

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

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UNITED STATES OF AMERICA :

:

-vs- : Case No. 1:05-cr-225

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STEVEN J. ROSEN :

and :

KEITH WEISSMAN, :

Defendants. :

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HEARING ON MOTIONS

March 15, 2007

Before: T.S. Ellis, III, Judge

APPEARANCES:

Kevin V. DiGregory, Thomas Reilly and Michael C. Martin,
Counsel for the United States

Abbe D. Lowell, Keith M. Rosen and Erica E. Paulson,
Counsel for Defendant Rosen

John N. Nassikas, III, Baruch Weiss and Kate B. Briscoe,
Counsel for Defendant Weissman

The Defendants, Steven J. Rosen and Keith Weissman, in person
Jay Ward Brown and John O'Keefe, Counsel for Reuters, et al.

1 THE COURT: All right, this is the United States
2 against Rosen and it is-- What's the number, please?

3 THE CLERK: 05-cr-225.

4 THE COURT: And the record will reflect that counsel
5 are present.

6 And the defendants are also present? They are both
7 present as well.

8 Good morning to all of you. The delay in commencing
9 was that I had other proceedings this morning, and indeed a
10 Naturalization ceremony.

11 For 20 years now I have been performing
12 Naturalization ceremonies, and they never cease to be a
13 powerfully moving experience and one of the unmitigated
14 pleasures, few I might say, of this office I am privileged to
15 hold. It is very nice, and I join in it with some greater
16 feeling because I am not native born either.

17 So, that's the reason for the late commencement.

18 Now, there is, there has been lately a flurry of
19 papers. I was not here, I was in Richmond sitting by
20 designation, so I have not been here, but I have read all
21 these papers and considered them.

22 What I am going to do is to tell you where I stand
23 and how I intend to proceed, but then I will give you an
24 opportunity to comment on it.

25 And this hearing should be open to the public. And

1 I am going to be clear about what is and what isn't open to
2 the public. There is a misconception about that, due to what
3 I will term at the appropriate time a hyperbolic
4 characterization of a pleading, but I can understand why it
5 was termed that.

6 In any event, we are in the process of, in this case
7 we are in the process of complying with the Classified
8 Information Procedures Act, known as CIPA. And I say this for
9 people in the courtroom as well.

10 This is a statute passed by Congress for the purpose
11 of, for the purpose of establishing procedures for Courts to
12 follow in using classified information in prosecutions of this
13 sort.

14 And underlying the statute is, of course, the two
15 interests: One is the interests of protecting the secrets of
16 the United States, and the other is in ensuring a fair trial
17 to the defendants. That's very simply put, it is more
18 complex, of course, than that.

19 We have already gone through a portion of the CIPA
20 process in this case. Which is to say, the parties have
21 indicated what information the parties believe they want to
22 use that has been designated by the Government as classified.

23 And the Section 6(c) portion is that part of the
24 CIPA procedure where the Court now considers whether summaries
25 or substitutions that are proposed by the Government are

1 adequate to insure that the defendant has a fair trial and
2 really necessary to protect secrets by the Government.

3 And so, the Government filed its Section 6(c)
4 pleading, in which they claim that certain of the information
5 is required to be, is required to be summarized or
6 substituted.

7 And indeed, in that motion they have also suggested
8 a procedure, which is commonly known as the silent witness
9 rule. And it is a procedure whereby, as the Government would
10 have it, the defendants would have the full extent of the
11 information, the Government, of course, would have the full
12 extent of the information, and the jury would have the full
13 extent of the information, but the public would not.

14 In that motion the defendants-- Or that motion
15 caused the defendants to file a response to it called a motion
16 to strike. Now, in their characterization of the Government's
17 motion, they used the term "close the trial."

18 Well, I think that's a lawyer's, good lawyer's
19 characterization, but it is hyperbolic. There was no motion
20 by the Government to close the trial, but it is perfectly
21 understandable that that should have engendered some interest
22 on the part of the press, which caused the filing of the
23 motion.

24 So, what I am doing is making clear what's under
25 seal and what isn't going to be under seal.

1 And all CIPA hearings that involve classified
2 information are by the terms of the statute to be held under
3 seal. And for that, of course, I refer all of those in the
4 courtroom to a reading of CIPA. You don't have to be a lawyer
5 to read and understand CIPA, it is very clear.

6 Of course, CIPA doesn't answer all the questions.
7 It does not answer the question whether this fairly novel, so
8 far as I can tell, procedure suggested by the Government is
9 warranted or sanctioned under CIPA.

10 That's the essence or the thrust of the defendants'
11 motion to strike. What the defendants say and the reason they
12 characterized-- It wasn't the Government's motion to close
13 the trial, it was the defendants' characterization. But what
14 the defendants say is, look, if you don't give the public this
15 information, there are other objections they have other than
16 this, but this is the principal one, if you don't give it to
17 the public, that amounts to closing the trial.

18 The issue of whether the procedure that is suggested
19 by the Government, whether that procedure is appropriate or
20 barred by the Constitution is an issue that in my view can be
21 argued and disposed of without reference to specific
22 classified information.

23 And, therefore, that argument can be in open court,
24 and should be. Because, remember, at least as I see the
25 Court's task under CIPA, is that we ought not to have, and

1 indeed in any case we ought not to have any proceedings under
2 seal that don't have to be under seal. As much as possible of
3 any proceeding, including this one, should be public, open to
4 the public.

5 And so, that argument, the argument of whether we
6 can use the silent witness and the argument about whether it
7 is constitutional to have the jury and the parties know the
8 material but not the public, seems to me to raise important
9 questions that have not been fully briefed yet by the
10 Government. I am not sure that they have been adequately
11 briefed even by the defendants. But they need to be briefed,
12 argued and resolved by the Court, and that can be done in
13 public.

14 At the same time, the Section 6(c) process needs to
15 go forward, there is no need to stop that, except with one
16 exception which I will talk about in a minute.

17 The Section 6(c) process, for those in the courtroom
18 who may not be familiar with it, the Section 6(c) process is
19 that part of the CIPA process in which the Court considers
20 whether the Government's proposed use of classified
21 information by way of redactions or substitutions or summaries
22 or what have you is necessary and appropriate, and considers
23 whether the defendants' objection to that should be upheld.

24 That has to be under camera-- Or not in camera, I
25 am sorry. That has to be under seal by statute because it

1 considers classified information.

2 Now, you should know that if the Court rules in that
3 regard, the Government has the right to an interlocutory
4 appeal if the ruling is objected to by the Government. That
5 should go on-- I am going to set the date. I granted the
6 defendants' motion not to file their brief-- Their brief
7 would have been due I think yesterday under the schedule, but
8 I entered an order saying, you don't have to file your brief
9 yesterday, I need to look at all of this material you have
10 filed.

11 But I am now going to set a date today where they do
12 file their answer, we go ahead with 6(c), but I am also going
13 to set a schedule for determining the meta-legal question, as
14 I will call it, that is the question of what the Government
15 proposed, can they do it.

16 Now, the one exception to that is this. Now, it may
17 be necessary-- Well, let me put it this way. I think it is
18 possible for the Court to consider many of the defendants'
19 arguments without any reference to classified information. It
20 is just a general question of due process and other things.

21 However, I think the defendants can make an
22 important point by the quantity of information. And for that,
23 I have to go through, I have to see what the legal landscape
24 or what the landscape is after the 6(c) process. I may have
25 to reassess any conclusion I reach with respect to the use of

1 any procedures.

2 So, I want to go ahead with the process that can be
3 done in public about the fundamental objections that the
4 defendants have, important fundamental objections to the
5 procedure proposed by the Government.

6 And in that regard, I have in mind chiefly the
7 missing or the silent witness, use of the silent witness rule
8 and the use by the Government of the procedure whereby the
9 parties may have the full text and the jury may have the full
10 text, but the public doesn't. And, of course, there are
11 subissues involved in these.

12 But I want to consider those issues in the public to
13 the extent that I can. And it may be informed, it may be
14 informed, ultimately, to some extent by the amount, the
15 quantity, and I don't know that until I go through the 6(c)
16 process.

17 So, they are going to have to proceed in parallel.
18 Of course, at any time some significant ruling could end
19 consideration of it as well. For example, were I to conclude
20 that it was unconstitutional to proceed in this fashion, that
21 would be the end of it. And I don't know what 6(c) process we
22 would then go through. But we will see, we will see.

23 So, what I have in mind doing is we will set a
24 schedule for resuming the 6(c) resolution. And that hearing
25 will be closed by statute and because it involves, because it

1 involves classified information.

2 The defendants' motion to strike, which, as I say,
3 raises very important fundamental issues under CIPA as to
4 whether it can proceed with the silent witness and this other
5 procedure where the public doesn't know this information, that
6 I think is subject to some further briefing by the parties and
7 argument. And that should be in open court.

8 And indeed, the pleadings should be on the public
9 record. I don't see any need to refer to specific classified
10 information in resolving that motion, at least in the first
11 instance. And I have already said that ultimately that motion
12 may have to be informed by the quantity, by the landscape
13 after 6(c).

14 Now, the national security privilege aspect, which
15 is something the Government can ask for in addition to the
16 6(c), that's not really ripe yet. It should be done in
17 conjunction with 6(c), but sort of after 6(c). In other
18 words, we look at the landscape after 6(c) and then see if
19 there is any further privilege asserted. We will see.

20 So, I think what needs to be done today, in addition
21 to my reviewing with you very briefly what remains to be
22 resolved of the outstanding motions, which I am going to get
23 to, and I am getting to quickly in the next week or so, I want
24 to set a schedule for continuing the 6(c) process. I want to
25 set a prompt schedule for further briefing on the defendants'

1 motion to strike, and the motion to reconsider the order
2 modifying the schedule will be in effect resolved by that.

3 And as I said, the 6(c) will be closed to the
4 public, it will be sealed. The motion to strike, which is
5 very important, needs to be in the public, in the public
6 record.

7 And to the extent that I ultimately have to factor
8 in in a final resolution of that motion the extent of what the
9 Government wants to put into this process, I don't know
10 whether that will be under seal or not. We will wait. I may
11 do that on the papers themselves.

12 Then we have the national security-- That's not
13 really ripe until we do the 6(c).

14 So, that's how I see-- And in addition, of course,
15 I still have the Brady motion, the AIPAC motion, the
16 reciprocal discovery motion. And there is a motion under the
17 CIPA thing too that I am going to ask you about in a moment.

18 But that really is the current status of things.
19 But I wanted to say this at the outset to tell you what I want
20 to do, I am going to give you an opportunity to tell me what I
21 have missed, but it seems to me that we need to be clear about
22 what's on the record, public record, and what has to be by
23 statute under seal.

24 I dislike under seal matters, they are obnoxious to
25 me, but the law requires it.

1 There are other subsidiary issues. I think the
2 defendants raise the issue of, well-- And this is really
3 under the procedure. This is what I want you to address when
4 we come to this motion to strike, which is going to be now,
5 not today, but now.

6 The defendants make a strong point about, look, if
7 you keep treating this matter as under seal and not public, it
8 sort of conveys to the jury that it is NDI. That's a
9 substantial point.

10 I can anticipate the Government's response, but I
11 need to evaluate it. The response would be, I assume, you
12 tell the jury, look, whether this is NDI or not is your
13 decision, it's not-- And the fact that it is treated here in
14 a different way is merely temporary, but you determine whether
15 it is NDI. And you should not be influenced in any way by the
16 fact that it may be substituted or summarized. You have to
17 decide in accordance with the instructions of this Court,
18 which I will give them, whether or not it is NDI. And you may
19 not consider the fact that a certain procedure has been used.
20 That is not a factor to take into account in your
21 determination as to whether it is NDI.

22 But these are all-- That doesn't answer the
23 question. I have to tell you, I am significantly troubled by
24 the fact that so much of it will not be public. But I need to
25 see that, I need to see-- Actually, I would like to see more

1 briefing by the defendants.

2 I think what happened here is you saw their 6(c)
3 motion and you quickly filed this request to suspend and the
4 motion to strike. Well, now we have got to solve, I have to
5 resolve this significant issue about whether this is really
6 constitutional.

7 And I think the defendants need an opportunity to
8 expand on what they have submitted. The Government has to do
9 the same. We need to move briskly and to have this matter
10 argued orally in public as soon as possible. And then I need
11 to resolve it quickly.

12 And I have reserved the fact that that decision on
13 the motion to strike may ultimately be informed or affected by
14 the result of the Section 6(c) process. In other words, when
15 I really see what the landscape is on classified information.

16 So, to recapitulate, I plan to set a schedule for
17 6(c); that is the defendants' response date and a hearing
18 date. That will be closed.

19 I intend to set a brisk pace for a briefing schedule
20 on the motion to strike. Those briefs I think can be on the
21 public record. That hearing will be on the public record.
22 And I must resolve that.

23 And I said, and I will repeat it, that ultimately
24 that motion may have to be informed in some respect. And I am
25 sure the defendants can say whether they think it should be

1 informed by the quantity.

2 But don't, in these pleadings, refer to any
3 classified information because I don't think it is necessary.

4 And I will ask the Court Security Officer, I think
5 we have some pleadings in this case that ought not to be
6 classified, but we need to look at that carefully. Because I
7 don't want any more in this record that remains under seal
8 than absolutely has to. So, we need to look at that.

9 And I would be glad to point out to you some. And I
10 would like for you to review the record so that we can be sure
11 that we have as much as possible on the public record.

12 And then I will do the other motions. I have those
13 under advisement. And I think that would really-- There is
14 also a press intervention motion, but I think this moots that.
15 They know what's under seal, they know what's open. They
16 thought it was going to be a closed trial according to some,
17 something on the computer.

18 I think it was on the docket sheet, is that right?
19 It's on the docket sheet of the defendants' characterization.
20 I am not-- It isn't a closed trial, it won't be a closed
21 trial, and I am going to be clear about what's under seal and
22 what isn't.

23 The motion seems to me to be premature and
24 unnecessary, so I don't need to hear from the press today. I
25 have made clear what's under seal. What's under seal is

1 what's required by statute to be under seal, 6(c). But this
2 other argument I think very definitely needs to be on the
3 public record to the maximum extent possible. And I think it
4 could be entirely that.

5 Let me hear first from the Government on the
6 proposed procedure that I have outlined.

7 Mr. Reilly, any problems with it?

8 MR. REILLY: We concur with the Court, Your Honor.

9 THE COURT: Mr. Lowell?

10 MR. LOWELL: Your Honor, we concur exactly with the
11 Court with one question to the Court.

12 THE COURT: Yes.

13 MR. LOWELL: You have said, and it makes perfect
14 sense to try to act in parallel; that is, to brief the motion
15 to strike and to find a means to continue on the 6(c) process.

16 THE COURT: Well, they both inform each other to
17 some extent.

18 MR. LOWELL: They do. And you are also, as always,
19 ahead on the issue that the quantity itself might then inform
20 part of the first part of the argument.

21 THE COURT: That's right.

22 MR. LOWELL: Having said that--

23 THE COURT: And also your arguments on the
24 constitutionality of it may inform what I do in the 6(c)
25 process, striking that balance.

1 MR. LOWELL: I see that very clearly. The question
2 I raise is this, and maybe the Government is prepared to say
3 this, but I don't think so. To actually proceed on parallel
4 tracks, that is, if we had been in the normal process where
5 having identified this much stuff in 6(a) and now it was the
6 weeding out of how much of that stuff was going to find its
7 way to trial through 6(c), whether it was a redaction, a
8 substitution, a stipulation, we can argue whether those words
9 apply to what the Government was seeking, but if that had
10 occurred, they would have made redactions, stipulation
11 requests and summaries with what was going to be seen out
12 there, not what was going to be seen here and here.

13 If what the Government is prepared to say now is,
14 every suggestion that we made as to what was going to be seen
15 out there is what we meant as to what would be seen in front
16 of the bar as well as our 6(c) stipulations, then we can take
17 them up one at a time because all this piece of paper that
18 they have had through 6(a) that is now a one-liner is what
19 they thought out there, if they are saying, no, no, no, we are
20 not going, if it is going to the same in front of the bar and
21 behind the bar, then, yes, we can proceed document by document
22 on 6(c).

23 But if they are not doing that, Your Honor, and I
24 imagine they wouldn't, then I don't-- It is almost like they
25 have to go back to the drawing board too. If you don't accept

1 the premise of their procedure, I suspect their stipulations
2 are different.

3 THE COURT: That's the point, I have to decide their
4 procedure. And I take your point, I think you certainly are
5 correct in raising this, but that's why, precisely why it has
6 to proceed in parallel.

7 And I don't doubt that they may change some things
8 as we go along and as I make rulings. But I take your point
9 entirely. I am sensitive to it.

10 But, Mr. Lowell, let me ask you this. Do you agree
11 that your fundamentally objection to the procedure and aspects
12 of the procedure, constitutional claims which are very
13 substantial that have to be resolved-- Because as far as I am
14 aware, Mr. Lowell, there is no precedent for this particular
15 procedure.

16 MR. LOWELL: The Government would suggest there
17 probably is.

18 THE COURT: Which your view there isn't?

19 MR. LOWELL: Right. And certainly in quantity and
20 in the wholesale nature.

21 THE COURT: Now, it is right, isn't it, that that
22 particular argument can be done without reference to specific
23 classified information?

24 MR. LOWELL: I think so. I think the only thing
25 that we could suggest, Your Honor, that would facilitate what

1 you have in mind, 95 percent, 98 percent of what we need to
2 argue in our motion to strike both on statutory grounds,
3 cumbersome grounds and constitutional grounds, we could do on
4 the public record.

5 I imagine to make an example of why this can't work,
6 it makes perfect sense to use the real document and the real
7 whatever. And so, having said that, I can imagine, as we have
8 done in the past, a filing to be completely public that's 20
9 pages or 25 or 30, whatever, and there be a one or two or
10 three or four-page whatever it is that has to be the
11 supplement filed under seal, if we are going to use an actual
12 piece of evidence.

13 Now, that's the only thing I could think of.
14 Because when I want to address the Court as to how the
15 Government's procedure can't even work, if you assume it is
16 supported and constitutional, it can't work in a courtroom, I
17 think the best way to show that is to show that.

18 THE COURT: Well, I think your point is well-taken,
19 but I think we can do that in the 6(c) process.

20 MR. LOWELL: Okay. But I am definitely with you
21 then that the argument on the lack of statutory structure,
22 cumbersomeness and constitutionality, et cetera, is very
23 amenable to public debate, absolutely amenable to public
24 debate.

25 THE COURT: All right. Mr. Nassikas.

1 MR. NASSIKAS: Mr. Weiss, Your Honor.

2 THE COURT: Mr. Weiss, is that your view in sum and
3 substance?

4 MR. WEISS: It is, Your Honor. We agree that your
5 proposal would work. I would like to point out one possible
6 downside that may not be avoidable.

7 And that is that the way that you suggest working,
8 there may be a lot of work that we will have to do twice. And
9 it may not be avoidable. And what I mean by that is as
10 follows. If we go through the 6(c) process and we examine
11 their substitutions, because their substitutions were phrased
12 envisioning that only the jury would hear them, if you rule in
13 our way even in part, we may have to go to the drawing board
14 on all those.

15 The Government may say, we have to submit entirely
16 new substitutions because now you are telling us the public
17 has to hear that.

18 THE COURT: Well, I think you raise a point that I
19 anticipated, but I think my answer to you is you are right,
20 but we will cross that bridge when we come to it.

21 MR. WEISS: Okay. Well, you have asked us for
22 comments on your process.

23 THE COURT: Yes. And you are absolutely right, and
24 I appreciate the comment, I think you are on the mark, but I
25 think we will have to cross that bridge when we come to it and

1 see what it actually looks like. That's why I want these
2 processes to proceed in parallel.

3 MR. WEISS: Yes, in tandem.

4 THE COURT: Now, the hard part is scheduling this.
5 First of all, let's talk about the motion to strike.

6 Now, you did file a motion to strike and a
7 memorandum, but I think it would bear further, some
8 elaboration or elucidation by the defendants.

9 And then a response by the Government on why they
10 think that it is constitutional, practical, fair, et cetera.
11 And these would be on the public record.

12 And while I think Mr. Lowell is right on the mark,
13 that I may need some examples at some point, we are going to
14 do that in the 6(c).

15 So, is there any reason, Mr. Lowell and Mr. Weiss,
16 why-- Let's see, the Ides of March. Well, I guess you-all
17 should stay away from the Forum today.

18 MR. LOWELL: This is not the Forum.

19 THE COURT: Would there be any reason why you could
20 not elaborate on yours by let's say the 21st by the close of
21 business, Mr. Lowell, Mr. Weiss?

22 MR. LOWELL: May we consult, Your Honor?

23 THE COURT: Yes, by all means.

24 And then I would have in have in mind, Mr. Reilly,
25 that I would have the Government's response by the 28th.

1 Because you have some material already. What you won't have
2 during the seven days from the 21st is what they produce on
3 the 21st. But I am going to set some page limits too. This
4 isn't going to be 100 pages. I have enough paper to read.

5 MR. LOWELL: That seems to work for both of us, Your
6 Honor.

7 THE COURT: Now, do you think you need more than 15
8 pages?

9 MR. LOWELL: You are not asking us to-- Well, we
10 won't--

11 THE COURT: No, I have got your motion to strike in
12 support. I want you now to add some flesh to some of that
13 because what you really did by filing that motion was to stop
14 the 6(c) process. That's what you intended, and you
15 succeeded.

16 MR. WEISS: Your Honor, may I? To conform with your
17 very appropriate desire to get this filed publicly, we need to
18 do more than simply file a supplement because we included some
19 classified material as examples in the original brief.

20 THE COURT: All right.

21 MR. WEISS: Much of that brief is public. So, what
22 I would suggest, Your Honor, if it would be acceptable to you,
23 is instead of merely filing a supplement to that--

24 THE COURT: All right, I think that's a good
25 suggestion.

1 MR. WEISS: Is file a superseding--

2 THE COURT: All right. So, 30 pages. 30 pages
3 without examples.

4 MR. LOWELL: That's fine, Your Honor.

5 THE COURT: All right. And that's by the 21st.
6 And Mr. Reilly by the 28th.

7 Now, we need an argument, all of which will be
8 public, it will be in the public record. And that will be--
9 Do I have the red book?

10 My plan is to have that argument on the 30th.

11 MR. LOWELL: Your Honor, one thing I just need to
12 remind the Court from our prior scheduling of events, the next
13 wave of religious holiday begins the very end of March and--

14 THE COURT: Oh, I will accommodate all of those.

15 MR. LOWELL: And people will be gone, I know.

16 THE COURT: Well, just tell me and I will
17 accommodate them.

18 MR. LOWELL: So, unfortunately, if you remember, Mr.
19 Weiss I believe is gone from the 28th for the whole period of
20 the holiday, which is an eight or nine-day period--

21 THE COURT: All right. Well then, I will
22 accommodate that. We won't do it until after the holidays.

23 MR. LOWELL: Mid-April.

24 MR. WEISS: I am gone for two weeks, Your Honor.
25 These are tickets we bought a year ago after Passover. Never

1 did I imagine that this case would still be--

2 THE COURT: All right, I will accommodate that. I
3 accommodate all religious holidays. I balked a bit once when
4 one of them was 30 days long, but--

5 MR. WEISS: We are leaving, my family and I are
6 leaving for two weeks starting the 28th of March.

7 THE COURT: All right. Let me ask you this, would
8 you be back by the 13th of April?

9 MR. WEISS: I think that will be my second day back.

10 THE COURT: All right. Well then, let's do this--

11 MR. WEISS: Your Honor, I have an electronic
12 calendar which I am not allowed to bring into the courtroom,
13 so let me just look over the shoulder--

14 THE COURT: All right.

15 MR. LOWELL: While he is doing that, the 21st, the
16 28th presumably, and did you--

17 THE COURT: And I am now setting the oral argument.

18 MR. LOWELL: Should we have the moment for brief
19 reply to their statement? As we are carrying the burden on
20 our motion. I mean, brief, but I just want to factor it in.

21 THE COURT: Five pages.

22 MR. LOWELL: And a date.

23 THE COURT: Five pages. And do it by the 1st of
24 April or the 2nd of April.

25 MR. LOWELL: There is a weekend in there.

1 THE COURT: The 2nd of April. Actually, you can
2 make it by the 3rd of April.

3 MR. LOWELL: That would be helpful, Your Honor.

4 THE COURT: The 3rd of April. Then we will have the
5 argument then on the-- I would rather have it on the 13th if
6 you can do that, Mr. Weiss? I know you are back two days, but
7 you are young, resilient.

8 MR. WEISS: Okay, Your Honor. I will be back two
9 days, but I will tell my wife that I have to do some work over
10 vacation and I will be ready on the 13th.

11 THE COURT: Well, you know this stuff.

12 MR. WEISS: Your Honor--

13 THE COURT: And anyway, let Mr. Nassikas do
14 something in this.

15 MR. NASSIKAS: Thank you, Your Honor.

16 THE COURT: He feels left out. So, we will do it on
17 the 13th at 2 o'clock.

18 I have a trial commencing the 17th, but what I will
19 do, Mr. Weiss, is we will do it at 2 o'clock on the 16th.

20 Does that accommodate you a little better?

21 MR. WEISS: Monday, yes, Your Honor.

22 THE COURT: All right, I will do it then.

23 MR. WEISS: Thank you.

24 THE COURT: Now let's go to 6(c). And, of course,
25 you have cashed in all your chits on accommodations now. Here

1 is where it is going to bite.

2 MR. REILLY: Excuse me, Your Honor, may I have a
3 moment to confer with my colleagues?

4 THE COURT: By all means.

5 MR. REILLY: There may be a small issue about what
6 we are briefing. And I have a question for the Court. Thank
7 you.

8 THE COURT: All right.

9 MR. REILLY: Thank you, Your Honor.

10 THE COURT: All right.

11 MR. REILLY: The question we have is, the defendants
12 have captioned their brief and requested relief in the form of
13 a motion to strike our motion under 6(c).

14 We believe CIPA actually requires the Court to
15 consider any motion we file under 6(c). And we think it would
16 be a waste of the Court's time to brief and argue that issue
17 when really what the Court wants to know is, is this a
18 constitutional procedure within a 6(c) request.

19 THE COURT: That's right. And I have treated it as
20 such, but I want it in the public. And I want the 6(c) under
21 seal as required.

22 And to the extent that I make judgments and end up
23 with a batch of material in certain forms in 6(c), that may,
24 as I said, inform what I end up-- These are all objections
25 that the defendants would raise to the 6(c) proposal that you

1 have made.

2 MR. REILLY: Right. And within the context--

3 THE COURT: I am going to resolve those in the way
4 that I said.

5 MR. REILLY: And in the context of the public
6 briefing and the public argument, the result wouldn't be based
7 on that alone, that the Court would reject the Government's
8 6(c), it's all in conjunction with the review of the
9 Government's 6(c).

10 THE COURT: That's right, because if I did do that,
11 then you would you clearly have the right to an appeal.

12 MR. REILLY: Thank you, Your Honor.

13 THE COURT: All right. Now, let's go to the 6(c)
14 schedule. Now, here is where there is a light bite because
15 you were on your way to getting that done, it was due on the
16 14th. So, we need to move ahead on that.

17 Is there any reason why the defendants could not
18 submit their 6(c) response, other than this fundamental
19 objection that you have, by the 30th of March?

20 MR. LOWELL: With a question. I am sorry. So, what
21 the Court envisions us to do now is to take what the
22 Government calls its substitutions and summaries as they
23 propose them within their context --

24 THE COURT: Yes.

25 MR. LOWELL: -- and treat them, notwithstanding

1 whether we think you can do what they have done, but now--

2 THE COURT: Assume that I can for purposes only of
3 your treatment of this material during the closed process.

4 MR. LOWELL: So, we will take their proposed, this
5 document and this is what we say, and say to you why that
6 doesn't do the trick --

7 THE COURT: Precisely.

8 MR. LOWELL: --under--

9 THE COURT: Because ultimately, Mr. Lowell, on those
10 sorts of things-- Let's assume there wasn't this fundamental
11 objection. The Court's task in 6(c) is to say, well, the
12 Government wants to do this, the defendants say it deprives
13 them of a fair trial for this and that reason, I have to
14 balance the Government's statement that this stuff is secret
15 and if it gets out, it will be bad for the national interest,
16 and your statement that it impairs the defendants' right to a
17 fair trial. And the Court has to balance that in 6(c).

18 MR. LOWELL: Okay. As long as we have the starting
19 point that we are using the Government's proposed stipulation,
20 summaries and redactions as if that's what they meant to say.

21 THE COURT: That's right.

22 MR. LOWELL: We are going to tell you what our
23 response is.

24 THE COURT: But you don't at all give up your
25 objections to the overall.

1 MR. LOWELL: I get it.

2 THE COURT: And Mr. Reilly is correct, that really
3 both of them are 6(c), it is just that I want this to be in
4 the public.

5 MR. LOWELL: Right. I understand. I do understand.
6 Yes, okay. And March 30 is a good date for us to do that.

7 THE COURT: Now, once that's done, Mr. Reilly, it
8 seems to me that we then proceed to a closed hearing on 6(c).

9 And the date for the closed hearing on 6(c) I had
10 picked was the date I gave Mr. Weiss for the arguments.

11 MR. LOWELL: The 16th of April is the arguments on
12 the general, the overview issues of statutory structure and
13 constitutionality?

14 THE COURT: That's correct.

15 MR. LOWELL: He changed it from Friday the 13th,
16 sort of in the Ides of March concept, to the 16th.

17 THE COURT: To accommodate Mr. Weiss.

18 MR. LOWELL: At 2 o'clock, you said, on the Monday
19 the 16th.

20 THE COURT: Yes. Now, I want to have this hearing
21 on 6(c) on April 11 at 10:00 a.m.

22 MR. LOWELL: You said April 11, which is before--

23 THE COURT: Wednesday.

24 MR. LOWELL: That's before Mr. Weiss is back. And
25 it almost structurally, Your Honor, at least ought to begin a

1 day or two after the overall because at least in the overall
2 argument on the 16th, we will have some spillover, as you have
3 already said, in informing the specific.

4 THE COURT: All right, then we will do it on
5 April 19 at 2 o'clock because I have another Naturalization,
6 and I never miss those.

7 MR. LOWELL: On that point, the 16th, 2 o'clock will
8 be, I assume, the time we need.

9 Do you want to block out the 19th at 2 and have the
10 carryover day already or see how the 19th works?

11 THE COURT: If it is necessary, yes.

12 MR. NASSIKAS: Your Honor, is it possible, the 19th
13 I meet with the U.S. Attorney's in Philadelphia, I am supposed
14 to be there for a proceeding. The 20th on I am fine, but not
15 on the 19th. The 20th would be the Friday.

16 THE COURT: When I first came to Alexandria, we had
17 a master docket, I never had to schedule anything, I never had
18 to worry about anything.

19 The one thing I hated when I practiced is I remember
20 I represented or the firm represented some company and they
21 had lawsuits all over the country, and I was to keep track of
22 all these schedules. And I had to appear in this court and
23 that court. I hated that.

24 I dislike the scheduling I now have to do because
25 it's an unappealing task.

1 So, what you are saying, Mr. Nassikas, is that you
2 are unavailable on the 20th--

3 MR. NASSIKAS: On the 19th am I unavailable, but on
4 the 20th I would be available forward.

5 THE COURT: Well, the 20th is a Friday. And I can't
6 do it on a Friday, I have a full docket on a Friday docket. I
7 have a jury trial beginning on Monday April 23.

8 Did I set it for the 18th or the 19th? The 18th you
9 were-- What was wrong with the 18th?

10 MR. LOWELL: 18th is fine.

11 MR. NASSIKAS: The 18th I am still in, I am in
12 Philadelphia that entire week until Friday.

13 THE COURT: Is this something Mr. Weiss can do
14 without your wise counsel?

15 MR. NASSIKAS: Yes, Your Honor, if it's necessary.
16 Obviously, I would like to be present.

17 THE COURT: Well, the problem is that after the 18th
18 and 19th, unless there are settlements and pleas and
19 everything else, I am in trial the rest of April. And I begin
20 a capital case in the beginning of May, which I have to finish
21 before we start this.

22 So, it raises a real problem.

23 MR. NASSIKAS: If it must be the 19th, Your Honor,
24 then I don't want to delay it further.

25 THE COURT: All right. We will do it the 19th at 2

1 o'clock. All right.

2 Yes, Mr. Weiss.

3 MR. WEISS: A request, Your Honor, that I think may
4 facilitate your proposal. In an effort to get as much public
5 as can be and limit as much as we can what goes in, the
6 Government's proposal about how it wants to conduct the trial
7 with the silent witness rule and so on was in its 6(c) motion
8 which, because it contained a lot of the underlying material,
9 was very understandably classified.

10 They at my request very kindly provided to us a
11 redacted version of their motion that contains the legal
12 argument about the silent witness rule and--

13 THE COURT: Yes. I want the Court Security Officer
14 to look at that and that can be placed on the public record.

15 MR. WEISS: Because now it is declassified--

16 THE COURT: The Security Officer will look at it.
17 And if it is not classified, I want it on the public record.

18 MR. WEISS: Right now it is declassified, but it is
19 under seal.

20 THE COURT: Why? Why on earth does it need to be
21 sealed?

22 MR. WEISS: I don't know.

23 THE COURT: All right, it is unsealed. I just
24 unsealed it, the redacted portion.

25 MR. REILLY: Your Honor, we would request at least a

1 day to review it --

2 THE COURT: Yes, you can have that.

3 MR. REILLY: -- to make sure that there isn't any
4 other reason that it should be sealed other than classified--

5 THE COURT: With the Court Security Officer.

6 MR. REILLY: We will work with the Security Officer
7 to do that.

8 THE COURT: All right.

9 MR. LOWELL: And we will do the same, Your Honor, so
10 that the portions of what we filed that had the example, which
11 is the issue, I think what caused it to fit into the
12 classified aspect, can easily be removed so that the front and
13 the back can be also released.

14 THE COURT: All right. Now, I will enter an order
15 accordingly. I will also deny the press' motion, but without
16 prejudice. You know, watch this carefully-- I think counsel
17 are here for the press. Am I looking at you?

18 MR. BROWN: You are, Your Honor.

19 THE COURT: Well, watch this carefully. And if you
20 see something that you think is a closed trial, by all means
21 you-all should do what you think is appropriate. But I
22 think-- And what you did I don't criticize at all.

23 You saw a caption on a docket sheet, is that right?

24 MR. BROWN: There is limited information available,
25 and that's what we had.

1 THE COURT: That's right. And you see something
2 that says a closed trial, I don't blame for you reacting to
3 that.

4 MR. BROWN: Today's public proceedings have been
5 very helpful, Your Honor.

6 THE COURT: They were meant to be. I am glad you
7 feel that way. I will deny your motion without prejudice to
8 your renewing it because I may make a mistake.

9 All right, I thank counsel for your cooperation.
10 You didn't have anything else, did you, Mr. Reilly?

11 MR. REILLY: I do, Your Honor.

12 THE COURT: All right.

13 MR. REILLY: Your Honor, at this point in time the
14 trial date is set for June 4.

15 THE COURT: I know that.

16 MR. REILLY: The CIPA 6(c) hearings will require, in
17 our estimation, more than one day.

18 THE COURT: I know that. And we will do the best we
19 can. And if it turns out that I need to postpone it a week or
20 so, I will do it. We will cross the bridge when we come to
21 it. It is an imperfect world.

22 You know, one of the things we don't do in these
23 cases, I don't know what they do in other districts, I have
24 never inquired, but in the Eastern District we typically don't
25 have long cases, trials go quickly in the Eastern District.

1 Four to six weeks is the longest trial I can remember there
2 being here.

3 But we don't go off the computer assignment of
4 cases. I don't quit setting trials, quit setting arraignments
5 in criminal trials and pleas and everything else. And they
6 just, the cascade keeps coming.

7 And so, I need to watch the schedule as much as I
8 can. But I am sensitive to that problem, and we will deal
9 with it. I am not going to require anybody to do the
10 impossible.

11 MR. NASSIKAS: Your Honor, one--

12 THE COURT: What was it that they say about the
13 Marines? The difficult we do immediately. The impossible
14 takes a little while longer.

15 Yes, Mr. Nassikas.

16 MR. NASSIKAS: Your Honor, we will work with Ms.
17 Gunning on the unsealing of a number of briefs filed in the
18 past--

19 THE COURT: Well, that is something she does on her
20 own. She can do that on her own. And if she needs your help,
21 she will contact you.

22 MR. NASSIKAS: The only brief I do believe really is
23 ripe for immediate unsealing is the defendants' reply brief in
24 the AIPAC fee brief dismissal motion we filed.

25 THE COURT: I am sorry, say that again.

1 MR. NASSIKAS: There is the defendants' reply brief
2 in the fee--

3 THE COURT: Well, she is going to look at everything
4 at my request. And she is going to, if she finds, for
5 example, a brief or something that she thinks needs or
6 deserves to be unclassified, the normal routine is that if it
7 is your brief, she calls and tells you she thinks it ought to
8 be declassified, do you have a problem with that. And put it
9 in the public record.

10 And if you don't give her a good reason not, then
11 she will tell me, I will issue an order and that will go in
12 the public record.

13 The same for the Government. She will come to a
14 Government brief and she will say, I think this needs to be
15 declassified. If the Government agrees with that, then it
16 will it will go. Otherwise I may have to resolve it.

17 But the brief that Mr. Weiss I think mentioned,
18 that's what docket number? Do you know?

19 MR. REILLY: It was a redacted version provided as a
20 courtesy. It is not on the docket.

21 THE COURT: Okay, that's it then.

22 MR. REILLY: We can file it on the docket.

23 THE COURT: You can file that on the public record
24 then.

25 All right. I thank counsel for your cooperation.

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MR. LOWELL: Thank you, Judge.

THE COURT: Court stands in recess.

MR. WEISS: Your Honor, thank you for accommodating my schedule. I very much appreciate it.

THE COURT: You are welcome.

HEARING CONCLUDED

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

Norman B. Linnell, RPR, CM, VCE