IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

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| HAROLD WEISBERG,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>CENTRAL INTELLIGENCE AGENCY, et al.,<br><br>Defendants-Appellees. | ) | NO. 79-1729 |

OPPOSITION TO MOTION FOR LEAVE
TO SUPPLEMENT THE RECORD

On May 15, 1980, appellant filed with this Court a Motion for Leave to Supplement Record With Newly Discovered Evidence, asking the Court to "take cognizance" of certain "newly discovered evidence"[1/] and to remand this case to the district court under 28 U.S.C. § 2106. For the reasons set forth below, the motion is without merit and should be denied forthwith.

The law is well established that appellate review is ordinarily unaffected by matters not contained in the record. Goland v. Central Intelligence Agency, 197 U.S. App. D.C. ____, 607 F.2d 339, 370 (1978) (supplemental opinion on motion to vacate and

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1/ Appellant has asked this Court to expand the appellate record to include an affidavit and two documents that have been filed by the Government in support of its opposition to Mr. Weisberg's motion for summary judgment in Weisberg v. Department of Justice, Civil Action No. 75-1996 (D. D.C.).

petition for rehearing).[2/] Thus, attempts to supplement the appellate record with "newly discovered evidence" that was not before the district court when it rendered its decision cannot be sanctioned and must be denied. As this Court recently observed in a similar case:

> An appellate court has no fact-finding function. It cannot receive new evidence from the parties, determine where the truth actually lies, and base its decision on that determination. Factfinding and the creation of a record are the functions of the district court; therefore, the consideration of newly-discovered evidence is a matter for the district court. The proper procedure for dealing with newly discovered evidence is for the party to move for relief from the judgment in the district court under rule 60(b) of the Federal Rules of Civil Procedure.

Goland, supra, 607 F.2d at 371.

Relief under Rule 60(b) in the district court is foreclosed, of course, by the fact that more than a year has elapsed since that court granted summary judgment for appellees.[3/] F.R.Civ.P. 60(b). In implicit recognition of that fact, appellant has also

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2/ Although there are a number of "settled exceptions" to this principle of appellate review (e.g., an intervening change in a pertinent law, Gomez v. Wilson, 155 U.S. App. D.C. 242, 247-48, 477 F.2d 411, 416-17 (1973)), Goland, 607 F.2d at 370 n. 7, the matters appellant seeks to introduce into the record on appeal fall clearly outside those exceptions and are "rather plainly 'newly discovered evidence.'" Id. at 370.

3/ The district court granted the Government's motion for summary judgment on January 4, 1979.

requested that this Court remand this case to the district court under 28 U.S.C. § 2106, in light of the "newly discovered evidence," without regard to the one-year time limit imposed by Rule 60(b). As this Court's decision in Goland states, however, Section 2106 provides for "such extraordinary relief" that it should not be granted except "in appropriate cases." Id., 607 F.2d at 372 (emphasis in original).

The circumstances giving rise to appellant's motion do not warrant invoking such extraordinary relief here. The "evidence" proffered consists of two items: first, an affidavit that suggests the possibility that in conducting its search in this case the CIA failed to uncover one particular document that might be responsive to Mr. Weisberg's FOIA request; and second, two FBI documents that have been released to appellant in another, unrelated district court action and which Mr. Weisberg speculates contain information that has been withheld from him by the CIA in this case.

As this Court held in Goland, when faced with a very similar factual situation:

> [a]s a substantive matter, the mere fact that additional documents have been discovered does not impugn the accuracy of the [relevant] affidavits. The issue was not whether any further documents might conceivably exist but whether CIA's search for responsive documents was adequate.

Id., 607 F.2d at 369. In Goland the CIA had in fact discovered

"hundreds" of additional responsive documents after the district court's judgment was well over a year old. Nevertheless, this Court declined to invoke 28 U.S.C. § 2106 as a basis for remanding the case to the district court.

By comparison, the matters appellant would introduce into the record here are even less suggestive of any need for resort to § 2106. Based on the three documents he has lodged with this Court, Mr. Weisberg can offer nothing more than the possibility that the CIA failed to retrieve one arguably responsive document in its search, and his own guesswork concerning the possible similarity between the contents of two FBI documents involved in another case and those of two CIA documents involved in this one. Such speculation and unsupported allegations cannot, under any circumstances, be said to constitute an appropriate case for invoking Section 2106's "extraordinary relief." Accordingly, appellant's motion must be denied.

## CONCLUSION

For the reasons stated above, appellant's Motion for Leave to Supplement Record on Appeal should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing Opposition to Motion for Leave to Supplement the Record has been made this 13rd day of May, 1980, by mailing copies thereof, postage prepaid, to appellant's counsel:

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