

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	Civil No. 10-765
)	
VS.)	June 15, 2011
)	
ISHMAEL JONES,)	
A pen name)	
)	
Defendant.)	

REPORTER'S TRANSCRIPT
MOTIONS HEARING

BEFORE: THE HONORABLE GERALD BRUCE LEE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: OFFICE OF THE U.S. ATTORNEY
BY: KEVIN MIKOLASHEK, ESQ.
DEPARTMENT OF JUSTICE
BY: MARCIA BERMAN, ESQ.
CENTRAL INTELLIGENCE AGENCY
BY: ANNA PECKAM

FOR THE DEFENDANT: LECLAIR RYAN
BY: LAURIN MILLS, ESQ.
C. MATTHEW HAYNES, ESQ.

OFFICIAL COURT REPORTER: RENECIA A. SMITH-WILSON, RMR
U.S. District Court
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1 (Thereupon, the following was heard in open
2 court at 10:04 a.m.)

3 THE CLERK: 1:10 civil 765, United States of
4 the America versus Ishmael Jones, et al.

5 Would counsel please note your appearances
6 for the record.

7 THE COURT: Good morning.

8 MR. MILLS: Good morning, Your Honor. Laurin
9 Mills and Matt Haynes on behalf of Mr. Jones.

10 THE COURT: Good morning.

11 MR. MIKOLASHEK: Good morning, Your Honor.
12 Kevin Mikolashek from the U.S. Attorney on behalf of the
13 United States. Joining me, Your Honor, is Anna Peckam
14 from the Agency. Also joining me is a Marcie Berman from
15 the DOJ civil division.

16 Ms. Berman has been admitted pro hac vice and
17 with the Court's permission will be delivering the
18 arguments in this case.

19 THE COURT: All right. Ms. Berman, you may
20 proceed.

21 It's always helpful at the outset to tell me
22 what the issue is.

23 MS. BERMAN: Absolutely, Your Honor. Good
24 morning.

25 THE COURT: Good morning.

1 MS. BERMAN: The issue on the Government's
2 motion today is whether there are any material facts in
3 dispute precluding summary judgment as to Mr. Jones'
4 liability for breaching his secrecy agreement, and the
5 answer to that question is no.

6 It is uncontroverted in this case that
7 Mr. Jones signed a secrecy agreement that required him to
8 submit his manuscript for prepublication review and that
9 required him not to publish it unless and until he
10 received the Agency's written approval.

11 It is also uncontroverted that Mr. Jones
12 submitted a manuscript to the prepublication review
13 process and that the Agency denied him permission to
14 publish the manuscript.

15 THE COURT: What remedy, if any, did he have
16 following the denial by the Agency of his request for
17 publication?

18 MS. BERMAN: I'm sorry. What was the
19 beginning of your question?

20 THE COURT: What remedy, if any, did
21 Mr. Jones have when the Agency denied his request for
22 permission to publish his book?

23 MS. BERMAN: Your Honor, Mr. Jones had the
24 remedy of coming into federal court and seeking judicial
25 review of that PRB decision. That is a remedy that has

1 been in existence since the *Marchetti* case, and he
2 clearly had it available to him, and he did not pursue
3 it.

4 THE COURT: So, is there any question that he
5 went on and published the manuscript?

6 MS. BERMAN: There is no question that he
7 went ahead and published the manuscript.

8 THE COURT: All right.

9 MS. BERMAN: That's correct. That is
10 completed admitted.

11 In fact, in the book itself, Mr. Jones boasts
12 about the fact that he published it against the expressed
13 denial of approval from the Agency. So, it's definitely
14 not in dispute.

15 Mr. Jones' defenses in this case that he has
16 raised are meritless. Whether the book contains
17 classified information is irrelevant to Mr. Jones'
18 liability for breaching his contract.

19 THE COURT: Does the agreement require
20 nondisclosure of only classified information? Doesn't
21 the law require you not disclose classified information?

22 MS. BERMAN: Your Honor, the cases that have
23 held that have based it on the author's First Amendment
24 rights. It's not a contractual obligation.

25 It's -- there's nothing in the agreement that

1 requires the Government to only deny approval of
2 classified information. That's a First Amendment right
3 that the courts have found to exist for the authors.

4 And so, Mr. Jones' argument that he's raised,
5 his defense that the Government breached the contract
6 first by denying permission of what he claims to be
7 unclassified information is absolutely meritless.

8 There's nothing in the contract that requires
9 that. All the cases have held it's a First Amendment
10 right. All of those courts would have been required by
11 the Doctrine of Constitutional Avoidance to find it in
12 the contract if it existed rather than to reach out and
13 base their decisions on the First Amendment.

14 And, a further reason for rejecting this
15 defense, Your Honor, is that it really would nullify the
16 force and effect of the secrecy agreement and be entirely
17 contrary to the *Snepp* case. Because if this defense
18 exists, then an author can simply submit a manuscript for
19 a prepublication review, get in -- once it's denied, the
20 author would -- could contend, like Mr. Jones is doing
21 here, that that's a complete defense and excuses
22 compliance with the secrecy agreement.

23 The author would go ahead, publish the book.
24 You'd have the unauthorized disclosure of potentially
25 classified information that the courts have held, you

1 know, can't happen. And there would be -- and the United
2 States would not be able to even sue for breach of
3 contract because, as Mr. Jones is claiming, it would be a
4 complete defense. And so that defense should definitely
5 be rejected.

6 Your Honor, so the essential facts here are
7 uncontroverted, and the harm to the Government is also
8 uncontroverted.

9 You know, in the *Snepp* case, the Court found
10 that the Government had been irreparably harmed by the
11 unauthorized publication of Mr. Snepp's book.

12 And here, you know, we rely on that holding.
13 We also submitted a declaration establishing the harm in
14 this case. And in fact, the harm is clearer here than it
15 was in *Snepp* because here we have a covert officers whose
16 affiliation with the Government, with the CIA remains
17 classified to this day, who published a book about his
18 experiences, you know, as an officer operating under what
19 he called deep cover when the CIA expressly denied him
20 permission to do so.

21 THE COURT: All right, I think I understand
22 your position.

23 MS. BERMAN: Thank you.

24 THE COURT: Let me hear from the other side
25 and I'll give you a chance to respond.

1 MR. MILLS: Good morning, again, Your Honor.

2 THE COURT: Good morning.

3 MR. MILLS: Your Honor, the issue in this
4 case is whether the Government can enforce a contract
5 that it breached first. And the rule under Virginia law
6 and under federal law is that it cannot.

7 That is a legitimate defense to the contract,
8 and he has a First Amendment right to be able to publish
9 nonclassified information.

10 He did not waive his First Amendment rights
11 by entering into this agreement. And the secrecy
12 agreement itself, which is Exhibit A to the complaint, I
13 refer the Court to the final paragraph -- the final
14 sentence of paragraph eleven which says, "Nothing in this
15 agreement prevents -- constitutes a waiver on any part of
16 any possible defense I may have in connection with either
17 civil or criminal proceedings which may be brought
18 against me".

19 So, there is a no waiver provision of any
20 defense. Prior breach is an unquestionable defense under
21 Virginia law --

22 THE COURT: What do you say is the prior
23 breach, Mr. Mills?

24 MR. MILLS: What happened here, Your Honor,
25 is that Mr. Jones is a man who spent his entire career in

1 the government, in the Marines and then 15 years as a
2 covert officers. This is a guy who follows the rules.

3 THE COURT: My question was what was the
4 breach?

5 MR. MILLS: The breach was, he went
6 through -- unlike *Snepp* and *Marchetti*, he went through
7 the prepublication review process for 18 months. He
8 submitted his manuscript multiple times. And if I may --

9 THE COURT: And my understanding is that they
10 gave it back to him with some feedback and he made
11 another submission. Is that right?

12 MR. MILLS: He made multiple submissions and
13 this is the final feedback. And if I can ask the court
14 security officer to hand this up. This is the -- this is
15 the final feedback he got from the Government.

16 THE COURT: So, is it your view that when he
17 was unhappy with the response he had a right to publish
18 it? That was the end of the process?

19 MR. MILLS: No, that's not what happened
20 here.

21 THE COURT: No, my question was very precise.
22 He had a right to come into federal court to challenge
23 the Agency's denial of prepublication; is that right?

24 MR. MILLS: That's certainly one of his
25 option.

1 THE COURT: That was a legal right he had, is
2 that right?

3 MR. MILLS: That's correct.

4 THE COURT: He did not exercise it?

5 MR. MILLS: No, he exercised his option.
6 This is a contract. This is a contractual agreement.
7 It's the same -- he has the same right if you hired
8 someone to paint your house.

9 THE COURT: This is not like painting your
10 house.

11 So you're saying that he submitted for
12 prepublication review multiple times. He was unhappy
13 with the result.

14 Rather than complete the process by bringing
15 a lawsuit in federal court, he unilaterally made the
16 decision to release the book on his own; is that right?

17 MR. MILLS: I think after 18 months of going
18 through the process, with them denying him the right to
19 publish anything but footnotes, as you'll see in the
20 exhibit I handed up and going six months through an
21 appeal process where the Government's own regulations say
22 they're supposed to complete it in a month, he exercised
23 his rights under the First Amendment to publish this.

24 THE COURT: So, then your view is that the
25 First Amendment is self executing, that covert agents can

1 make their own judgment to publish despite the Agency's
2 denial of that request while they're in the process of
3 reviewing the publication; is that right?

4 MR. MILLS: Your Honor, he takes a risk by
5 doing that. And --

6 THE COURT: Well, all agents take a risk by
7 doing that, don't they?

8 MR. MILLS: That's correct and --

9 THE COURT: So then the agreement would have
10 no effect if the effect of it could be that the agent on
11 their own could just decide to release the book; is that
12 right?

13 MR. MILLS: That's not true, Your Honor.

14 THE COURT: Well, help me with what was the
15 Agency supposed to do under this circumstance where he
16 unilaterally released the book. There was no chance now
17 to further review it, to give him any additional
18 feedback? So, what was the Agency to do now?

19 MR. MILLS: The Agency should do exactly what
20 it's doing here. Is that if it thinks that he -- that
21 he -- that they denied him the right to publish
22 legitimately classified information, they have one --
23 they have two choices. They can prosecute him criminally
24 because it's a crime to do that. Or second they can do
25 what they're doing here in an attempt to impose a

1 constructive trust. And so, they can do that.

2 If he had gone to federal court, we would be
3 having the same issue we're having now, justify whether
4 it's classified or not. When --

5 THE COURT: Well, it is your view that the
6 secrecy agreement only affects classified information?

7 MR. MILLS: Absolutely.

8 THE COURT: Only classified information?

9 MR. MILLS: The way the secrecy agreement is
10 written is a little bit convoluted. It say you can't
11 publish in derogation of an executive order that is
12 listed in there.

13 Now, I can't find the executive order
14 anywhere. I think the executive order is classified.
15 But every case that's ever talked about it has said that
16 you can only published classified information.

17 But, you can only --

18 THE COURT: Say it again.

19 MR. MILLS: The executive order referenced in
20 the secrecy agreement says you can't publish anything
21 that's in violation of this executive order.

22 I have not been able to find online anywhere
23 this executive order, and the Government has never
24 submitted it as part of the papers in this. So, I
25 believe the executive order itself is classified, but I

1 can't swear to that.

2 But, the way the courts have interpreted this
3 agreement it's been multiple times, is that the
4 Government can only deny him the right to publish what's
5 classified. And, in fact, that's what the Agency's own
6 regulations say.

7 THE COURT: All right. Well, in this case,
8 there's no dispute about the fact that he submitted the
9 item for prepublication review; is that right?

10 MR. MILLS: That's correct.

11 THE COURT: And there's no dispute of fact
12 that he decided to publish it without Agency permission.

13 MR. MILLS: That's correct. After 18 --

14 THE COURT: All right. So, this is a pure
15 legal question then on the issue of your defense, that is
16 whether the Government breached the agreement by failing
17 to approve of his request to publish his manuscript.

18 MR. MILLS: No, I think it's a factual issue
19 about whether the -- whether the -- whether anything in
20 this very long book was legitimately classified. And, we
21 have more than enough facts to get to a jury on that
22 issue of a bad faith denial here because we have multiple
23 denials. He comes back and says tell me what's
24 classified. I will take it out. They say you can't
25 publish any of it other than a couple of footnotes and

1 harmless anecdotes.

2 You can open this book to any page in the
3 book and you can't find anything that's remotely
4 classified. This is a book that is --

5 THE COURT: How would I know that? How would
6 I know what's classified and what's not? How would the
7 jury know that?

8 MR. MILLS: The -- the jury -- you know --
9 I'll give you an -- I'll give you an example.

10 THE COURT: If you would answer my question
11 it would be very helpful. How would the jury know what's
12 classified or what's not?

13 MR. MILLS: Because it's obvious from the
14 context of the book. He's talking about an excursion he
15 has to a bar in Bangkok with a friend of his. There's
16 nothing remotely classified about it. He talks about
17 a --

18 THE COURT: I understand what you just said,
19 but as a judge who has had cases involving classified
20 information, I'm sure you realize that there is the issue
21 of classified documents. And then there's also the issue
22 of revealing means and methods of intelligence gathering.
23 Are you familiar with that doctrine as well?

24 MR. MILLS: I am, Your Honor.

25 THE COURT: So, would you agree that a covert

1 agent who has contacts with an operative in a foreign
2 country revealing his or her identity and the identity of
3 others that they're interacting with in a covert
4 intelligence gathering operation might expose that
5 individual's family, not the agent, but the person that
6 they're dealing with to some personal risk? Would you
7 agree with that?

8 MR. MILLS: I think in the right context, I
9 do, Your Honor.

10 THE COURT: Well, let me do this. I think I
11 understand your position.

12 If -- your argument is that, one, that the
13 Agency breached the agreement by not approving the book,
14 correct?

15 MR. MILLS: Correct.

16 THE COURT: All right. I think I understand
17 your position.

18 MR. MILLS: I'd like to make just a couple
19 more quick points.

20 THE COURT: If you would just sum up, it
21 would be very helpful to me.

22 MR. MILLS: Yes. This isn't the first in
23 this line of cases. In the *Snepp* and *Marchetti* cases,
24 both of which were brought in this court and both of
25 which involved factual scenarios where the agents didn't

1 even bring it to the prepublication review board, they
2 were allowed discovery to present their defenses.

3 And in fact, in *Snepp*, not only were they
4 allowed what the Court characterized as extensive
5 discovery, we had live testimony from Stansfield Turner
6 and Richard Colby, the current and former CIA director in
7 that case on facts not nearly as egregious as you have
8 here.

9 So the Government is asking you to do
10 something that has never been done before. We are
11 entitled to discovery to assert a defense recognized
12 under Virginia law.

13 Second, the Government hasn't met their
14 burden. All they have done -- they have submitted an
15 affidavit from a woman named Mary Ellen Cole. She's not
16 tendered as an expert. She's not been qualified as an
17 expert for anything. All she has done is assert
18 nonexpert opinion testimony and speculation and basically
19 crib quotes from the *Snepp* case as a basis for showing
20 irreparable harm.

21 If the Government is going to establish
22 liability and it has to do by clear and convincing
23 evidence here, it has to put on at least some admissible
24 evidence.

25 And the Mary Ellen Cole affidavit is not even

1 admissible, Your Honor. It is nothing but nonexpert
2 speculation, and it's not admissible. We're entitled to
3 discovery, to assert our defense.

4 The Government breached first. This is an
5 egregious case where they repeatedly denied him. They
6 sat on this appeal for six months during an election
7 year. And he made a gutsy call and took a risk to
8 publish this on the basis that he knew there was nothing
9 classified in it, Your Honor.

10 THE COURT: Thank you.

11 Anything further?

12 MS. BERMAN: Yes, Your Honor. Excuse me,
13 just a few points in summary.

14 There are no material facts in dispute here
15 on which to conduct discovery. The -- Mr. Jones is not
16 entitled to discovery unless there are any material facts
17 on which he would be conducting them.

18 The harm in this case is self evident. And
19 the Cole declaration is perfectly admissible, and she is
20 perfectly competent to testify in the matters that she
21 testified.

22 Your Honor, Mr. Jones' counsel referred to
23 Mr. Jones taking a risk -- assuming the risk by
24 publishing his book. Well, respectfully, the risk is to
25 the Government, and the Government's -- and to the

1 release of classified sensitive information. That's what
2 he took. And he should not be able to execute -- to put
3 that risk to the Government without any consequences.

4 THE COURT: Thank you.

5 MS. BERMAN: Thank you, Your Honor.

6 THE COURT: Let the record reflect this
7 matter is before the Court on the defendant's motion for
8 partial summary judgment as to liability. And this is a
9 case as we've heard involving the publication of a
10 manuscript that was not approved by the Agency in
11 prepublication review as required by the secrecy
12 agreement.

13 So the issue is whether the Court should
14 grant the Government's motion for summary judgment as to
15 liability where the plaintiff signed a secrecy agreement
16 which is attached to the complaint as Government Exhibit
17 A.

18 And, the Agency required under the secrecy
19 agreement that the plaintiff obtain written permission
20 from the Central Intelligence Agency's publication review
21 board prior to publishing any work. And the plaintiff
22 did not secure Agency approval prior to having his book
23 published.

24 The facts are not in dispute, it seems to me.
25 Plaintiff admits that he was signatory to the secrecy

1 agreement. He did prepare a manuscript which he
2 submitted to the publication review board multiple times,
3 and he was given feedback from the Agency about what was
4 publishable and what was not.

5 His opinion is that the Agency's refusal to
6 approve publication of his book was unreasonable and
7 deprived him of his rights under the First Amendment, and
8 he decided to publish the book without securing Agency
9 approval.

10 I don't think that this is really a very
11 difficult question. I think the *Snepp* case would control
12 here. It seems to me that where he signed a binding
13 secrecy agreement that prevented from publishing any
14 materials prior to receiving written consent, that under
15 *Snepp* this liability for the Government has been
16 established.

17 His signing a secrecy agreement does not
18 violate his First Amendment rights. And his claim that
19 the Court should deny summary judgment because of genuine
20 issue of fact about whether the plaintiff's counterclaim
21 alleging First Amendment violations creates a genuine
22 issue of fact for trial.

23 It seems to me that the judgment that he
24 exercised at some risk, according to his own counsel, to
25 publish a matter without securing Agency approval does

1 not demonstrate that the Government breached the contract
2 first because plaintiff acknowledges that under the
3 process in effect that once the prepublication board
4 denied his request for publication, that he had a remedy
5 and that remedy was to come to U.S. District Court and to
6 pursue a claim to have the Court determine if the
7 Agency's withholding of permission was unreasonable.

8 Not having exercised that right, I do not see
9 how the Government could be held liable for breach when
10 they were pursuing the process as set forth in the
11 agreement.

12 So, I am first of all holding that the *Snepp*
13 case controls here. They're both -- *Snepp* was an agent
14 and so is this plaintiff. They both signed secrecy
15 agreements. They both failed to adhere to them knowing
16 what they were -- the agreement said.

17 I don't think any discovery is necessary
18 because the plaintiff admits that he published without
19 the permission.

20 And the issue of whether the Government
21 breached first because of some sham appellate review, the
22 process was never over. And, his judgment to go forward
23 without the completing -- pursuing his remedies before
24 the court was the breach. It was not the Government's
25 breach. The Government was carrying out it's agreement.

1 So, for those reasons, it is the -- the case
2 is also very similar to *Marchetti*, but I don't think we
3 needs to go as far as *Marchetti*. I think that *Snepp* is
4 sufficient.

5 Motion for summary judgment for the
6 Government is granted, and the case will be dismissed as
7 it relates to his claim, counterclaim. So, partial
8 summary judgment liability is granted.

9 What remains to be done is the issue of what
10 remedy the Government is entitled to because of the
11 breach of secrecy agreement.

12 Thank you. You all are excused.

13 (Proceeding concluded at 10:24 a.m.)
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CERTIFICATE OF REPORTER

I, Renecia Wilson, an official court reporter for the United State District Court of Virginia, Alexandria Division, do hereby certify that I reported by machine shorthand, in my official capacity, the proceedings had upon the motions in the case of United States of America vs. Ishmael Jones, a pen name.

I further certify that I was authorized and did report by stenotype the proceedings and evidence in said motions, and that the foregoing pages, numbered 1 to 21, inclusive, constitute the official transcript of said proceedings as taken from my shorthand notes.

IN WITNESS WHEREOF, I have hereto subscribed my name this 29th day of June, 2011.

/s/
Renecia Wilson, RMR, CRR
Official Court Reporter