

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

3 -----x
4 MAX BLUMENTHAL, : Civil Action No.:
5 : 1:26-mc-16
6 Plaintiff, :
7 versus : Wednesday, July 29, 2026
8 : Alexandria, Virginia
9 MARKWAYNE MULLIN, :
10 : Pages 1-10
11 Defendant. :
12 -----x

13 The above-entitled motions hearing was heard before the
14 Honorable Leonie M. Brinkema, United States District Judge.
15 This proceeding commenced at 9:58 a.m.

16 A P P E A R A N C E S:

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P R O C E E D I N G S

THE DEPUTY CLERK: Civil Action Number 1:26-mc-16,
Blumenthal v. Mullin.

Will counsel please note their appearance for the
record, first for the plaintiff.

MS. YOUNES: Yes. Jenin Younes from American-Arab
Anti-Discrimination Committee for Mr. Blumenthal.

MR. DOUMAR: And I'm George Doumar, local counsel for
Mr. Blumenthal, Your Honor.

THE COURT: Good morning.

MR. BARGHAAN: Good morning, Your Honor. Assistant
United States Attorney Dennis Barghaan on behalf of the
Secretary.

THE COURT: All right. Mr. Barghaan, why don't you
stay there.

This case is an interesting one, because you may not
have seen the Fourth Circuit's recent decision in *Belmonte*
v. -- Belmonte Cardozo v. The United States?

MR. BARGHAAN: I'm sorry, I have not.

THE COURT: There, the Fourth Circuit has quite
clearly drawn the line between a routine search of a cell phone
at the border and a more intense or advanced search. All
right.

And what concerns me a little bit is that in your
papers, you referred to the reason why they -- your client held

1 the phone so that an advanced search could be done. I'm
2 looking at page 3 of your brief. You say: As a result, a CBP
3 Assistant Port Director at Dulles authorized the officers to
4 detain the two cellular phones to attempt to perform a more
5 advanced search, i.e., one in which officers "connect
6 equipment, wired or wireless, to copy and/or analyze the
7 contents of an electronic device." I believe now under Fourth
8 Circuit case law, a search warrant would be required for that
9 degree of intrusion into a cell phone. Okay.

10 Now, the problem I have in this case is I've read
11 your response and the declaration; however, that doesn't
12 satisfy the Court as to why these phones would have been kept
13 for over a month, and it would appear -- unless I've missed
14 something, weren't they ceased on June 10? Was it July 10 or
15 June 10?

16 MR. BARGHAAN: It was less than a week, I believe,
17 and my colleague can correct me if I'm wrong.

18 THE COURT: Then I may have misread it.

19 MS. YOUNES: We did have an error in our opening
20 paragraph, but later --

21 THE COURT SECURITY OFFICER: Ma'am, you need to stand
22 up.

23 MS. YOUNES: Sorry.

24 Yes, so the rest of the brief said July 10th, but it
25 was a week.

1 THE COURT: All right. That's what caught my eye.

2 MS. YOUNES: My apologies for that.

3 THE COURT: That does make a difference, to some
4 degree, in the Court's eyes.

5 But what was actually done during that even week?

6 MR. BARGHAAN: So from what I understand, it is a
7 situation in which the phones are taken at Dulles, they
8 referred to another DHS component, and they tried to do what
9 they tried to do. All of that, of course, is privileged law
10 enforcement -- privileged information.

11 But from the information that I have, that was -- it
12 was unsuccessful, they were unable to get access to the phone,
13 and thus no search, whether it be basic, because Mr. Blumenthal
14 exercised his right to say I don't want you to conduct that
15 search -- to do that, you would give the password and the
16 officer would look at it as he's there -- or an advanced
17 search, and none of those searches occurred.

18 The thing I do want to highlight here, Your Honor, is
19 the limited nature of this proceeding. This is not a criminal
20 action, obviously, but it also is not a full civil action.
21 This is a miscellaneous action brought under Federal Rule of
22 Criminal Procedure 41(g). Courts repeatedly have held that
23 that is a very limited vest of jurisdiction in district courts.
24 And when the government does not possess any of the information
25 or the property of the person bringing that motion, the case is

1 at its closure. That is exactly what my colleagues wrote in
2 their very appropriate --

3 THE COURT: Let me stop you, though.

4 MR. BARGHAAN: Sure.

5 THE COURT: They asked for the return of, A, a
6 physical device, but also for any information that was obtained
7 from those devices.

8 You're not saying that the contents of a cell phone
9 is not property to which the owner of the cell phone is
10 entitled?

11 MR. BARGHAAN: I'm not making that argument here,
12 Your Honor, but what we are saying is that we don't possess
13 them and never did, and that brings this limited proceeding to
14 its terminus.

15 THE COURT: I don't disagree with you in terms of the
16 law. My concern is the factual predicate. That is, is there
17 enough in this record to satisfy a neutral, which I am, that,
18 in fact, no information was obtained from those phones.

19 For example, we don't know from the declaration what
20 efforts were, in fact, made. We don't know if somebody ran
21 some password algorithm over the phone and tried to figure out
22 how to get into it.

23 And I think given the fact that this plaintiff is a
24 reporter, this case has particular concern to the Court because
25 there's been so much recently in the ether about attempts by

1 the government to intrude upon a reporter's right to report.
2 And, you know, just recently in New York we had the issue of
3 the subpoenas that were issued to the New York Times reporters.
4 I don't think that can be overlooked in this context.

5 MR. BARGHAAN: But I don't believe, Your Honor, that
6 that impacts the Court's jurisdiction. It doesn't impact the
7 fact that the only evidence is on one side of the equation
8 here. It is that we say in a sworn declaration. It is not me
9 standing up here and saying, trust me, Judge, I looked into
10 this, and this didn't happen. We have a declaration.

11 And the kind of information that you have suggested,
12 Your Honor, what algorithm was used and that, that's all law
13 enforcement privileged information. It is not information that
14 we can rely on a public record, because for obvious reasons.
15 You explain how this is done, and the individuals who we are
16 trying to get information from are able to "beat it."

17 THE COURT: All right. Let me hear from plaintiff's
18 counsel. Yes, ma'am.

19 MS. YOUNES: So I think you made many excellent
20 points, which we obviously agree with, about the fact that we
21 don't really know what happened with the phones, and the
22 declaration alone is simply not enough. It's a piece of
23 evidence, but it's not conclusive. The officer also misses a
24 lot of information. For example, the officer doesn't say who
25 handled the phones. He doesn't say what the basis of his

1 knowledge is. He just says this is what happened. Maybe
2 that's what he believed happened, but we ought to have an
3 opportunity to test the knowledge of people who came into
4 direct interaction with the phones. We don't know who they
5 were. We don't know what happened. We don't have any property
6 logs. We don't know if they made any attempts to try to get
7 information from the tech companies, for instance, or from the
8 cloud.

9 As for the -- and with respect to the law enforcement
10 privilege, that doesn't exist where there's no legitimate law
11 enforcement objective, which there was not here, for the
12 reasons that we've stated and you've stated.

13 THE COURT: All right. I think some limited
14 discovery is appropriate in this case. To the extent that the
15 government feels that some of that discovery cannot be shared
16 with the plaintiff, it can be filed with the Court in camera
17 for an in-camera review by the Court.

18 I am concerned, because, again, of the nature of who
19 the plaintiff is, the fact that these are two cell phones, and
20 even a week is a long time. I would be very uncomfortable if I
21 didn't have my phone for an entire week. I think most people
22 would these days. I'm not so sure why the phones were kept
23 that long. And, of course, we don't know, had you all not
24 filed your motion, how much longer they might have been kept.

25 But I think it's fair and appropriate before the

1 Court dismisses this matter as moot that we have a better
2 evidentiary record as to exactly what was done with these
3 phones, how long they were -- you know, how many people handled
4 them. And also, frankly, the knowledge -- I think counsel is
5 correct, the basis upon which the declarant is able to make the
6 statements that he has made. Hopefully you all can work out a
7 reasonable discovery plan.

8 And of course the other thing is, you know, the
9 plaintiff perhaps could, if he's really concerned, also
10 probably have an expert take a look at his phones to see if
11 there's any indication to see if they were somehow tampered
12 with or accessed in some way.

13 But, in any case, what I'll ask you all to do is to
14 report back in 14 days as to what discovery plan you've worked
15 out. Hopefully you will not have objections. And then we'll
16 figure out a time period in which to resolve this.

17 MR. BARGHAAN: May I just be heard very briefly, Your
18 Honor?

19 THE COURT: Yes, Mr. Barghaan.

20 MR. BARGHAAN: I, again, want to reiterate,
21 understanding that I'm probably beating a head against a brick
22 wall, that -- the limited nature of this -- of this situation
23 and this proceeding. And, moreover, that simply saying you
24 should have some limited discovery. If you saw the -- if you
25 saw the reply brief from my colleagues, this will be treated as

1 if it is an open field to ask any and all questions about why
2 were they interested in Mr. Blumenthal's phones, which is
3 completely irrelevant to the limited issue before the Court at
4 this point, and I would ask the Court at the very least to do
5 one of two things. To allow us the opportunity to provide a
6 more detailed declaration, to the extent that we can; and
7 that -- Number 1. And, Number 2, to put some parameters, at
8 least subject-matter-wise, on the discovery that -- the limited
9 discovery at issue so that this isn't a fishing expedition,
10 which courts -- including the Eleventh Circuit in the case we
11 cited in our opposition -- have said are completely
12 inappropriate in a 41(g) proceeding like this.

13 THE COURT: All right. I think that's reasonable.
14 That will help both the Court and counsel for the plaintiff in
15 focusing their attention on the critical thing.

16 So obviously one of the things that's missing from
17 the declaration is a very clear and detailed explanation as to
18 how the declarant is able to make the statement that he's made.

19 So did you interview people? Was he the one who kept
20 the phones the whole time and he tried to do whatever he tried
21 to do? More detail will assist both the Court and counsel in
22 evaluating whether anything further is needed. All right.

23 Can you get that to us within 14 days?

24 MR. BARGHAAN: Fourteen days, absolutely.

25 THE COURT: All right. That's fine. And after I've

1 seen that, plaintiff can respond to it, and then we'll
2 determine what other -- what else might necessarily be needed.

3 Thank you. We'll recess court.

4 MR. BARGHAAN: Thank you, Your Honor.

5 MS. YOUNES: Thank you, Your Honor.

6 (Proceedings adjourned at 10:09 a.m.)

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8 I certify that the foregoing is a true and accurate
9 transcription of my stenographic notes.

10
11 Stephanie Austin

12 Stephanie M. Austin, RPR, CRR