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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

BRENNAN CENTER FOR JUSTICE  
AT NEW YORK UNIVERSITY  
SCHOOL OF LAW, et al.,

Plaintiffs,

vs.

U.S. DEPARTMENT OF JUSTICE,

Defendant.

Civil Action  
No. 1:18-cv-1860

Washington, DC  
December 1, 2022

10:02 a.m.

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TRANSCRIPT OF VIDEO STATUS CONFERENCE  
BEFORE THE HONORABLE RANDOLPH D. MOSS  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs:           **JONATHAN MOSES**  
Wachtell, Lipton, Rosen & Katz  
51 West 52nd Street  
New York, NY 10019

For the Defendant:           **BRENDA GONZALEZ HOROWITZ**  
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Court Reporter:           **JEFF M. HOOK**  
Official Court Reporter  
U.S. District & Bankruptcy Courts  
333 Constitution Avenue, NW  
Room 4700-C  
Washington, DC 20001

P R O C E E D I N G S

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2           **DEPUTY CLERK:** This is civil action 18-1860,  
3 Brennan Center for Justice at New York University School of  
4 Law, et al., vs. United States Department of Justice.  
5 Counsel, starting with plaintiff, please identify yourself  
6 for the record.

7           **MR. MOSES:** Good morning, Your Honor. This is  
8 Jonathan Moses for plaintiffs.

9           **THE COURT:** Good morning.

10          **MS. GONZALEZ HOROWITZ:** Good morning, Your Honor.  
11 This is Assistant U.S. Attorney Brenda Gonzalez-Horowitz on  
12 behalf of the Department of Justice. And with me also is  
13 Vinay Jolly who is agency counsel at EOUSA.

14          **THE COURT:** Well, welcome to all of you. Thank  
15 you. So I have gone through the 20-sample Vaughn index  
16 entries just to do the double check that I had promised that  
17 I would do of these, and I wanted to tell you what my  
18 conclusions were with respect to those entries. By and  
19 large, I think that the Department of Justice correctly  
20 concluded that the cases -- or there was not evidence or  
21 reason to believe that the cases fell within the statutory  
22 definition of domestic terrorism at 18 U.S.C. section  
23 2331(5).

24                   And just so that the plaintiffs are aware of my  
25 reasoning -- because I know they're not privy to the actual

1 docket numbers and can't look for themselves, but many of  
2 the cases are cases that involved false threats or hoaxes,  
3 but where there was no actual danger to human life involved  
4 in any way. It's the equivalent of calling in the bomb  
5 scare when there was no bomb, that type of thing.

6           There were a handful of cases where there were  
7 threats of -- or danger to human life in some of the cases.  
8 But in those cases -- and I'm looking at the dockets,  
9 there's not any evidence or reason to think that they were  
10 for one of the purposes identified in 2331. Those purposes  
11 include to intimidate or coerce civilian populations, to  
12 influence policy of a government by intimidation or coercion  
13 or to affect the conduct of a government by mass  
14 destruction, assassination or kidnapping. And more were  
15 just personal squabbles or personal issues between the  
16 defendant and some individual who that person was angry  
17 with. Sometimes the cases were just involving what I think  
18 appears to be mental illness. There were two, though, where  
19 I had further questions. One is docket entry 423.

20           Ms. Gonzalez-Horowitz, I don't know if the docket  
21 number that you gave the Court is a mistake or not, but when  
22 we went to look at that docket number, there was nothing --  
23 I don't think there was a case that opened up at all, and  
24 certainly nothing that appeared to be in any way at issue in  
25 this proceeding. So you may just need to check that docket

1 number again.

2 **MS. GONZALEZ HOROWITZ:** Sure. And just to  
3 confirm, you said docket entry 423?

4 **THE COURT:** 423, correct.

5 **MR. MOSES:** Judge, you mean Vaughn index entry  
6 423?

7 **THE COURT:** Yes, I do, thank you. And then so I  
8 just need to take a look at that one still.

9 **MS. GONZALEZ HOROWITZ:** Okay.

10 **THE COURT:** But the one entry where I tend to  
11 think it probably should be disclosed is docket -- I'm  
12 sorry, I keep saying docket, Vaughn index 413. I don't know  
13 if you want to look at that, Ms. Gonzalez-Horowitz, on your  
14 end, on your chart.

15 **MS. GONZALEZ HOROWITZ:** Just a moment, Your Honor,  
16 I'm pulling up the -- what was submitted in camera.

17 (Brief interruption)

18 **MS. GONZALEZ HOROWITZ:** Okay, I have it up. Thank  
19 you, Your Honor.

20 **THE COURT:** And so I just want to make sure,  
21 before I order you to disclose that one and where I say more  
22 about it, that there's not some other privacy concern that's  
23 not evident to me. But the case is one that is a civil  
24 rights matter involving actual use of incendiary devices to  
25 terrorize, as far as I can tell, individuals on grounds of

1 race based on what appears to be just disapproval and trying  
2 to terrorize people based on white supremacy.

3 **MS. GONZALEZ HOROWITZ:** I'd have to go back and  
4 take a look at the specific documents relating to that case,  
5 I don't have all of them up in front of me right now, Your  
6 Honor. I think your understanding of that is correct. I  
7 think our position is probably that it would constitute a  
8 hate crime. And without disclosing too much on the public  
9 record, since that was not submitted publicly, I think  
10 that's probably the most that I can say.

11 But that's something we would probably need to go  
12 back and look at again, if the Court is inclined to order us  
13 to disclose that.

14 **THE COURT:** So my ruling is that you should  
15 disclose Vaughn index number 413 unless you come back to me  
16 and explain to me why it shouldn't be disclosed. And I'll  
17 tell you, my reasoning is I think you're completely right  
18 that it's a hate crime, but I think there are times in which  
19 hate crimes can be acts of domestic terrorism. Without  
20 talking about the specifics of this particular case, and  
21 without giving you the opportunity to come back to me if  
22 that's what you decide to do, hypothetically I would have  
23 thought that the Klu Klux Klan and the two -- there were two  
24 versions of the Klu Klux Klan. There was the reconstruction  
25 era of the Klu Klux Klan and then there was the reemergence

1 of the Klu Klux Klan.

2 But I would think that those were domestic  
3 terrorism groups because they clearly posed danger to human  
4 life, and they did so to intimidate or coerce a civilian  
5 population. In other words, we don't want black people to  
6 be, for example, engaged in relationships with white people.  
7 And to discourage and intimidate people from doing that, if  
8 there is a black man who does anything that we regard as an  
9 advance towards a white woman, we're going to kill that  
10 person or we're going to beat that person senseless. That  
11 strikes me as falling within the definition of domestic  
12 terrorism, because it is -- it involves an act dangerous to  
13 human life. It appears to be intended to intimidate or  
14 coerce the population; in other words, stop engaging in  
15 non-segregationist type behavior.

16 So that's my ruling with respect to 413, but I  
17 will give you time. And you can just tell me,  
18 Ms. Gonzalez-Horowitz, how much time you need to look at  
19 that. And if you want to seek reconsideration with respect  
20 to that ruling, I'll give you the opportunity to do so. But  
21 it did appear to me that that was something that should be  
22 disclosed. If you can just give me how much -- you need to  
23 tell me how much time you need to look at that.

24 **MS. GONZALEZ HOROWITZ:** Sure, okay. Thank you,  
25 Your Honor. It will require obviously some coordination,

1 not just between me and Mr. Jolly, but with other components  
2 of the Department of Justice. And given the holidays, I  
3 think that process might be delayed slightly. So I would  
4 ask for at least, you know, 45 days.

5 **THE COURT:** Well, I'll give you until January 16th  
6 to get back to the Court. If I don't hear from you, I'm  
7 just going to assume at that point you're going to disclose  
8 that Vaughn index entry to the plaintiffs. But if you do  
9 get back to me before then and seek reconsideration, then  
10 that ruling -- I'll stay that ruling pending my resolution  
11 of whatever you file.

12 **MS. GONZALEZ HOROWITZ:** Okay, understood.

13 **THE COURT:** Anything else -- I'm sorry, just a  
14 second here. Give me just a second.

15 (Brief interruption)

16 **THE COURT:** And then, also, when can you get back  
17 to me with respect to Vaughn index 423? It probably should  
18 be before that date. I don't think it's going to take much  
19 time just to figure out what that really corresponds to.

20 **MS. GONZALEZ HOROWITZ:** Yes, Your Honor, I think  
21 we should be able to get that to you within the next few  
22 days. I'll coordinate with Mr. Jolly after our call right  
23 now. So if you could just give us a week and we can send  
24 that back to you in camera, I think that should be fine.

25 **THE COURT:** That's fine. So I'll give you until

1 the 8th of December to do that.

2 **MS. GONZALEZ HOROWITZ:** Great, thank you.

3 **THE COURT:** Okay. Mr. Moses, I know there's not a  
4 lot you can say because you're not privy to the ex parte  
5 material, but is there anything else you want to add?

6 **MR. MOSES:** Your Honor, if I may just briefly.  
7 First of all, thank you to the Court and to your chambers  
8 for taking a look at these 20 docket numbers, and for the  
9 close attention the Court has given to this matter. We do  
10 appreciate it. I just wanted to make two points, and I  
11 don't know if it's going to move Your Honor or not. But I  
12 would have thought that we should -- there should be  
13 disclosure of any case involving hate crimes, and my  
14 reasoning is as follows.

15 The issue here, to me, should be not be whether it  
16 is technically domestic terrorism. The issue should be  
17 whether or not there will be some extra harm to the privacy  
18 interests of the person who has been convicted. And if  
19 someone has been convicted of a hate crime, I'm having a  
20 hard time seeing the greater privacy interest at issue here.  
21 The paradigmatic example that you put up of someone turns  
22 out to be a fraudster, initially we thought they were also  
23 supporting a terrorist group. And we have this very strange  
24 thing now where we've taken the 50 statutes -- which we,  
25 based on our research, thought had the most self-evident



1 link to terrorism, and the amount we're getting of these  
2 reviews is minimal. It was even less on the next Vaughn  
3 index.

4 I think we're getting a very distorted view of  
5 what the government is doing in terms of these kinds of  
6 cases. In fact, most of the cases we're seeing -- I would  
7 say the majority -- I wouldn't say the vast majority, but  
8 more than 50 percent are what are called ecoterrorism cases.  
9 And that's because the statute uses the word. If you were  
10 to look at what we've been getting, you might think the  
11 government, at least in this time period, was spending all  
12 its time going after PETA as opposed to going after people  
13 who have white supremacist ideologies. And I think the  
14 public, therefore, may be getting a distorted view.

15 So I guess I would ask Your Honor whether you  
16 thought it was appropriate to instruct the government that  
17 hate crimes in general should be disclosed, because the  
18 privacy interest is not as great for some of the other cases  
19 we spoke about? And I have one other point I'd like to ask,  
20 but let me stop there.

21 **THE COURT:** So I think -- I'm not persuaded by  
22 that. I think there are a lot of things that are classified  
23 as hate crimes that are at various points along the scale in  
24 terms of how heinous the crime is. And I do think, as I've  
25 previously held, there is something uniquely powerful with

1 an assertion that the United States Government believes you  
2 are a terrorist. One might make the same argument you're  
3 making with respect to any crime that involves use of  
4 automatic weapons or the maiming of an individual. Once  
5 you're convicted of doing something like that, your  
6 reputation is already pretty stained, so what other harm is  
7 there in saying you're a terrorist. And I think there is  
8 something uniquely powerful about that label.

9 I think part of the problem here, of course, is  
10 that there isn't a clear understanding and label of what  
11 terrorism is. And quite frankly, I think that you have  
12 achieved a lot in this litigation already by drawing that  
13 out. The fact that you are not getting more from the  
14 government strikes me as pretty powerful information that  
15 you're obtaining with respect to what the government has  
16 been reporting to Congress and to the public over the years  
17 with respect to their efforts to combat terrorism. I think  
18 you, through this litigation, have shown that that actually  
19 appears to be vastly overstated.

20 But I do think that if -- when the government  
21 looks at this one matter that I've identified, that if they  
22 concur in my judgment about this or don't convince me to  
23 change my mind about it, that may create a template for them  
24 to take a further look at some of the other cases. I do  
25 think that a hate crime can be terrorism, but I think a hate

1 crime, at least based on the admittedly imperfect template  
2 that we've put in place to try and do our best under  
3 difficult circumstances to figure out what needs to be  
4 disclosed and what doesn't need to be disclosed, that under  
5 the template where we're talking -- where we're using the  
6 definition in the statute, there has to be a danger to human  
7 life. And that's certainly not true of every hate crime.

8 Burning a cross in somebody's front yard is  
9 clearly a hate crime -- not clearly, but it oftentimes will  
10 be a hate crime. But it's not clear that doing that poses  
11 an actual danger to human life. So I admit and concede that  
12 there is imperfection to the definition of terrorism.

13 That's part of the problem here, and that's what we've been  
14 wrestling with all along in this litigation. And we came up  
15 with sort of the best model we can to try and sort through  
16 that.

17 And it may be that when the Department of Justice  
18 takes a further look at this, they may decide there are some  
19 other cases that they treated as hate crimes that are also  
20 terrorism. I guess the way I would put it is I don't think  
21 that every hate crime is an act of terrorism, but it also is  
22 the case that there are hate crimes that are acts of  
23 terrorism.

24 **MR. MOSES:** Thank you for the explanation, Your  
25 Honor. We appreciate your thoughtfulness on it. I want to

1 pick up on -- and I appreciate that the government will --  
2 the department will take into account your thoughts in this  
3 regard as they go forward. And obviously, we're not going  
4 to reargue points.

5 I just want to pick up on one other thing, which  
6 was you said we've achieved a lot by showing that a lot of  
7 these cases aren't terrorism. I don't think the government  
8 has quite conceded that. Because what the government says  
9 in its -- in the Vaughn index is: "Initial investigation  
10 related to terrorism" -- or, "Initial investigation  
11 suggested possible connection to terrorism." The government  
12 uses these numbers to say we have 3,000 terrorism  
13 convictions in what it represents to Congress. I don't  
14 think the government has yet conceded that that number is  
15 misrepresented. Because what they say is, well, all we are  
16 saying is what we charged or what is public doesn't tell you  
17 whether or not this was a true terrorism case or not, not  
18 that we concluded that it wasn't a terrorism case.

19 And that is, I think, a significant gap in the  
20 transparency that we need here. Because if DOJ has been  
21 misrepresenting its overall number of terrorism-related  
22 convictions to Congress, that's pretty significant.

23 **THE COURT:** Right.

24 **MR. MOSES:** And they should not be let off the  
25 hook on this. What I would suggest is that they -- that the

1 Vaughn index be extended one column: Was it a terrorism  
2 case or not, regardless of whether it was disclosed.

3 Because we should know, the public should know, whether  
4 they've been misrepresenting to Congress this number. And  
5 they shouldn't be able to basically hide behind the sort of  
6 obscurity that this initial investigation suggested a  
7 possible connection to terrorism is giving them. And it's  
8 something which is -- as I was preparing for this hearing,  
9 because I have all sorts of suggestions for you based on  
10 your review. But this was one suggestion which I think is  
11 still applicable, even though you have found that these  
12 cases were appropriately not disclosed by and large.

13 **THE COURT:** What I can say is that, based on my  
14 review, the cases that are being withheld I do not believe  
15 are terrorism -- domestic terrorism cases. I don't know if  
16 that's helpful or not. But based on the review that I've  
17 had, the cases where the government is withholding, I do not  
18 believe, based on the definitions of terrorism that we're  
19 using as working definitions of terrorism, that they are in  
20 fact domestic terrorism cases.

21 Now, one can define terms however one wants. If  
22 one defines terrorism as acts that cause injury to human  
23 beings, then there are millions of terrorism prosecutions  
24 that are brought in the United States every year at the  
25 state and federal level. If one defines terrorism as it's

1 defined in 2331, the universe is obviously fairly narrow.

2 **MR. MOSES:** Well, that suggests to me, based on  
3 the sampling that we've been doing, and based on the returns  
4 we've been getting, is the Justice Department's  
5 representations to Congress -- and I haven't looked at the  
6 latest representations of the new administration, but at  
7 least through the period that we were focused on, are  
8 overstated. I guess there's nothing you can do about that,  
9 Your Honor, but it does suggest that this process has  
10 revealed that, as you suggest.

11 **THE COURT:** The one thing I will say is I don't  
12 know exactly what the Justice Department has conceded or not  
13 conceded here. They have, though, acknowledged in some of  
14 their filings that there are cases in which the  
15 investigation was originally opened as a terrorism case in  
16 which they ultimately concluded it was not a terrorism case.  
17 And they've also acknowledged that there are cases that were  
18 mistakenly classified as terrorism cases. I'm not sure, I  
19 don't think we know exactly how many fall into each of those  
20 categories.

21 But to the extent the reporting was simply based  
22 on output from the LIONS database, I think it has disclosed  
23 that there are -- there's been some over reporting, if  
24 that's in fact what the methodology was. I don't know how  
25 much over reporting there was in light of that. This in the

1 end can't be a science.

2 I understand what you're getting at, and I think  
3 it's an important point, which is the reason that we've gone  
4 down this path here. Because as I've said in one of my  
5 earlier opinions, I think that there are weighty interests  
6 on both sides of the scales here. And that there is a very  
7 important public interest in knowing how the Department of  
8 Justice classifies cases as terrorism cases when the Justice  
9 Department is reporting to Congress and to the public with  
10 respect to terrorism prosecutions; how the Department of  
11 Justice's budget is used for purposes of fighting domestic  
12 terrorism. Those are all very, very weighty and important  
13 interests and questions.

14 But what I've also said is that there are weighty  
15 interests on the other side of the scale. And I think that  
16 there is very powerful privacy interests to individuals who  
17 were not party to this litigation in not having it publicly  
18 disclosed that an AUSA on day one in a case thought that,  
19 hey, maybe this is terrorism, and they put that terrorism  
20 label in. And it turned out that it was a really stupid  
21 16-year-old who called a bomb threat in to his or her school  
22 because he or she didn't want to take an exam and wasn't  
23 prepared to take the exam, or something like that, which  
24 clearly is not terrorism. You have that person out there  
25 now who -- that has a terrorism label associated with them

1 in ways which can be very damaging to someone's reputation.  
2 So I think there are very weighty considerations on both  
3 sides of the scale here.

4 I also think that there is an inevitable  
5 imprecision in all of this that we're wrestling with. All I  
6 can say is I think we're all doing our best -- and I know  
7 the Department of Justice has devoted an enormous amount of  
8 resources to this case, that we're doing our best to try and  
9 work through this to strike what I think is hopefully a fair  
10 balance.

11 **MR. MOSES:** I appreciate that, Judge. And I agree  
12 that the high school student who calls in the bomb threat  
13 is -- should not be labeled a terrorist. Of course, it  
14 could be less benign, which is an agency starts an  
15 investigation as a terrorism investigation for whatever  
16 resources that allows them to get -- which is not -- really  
17 should never have been classified that way, and that's part  
18 of what we're trying to get at, too.

19 I guess, Judge, could we take away, at least based  
20 on your review, that these 18 of the 20 cases, excluding the  
21 one you've tentatively ordered revealed and reviewed --  
22 excuse me, disclosed and the one that you need the docket  
23 number for, that those ultimately turned out not to be  
24 terrorism-related?

25 **THE COURT:** They did not turn out to be



1 terrorism-related within the definition of terrorism that's  
2 contained in 18 U.S.C. section 2331(5).

3 **MR. MOSES:** Thank you, Judge. I guess I'll just  
4 ask it squarely. I'm sure you'll say no, but I want to make  
5 sure I've asked it. Can we ask the government to add a  
6 column where they say that -- whether the case after the  
7 initial investigation turned out to be terrorism or not  
8 terrorism?

9 **THE COURT:** You know, I don't think that is  
10 appropriate here. Because this is a FOIA case, it's not a  
11 discovery case in which you're going to interpose  
12 interrogatories to the government that they have to respond  
13 to one way or the other. We're just doing our best here.  
14 The reason for the Vaughn index is to let us do our jobs  
15 under FOIA. I think that's, for present purposes, what we  
16 have to limit ourselves to.

17 **MR. MOSES:** Thank you, Judge. And thank you for  
18 your time, again.

19 **THE COURT:** Okay, thank you for your thoughtful  
20 comments. Ms. Gonzalez-Horowitz, anything else today?

21 **MS. GONZALEZ HOROWITZ:** No, Your Honor. We  
22 appreciate all of the time you've dedicated to this case,  
23 and all of the thoughtfulness that you've shared with us  
24 today. Obviously, the government concurs with several of  
25 your statements regarding the weighty privacy interests at

1 stake. I think you noted that the department has put a lot  
2 of resources and has devoted a lot of time into this case.  
3 And we recognize, of course, the importance of it.

4 But as the Court just recognized, at the end of  
5 the day, this is a FOIA case. So the department is trying  
6 to meet its statutory obligations under FOIA while balancing  
7 all of the other important interests at stake here. So we  
8 appreciate the Court recognizing that and appreciating that.

9 **THE COURT:** Well, and I appreciate all of your  
10 efforts. So we have appreciations all around. As we move  
11 forward here, I look forward to your additional submissions,  
12 and we'll see where we go from here. Thank you all for your  
13 efforts.

14 (Proceedings adjourned at 10:31 a.m.)  
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C E R T I F I C A T E

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3 I, Jeff Hook, Official Court Reporter,  
4 certify that the foregoing is a true and correct transcript  
5 of the remotely reported proceedings in the above-entitled  
6 matter.

7 **PLEASE NOTE:** This hearing occurred by  
8 videoconference and is therefore subject to the  
9 technological limitations of court reporting remotely.

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13 December 22, 2022

14 DATE



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Jeff M. Hook

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