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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 AMERICAN CIVIL LIBERTIES
4 UNION, et al.,

5 Plaintiffs,

6 v.

04 CV 4151 (AKH)

7 DEPARTMENT OF DEFENSE, et al.,

8 Defendants.
-----x

9 New York, N.Y.
10 December 14, 2012
11 11:42 a.m.

12 Before:

13 HON. ALVIN K. HELLERSTEIN,

14 District Judge

15 APPEARANCES

16 AMERICAN CIVIL LIBERTIES UNION FOUNDATION
ALEXANDER A. ABDO

17 GIBBONS PC
18 Attorneys for Plaintiffs
LAWRENCE S. LUSTBERG
PORTIA DOLORES PEDRO

19 U.S. DEPARTMENT OF JUSTICE
20 United States Attorney's Office
Southern District of New York
21 AMY A. BARCELO
MICHAEL J. BYARS

22 ALSO PRESENT:

23 CHARLES D. MILLS, Amicus Curiae
24
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1 (In open court)

2 THE DEPUTY CLERK: ACLU versus Department of Defense.
3 Counsel, please state your appearances for the record.

4 MR. LUSTBERG: Lawrence Lustberg, Gibbons PC -- with
5 me is Portia Dolores Pedro -- on behalf of the plaintiffs.

6 MR. ABDO: Good morning, your Honor. Alex Abdo from
7 the ACLU on behalf of the plaintiffs.

8 THE COURT: Good morning.

9 MS. BARCELO: Good morning, your Honor. Assistant
10 United States Attorney Amy Barcelo on behalf of the government.

11 THE COURT: Good morning, Ms. Barcelo.

12 MR. BYARS: Good morning, your Honor. Assistant
13 U.S. Attorney Michael Byars for the government.

14 THE COURT: Are you signed in, Mr. Byars?

15 MR. BYARS: I'm sorry, I gave me card but I don't
16 believe I signed it.

17 THE COURT: And you are Mr. Mills?

18 MR. MILLS: I'm Charles Mills for the amicus curiae
19 the, American Legion.

20 THE COURT: I don't think you made a motion to be
21 amicus in this case but I'll grant it.

22 MR. MILLS: Well, your Honor, we filed two briefs as
23 amicus already in the case.

24 THE COURT: You did?

25 MR. MILLS: I've been in the case since about 2004.

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1 THE COURT: Well, sorry, then I insulted you.

2 Welcome.

3 MR. MILLS: Thank you, your Honor.

4 THE COURT: I called this conference because I was
5 unsure if there was more that was coming that I had to decide.
6 I thought I decided everything.

7 MR. LUSTBERG: Almost.

8 THE COURT: Fees I haven't decided, right,
9 Mr. Lustberg?

10 MR. LUSTBERG: Right, Judge. Your Honor, let me tell
11 you where we are. There really are three remaining aspects of
12 the case, only probably one of which -- and you're correct,
13 it's fees -- you will likely have to get involved with to any
14 degree.

15 First, the Court will recall that the CIA is
16 reprocessing certain documents that have been gathered by the
17 Inspector General. That process is ongoing pursuant to a
18 schedule that the parties have worked out. And there are some
19 parts of it that we will continue to have to work out, but we
20 do not anticipate raising any challenge to the reclassification
21 decisions. It's possible, I suppose, theoretically that we can
22 conclude that the standards that are being used were not the
23 ones that were previously used, which is all we want, but so we
24 don't anticipate the Court being involved with that process.

25 THE COURT: What time frame are we talking about?

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1 MR. LUSTBERG: Some documents have already been
2 provided. A number of other documents, I believe, are to be --
3 not documents provided but some of the processing has already
4 occurred. Some more is supposed to have occurred, I believe,
5 by either today or Monday. Those are mainly CIA cables, the
6 Court will recall.

7 There are other documents that are supposed to have
8 been processed by February 15th, after which the parties will
9 be getting together and coming to a schedule with regard to any
10 remaining documents. But the process has been moving
11 collegially and cooperatively. But, again, we don't anticipate
12 that there will be any legal challenges with regard to those
13 classification decisions.

14 THE COURT: You gave me two areas. The third?

15 MR. LUSTBERG: OK, that was one. The second --

16 THE COURT: Fees was one.

17 MR. LUSTBERG: Well, fees -- I was going to get to
18 that third because that's where we actually have to talk about
19 some scheduling.

20 THE COURT: All right.

21 MR. LUSTBERG: The second is with regard to the
22 photographs. With regard to the photographs --

23 THE COURT: This is Department of Defense?

24 MR. LUSTBERG: Correct.

25 -- your Honor will recall that, this Court ruled --

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1 THE COURT: The Congress and the President took the
2 case away from us.

3 MR. LUSTBERG: That's what you said. You remember
4 that we argued that in fact you had some residual authority?
5 The Secretary of Defense has now --

6 THE COURT: Mr. Lustberg, could you take the stand
7 because -- not the stand, the podium.

8 MR. LUSTBERG: You don't really want me to take the
9 stand.

10 THE COURT: No, the podium, right.

11 MR. LUSTBERG: OK.

12 Can you hear me?

13 THE COURT: My recollection is that I ruled on that
14 question, that I was bound.

15 MR. LUSTBERG: That's correct, Judge, you did. And
16 now the Secretary of Defense has recertified, because the prior
17 certification expired. That matter was never -- the issue of
18 the Court's residual authority and in particular the extent to
19 which the government is required to make a showing with regard
20 to -- similar to a Vaughan type of showing, was never decided
21 by the Second Circuit Court of Appeals. So it may well be --
22 in fact, we anticipate that what we would want to do is reraise
23 the issue in essence before your Honor, the Court would, we
24 assume, simply readopt or restate its prior --

25 THE COURT: You want to catalogue any more pictures

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1 the government has?

2 MR. LUSTBERG: Pardon me?

3 THE COURT: You want a catalogue? In effect, what you
4 want is a catalogue of any more photographs that the government
5 has?

6 MR. LUSTBERG: Well, we want the photographs to be
7 disclosed.

8 THE COURT: I know, but when you say you want a
9 Vaughan showing --

10 MR. LUSTBERG: No, no, no. Let me be clear. The
11 statute requires, and the certification states, for example,
12 that the disclosure of the photographs would cause certain
13 harm. Our argument to the Court was that the mere conclusory
14 statement by the Secretary that there will be harm caused is
15 insufficient, that there has to be -- consistent with the other
16 types of declarations that are required in Freedom of
17 Information Act cases, there has to be a sufficiently detailed
18 showing so that that matter could be reviewed.

19 Your Honor rejected that. We assume that that would
20 be the Court's ruling again, and so what we may ask the Court
21 to do is, what we intend to ask the Court to do is essentially
22 reiterate your prior holding so that we would be able to appeal
23 this time around.

24 THE COURT: Mr. Lustberg, I think -- and I want to
25 hear Ms. Barcelo on this -- I think the conditions are

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1 different now from what they were at the time.

2 MR. LUSTBERG: OK.

3 THE COURT: We're out of Iraq, mostly, but there are a
4 extraordinary number of problems in Iraq and there's always the
5 potential that we may be having to go back in. So I don't know
6 how this plays out in relationship to a reapplication that you
7 would be making. I think the Second Circuit would want me to
8 make some form of a record on this. So I don't think you
9 should assume, although that would be the probable outcome, I
10 think, that I would deny your application. I think I need to
11 examine it.

12 MR. LUSTBERG: Your Honor, under those circumstances,
13 we will, of course, bring a formal application before the Court
14 and we can litigate it in the ordinary course, as we did
15 previously.

16 THE COURT: Do we know that there are more
17 photographs?

18 MR. LUSTBERG: Oh, yes, yes, sir.

19 THE COURT: We know that?

20 MR. LUSTBERG: Yes, sir.

21 THE COURT: Give me some order of magnitude,
22 Ms. Barcelo.

23 MS. BARCELO: I'm a little confused. I'm not sure
24 that what we're talking about here would be releasing to them
25 new photographs other than the photographs that were at issue

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1 back in the Court's July 2011 ruling. The only real issue, as
2 I understand it --

3 THE COURT: What Mr. Lustberg --

4 MR. LUSTBERG: Let me make sure from Mr. Abdo, because
5 he knows this part better.

6 (Pause)

7 MR. LUSTBERG: That's correct, it is in fact the same
8 photographs, it's the same photographs but it's a new
9 certification.

10 THE COURT: So what is this, every three years the
11 case comes back to me to recertify photographs?

12 MR. LUSTBERG: I wouldn't say every three years. This
13 three years. The issue that the Secretary has recertified, we
14 want to challenge that recertification. I don't anticipate we
15 would do it again in three years. And, in fact, Ms. Barcelo
16 has told me that she's not sure we can even -- that technically
17 we would be able to do this without a new Freedom of
18 Information Act request, but we anticipate we can resolve that
19 by some sort of stipulation with the government, although I
20 don't know that for sure.

21 But in any event, it's our intention to bring that
22 matter before the Court again. We agree with what the Court
23 said, that there may be a change in circumstances --

24 THE COURT: Let's say you have to make a new
25 application. Would both the government and the ACLU want me to

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1 take that as a related case or not? Because I'm not
2 volunteering.

3 MR. LUSTBERG: We are volunteering you.

4 THE COURT: Ms. Barcelo, do you also volunteer me or
5 would you prefer a different judge?

6 MS. BARCELO: I think we would volunteer you also.

7 What we --

8 THE COURT: I regret to hear this.

9 MS. BARCELO: It really is an extremely similar issue
10 to the issue that your Honor decided in July of 2011.

11 THE COURT: Would you make some kind of -- in that
12 case what's the point of a new demand? Let me just take up the
13 issue and do it.

14 MR. ABDO: I think that's what we had originally
15 anticipated, your Honor, you would simply apply your old ruling
16 to the new certification so that it was ripe for review by the
17 Second Circuit.

18 THE COURT: Well, I don't think I should do that, so I
19 think Mr. Lustberg and Ms. Barcelo should come up with a motion
20 schedule.

21 MR. LUSTBERG: We'll do that, Judge.

22 THE COURT: OK.

23 MS. BARCELO: We will preserve the issue of whether we
24 need a new request or not; we'll work something out.

25 THE COURT: Put something on the stipulation that

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1 excuses it for this case because of my familiarity and the like
2 because of my suggestion -- do anything you want, but get rid
3 of that issue. That's a stupid issue.

4 MS. BARCELO: That's what we have been anticipating in
5 discussing so far.

6 THE COURT: So that's two. And now go back to fees,
7 Mr. Lustberg.

8 MR. LUSTBERG: Back to fees, your Honor: What we are
9 proposing to do, Judge, is to proceed basically the way we did
10 with regard to the prior fee application with regard to the CIA
11 sanctions issue.

12 THE COURT: May I suggest this as an economy measure:
13 Would you and Ms. Barcelo try to identify all the subissues
14 that come into this, and when you're ready, could we talk about
15 it informally? I think I could probably save you a lot of time
16 and money on this.

17 MR. LUSTBERG: That's exactly what we were intending
18 to propose to the Court. By the middle of next month, we
19 intend to provide to the government -- I don't think it will be
20 Ms. Barcelo because I think she'll be otherwise occupied at the
21 time --

22 THE COURT: Are you leaving me? I lost three fine
23 people.

24 MS. BARCELO: Just for a few months, yes.

25 THE COURT: Oh, OK. That's exciting.

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1 MR. LUSTBERG: There seems to be certain fertility
2 aspects of this case.

3 So, Judge, we'll provide to the government our initial
4 request for fees. And from there, we'll --

5 THE COURT: Do a schedule, please, because nobody
6 works unless --

7 MR. LUSTBERG: January 15th.

8 THE COURT: Do a schedule with Ms. Barcelo and give it
9 to me for so-ordering. And the schedule should say by a
10 certain date that you will give her either all the issues with
11 some kind of sense of magnitude of the issues, and then another
12 couple weeks after that she can identify what she might take
13 exception to, and then we'll have a conference.

14 MR. LUSTBERG: No problem.

15 THE COURT: But I don't think we ought to go into the
16 audit situation yet. I think there are ways of dealing with
17 this before that. That becomes expensive.

18 MR. LUSTBERG: Yes. And we were able to avoid that
19 last time, and we anticipate being able to avoid that again.

20 THE COURT: All right. So when will I hear from you?

21 MR. LUSTBERG: So we'll work out the schedule, but we
22 are intending to provide something to the government by
23 January 15th. And sometime shortly thereafter you'll hear from
24 us with regard to a set of issues that we think will require --
25 may require the Court's intervention.

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1 THE COURT: Give me a date when I can expect to hear
2 from you on all issues.

3 I'll suggest: Why don't you write me a joint letter
4 denoting progress with regard to the issues of production with
5 regard to the motions of photographs and with regard to the
6 fees, by January 18th.

7 MR. BYARS: Your Honor, if we could have maybe another
8 week? I'm going to be out of the office from the 15th to the
9 18th.

10 THE COURT: January 25.

11 MR. BYARS: Thank you, your Honor.

12 MR. LUSTBERG: No problem. Thank you, Judge.

13 THE COURT: OK. Anything else I need to do?

14 MR. LUSTBERG: Nope. That's it.

15 THE COURT: OK. Thanks very much. Nice to see you
16 again, Mr. Lustberg.

17 MR. LUSTBERG: Thank you, Judge. Have a great
18 holiday.

19 THE COURT: Thank you. You too.

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