

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

CENTER FOR NATIONAL SECURITY STUDIES, )  
 et al., )  
 )  
 Plaintiffs, )  
 )  
 v. ) Civil Action  
 ) No. 01-2500  
DEPARTMENT OF JUSTICE, )  
 ) Judge Kessler  
 Defendant. )  
\_\_\_\_\_)

**DECLARATION OF DAVID L. SOBEL**

I, DAVID L. SOBEL, hereby depose and state:

1. I am co-counsel to the plaintiffs in the above-captioned action.

2. I have reviewed the Declaration of James S. Reynolds ("Reynolds Decl."), proffered by defendant in support of its motion for summary judgment. With respect to those portions of Mr. Reynold's declaration that address defendant's contention that disclosure of the information plaintiffs seek would, inter alia, interfere with investigative activities, invade personal privacy, and endanger the safety of individuals, plaintiffs' counsel are currently unable to present certain facts material to plaintiffs' opposition to defendant's motion.

3. Based upon experience I have gained through litigating Freedom of Information Act cases during the past 20 years, I believe that these material facts may only be

obtained through discovery, as they are in the exclusive possession of defendant.

4. There are credible indications that, contrary to defendant's vague assertions, the government itself has determined that most of the detainees are not connected to terrorism. I base this conclusion upon the following factors:

a) In support of its motion for summary judgment, defendant has presented only broad and general assertions that purport to apply to the various circumstances of hundreds of detained individuals. There is no solid information provided from which plaintiffs or the court can determine the applicability or validity of defendant's claims to the requested information. In fact, only one paragraph of defendant's supporting declaration contains language making any connection between the harms posited by defendant and the requested information: "in the course of questioning [the individuals detained], law enforcement agents determined, often from the subjects themselves, that they were in violation of federal immigration laws, and, in some instances also determined that they had links to other facets of the investigation." Reynolds Decl. ¶ 10 (emphasis added).

b) Mr. Reynolds proceeds to recite a litany of potential harms, using the assertion that "some" detainees have "links" to "facets of the investigation" to justify withholding information relating to each of the 725 INS

detainees. Significantly, Mr. Reynolds does not assert that each of the detainees -- and former detainees -- about whom basic information is being withheld has been "linked" to anything.

c) In contrast to Mr. Reynolds' vague assertion that "some" detainees may have unspecified "links" to some "other facets" of the government's investigations, there are (as set forth below) credible indications that, in fact, the government has determined that hundreds of the detainees are not in any way connected to terrorism.

d) Defendant's own submission appears to contradict Mr. Reynold's assertion. The 118-page list of INS detainees submitted by defendant in support of its summary judgment motion (Exhibit 6) is divided into two segments: a 58-page segment with 381 names captioned "INS Special Interest List," and a 60-page segment with 344 names, with each page bearing the legend "INACTIVE CASES" in large type. The apparent meaning of that legend is that these 344 individuals are no longer of "special interest."

e) It is public knowledge that hundreds of the individuals listed in defendant's Exhibit 6 have now been released from custody. Brooke A. Masters and Patricia Davis, Moussaoui Has Va. Hearing, Washington Post, December 20, 2001, page A32 ("yesterday, the Justice Department announced that 460 people are currently in federal custody on immigration charges"). At a recent public forum, a Justice Department

spokesman stated that there were only 160 post-September 11 INS detainees still in custody. Declaration of Elizabeth S. Westfall. If the government has concluded that most of those initially detained no longer need to be in custody, it appears that those individuals are no longer even suspected of being involved in terrorist activity.

f) There are other credible indications that most of the detainees are not, in fact, even suspected of terrorist activity, believed to have knowledge of terrorist activity, or of any continuing interest to the government's ongoing post-September 11 investigation. The Los Angeles Times reported that "[o]fficials have said that, of the 700, only a few have links to the terrorism investigation. The vast majority were swept up on immigration violations or state and local charges." Richard A. Serrano, Many Held in Terror Probe Report Rights Being Violated, Los Angeles Times, October 15, 2001, page A1.

g) The "USA PATRIOT" Act of 2001 provides that a non-citizen may be detained when the Attorney General certifies that he has "reasonable grounds to believe" that the non-citizen is "engaged in any ... activity that endangers the national security of the United States." Pub. L. 107-56, § 412, 115 Stat. 272, 351 (October 26, 2001) (to be codified at 8 U.S.C. § 1226a). Mr. Reynolds' declaration does not address the number of detainees who have -- or, more importantly, have not -- been so certified under the Act.

5. There are credible indications that defendant's submission in support of its summary judgment motion is inaccurate and incomplete. I base this conclusion upon the following factors:

a) On November 5, 2001, the Department announced that 1,182 people had been detained since September 11. See Dan Eggen and Susan Schmidt, Count on Released Detainees is Hard to Pin Down, The Washington Post, November 6, 2001, page A10. However, in its FOIA response, defendant lists only 725 INS detainees and states that 117 detainees are being held on federal criminal charges and some number on material witness warrants; the Justice Department has stated that the latter is a "small number." Neil A. Lewis, A Nation Challenged: The Detainees, New York Times, October 30, 2001, page B1. Accordingly, the government's response at a minimum fails to account for more than 300 individuals who have been detained.

b) Defendant's list of detainees who have been charged with federal crimes (Exhibit 5 to defendant's motion) contains the names of 92 individuals. However, on November 27, 2001, Attorney General Ashcroft named 93 criminal defendants who were said to be part of the post-September 11 investigation. Dan Eggen, Many Held on Tenuous Ties to Sept. 11; Ashcroft Names 93 Defendants, Washington Post, November 29, 2001, page A18. Moreover, Mr. Reynolds states that "[t]he second category of detainees consists of 117 individuals who have been held on federal criminal charges." Reynolds Decl. ¶ 27 (emphasis

added). Thus, 25 individuals appear to have been omitted altogether from defendant's list.

c) There appears to be an unspecified number of federal criminal defendants whose cases are under seal. Mr. Reynolds states, in passing, that "for those persons being held on federal criminal charges whose cases are not under seal, DOJ has already disclosed [certain information] to plaintiffs." Reynolds Decl. ¶ 8. Mr. Reynolds says nothing further about cases that are under seal (these are not the sealed "material witness" cases discussed by Mr. Reynolds at ¶¶ 31-36 of his declaration), and no information has been released as to them -- not even the number. However, government officials have stated that there were eleven such defendants as of late November, and there may well be more by now. Dan Eggen, Many Held on Tenuous Ties to Sept. 11; Ashcroft Names 93 Defendants, Washington Post, November 29, 2001, page A18.

d) Mr. Reynolds states that defendant has previously released to the public the identity of the federal judicial district in which "the complaint or indictment was filed" against each criminally charged defendant. Reynolds Decl. ¶ 8. His assertion is only partially true. That category of information was released on November 27, 2001, in connection with the release of information about the 93 defendants then disclosed. But there are 10 detainees listed in defendant's Exhibit 5 who were not named on November 27, and as to them the district in which they are charged has not been disclosed. And,

as noted in ¶ 5(a), supra, there appear to be 25 charged individuals as to whom no information -- including district in which charged -- has been provided.

e) On defendant's list of INS detainees (Exhibit 6 to defendant's motion), eleven individuals are shown as being charged under federal criminal law (Title 18 U.S. Code) rather than under provisions of the Immigration Act. Because of the absence of names, it is impossible for plaintiffs to ascertain whether any of those individuals are also listed in Exhibit 5 (the criminally-charged detainees). However, it appears certain that at least six of those eleven individuals do not appear in Exhibit 5, because the charges (or combination of charges) shown against them on Exhibit 6 do not appear on Exhibit 5.

6. In order to resolve the discrepancies set forth above, plaintiffs must obtain relevant facts through discovery. Plaintiffs require discovery, inter alia, to clarify the apparent incompleteness and inconsistency of defendant's disclosures; to ascertain the number of detainees who have been released from custody and/or approved for voluntary departure under the immigration laws; to ascertain the number of detainees who have been certified or not certified under the USA PATRIOT Act; and to determine the significance of a detainee being placed on the "INACTIVE" list.

7. The information at issue in this case concerns matters that raise questions relating to potential governmental impropriety. I base this conclusion upon the following factors:

a) In granting plaintiffs' requests for expedited processing of their FOIA requests, defendant conceded that this is "(a) matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." Exhibit B to Declaration of Melanie Ann Pustay (attached to Defendant's Motion for Summary Judgment as Exhibit 4).

b) Review of the list of INS detainees attached to defendant's summary judgment motion indicates that, as the Washington Post has reported, "[s]cores of immigrants detained after the Sept. 11 terror attacks were jailed for weeks before they were charged with immigration violations," including at least one who was held for 66 days with no charge pending against him. Dan Eggen, Delays Cited In Charging Detainees, Washington Post, January 15, 2002, page A1.

c) Although Mr. Reynolds asserts that "[n]o one has been denied their right to talk to an attorney," Reynolds Decl. ¶ 21, there have been credible reports about the severe obstacles that the government has placed in the way of detainees seeking to contact legal counsel. Testimony of Gerald H. Goldstein, Esq., before the Committee on the

Judiciary of the United States Senate, December 4, 2001; Testimony of Michael Boyle, Esq., before the Committee on the Judiciary of the United States Senate, December 4, 2001. See also Lois Romano & David S. Fallis, Questions Swirl Around Men Held in Terror Probe, Washington Post, October 15, 2001, page A1 (quoting "senior federal law enforcement official involved in the investigation" as saying that some detainees are "held for a week or longer without legal representation or permission to contact family members").

d) There have been credible reports about detainees being refused or hindered in exercising their undoubted legal right to contact consular officials from their country of citizenship. For example, the Canadian government recently sent a formal diplomatic note to the U.S. State Department, protesting the treatment of a Canadian citizen who "disappeared" on September 20 and whose detention in federal custody was not disclosed for nearly three months, despite inquiries by Canadian authorities. Barbara Crossette, Diplomats Protest Lack of Information, New York Times, December 20, 2001, page B5.

e) There have been credible reports about detainees being abused or treated improperly while in federal custody. For example, some detainees are reported to have been left in the cold without blankets "apparently to weaken their resistance," or to have been housed with convicted criminals. Others have reportedly been kept blindfolded during

questioning or confined without a mattress, blanket or drinking cup. At least one female detainee was guarded by male guards 24 hours a day, even while bathing. Id.; see also Testimony of Ali Al-Maqtari before the Committee on the Judiciary of the United States Senate, December 4, 2001; Richard A. Serrano, Many Held in Terror Probe Report Rights Being Abused, Los Angeles Times, October 15, 2001.

8. Plaintiffs require discovery into the treatment of detainees, as such facts are relevant to the showing of potential government misconduct, which is in turn relevant to this Court's review of the defendant's declarations. See Rugiero v. Department of Justice, 257 F.3d 534, 546 (6th Cir. 2001).

9. Plaintiffs' discovery will seek only information material to their opposition to defendant's motion for summary judgment, and will not seek disclosure of the very information they sought in their original FOIA requests or in this litigation.

10. The published reports and congressional testimony upon which plaintiffs rely are attached hereto.

Under penalty of perjury, I hereby affirm that the foregoing is true and correct to the best of my knowledge and belief.

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DATE

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DAVID L. SOBEL