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JUDGES NEED TO LOOK

In FOIA cases over national security, courts should examine the documents.

BY LOUIS FISHER

If the executive branch uses the classification system to hide unlawful acts, the federal judiciary should not turn a blind eye to the possibility. Judges at least need to look at disputed documents. Unfortunately, one recent D.C. ruling—in an important case involving terror detainees who were most likely tortured—did not.

Executive Order 12958 establishes administration policy for classifying national security information. To prevent abuses, Section 1.7 provides: "In no case shall information be classified in order to … conceal violations of law … prevent embarrassment to a person, organization, or agency … or prevent or delay the release of information that does not require protection in the interest of the national security."

Sensitive government information may be withheld from the public under different exemptions listed in the Freedom of Information Act. One critical aspect of enforcing FOIA depends on how federal judges interpret the national security exemption. Congress very explicitly intended judicial scrutiny on these issues. Yet, contrary to the congressional intent, that hasn't routinely been happening, as an Oct. 29 decision by Judge Royce Lamberth of the U.S. District Court for the District of Columbia shows.

TORTURE AND RENDITIONS

Lamberth's case arose after the American Civil Liberties Union filed a FOIA request seeking documents from the Central Intelligence Agency. It asked for unredacted records related to the hearings of 14 "high value" detainees before the Combatant Status Review Tribunals at Guantánamo Bay, Cuba.

Public reports indicated that the detainees had been subjected to torture and degrading treatment, including prolonged sleep deprivation, stress positions, exposure to extreme temperatures, and "waterboarding"—actions that violate domestic and international prohibitions against torture. All 14 detainees had been part of the Bush administration's program of extraordinary rendition (sending suspects to other countries for interrogation and torture).

The government edited the transcripts of the tribunal proceedings for the 14 detainees to remove information whose release the administration considered "dangerous to national security." The CIA acknowledged in its declaration that redacted materials included information about "interrogation methods"—methods that judging from outside reports likely included unlawful torture.

So, is the CIA's classification proper under Executive Order 12958 or not? Did the redactions truly promote "the interest of national security"? Or was information classified to conceal violations of law? Were the transcripts really redacted to prevent government embarrassment?

Unfortunately, even the judge who ruled on this FOIA case can't answer these fundamental questions. He doesn't know, because he didn't look.

NOT REVIEWED

The administration advised the district court that it had fully complied with the ACLU's FOIA request. As explained in the CIA declaration, eight of the transcripts were unclassified and six were classified. The agency redacted portions of the six and posted all 14 on a government Web site. It released two separate documents in full and redacted three others.

Based on FOIA Exemptions 1 and 3, which cover national security and documents exempted from disclosure by statute, the administration asked for summary judgment to prevent a trial and the ACLU's access to other documents.

The ACLU requested in camera review by the district court to ensure that the CIA had redacted only appropriate information. Lamberth did not undertake such a review.

The ACLU argued that some material had been improperly classified "because it may contain evidence that the government has violated the law." Lamberth concluded that the ACLU "misapprehended" the executive order. Although the order prohibits

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classifying information "in order … to conceal violations of the law," he found "no indication that these materials were classified 'in order' to conceal violations of the law." (That indication, of course, might well have been self-evident from what is hidden beneath the redactions, but Lamberth didn't look.)

The ACLU questioned whether the administration promoted "false or exaggerated" claims of threats to national security or foreign policy. Lamberth, "giving deference to the agency's detailed, good-faith declaration," said he was "disinclined to second-guess the agency in its area of expertise through in camera review." And so he granted summary judgment on the basis of the CIA declaration—without ever looking at the unredacted documents.

AT ARM'S LENGTH

In doing so, Lamberth pointed to case law that supported granting summary judgment "on the basis of agency declarations if they are reasonably specific and submitted in good faith."

But this doesn't address the underlying problem: How can judges determine that an affidavit or declaration is "reasonably specific" and "submitted in good faith" if they never examine the underlying documents?

Take specificity, to start. If officials expect that judges won't actually be looking, agencies can easily toss together affidavits to meet the "reasonably specific" requirement while concealing information that ought to be disclosed. They can (and do) work off a formulaic model: something fairly long, repetition of stock phrases ("national security," "foreign relations," "foreign affairs"), and vague threats about "damage" to "national security." The result: pages of standard boilerplate.

Assuming "good faith" is even more problematic. Private parties bringing the case cannot prove "bad faith" because they do not see the requested documents. And even "good faith" interpretations by an agency can reflect an executive bias against disclosure and concern about agency embarrassment—impermissible reasons for classification.

And in this case, Lamberth had reason to be skeptical about the government's claims about interrogation and extraordinary rendition.

On Dec. 5, 2005, Secretary of State Condoleezza Rice issued a detailed statement explaining that the United States "does not permit, tolerate, or condone torture under any circumstance." Contradicting that claim are the "torture memos" drafted by the Justice Department and the Taguba report on the Abu Ghraib prison. Rice also stated that the United States "does not transport, and has not transported, detainees from one country to another for the purpose of interrogation using torture." Six months later, during a news conference on June 9, 2006, President George W. Bush confirmed the existence of the CIA rendition program. On Sept. 6, 2006, he announced that the 14 high-value detainees would be transferred to Guantánamo. The administration has confirmed that three of the 14 had been subject to waterboarding.

This evidence is more suggestive of dishonesty than of "good faith." And still Lamberth didn't look.

CONGRESSIONAL POLICY

Lamberth noted that agency affidavits or declarations "are accorded a presumption of good faith." Other federal judges have made similar observations.

And this gets to a root problem, one greater than Lamberth's particular ruling. In enacting FOIA, Congress intended courts to exercise their independence in the field of national security, and that hasn't been happening.

Congress passed FOIA in 1966 to protect the interests of an informed electorate and the proper functioning of a democracy. If individuals filed a lawsuit to challenge agency noncompliance, "the court shall determine the matter *de novo* and the burden shall be upon the agency to sustain its action."

De novo means trying a case anew with full judicial autonomy. As explained in the legislative history, a *de novo* proceeding was considered essential to ensure that the "ultimate decision as to the propriety of the agency's action is made by the court."

To preserve judicial independence in FOIA cases, some courts began to inspect agency documents in camera. Then, in *Environmental Protection Agency v. Mink* (1973), the Supreme Court ruled that Exemption 1 on national defense did not permit "compelled disclosure of documents" or in camera inspection to sift out "nonsecret components."

Congress reacted to *Mink* by authorizing federal judges, as part of their *de novo* duties, to examine national security documents in their chambers. The purpose was to allow federal judges "to go behind the official notice of classification and examine the contents of the records themselves." President Gerald Ford vetoed the bill, expressing concern about military and intelligence secrets, but in 1974 both chambers overrode him, the House 371 to 31 and the Senate 65 to 27.

JUDICIAL INDEPENDENCE

Despite this congressional authorization to examine national security documents in camera, few federal judges choose that option. Typically they rely on executive branch assertions made in affidavits and declarations without reviewing the underlying evidence. At times they read classified affidavits in camera, but not the documents requested by private parties.

Yet examining classified affidavits in camera is no substitute for in camera inspection of contested documents. Plaintiffs depend on judges to exercise both their constitutional independence and the statutory authority conferred by Congress. When an agency appears to withhold documents that might reveal violations of law, a presumption of good faith is not appropriate.

Congress directed federal courts to take a fresh look at an agency's decision of nondisclosure, to check misrepresentations, and to lean against the inherent agency bias that favors suppression of information, especially information that puts an agency in a bad light. Statutory policy calls for independent *de novo* review, including in camera inspection.

Agencies in the intelligence community should not receive indirect encouragement to conceal violations of law. Long ago, a wary Congress authorized judges to take a hard look.

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