IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	**:**	**CRIMINAL NO. 12-231 (RC)**
	:	
v.	**:**	
	:	
JAMES F. HITSELBERGER,	**:**	
	:	
Defendant.	**:**	

GOVERNMENT'S SUPPLEMENTAL REPLY MEMORANDUM IN OPPOSITION TO MOTIONS TO SUPPRESS EVIDENCE

Following a motions hearing, the Court requested supplemental briefing on defendant's motions to suppress tangible evidence seized from defendant's living quarters and backpack. [Dkt. #73]; *see also* [Dkt. # 38, 39] (defendant's motions to suppress). The United States filed the Government's Supplemental Memorandum in Opposition to Motion to Suppress Evidence [Dkt. #80], (hereinafter, "Gov't Supp. Mem.") and the defendant filed a Supplemental Memorandum in Support of Motion to Suppress [Dkt. #78] (hereinafter, "Defense Supp. Mem."). Based on the entire record, the Court should deny the motions, as set forth below.

I. Defendant Did Not Have a Reasonable Expectation of Privacy in the Contents of His Backpack

In his supplemental memorandum, the defendant asserts that he had an expectation of privacy in the backpack he was carrying when stopped and that people generally have an expectation of privacy in containers they carry, Defense Supp. Mem. at 4, 5, but he does not point to any facts that would allow the Court to find that defendant had a subjective expectation of privacy, or that such expectation was objectively reasonable. "'[A] Fourth Amendment search does *not* occur . . . unless the individual manifested a subjective expectation of privacy in the object of the challenged search and society [is] willing to recognize that expectation as

reasonable.'" *United States v. Maple*, 348 F.3d 260, 261 (D.C. Cir. 2003) (quoting *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (internal quotation marks omitted). Defendant did not manifest a subjective expectation in the privacy of the dictionaries and classified documents that he placed in his backpack while in the Restricted Access Area, and it would have been objectively unreasonable to do so, for three reasons.

First, the defendant did not have a reasonable expectation in privacy in the documents that he took off the classified, Secret printer because he accessed and printed them using classified government machines in a secure, classified information facility which abounded with security measures and warnings about the handling of classified information. *See* Gov't Supp. Mem. at 11-13. In addition to the general security measures, Hitselberger had been trained on the handling of classified information, and there were ample warnings within the Restricted Access Area that would put a reasonable person on notice that he should not expect privacy in the classified government information he was viewing. For instance, at the motions hearing, the defense moved into evidence a variety of photographs depicting the inside of the Restricted Access Area. As Master Sergeant Holden testified, red "SECRET" stickers were affixed to the Secret computer monitors and central processing units, as well as to the Secret printers. As can be seen from the photographs, each sticker says "This medium is classified SECRET. U.S. Government Property. Protect it from unauthorized disclosure in compliance with applicable executive orders, statutes, and regulations." This is a standard issue decal in use throughout the federal government – the sticker bears the number SF-707 (1-87), which is the identifier for this federal form.[1] The printer from which Mr. Hitselberger took each classified document also bore the same decal. The machines that were not classified were marked "UNCLASSIFIED" with a

[1] Examples of the standard classified material decals and other security forms are available from the National Archives at http://www.archives.gov/isoo/security-forms/. (last accessed December 16, 2013).

green SF-710 decal, which are visible in the photos.[2] Given all these security measures and warnings – along with, the government proffers, a banner on the Secret computer system advising the defendant that his use of the system was subject to monitoring – it would have been unreasonable for the defendant to expect privacy in classified material.

Indeed, when it comes to the use of government-owned computers on a military base, courts have held that privacy expectations are reduced or even unreasonable. *See, e.g., United States v. Tanksley*, 50 M.J. 609, 620 (N.M.Ct.Crim.App. 1999) (no reasonable expectation of privacy in government-owned office or computer on military base); *United States v. Muniz*, 23 M.J. 201, 206 (C.M.A. 1987) ("The omnipresent fact of military life, coupled with the indisputable government ownership and the ordinarily non-personal nature of military offices, could have left appellant with only the most minimal expectation –or hope – of privacy . .."); *United States v. Larson*, 64 M.J. 559, 563 (A.F.Ct.Crim.App. 2006) (collecting cases in which military courts found reduced expectation of privacy in government-owned computers).

Second, it would be particularly unreasonable for defendant to harbor expectations of privacy in the documents given his conduct in the Restricted Access Area. Hitselberger accessed, printed, and hid the classified documents right in front of Master Sgt. Holden and Capt. Hering. Having exposed his actions and his possession of the documents to the soldiers in the Restricted Access Area, it would be unreasonable for defendant to expect privacy in these items. Indeed, defendant's conduct indicates that he did not subjectively have such an expectation.

[2] As the United States noted in its Supplemental Memorandum, because the defendant had not asserted that he maintained an expectation of privacy in the classified documents he accessed on the SECRET computer, the United States did not offer evidence of the banner that appeared on the computer screen every time an individual such as Mr. Hitselberger logged on. Gov't Supp. Mem. at 12 n.3. If the Court desires, the United States will formally supplement the record to introduce the banner, which was produced to defendant in discovery, and which informs users that by using the computer, they consent to monitoring and interception of communications and that any communications using or data stored on the computer are not private. As the United States has noted, it has often been held that employees do not have a reasonable expectation of privacy in employer-owned computers, especially where warning banners advise them they are subject to monitoring. Gov't Supp. Mem. at 12-13.

Defendant's Supplemental Memorandum simply does not address how his actions comport with a reasonable expectation of privacy.

If Mr. Hitselberger had any privacy expectation left despite all these factors, it would be further whittled away by the realities of the military base where his acts occurred. The United States elicited detailed testimony about the security situation on this closed, overseas military base, which housed sensitive special forces operations, was situated close to Iran, and which was in a country undergoing a prolonged period of sometimes violent insurrection by the Shia majority against the ruling Sunnis. *See* Gov't Supp. Mem. at 6-7. Given all these factors, it would be unreasonable for Mr. Hitselberger to believe he was immune from search, at least while moving about the grounds of the base, as he was here. This is especially true when the nature of the military base is combined with the other factors discussed above.

The defense attempts to obscure this issue by focusing wholly on the notion of implied consent. The defense argues that the basis for warrantless searches on a military base must be implied consent, and that implied consent searches can occur only at the gates of the military installation and only when visible signs intone certain words. *See* Defense Supp. Mem. at 7-14. The cited cases do not indicate that searches can occur *only* at the gates; rather, they stand for the proposition that the case for suspicionless and warrantless searches is at its strongest at the gates. Nonetheless, the Fourth Circuit has recognized that "[t]he more the public or national interest is involved, as in the case of a closed, top-security installation, the more the judiciary may weigh this in the scale in determining whether the recognized constitutional right of individuals, including civilians who seek and gain entrance to military installations, to be free from unreasonable searches has been invaded." *United States v. Jenkins*, 986 F.2d 76, 78 (4th Cir. 1993) (quoting *United States v. Burrow*, 396 F.Supp. 890, 900 (D.Md. 1975)). The

circumstances of a specific military base may render searches reasonable based not just on implied consent, but because "[t]he barbed-wire fence, the security guards at the gate, the sign warning of the possibility of search, and a civilian's common-sense awareness of the nature of a military base – all these circumstances combine to puncture any reasonable expectation of privacy for a civilian who enters a closed military base. *Id*. at 79.

In *Jenkins*, the Fourth Circuit found a search to be reasonable when officers at Andrews Air Force Base stopped the defendant while he was on base and driving towards an exit, and searched his car. The officers stopped the defendant because he had threatened to use a weapon to kill his wife, who worked on the base, and it was believed that he had come to the base to make good on his threat. The Fourth Circuit found that the search was reasonable based on all the circumstances, which included the nature of the base and its sensitive role as the departure and arrival point for flights carrying the President and Vice President, the defendant's implied consent, and the lack of reasonable expectations of privacy on the base, as noted above. Nothing in the case turned on whether the defendant was entering or exiting a gate. Notably, the Fourth Circuit did not even address whether the officers had probable cause, holding that it was not necessary under the circumstances since the defendant had no privacy expectation.[3]

The Fourth Circuit's description of Andrews Air Force Base in *Jenkins* could readily be applied to NSA Bahrain in this case. Moreover, whereas the court in *Jenkins* did not address whether there was probable cause for a search or an exception to the warrant requirement, the soldiers in this case were acting upon the basis of probable cause and under exigent circumstances, making their conduct all the more reasonable. Whether or not Mr. Hitselberger is

[3] The defendant relies on the civil case of *Morgan v. United States*, 323 F.3d 776, 781 (9th Cir. 2003), for the proposition that the Ninth Circuit has declined to adopt a categorical rule permitting *all* searches on *all* military bases in *all* circumstances based on a theory of implied consent. The United States does not ask this Court to adopt a rule that consent to search is implied on every military base, but rather to examine the facts of this particular base during the relevant time frame.

deemed to have impliedly consented to a search while moving about the base, the features of this military installation, and the fact that signs warned of the possibility of searches, are all factors that must be considered part of the totality of circumstances.[4] After all, "[w]hat is an unreasonable intrusion in a civilian context may be reasonable in a military context." *United States v. Rosario*, 558 F.Supp. 2d 723, 727 (E.D.Ky. 2008).

II. To the Extent Mr. Hitselberger Had Any Reasonable Expectation of Privacy in the Contents of His Backpack, Any Search Was Justified By the Exigent Circumstances Doctrine and Was Reasonable Under All the Circumstances

No matter what degree of privacy Mr. Hitselberger reasonably expected to maintain in his backpack, Master Sgt. Holden and Capt. Hering acted reasonably under the circumstances when they directed him to hand over the classified documents. "The ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)). "Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances." *United States v. Robinette*, 519 U.S. 33, 38 (1996). "Accordingly, the warrant requirement is subject to certain reasonable exceptions." *King*, 131 S.Ct. at 1856. "An action is reasonable if the circumstances, viewed objectively, justify the action. The officer's subjective motivation is irrelevant." *McNeil v. City of Easton*, 694 F.Supp.2d 375, 387 (E.D.Pa. 2010).

As the defendant has noted, a search of a container, even one that is in plain view, ordinarily must be premised on a warrant or an exception to the warrant requirement. "One well-recognized exception applies when 'the exigencies of the situation make the needs of law

[4] The defense spent considerable time at the motions hearing and in its Supplemental Brief exploring what the standard practices were at NSA Bahrain for obtaining a command authorized search or conducting a random search. But the practices of military members – most of whom are not trained law enforcement officials – do not define what is reasonable under the Fourth Amendment. Certainly, the presence or absence of random searches on base would be one of many factors going to whether Mr. Hitselberger had a reasonable expectation of privacy when carrying classified information about the grounds of the base. The fact that random searches did occur on base is one of many factors that, taken together, would make it unreasonable to maintain an expectation of privacy.

enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.'" *King*, 131 S.Ct. at 1856 (quoting *Mincey v. Airzona*, 437 U.S. 385, 394 (1978) (internal quotation marks omitted)). As the United States has established, the exigent circumstances exception justified the reasonable conduct of Master Sgt. Holden and Capt. Hering in directing Mr. Hitselberger to return the classified documents from within his backpack. *See* Government's Consolidated Response to Defendant's Motion to Suppress Tangible Evidence [Dkt. #45] at 11-17; Gov't Supp. Mem. at 15-18.

"Although the Supreme Court has never provided a complete catalog of the exigencies that satisfy the exception, it has recognized that "[t]he need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency." *United States v. Goree*, 365 F.3d 1086, 1089 (D.C. Cir. 2004) (quoting *Mincey v. Arizona*, 437 U.S. 385, 392 (1978)) (internal citation omitted). Similarly, "the need 'to prevent the imminent destruction of evidence' has long been recognized as a sufficient justification for a warrantless search." *King*, 131 S.Ct. at 1856 (quoting *Brigham City*, 547 U.S. at 403); *see also United States v. Tartaglia*, 864 F.2d 837, 840 (D.C. Cir. 1989) ("When probable cause has been established and there is danger that evidence will be removed or destroyed before a warrant can be obtained, a warrantless search and seizure can be justified.").

"The test for exigent circumstances is whether the police had 'an urgent need' or 'an immediate major crisis in the performance of duty afford[ing] neither time nor opportunity to apply to a magistrate.'" *United States v. James Johnson*, 802 F.2d 1459, 1461 (D.C. Cir. 1986) (quoting *Dorman v. United States*, 435 F.2d 385, 391 (D.C. Cir. 1970)). "There being probable cause to conduct a search, the critical question becomes whether, 'guided by the realities of the situation presented by the record,' there was a 'reasonable likelihood that the item *would be*

moved before a warrant could be obtained.'" *Tartaglia*, 864 F.3d at 842 (quoting *McEachin*, 670 F.2d at 1144) *and United States v. Martin*, 562 F.2d 673, 678 (D.C. Cir. 1977) (emphasis in original)). "The 'question of whether there were exigent circumstances is judged according to the totality of the circumstances,' and the standard 'is an objective one, focusing on what a reasonable, experienced police officer would believe.'" *Goree*, 365 F.3d at 1090 (quoting *In re Sealed Case*, 153 F.3d 759, 766 (D.C. Cir. 1998); *see also McNeely*, 133 S.Ct. at 1559..

Based on the detailed and uncontradicted testimony of Master Sgt. Holden, there was probable cause to believe a crime was occurring and that evidence or contraband would be found in Mr. Hitselberger's backpack. Holden had witnessed Hitselberger's actions, and confirmed his observations with a second witness, Master Sgt. Christensen, before taking action. There was clearly probable cause. *See, e.g., United States v. MacDonald*, 916 F.2d 766, 770-71 (2d Cir. 1990) (*en banc*) (once undercover officer had first-hand knowledge of armed drug dealing occurring in apartment at the time of warrantless entry, "exigent circumstances were present."); *cf. Virginia v. Moore*, 128 S.Ct. 1598, 1604 (2009) ("In a long line of cases, we have said that when an officer has probable cause to believe a person committed even a minor crime in his presence, the balancing of private and public interests is not in doubt. The arrest is constitutionally reasonable."). The considerable strength of the probable cause in this case is one of the factors the court should consider in assessing reasonableness.

When "'guided by the realities of the situation presented by the record,'" the exigency in this case justified the limited search at issue. *Tartaglia*, 864 F.3d at 842. The offense the soldiers were witnessing was indeed a grave one.[5] The soldiers also knew that the safety of

[5] "[T]he gravity of the underlying offense [is] a principal factor to be weighed." *Welsh v. Wisconsin*, 466 U.S. 740, 751-52 (1984). The unauthorized retention of national defense information is indeed a grave offense, and the soldiers acted to prevent other grave offenses that they feared might have occurred, such as unauthorized disclosure of the information.

those on the base could be at risk if the classified information in the reports Mr. Hitselberger took was misused or unlawfully disseminated. Master Sgt. Holden testified that he knew that one of the classified documents Mr. Hitselberger had read was the Joint Special Operations Task Force situation report, which described that sensitive unit's current work, some of which "was very sensitive." Sept. 6 Tr. at 19:11-13. By definition, the unauthorized disclosure of Secret information can be expected to cause serious damage to the national security, *id*. at 108:16-17, and Master Sgt. Holden understood that such materials "can be harmful and cause people to lose their lives." *Id*. at 28:-13-17. As a result, Master Sgt. Holden understood it to be "my obligation as a soldier" to make sure the classified documents did not leave the area. *Id*. at 28:7-9. Master Sgt. Holden and Capt. Hering were not trained law enforcement officers. Rather, they were soldiers who were trained in handling classified information and whose jobs revolved around maintaining the security of classified information concerning the highly sensitive work they performed. Their clear objective in pursuing Hitselberger was to secure the classified information he had taken, and their actions should be viewed within that overall context.

Contrary to the defendant's argument, the exigency would not have been adequately addressed merely by seizing Mr. Hitselberger's backpack pending an application for command authorization to search. While Holden kept Hitselberger in his view for most of the time he was out of the Restricted Access Area, he had to take his eyes off Hitselberger for a moment to summon Capt. Hering. With objects such as a few papers, a moment is all that would have been necessary for Mr. Hitselberger to hide the documents on his person or somewhere on the base, to hand them off to another person, or to destroy them. While Master Sgt. Holden believed that the papers were still in Hitselberger's bag, the only way to be sure that the exigency was contained was to persist until the documents were recovered. If the soldiers had simply seized

the backpack and then waited for authorization to search, there would be no way to know whether the documents were still at large, where the information they contained could be used to the detriment of national security. If the documents could not be found, further measures would have been immediately necessary to try to locate them and assess the potential damage. Under these circumstances, the soldiers had to act and "the exigencies of the situation made that course imperative," *McDonald v. United States*, 335 U.S. 451, 456 (1948), for "[t]he Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others." *Warden v. Hayden*, 387 U.S. 294, 299-300 (1967). *See also United States v. Torres*, 534 F.3d at 212 (quoting *United States v. Sanchez*, 519 F.3d 1208, 1211 n.1 (10th Cir. 2008)) ("People could well die in emergencies if police tried to act with the calm deliberation associated with the judicial process.").

Courts have frequently upheld warrantless searches in exigent circumstances analogous to this case, where authorities seek to address an urgent, dangerous situation or recover an object that is highly dangerous under the circumstances. *See Michigan v. Tyler*, 436 U.S. 499 (1978) (firefighters may make warrantless entry to fight fire and investigate its cause and origins); *United States v. Crippen*, 371 F.3d 842 (D.C. Cir. 2004) (exigent circumstances justified entry where there was probable cause to believe a rocket launcher was on premises); *United States v. Geraldo*, 271 F.3d 1112 (D.C. Cir. 2001) (exigent circumstances may justify entry into house where police had probable cause to believe a firearm was inside and that an occupant was armed and likely to use the weapon against intruders). *See also United States v. Roberts*, 166 Fed. Appx. 80 (4th Cir. 2006); *United States v. Uscanga-Ramirez*, 475 F.3d 1024 (8th Cir. 2007). The classified documents in this case were analogous to a dangerous object that must be immediately recovered to avoid the risk of grave harm.

Given the exigencies here, the conduct of the soldiers was especially reasonable because the degree of intrusion on any privacy interest maintained by the defendant was minimal.[6] The soldiers acted in a restrained fashion, directing Hitselberger to hand over the documents, rather than rifling through his bag or conducting a thorough search of his person. "Courts adjudicating the lawfulness of a search under this exception weigh the degree of intrusion against the exigency that is its rationale." *Goree*, 365 F.3d at 1090. Here, the soldiers, who were not trained law enforcement officers, made the minimum possible intrusion in a clear effort to safely recover the classified documents, not to engage in a wide ranging search for evidence of a crime. The search in this case was reasonable because it was "limited in scope and proportionate to the exigency excusing the warrant requirement." *Socey*, 846 F.2d at 1448. The reasonableness of this search is all the more apparent when the Court considers the extremely low or non-existent expectation of privacy that would be reasonable in these circumstances, combined with the nature of the exigency and the restrained conduct of the soldiers.[7]

III. The Command Authorized Search of Mr. Hitselberger's Living Quarters Was Constitutional

In the case of the April 11, 2012 search of Mr. Hitselberger's living space, that search was predicated on a command authorization to search. In the military context, such authorization is a valid substitute for a warrant, including for the search of a civilian. *See United States v.*

[6] Because Mr. Hitselberger was a civilian, compliance with the standards set forth by the Military Rules of Evidence would not excuse a violation of his Fourth Amendment rights. But the Court's reasonableness inquiry can and should be informed by the fact that the soldiers did comply with the standards for reasonableness that are meant to guide their actions in the military context. The Military Rules of Evidence state that a "search warrant or search authorization is not required under this rule for a search based on probable cause when . . .[t]here is a reasonable belief that the delay necessary to obtain a search warrant or search authorization would result in the removal, destruction, or concealment of the property or evidence sought . . .." Mil. R. Evid. 315(g)(1). *See also United States v. Rogers*, 549 F.2d 490, 493 (8th Cir. 1976); *Commonwealth v. Contos*, 754 N.E.2d 647, 659 n.14 (Mass. 2001) (same).

[7] If the Court were to hold that the soldiers should have seized the bag and awaited command authorization to search, suppression still is not warranted, due to the doctrine of inevitable discovery. There is ample basis to determine that authorization to search would have been obtained based on the observations of Master Sgt. Holden and Capt. Hering. *See* Gov't Supp. Mem. at 17 n.4.

Rogers, 388 F.Supp. 298, 301 (E.D. Va. 1975); *United States v. Burrow*, 396 F.Supp. 890, 900 (D.Md. 1975); *see also* Maj. Jeff. A. Bovarnick, *Can a Commander Authorize Searches & Seizures in Privatized Housing Areas?*, 181 Mil. L. Rev. 1, 40-41 (2004) ("Under MRE 315, there is little doubt that commanders can authorize searches of on post government-owned quarters. This is true even if those quarters are occupied by civilians . . ..."). The surrounding circumstances make the reasonableness of this search especially clear. First, exigent circumstances still pertained, since it was not known whether Hitselberger had taken any other documents. Second, Hitselberger's privacy expectations were diminished while on a secure, closed military base. Even if he maintained an increased degree of privacy in his personal living space, this would not be the same expectation held by a citizen in a private home not located on a navy base. When all these things are taken together, the search was reasonable.

CONCLUSION

Soldiers saw defendant hide classified documents and take them out of a secure area without authorization. Worried that the documents could quickly be put to a dangerous use, the soldiers followed defendant and told him to give the documents back, until he did so. The defendant's suppression motions ask the Court to find that this was unreasonable, and that the only reasonable course of action was to wait for authorization to search the backpack, even if that meant running a substantial risk that the classified documents might be unaccounted for or could be transmitted to someone else. Such a holding would turn reason on its head. The soldiers in this case acted reasonably under the circumstances and consistently with the Fourth Amendment, and the Court should deny the motions to suppress.

Respectfully submitted,

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Certificate of Service

I, Thomas A. Bednar, certify that I served a copy of the foregoing Government's Supplemental Memorandum in Opposition to Motions to Suppress Statements by ECF on Mary Petras, Esq., counsel for defendant, this 20th day of December, 2013.

_____/s/_Tom Bednar_____
Thomas A. Bednar