

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MILITARY AUDIT PROJECT, et al.,
Plaintiffs

v.

GEORGE H. BUSH, Director of
Central Intelligence, et al.,
Defendants

Civil Action No. 75-2103

FILED

JUL 11 1977

JAMES F. DAVEY, Clerk

Washington, D. C.
June 28, 1977

The above-entitled cause came on for Hearing before
the HONORABLE GERHARD A. GESELL, United States District Judge,
at 2:30 p.m.

APPEARANCES:

WILLIAM A. DOBROVIR, Esq.,
Counsel for Plaintiffs

JEFFREY AXELRAD, Esq.,
PAUL F. FIGLEY, Esq.,
Department of Justice,
Counsel for Defendants

IDA Z. WATSON
Official Reporter
U. S. Court House
Washington, D. C.

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P R O C E E D I N G S

THE CLERK: Civil Action No. 75-2103, Military Audit Project, et al., v. Bush, et al. Mr. William Dobrovir for the Plaintiffs. Mr. Jeffrey Axelrad and Mr. Paul Figley for the Defendants.

THE COURT: When I learned that the mandate had come down from the Court of Appeals, I thought I had better have you gentlemen in to see what lies ahead in connection with this case.

Is it still a viable case or is it all over?

MR. AXELRAD: May it please the Court, the current status of the matter is that a re-review of the material is being conducted.

In all candor, I think I should represent to Your Honor that I am virtually certain that as a result of the re-review substantial portions if not all of the material at issue will remain at issue.

THE COURT: Well, if that is the case, I have got some very serious problems, Mr. Axelrad that I want to talk about.

I took your representations to me in good faith and I have made, after ex parte hearings, decisive findings on many issues that I guess are still going to be litigated. I am in a position where I doubt very much that I should continue in the case.

I heard witnesses. I reviewed documents, at your

insistence. I made findings of fact. Then as soon as you face the realities of an appellate court, you change your position entirely and take a direct opposite position from what you have been constantly taking in front of me.

You refused to supply a Vaughn v. Rosen index repeatedly in our proceedings; and as soon as you got upstairs and under the gun, you said you would give one.

I think I am compromised in this case, as far as I can see. I don't see really that I should go forward with it. You have got 128,000 documents you are going to have to index; and I think you had better get at it, because that is what the Court of Appeals has ordered.

I feel very disturbed about my status in this whole matter. I certainly can't accept your representations any longer and I wouldn't be able to accept the representations of those witnesses who appeared before me, who cut their heart out about the secrecy here, and led to findings by the Court which now are -- obviously, I was just made fun of by the agency. I just have a doubt that I ought to go ahead.

MR. AXELRAD: May I be heard briefly in the interest of completeness on what Your Honor has just said?

THE COURT: Yes, surely.

MR. AXELRAD: If I may have Your Honor's indulgence, I would like to present at this time a copy of what we did file in the Court of Appeals and which led to the remand which caused

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Your Honor to set the hearing today.

May I hand up a copy of what we did file in the Court of Appeals?

THE COURT: I have seen it but I would be glad to have it for the record.

MR. AXELRAD: Your Honor, I would like the record to reflect what I have on the face of the motion which we filed in the Court of Appeals. It indicates that I mailed it to several Government agencies. Mr. Dobrovir has the entire document, absent the notation that I mailed it to agencies. I would not object to his examining that copy, if he wishes to determine which agencies I mailed copies to.

I am handing that to Your Honor particularly for an examination of the first two pages.

I would like to discuss exactly what Your Honor raised a moment ago; but I suggest, if I may, that Your Honor examine the first two pages first.

THE COURT: I have seen this motion before. I couldn't understand why the case came back. I couldn't understand how you could get an order such as I got. I went and looked at the file upstairs to find out what was going on, which is what I often do at time of remand.

MR. AXELRAD: Your Honor, I suggest, first of all, that Your Honor has raised questions as to the good faith, if you will, of the Government.

I don't believe that there is anything at all to warrant any suggestion that the Government hasn't acted in good faith or that Your Honor hasn't acted in the judicial capacity that Your Honor must.

THE COURT: I made findings. I made ex parte findings after hearing witnesses ex parte. Now we have a contested case on those very issues. How can I sit?

MR. AXELRAD: Let me --

THE COURT: How can I sit?

MR. AXELRAD: Let me answer it in this way, if I may. Your Honor, we asked for the ex parte proceeding --

THE COURT: You certainly did.

MR. AXELRAD: -- only as a last resort and because of the view taken, which was to my satisfaction made by the persons responsible within the Government that it was necessary to proceed in this fashion in order to protect the national security interests at stake. For that reason we sought an in camera proceeding. To be sure, not the precise in camera proceeding which resulted but an in camera proceeding. We did so with great reluctance, as we stressed.

Your Honor thereupon heard the evidence submitted in camera. There can be no doubt that Your Honor did so.

Mr. Dobrovir did not see the material submitted in camera. That is so.

Whether or not in this unique situation Your Honor

feels obliged to recuse himself, I do suggest as a matter of my understanding of the law that it would not require Your Honor to disqualify himself from further proceedings.

THE COURT: Let me read you from my opinion.

MR. AXELRAD: Your Honor, I --

THE COURT: For instance, I say:

"The capabilities of our Government in the area, the methods used to finance and conceal the project and the amounts which the United States was willing to commit to the venture are all matters vital to the security of the country."

So now you are going to continue to urge those very points before me and I have made a finding already in your favor, based upon ex parte presentation by witnesses who apparently were ill advised, to say the least.

MR. AXELRAD: Your Honor, the determination was made recently by the National Security Council of the fact that the Central Intelligence --

THE COURT: They made it differently before I heard the case.

MR. AXELRAD: They made a contrary determination before you heard the case, that is so.

THE COURT: I think it would be appropriate to put this matter in the hands of some judge who can approach it fresh

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and who is not involved in the situation which I am involved in, which is to me a matter of great personal embarrassment. I don't feel I could accept representations coming from these people again. So what is the point of my hearing it?

MR. AXELRAD: Your Honor, if Your Honor feels you cannot accept representations which are based on the record and which Your Honor can have in open Court, then I agree with you.

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THE COURT: How can I? It turns out that it was all just a game that was played over a period of a year in front of me.

MR. AXELRAD: Your Honor, I know of nothing to support that view and I must take issue with it. You don't know what Your Honor is suggesting.

THE COURT: You can take issue with it but I heard reams of testimony; and as soon as you got up in the Court of Appeals, you gave it all up.

MR. AXELRAD: Your Honor --

THE COURT: May I raise some other questions with you, too.

Should I return to you all these documents now?

MR. AXELRAD: That is what I would suggest is the proper procedure. The case will be litigated in open Court on remand, as far as I can tell at this time.

THE COURT: I have no way of knowing whether it will

or not. That depends on how you interpret Weisman.

What about the transcript of the testimony?

MR. AXELRAD: Your Honor, I think that the best way of handling that is that, since we believe that there are and continue to be -- the extent which will be determined is being determined at this time -- important national security interests still at stake in this litigation, the remand does not suggest to the contrary, we do not believe that the in camera submissions can be opened.

THE COURT: I am talking about returning the transcript to you.

MR. AXELRAD: The transcript -- I don't know that a transcript of the matter was actually made.

THE COURT: Well, it must have been.

MR. AXELRAD: I certainly didn't receive it.

THE COURT: It must have been if you had an appeal for the purpose of testing my findings.

MR. AXELRAD: I stipulated, as I recall it, a transcript could be made but I do not know that a transcript was made. I have not received any bill for such a transcript.

THE COURT: I assumed it was.

MR. DOBROVIR: At some point, I would like to be heard on all these matters.

THE COURT: I assume the transcript was made. If the transcript was made, you want it back, don't you?

MR. AXELRAD: I would seek to have it kept confidential, except such portions --

THE COURT: It can't be kept confidential from Mr. Dobrovir. If you call any of those people to the stand, their prior statements will be made subject to cross-examination.

MR. AXELRAD: I must point out that I don't read the remand order as broadly as requiring an index -- I am not quite sure what the scope is. I know that what was before Your Honor is the subject matter of the litigation.

THE COURT: They vacate my order and direct that a Vaughn v. Rosen index be presented as to the 128,000 documents. That is what they direct.

MR. AXELRAD: Maybe I don't recollect the order correctly, Your Honor, but as I recollect it, it is remanded for further proceedings pursuant to Vaughn v. Rosen. Am I erroneous?

THE COURT: That is what it says. That means an index.

MR. AXELRAD: I don't believe that Vaughn v. Rosen held that an index of every document in every case must be made.

THE COURT: That is another reason why I guess I shouldn't be in the case, then, Mr. Axelrad.

MR. DOBROVIR: Your Honor, I have been listening to Mr. Axelrad with increasing impatience. I think, as I have

always requested in this litigation, I would like to participate in it.

THE COURT: I want you to and I want you to participate before a judge who is open-minded.

MR. DOBROVIR: May I be heard on these matters?

THE COURT: I heard elaborate testimony in these areas. Therefore, I couldn't conduct a Vaughn v. Rosen type of review of the adequacy of the index when I have all this other information in the back of my mind.

MR. DOBROVIR: There is a solution and I am about to make a motion.

THE COURT: Perhaps there is.

MR. DOBROVIR: I am about to make a motion. I don't think this really needs elaborate papers. I don't think it needs any papers at all. The matter is well within the Court's knowledge.

I move at this time that, a, the Court's written findings or opinion, or whatever the document was which was filed in camera and kept in the Court's safe, b, the Government's evidentiary submission that was written in the form of affidavits -- if deletions be necessary to protect the identity of secret witnesses, that would be another matter that we would have to consider -- and, finally, the proceedings that were held in camera all be unsealed forthwith and spread on the public record of this Court.

With respect to the in camera hearing, Mr. Axelrad and I had an understanding and then we had a misunderstanding. The understanding was that the Government would pay for a transcript of those proceedings to be prepared. The misunderstanding was as to whether the Government would in fact order the transcript.

Mr. Axelrad said: No, we only agreed to pay for it if it was prepared. We did not agree to order it.

THE COURT: So there was no transcript.

MR. DOBROVIR: There is no transcript. However, I think it is time. If necessary, the Court may order the transcript prepared forthwith; and the Government's agreement to pay for it would then become triggered. We would then have the matter in a posture where both sides know everything that happened in the litigation up to now.

I think that this result is within the spirit and the letter and within the mandate of the Court of Appeals order.

The Court of Appeals cites not Vaughn v. Rosen I, which is the case in which the Court of Appeals said that the proper procedure in Freedom of Information Act cases is for the defendant to prepare an index and detailed justification. It cites Vaughn v. Rosen II, at 523 F. 2d 1136.

In Vaughn v. Rosen II, the procedure followed was that a sample of the documents was submitted in open court with certain deletions to protect the privacy of individuals; and

the entire matter was litigated before Judge Pratt on an open record with the actual documents known to both sides.

THE COURT: But with an index also.

MR. DOBROVIR: With an index also.

I think what the Court of Appeals was saying here was: We are fed up with secrecy. We think that whatever representations were made with respect to the need for secrecy here have now been repudiated by those who made them; and we are not going to stand for this proceeding to be carried on any further in the dark.

That is why they cited Vaughn v. Rosen II, which is a proceeding which took place entirely in the light.

Accordingly, unless there are certain matters in those proceedings which are presently in the dark and in secret, which the Government wishes specifically to seek to have kept secret and deleted from the public record -- as to which I think we would have to litigate those on a deletion-by-deletion basis, since I am not willing to accept representations either on that matter -- I request and I so move that these matters immediately be unsealed and made part of the public record.

THE COURT: Well, the difficulty that I have is that I have been advised this afternoon that the Government is going to insist on the secrecy of certain aspects of those papers.

Now, there is a mass of papers.

MR. DOBROVIR: I am not asking that the original documents, except in so far as Your Honor may order a sample, as in the Vaughn case, be made public. The 128,000 documents were given to Your Honor in chambers.

THE COURT: No, they were not. A smattering of documents were given to me. I found them insufficient on their face; required the production of more informative documents; and ruled on the basis of the documents I had, which were just a small smattering. Documents were held back. It took some effort on my part even to get a sample that was sufficient for me to act on.

MR. DOBROVIR: What we have here, Your Honor, is a very dangerous precedent, what is in many ways a blotch on the judicial process in this Court. A unique situation, an in camera ex parte, close to a star-chamber proceeding. I think that the Court of Appeals, in its order, made it clear that that is an anathema.

I suggest and I request that the way in which that matter should be --

THE COURT: I agree with you. Of course, I have written on that and talked about it a great deal.

MR. DOBROVIR: Yes, sir.

THE COURT: I think, since I was euchred into it by what I can only feel now were irresponsible representations, that I ought to get out, as one way to cleanse the proceeding.

MR. DOBROVIR: I don't think that will solve the problem, Your Honor.

* || THE COURT: That is the point I am making to you. Let somebody else look at it. It is an outrageous chapter in this courtroom.

MR. DOBROVIR: If these documents and these proceedings are withdrawn from the Court file and returned to the Defendants and then Your Honor recuses himself, this what I consider to be a very bad precedent remains.

THE COURT: I wouldn't think of returning them, in view of your motion, which is to have them made public. I wouldn't think of returning them.

MR. DOBROVIR: Yes, sir.

THE COURT: And I won't, if that is your motion. Then that motion ought to be heard by the trier of facts.

MR. AXELRAD: Your Honor, may I respond to Mr. Dobrovir?

First, I suggest, in view of what Your Honor just said, that the proper procedure would be for Mr. Dobrovir to reduce his motion to writing and we would have an opportunity to respond.

THE COURT: I think so. I think that is right.

MR. AXELRAD: Perhaps more fundamentally, Your Honor, just for this case, Your Honor has referred to the fact that Your Honor thinks that you were euchred into the proceedings --

THE COURT: Yes.

MR. AXELRAD: -- that the Government's position was irresponsible. While I don't believe in litigating matters that are over, in a sense, I do think, Your Honor, that I would like for a moment now to remind the Court, if I may, and with all respect, that we submitted in support of our position, first, as Your Honor requested, specifically, public affidavits reflecting that the responsible persons in the Executive Branch, based upon their concern for national security, made the determinations not because they were concerned with the criteria of the Executive Order but because of their conscientious judgment that they were doing their duty.

Your Honor, I don't think it appropriate to go into the in camera proceeding at all. Mr. Dobrovir will file his motions.

I do believe that I would have, Your Honor, to take issue with your suggestion that the documents supplied initially were not the documents covered by this suit. I simply must respect Your Honor's statements but I also respectfully disagree with them in this instance.

THE COURT: Well, the transcript will show.

MR. AXELRAD: Very well.

I finally would like to point out a technical problem which we would probably insist upon because of our ongoing concerns with national security.

When the Court of Appeals denied our mandamus petition, it issued an order protecting the security of the matters which were subsequently submitted in camera. Because we are still concerned with the matters and we agree, in view of Mr. Dobrovir's representations, the Court must hold the materials, we believe they ought to be held in accordance with that Court of Appeals order and continued to be.

That raises an ongoing problem because we are still concerned with national security matters. It may well be that portions of the affidavits can be released. I don't think all of them can be.

I will ask the responsible officials to review the affidavits and I will contact Mr. Dobrovir if portions may be released. But the fact remains that the Court of Appeals order is still outstanding and covers those materials.

I bring that to Your Honor's attention. I do not believe --

THE COURT: What was I doing that was contrary to that order?

MR. AXELRAD: No, no, you haven't done anything.

THE COURT: Why are you bringing it up then?

MR. AXELRAD: Because of Mr. Dobrovir's suggestion. I felt I should respond to Mr. Dobrovir's suggestion.

THE COURT: You mean to his motion?

MR. AXELRAD: His oral motion. Your Honor has already

indicated --

THE COURT: I think he should put it in writing because it will be going to somebody else.

MR. DOBROVIR: Your Honor, one thing.

After the Court of Appeals order came down, I represented to the Court that my interpretation of that order was not to permit ex parte filings or an ex parte opinion. Your Honor disagreed with me. I moved in the Court of Appeals that those proceedings be unsealed for the purposes of the appeal. The Court of Appeals denied my motion without prejudice to its renewal on presentation of the appeal on the briefs. In my brief I renewed the motion.

So I think the matter is again in a position where the Court could change its mind; and I think my interpretation was correct. I think that the Court erred in interpreting the Court of Appeals order in the draconian way that it did.

I don't think Mr. Axelrad's statement should be accepted in terms of an authoritative interpretation of what the Court of Appeals said. We have differed about that. The Court ruled for him; but I think that I was right.

MR. AXELRAD: I need only add on that point, Mr. Dobrovir raised that point in the Court of Appeals, as well, and on January 14, 1977, the Court of Appeals agreed with Your Honor's construction of its prior order.

THE COURT: I am aware of that.

All right, I will refer this matter to the Calendar Committee for assignment to some judge who has not been tainted by these proceedings. I will keep the materials under seal and that judge, whoever it is, will have to hear the motion. I will keep all the materials sealed pending the action of the other judge.

I don't know what the schedule will be. I think under our system, it ought to be set by the new judge.

All right, gentlemen, thank you.

CERTIFICATE OF COURT REPORTER

I, Ida Z. Watson, certify that I reported the proceedings in the above-entitled cause on June 28, 1977 and that the foregoing Pages 1 to 18, inclusive, constitute the official transcript.

Ida Z. Watson