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July 7, 1966

The Honorable Roszel C. Thomsen
Chief Judge
United States District Court
District of Maryland
502 Post Office Building
Baltimore, Maryland 21202

Re: Heine v. Raus, C.A. No. 15,952

Dear Judge Thomsen:

Enclosed is the plaintiff's Memorandum Brief in Opposition to Defendant's Motion for Summary Judgment. A copy has been also sent to the Clerk of the Court.

It became necessary because of the conflict of schedules between Mr. Raskauskas and myself to request an extension of time to July 5th. [redacted] kindly agreed, stipulating however that there would be a corresponding deferral of the defendant's response.

The press of personal business required an extension of two additional days. However, attempts to reach [redacted] were not successful, it was understood however that he was out of the city for the entire week.

In view of your scheduled absence and the cushion of time existing between the scheduled time for the defendant's response and the tentative hearing date, we hope and feel that this delay will not inconvenience the Court.

Respectfully,

Robert J. Stanford

RJS/fhr
Enclosure/mentioned
cc: [redacted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DERIK HEINE,	)	
Plaintiff,	)	
v.	)	Civil Action No. 15,952
JURI RAUS,	)	
Defendant.	)	

MEMORANDUM BRIEF OF PLAINTIFF
IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

In compliance with the direction of the Court at the continued hearing on May 13, 1966, on the defendant's Motion for Summary Judgment, comes now the plaintiff, Derik Heine, by his counsel, Ernest C. Raskauskas and Robert J. Stanford, and submits this outline of his principal points in opposition to the defendant's pending Motion for Summary Judgment.

I. Plaintiff Urges Pending Motion Respecting Amended Answer.

Plaintiff's Motion to Strike Motion to Amend Answer redesignated by the Court as a Motion to Strike Order Amending Answer is still pending and plaintiff urges the Court to rule on said Motion prior to its consideration of defendant's Motion for Summary Judgment, and in accordance with the Court's statement at the hearing of April 14, 1966.[1]

In defendant's Motion to Amend Answer, he attempts to justify a delay of more than one year in pleading the affirmative and annihilating defense of absolute privilege on the "reasons clearly beyond the control of the defendant, as detailed in the testimony of [redacted]"[2] when in fact said

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1/ Transcript of Proceedings, April 14, 1966, p. 5.

2/ Memorandum of Points and Authorities in Support of Motion to Amend Answer.

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[redacted]

witness was unable to state why the Central Intelligence Agency reversed its position and permitted the tardy assertion of the defense other than for reasons of expediency[3] and further, said witness could neither explicitly state that because of the secrecy law was the defendant forbidden to assert the defense of absolute immunity,[4] nor would the witness disclose who directed or forbid him to assert the defense of absolute privilege.[5] The Court is furnished no information as to the capacity, authority, or rank of the person purportedly forbidding the defense of absolute privilege except that in a question propounded by [ ] to [ ] an inference can be drawn that at least a discussion was had with an attorney concerning the question of raising the defense of absolute privilege.[6] In contradistinction to the vague, ambiguous and pretended reasons for the allowance of an amended answer, plaintiff has asserted and meticulously detailed in his opposition to said Motion, specifically and conclusively the grounds for the denial of such a motion under existing Federal Case Law, of undue delay, bad faith, dilatory motive on the part of the movant, and undue prejudice to the plaintiff by virtue of the allowance of the amendment, which plaintiff hereby urges upon the Court without restatement, and states that defendant has asserted no impressive reasons upon the Court on which it may exercise its discretion, and plaintiff requests that the Court

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3/ Transcript of Proceedings, p. 73, [ ] Esquire, "I do not know the policy reason or other reason that the Agency decided to change its stand."

4/ Transcript of Proceedings, p. 73, Testimony of [ ] "Well, I presume so, yes. The law [ ] was pointed out."

5/ Transcript of Proceedings, Testimony of [ ] pp. 70-71, "Frankly, [ ] I would think not."

6/ Transcript of Proceedings, March 11, 1966, p. 69.

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[illegible] in its consideration of the testimony of [redacted] as it suggested it would at the conclusion of the hearing of March 11, 1966.7/

II. There Exist Numerous Genuine Issues of Material Fact.

A. In his first opposition to the defendant's Motion for Summary Judgment, the plaintiff set forth in columnar fashion the numerous controversies, contradictions and conflicts as set forth in the complaint, the answer, and all of the affidavits filed herein on behalf of the plaintiff and the defendant in various stages of the litigation as well as those filed with the motion of the defendant and the opposition of the plaintiff.

These contradictions are still present and are so material that they alone prevent consideration of the issue of governmental immunity which constitutes the totality of the defendant's Motion for Summary Judgment. There is a mutual exclusion palpably evident in the juxtaposition of the material averments. Most pointed is the comparison of the Second and Ninth Defenses in the Amended Answer.

In the Second Defense, the last sentence of the final paragraph, section 1, the defendant denies making statements attributed to him as specified in those paragraphs (i.e., paragraphs 6 and 7).

In his Ninth Defense he states that on those occasions specified in paragraphs 5, 6, and 7, of the complaint, when he spoke concerning the plaintiff, he was acting within the scope of his employment. Thus to deny having made the allegations but to arrogate course-of-employment privilege is a metaphysical impossibility.

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7/ Transcript of Proceedings, March 11, 1966, pp. 74-75.

B. Assuming [illegible] all other averments of the defendant, there exists a factual issue with regard to the scope of the Agency's functions. The defendant contends that Title 50, § 403 (d)(3), permitted Raus' action under the power of the final clause "And provided further, That the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure."

However, the plaintiff contends that the same statute and paragraph § 403(d)(3) contains a stricture and specific prohibition against the Agency: "Provided, That the Agency shall have no police, subpoena, law-enforcement powers, or internal-security functions." The necessity for the resolution of this issue will defeat the Motion for Summary Judgment.

III. Affidavits And Testimony Do Not Present Admissible Evidence.

There is a gross insufficiency in the affidavits supporting the defendant's motion and in the testimony elicited in the deposition of Juri Raus. In Sprague v. Yost, (CCA 8th, 1945) 150 F.2d 795, 800, the Court said:

> "When affidavits are offered in support of a motion for summary judgment, they must present admissible evidence."

The primary rule for admission of evidence in any Court in this land is the requirement that it be subject to cross-examination. However, all of the affidavits, reiterations and restatements, are replete with multiple assertions of full disclosure and a declaration of an inability to disclose more. This was sealed with finality by the claim of Governmental privilege entered by Admiral William Raborn, then Director of the Central Intelligence Agency. Under footnote 2 of the original memorandum in support of the defendant's motion, there was quoted from

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50 USCA § 403(g) that the Agency is exempted from the provisions of any law "which require the publication or the disclosure of the organization's function, aims, official titles, salaries or numbers of personnel employed by the agency."

In adherence to this policy, and in accordance with the oft-repeated and oft-modified position of the defendant, we must presume that full disclosure has been made. As held in Sexton v. American News Company, DCC, 1955, 133, F. Supp. 591 "where evidence is taken in support of motion for summary judgment, it is the duty of counsel for both parties to fully disclose all evidence bearing on the issues raised by the motion..." If the affidavits and Raus' deposition are the full and complete disclosure, it is readily apparent that the evidence which the defendant asks the Court to accept cannot stand.

If, in attempting to prove at trial that he was in fact an employee, Juri Raus, under direction, confines his statements to the fact that he received money directly or indirectly from the Central Intelligence Agency and refuses any other inquiry on cross-examination which would bring a clarification of a vague generality which sheds no light upon the issue of employment, that testimony would be summarily stricken. We must conclude that the refusal to submit to cross-examination on deposition exemplifies the course at trial. Since it is the intent of Rule 56 that the result of a Summary Judgment hearing be the same as would be achieved at trial, it follows that the defendant's motion must fail.

IV. Insufficiency of Facts Presented.

There exists a gross insufficiency in the affidavits of Richard Helms and the testimony of Juri Raus insofar as they purport to set forth incontrovertible facts showing that the

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defendant was an employee of the Central Intelligence Agency, that he had a scope of employment, and that in the course and scope of that employment he launched his slanderous attack upon the plaintiff.

Nothing sets forth with decisiveness and clarity the elements of fact upon which the Court can make a determination of the vital central issue upon which the motion depends. The record on the issue of employment is still such that reasonable men may widely differ since the evidence is conflicting, of uncertain weight, in part incompetent and susceptible of various interpretations. Therefore only by a trial can the Court ascertain truth of the pertinent facts and move to decide such questions of substantive law as those facts present. In such a situation the entry of summary judgment is not the proper method, American Security Company v. Hamilton Glass Company, 254 F.2d 889, 892.

The affidavits of Richard Helms contain declarations that no further information can be given concerning the employment of Juri Raus and were accompanied by memoranda of Counsel declaring that each affidavit was the final word possible on the subject under the demands of national security. However nothing in the affidavits or the interrogation of Juri Raus at the time of his deposition in open court is sufficient to show that the defendant was in fact an employee with the Central Intelligence Agency, that as a regular employee with known and prescribed duties he had a scope of employment. No evidence is presented to show that he was more than an independent contractor not dissimilar to the private detectives who undertook the assignment to travel throughout the United States and Canada in order to gather information about the plaintiff. The absolute privilege of Barr v. Matteo, 360 U.S. 564, 571, which sets forth the philosophy of Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), applies only to actual government officers

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not to co-operators, volunteers, informers or other links with a particular community or culture who are used or "employed" (as defendant semantically urges) for a particular purpose but who possess no scope of duties which demands freedom of action, discretion or choice. If the defendant as a volunteer or an independent contractor agreed to utter slanderous comments about the plaintiff, to the use of the CIA, he did so at his own risk, but the privilege does not exist for someone who is doing his work outside of a scope or course of employment.

V. Absolute Immunity Does Not Attach To All Government Employees.

If it could be clearly shown that the defendant Raus was a subordinate employee and that his sole duty was the issuance of a totally untrue vilification (and it is staunchly averred by the plaintiff that such has not been shown by the defendant) he would still not enjoy the governmental immunity as contemplated by Barr v. Matteo and Howard v. Lyons. If a person is not exercising a discretion he has no freedom. If he has no freedom or scope of action, then there is no necessity for the immunity as contemplated by the Supreme Court decisions, or the decision of Learned Hand as set forth in Gregoire v. Biddle. Absolute immunity is not enjoyed by all government employees but only officers or officials with discretional choice.

In quoting the Barr v. Matteo, 360 U.S. at 572, 573, the courts said:

> "The privilege is not a badge or a monument of exalted office, but an expression of a policy designed to aid in the effective functioning of government * * * it is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted. The relation of the act complained of to "matters commited by law to his control or supervision," * * * must provide the guide in delineating the scope of the rule which cloaks the official acts of the executive officers with immunity from civil defamation suits."

This clearly shows that the doctrine of absolute privilege to speak or write in a defamatory manner of any person which was recognized to reside in federal officers of Cabinet rank was not by either the Barr or Howard cases extended to government employees of any rank or of any connection but to "officers of lower rank in the executive hierarchy." The defendant by his own claim, was a government employee of subordinate rank and not an officer in the executive hierarchy. The affidavits and the statements in deposition and the claims by Counsel all place defendant Raus outside the contemplation of the oft-quoted Supreme Court decisions which form the basis of the Motion for Summary Judgment.

VI. The Statements by Juri Raus Were Actions Beyond the Statutory Power of the Central Intelligence Agency and Beyond the Claimed Instructions to the Defendant.

Throughout the pleading, defendant has repeatedly quoted with self interest that the Director of Central Intelligence is directed to protect intelligence sources and methods. However, this is a conveniently truncated repeatedly by the provisions of the quoted statute. 50 USCA § 403(d)(3) and 50 USCA § 403(g) state that the Director is directed to protect "intelligence sources and methods from unauthorized disclosure." The clear intent of the word "disclose" is to protect information for known sources of information within the knowledge of the Central Intelligence Agency from revelation to others outside of the Central Intelligency Agency as the intelligence gathering organization for the United States Government. A claim of protection of sources does not extend to a speculative area when the slanderous utterances are made to potential possessors of information and not intelligence sources who could be notified directly by their contact and no doubt have been in accordance with accepted intelligence procedures. To disclose the information received from behind the Iron Curtain to none other than Central Intelligence Agency or

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known and approved persons. The slanders of the defendant did not therefore attempt or accomplish the protection of foreign intelligence sources from disclosure, but served merely to poison the reputation of the plaintiff, a heretofore widely recogni anti-communist hero.

Further Central Intelligence Agency Regulation HR 10-20, effective 29 August 1952, submitted by the defendant states in paragraph .20 Protection and Disclosure of Information, in paragraph b, indicates that the information to be protected is that information within the Agency or other intelligence components.

Nothing in the supplementary memorandum on the authority of the Central Intelligence Agency gives any further authority than has been quoted to date. The defendant has the affirmative burden to establish statutory authority before he can claim official immunity and in Maryland this must be done by a preponderance of the evidence.

Therefore until the defendant makes such a showing, the defense of absolute privilege and summary judgment are not available to him.

There exists a factual issue concerning the statutory authority as detailed under Section II.

In the affidavit of August Kuklane heretofore filed by plaintiff, said deponent states that the defendant claimed the FBI as the source of his slanderous statements. Defendant, by inference from the testimony in his deposition of April 28, 1966, p. 66, admitted the attribution and further directly admitted that the FBI in fact did not furnish him any information that plaintiff was a KGB agent, p. 67. Accordingly, such a deliberate, malicious, admitted slanderous untruth cannot be statutorily justified as the protection as an intelligence source. The tortuous action of the defendant was not in protection of any "intelligence source

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from unauthorized disclosure" but rather was a direct, overt, wrongful act against an individual without reference or relation to any intelligence source in need of protection.

Furthermore, such remarks according to the affidavit of August Kuklane were in marked contrast to the instructions supposedly given to a subordinate employee who had, according to the defendant, no discretion.[8/]

VII. Premature Presumption of The Existence of A Federal Question.

It is premature to determine whether a privilege exists for statements communicated in the course of employment under State court rulings or whether this is a Federal question, until there is a showing of facts beyond dispute that the defendant was acting within the scope of his employment for the Central Intelligence Agency. This once again illustrates that the defendant is premature in his motion and presumptuous in his claim.

VIII. The Refusal To Permit Discovery By The Defendant Exempts The Plaintiff From Responding to Motion.

Rule 56(f) provides that when a party opposing the motion cannot for reasons stated present by affidavit facts essential to justify his opposition, the Court may refuse the application for judgment. This is most pointly true in the instance where the movement for summary judgment is in possession of the very facts necessary to permit the opponent to properly oppose the motion. Defendant Juri Raus is in possession of all of the facts relating to his connection, compensation, duties, assignment, scope of employment and responsibility. He refuses to disclose any of them in response to the interrogatories propounded to him in written

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8/ The Supplemental Memorandum of the Defendant states "that Raus was employed on those occasions specified in paragraphs 5, 6 and 7 of the complaint to carry out a specific assignment." Further, "Raus was acting as a subordinate government employee in the discharge of orders."

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form or by examination by deposition held in open court.

The interposition of the governmental privilege not to disclose information of a security nature is an independent, non-partisan rule of law which favors neither side. Since secrecy prevents full disclosure and prevents subjection of defendant Raus to cross-examination, the said defendant cannot prove by a preponderance of the evidence that he is within the scope of employment of the Central Intelligence Agency. The failure to disclose therefore must inure to the detriment of the defendant and not to the plaintiff who seeks information from the defendant. As stated in Moore's Federal Practice, section 56.24 with regard to Rule 56(f), FRCP,

> "If however, the Court is of the opinion that since the knowledge is in the possession or control of the moving party, who is, of course, an interested party, and that the opposing party may be able to establish his claim or defense if afforded the opportunity to cross-examine the moving party in Court, or for some other reason the case needs the full development of a trial, the Court may deny the motion for summary judgment."

IX. The Formal Claim of Privilege Lodged By The CIA Estops It And The Defendant From Any Subsequent Proffer Of Privileged Facts.

On April 28, 1966, the CIA, in writing, over the signature of its then Director, Admiral W. F. Raborn, filed a formal Claim of Privilege. This action was accepted by the Court to the extent that the plaintiff was precluded from even ascertaining the gross income of defendant as reported on defendant's federal income tax return for 1964, and whether he was contacted or he contacted the FBI concerning Eerik Heine, Deposition of Juri Raus, p. 59, p. 75.

Therefore, the in camera affidavit of Lawrence R. Houston, and the annexed and admittedly secret papers, amount to a repudiation by the General Counsel of the Agency of previous Claim of Privilege by the Director of the Agency. This is a classic

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example of judicial estoppel, and under Maryland law, defendant is estopped to proffer inconsistently the evidentiary materials submitted by Mr. Houston in an attempt to shore up and salvage the arguments of defendant in his Memorandum Concerning the Authority of the Central Intelligence Agency. M.L.E. Estoppel § 43.

Accordingly, it is not necessary for counsel for plaintiff to review or study the affidavit and exhibit filed in support of defendant's Memorandum Concerning the Authority of the Central Intelligence Agency, since the same cannot be considered by the Court.

X. Plaintiff's Counsel Cannot Review the Secret Filings Proffered by Defendant Concomitant With the Discharge of Their Ethical Obligations To Their Client.

Assuming without admitting, that the secret papers filed by Mr. Houston were not susceptible of estoppel, nevertheless, plaintiff's counsel could not in good conscience and in accordance with the Canons of Professional Ethics of the American Bar Association review said secret papers. Section 15 of said Canons, among other matters, directs that "In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense." In a courtroom climate where the supposedly impartial representatives of the government, purportedly there only to protect state secrets, interpose objections as to materiality, Transcript of Proceedings, April 28, 1966, p. 68, second objection of Mr. Moroney, counsel will not and cannot circumscribe the prosecution of his prospective arguments and remedies on behalf of his client, under the Damoclean sword that some argument or some tactic is proscribed or prohibited because

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it would disclose some "method or technique" of intelligence or perhaps reveal some secret in the "nether world" of international conspiracy, Defendant's Motion for Summary Judgment, p. 5.

In addition, the condition of secrecy imposed upon counsel, precluding consultation and conference with their client concerning said proffered materials, is patently divisive and violative of the undivided fidelity which must exist between counsel and client, and is contrary to the adverse and conflicting interest rule contained in Section Six of the Canons.

For the foregoing reasons, plaintiff respectfully moves the Court to deny defendant's Motion for Summary Judgment.

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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing MEMORANDUM BRIEF OF PLAINTIFF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT was mailed, postage prepaid, to [ ] and [ ] Attorneys for Defendant, to their office address at [ ] this 7th day of July, 1966.

Ernest C. Raskauskas

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