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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

No. 1:19-cv-10291-WGY

AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS,
Plaintiff

vs.

U.S. DEPARTMENT OF HOMELAND SECURITY, et al,
Defendants

For Hearing Before:
Judge William G. Young

Status Conference

United States District Court
District of Massachusetts (Boston)
One Courthouse Way
Boston, Massachusetts 02210
Wednesday, February 27, 2019

REPORTER: RICHARD H. ROMANOW, RPR
Official Court Reporter
United States District Court
One Courthouse Way, Room 5510, Boston, MA 02210
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A P P E A R A N C E S

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1 P R O C E E D I N G S

2 (Begins, 10:00 a.m.)

3 THE COURT: Good morning. Would counsel
4 identify themselves.

5 MR. McFADDEN: Good morning, your Honor. Dan
6 McFadden from the ACLU of Massachusetts on behalf of the
7 plaintiff.

8 MS. KENNEDY: And, good morning, your Honor,
9 Alycia Kennedy of Todd & Weld also on behalf of the
10 plaintiff.

11 THE COURT: Good morning.

12 MR. BRYCE: Good morning, your Honor. Peter
13 Bryce from the Department of Justice on behalf of DHS
14 and CBP.

15 MR. SADY: Your Honor, Michael Sady on behalf
16 of the government.

17 THE COURT: Well good morning to you all,
18 thank you for attending on the Court. Let me tee this
19 up, at least as I see it, and you may have to correct
20 me.

21 The reason I scheduled a prompt hearing is the
22 plaintiff's insistence that the matter was of such
23 public importance that the normal schedule on which a
24 case of this sort would proceed had to be accelerated.
25 Since then -- and I appreciate it, the plaintiffs have

1 provided me with an updated status report which appears
2 to give an answer to the question which the plaintiffs
3 raise, that is, um, you've already found out on your own
4 from the Corps of Engineers that there is no such
5 contract and now one of the defendants you have sued,
6 the Bureau of Customs and Border Protection, has
7 responded formally and says there is no such contract.
8 And given the assertion in the text and developments, of
9 which I think it's appropriate I can take judicial
10 notice, it would appear that it's highly highly
11 unlikely, though we're going to ask the government, that
12 there is any such contract.

13 So you found the information that you seek. How
14 can we wind this case up? I just don't see any more for
15 me to do here. I'll hear you.

16 MR. McFADDEN: Thank you, your Honor. And we
17 did receive that response and provide it to the Court
18 from CBP after we filed a complaint in this action. The
19 administrative process does not restart after an action
20 in court has been filed, but in any event the response
21 we received from CBP, in our view, is not adequate and
22 raises additional concerns, and we're asking the Court
23 to translate it.

24 THE COURT: Well, you know I'm not seeking
25 argument now, but I read your response to it and it's

1 not for me, at this preliminary proceeding, to evaluate
2 that, I'll evaluate that on appropriate pleadings, if
3 that's where we're going.

4 I guess I approach these as a practical matter and
5 so I -- believe me I'm going to ask them, and we've got
6 the government attorneys here, and I'm going to say to
7 them, "Well, so is there a contract anything like what's
8 described in the tweet?" And I expect them to answer.
9 If they give me some sort of equivocal answer, "Well, we
10 don't know, we've got to check," um, "We can't tell
11 yet," "We need delay," well then, fine, we'll have
12 something to talk about. But if, as seems the case,
13 they say, "No, we've checked, so far as we can tell
14 there's no contract like this at the material time
15 relative to that tweet" -- you know I'm limited to cases
16 and controversies, I'm not on my own motion saying this
17 case is over, I just don't see practically what we're
18 doing here.

19 What -- as a matter of -- there is public interest
20 here, and I don't just mean notoriety, these are matters
21 of significant public policy to which the ACLU has every
22 right to make its inquiry and then to, um, based upon
23 what response it gets, to take whatever positions it
24 sees fit. It just seems to me that this is
25 straightforward and the government's responded.

1 MR. MCFADDEN: Your Honor, I think your
2 observation goes to the heart of our concern, which is
3 right now there appear to be conflicting statements by,
4 on the one hand, the President the United States, who
5 asserts publicly that this contract exists --

6 THE COURT: I've read the papers, all right?
7 Here -- you know a tweet is not a treaty, all right?
8 The President, it's conceivable that he was mistaken.
9 And one can think of the President -- and I do -- no
10 disrespect to the current President or the Office of the
11 Presidency, but he's not an attorney, so it does not
12 dishonor that office to imagine that the President,
13 personally himself, is not familiar with the volumes of
14 the Code of Federal Regulations that govern federal
15 contracting.

16 I also -- and this is just something -- a
17 hypothetical I thought of to throw out at this hearing.
18 Don't take anything from it. I have no basis for it.
19 But I understand that in order to build the wall --
20 however you want to describe it, um, it's a pretty big
21 undertaking and it will need waivers of various
22 environmental laws or regulations. It's at least
23 conceivable the President, in complete good faith,
24 granted those waivers in the hopes that he would, um, be
25 vindicated as to his policy position, and conflated

1 that, the granting of 115 miles of waivers, with a
2 contract. But that isn't what you've asked for here,
3 you've assumed the accuracy of the tweet -- you have
4 every right to, but when we go to look at it, it looks
5 like it's inaccurate. I'm not going to characterize it,
6 it's just inaccurate, there isn't a contract. So
7 chasing around for a nonexistent contract seems to me a
8 waste of everyone's time and government, i.e. taxpayer
9 money. I'm not getting what the Court needs to do. You
10 seem to have made your point here.

11 MR. McFADDEN: Well, your Honor, I mean I
12 think that we have challenged -- well first to step
13 back. The public interest here is that the President of
14 the United States has declared a state of domestic
15 emergency at the southern border and that creates an
16 immediate need for the public to understand what the
17 government is and has been doing there, whether or not
18 they're complying with the law --

19 THE COURT: Couldn't agree more.

20 MR. McFADDEN: -- and whether the President's
21 statements are accurate. Here we seem to have
22 conflicting answers from two different components of the
23 government.

24 THE COURT: We have a tweet -- we have a tweet
25 and we have the official answers of the responsible

1 agencies. Now, yes, they work for the President. It's
2 like you want to pursue the idea that there's some
3 contract out there that none of us know about and you're
4 going to uncover it.

5 Don't you think -- and it goes beyond this case,
6 so I shouldn't press you, you've got a right to your
7 positions, but the Congress enacted a law in which they
8 budgeted, and the President signed it, \$1,375,000,000
9 for border security. Now I'm not intimately familiar
10 with the budgetary process, I have some familiarity in
11 the exercise of the judicial office with budgeting
12 generally, and there's legislative history for that,
13 that was a bipartisan effort on the part of the
14 Congress, but don't you think they had before them the
15 types of security, including -- and I'll use the word
16 "wall," because others have, but including other fences,
17 barriers, or however you want to refer to it, um, along
18 the border and where they are and where they are
19 proposed to be put? And I suppose there are some
20 contracts out there where now it's contracted, and on
21 the base of that -- on the basis of that, the Congress,
22 in its wisdom and the President signed it, allocated
23 significant money for border security. And all of that
24 took place after December 24th. So there's a copious
25 public record of the actions by the legislative branch

1 of our government to which the President has acceded and
2 now that is the law.

3 I'm not insensitive to the fact that there's this
4 Declaration of National Emergency and I'm not
5 insensitive to the fact that if there were a contract,
6 or anything like this contract, that this would be a
7 whopping big contract, 115 miles of wall, so then that
8 presents a host of issues, you're right. But all the
9 evidence, evidence now, is that there is no such
10 contract. The President was mistaken. You can
11 characterize it differently. It may be -- and I've
12 given you an example, it may be a completely innocent
13 mistake. Well you got it, he was mistaken. I don't
14 know what more there is to this lawsuit.

15 There's a lot of -- and there are other lawsuits
16 about the National Emergency and things are going on in
17 Congress right now, and this Court expresses no opinion,
18 it has nothing to say, but just let me give you one last
19 chance, because I want to hear from them. What is there
20 really for me to do now?

21 MR. McFADDEN: Your Honor, we of course want
22 to be practical and we do not want to waste the Court's
23 or the government's time. At this point it's our view
24 that if the defendants wish to take the position that
25 they cannot find a contract, then under cases like the

1 First Circuit's case in *Maynard*, one, CBP should provide
2 a declaration explaining what they did and why they
3 can't find it, and two, DHS, which has never conducted
4 any search or response to this request, but yet oversees
5 this process, DHS should conduct its own search and
6 produce what documents it finds.

7 THE COURT: All right. Thank you. Let's go
8 to the government.

9 Now I'm not going to keep on talking because I've
10 spelled out my concerns here. So let me put it straight
11 to you.

12 MR. BRYCE: Yes, your Honor.

13 THE COURT: You're the government attorney
14 here.

15 MR. BRYCE: Yes, your Honor.

16 THE COURT: In some respects you are the
17 President's official attorney appearing in this
18 courtroom.

19 Is there a contract?

20 MR. BRYCE: Your Honor, um, at the risk of --
21 at the risk of sounding equivocal, I want to point out
22 very emphatically at the beginning of this that FOIA
23 does not impose any obligation on the government to
24 answer questions.

25 THE COURT: Yeah.

1 MR. BRYCE: It imposes an obligation to
2 conduct a reasonable --

3 THE COURT: I've read the statute. I'm trying
4 to be practical.

5 MR. BRYCE: Understood, your Honor.

6 THE COURT: Try my question. Is there a
7 contract? I mean you've prepared to appear here today.
8 Is there any such contract at this material time? Is
9 there?

10 MR. BRYCE: Your Honor, I think there's a lack
11 of clarity perhaps about what contract may be being
12 sought. However, the terms of this FOIA request are
13 essentially a copy and paste from a Presidential tweet,
14 as your Honor pointed out.

15 Now, um, the agency has done a search, it believes
16 a reasonable search, and the, um -- the agency has asked
17 for clarification about what contract they were asking
18 for and they insisted that they were only seeking --

19 THE COURT: Now wait a minute. Wait a minute.
20 At least originally, if I accept their papers, they were
21 asking for numbers and the like. You can't expect the
22 public to have those numbers. The obligation is on the
23 government. The obligation is not on the person who
24 seeks, it's on the government.

25 Look, I am practical. I held this hearing because

1 I always take pleadings, at least for starters, at face
2 value. If that's the way the government is going to
3 play this, then fine, we'll let it all play out, and I
4 will -- I don't contemplate extensive public hearings, I
5 contemplate ruling on papers when those papers come up.
6 But I'll give you one last shot.

7 So far as you know, is there any such contract?

8 MR. BRYCE: No, your Honor, so far as I know
9 there is no contract of 115 miles as referenced in the
10 --

11 THE COURT: Fine. Are you planning to move
12 for summary judgment here?

13 MR. BRYCE: We likely will, your Honor, but at
14 the moment we haven't even had a chance to answer or
15 otherwise respond.

16 THE COURT: I understand. Now you've answered
17 my question. All right.

18 MR. BRYCE: We certainly -- we expect that
19 that's the most likely way this will go.

20 THE COURT: You've answered my question.
21 Because there's another aspect here and I should give
22 the plaintiffs a shot on that and then I'll hear you on
23 it.

24 So that's all I can expect, it seems to me, about
25 the existence of the contract here at this stage in the

1 proceedings. But I will tell you that -- and I'm saying
2 to the plaintiffs and to the defendant agencies, um,
3 from everything the Court can discern, and given the
4 setting in which all this arises, it appears that there
5 is no credible evidence that there is, at any material
6 time, any contract, at least as described in the tweet,
7 or remotely like what was described in the tweet. But
8 that doesn't end it. Let's go back to why I originally
9 wanted to hold the hearing.

10 What's the need -- especially now that I'm
11 satisfied -- um, well I should take that back, we'll
12 adjudicate based upon pleadings as they come in at the
13 appropriate time.

14 What's the need for expedition here?

15 MR. MCFADDEN: Your Honor, the need for
16 expedition arises from the President's decision to
17 declare an emergency, and in connection with doing that
18 to say that at the southern border he has to power to
19 deploy the military, to seize land and place under
20 military jurisdiction --

21 THE COURT: I know, or at least I read the
22 papers. I imagine I could take judicial notice of what
23 the claims can be done. I'm going to express no opinion
24 on any of it. Okay, of course. But why not let this
25 proceed in the ordinary course?

1 MR. McFADDEN: Because, your Honor, that
2 action creates an immediate need for the public to make
3 informed judgments -- as well as they can, to make
4 informed judgments about what the government's doing at
5 the border.

6 THE COURT: Couldn't agree more, and I think
7 we've held a hearing in which I've gotten some important
8 data that, um, at least would lead a reasonable person
9 to conclude that there isn't such a contract and life
10 goes on.

11 MR. McFADDEN: Your Honor, I think what I
12 heard from the defendants was that they are interested
13 in filing an answer and they're also interested in
14 moving for summary judgment. You know I respectfully
15 suggest that --

16 THE COURT: Why do we need to expedite it?

17 MR. McFADDEN: Your Honor, I think the reason
18 we need to expedite it is people need to understand and
19 have the information, the maximum information available.

20 THE COURT: Well of course you're right and,
21 you know, if there was any credible evidence that there
22 was a contract, anything like this contract, granted on
23 or about that time, certainly we need to know that for a
24 variety of reasons, not the least of which I understand
25 there's some lawsuit challenging this -- in addition to

1 what Congress is doing, challenging it, and of course
2 one of the issues in that lawsuit is ripeness. And of
3 course if the President already has the, um -- a
4 contract in place that we don't know about, then that
5 goes very much to that issue. Of course that's
6 important.

7 Likewise if the President couldn't grant a
8 contract once there's a lapse in appropriations -- you
9 point that out, that would be an illegal act, and I have
10 no basis to think that there's been any illegal acts.
11 All of those are premised on the assumption there is a
12 contract. There's been no suggestion that there is a
13 contract. Everything, every scintilla of credible
14 evidence here is that there is no such contract.

15 And I've suggested -- not that I'm adopting it,
16 but I've suggested a perfectly innocuous reason why a
17 nonlawyer public official could mistakenly refer to some
18 other government action as a contract. That could
19 happen. But it's a mistake and you can do with it what
20 you want.

21 Since there's no contract -- I'm not hearing
22 anything about a contract, and I doubt that we will, so
23 why speed things, why add to people's costs? Why don't
24 I just let it play out and enter no order, except to
25 deny this motion for expedition, and then I'll rule in

1 the appropriate manner, if you can't resolve it among
2 yourselves, and I would hope that you could. Why
3 shouldn't I do that?

4 MR. McFADDEN: Your Honor, I mean I think that
5 if the Court is inclined to proceed in that fashion, um,
6 you know we would ask that pursuant to the statute, that
7 the answer would be due within the 30-day window
8 established by that statute, um, which --

9 THE COURT: Well no one's asked for any more?

10 MR. McFADDEN: Yes, your Honor, I think
11 currently the docket does reflect a slightly longer time
12 period, so I would just ask that that be adjusted in
13 that fashion. But I think that the reason -- the reason
14 to expedite is, you know, as your Honor says, what we've
15 heard today from the government is a statement that at
16 least counsel for the government is not aware of this
17 contract. At the same time we have a statement --

18 THE COURT: But let's not parse that too fine.
19 The record will reflect how seriously I took that
20 question and while the answer by Mr. Bryce was
21 considered and careful, um, he well understands his
22 responsibility here and he understands his authority,
23 and I have every reason to expect that he came to this
24 hearing prepared. And as I do you, and I've accepted
25 your allegations except where there's something to

1 refute them, you know I think prepared counsel
2 representing the President and the agencies has now
3 advised me. I -- I'm, all things considered, prepared
4 to accept that at least in managing the litigation.

5 All right. I'm disposed to deny any motion for
6 expedition but to allow the litigation to proceed as the
7 statute requires.

8 Does the government have any other interest beyond
9 that?

10 MR. BRYCE: No, your Honor, I was prepared to
11 explain why expedition would be improper, but I won't
12 belabor that point in light of your statements.

13 THE COURT: When the judge is with you,
14 silence is not mandatory, but always is advised.

15 MR. BRYCE: Understood, your Honor. Thank
16 you.

17 THE COURT: All right. So the motion for
18 expedition is denied. Obviously the case stands.
19 Settlement is always a possibility, it seems very much
20 advised in this case. Should you settle the case, a
21 simple phone call to Ms. Gaudet is all that's necessary.
22 Other than that I will deal with matters as they arise
23 in the ordinary course. I do thank you for this
24 hearing. We'll recess.

25 (Ends, 10:30 a.m.)

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C E R T I F I C A T E

I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER,
do hereby certify that the foregoing record is a true
and accurate transcription of my stenographic notes
before Judge William G. Young, on Wednesday, February
27, 2019, to the best of my skill and ability.

/s/ Richard H. Romanow 2-28-19

RICHARD H. ROMANOW Date