

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

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MICHAEL A. AQUINO, :
Plaintiff, :
:
-vs- :
:
MICHAEL P.W. STONE, :
Defendant. :
-----:

C.A. No. 90-1547-A

HEARING ON MOTIONS

May 31, 1991

Before: Claude M. Hilton, Judge

APPEARANCES:

Gary R. Myers, Counsel for the Plaintiff

Patrick Lisowski and Richard Parker, Counsel for Defendant

1 THE CLERK: Civil action 90-1547-A, Michael Aquino
2 versus the Honorable Michael P.W. Stone.

3 MR. PARKER: Good morning, Your Honor. Richard
4 Parker for the United States. With me is Major Patrick
5 Lisowski from the Army Litigation Division. Major Lisowski
6 is a member in good standing of the Bar of Pennsylvania.
7 Accordingly, I move his admission pro hac vice.

8 THE COURT: All right, the motion is granted. Who
9 wants to go force? You have both got motions for summary
10 judgment.

11 MR. MYERS: Your Honor, the plaintiff in
12 conversation with the defendant has agreed to go first. To
13 the extent necessary, I wonder if I might reserve two minutes
14 for rebuttal.

15 THE COURT: All right.

16 MR. MYERS: Your Honor, this is a case that elicits
17 immediate emotional response. It is a titling action by the
18 United States Army against a former active duty officer who
19 has been accused of heinous acts against small children,
20 conspiracy, sodomy, indecent acts against small children.
21 What makes it more different is the religious, is the
22 religion predicated upon the worship of Satan.

23 I want to say that with respect to this individual
24 and because there are multiple buzz words associated with
25 this particular case, it is imperative that the Court

1 recognize in Exhibit 13 the status and character of this
2 man. You will find there the efficiency reports of this man
3 through his military career. Each and every one is
4 outstanding. His last one refers to him as a man of the
5 highest moral and ethical standards. I believe that a review
6 of his military record will show that.

7 The church of which he is the head is the Temple of
8 Set. It has been recognized by the Internal Revenue
9 Service. There has been no secrecy associated with it.

10 The man is a Ph.D. in political science. He is an
11 intellectual. The dogma that he predicates his religion upon
12 comes from Egyptian and pre-Egyptian theology having to do
13 with the anti-Christ view of things. But nonetheless, not a
14 dogma that suggests abuse of children, animals or any other
15 form of heinous conduct is appropriate.

16 And I want to predicate all that I do today on
17 those two simple statements, because we are not dealing here
18 with an individual who has gone outside the mainstream of
19 American Society with regard to conduct. He has gone outside
20 the mainstream of American Society in a protected
21 constitutional fashion with respect to religion.

22 Now, the Government in their brief suggests that
23 although we have brought this suit as the plaintiff on a
24 privacy act, that it is an inappropriate vehicle and that the
25 APA should be used so that you are limited to an arbitrary

1 and capricious standard. We believe that you need not get to
2 the arbitrary and capricious issue. We believe that the
3 Privacy Act applies.

4 If one examines the case of Ryan versus the
5 Department of Justice decided by the Fourth Circuit, in 1979,
6 there you will find, Your Honor, that the exemption from the
7 Privacy Act which the Government relies upon was scrupulously
8 examined by the Fourth Circuit. That court concluded that
9 the exemption is only viable if the reasons for the exemption
10 apply to the particular case.

11 The reasons for the exemption of the Privacy Act in
12 this case as stated in the C.F.R. applicable to this case are
13 as follows: If there is an ongoing investigation. If there
14 are classified matters to be revealed. If there are
15 informants to be protected. If there are individual privacy
16 rights to be protected. If there are investigatory
17 techniques to be protected. None of those reasons apply to
18 this case.

19 This is an investigation that was completed,
20 completely and fully. Matters that were a part of the
21 Privacy Act in the prior investigation were given to the
22 plaintiff upon discovery requests for documents.

23 There is no ongoing investigation. This case comes
24 before you after the investigation is utterly and totally
25 completed. There are no confidential informants. No privacy

1 rights to be protected. No national secrets to be revealed.

2 So, we believe as the plaintiff that the
3 appropriate forum is the Privacy Act with its attendant
4 damage provisions.

5 Moving now, if I may, Your Honor, to certain
6 questions that give rise to why we are here. You have read
7 the briefs, I am not going to belabor you with the facts.
8 But it is more than passing strange that the brief from the
9 plaintiff, which laid out with particularity egregious
10 misconduct of the military in this case, was not rebutted.
11 Not rebutted.

12 There is no probable cause in this case, Your
13 Honor, which is the test, to conclude that this man has done
14 anything. The plaintiff through counsel has been able to
15 identify three separate and distinct alibis, all of which
16 have held up.

17 The defendant in this case attempted to title the
18 plaintiff's wife based upon the same eyewitness testimony of
19 the little girl who is supposed to have been molested. And
20 yet that woman, Mrs. Aquino, was taken off the title block by
21 the Army, notwithstanding the eyewitness testimony of this
22 little girl.

23 I point out to you, Your Honor, that this case was
24 a cause celebre in the San Francisco Bay area and most of the
25 west coast. It received huge amounts of publicity. The FBI

1 and the San Francisco Police Department were inextricably
2 involved in it for month upon month. Nothing came of it.

3 What did happen after they closed their cases was
4 that Senator Jesse Helms, because of the high profile nature
5 of my client, initiated an inquiry to then Secretary Marsh
6 regarding my client. And you have Senator Helms' letter in
7 front of you.

8 And I say this to you, Judge. Very simply, what
9 happened was this. A couple of parents who had a little girl
10 decided that Michael Aquino was a reasonable target. And the
11 CID, which is the Army investigative branch, in league with
12 their superiors started a campaign to make certain that
13 Senator Helms was satisfied and that this Satanism would be
14 eliminated from the Army. And that is exactly what
15 happened. And I stand on every line and sentence that you
16 have in that brief before you.

17 Now, as a result of all of this the parents of this
18 little girl have filed \$3 million in claims from the United
19 States Government. There is not one other child at the
20 Presidio Day Care Center, not one other child out of a
21 multitude of nearly 20 who alleged abuse, who could identify
22 Michael Aquino or his wife other than this little girl who
23 was then three years old. And when did this little girl
24 identify Mike Aquino? Not in 1987 when all this happened,
25 when the FBI was there. Her parents said she identified him,

1 she identified him supposedly in 1989.

2 Now, we are talking about the memory of a very
3 small child. And I ask you to take judicial notice at least
4 of what two and three-year-olds can and cannot remember.

5 There is not the slightest prospect, Your Honor,
6 that my client engaged in any form of misfeasance or
7 malfeasance. As an Army officer he was utterly superior, but
8 they through him out. And the way they through him out was
9 this. He came up for continuation as an AGR officer, meaning
10 a National Guard officer. The test for that was whether or
11 not he was fully qualified. And you will find a memo in the
12 file, part of the exhibits, showing that he clearly was fully
13 qualified. And there was a billet for him to fill.

14 But what the Army did was they advised this
15 continuation board that Michael Aquino had been flagged.
16 Improper. The only matter that is supposed to be before that
17 continuation board is his OMPF, which is basically his
18 personnel file. Improper. There is an interesting
19 memorandum detailing the scenario of events that occurred in
20 the Aquino matter which I have provided to the Court as an
21 exhibit, which was obtained under the Freedom of Information
22 Act.

23 Judge, this is simply a case where there are no
24 conspirators. There never was any evidence that Michael
25 Aquino was in any way, shape or form associated with a Mr.

1 Gary Hambright who was at the Presidio Day Care Center. Mrs.
2 Aquino was dropped from the titling block for lack of
3 probable cause. Who did he conspire with? This child was
4 examined by medical doctors and found to be perfectly fit
5 physically. Although she said she was raped, although she
6 said she was sodomized, there is no evidence of that.

7 Michael Aquino could not have done this. This
8 child was only in Mr. Hambright's class in September and
9 October of 1987. And Michael Aquino was here in Washington
10 during that period of time.

11 What the CID did was they tried to figure out when
12 Aquino was in San Francisco and convert the facts to that
13 date. The only date that they found to be meaningful, June
14 10, plaintiff has provided an absolute alibi for that date.

15 Your Honor, my practice is limited to military
16 law. And I know the men who are making these decisions, and
17 they are not evil men. It is not the evil men we have to
18 worry about. It is the well-intentioned ones who bend to
19 pressure. And that is what has happened in this case. No
20 matter what standard you choose to employ, whether it be the
21 arbitrary and capricious standard because you do not feel
22 that the Privacy Act applies here, and we strenuously suggest
23 that it does, you must conclude, Your Honor, that it is
24 arbitrary and capricious, I say this respectfully of course,
25 arbitrary and capricious not to title Mrs. Aquino and to

1 title Dr. Aquino when the same little girl identified them
2 both.

3 No, there was an agenda here, Judge. The Army
4 carried out that agenda. They made certain that the man
5 would never go to trial because they titled him after the
6 statute of limitations ran. They had the best of all
7 worlds. They satisfied Senator Helms, they satisfied their
8 own needs, and they left this man with no career.

9 And that is what happened in this case, Judge. And
10 I believe that the factual representations we have made, all
11 of which are supported by documentation, none of which are
12 speculative, all of which are unrebutted by the Government,
13 are dispositive.

14 Thank you.

15 THE COURT: All right.

16 MR. LISOWSKI: Your Honor, at the outset I would
17 like to say that the Government has not chosen to respond to
18 every allegation that plaintiff makes because the Government
19 feels very strongly that there is absolutely no credence to
20 most of those allegations at all. And that to respond to
21 those is not necessary.

22 The facts of the case are fairly straightforward.
23 This case comes down to two issues, Your Honor. Does the
24 Privacy Act exemption apply; and if so, were the Government's
25 actions arbitrary and capricious.

1 The Government agrees with plaintiff's counsel and
2 plaintiff has conceded that if the Privacy Act exemption does
3 apply, the (j)(2) exemption, then the arbitrary and
4 capricious standard is the correct one to apply in this
5 case. And if that is the correct standard under the APA,
6 then plaintiff is entitled to no damages. Plaintiff seeks
7 the broader de novo review, and he seeks the glimmer of hope
8 that he can recover some damages under the Privacy Act.

9 The Ryan case states that there are two
10 requirements for a proper exemption. First, that the
11 secretary promulgate regulations, which the Secretary of the
12 Army has done in 32 C.F.R. 505.5. And secondly, that those
13 regulations state the reasons why records are exempt. And
14 the Army has also done that.

15 I think a case that is better on point here, Your
16 Honor, is the Wentz case that is cited in the Government
17 brief. Ryan involved a Privacy Act issue of access and
18 wrongful disclosure. The Wentz case involves a plaintiff who
19 was seeking to amend a law enforcement record, which is more
20 directly on point here. And in Wentz the Court noted that
21 the (j)(2) exemption is a general exemption which is designed
22 to apply to a whole system of records, which is the case
23 here.

24 And the Court in Wentz also noted that in examining
25 this issue, the Privacy Act exemption or the Privacy Act

1 provision for amendment of records falls under 552a(d). And
2 that subsection is entitled Access to Records. And access,
3 as is stated in the regulation, necessarily includes
4 amendment.

5 So, it is not inconsistent for the Government in
6 their exemption regulations to also address access to
7 records. And under the subsection in the Privacy Act
8 statute, it is consistent then for that access to also
9 include amendments to records and the reasons are the same.

10 For that reason, Your Honor, the Government urges
11 that the Privacy Act exemption does apply in this case.

12 Even if Your Honor were to find that the exemption
13 does not apply, the Privacy Act still allows, allows a
14 plaintiff only to amend factual determinations. And in this
15 case, Your Honor, clearly the facts are not in dispute. The
16 little girl made the identification at the Post Exchange
17 while she was shopping with her parents. And the dispute
18 that the plaintiff has is with the evaluation and
19 determination of those facts.

20 And the Privacy Act is not meant to allow a
21 plaintiff who disagrees with a determination to change, to
22 shape or color that determination to his own likings. It is
23 meant to allow the plaintiff to attack facts that are in
24 error. And plaintiff is only allowed to attack the
25 determination if he can discredit each and every one of the

1 underlying facts. And plaintiff has not done so in this
2 case.

3 Additionally, Your Honor, if you find, once again
4 assuming that the Privacy Act did apply, plaintiff would
5 would not be entitled to damages. He has the very formidable
6 barrier that in order to prove damages, he as to show
7 causation. And the only causation that is mentioned here in
8 the record is purely speculative, on whether or not the
9 Continuation Board may have known that the plaintiff was
10 flagged or titled, whether or not that would be improper.
11 And that certainly doesn't meet the high hurdle of
12 causation.

13 And it doesn't come close to meeting the even
14 higher hurdle of showing that the Army acted willfully and
15 intentionally in doing so.

16 Finally, Your Honor, the only way one can rule for
17 the plaintiff in this case is to adopt the plaintiff's view
18 of the facts. And that means that you have to assume or you
19 have to believe that a mother and a father instructed their
20 daughter to fabricate this story of child molestation and to
21 identify or pick out someone who they didn't like and talk
22 their daughter or embed in her somehow the fact that this was
23 the man that molested you.

24 If you look at the facts, Your Honor, Colonel
25 Aquino left the Presidio San Francisco in the end of the

1 summer of 1986. He was assigned here in Washington, D.C.
2 After Washington, D.C. his follow-on assignment was to go to
3 St. Louis. He was only back in the Presidio in San Francisco
4 during that summer. Plaintiffs would not even know that he
5 was back there. He had left the Presidio. How would they
6 know that their daughter would see that person in the Post
7 Exchange in San Francisco in the summer of 1987 when he had
8 left that area for a year and he was being reassigned to St.
9 Louis?

10 And yet this girl, in a completely public setting,
11 identifies this man as Mikey, a man who sodomized her and
12 having her place her mouth on his penis. There wouldn't be
13 any tears or anything in her vagina or anus for that kind of
14 sodomy.

15 Based on the facts, Your Honor, you would have to
16 believe that there was a giant conspiracy between the
17 parents, the daughter, the psychiatrist, the child
18 psychiatrist that treated the girl, between the CID agents
19 who investigated the case, between the military policemen and
20 investigators who reviewed the case, and between the
21 officials in the Army Criminal Law Division who also reviewed
22 the case.

23 And finally, Your Honor, plaintiff is not left
24 without a remedy here. The Privacy Act requires and Army
25 Regulation 195-2 provides that remedy. That if the plaintiff

1 disagrees with a determination that is made, he should be
2 allowed to state the reasons for his disagreements, and those
3 reasons should be appended to that official record. As you
4 can see by the volume of this administrative record that you
5 have, Appendix F, which is part of the Criminal Investigation
6 Division report of investigation, includes all of the
7 submissions made by the plaintiff which state his side of the
8 story and the reasons why he disagrees with this.

9 But the proper way to dispose of this case, Your
10 Honor, is to examine the (j)(2) exemption under the Privacy
11 Act, and to conclude that this (j)(2) exemption applies under
12 the Ryan case and the Wentz case under either or both cases
13 to this case at hand, and that the Army did not act
14 arbitrarily and capriciously in making its determination.

15 Your Honor, plaintiff has a lot better chance in
16 this case of fitting a camel through the eye of a needle than
17 showing that the Army acted arbitrarily and capriciously in
18 their determination that Lt. Colonel Aquino sexually abused
19 this child. This is not a case of a witch hunt or a warlock
20 hunt, and it is not a case of religious discrimination.
21 Plaintiff was not titled because he the chief priest or the
22 high priest of the Temple of Set. It is completely
23 irrelevant, Your Honor. He was titled in this report of
24 investigation because the evidence shows that he committed
25 indecent acts with a child, and that he conspired with others

1 to take this child away from the day care center, take them
2 to his apartment, and that's where he sexually abused her.

3 Thank you, Your Honor.

4 THE COURT: All right.

5 MR. MYERS: If I may, Judge. There is no evidence
6 that this child has told anyone herself that she identified
7 Michael Aquino. The parents say this.

8 But let me point out to you, Your Honor, this
9 little girl at the same time advised the psychiatrist that
10 her next door neighbor, who was a doctor, Dr. Steve, was part
11 of this effort as well. This little girl identified the car
12 that the Aquinos owned as the one that Mrs. Aquino drove her
13 in. It was a rented car. It could not have been their car.
14 It was rented for the weekend that they were out there. The
15 little girl's testimony is utterly incredible.

16 And it wasn't this little girl alone who is
17 supposed to have gone to the Aquino home, Judge. It was
18 multiple children. And the only day the Army has in their
19 investigation was June 10. Yet no other child could identify
20 Dr. Aquino or Mrs. Aquino or the home they lived in, no other
21 child.

22 And yet they were supposed to-- The Army glibly
23 talks about a conspiracy. With whom? Mrs. Aquino couldn't
24 have been in it. The Army decided not to title her. There
25 is no evidence that Gary Hambright even knew Michael Aquino.

1 With whom? It is easy to say conspiracy, but with whom? And
2 upon what factual predicate?

3 No, Judge. This isn't a neat and tidy little case
4 where we can just sweep it away and say, we did a wonderful
5 job here protecting the public interest. This was a
6 concerted effort to bury this plaintiff. And the facts that
7 I have put in that brief are not speculation, Judge. They
8 come from government documents. Each and every fact is
9 supported by exhibit number. And each and every fact comes
10 from the government. Not speculation, Judge. This is a
11 serious matter.

12 Thank you.

13 THE COURT: All right. I will look at this further
14 and I will get an answer to you all in some reasonable time.

15 MR. LISOWSKI: Thank you, Your Honor.

16 MR. MYERS: Thank you, Judge.

17 THE COURT: If we have no further business, we will
18 adjourn until Monday morning.

19 -----
20 HEARING CONCLUDED

21
22 I certify that the foregoing is a true and
23 accurate transcription of my stenographic notes.

24 COPY

25 _____
Norman B. Linnell, CP, CM, CE