

X9AT3ACLC

SEALED - ~~CLASSIFIED~~

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

AMERICAN CIVIL LIBERTIES
UNION, et al.,

Plaintiffs,

v. 04 CV 4151 (AKH)

DEPARTMENT OF DEFENSE, et al.,

Defendants.

-----X

New York, N.Y.
October 29, 2009
3:15 p.m.

Before:

HON. ALVIN K. HELLERSTEIN,

District Judge

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
HEATHER K. MCSHAIN
SEAN H. LANE
Assistant United States Attorneys

BRIAN KNIGHT
Central Intelligence Agency

ALSO PRESENT: David Simunovich, Law Clerk

X9AT3ACLC

SEALED - CLASSIFIED

1 (In chambers; law clerk not present)

2 THE COURT: This is the last part of a two-part
3 proceeding. It began on October 27, it went for approximately
4 two hours. We went together off the record to discuss the
5 various redactions that were being reconsidered by the
6 government and the CIA. In all those proceedings, the
7 government attorneys, Mr. Lane, Ms. McShain, and Mr. Knight,
8 showed me line by line the various redactions. I made certain
9 suggestions with some deferred to the government with others,
10 and I think I may have ruled against the government in a few
11 instances also.

12 The government wanted to consider my rulings, taking
13 instructions from superiors in Washington, and thus we recessed
14 until now. And now we are convened in a session where I intend
15 to record the views I expressed.

16 The government will take the transcript, review it,
17 and then make a decision as to what may be public and what will
18 be filed under seal.

19 Have I stated that correctly?

20 MR. LANE: That's correct, your Honor.

21 THE COURT: Let's proceed item by item. You'll do the
22 identification and give it to me to look. If you want to look
23 over my shoulder, it might be the easiest way to proceed.

24 MR. LANE: We think the first issue before we get to
25 documents is your Honor had asked us to specifically identify

X9AT3ACLC

SEALED - ~~CLASSIFIED~~

1 the second declarant. There is a second declaration in this
2 case. And we wanted to put that on the record that that
3 declaration is from James L. Jones, Assistant to the President
4 for National Security and National Security Advisor.

5 THE COURT: I read two declarations, both were
6 classified and both will be filed under seal in their
7 entireties.

8 MR. LANE: Correct, your Honor. They both have been
9 filed under seal.

10 THE COURT: In their entireties.

11 MR. LANE: Correct, your Honor.

12 THE COURT: And identify them, please.

13 MR. LANE: Certainly, your Honor. One of the
14 declarations is the one that we referenced from General James
15 L. Jones; and the other is from Wendy Hilton, who is a CIA
16 employee.

17 THE COURT: Both support the argument for maintenance
18 of the redactions.

19 MR. LANE: Correct, your Honor. They both address
20 what the government has been calling "the intelligence method"
21 withheld from the two OLC memos, and the Court has been
22 referring to as "the source of the CIA's authority."

23 That's probably an appropriate segue to get into that
24 issue.

25 THE COURT: I'll say a word which will illustrate it

1 in the redactions themselves. I think the government calls
 2 these "methods of interrogation" because part of the method is
 3 to seek authority from a higher source. And I've called these
 4 "source of authority" because I think they're less a matter of
 5 methodology and more an aspect of authorization.

6 I'm not comfortable with calling these "methods." The
 7 statute authorizes classification with regard to methods of
 8 interrogation. It does not say anything about sources of
 9 authority for interrogation, and that's one of the tensions
 10 between the position expressed by the government and the
 11 rulings of the Court.

12 MR. LANE: Thank you, your Honor. What we can do at
 13 this point is go through the Court's specific references line
 14 by line in the two OLC memoranda. Where these source of
 15 authority is referenced.

16 MS. McSHAIN: I am going to start with what we've been
 17 calling the second OLC memo, which is dated May 10, 2005. And
 18 it is a total of 46 pages in length.

19 THE COURT: Are they numbered, Ms. McShain?

20 MS. McSHAIN: Your Honor, unfortunately in the copy
 21 that you've seen, the photocopy, only some of them. The fax
 22 numbers don't match up. The Bates stamps start 0000013.

23 THE COURT: Let's call it 13.

24 MS. McSHAIN: Okay. And that's the only Bates stamp,
 25 and it is on the first page.

X9AT3ACLC

SEALED - ~~CLASSIFIED~~

1 THE COURT: Is it possible to put a number on the
2 bottom right of the page?

3 MR. LANE: Certainly we can do that, your Honor.
4 Absolutely.

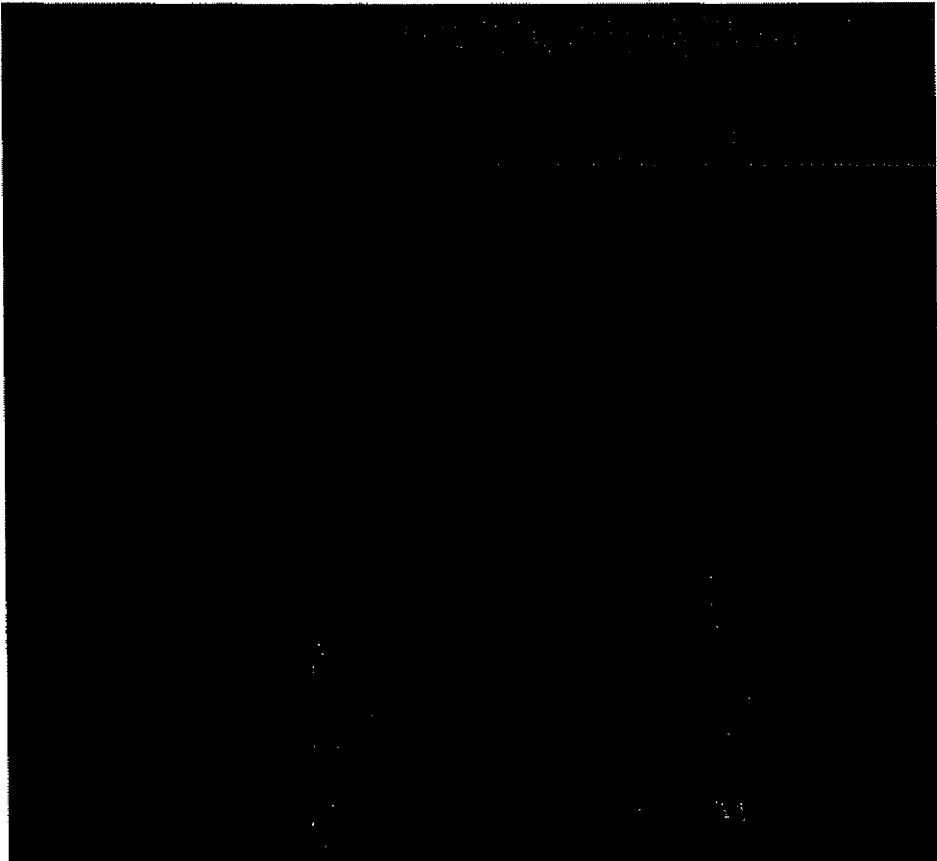
5 MS. McSHAIN: I am going to through and number it one
6 through 46. I am going to insert handwritten page numbers one
7 through 46 in the second OLC memo.

8 Do you want me to do it now, your Honor?

9 THE COURT: Yes. You might as well.

10 MS. McSHAIN: Your Honor's first ruling in the second
11 OLC memo appears on page five.

12
13
14
15
16
17
18
19
20
21
22
23
24
25



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

[REDACTED]

For example, in one of the two affidavits presented to me, there is an argument that various other governments [REDACTED]

[REDACTED]

I'm in no position to evaluate that assertion. But I told the government lawyers that I would defer to them as long as there is an adequate reference to show that the CIA is functioning [REDACTED]

[REDACTED]

The government lawyers received instructions that that phrase also would be covered by their need to redact. I reject that. I rule against the government on that particular point.

[REDACTED]

I would think, cause the descriptions to be misleading.

Actually, there could not be anything other in that context than [REDACTED] Because at some point, the source of authority has to be identified, and it could not

[REDACTED]

I further think that there can be no real compromise

1 of security by noting that [REDACTED]
2 that is involved in all of this.

3 So, I then put to the government whether they would
4 like the document, if my ruling is adhered to, to be presented
5 publicly in unredacted form on this page, or would the
6 redaction to be kept, and the phrase [REDACTED]
7 substituted. I leave it to them to choose which of those two.

8 MR. LANE: Your Honor, the government would take the
9 position that it wants the information redacted, and is not
10 willing to insert the phrase [REDACTED] But it
11 is certainly conscious of the Court's ruling.

12 THE COURT: All right. Very well.

13 MS. McSHAIN: The next ruling your Honor made with
14 respect to the second OLC memo appears on page 29.

15 THE COURT: It is the same point regarding the top
16 most redaction. I think that was the only one in issue, right?

17 MS. McSHAIN: That is. It is in the first full
18 paragraph that appears on page 29.

19 THE COURT: Right. It is the same point.

20 MS. McSHAIN: Okay. Your Honor, the next ruling you
21 made is with respect to what we have deemed the fourth OLC memo
22 which is dated May 30, 2005, and is 40 pages in length. And
23 this memo already has page numbers visible on it.

24 Your first ruling was made on page four to the first
25 full paragraph that appears under I.

1 THE COURT: That's exactly the same point.

2 MS. McSHAIN: Do you want to specify what you had
3 suggested as far as insertions and deletions?

4 THE COURT: I think it would be necessary for me to
5 read out what is here. The top paragraph under I is redacted.

6 It reads as follows:

7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]

15 I ruled that the phrase [REDACTED] could be
16 substituted to the end of the first line and the continuation
17 in the second line, so the phrase would read as follows:

18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]

22 Next, on the sixth line continuing to the ninth line,
23 there is the source citation for that which we just read. And
24 it read as follows:

25 [REDACTED]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

[REDACTED]

I'll stop at this point although the redaction continues.

That is the same [REDACTED] that we discussed a few minutes ago, and [REDACTED]

The government argues, in addition to the arguments I mentioned before, that [REDACTED]

[REDACTED]

The ability of the United States to collaborate with other governments and the sensitivity regarding that has been noted by the D.C. Circuit in the Glomar opinions. I think specifically the latter of the Glomar opinions, which I cited in my lengthy opinion in this case previously. So I'm aware of the sensitivity in this regard. And I can understand the claim of redaction by the government. And as I told the government lawyers, I would defer to their interests with the notion that

[REDACTED]

Again, I leave it to the government to decide whether they insist on the full redaction or abide by my ruling or abide by the compromise I suggested.

1 MR. LANE: The government again would --

2 THE COURT: I understand your position.

3 MR. LANE: -- stand by its position, correct.

4 THE COURT: You are going to inquire on this, but
5 you're not withdrawing any part of your position.

6

7

8

9

10

11

I defer to the government on this particular point,
12 and I note that if this is in the

13

14

as the government lawyers have argued. But I

15

maintain that substitution of the phrase

16

the space I mentioned does not compromise that interest, and

17

supports the interest of proper disclosure.

18

19

Finally, there is a reference to another memorandum,

20

see also counter-terrorism, detention and interrogation

21

activities, September 2001 to October 2003, and identification

22

number and a date, May 7, 2004, and that is the IG report.

23

And does the government wish to keep that redacted or

24

is it now agreeing that that part can be disclosed? That's the

25

IG report that I think is public.

MR. LANE: Your Honor, if I can, I confess that I'm

X9AT3ACLC SEALED - CLASSIFIED

1 not sure that anyone in the government has focused specifically
2 on just that cite by itself. So at this point what --
3 obviously your Honor has the cite released, and then the
4 subsequent parenthetical redacted. What I would say at this
5 point is the government stands by its position, but we will
6 bring that specific issue back. So we will let the Court know
7 immediately.

8 THE COURT: Follow that up.

9 MR. LANE: Thank you, your Honor.

10 THE COURT: The parenthetical phrase says [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 I think that should travel with the decision whether
16 or not to redact. I rule you should disclose that and the
17 parenthesis after that, and you'll decide whether you want to
18 appeal that particular point or abide by it.

19 MR. LANE: If I can, for a second. I think it may be,
20 since this is a public document, the IG report, we'll go back
21 and discuss that with the client, because it is in a slightly
22 different posture than the parenthetical references, [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

THE COURT: [REDACTED]

MR. LANE: Correct. So the parenthetical refers to

1 the document that's up here that's been redacted from that
2 second line. So I confess I am not quite sure what to make of
3 that IG report cite by itself.

4 THE COURT: I think you should look at the IG report
5 and see if there are references in the public document that
6 reference [REDACTED]

7 MR. LANE: I can represent there are no references,
8 public references [REDACTED] in the IG report.

9 THE COURT: Well, you can redact the phrase
10 [REDACTED]
11 [REDACTED]

12 MR. LANE: Thank you, your Honor.

13 MS. McSHAIN: Your Honor's next ruling appeared on
14 page five, under I, the first four lines, and then also the
15 last partial paragraph.

16 THE COURT: I deferred to you on those first four
17 lines.

18 MS. McSHAIN: Yes, your Honor. The second redaction
19 on page five to which your Honor made a ruling appears in the
20 last partial paragraph on page five.

21 THE COURT: But I gave you that point.

22 MS. McSHAIN: Yes.

23 THE COURT: So we don't have to discuss what I gave
24 you.

25 MS. McSHAIN: Just to memorialize, your Honor deferred

1 to the government.

2 THE COURT: Unless you are bringing up the point, the
3 redactions were excluded by me.

4 MR. LANE: What we might do is we'll just address the
5 ones where the Court ordered disclosure. What we might suggest
6 is we give to the court reporter at some point a copy of these
7 documents as were marked up during the in camera sessions.

8 THE COURT: What we need to do is make this a sealed
9 exhibit.

10 MR. LANE: Exactly. That's what I mean. So in that
11 way we don't have to go back over what the Court has already
12 addressed.

13 THE COURT: Right.

14 MR. LANE: We will do that, your Honor. Make it a
15 sealed exhibit.

16 MS. McSHAIN: Your Honor's last ruling in the fourth
17 OLC memo appears on page seven. It is the second full
18 paragraph under the number two. And it begins on the fourth
19 line of that paragraph.

20 THE COURT: As I did before, I ruled that the phrase

21  So I defer

23 to the redaction, ruling that a phrase of equivalence and
24 neutrality should be put inside, which I believe is my
25 authority under the CISA, Confidential Information Securities

1 Act. Where the Court is given the ability to summarize and
2 create equivalences. That's a procedure that's done where
3 classified information has to be introduced at trial, and there
4 is a process by which the Court reviews that with the
5 intelligence officials and tries to create neutral summaries
6 that can be admitted, providing the content and the substance
7 that has to be disclosed without compromising classified
8 information.

9 MS. McSHAIN: Your Honor, I believe that applies to
10 criminal cases.

11 THE COURT: It does. And civil cases, possibly. But
12 I adopt it for FOIA.

13 MR. LANE: Thank you, your Honor.

14 MS. McSHAIN: That's the last ruling your Honor made.

15 THE COURT: Thank you.

16 MS. McSHAIN: We also have the transcript that you
17 made rulings on.

18 MR. LANE: I think, your Honor, we can summarize those
19 rulings to say that wherever the Court addressed something
20 other than [REDACTED] the government,
21 where you ordered additional releases, the government will
22 release that information.

23 THE COURT: That's fine.

24 MR. LANE: As to the [REDACTED]
25 references, the government would raise the same objection and

1 understands that the Court has ordered that release. And that
2 to the extent that the government doesn't appeal that, that
3 would be released.

4 THE COURT: Released with the substitution.

5 MR. LANE: Correct. As your Honor had marked it up at
6 the session, and as reflected in what we'll make this sealed
7 exhibit to this proceeding.

8 THE COURT: Right.

9 MS. McSHAIN: We can memorialize that as well for the
10 order.

11 MR. LANE: Again, we're happy to, although if we have
12 a sealed exhibit, that may actually be -- if your Honor wants a
13 public order, we are happy to put this together and provide
14 your Honor with a draft of the references so your Honor can
15 make something public, so the ACLU is fully aware of what your
16 Honor's rulings were.

17 THE COURT: I'd like that.

18 MR. LANE: We will do that, your Honor.

19 THE COURT: This transcript is now completed.

20 MR. LANE: We had one or two other minor things that
21 won't take very long, and I think one minor thing. As you
22 remember, your Honor, in the last session, you had looked at
23 document 59-A which was a typed version of document 59. And we
24 had said that the CIA had certain information that it was ready
25 to release, but that the -- for reasons we explained in camera

1 outside the presence of the CIA counsel, that the Durham team
2 had asserted 7A --

3 THE COURT: I think I can get my law clerk.

4 MR. LANE: Yes, you can, your Honor.

5 (Law clerk present)

6 THE COURT: Okay.

7 MR. LANE: Your Honor, back on the record, the last
8 item for today is that there were some documents out of the
9 sample of 65 that we had discussed at the last in camera
10 session. The first one was 59-A, which is a typed version of
11 document 59.

12 THE COURT: 59 was a log of what the investigator did.

13 MR. LANE: [REDACTED]

14 [REDACTED] And

15 the CIA had some information. As the institution is ready to
16 release, the prosecutor, the Durham team came in and said they
17 would like that information, the document to be withheld
18 because of concerns about their ongoing investigation. And the
19 Court had deferred to the prosecutors with the same sort of
20 temporal limitations that your Honor had earlier expressed to
21 the Durham team.

22 THE COURT: I think I asked you to look into that?

23 MR. LANE: No, your Honor made the ruling. What I had
24 promised to do was to look into two other documents that the
25 Durham team had not had the chance to look at. Those were

1 documents 54 and 56. And the Durham team, we communicated with
2 them earlier today, and they have looked at those and they have
3 the same position for 54 and 56 because of concerns about their
4 ongoing investigation.

5 THE COURT: I would like to put a temporal duration
6 for the rulings, after which they should be made public.

7 MR. LANE: Your Honor, if I can, I believe that there
8 was a temporal duration discussed in your in camera discussion
9 with Mr. Durham.

10 THE COURT: Do you remember what it was?

11 MR. LANE: I confess I wasn't privy to that. Because
12 it was a 6(e) issue.

13 MS. McSHAIN: I have a redacted version of that
14 transcript, your Honor. I don't know if it was redacted or if
15 it is part of the public version of the transcript. I can look
16 quickly to see if it is in, because they redacted anything that
17 was 6(e).

18 MR. LANE: Your Honor, at the last session you applied
19 that ruling to 59 and to document 60, and then today we ask you
20 to apply that same ruling to 54 and 56. And again, I don't
21 recall, because we've been very cautious about 6(e) problems,
22 if we are aware of the temporal limitation. I know it was
23 communicated to your Honor in that transcript.

24 THE COURT: I don't recall having put a temporal
25 limitation.

X9AT3ACLC

SEALED - ~~CLASSIFIED~~

1 MR. LANE: I think what happened, your Honor, the
2 description the Durham team gave me was that Mr. Durham made a
3 representation about how long he thought it was going to take
4 for certain things to happen in terms of his investigation.
5 And that your Honor had said, okay, well, we'll reach that
6 point and we'll see where we are.

7 MS. McSHAIN: It's redacted. Do you want this on the
8 record? It is this paragraph. It gives the time but then
9 "will" and then it's redacted.

10 (Discussion off the record)

11 THE COURT: I was discussing with the people here how
12 to create a temporal duration to the order for secrecy based on
13 Mr. Durham's representations of what his needs are for the
14 grand jury investigation.

15 My recollection is that I did not make such an order,
16 and my belief is that I should have such an order. So I'm
17 going to ask Mr. Durham to give me a representation every six
18 months of his continuing need for secrecy with regard to
19 documents that but for his representations would be covered by
20 my orders for disclosure, along with a representation that when
21 his need ends, he will promptly let me know so that the
22 documents can be made public.

23 MR. LANE: Thank you, your Honor. We can also
24 communicate that to him. We are happy to do that. Chambers
25 has enough things to do.