Tripp v. Exec. Office of the President, 200 F.R.D. 140

United States District Court for the District of Columbia

April 5, 2001, Decided ; April 5, 2001, Filed

Civil Action No. 99-2554 (EGS), [20-1], [95-1], [95-2], [53-1], [53-2], [89-1], [105-1]

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LINDA R. TRIPP, Plaintiff, v. EXECUTIVE OFFICE OF THE PRESIDENT, et al., Defendants.

[141] MEMORANDUM OPINION & ORDER

I. Background

Plaintiff Linda Tripp seeks declaratory and injunctive relief and damages against defendants the Executive Office of the President (EOP), the Federal Bureau of Investigation (FBI), and the U.S. Department of Defense (DOD) for violations of the Privacy Act, 5 U.S.C. § 552a *et seq.*Plaintiff also seeks damages against individual defendants Kenneth H. Bacon, Assistant Secretary of Defense, Clifford Bernath, Principal Deputy Assistant Secretary of Defense, and Jane and John Doe, numbers 1 through 99, for conspiracy to violate plaintiff's civil rights pursuant to clause 2 of the Civil Rights Act of 1871, 17 Stat. 13 (1871) and 42 U.S.C. § 1985(2). Finally, plaintiff seeks damages against defendants Bacon and Bernath for invasion of her privacy and civil conspiracy against her.

Plaintiff contends that the EOP, the FBI, and the DOD released confidential information about her. She alleges that she was the victim of a pattern of intentional and wrongful disclosures by the EOP and the FBI of confidential information contained in government files for the purpose of embarrassing her and retaliating against her. At the heart of plaintiff's complaint is the alleged release of information from plaintiff's security clearance application by the DOD to Jane Mayer, a reporter from *The New Yorker* magazine. Plaintiff alleges the following: On March 12, 1998, Mayer contacted Kenneth Bacon, the Assistant Secretary of Defense for Public Affairs. Mayer indicated she was writing a story on plaintiff and had uncovered information suggesting that plaintiff had been arrested in 1969. Mayer wanted to know whether plaintiff had disclosed any prior arrests on her security clearance application. Bacon then enlisted his deputy, Bernath, to obtain the information Mayer requested. The next day Bernath contacted Mayer and informed her that plaintiff had denied having an arrest record on her clearance application. Later that same day, *The New Yorker* published Mayer's article, entitled "Portrait of a Whistleblower," which included the information from plaintiff's file.

The original complaint in this case was filed in September 1999, and named as defendants the EOP, the DOD, Kenneth H. Bacon, Clifford Bernath, and Jane and John Doe, numbers 1 through 99. In January 2000, plaintiff filed an amended

complaint, incorporating her prior claims and adding further allegations. In the amended complaint, plaintiff adds the FBI as a defendant.

This case comes before the Court on the EOP and the FBI's Motion to Dismiss Count I and II under Rule 12(b)(1) for lack of subject matter jurisdiction and 12(b)(6) for failure to state a claim upon which relief can be granted, and Count V under Rule 12(b)(1) for lack of subjectmatter jurisdiction. The United States filed a Notice of Substitution as the sole defendant on Count V. Individual defendants Bacon and Bernath filed a Motion to Dismiss Counts IV and V. Upon consideration **[142]** of those motions, and the responses and replies thereto, the Court will grant the Executive Office of the President's motion to dismiss Count 1 of the complaint with prejudice and enter final judgment against the plaintiff on that count. The Court will dismiss without prejudice Count II of the complaint against the FBI, pending resolution of the class certification issue in *Alexander v. FBI*, No. 96-2123 (D.D.C. filed Sept. 12, 1996). Accordingly, the motions of the EOP and FBI for protective orders are denied as moot. As to Count V, the motions of the government and the individual defendants are denied without prejudice pending determination of the Notice of Substitution issue.

Plaintiff may proceed with count III of her complaint against the DOD [1] for violations of the Privacy Act and Count IV of her complaint against the individual defendants pursuant to § 1985(2). The motion of the individual defendants to dismiss plaintiff's claim pursuant to § 1985(1) and the Civil Rights Act of 1871 is granted.

II. Standard of Review

The Court will not grant a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." *See Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02, 2 L. Ed. 2d 80 (1957); *Kowal v. MCI Communications Corp.*, 305 U.S. App. D.C. 60, 16 F.3d 1271, 1276 (D.C. Cir. 1994). Accordingly, at this stage of the proceedings, the Court accepts as true all of the complaint's factual allegations. *See Doe v. United States Dep't of Justice*, 243 U.S. App. D.C. 354, 753 F.2d 1092, 1102 (D.C. Cir. 1985).Plaintiff is entitled to "the benefit of all inferences that can be derived from the facts alleged."*Kowal*, 16 F.3d at 1276.

The standard of review for a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) is virtually identical to that used for 12(b)(6) motions. *See, e.g.,Vanover v. Hantman*, 77 F. Supp. 2d 91, 98 (D.D.C. 1999)(citing *Pitney Bowes Inc. v. U.S. Postal Serv.*, 27 F. Supp. 2d 15, 19 (D.D.C. 1998). In the 12(b)(1) context, the plaintiff bears the burden of proving jurisdiction. *See id.*

III. Discussion

A. Government's Motion to Dismiss Count I: Defendant EOP

Plaintiff sues the EOP for violations of the Privacy Act, 5 U.S.C. § 552a, *et seq.*, which governs federal agencies' acquisition, maintenance, use, and disclosure of information concerning individuals. The Act requires that agencies maintain "only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President." 5 U.S.C. § 552a(e)(1). Agencies maintaining such information are required to "establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity…." *Id.* § 552a(e)(10). Under the Act, an agency is generally prohibited from disclosing information about an individual in its records without the individual's consent. *See id.* § 552a(b). Moreover, an agency subject to the Privacy Act must permit an individual to have access to and an opportunity to correct its records regarding that individual. *See id.* § 552a(d). The Privacy Act grants federal courts jurisdiction to compel compliance with the Act and, in the case of willful or intentional violations, to award damages. *See id.* § 552a(g).

Defendant contends that the central issue in this case is whether the EOP is an "agency" within the meaning of the Privacy Act. Defendant EOP asserts that the Office of the President, which is a component of the EOP, is not an agency subject to the Privacy Act. Plaintiff asserts that the Office of the President is an agency under the Privacy Act based on the Act's plain language, purpose, and legislative history.

The Privacy Act adopts the Freedom of Information Act's (FOIA) definition of agency. 5 U.S.C. § 552a(1)("the term 'agency' means agency as defined in section 552(e)" of **[143]** Title 5, U.S.C.); *Dong v. Smithsonian Inst.*, 326 U.S. App. D.C. 350, 125 F.3d 877, 878 (D.C. Cir. 1997)(holding that the Privacy Act "borrows the definition of 'agency' found in FOIA"). The definition of "agency" under the FOIA "includes any executive department….or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." 5 U.S.C. § 552(f). Despite the plain language of the statute, the FOIA's legislative history directs that the term "Executive Office of the President" is "not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." H.R. Rep. No. 1380, 93rd Cong., 2d Sess. 114-15 (1974); S. Rep. No. 1200, 93rd Cong., 2d Sess. 15 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6267, 6285. The Supreme Court recognized the FOIA's legislative history in *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156, 100 S. Ct. 960, 972, 63 L. Ed. 2d 267 (1980): The "legislative history is unambiguous. ..in explaining that the 'Executive Office' does not include the Office of the President [and]…that 'the

President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President.'" The Court held that the Office of the President is not subject to the FOIA.

Likewise, the D.C. Circuit held that the Office of the President and the White House are not agencies for purposes of the FOIA. *See United States v. Espy*, 330 U.S. App. D.C. 299, 145 F.3d 1369, 1373 (D.C. Cir. 1998)(holding that the EOP is not a discrete agency under the FOIA); *Meyer v. Bush*, 299 U.S. App. D.C. 86, 981 F.2d 1288, 1293 n.3 (D.C. Cir. 1993)(holding that individuals employed in the White House are considered part of the President's immediate personal staff and thus are exempt from the FOIA); *National Security Archive v. Archivist of the United States*, 285 U.S. App. D.C. 302, 909 F.2d 541, 545 (D.C. Cir. 1990)(holding that the White House is not an agency for purposes of the FOIA); *see also Rushforth v. Council of Economic Advisers*, 246 U.S. App. D.C. 59, 762 F.2d 1038, 1040 (D.C. Cir. 1985) (holding that the Council of Economic Advisors, whose sole function is to advise and assist the President, is not an agency for purposes of the FOIA).

The parties disagree whether this exception to the term "agency" under the FOIA for the Office of the President applies to the Privacy Act. Defendant EOP argues that the Privacy Act expressly adopts the FOIA definition of "agency," including that definition's legislative history and judicial interpretation. Plaintiff argues that while the Privacy Act adopts its definition of "agency" from the FOIA, it does not follow that the Office of the President is exempt from the Privacy Act. First, plaintiff argues that the Privacy Act adopts the plain language of the FOIA statute which includes the EOP in its definition of agency. Second, plaintiff argues that the definition of agency under the FOIA and the Privacy Act should be treated differently because the two statutes serve different purposes. Finally, plaintiff argues that the legislative history of the Privacy Act demonstrates that the Office of the President is subject to its terms. There are several District Court cases that provide guidance on this issue. In *Alexander v. FBI*, 971 F. Supp. 603 (D.D.C. 1997), the District Court held that the Office of Personnel Security and the Office of Records Management, each units of the EOP within the White House, were agencies subject to the Privacy Act. The *Alexander* Court acknowledged that the Privacy Act adopts its definition of "agency" from the FOIA and that the Supreme Court and the D.C. Circuit have held that these units within the EOP are not agencies subject to the FOIA. However, the court concluded that, "while it is true that Congress adopted the statutory definition of 'agency' as used in FOIA for the Privacy Act, no court has provided the term 'agency,' as used in the Privacy Act, with the same interpretation which excludes from the plain language the President's personal staff and units whose sole function is to advise and assist the President. Recognizing the very different purpose the two statutes serve, this court will not be the first." *Id.* at 606. The court determined that since the FOIA and the Privacy Act serve different purposes, the term "agency" in each statute need not be **[144]** interpreted the same way: "Words in statutes must be construed within the statutory scheme in which they appear, and this court

holds that under the Privacy Act, the word "agency" includes the Executive Office of the President, just as the Privacy Act says." *Id.* at 607. [2]

Five other Federal District Courts have since rejected the *Alexander* Court's reasoning. Recently, in *Jones v. Executive Office of the President* and *Flowers v. Executive Office of the President*, the District Courts held that the terms of the Privacy Act do not apply to the White House Office. In *Jones*, the court based its conclusion, in large part, "on the fact that Congress, neither in the text of the Privacy Act, nor in its legislative history, indicates an intention to interpret the term 'agency' in any manner other than as it is used in FOIA." *Jones*, No. 00-307, slip op. at 14 (D.D.C. Mar. 12, 2001). In *Flowers*, the court found that since the EOP is not an agency subject to the FOIA, the EOP is not an agency subject to the Privacy Act. *Flowers*, No. 99-3389, slip op. at 8 (D.D.C. Mar. 16, 2001).
Similarly, in *Barr v. Executive Office of the President*, No. 99-1695, slip op. at 6 (D.D.C. Aug. 9 2000), the District Court held that the EOP was not subject to the Privacy Act. The District Court found that if the Privacy Act applied to the Office of the President, the President would have to disclose information, publish in the Federal Register the types of records he or she keeps, be prohibited from maintaining certain records, and be restricted in what type of information he or she could disclose and to whom. Congress's exercise of this type of control over the President raises separation of powers and other constitutional concerns.
Applying the rules of construction that require a statute to "first be construed to avoid doubts of constitutionality" and further noting that "Congress, in enacting legislation restricting presidential action, must make its intent clear," the District Court found that Congress has not clearly subjected the White House Office to the Privacy Act. *Id.* at 5-6. The *Barr* Court concluded that "as the Privacy Act borrows the FOIA definition, it fairly borrows the exceptions thereto as provided in legislative history and by judicial interpretation," and excludes the White House from the terms of the Privacy Act. *Id.* at 6.

In *Sculimbrene v. Reno*, 2001 U.S. Dist. LEXIS 12307, No. 99-2010, slip. op. at 15 (D.D.C. Feb. 16, 2001), the District Court held that the White House Office is not subject to the terms of the Privacy Act. In this case, the court found the exclusion of the White House to be a fair construction of the terms of the Privacy Act, and that such construction properly avoids constitutional questions. The court based its conclusion, in large part, on the fact that Congress, neither in the text of the Privacy Act or its legislative history, indicates an intention to interpret "agency" in any other manner than it is used in the FOIA. The drafters of the Privacy Act, in choosing to expressly apply the FOIA definition of "agency" were aware of the FOIA's legislative history which specifically provided that "the term [agency] is not to be interpreted as including the President's immediate personal staff or units within the Executive Office whose sole function is to advise and assist the President." *See* H.R. Conf. Rep. 93-1380 at 15. Additionally, the *Sculimbrene* court points to Supreme Court precedent clearly stating that, "where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge

of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard v. Pons*, 434 U.S. 575, 581, 98 S. Ct. 866, 870, 55 L. Ed. 2d 40 (1978). The *Sculimbrene* court rejects the*Alexander* court's reasoning, finding instead that "absent express congressional guidance, the mere fact that the Privacy Act and FOIA may reflect competing concerns for privacy and public **[145]** access cannot control the Court's interpretation of the term 'agency' as it is used in the Privacy Act." *Sculimbrene*, slip. op. at 17.

In *Falwell v. EOP*, 113 F. Supp. 2d 967 (W.D. Va. 2000), the District Court in another jurisdiction held that the Office of the President is not subject to the Privacy Act: "The Privacy Act clearly and expressly adopts the FOIA's definition of agency. This definition has been interpreted by the Supreme Court as excluding the Office of the President, a component of the EOP. Consequently, the FOIA's definition of agency and its judicial interpretation control the outcome of this case. Therefore, the court finds as a matter of law that the Office of the President is not subject to the Privacy Act and, therefore, is not required to comply with Falwell's request for information." *Id.* at 969-70. The *Falwell* court also relied on *Rushforth v. Council of Economic Advisers*, 246 U.S. App. D.C. 59, 762 F.2d 1038 (D.C. Cir. 1985), as authority that the FOIA's definition of agency, when incorporated into other statutes, applies exactly as it does under the FOIA, inclusive of judicial interpretation. *See* 113 F. Supp. 2d at 969. In *Rushforth*, the D.C. Circuit held that "inasmuch as the Council of Economic Advisors is not an agency for FOIA purposes, it follows of necessity that the CEA is, under the terms of the Sunshine Act, not subject to that statute either…[because] the Sunshine Act expressly incorporates the FOIA definition of agency." 762 F.2d at 1043. Further, in *Dong v. Smithsonian Institution*, the Circuit held that the Smithsonian Institution is not an agency subject to the Privacy Act, because the Smithsonian is not an agency subject to the FOIA. 326 U.S. App. D.C. 350, 125 F.3d 877 at 878-79.

The Court finds persuasive the reasoning of the courts in *Barr, Sculimbrene*, and *Falwell* and rejects plaintiff's arguments. [3] First, plaintiff argues that the EOP is subject to the Privacy Act based on the plain language of the statute. The plain language of the Privacy Act directs one to look to the FOIA for the definition of "agency." 5 U.S.C. § 552a(1). While on its face, the FOIA states that the definition of "agency" includes the Executive Office of the President, the U.S. Supreme Court, the D.C. Circuit, and Congress, through the FOIA's legislative history, have all made it abundantly clear this does not include the Office of the President. *See Kissinger*, 445 U.S. at 156 (1980); *United States v. Espy*, 330 U.S. App. D.C. 299, 145 F.3d 1369, 1373 (D.C. Cir. 1998); H.R. Rep. No. 1380, 93rd Cong., 2d Sess. 114-15 (1974); S. Rep. No. 1200, 93rd Cong., 2d Sess. 15 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6267, 6285. In enacting the Privacy Act, Congress gave no indication that the identical language means one thing in the context of the FOIA and something completely different in the context of the Privacy Act. To the contrary, Congress said that the definition of agency for the Privacy Act was the same as for the FOIA.

[146] Second, plaintiff argues that the definition of "agency" under the Privacy Act is different than the definition of "agency" under the FOIA because the statutes serve different purposes. Plaintiff asserts that the purpose of the FOIA is to provide access to federal government records, while the purpose of the Privacy Act is to protect individuals against invasion of personal privacy. The FOIA's exception for the Office of the President is based on a balance between the public's interest in information and the need for the President and his or her advisors to make important and classified decisions without fear of disclosure. Plaintiff argues that under the Privacy Act, there is no similar need for the exception. However, Congress did not indicate that this was the case. Rather, Congress adopted the FOIA's definition of "agency" for the Privacy Act, and the FOIA's legislative history was clear that it excluded the Office of the President. Congress did not indicate that the Privacy Act's definition of "agency" differed in any way from the definition under the FOIA.

As the *Sculimbrene* court correctly points out, when Congress adopts a new law incorporating sections of a prior law, Congress is normally presumed to have knowledge of the interpretation given to the incorporated law. *Lorillard v. Pons*, 434 U.S. 575, 581, 55 L. Ed. 2d 40, 98 S. Ct. 866 (1978). In enacting the Privacy Act, Congress was aware of the legislative history of the FOIA which unambiguously states that the Office of the President is not subject to the FOIA. *See Kissinger*, 445 U.S. at 156 (1980).

Finally, plaintiff argues that the Privacy Act's legislative history indicates that Congress intended the Act to cover the Office of the President. Plaintiff argues that the Privacy Act was passed to address Watergate related abuses. Since it was the Office of the President committing theses abuses, she contends, the Act must have been intended to cover the Office of the President. However, once again, nowhere in the legislative history of the Privacy Act does Congress state that "agency" means anything other that what it means in the context of the FOIA. Absent express Congressional guidance, the mere fact that the Privacy Act and the FOIA reflect different concerns cannot persuade the Court's interpretation of the term "agency" as it is used in the Privacy Act.

Based on the foregoing analysis, the Court is persuaded by defendant EOP's arguments and grants its motion to dismiss on the grounds that ***HN12*** the Office of the President/White House Office is not subject to the terms of the Privacy Act. [4]

B. Government's Motion to Dismiss Count II: Defendant FBI

Plaintiff sues the FBI for violations of the Privacy Act. Defendant FBI argues that Count II of plaintiff's amended complaint is not factually specific enough and should be dismissed underRule 12(b)(6) and that it is barred by the Privacy Act's statute of limitations. Defendant also maintains that plaintiff's claim against the FBI establishes

nothing more than an unspecified disclosure, for an unspecified purpose, sometime "beginning in the Spring of 1993."

During oral argument on this motion, plaintiff's counsel admitted that Count II of the amended complaint is essentially identical to the complaint in *Alexander v. FBI*, No. 96-2123 (D.D.C. filed Sept. 12, 1996) pending before U.S. District Judge Royce Lamberth. The *Alexander* case is a class action and plaintiff's counsel is of the opinion that plaintiff is a member of that class. However, the District Court in *Alexander* has not yet ruled on the issue of class certification. Plaintiff's counsel represented in Court that once the class is certified, and if plaintiff is a member, Count II should be dismissed.

Based on counsel's representations that two essentially identical claims are currently pending in separate cases, the Court dismisses Count II without prejudice pending the resolution of the class certification issue in *Alexander*.

[147] C. Government's Motion to Dismiss Count V: Notice of Substitution for Defendants Bacon and Bernath

Plaintiff brings pendent state common law claims against Bacon and Bernath for invasion of privacy and civil conspiracy. In conjunction with its motion to dismiss, the government filed a Notice of Substitution pursuant to the Federal Employees' Liability Reform and Tort Compensation Act of 1988 (Liability Reform Act), 28 U.S.C. § 2679, which substitutes the United States as the sole defendant in place of individual defendants Bacon and Bernath for the common law tort claims asserted in Count V. Thus, the government argues that the Court lacks subject matter jurisdiction over the resulting claim against the United States under the Federal Torts Claim Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-80, because plaintiff failed to exhaust her administrative remedies under 28 U.S.C. § 2675 prior to commencing this suit.

The Liability Reform Act provides that a claim against the United States under the FTCA is the exclusive remedy for persons seeking recovery for damages for any "negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment…." 28 U.S.C. § 2679(b)(1). The government argues that upon certification by the Attorney General that a defendant in a civil action was acting within the scope of federal employment at the time of the act giving rise to the civil action, the United States will be substituted as the sole defendant. In this case, a certificate was executed stating that individual defendants Kenneth Bacon and Clifford Bernath were acting within the scope of federal employment and that plaintiff's claim should be deemed an action against the United States. The government argues that plaintiff's claims must be dismissed pending exhaustion of administrative remedies under the FTCA.

Plaintiff argues that the government's filing of certification does not substitute the United States as a matter of law and that the Court should review *de novo* the Attorney General's certification regarding the scope of Bacon's and Bernath's employment after discovery, briefing, and a hearing on the scope of employment. Further, plaintiff argues that if the Court is inclined to rule on the scope of employment issue now, that the record shows that Bacon and Bernath were not acting within the scope of federal employment.

Plaintiff is correct that the Attorney General's determination is not conclusive. In*Kimbro v. Velten*, 308 U.S. App. D.C. 134, 30 F.3d 1501 (D.C. Cir. 1994), the D.C. Circuit held that the Attorney General's initial certification that a federal employee is acting within the scope of employment at the time of the incident giving rise to the action is *prima facie*evidence that the employee was acting within the scope of his or her employment, shifting the burden to the plaintiff to produce evidence to rebut certification. In *Kimbro*, the D.C. Circuit remanded the case to the District Court to conduct an evidentiary hearing to ascertain whether the defendant was acting within the scope of her employment.

The Supreme Court in *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 115 S. Ct. 2227, 132 L. Ed. 2d 375 (1995), held that scope of employment certifications from the Attorney General are subject to judicial review. The D.C. Circuit has interpreted *Lamagno* to mean that "the federal court may determine independently whether the employee acted within the scope of employment and, therefore, whether to substitute the federal government as the proper defendant." *Haddon v. United States*, 314 U.S. App. D.C. 369, 68 F.3d 1420, 1422 (D.C. Cir. 1995).

The Court is persuaded by plaintiff that there should be discovery, briefing, and an evidentiary hearing to determine whether Bacon and Bernath were acting within the scope of their employment and whether the Attorney General's certification is proper. Therefore, the government's motion to dismiss Count V is denied without prejudice pending a brief period of discovery limited to the substitution issue. Likewise, the individual defendants' motion to dismiss Count V is denied without prejudice pending determination of the substitution issue.

[148] D. Individual Defendants' Motion to Dismiss Count IV

Pursuant to Count IV, plaintiff sues Bacon and Bernath individually for violations of the Civil Rights Act of 1871 and 42 U.S.C. § 1985(2). These defendants argue that plaintiff fails to make a claim under the original text of the Civil Rights Act of 1871 and that plaintiff fails to make a claim within the text of § 1985.

1. Civil Rights Act of 1871

Plaintiff contends that § 2 of the Civil Rights Act of 1871 creates a civil cause of action for a conspiracy which "by force, intimidation or threat…prevent(s), hinders(s) or delay(s) the execution of any law of the United States." The original text of § 2 of the Civil Rights Act of 1871 (also known as the Ku Klux Klan Act of 1871) was later codified as § 1985. In her amended complaint, plaintiff adopts the language-"delay, hinder and prevent the proper execution of the laws of the United States"-from the original language of the Civil Rights Act of 1871. Plaintiff claims that the release of her private information to the public and the media was both intimidating and threatening, and casts a "chilling effect" over plaintiff's ability to carry out her duties as a federal employee. Defendants argue that there is no independent cause of action under § 2 of the Civil Rights Act of 1871 because § 2 is codified in § 1985 and that plaintiff must bring her claims under that statute.

Plaintiff claims that when there is a conflict between the Statute at Large and federal codification, the Statute at Large must prevail. *United States Nat'l Bank of Oregon v. Independent Ins. Agents of America*, 508 U.S. 439, 448, 113 S. Ct. 2173, 2179, 124 L. Ed. 2d 402 (1993). Plaintiff argues further that where a title of the United States Code has been enacted into positive law, the text thereof shall be legal evidence of the laws contained therein. The D.C. Circuit has held that the provisions of the United States Code are the legal evidence of the laws. However, the language of the Statutes at Large controls when the provisions contained in the United States Code have not been enacted into positive law. *Five Flags Pipeline v. Dep't of Transp.*, 272 U.S. App. D.C. 221, 854 F.2d 1438 (D.C. Cir. 1988).Plaintiff argues that according to the Office of Law Revision Counsel of the U.S. House of Representative, Title 42 has not been enacted into positive law. Thus, plaintiff claims that the language contained in § 1985 must yield to the text of the original Civil Rights Act as reported in the Statute at Large. According to plaintiff, this means that § 1985 is *prima facie* evidence of the laws, not *legal* evidence of the laws.

Defendants argue that the predecessor to § 1985, which is materially identical to its current version, was enacted into positive law as § 1980 of the Revised Statutes of 1873, and thus, plaintiff may not predicate her claim on text from the original Act that was not included as part of the re-enactment. The Supreme Court has held: "The statutory provision that is now codified as § 1985 of Title 42 of the United States Code was originally enacted as § 2 of the Civil Rights Act of 1871." *Kush v. Rutledge*, 460 U.S. 719, 724, 103 S. Ct. 1483, 1486-87, 75 L. Ed. 2d 413 (1983). The Court also stated that "the reclassification [in § 1985] was not intended to change the substantive meaning of the 1871 Act." *Id.* In that case, the Court used the Act as an interpretive aid in determining what § 1985 means. The plaintiff in that case only brought a claim for damages under § 1985.

Notably, however, the plaintiff cannot cite to a single case where a claim was brought directly under § 2 of the Civil Rights Act, rather than under § 1985, and the Court is aware of none. Accordingly, this Court is not persuaded that there is a direct cause of action under the Civil Rights Act of 1871. Rather, the Act should be

interpreted to allow, if at all, plaintiff's claims under § 1985, but not as a separate cause of action.

2. 42 U.S.C. § 1985

Section 1985 prohibits conspiracies against: 1) federal officials in the performance of their duties (§ 1985(1)); 2) federal judicial proceedings (§ 1985(2)); and 3) the federal electoral process § 1985(3)). Plaintiff argues that defendants violated § 1985(1) and § 1985(2).

[149] a. Section 1985(1)

In plaintiff's response to defendants' motion to dismiss, she claims that she seeks relief under§ 1985(1) because Bacon and Bernath conspired to harass and intimidate her by releasing sensitive, personal information in retaliation for her having blown the whistle on President Clinton's alleged illicit activities. However, plaintiff's amended complaint does not state that she is suing under § 1985(1) (it does state several times that she is suing under § 1985(2)) and does not allege any facts in support of a claim under § 1985(1). Accordingly, plaintiff may not sustain a claim under § 1985(1) for the first time in her response to defendants' motion to dismiss. Thus, the Court dismisses her claim under § 1985(1).

b. Section 1985(2)

Plaintiff's amended complaint asserts a claim under the first clause of § 1985(2), which states:

> If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified….

Plaintiff contends that at all times relevant to the incidents she alleges, it was widely known that she was a witness or a potential witness in the case of *Jones v. Clinton*, the case of*Alexander v. FBI*, the OIC's investigation into the "filegate" scandal, and the OIC's investigation into President Clinton's alleged misconduct. Plaintiff claims that Bacon and Bernath conspired to punish her for her testimony or potential testimony and to send a message to deter her and others from doing the same. Defendants make three arguments relevant to § 1985(2): 1) that plaintiff, as a nonparty to the federal proceeding at issue, has no standing to file a claim under this section; 2) that plaintiff suffered no cognizable injury under this section because she testified fully every time she was called upon to do so; and 3) that Bacon and

Bernath, as members of the same agency, could not conspire against her within the meaning of this section.

First, defendants argue that plaintiff does not have standing to bring a claim under § 1985(2).Authority on this issue is split. The Seventh and Ninth Circuits have held that only a party to the federal proceeding has standing. *Rylewicz v. Beaton Servs., Ltd.*, 888 F.2d 1175, 1180 (7th Cir. 1989)(witness whose testimony defendants allegedly attempted to influence, but who was not himself a party to the action, did not have standing to bring suit); *David v. United States*, 820 F.2d 1038, 1040 (9th Cir. 1987)(since plaintiff was not a party to the actions in which she was intimidated, she can show no injury under § 1985(2)). The Third and Tenth Circuits have held that a witness can have standing. *Heffernan v. Hunter*, 189 F.3d 405 (3d Cir. 1999)(holding that a witness or juror may be a "party" entitled to maintain an action under § 1985(2)); *Brever v. Rockwell International Corp.*, 40 F.3d 1119, 1125 (10th Cir. 1994)(holding that witnesses have standing under § 1985(2)). The Supreme Court has not resolved this issue. *See Haddle v. Garrison*, 525 U.S. 121, 125 n.3, 119 S. Ct. 489, 491 n.3, 142 L. Ed. 2d 502 (1998)("We express no opinion regarding respondents' argument…that only litigants, and not witnesses, may bring § 1985(2) claims.").

Defendants argue that the plain meaning of the text only gives parties standing, because the text says "party." The codified remedy section of § 1985 states that if one or more conspirators "do…any act in furtherance of the…conspiracy, whereby another is injured in his person or property,…, the party so injured or deprived may have an action for the recovery of damages." 42 U.S.C. § 1985(3). The term "party" should not be read so literally as to mean only the named party to an action. The Court agrees with the Third Circuit that the term "party" is not meant to limit the more general term "another." *See Heffernan*, 189 F.3d at 410. Thus, the meaning of "another" in the § 1985(2) context is not defined by § 1985(3)'s reference to "party," but rather **[150]** by § 1985(2)'s reference to parties, witnesses, and jurors.

Second, defendants argue that the text of § 1985(2) requires proof of an actual inability to testify as a consequence of the defendants' conspiracy. They assert that plaintiff was not prevented from testifying "freely, fully and truthfully." The Ninth Circuit has held that where a plaintiff cannot show that the conspiracy affected his or her ability to present a case in federal court, the absence of such an effect precludes compensable injury under § 1985(2). *Rutledge v. Arizona Bd. of Regents*, 859 F.2d 732 (9th Cir. 1988). The Ninth Circuit has also held that allegations of witness intimidation will not suffice for a cause of action under § 1985(2) unless it can be shown the litigant was hampered in being able to present an effective case.*Blankenship v. McDonald*, 176 F.3d 1192 (9th Cir. 1999). In an unpublished opinion, the Sixth Circuit held that, at a minimum, there must be "some allegation that the litigant's ability to present an effective case was hampered by the conspiracy." *Ellison v. Leffler*, 1994 U.S. App. LEXIS 15606, 1994 WL 276926 (6th Cir. 1994).

It is undisputed that plaintiff was not prevented from testifying. Plaintiff's counsel conceded during oral argument that plaintiff was not deterred from testifying fully. However, plaintiff argues that she suffered from harassment and "loss of professional reputation." At oral argument, plaintiff states that she relies primarily on *Haddle* to support her assertion that § 1985 redresses such injuries.

In *Haddle*, the plaintiff alleged that he was fired as a result of his coopecration with a federal Medicare-fraud investigation of his employer. The plaintiff was subpoenaed to testify before the grand jury, but did not testify "due to the press of time." 525 U.S. at 123. He was also expected to testify at a criminal trial that had not yet occurred at the time of his termination.The plaintiff's complaint contained two counts under § 1985(2), one for conspiracy to deter him from testifying in the criminal trial and one for conspiracy to retaliate against him for attending the grand jury proceedings. The Supreme Court held "that the sort of harm alleged by petitioner here--essentially third-party interference with at-will employment relationships--states a claim for relief under § 1985(2). Such harm has long been a compensable injury under tort law, and we see no reason to ignore this tradition in this case." *Id.* at 126. This case deals with injury suffered from termination of at-will employment and does not address the precise situation that is currently before the Court. However, the Court is persuaded that*Haddle* does suggest that other types of injury, beyond interference with one's testimony, may be redressed under § 1985(2).

Finally, defendants argue that plaintiff cannot prove a conspiracy existed because under the "incorporate conspiracy" doctrine, two or more individuals within the same legal entity cannot form a legal conspiracy. Both defendants and plaintiff agree that the federal circuits are split over whether to apply this doctrine to § 1985 claims. Recently, the Eleventh Circuit decided *en banc* that claims under § 1985(2) were not subject to the incorporate conspiracy doctrine.*McAndrew v. Lockheed Martin Corp.*, 206 F.3d 1031 (11th Cir. 2000) (finding that conspiracies under § 1985(2) are criminal in nature and thus the incorporate conspiracy doctrine does not apply). Some courts within this jurisdiction have applied the doctrine to civil rights cases. *See Michelin v. Jenkins*, 704 F. Supp. 1 (D.D.C. 1989)(finding that Board of Education and its officials comprise a single entity are thus not capable of entering into a conspiracy under § 1985); *see also Okusami v. Psychiatric Institute of Washington*, 295 U.S. App. D.C. 58, 959 F.2d 1062 (D.C. Cir. 1992) (applying incorporate conspiracy doctrine to claim under the Sherman Act).

Plaintiff argues, first, that the cases finding incorporate conspiracy applicable have factual situations where employees of a company and the company itself are alleged to have participated in a conspiracy, rather than just two employees of the same agency. Second, she argues that, as a matter of policy, the incorporate conspiracy doctrine should not be applied to civil rights laws. Third, she argues that, even if the Court finds that the incorporate conspiracy doctrine applies to her case, her claim should not be dismissed because there are alleged participants in the **[151]** conspiracy who are not employees of the Department of Defense. Finally,

she argues that there is no heightened pleading requirement in the civil rights laws requiring plaintiff to allege with particularity a conspiracy at this stage in the proceedings.

The Court finds plaintiff's last two arguments persuasive. In her amended complaint, plaintiff does allege that others may have been involved in the alleged conspiracy and plaintiff does not have to plead all the details of the conspiracy at this stage in the proceedings.

For the reasons articulated, the Court denies individual defendants' motion to dismiss Count IV as to plaintiff's claim under § 1985(2).

IV. Conclusion

For the foregoing reasons, it is hereby

ORDERED that defendant Executive Office of the President's Motion to Dismiss Count I is **GRANTED**; it is

FURTHER ORDERED that final judgment be entered for the Executive Office of the President and against plaintiff as to Count I; it is

FURTHER ORDERED that Count II against defendant FBI is **DISMISSED without prejudice** pending resolution of the class certification issue in *Alexander v. FBI*, No. 96-2123 (D.D.C. filed Sept. 12, 1996); it is

FURTHER ORDERED that defendants' Expedited Motion for Protective Order and Extension of Time on Behalf of the Executive Office of the President and the Federal Bureau of Investigation [53-1][53-2] and Executive Office of the President's Expedited Motion for Protective Order and Extension of Time [95-1][95-2] are **DENIED** as moot; it is

FURTHER ORDERED that the government's Motion to Substitute the United States as the sole defendant and to dismiss Count V is **DENIED without prejudice** pending a brief period of discovery and briefing limited to the substitution issue; it is

FURTHER ORDERED that individual defendants' Motion to Dismiss as to Count V [20-1] is **DENIED without prejudice** pending determination of the substitution issue; it is

FURTHER ORDERED that individual defendants' Motion to Dismiss as to Count IV [20-1] is**DENIED without prejudice** as to plaintiff's claim under § 1985(2). Plaintiff may not proceed with a claim under § 1985(1) or directly under the Civil Rights Act of 1871; it is

FURTHER ORDERED that the government's Motion to Strike John and Jane Does from the caption in this case is **GRANTED**. John and Jane Doe, numbers 1-99, are stricken from the caption in this case without prejudice; it is

FURTHER ORDERED that plaintiff's Motion for Protective Order [105-1] concerning the DOD's discovery requests is **DENIED**. Discovery in this case will not be bifurcated. Plaintiff shall respond to DOD's discovery requests by no later than **May 4, 2001**; it is

FURTHER ORDERED that the parties are directed to meet, confer, attempt to agree on, and file with the Court an appropriate discovery plan by no later than **May 4, 2001** ; it is

FURTHER ORDERED that a status hearing is scheduled for **May 18, 2001** at **10:00 a.m.** in Courtroom 1.

IT IS SO ORDERED.

4/5/01
DATE

EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE