

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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JASON LEOPOLD

Plaintiff

Civil Action Nos.:

13-1324, 14-1056 and 14-048

v.

CENTRAL INTELLIGENCE AGENCY,
DEPT. OF JUSTICE, et al.,

Defendants

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AMERICAN CIVIL LIBERTIES UNION, et al.,

Plaintiffs,

v.

Civil Action No. 13-1870

CENTRAL INTELLIGENCE AGENCY, et al.,

Defendants

-----X

Washington, D.C.

Thursday, September 4, 2014
10:25 A.M.

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE JAMES E. BOASBERG
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For Plaintiff Leopold: Jeffrey Louis Light, Esq.
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APPEARANCES: (Cont'd.)

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Court Reporter: Lisa Walker Griffith, RPR
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P R O C E E D I N G S

1
2 THE DEPUTY CLERK: Your Honor, calling Civil Action
3 Number 13-1324, Jason Leopold versus the Department of
4 Justice, et al.; Case Number 13-1870, the American Civil
5 Liberties Union, et al., v. The Central Intelligence Agency,
6 et al.; case number 14-48, Jason Leopold versus the Central
7 Intelligence Agency; and 14-1056, Jason Leopold, et al. v.
8 the Central Intelligence Agency.

9 Would counsel for the plaintiff in Civil Action
10 Number 13-1870 appearing telephonically, please identify
11 yourself for the record and the party you represent.

12 MS. SHAMSI: Good morning. This is Hina Shamsi on
13 behalf of the American Civil Liberties Union. And Your
14 Honor, thank you for letting me participate by phone.

15 THE COURT: All right. Glad you are here. If you
16 have any trouble hearing anything, just let me know,
17 Ms. Shamsi.

18 MS. SHAMSI: I will, thank you.

19 THE COURT: Counsel for plaintiff in all other
20 matters, and counsel for the defendants, please come to the
21 lecturn and identify yourselves for the record and the
22 parties you represent.

23 MR. LIGHT: Good morning, Your Honor. Jeffrey Light
24 on behalf of plaintiffs, Jason Leopold and Ryan Noah Shapiro.

25 THE COURT: Good morning.

1 MS. MEI: Good morning, Your Honor. Vesper Mei from
2 the Department of Justice on behalf all defendants in all of
3 the cases. With me is also Elizabeth Shapiro also from the
4 Department of Justice.

5 THE COURT: Good morning to all of you. I'm glad
6 you folks are here. I just want to check in on the status of
7 a couple of these items. I know we've extended the date for
8 processing for a month until the end of this month. But
9 there is still some housekeeping that I wanted to take care
10 of, to make sure we're on top of.

11 So, let me start by asking you, Mr. Light, having
12 again spent a little time with the dockets of these cases.
13 And we'll do -- the 1056 is a little bit different. So we'll
14 deal with that later. But on 1324, you've amended your
15 complaint to ask for, quote, portions of the final report
16 unquote.

17 Now, the government I think believes that you are
18 looking for the executive summary but that's not so clear to
19 me based on how you've amended your complaint. So perhaps
20 you can make that clear.

21 MR. LIGHT: Thank you, Your Honor.

22 Our original FOIA request was for the executive
23 summary. Subsequent to that, we learned that the final
24 Senate report include some pages that are a summary of
25 findings. I'm not exactly sure what the right term is for

1 it, but essentially some bullet points that are separate from
2 the executive summary. So that is something that we had also
3 are included in our report. I'm not exactly sure
4 specifically how to refer to it but hopefully the defendants,
5 I'm conveying it adequately to them what it is I'm referring
6 to.

7 THE COURT: All right. I'll ask Ms. Mei, because I
8 can't say that I understand precisely what you've said. And
9 based on the defense's filings, they believe you are still
10 looking for the executive summary.

11 MS. MEI: Your Honor, our characterization of
12 Mr. Leopold's request is the copy of the executive summary
13 was based on his FOIA request to the CIA, which is where we
14 got that. I don't believe, although I may be wrong, that the
15 findings and conclusions are included within that FOIA
16 request.

17 THE COURT: Okay. Mr. Light.

18 MR. LIGHT: Your Honor, I'll need to review the FOIA
19 request. If for any reason that we had not included that in,
20 then that was an oversight. We'll submit a new FOIA request
21 to add that in. My recollection to the best of my memory was
22 that was something that was included in our second FOIA
23 request, the one to the CIA.

24 THE COURT: It won't make a whole lot of difference
25 because the ACLU's request asked for the full report. So,

1 I'm not sure it makes a difference. But I still am not sure
2 what else you are asking for beyond the executive summary,
3 even if it was included in your FOIA request.

4 MR. LIGHT: So, and I'm not exactly sure what the
5 terminology is but there is an executive summary and then a
6 findings and conclusion section. My understanding, the
7 findings and conclusion wasn't in the original draft, or at
8 least we didn't know about its existence at that point. We
9 were just asking for the executive summary. So now it is the
10 executive summary, plus findings and conclusions.

11 THE COURT: Isn't that what an executive summary is?
12 Unless there is something that is clearly stated in the FOIA
13 request that is still part of this case, I am going to limit
14 it to the executive summary which I think is what they
15 thought it is all along. Again, there are other cases that
16 we're going to get to that deal with other points but I think
17 this is just executive summary.

18 So let me now ask you, Ms. Mei, my question which
19 plays off of that which is, so the ACLU's suit, 1870 has
20 asked for three documents. The full SSCI report, not just
21 the executive summary, the CIA response to the report and
22 what everyone is referring to as the Panetta Report, which is
23 the independent report commissioned by Leon Panetta. And
24 again, for ease of reference, since everyone refers to it as
25 the Panetta report, I will too.

1 So my question is, when you talk about your
2 declassification review and production, I inferred that from
3 your pleadings that the processing of all three of these is
4 going to be complete by September 29. Is that right?

5 MS. MEI: Well, as we stated in our motion for
6 extension, the negotiations between SSCI and the executive
7 branch for the executive summary findings and conclusions
8 that were submitted for declassification review is still
9 ongoing.

10 We expect that those will be completed by August 29.
11 It is possible, if those discussions go up until September 29
12 or close to it, that the CIA may need another brief extension
13 for the remaining two documents, the CIA response and the
14 Panetta Report, in order to conform the writ actions in there
15 to the newly declassified information.

16 THE COURT: But I'm correct in inferring that your
17 intent is to produce in some form or fashion all three of
18 these documents?

19 MS. MEI: To the extent that there is non exempt
20 information to be released, yes. Although, I will also add
21 that none of the agencies have yet received the full updated
22 version of the SSCI report. All that they have at this point
23 is the executive summary with the findings and conclusions.

24 THE COURT: But the point is that everyone will
25 apply the declassifications in the executive summary to the

1 body of these reports.

2 MS. MEI: To the CIA response in what we've called
3 the Panetta Report.

4 THE COURT: How about the full SSCI report? I think
5 that's what the ACLU has asked for, not just the executive
6 summary.

7 MS. MEI: The ACLU has asked for the full updated
8 version of the SSCI report. None of the agencies have
9 received that yet. So there is no full updated version.

10 THE COURT: I'm sorry. It is not a document in your
11 possession.

12 MS. MEI: Correct.

13 THE COURT: So Ms. Shamsi, is this news to you or
14 not?

15 MS. SHAMSI: Sorry, Ms. Mei. Were you going to
16 speak first?

17 THE COURT: No, I'm waiting to hear from you.

18 MS. SHAMSI: Your Honor, this is something that
19 we've been going back and forth with the Department of
20 Justice about, if I may take a minute just to explain. As
21 you may recall from our papers, in April of this year,
22 Senator Feinstein said that she would transmit the full
23 report to the executive branch. We filed a FOIA for the full
24 report.

25 In response, the defendants never said that they

1 didn't have the full report. And we came to understand that
2 it would likely be the defendant's position that they didn't
3 have the full report in around June of this year and we asked
4 for clarification about whether that was the case or not.
5 And Ms. Mei, on behalf of her clients, clarified that, said
6 that defendant's position is that they do not have the full
7 report.

8 That doesn't sound very plausible to us given
9 Senator Feinstein's indication that she would transmit the
10 full report to the executive branch. Our legislative staff
11 at the ACLU talked to many people on the hill and they have
12 been led to understand that at least one or more of the
13 agencies may have the full report.

14 So if it is the defendant's position that none of
15 them have the full report, we would respectfully ask the
16 agencies to file a declaration for the public record about
17 what is exactly and is not in their possession so that we may
18 take it from there.

19 THE COURT: Ms. Mei, did you want to respond further
20 to any of that?

21 MS. MEI: I would just add that, as late as this
22 week when I did check again with my contacts in the agencies,
23 they all represented to me that none of the agencies have yet
24 received the full updated version of the report.

25 THE COURT: All right. Well, I'm not going to

1 require at this point the declaration. We'll talk about that
2 further down the road if you want to still maintain,
3 Ms. Shamsi, that they do have it.

4 All right. So, the next question then is, are these
5 motions, the jurisdictional motions based on the agency
6 records defense, are those now moot, Ms. Mei, given what is
7 happening here?

8 MS. MEI: Given that there is no FOIA request
9 pending, the motion in the ACLU case was based on the prior
10 version of the SSCI report. I believe that's moot. The
11 motion in Mr. Leopold's case was also based on the prior
12 version of executive summary in the Department of Justice's
13 possession. Since the Department of Justice is no longer a
14 defendant, and also the executive summary is no longer the
15 same version, we believe that's moot too.

16 Also, I just wanted to add one more thing with
17 respect to the full SSCI report. To the extent that the
18 agencies do at some point receive the full updated version,
19 we would also continue to maintain that that is not an agency
20 record.

21 THE COURT: If you do, then I think what you have to
22 do then -- I'll end up denying these motions as moot. But if
23 you do receive it, and you would make that argument, I think
24 -- I don't want to be in a situation where you have the
25 report and you are maintaining it is not an agency record.

1 But Ms. Shamsi believes your position is still you don't have
2 it.

3 So at some point you'll have to make clear either we
4 don't have any documents that are responsive to this request
5 because it is not in our possession. Or we do and here is
6 our position on agency records. So that is, we'll leave you
7 to make that down the road.

8 All right. So then--

9 MS. SHAMSI: I'm sorry, Your Honor, may I just
10 clarify?

11 THE COURT: I'm sorry, Ms. Shamsi. Did you want to
12 say something?

13 MS. SHAMSI: Yes, I just wanted to clarify if I may.
14 So our FOIA request and complaint currently covers both the
15 executive summary as well as the full report. With respect
16 to the full report, as I understand it, Your Honor, you are
17 saying that we can raise down the line, but not now, our
18 request to ask for declaration from the agencies saying that
19 they do not in fact have the full report because if they
20 don't have the full report then they don't have an obligation
21 to process. If they do have the report, then we should be
22 discussing processing.

23 THE COURT: Yes. In other words, when they
24 ultimately respond with the documents, they will have to have
25 a position regarding the full report. I agree with you,

1 unless Ms. Mei tells me different, that the executive summary
2 is part of the report. So you would be producing to the
3 ACLU, as well as to Mr. Leopold the -- once the
4 declassification procedures are done, the executive summary I
5 trust.

6 MS. MEI: We expect that SSCI itself will actually
7 publicly release this document.

8 THE COURT: Which is the second point. But you
9 would not take the position here that the executive summary
10 is not responsive to their request because it's somehow not
11 the report.

12 MS. MEI: I think that's correct, Your Honor.

13 THE COURT: So I think that resolves your question,
14 Ms. Shamsi.

15 So again, it is not for me to dictate certainly how
16 the Senate proceeds. And I understand from the attachments
17 you've submitted that the committee wishes to make this
18 public itself. So your argument would then be, this is in
19 the public domain, it is now -- the issue is now moot. Of
20 course, we can then argue about what has not been
21 declassified. But your position is that the committee will
22 release it once this is done, thereby mooting the request for
23 the declassified material.

24 MS. MEI: I think that's probably right, Your Honor.

25 THE COURT: Okay. So then, shall we set another

1 status then for September 30 or the first couple of days of
2 October? Then we can see again what is happening with the
3 declassification. I mean, part of the issue, and Mr. Light
4 and Ms. Shamsi -- and I'll hear from Ms. Shamsi first, is if
5 declassified portions are released, will you then be still
6 seeking the release of what has been deemed classified or is
7 that too speculative a question for me to ask until you've
8 seen it?

9 Ms. Shamsi?

10 MS. SHAMSI: Your Honor, I think we would make our
11 assessment after we have seen what ends up being released and
12 consider whether to proceed under FOIA to challenge any bases
13 for withholding at that point.

14 THE COURT: All right. That's perfectly reasonable.
15 The reason I'm asking is I don't want to force people to come
16 back before you've had time to review the material and figure
17 out how you are going proceed. So maybe we should set a
18 status for a little bit later. Say, the week of October 6.
19 Does that make sense, Ms. Shamsi?

20 MS. SHAMSI: That makes perfect sense, Your Honor.

21 THE COURT: And Mr. Light, I don't want to cut you
22 out of this. Are you in the same position that you would
23 rather have a chance to see what has been declassified before
24 deciding how you want to proceed?

25 MR. LIGHT: That's correct. I think it is too

1 speculative at this point for us to make a decision. But I
2 think that, before we make a decision, we are going to want
3 to, not just what is determined classified and not
4 classified, but also a Vaughn declaration from the government
5 agency.

6 THE COURT: I'm not going to require them to submit
7 that yet. Let's see what is declassified first, what you get
8 and then we'll go from there. I mean, the Vaughn declaration
9 would simply say there are only three documents -- one
10 document for you, three for the ACLU. The declaration would
11 say "classified." So I don't think that is so complicated.

12 MR. LIGHT: Respectfully, Your Honor, that is
13 correct it will say it's classified but we need to review it
14 to determine if the proper procedures were followed if we
15 want to make any challenges.

16 THE COURT: Right. But what I'm saying is let's see
17 first what you get, and maybe you are happy with what you get
18 and maybe you are not. But I'm not going to require them to
19 do that until we come back and see where we are.

20 MR. LIGHT: I understand. It's just to advise you
21 that, I think if we come back say October 6, we won't have a
22 position yet because we won't have seen the Vaughn Index.

23 THE COURT: But I think we can still make -- then we
24 can talk about how we're going to proceed going forward and
25 timetable for going forward.

1 MR. LIGHT: That would be fine.

2 THE COURT: So let's wrap this one up.

3 Mr. Light, I'm going to go to your last case. So,
4 how is October 7 at 9:30 for status, Mr. Light? And this
5 will be on the three cases, 1324, 14-48, and 1870.

6 MR. LIGHT: I'm free that day.

7 THE COURT: Ms. Shamsi, you can appear by phone if
8 you prefer.

9 MS. SHAMSI: I appreciate that, Your Honor, I will
10 appear in person on this day.

11 THE COURT: Are you available?

12 MS. SHAMSI: I am.

13 THE COURT: Ms. Shamsi, that date works for you?

14 MS. SHAMSI: Yes, it does.

15 THE COURT: Ms. Mei, how is that date for the
16 government?

17 MS. MEI: That's fine, Your Honor.

18 THE COURT: All right, that will be the status date
19 for that case. So the last --

20 I think, Ms. Shamsi, I'm going to talk about this
21 last case. It is somewhat related in that it is the CIA and
22 Senate Committee documents regarding access. But I'm also
23 happy to release you unless you have anything further you
24 want to raise this morning.

25 MS. SHAMSI: I don't have anything further, Your

1 Honor. But I would appreciate staying on if I may.

2 THE COURT: You may.

3 Then let me go to the government on the last case
4 which is 14-1056, which relates -- and the request there was
5 agreements between the committee and the CIA regarding the
6 committee's access to CIA documents and CIA's investigation
7 into the search of the committee's computers. Can you tell
8 me where things stand there?

9 MS. MEI: Yes, Your Honor. The searches are ongoing
10 at the CIA. They should have a better idea around the first
11 week in October, which I guess is when the status conference
12 in the other cases is set for, where the CIA stands and when
13 it can complete the processing of the documents. It will
14 depend on the volume of the documents found and also the
15 degree of the coordination that needs to be done.

16 THE COURT: Okay. So let's set a status for 10:00.
17 These really aren't the same case. Let's set a status for
18 10:00. So following the earlier consolidated hearing, we'll
19 have a hearing on this. And you will be able to represent to
20 me and to Mr. Light where things stand there. And we can
21 figure out about production or briefing schedules in that
22 case. How does that sound?

23 MS. MEI: That will work, Your Honor.

24 THE COURT: Mr. Light?

25 MR. LIGHT: That would be fine, Your Honor. I did

1 want to advise that we are planning to amend that lawsuit. We
2 have two additional outstanding FOIA requests that are very
3 similar subject matter but based on events that we've learned
4 have occurred since the original FOIA request. Specifically
5 the referral to DOJ for prosecution of CIA and Senate
6 staffers, my understanding is DOJ declined prosecution. We
7 now have FOIA requests pending with CIA and DOJ related to
8 that issue.

9 THE COURT: Thank you.

10 All right. Anything else then?

11 Ms. Mei, I think you want to respond?

12 MS. MEI: Your Honor, I think we would oppose that
13 amendment, it is a different case. It is not within the
14 confines of this lawsuit.

15 THE COURT: I appreciate that. I not saying to
16 Mr. Light that he may amend. He may seek to amend and I'll
17 hear you and we'll go from there.

18 MS. MEI: Thank you, Your Honor.

19 THE COURT: Anything else then, Mr. Light, on that
20 case or on the previous ones?

21 MR. LIGHT: If I can speak to the 14-48 regarding
22 the Panetta?

23 THE COURT: Right. In that case, I wasn't exactly
24 clear from the complaint, but it seems that it is the Panetta
25 report that you are seeking?

1 MR. LIGHT: That's correct.

2 THE COURT: Okay.

3 MR. LIGHT: And my understanding of where we are
4 right now with that, and perhaps the defendant can clarify,
5 is that, the SSCI report and the Panetta Report were, had
6 some interrelated material. And that the initial review of
7 the Senate's report has been completed by the White House and
8 the CIA. And the Senate is now looking to try and make more
9 information unredacted. But I'm not sure what effect that
10 would have on the Panetta Report because the Senate has no
11 control at all over the Panetta Report. And I'm not sure why
12 Senator Feinstein is trying to delay our being able to get
13 that report.

14 THE COURT: In the ACLU's case, the Panetta Report
15 was something they had also sought. And Ms. Mei has
16 represented in the pleadings, and has also confirmed today,
17 that they are continuing to process that. And expect to have
18 that on the same date as the other documents.

19 MR. LIGHT: My understanding was that the previous
20 date that was set for processing to be complete has been
21 extended because of the further review that the Senate is
22 doing of the Senate's report. And that, what Ms. Mei said
23 this morning is that what would happen to the Panetta Report
24 is conforming changes to the Senate report. But we would
25 like to receive it if it is ready now, even if there are

1 going to be further redactions in the future, we would like
2 to receive what is ready now.

3 THE COURT: I gave them in the prior case, and I
4 think in this case until September 29 to finish that. It
5 would makes sense that they are coordinating. The items that
6 are classified in one report are obviously going to be
7 classified in the other, and for them to be able to cross
8 reference those reports to declassify in a consistent manner
9 makes perfect sense.

10 MR. LIGHT: Sure. But if all that's happening is
11 more items are being declassified, our consent for an
12 extension was premised on the initial e-mail I received from
13 Ms. Mei, which was that processing was ongoing. But from
14 what I understand from the actual memo and exhibit that was
15 submitted is that the extension was based on the senator's
16 request that processing be delayed.

17 We were unaware of Senator Feinstein's position at
18 the time we consented to that. Our position is she shouldn't
19 be permitted to interfere with our proceeding.

20 THE COURT: I thought it was more than that, but
21 I'll hear from Ms. Mei.

22 MS. MEI: Your Honor, what the plaintiffs have
23 called the Panetta Report is based on the same historical
24 events as the SSCI report. And the declassification review
25 of executive summaries may effect whatever, as Mr. Light has

1 recognized, may effect what is declassified in the Panetta
2 Report and may effect whatever non-exempt information there
3 is to release.

4 It didn't make any sense to the defendants to
5 process it and then have to reprocess it. In addition, it
6 would be -- it would give more of a road map of what was
7 classified initially, if there was an initial release and
8 then a subsequent one of more declassified information.

9 THE COURT: I think my orders approving this course
10 makes sense, that all three are being declassified
11 simultaneously. If you are unhappy with what is released,
12 we'll go from there.

13 Okay. Thank you.

14 Anything, any final issues from the government?

15 MS. MEI: No, Your Honor.

16 THE COURT: All right. I'll issue an order
17 memorializing what we have just discussed today. And we'll
18 see everybody back here on October 7. Thank you so much.

19 (Whereupon, at 10:52 A.M., the hearing adjourned.)
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CERTIFICATE OF REPORTER

I, Lisa Walker Griffith, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Lisa Walker Griffith, RPR

Date