental Memorandum, under the government's theory, visitors would at least retain their

With the "totality of the circumstances" argument defeated, the government is left only with the doctrine of implied consent.[6] As it did in its previous briefing, the government relies heavily on *United States v. Jenkins*, 986 F.2d 76 (4th Cir. 1993). But as Mr. Hitselberger noted in his Supplemental Memorandum, *Jenkins* stands only for the proposition that when a sign is posted that explicitly provides: "While on this installation all personnel and the property under their control are subject to search," searches are permissible of anyone at anytime. 986 F.2d at 77. As SJA Peck testified, however, this was not the case at NSA Bahrain, and the signs introduced by the government did not authorize searches "while on this installation," but only searches upon entry. Tr. 205:5.

The government also cites *United States v. Ellis*, 547 F.2d 863 (5th Cir. 1977), for the proposition that "[t]he base commander has authority 'to place restrictions on the right of access to a base,' including subjecting a person to a search upon request." Gov't Supp. at 5 (quoting *Ellis*, 547 F.2d at 866). But *Ellis* does not in fact stand for such a broad proposition. It, like *Jenkins*, is an implied consent case. The very first sentence of *Ellis* reads: "Consent to search a motor vehicle while on board a Naval Air Station was validly obtained through issuance, acceptance[,] and display of a visitor's pass." 547 F.2d at 864. The pass at issue stated: "Acceptance of this pass gives your consent to search this vehicle while entering, aboard, or leaving this station." *Id.* at 865 n.1. Again, no pass or sign in this case extinguished Mr. Hitselberger's reasonable expectation of privacy in his backpack and living quarters — an

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expectation of privacy in their residence and the belongings that they choose not to bring with them into the base. Residents, however, would have no expectation of privacy whatsoever once they move onto the base. The Fourth Amendment does not permits such a finding.

[6] The government employs this doctrine with respect to both searches.

expectation that is bolstered by the CASS procedures described by SJA Peck.[7]

## III. NEITHER EXIGENT CIRCUMSTANCES NOR ANY OTHER EXCEPTION TO THE WARRANT REQUIREMENT APPLIES IN THIS CASE.

The government repeatedly refers to the security concerns regarding the location of NSA Bahrain and the nature of the work done there to argue that the search at issue here was reasonable and suggest that these circumstances somehow create an exception to the warrant requirement. They do not. This Court should reject the government's suggestion that because Master Sergeant Holden took "the most minimally invasive approach possible," Gov't Supp. at 2, the search of Mr. Hitselberger's backpack was constitutional. It was not.

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."
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> Thus the most basic constitutional rule in this area is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions." The exceptions are "jealously and carefully drawn," and there must be "a showing by those who seek exemption * * * that the exigencies of the situation made that course imperative." "[T]he burden is on those seeking the exemption to show the need for it." In times of unrest, whether

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[7] Indeed, the CASS procedure undermines the government's implied consent analysis as well as its "totality of the circumstances" argument. If the signs introduced by the government at the evidentiary hearing represented consent to search anyone (or any place) at anytime, no command authorization would ever be necessary.

> caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or "extravagant" to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won—by legal and constitutional means in England, and by revolution on this continent—a right of personal security against arbitrary intrusions by official power. If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important.

*Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971) (internal citation and footnotes).

Regardless of the nature of the security concerns at NSA Bahrain, the circumstances of this case simply do not meet any recognized exception to the warrant requirement. Under some circumstances, security concerns may justify a warrantless search, but only when there are "exigent circumstances." As the D.C. Circuit has recognized, "exigent circumstances" exist only where there is a "'need to protect or preserve life or avoid serous injury.'" *United States v. Goree*, 365 F.3d 1086, 1090 (D.C. 2004) (quoting *Mincey v. Arizona*, 437 U.S. 385, 392 (1978)). Here, any exigency would have been averted by the seizure of the bag -- the only constitutionally permissible course.

In a footnote, the government suggests that the Court should apply the "inevitable discovery" exception to the warrant requirement. Gov't Supp. at 17 n.4. This suggestion is completely without merit. The "inevitable discovery" doctrine applies only when the discovery of the evidence "would have occurred (1) *despite* (not simply *in the absence of*) the unlawful behavior and (2) *independently* of that unlawful behavior." *Hudson v. Michigan*, 547 U.S. 586, 616 (2006) (Breyer, J., dissenting). "The government cannot . . . avoid suppression of evidence seized without a warrant (or pursuant to a defective warrant) simply by showing that it could

have obtained a valid warrant had it sought one." *Id.* (citations omitted). The government's attempted application of the inevitable discovery doctrine in this case would swallow the Fourth Amendment -- in any case in which an officer failed to get a warrant before a search, the government could simply argue that there was probable cause and that the officer would have gotten a warrant (if he had not conducted the illegal search). Such an application of the rule would obviate the need for a warrant in any case and reduce the Fourth Amendment to a nullity. This is not the inevitable discovery doctrine. The rule "does not refer to discovery that would have taken place if the police behavior in question had (contrary to fact) been lawful." *Id.*

Finally, the government emphasizes the strength of Master Sergeant Holden's belief that the backpack contained classified documents. This is not an exception to the warrant requirement. The Supreme Court has plainly held that if a government agent has "probable cause to believe that a container holds contraband or evidence of a crime," the agent may *seize* the container "pending issuance of a warrant to examine its contents." *United States v. Place*, 462 U.S. 696, 701(1983). The Fourth Amendment may have authorized Master Sergeant Holden to seize the backpack and then seek a warrant (or CASS), but he was not authorized to search the bag. That he may have taken "the most minimally invasive approach possible," Gov't Supp. at 2, as the government argues, is of no moment. Any invasion of privacy -- any search of the bag -- was a violation of the Fourth Amendment. By requiring Mr. Hitselberger to open is backpack and expose the contents to those around him, Master Sergeant Holden violated Mr. Hitselberger's Fourth Amendment rights.[8]

[8]As the government concedes, Captain Hering, who was with Master Sergeant Holden at the time of the search of the backpack, saw the contents of Mr. Hitselberger's backpack after he was required to unzip the bag. Gov't Supp. at 16.

In short, Master Sergeant Holden's actions did not fall within any recognized exception to the warrant requirement.

## CONCLUSION

For the foregoing reasons, and such other reasons as previously presented to the Court, Mr. Hitselberger respectfully moves this Honorable Court to suppress the use as evidence of all tangible objects recovered during the search of his backpack and the search of room 317B in Building 264.

Respectfully submitted,

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