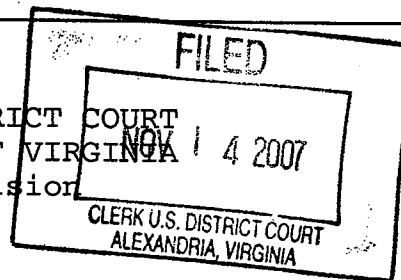


UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division



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UNITED STATES OF AMERICA :
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-vs- :
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Case No. 1:05-cr-225

STEVEN J. ROSEN :
& :
KEITH WEISSMAN, :
Defendants. :
: :
----- :

HEARING ON MOTIONS

November 8, 2007

Before: T.S. Ellis, III, Judge

APPEARANCES:

Kevin DiGregory, W. Neil Hammerstrom, Jr., Thomas Reilly and
Michael C. Martin, Counsel for the United States

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

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

The Defendants, S. Rosen and K. Weissman, in person

1 NOTE: After the matters relating to CIPA issues are
2 concluded, the public portion of the hearing begins as
3 follows:

4 THE COURT: So, this discussion I think can be
5 unsealed for purposes of the court reporter and for purposes
6 of the public.

7 MR. REILLY: With the admonishment to all parties
8 that if we are on the public record, not to disclose
9 classified information.

10 THE COURT: Absolutely. But I don't see any need to
11 do that.

12 All right. So, what I intend to do now is to
13 address the classified markings issue. Then I am going to
14 express a view about the disparate disclosure. And I want to
15 hear very briefly, maybe further from the parties, and then I
16 am going to resolve that. And following that, we will go to
17 scheduling. And that should end the day, I think.

18 All right. At issue with respect to the document
19 markings is whether the classification markings on these
20 documents that are slated to be admitted into the trial record
21 should be removed as inadmissible hearsay.

22 This is not as straight forward an issue as might
23 appear at first blush, and this is so because the markings I
24 think, carefully examined, have both hearsay and nonhearsay
25 purposes and the markings raise significant 403 issues.

1 I also asked the Government to tell me why they
2 thought it was illegal to remove the markings, and I will
3 address that as well.

4 Now, before beginning my analysis of this issue, I
5 think it is important to have in mind the role that these
6 documents may be expected to play in the case and the nature
7 prominence and providence of the markings that are in issue.
8 That is, what do they look like, what are they, where did they
9 come from.

10 To begin with, this Espionage Act prosecution is not
11 one in which some clandestine agents, foreign or domestic,
12 steal documents or illegally obtain documents or plans which
13 are conspicuously marked as Secret or Top Secret or the like.

14 All of these documents are documents that were not
15 disclosed in their documentary form to the defendants. The
16 defendants never saw these documents. They never saw these
17 markings.

18 So, the Government in this case instead accuses the
19 defendants not of obtaining classified documents, but of
20 obtaining information that the Government contends is national
21 defense information under the Espionage Act. And as I have
22 said in several opinions, this essentially means that it's
23 information that is closely held by the United States
24 government and that if disclosed would be damaging to the
25 national interest. Those are the requirements for something

1 to be national defense information.

2 Actually, the Government really accuses the
3 defendants of conspiring to obtain NDI. And the Government
4 claims that they don't even have to prove that the information
5 was NDI, they just have to prove that the information they
6 conspired to obtain is NDI.

7 Well, putting that to one side because as a
8 practical matter, the Government is going to attempt to prove
9 that the information passed is NDI. And indeed, I don't think
10 they could persuade a jury that there was a criminal state of
11 mind if they didn't do that. It is clearly part of the
12 Government's case to show that the information orally provided
13 to the defendants is NDI.

14 Now, to do so, the Government plans to show that the
15 defendants received certain oral information from government
16 officials, government official 1 and 2, for example, and then
17 passed-- And then the Government intends to put on expert
18 testimony to show that this information was at the time NDI.

19 And to aid in this effort, what the Government plans
20 to do is to have its experts apparently rely on documents
21 containing this information, documents which are classified or
22 at least marked with one or another classification category.

23 Now, these markings are placed on documents by
24 government officials in accordance with an Executive Order
25 definition of classified terms. And they put it on there

1 after training and review of the documents. This Executive
2 Order analysis includes assessment of whether the document
3 would damage national security if the material was disclosed.

4 So, if introduced with the markings, these markings
5 would clearly constitute hearsay evidence as to what these
6 unnamed and not present persons, government officials, their
7 opinion as to whether disclosure of this material would be
8 damaging to the national interest. That's clearly hearsay.

9 There is I think clearly a nonhearsay purpose that
10 the documents might serve. And that is the markings on the
11 documents show that the Government intended that this be
12 closely held information.

13 Now, we have a situation then in which there is both
14 hearsay and nonhearsay purposes. Obviously there are two ways
15 to deal with that. One way is to let the markings in and give
16 a limiting instruction that says they can only consider it for
17 the closely held issue but not for the other issue.

18 Alternatively, the Court could exclude the markings
19 and have a stipulation by the parties as to how the documents
20 were marked at the times relevant to this case, but not have
21 the markings on there. And indicate that the stipulation as
22 to the markings may only be considered for the purpose of
23 deciding whether the closely held element of NDI is satisfied
24 by the Government. Those are two choices that the Government
25 or that the Court could pursue.

1 Now, the Government makes some other arguments that
2 I want to deal with. The Government argues at some point that
3 these document markings are admitted under 803(8), which
4 allows for the admission of public records.

5 I think that argument is not well taken. 803(8)
6 limits the admissibility of public records to certain kinds of
7 public records. And this is a criminal matter, so 803(8)(C)
8 does not apply. It is 803(8)(A) which applies to reports of
9 an agency's regularly conducted activities. And (B), matters
10 observed pursuant to duty imposed by law as to which matters
11 there was a duty to report; excluding, however, in criminal
12 matters, criminal cases matters observed by police officers.

13 I don't think either of those apply because this is
14 an expert's view. It is an evaluation made by an expert of
15 damage to the national security. It is not, not something
16 that a police officer observed.

17 Subsection (C), as I said, I don't think applies at
18 all because it only establishes the admissibility of these
19 kinds of evaluations in civil cases or against the Government
20 in a criminal case. That's not what is being done here.

21 So, I will probably write further on this, but I
22 looked at the Farah case that the Government cited, and I am
23 not persuaded that that is to the contrary. And I will
24 explain that in further detail. I think that matter is
25 distinguishable, that case is.

1 So, I don't believe 803(8) applies.

2 Now, then the Government says, well, what about
3 803(6), a business record exception. Well, quite apart from
4 my sense that Wigmore and McCormick and folks who thought hard
5 about the business records exception decades ago, I think they
6 would flip in their graves if they thought we were going to
7 extend it to this kind of thing. I don't think it does.

8 In addition, I am moved to some extent by the view
9 expressed in the Eleventh Circuit case that if you can't get
10 it in through (8), then you shouldn't use (6) as a way to get
11 around the restrictions on 803(8). I don't believe these are
12 business records; that is, the markings are not business
13 records in terms of their hearsay evaluation testimony as to
14 whether there is damage to the public or the national security
15 if the material is disclosed.

16 So, I think there is clearly a hearsay purpose, as I
17 have indicated. There is a nonhearsay purpose. There are two
18 choices, and the Court has to consider which choice is the
19 more sensible one.

20 Now, I do want to pause a moment and deal with the
21 Government's contention that was initially made that the
22 Executive Order prohibited classification document markings to
23 be removed. It does say-- The Executive Order, of course,
24 does govern how to evaluate the document, but the Government
25 says it does more than that. The Government says that it

1 doesn't permit them to be removed from evidence introduced at
2 trial.

3 I have looked and I have found no authority that
4 supports that view, no authority to the contrary. There is
5 just simply no authority.

6 I don't think an Executive Order precludes the Court
7 from making determinations about the evidence that is admitted
8 in a trial. Indeed, we have gone through a lengthy CIPA
9 process, and the result of that lengthy CIPA process has been
10 to preserve Government secrets to the maximum extent possible
11 consistent with allowing the defendants to make substantially
12 the same defense they would make if they were allowed to have
13 all the documents.

14 And so, what we have is a mass of documents,
15 although it is not a document case, but we have a mass of
16 documents which are no longer classified. The Government
17 wants to do this prosecution, so it has agreed to declassify
18 these documents to the extent that they are now disclosed at
19 trial.

20 So, even if there were something in the Executive
21 Order that persuaded me that I ought to be cautious about
22 removing the markings, it is gone, they are no longer
23 classified, period. They are going to be in the public
24 record.

25 Yes.

1 MR. REILLY: Your Honor, Section 8 of CIPA deals
2 with this issue and states that Court rulings do not affect
3 the classification status. Classification is an Executive
4 Branch function. The documents have not been declassified.
5 They are going to be authorized for disclosure at the trial.

6 THE COURT: And where are they going to be?

7 MR. REILLY: Pardon?

8 THE COURT: Where are they going to be? They are
9 going to be in the public record.

10 MR. REILLY: Yes.

11 THE COURT: How in the world could they ever
12 constitute NDI after that?

13 MR. REILLY: It is not a question of NDI. It is a
14 question of classification.

15 THE COURT: You are right. Well, they are no longer
16 NDI in any event, once they are in the public record.

17 So, I take your point that they are still
18 classified. And the way I am going to handle it is this. I
19 am going to require that there be a stipulation for each
20 document as to how it was marked at the time of the events
21 here in issue, whether it was Top Secret, Secret or whatever.

22 However, after 20-years plus of watching juries, I
23 am persuaded that if the mass of documents in this case, all
24 of them stamped prominently with large legend Secret, Top
25 Secret, NOFORN, this or that, you eventually overcome any

1 instruction the Court can give.

2 The fact that the markings, the likelihood that the
3 jury will review all of these documents during deliberations,
4 see document after document after document, say that it is
5 Secret, I don't believe that the jurors can be expected to be
6 blind to the improper hearsay purposes of the statement
7 regardless of whatever instruction I give them.

8 I am going to give them an instruction as to how
9 they have to consider the fact that it was classified, and the
10 parties stipulate that it was classified, and they may
11 consider that for the limited purpose of considering whether
12 the Government has met its burden of showing that the material
13 was closely held.

14 In fact, as I have indicated, all it shows is that
15 the Government intended or attempted to closely hold it. It
16 is still open to the defense to show that they didn't succeed
17 in that respect.

18 But I find that looking at this mass of documents,
19 as I have, with all of these prominent inch-and-a-half,
20 two-inch stamps, maybe not two inches, but certainly inch and
21 half-inch stamps of Secret, Secret, creates I think unfair
22 prejudice, likelihood of confusion with the jury
23 notwithstanding the instruction.

24 I am very aware of authority in the Supreme Court
25 and elsewhere and indeed follow it that juries can be expected

1 to pay attention to instructions. But as any thinking person
2 knows, particularly persons with long experience in
3 litigation, maybe even including some who were on the
4 Supreme-- Maybe not. But in any event, everyone would
5 recognize that it doesn't always work. There are limits to
6 the efficacy of Court instructions.

7 And in my view, this is a case where allowing the
8 documents to proceed with the markings, given the number of
9 documents, the prominence of these markings, that it creates
10 unfair prejudice through confusion and the likelihood that
11 they will not be able to remain faithful to the Court's
12 instructions to consider it for a limited purpose. It just
13 has an impact.

14 I think the matter is better dealt with, because the
15 Government is entitled to show that they were classified--
16 And indeed, I don't have any problem and neither should the
17 defendants with showing that they remain classified, that's
18 all right too, you shouldn't care. They remain classified.

19 In fact, an undercurrent of the defense's case, even
20 though they don't have the luxury of showing, is that the
21 material is overclassified or silly.

22 But in any event, there has to be a stipulation as
23 to each document admitted, what its classification was at the
24 time. Now, some classification markings appear in small
25 letters in parentheses. Those remain on the document. Those

1 don't create the 403 problem. Indeed, many of them go the
2 other way. Many of them are important as exculpatory for the
3 defendants.

4 Now, some of those create a problem in that although
5 they were marked unclassified, I believe it's the Government's
6 contention that they are nonetheless classified in the scope
7 or in the context of this document.

8 Is that right, Mr. Reilly?

9 MR. REILLY: That's correct.

10 THE COURT: So, a stipulation should say that as
11 well. And the reason that's appropriate, it's even more
12 appropriate that the markings, the top bold markings be
13 removed from those documents because they have the U there,
14 but it's important for the Government to have included in the
15 stipulation that the entire document was marked in some
16 classified way. Because they are entitled to show that that
17 was the intent or the intention to hold it closely. And
18 that's true.

19 Now, whether the Government succeeds in persuading
20 the jury that the paragraphs marked U should be treated as
21 NDI, that's up to you all. I don't know how that's going to
22 come out.

23 So, in the end, that's the Court's ruling on
24 classified documents. To summarize it, the bold, large
25 classified markings for any documents that are admitted will

1 be removed.

2 There will be a stipulation indicating that the
3 documents were classified, either are or were, doesn't matter
4 much to me, nor should it to the parties, I think. And the
5 fact that they are classified is stipulated, but may be
6 considered by the jury solely for the limited purpose in their
7 consideration as to whether the Government has proved that it
8 is NDI as to whether it was closely held or not. But they are
9 not to consider it for any other purpose.

10 Now, that means that when an expert testifies for
11 the Government that certain material given to the defendants
12 was NDI, that expert is going to have to have an independent
13 basis for saying that it was damaging to the national security
14 other than the fact that the document is marked.

15 Now, the expert may rely on the document markings
16 that have been removed but that are now in the stipulation as
17 aiding in his opinion that the material was closely held or
18 attempted to be closely held.

19 The small designations for individual paragraphs
20 will all remain on the document. They don't raise the same
21 403 problems as the big bold markings on the tops and sides
22 and other things of document after document after document in
23 this nondocument/oral transmission case.

24 That's the Court's ruling. And I am going to go on
25 to another subject now.

1 MR. WEISS: One thing you did not address, if I may
2 inquire of the Court. On the small markings that you said
3 remain, one issue that we addressed is those paragraphs where
4 there has been material redacted where in our view the only
5 reason that the small S would have been there is because of
6 the original paragraph as a whole, our view has always been
7 that the paragraphs that have been redacted are an entirely
8 different case.

9 We wouldn't want the jury to think, because we
10 dispute it, that the S clearly applies to the material that
11 remains when we are arguing all along that the S was there
12 because of the material that was redacted.

13 THE COURT: Oh, you will have to deal with that
14 because it does apply to the material that remains.

15 MR. WEISS: The person who put the S there put it
16 when he or she saw the entire paragraph. They never had--

17 THE COURT: It's only going to be, the S is only
18 going to be considered for closely held.

19 Now, you may consider a U as an admission because
20 that's not hearsay, but the S on there, the Government gets
21 the benefit of for closely held. They don't get the benefit
22 of it for damaging to the national security.

23 MR. WEISS: The point is that when the person
24 affixed the S and wanted to closely hold the paragraph, it may
25 well have been the intention--

1 THE COURT: We don't care, that's not going to be in
2 this case. What's going to be in this case is the expert for
3 the Government that says what's left, in my opinion, is NDI
4 because of A and B. And it won't have to do, except for B,
5 the closely held can rely on the markings, but not for the
6 other.

7 MR. WEISS: But my point, if I may just finish, is
8 on the closely held point, the person who affixed the S to the
9 entire unredacted paragraph may have done so with the purpose
10 and intent and the conclusion that only the first sentence
11 needs--

12 THE COURT: It's an imperfect world. It stays on
13 the document.

14 MR. MARTIN: Your Honor, may I ask a few points of
15 clarification as to your ruling?

16 THE COURT: Yes.

17 MR. MARTIN: With respect to documents that are
18 offered by the defense and not by the Government, does your
19 ruling apply equally?

20 THE COURT: Why wouldn't it?

21 MR. MARTIN: Because the defendants are offering the
22 document and, therefore, any prejudice would be of their own
23 making.

24 THE COURT: Well, I will tell you what. In the
25 words of a famous American, I will cross that bridge when I

1 come to it.

2 Next. What's your next question?

3 MR. MARTIN: I just have two more quick ones.

4 THE COURT: I doubt I will ever come to that bridge,
5 but we will see.

6 MR. MARTIN: Also--

7 THE COURT: Because there may be circumstances where
8 they want it on there, the document they offer and they would
9 love to have you repeat what you say here.

10 So, I don't know. We will cross that bridge when we
11 come to it.

12 What else do you have?

13 MR. MARTIN: Yes, on documents that Larry Franklin
14 saw, does your ruling apply to those as well?

15 THE COURT: Documents that Larry Franklin saw?

16 MR. MARTIN: Yes, Your Honor. Because there would
17 be a secondary nonhearsay purpose for the documents, namely
18 Larry Franklin's criminal intent.

19 MR. LOWELL: That might be true if he was standing
20 trial with us, but the fact is he is never accused of giving
21 us the document.

22 THE COURT: I think it does apply to those, but you
23 have the benefit, assuming that's right, you have the benefit
24 of the stipulation that the requires the defendants to
25 stipulate that the document was classified.

1 You also, then you may have a problem if you don't
2 present Franklin and you want to say that he knew it was
3 classified. Well, I might reconsider at some point to have
4 the stipulation say that it was not only classified, but
5 that's how, marked as classified, but that's how it was.

6 My whole purpose is-- I have been in these cases.
7 I have also talked to jurors over many years. To see this
8 onslaught of documents marked Secret, Top Secret, NOFORN, it
9 creates an atmosphere.

10 MR. MARTIN: Yes, Your Honor.

11 THE COURT: That is just unfair, and I am trying to
12 ameliorate it.

13 But in your case, the question you have just asked,
14 if it becomes necessary, if Franklin isn't here, which would
15 surprise me, but if it becomes necessary to show that the
16 document had a marking on it when it was in his possession,
17 because that's all you can show if he is not here unless you
18 produce a witness that says, I saw Larry Franklin look at that
19 document, then presumably that witness could also say, and it
20 had these markings on it. But assuming you don't have that
21 and all you have is a search warrant that digs it up out of
22 his house or somewhere and you need to show that it had the
23 markings on it, the stipulation will show that they were
24 marked. And if you need to show something else, I will
25 consider it at the time.

1 MR. MARTIN: Thank you. And one last question. Are
2 you planning to issue a written order, or is this your final
3 order from the bench?

4 THE COURT: Well, I am sure I will issue an order.
5 Whether it will go through the detail that I have just gone
6 through depends upon the vast amounts of spare time that I
7 have with all the 800 other cases I have.

8 MR. MARTIN: Thank you.

9 THE COURT: But in due course I may, I may. I just
10 don't know because I haven't discussed the various cases in
11 detail. But, you know, I don't have the luxury of weeks and
12 weeks and I don't have a dozen law clerks.

13 MR. MARTIN: Yes, I just was referring to a written
14 order on the record or--

15 THE COURT: Yes, there will be a written order in
16 due course. But even that, I just finished a four-week
17 capital trial, it won't surprise you that I have a mass of
18 documentation about that, and I start another trial here
19 fairly soon. So, I probably will issue an order, and I may or
20 may not do a discursive one or a memorandum opinion, I just
21 don't know.

22 Frankly, this I don't think is a CIPA matter. And
23 so, I don't see the need to produce something in a hurry that
24 a Court of Appeals needs to look at. It is really a 403
25 ultimate determination by me.

1 But I, frankly, haven't decided whether to produce
2 anything more extensive than what I have said. I would like
3 to, but I can't predict. I am sitting on about five cases of
4 public corruption in North Carolina. And I have got a number
5 of other things to do. So, I just don't know whether I will
6 get to it. That's why I wanted to give you a fairly broad
7 view of why I reached the result that I reached.

8 Now, do you have anything further?

9 MR. MARTIN: No, Your Honor.

10 THE COURT: Now I want to go on to the disparate
11 disclosure. And here I think I need some additional help.
12 Let me tell you where I stand and what I think is the proper
13 resolution of this dispute, and then have all of you address
14 that and tell me why you think I am wrong or right.

15 I think the issue may be succinctly put as follows.
16 There are many documents that will be introduced with
17 redactions of material, redactions that have been arrived at
18 through the CIPA process. In the course of this process, the
19 defendants have several times raised the specter that they
20 want to argue that, look, this stuff that our clients were
21 told was not the real basis for the classification of the
22 document, it was something else.

23 The Government has listened to that and is
24 apprehensive about that contention. And so, it says, as a
25 safeguard, we are going to show our expert the whole amount,

1 but we can't show it to the defendant, the defendants' experts
2 because we want to argue, we want to be able for our expert to
3 say when the defense asks the expert, well, isn't it true that
4 you don't know whether the reason for the classification of
5 this document was the part that's redacted or not because you
6 haven't seen the redacted parts? That's the Government's
7 genuine concern, and it's a reasonable concern. Well, it's a
8 reasonable concern only if, only if the experts are not all
9 limited.

10 It seems to me that if a Government expert can say,
11 I have not seen the redacted portions, but I don't need to see
12 the redacted portions to offer you my opinion that this
13 material is national defense information because it is closely
14 held-- Now, that I may need to go to the markings to rely to
15 some extent on that. And because in my opinion, based on all
16 the things that I have told you about how great I am,
17 disclosure of this information would be damaging to the
18 national security. And I don't need to know what's in the
19 rest of the document because just looking at this in
20 isolation, which is what is at issue in the case, or probably
21 more than what's at issue in the case, is NDI.

22 Now, if that's what the testimony is and is expected
23 to be, then I don't see what the specter is and I don't see
24 any need to have disparate disclosures to the experts. That
25 may reflect a view about the defense's attack in that regard,

1 the fact that I think it may not be as successful as they
2 might otherwise hope.

3 I am somewhat offended by disparate disclosures. I
4 want to avoid it if I can. It smacks of unfairness. But my
5 whole view is predicated on the notion that it is the
6 information that is disclosed that the experts will be
7 testifying about and not the stuff that's redacted. And that
8 that's what the defense experts will be testifying to, namely
9 what was disclosed and not what's been redacted from these
10 documents. So that we don't need to get into what's redacted.
11 These people don't need to see it.

12 As I view it, and I am going to start with you, Mr.
13 Reilly, as I see it, this scheme that I have outlined really
14 strengthens the Government's position on whether this is NDI
15 because I suppose that the expert would say, I don't even know
16 what's in the document other than what is revealed here
17 because what is revealed here, this is NDI, that is NDI and
18 it's NDI for these reasons.

19 So, I think it really strengthens your position and
20 removes from the case the speculation about, ah-huh, what else
21 is in this document may do it.

22 Now, that undercuts the defense significantly, but
23 it seems to me that that's what the case is about. Now, if
24 your expert can't look you in the eye and tell you under oath
25 that's NDI, well then, let's pack our books and go home.

1 Although you still have the claim that all they had to do was
2 to conspire to do it, but you are not going to get anybody to
3 agree that they had a guilty mind unless you have something to
4 go with that. But anyway, we know about that.

5 All right, Mr. Reilly, what is your view about the
6 Court's proposed view of this?

7 MR. MARTIN: I will take this one.

8 MR. REILLY: Mr. Martin will.

9 THE COURT: Yes, sir, what's your view?

10 MR. MARTIN: If the Government's expert were to
11 testify as you just outlined, are you then saying that the
12 defense would be precluded from asking the kind of questions
13 that we are concerned about?

14 THE COURT: Like what?

15 MR. MARTIN: Like, well, isn't it true, Mr. Expert,
16 that the real reason this information you alleged is NDI--

17 THE COURT: I would preclude the defendants from
18 that. But what is your expert's answer?

19 MR. MARTIN: He would then say because he hasn't
20 seen the redacted material, he would say, I haven't seen the
21 redacted material.

22 THE COURT: Have you been listening to what I said?
23 The answer is, I don't need to see the redacted material.
24 This stuff by itself is NDI.

25 MR. MARTIN: Correct. But then they would press on

1 that. They are not going to just--

2 THE COURT: All right. What would they press? Give
3 me a sense.

4 MR. MARTIN: They would say, well, you can't
5 possibly be sure that you don't need to rely on it because you
6 don't even know what is in it. And imagine if the following,
7 they give a hypothetical. What if what was in it was a
8 sentence that said, this material was disclosed publicly last
9 week, would that affect your expert opinion on whether it was
10 NDI?

11 THE COURT: Well, in the first place, they wouldn't
12 put such a hypothetical because it would be contrary to CIPA.
13 That would be exculpatory and that I would have disclosed.
14 So, that wouldn't be really an appropriate question.

15 But to answer your question directly, I don't see
16 precluding a question. I do think what you are doing now is
17 productive, which is to say, let's imagine how they might
18 pursue the point anyway and see what is infirm or
19 inappropriate about the view that I have taken.

20 The first thing is, isn't it true you can't tell
21 that the document was classified for reasons other than this
22 information? And the answer is, yes, I can. The information
23 that's right here, the stuff that is disclosed, is NDI because
24 it would be damaging and so forth. And moreover, the entire
25 document was classified, so it was closely held.

1 We need to get this issue resolved. I cannot tell
2 you that it doesn't help either side for there to be disparate
3 disclosures.

4 Now, let me tell you one thing else. If you show
5 your people that information, then you do open the 705 can of
6 worms.

7 MR. MARTIN: Your Honor, can I just make one point
8 of clarification? We are not advocating that our expert can
9 see the redacted material and theirs can't, with the
10 exception, with one area of exception, that being the material
11 that was redacted in discovery.

12 What we are saying is--

13 THE COURT: In what?

14 MR. MARTIN: With the one exception being the
15 material that was redacted under Section 4 of CIPA --

16 THE COURT: All right.

17 MR. MARTIN: -- during discovery.

18 THE COURT: Well, presumably neither your experts
19 nor theirs would see that.

20 MR. MARTIN: Well, again, our concern is the same
21 even with respect to that material.

22 THE COURT: Well, then there is disparate
23 disclosure.

24 MR. MARTIN: Right, but that's a fairly narrow
25 avenue of material.

1 THE COURT: It is still disparate disclosure.

2 MR. MARTIN: I agree in that scenario it is
3 disparate, but that is a fairly narrow category of material.
4 The broader category of material is the stuff that we have
5 redacted from the CIPA section--

6 THE COURT: How do you think it will look if the
7 defense asks these experts, well, you have seen that
8 information, are you aware that the defense experts haven't
9 seen it? And to ask their experts, now, you weren't permitted
10 to see some of this material, were you? No. Do you think
11 that is significant?

12 I don't know. I think that--

13 MR. MARTIN: My only point being is that by dividing
14 the two groups, it helps inform the Government as to what the
15 Government can show its experts.

16 THE COURT: Oh, I agree, that's why I am addressing
17 the issue now.

18 MR. MARTIN: Correct.

19 THE COURT: Because once you show them everything,
20 Rule 705 operates. What do you think I am saying when I say
21 705 operates?

22 MR. MARTIN: That they have a right to challenge the
23 expert's basis of his opinion.

24 THE COURT: Right.

25 MR. MARTIN: My only point is that when the

1 Government goes to select and prepare its expert witnesses, it
2 will be helpful if it could--

3 THE COURT: Yes.

4 MR. MARTIN: If there would be a distinction between
5 the two groups. And what I am saying is--

6 THE COURT: Distinction between the two groups.
7 Between the Section 4(a) exclusions and the CIPA redactions?

8 MR. MARTIN: Correct, correct.

9 THE COURT: All right. Well, help me a little
10 further now. I think what you are really saying is, look, we
11 have a universe of people we are picking experts from, and
12 some of them have already seen this stuff.

13 MR. MARTIN: That may be a possibility, Your Honor.

14 THE COURT: That's exactly what I am thinking too.

15 MR. MARTIN: And we are not saying, that at least as
16 far as the Section 6(c) material, that their expert is
17 precluded from looking at the redacted material. But we are--

18 THE COURT: All right, that's a huge step forward.

19 MR. MARTIN: What we are saying though is both
20 experts if they are going to refer to the redacted material in
21 their testimony should be bound by the substitutions that we
22 have worked on for these past several months, weeks. Namely,
23 for each redaction there is the boilerplate and for many
24 redactions there is more, there is the boilerplate plus
25 additional details.

1 THE COURT: You know, I made the suggestion I made
2 because I thought you all would like it. I thought the
3 Government would like it because it would serve to neutralize
4 to a large extent this attack on--

5 MR. MARTIN: I do like it, except I am just worried
6 that it is not really going to neutralize the attack.

7 THE COURT: Mr. Lowell.

8 MR. LOWELL: I just want to separate the three
9 things then.

10 THE COURT: All right.

11 MR. LOWELL: I am agreeing with Your Honor that if
12 their expert can't take the stand and say, the material that I
13 heard Mr. Rosen or Mr. Weissman say with reference to the
14 information that is in the document in the unredacted form is
15 NDI, then we should all pack up and go home because that's the
16 starting point.

17 THE COURT: Well, I did have a caveat on that. I
18 did say they don't have to show any NDI in this case. They
19 just have to show a conspiracy and a guilty mind to obtain it.

20 That's your position, isn't it, Mr. Reilly?

21 MR. REILLY: That's correct.

22 MR. LOWELL: I stand pretty well with your long
23 recitation in your ruling last week as to what elements the
24 Government has to prove--

25 THE COURT: It is pretty hard to do that without

1 showing that there is NDI being talked about.

2 MR. LOWELL: So, what I start with, Your Honor, is
3 simply to say that we started this whole process of what the
4 experts were going to see with the proposition that in a
5 nondocument case, it is what the defendants disclosed or
6 intended to disclose. Since they were never shown a document,
7 the only inference should come from what they were told or
8 what they told others.

9 And I am with you as a matter of trial tactics,
10 forget the law for a second, but as a matter of trial tactics
11 if their witness takes the stand and says in response to a
12 question of ours, isn't it a fact, Mr. Government Expert, that
13 the reason this was, A, classified to begin with, B, marked in
14 whatever fashion it was and, C, has any ability to impact the
15 national security, is what is in the black part, not there?

16 And if you are right, that the Government witness
17 will say, no, the stuff that's right there in black and white
18 that I am talking about that the jury is seeing is NDI
19 because.

20 I don't have a very good question to ask after that
21 except, oh, do you really mean it? I mean, I don't think
22 that's a very persuasive line of cross-examination.

23 We started this process because of what you said at
24 the end, which is, wait--

25 THE COURT: Well, if you say, well, look, you don't

1 know, it could be something really significant in there? And
2 the answer is, well, that just makes it more NDI than it
3 already is.

4 MR. LOWELL: I guess that's their answer.

5 THE COURT: And if it is a statement as suggested
6 here that it was disclosed to the public, well, that wouldn't
7 be blacked out. That would be Brady.

8 MR. LOWELL: Right, but we started in the flip side.
9 We started with what you called disparate disclosure. And
10 that is what started us down the path. Which is, okay, you
11 get to pick the expert you want to pick. Now, if you want to
12 pick somebody who was the author, all right, that's one thing,
13 at least we will now know and we will have the person to
14 examine, the person who classified it classified it as
15 whatever, decided it.

16 But if you are picking somebody who has seen
17 whatever the redactions are, either originally in its 4 form,
18 which we have never seen, or later, well then, how-- We have
19 briefed the issue of rely versus review. It is not that they
20 get to self-describe an expert who comes on the stand, oh, no,
21 I didn't rely on what was redacted, I didn't rely on what was
22 taken out. I mean, that's up to us to be able to probe and
23 decide.

24 So that is where we started, which is what you are
25 calling disparate disclosure. And I think that's where we end

1 up, which is the key to this decision belongs to the
2 Government. If they are going to show their experts anything,
3 and it has got to be that we get to cross-examine them because
4 it is possible that their experts will have used it, seen it,
5 thought about it, and the law doesn't say "rely," it says--

6 THE COURT: I have seen it before. Once they show
7 an expert something, there is at least the beginning 705
8 wedge.

9 Now, how far you get to go into that will depend
10 upon the answers and on the objections. For example, if
11 somebody has reviewed everything and said, yes, I reviewed it,
12 but it doesn't play any role in my decision, there may come a
13 time very soon after that that I stop questioning.

14 MR. LOWELL: Right, but it can't be right--

15 THE COURT: It may not be right there, but you would
16 then have to cross-examine to begin to suggest to me that you
17 are making headway in showing that he is not being
18 straightforward in saying, I didn't rely on this other stuff
19 at all.

20 MR. LOWELL: The redacted paragraph is the
21 identification of a source and method. The nonredacted
22 paragraph is a policy discussion that relies thereafter. And
23 there is a classification and he said this information is, or
24 she says NDI.

25 It seems to me that if they want to expose their

1 expert to what is in that first paragraph, certainly the next
2 question allowed is, are you saying that this paragraph, which
3 includes a specific source or a specific method or the
4 identity of a specific source or a specific method or
5 something that is of that nature, is not the reason? Is that
6 what you want these people to believe, that the general policy
7 pabulum in paragraph 4 is NDI and it wasn't because of that?

8 And if they are going to show them that, that's
9 where I am saying that question goes. Now, if he says, yep,
10 that's what I am saying-- I mean, I don't think it goes on
11 forever, but I think you are right, it has to be probed to a
12 point.

13 THE COURT: But in the colloquy or in the
14 questioning that you have just described, you don't need to
15 identify the source or the method.

16 MR. LOWELL: No, I think we can decide that we can,
17 we will have to find the means when we have talked about
18 sources and methods--

19 THE COURT: Right. But what I am suggesting is that
20 the whole thing can be avoided if both sides have the same
21 access to the document.

22 Now, I don't know what you do with folks who have
23 already seen it, with authors or anything else, I can't decide
24 that issue right now.

25 What I wanted to do was to address this issue raised

1 by the defendants because it seemed to me that the Government
2 by going ahead and saying, we are going to show our experts,
3 assuming they are not authors and original classifiers, we are
4 going to show our experts the whole thing but we are not going
5 to show your experts the whole thing, that is in redacted
6 portions, that that may be not the best way to go about this.
7 You open up the 705 door. You make this whole thing about is
8 the document classified because of this or this much more
9 significant than you would want.

10 What you want are experts who would say, I don't
11 know what's in the document other than this. I don't know
12 what else is there and I don't care. I focused only on what's
13 here because that's what I was told to focus on and here are
14 my reasons.

15 MR. REILLY: I am terribly sorry to interrupt. I am
16 not seeking a tactical advantage, I am seeking a comfort
17 break.

18 THE COURT: All right.

19 MR. REILLY: Sorry.

20 THE COURT: All right. Well, talk about this during
21 this break and see-- My sense is that I don't need to decide
22 anything right now. What I have done is to explain to you
23 what the ramifications are of how you are proceeding. You all
24 can get together and resolve this. And we are not dealing
25 with authorize or classifiers, we are dealing with experts.

1 And I can't repair what someone has already seen.

2 So, think about that and talk about scheduling,
3 that's the last thing we have to do.

4 MR. WEISS: I would like after the break to have an
5 opportunity to address the issue on behalf of Mr. Weismann.

6 THE COURT: You are going to get a chance after we
7 take a brief issue. It is after 4 o'clock.

8 MR. WEISS: I understand it is.

9 THE COURT: And I promised the court reporter that
10 he wouldn't be here all day, and I don't want to incur his
11 wrath. I will tell you, he is really in charge here. You
12 know, he could get up and walk away and that would be the end.

13 MR. WEISS: I just don't want to have the smallest
14 opportunity simply because I was last, Your Honor. I don't
15 think I should suffer the least because I was the last.

16 THE COURT: All right. Court stands in recess for
17 15 minutes.

18 NOTE: At this point a recess is taken; at the
19 conclusion of which the case continues as follows:

20 THE COURT: All right, we are back on the record,
21 but not the CIPA record.

22 With respect to disparate disclosures, you wanted to
23 say something.

24 MR. WEISS: Yes, Your Honor. I believe the
25 Government here has a choice. The Government can put on the

1 expert showing them the redacted material or not. I believe
2 their choice is if they show them the redacted material,
3 anything they show them, they have opened the door. And under
4 the A&S Council Fourth Circuit case that we have addressed--

5 THE COURT: I understand, that's why I kept
6 indicating.

7 MR. WEISS: Our view is even if, here is one thing I
8 would like to stress, even if that expert says, I looked at it
9 and discounted it, that case makes clear they have opened the
10 door.

11 THE COURT: Oh, I quite agree, that's why I have
12 told you all, I think we can avoid this whole 705 mess, which
13 is what I was referring to, by limiting experts to what's not
14 been redacted.

15 MR. WEISS: I think though, I think though that if
16 they make the choice of showing them only the material that is
17 in the exhibit and they don't show them the unredacted
18 material, then when we ask questions are limited to either
19 what's unredacted or the summaries or stipulations that are
20 part of the document there.

21 I can ask the expert, for example, you never looked
22 at the rest of the stuff? He will say, of course not, I
23 didn't need to.

24 I can say, maybe the classifier wanted to closely
25 hold this because of the redacted Top Secret source, sources

1 and methods that the substitution talks about--

2 THE COURT: And the right answer there is, who knows
3 what the classifier thought, I know what my opinion is.

4 MR. WEISS: Exactly. All I am saying is, they can
5 give those answers, I can ask those questions, no door has
6 been opened.

7 On the other hand--

8 THE COURT: You are just making the point of 705
9 again. And it's after 4.

10 MR. WEISS: And the last point I want to make, Your
11 Honor, is I think the choice is available to both sides. If
12 they show it, they open the door. And if we show it to our
13 experts, we open the door. If we don't show it to the
14 experts, they can't ask. If we show it to the experts, they
15 have the choice of asking.

16 THE COURT: I think you are correct, except that it
17 is more the Government's choice than yours. I think it is
18 more the Government's choice than yours because I think the
19 redactions are not supposed to be shown to your experts.

20 But anyway, I don't think we need to get there.
21 Have you all discussed it further?

22 MR. MARTIN: Yes, Your Honor. I just wanted to
23 offer two additional things that might help advance the
24 analysis a little bit.

25 And that is, with respect to the Section 4

1 redactions, we met and talked, and we are not going to show
2 our experts any of those Section 4 redactions.

3 THE COURT: All right.

4 MR. MARTIN: So, in other words, there is now, we
5 can represent to the Court, that there is no disparate
6 treatment. The defendants' experts can look at the redacted
7 material just ours can, but both parties are bound by the
8 substitutions when they testify to it at trial.

9 MR. WEISS: That's where we disagree with them, Your
10 Honor. If they show it to them, they have opened the door, we
11 are no longer bound by the substitutions. And that's what--

12 MR. MARTIN: But then, Your Honor, my response to
13 that would be that if there is something in the redacted
14 material that they believe that they need to cross-examine our
15 expert, then CIPA provides a vehicle through which that can be
16 accomplished.

17 THE COURT: But then I would have to have CIPA all
18 over again after you showed your experts the stuff.

19 MR. MARTIN: That's right.

20 THE COURT: And I am suggesting to you that you can
21 strengthen your case and avoid all of this if all both sides
22 show to their experts is what is unredacted. Nobody seems to
23 hear that. It makes your case stronger, it undercuts a little
24 bit of yours, but it gives you at least even on what the
25 expert sees.

1 But, you know, I am not going to resolve this now.
2 You can show your experts what you wish. I don't think you
3 have that choice right now.

4 MR. WEISS: Your Honor, they have told us that we
5 do.

6 THE COURT: Well then, if they don't have an
7 objection, you do it. But I don't know what's going to happen
8 at trial. I don't think you all have thought enough about
9 this, frankly. You need to go think about it some more. You
10 may be opening doors you don't want to open.

11 Have you read that case, A&S.

12 MR. MARTIN: Of course I have, Your Honor.

13 THE COURT: Well, what do you think it holds?

14 MR. MARTIN: A&S Council was a completely different
15 situation. The expert in that case relied to form his opinion
16 on what would be the equivalent in our case of the redacted
17 material and then opined at trial on the redacted material.
18 Our expert is not going to do that.

19 THE COURT: Suppose he is asked a question about
20 whether the redacted material would have been the reason for
21 the classification.

22 MR. MARTIN: That's exactly the issue that we are
23 trying to address. In that case--

24 THE COURT: But you don't even get there if you
25 don't show it to him because it doesn't matter. His opinion

1 about NDI is independent of the redacted material.

2 MR. MARTIN: Correct, Your Honor. But the concern
3 is that the defendants aren't going to stop there. They are
4 going to argue to the jury that the expert couldn't possibly
5 be 100 percent sure whether it was the redacted material that
6 caused the classification. And then they will argue to the
7 jury--

8 THE COURT: He isn't going to be sure of that even
9 if he sees it. He doesn't know what the classifier thought or
10 did. He just doesn't know.

11 MR. MARTIN: He won't be testifying to the
12 classifier's thought. He will be testifying to his own
13 opinion.

14 THE COURT: All right. And then all he needs to see
15 is what is disclosed, not what is redacted.

16 MR. MARTIN: But furthermore, the defendants will
17 then argue to the jury that the expert didn't conduct a
18 thorough review, the jury shouldn't credit his opinion, he
19 didn't even bother to look at the whole document, the
20 Government is offering this person as an expert to you--

21 THE COURT: All right, I am not going to tell you
22 how to try your case. I will decide the issue when it comes
23 up. You will have to make your own judgment about it. And
24 you can have your expert look at it, I will decide in the
25 course of the trial what has to be done.

1 But it seems to me that it opens up a complete can
2 of worms. And I am pretty sure neither side is going to be
3 happy with the result. You are both spitting into the wind.
4 You can do it if you want to, but I guarantee you won't like
5 the results.

6 All right. Now, let's move on to another subject.
7 There is no issue before the Court to decide.

8 MR. LOWELL: On the scheduling, which I think that
9 segs into.

10 THE COURT: Yes.

11 MR. LOWELL: A couple things to say about it, one of
12 which may be effective. When and if the Government makes
13 their expert disclosure to us, as we would do in our
14 reciprocal expert disclosure, we will have to tell each other
15 whether in fact we did or they decided to open that door so
16 705 could be argued. We will know that later, I think.

17 As to scheduling, Your Honor, here is what is next.
18 Next week we have two deadlines--

19 THE COURT: Well, you certainly don't want to be in
20 the position of disclosing to your experts what's in the
21 redaction if they decide not to do it.

22 MR. LOWELL: Probably not. I just can't answer it.
23 But what will be the first most important trigger there is
24 their expert disclosure--

25 THE COURT: Well, I can tell you right now that it

1 doesn't matter what I think. It matters what you all decide.
2 I can virtually guarantee you that these folks are going to
3 show it to them and you will too, and I will have to deal with
4 the fallout.

5 MR. LOWELL: I too have read the Fourth Circuit
6 opinion and this distinction of "discounting stops
7 cross-examination" is just not what the Fourth Circuit said.
8 Indeed, that's exactly what the expert there said. And the
9 Fourth Circuit said it was reversible error not to allow the
10 defense to pursue that line.

11 THE COURT: That's right, it did say that.

12 MR. LOWELL: So--

13 THE COURT: And in fact, I have recently come from
14 the Fourth Circuit where an issue not dissimilar was argued.
15 You know, you all do what you decide to do, and I will deal
16 with the fallout.

17 Now, what about scheduling?

18 MR. LOWELL: Next week we have two items. On the
19 14th both sides were supposed to file whatever left they have
20 to say on the remaining unsealed, I am sorry, the remaining
21 sealed material, and that's fine. On the 16th--

22 THE COURT: Wait a minute. What is the 16th?

23 MR. LOWELL: The 14th, the 14th is where we provide
24 the Court with the answer to, if there is anything left to be
25 addressed, as to what should be unsealed.

1 THE COURT: Yes, that's for the unsealing.

2 MR. LOWELL: Correct.

3 THE COURT: Right.

4 MR. LOWELL: The 14th. And now we have seen each
5 other's positions and we will confer and see if there is
6 agreement as to anything that is left.

7 On the 16th, you have invited us to file our good
8 faith basis as to one of the subpoenaed Touhy witnesses. And
9 we will take advantage of your invitation to do so. That is
10 on the 16th.

11 THE COURT: All right.

12 MR. LOWELL: I want to tell the Court as well that
13 on or before the 16th we will be seeking the Court's review of
14 one of the witnesses I think that you have said you didn't see
15 the relevance under the applicable standards that you have
16 ruled it is in the motion on the reconsideration. And it will
17 be on one of the witnesses, but we will use the 16th date, I
18 just didn't want not to say it so that people thought, oh, my
19 gosh, they are moving for reconsideration, they didn't tell
20 us. Well, there is one.

21 As to scheduling, Your Honor, here is what is my
22 best articulation of our problem is. I think you, being the
23 hard working optimist you are, believes that we are going to
24 have a 6(c) order, first of all, fairly soon. By that I mean
25 a week or two weeks.

1 We have not even seen the first draft of the first
2 Government part, and they have been working on it for a long
3 time. They were supposed to start providing that to us in the
4 very--

5 THE COURT: Well, Mr. Reilly says it is nearly done,
6 right, Mr. Reilly? You just had to--

7 MR. REILLY: Except for Tabs 17 to 30--

8 THE COURT: When do you think you can finish a draft
9 so that they can begin?

10 MR. REILLY: We are going to try and get them, we
11 are going to get them tomorrow what we have now. And we are
12 going to wait until next, we have ordered the transcripts from
13 yesterday so that we can start work on Tabs 17 to 30 and the
14 silent witness rule on the other document.

15 THE COURT: All right. By the way, I think there
16 were some findings I think I made adequately on the record
17 there.

18 MR. REILLY: Correct.

19 THE COURT: I didn't go into detail, but I think
20 they were in general since it was ex parte. I think I
21 adequately covered the Press Enterprise aspects.

22 Okay. So, that means that by the 13th or 14th, Mr.
23 Lowell and Mr. Weiss, Mr. Nassikas, you will have everything.

24 MR. LOWELL: We will have what the Government
25 provides us.

1 THE COURT: I don't mean to exclude you.

2 MR. LOWELL: And so will Ms. Paulson, and I can
3 guarantee that it will be Ms. Paulson who is doing the heavy
4 lifting on this.

5 THE COURT: I suspect Ms. Paulson is the author of a
6 lot of this material I am reading.

7 MR. LOWELL: You would be correct. This is a
8 collaborative effort, all parts of which are very active.

9 THE COURT: All right.

10 MR. REILLY: Sir, we won't have a transcript from
11 yesterday until later. I think Wednesday next week is the
12 earliest we would get it.

13 THE COURT: All right. Well, let's shoot for
14 Wednesday or Thursday. Then why couldn't the review and
15 conference be done by, at the very latest by the Tuesday after
16 Thanksgiving, the 27th?

17 MR. LOWELL: What I am asking you, Your Honor, is
18 assuming the Government gives us this, I assume that in that
19 week of what you have now identified as the 27th is a very
20 realistic date by which we, the defense, will have reviewed
21 and looked at the transcripts and said, oh, Mr. Reilly, you
22 got 90 percent correct, you got 10 percent wrong, I hope. As
23 opposed to saying, you got 10 percent correct and 90 percent
24 wrong.

25 And, therefore, that's a week by which I suspect--

1 THE COURT: Well, if I had to do it over again, I
2 would require you to do it piecemeal so that it would already
3 be done as to the earlier stuff.

4 But in any event, when do you think you could be
5 done with your review if you get it next Wednesday? Thursday,
6 let's say you get it by the 15th of November.

7 MR. LOWELL: If they give it to us on the 15th,
8 there is two days the following week--

9 THE COURT: Just a moment.

10 MR. DiGREGORY: Excuse me, Your Honor. I am sorry.
11 We don't anticipate that we will have the transcript until
12 Wednesday of next week, which would be the 14th.

13 THE COURT: I see. Then do it by Friday.

14 MR. DiGREGORY: So, getting it by Thursday may be a
15 little unrealistic.

16 MR. REILLY: Your Honor, with respect to Tabs 17
17 through 30 and the reason a lot of this takes so long is we
18 have to go through every single redaction. So, we have to
19 detail every single redaction and ruling on the redaction.
20 And we started it. We have to finish that. So, it does take
21 a considerable amount of time--

22 THE COURT: All right. When do you think you can
23 finish?

24 MR. REILLY: On that part of it?

25 THE COURT: On the whole thing, when do you think it

1 will be done? You are going to give them part of it, but when
2 do you think you will finally be done with everything? Even
3 though they will have 80 to 90 percent of it before then, they
4 won't have this until when?

5 MR. REILLY: Assuming we get the transcript on the
6 14th, the 14th or 15th, the 19th or 20th.

7 THE COURT: All right, let's say the 20th. Now, any
8 reason why by the 27th--

9 MR. LOWELL: Your Honor, we are going to need ten
10 business days to review. Now, that can start--

11 THE COURT: Oh, it will start long before the 26th
12 because you will get stuff beforehand.

13 MR. LOWELL: Right. And as soon as they start
14 giving us any material, I think it's fair to say that at every
15 trigger we would want ten business days--

16 THE COURT: Well, you are not going to get ten
17 business days from the last dribs and drabs.

18 MR. LOWELL: The last dribs and drabs comes on the
19 week of Thanksgiving, I suspect.

20 THE COURT: It comes on the-- What did we say, the
21 20th or the 21st?

22 MR. DIGREGORY: You said the 20th.

23 THE COURT: The 20th or the 21st.

24 MR. LOWELL: And the last of that week is
25 Thanksgiving.

1 THE COURT: Thanksgiving, right. So, if you have
2 until the 30th, you would have enough time.

3 MR. LOWELL: That's correct. I think on the last
4 drib, yes, I think that's right.

5 So, we are going to assume that the Government will
6 give us a great deal of material by Friday, the 16th. By
7 tomorrow, I am sorry, that's right.

8 THE COURT: You will get a bunch of material on the
9 9th of November.

10 MR. LOWELL: Yes. And that we will start giving it
11 back.

12 THE COURT: And then you will get on the 20th of
13 November the material that we have been working on for the
14 last two days.

15 MR. LOWELL: And in the same manner, as soon as we
16 get material, review it against our notes and transcript, we
17 will tell Mr. Reilly and his colleagues, you got it right, you
18 got it wrong.

19 THE COURT: And then you have got to negotiate with
20 them.

21 MR. LOWELL: Exactly. We will end up with whatever
22 we can do. And sometimes we do better.

23 THE COURT: All right. Now, we need to schedule a
24 hearing so that I can sign this order and deal with any
25 lingering problems. There shouldn't be any lingering

1 problems.

2 MR. LOWELL: I hope not, but remember what happened
3 in the 6(a) period, it wasn't that it was that easy without
4 you.

5 THE COURT: Well, I should make a greater effort to
6 make everything very unpleasant with me.

7 I have a trial beginning December 4. And I don't
8 know whether I will then be available any time before
9 Christmas. And the problem is that for a good part of that
10 time I will be in North Carolina. So, even in the evenings I
11 am not available.

12 So, let's look at the-- Let's tentatively set,
13 let's tentatively set the 29th of November at 2 o'clock for a
14 hearing for the entry of the 6(c) order.

15 MR. LOWELL: We will not even have received-- We
16 have until the next day to finish our job.

17 THE COURT: You are right.

18 MR. LOWELL: And I understand the holiday issues are
19 very profound, but we won't have gotten our materials--

20 THE COURT: What holiday issues?

21 MR. LOWELL: Well, Thanksgiving, and then the end of
22 December is going to be a problem for some of the people.

23 THE COURT: Yes.

24 MR. WEISS: Your Honor, if you want to meet on the
25 29th, we can do it with respect to the first part of the

1 order. We will work in tandem, we will be prepared to come
2 before you on the 29th with respect to the first part of the
3 order that we are getting tomorrow. And I don't think
4 2 o'clock until the rest of the day is going to be enough time
5 for the whole order anyway.

6 In the 6(a) round--

7 THE COURT: What have I been doing for all these
8 days?

9 MR. WEISS: Your Honor, I am just going by past
10 experience. In 6(a) it took us, after we had all the 6(a)
11 hearings, it took us three or four days, full days of hearings
12 to get--

13 THE COURT: But I have already made the rulings.

14 MR. WEISS: Your Honor, that was true in the 6(a)
15 process also.

16 THE COURT: Do you anticipate the same problem?

17 MR. REILLY: There will be disagreements. The
18 transcripts in certain places, it is difficult to discern
19 exactly what the reasoning is and what the ruling is in some
20 places.

21 I don't anticipate that we will need as much time.
22 If the Court, if we give the Court a written submission of the
23 disagreements, the Court can have that and resolve what it can
24 resolve without a hearing and then come to us and say, here
25 are the ones I just want to hear very quickly on.

1 THE COURT: Let's have a hearing then at 2 o'clock
2 on the 29th on whatever has been reviewed by then. 2 o'clock
3 on the 29th.

4 MR. LOWELL: And then you should probably--

5 THE COURT: Now, I would hope that there would not
6 be much. If there is a lot, then I want a submission on the
7 28th that gives me some sense of what's afoot so that I can
8 think about it. It could be a joint submission or it could be
9 separate. But by 5 o'clock on the 28th, give me something
10 that I can look at.

11 MR. LOWELL: 4 o'clock on the 28th. I think because
12 of the problems in handling the classified information, you
13 have said--

14 THE COURT: Oh, yes, you are quite right. You are
15 quite right. This would be classified. Thank you. Thank
16 you.

17 MR. LOWELL: So, we will do that at 4.

18 THE COURT: Ms. Gunning thanks you.

19 MR. LOWELL: Remind her. Then if you have a date
20 that we could put on the calendar, and I don't know that you
21 do, but if you do for the remainder--

22 THE COURT: Well, one of the cases that I have on
23 December 4 may be resolved in large part. Let's set
24 December 8, or 6th rather at 2 o'clock as the next date.

25 MR. DiGREGORY: Your Honor, if I may. Mr.

1 Hammerstrom and I are supposed to be in Williamsburg for an
2 all office conference that the United States Attorney's Office
3 has that lasts the 4th, 5th and 6th.

4 Well, I guess if the 6th is the last day of the
5 conference, it is conceivable that we could get in the car and
6 get back here by 2 o'clock on the 6th for the hearing.

7 THE COURT: Well, that's fairly-- I really do want
8 to accommodate you. I mean, I think that's a useful and
9 important thing that you do and I don't want to impose any
10 hardship on you.

11 I also-- And I don't know whether I will have to, I
12 know I am going to have to be in North Carolina some part of
13 December 4 and maybe 5th and maybe 6th. I might have to
14 cancel. But I am thinking that I might be able to resolve it.

15 Of course, I may not. If the jury doesn't come
16 back, I may have to sit there.

17 So-- And then the next date I have, I know I am
18 going to have problems on December 10, that's a bigger trial,
19 more defendants, harder to pick a jury. I don't even know if
20 I will finish that one before Christmas.

21 MR. DiGREGORY: Your Honor, depending upon where you
22 are in North Carolina, it may be easier for Mr. Hammerstrom
23 and I to get to you rather than to Virginia.

24 THE COURT: I am in Asheville, North Carolina.

25 MR. DiGREGORY: Oh, not so easy.

1 THE COURT: You think it is not easy for you, think
2 about for me. It is very hard to get to Asheville. But
3 worthwhile when you get there.

4 Well, let's do this because I do think your meeting
5 on the 8th is important.

6 MR. DIGREGORY: 6th.

7 THE COURT: The 6th, it is important. I will cancel
8 that, I may have to cancel it for my own reasons, but I will
9 cancel that if it turns out you all need to be here. It is a
10 good three hours from here to Williamsburg. And I don't think
11 you can reasonably have to be in a meeting and come back up
12 here.

13 So, we can set it tentatively-- I don't think I can
14 do it on the 7th in the afternoon. I have seven sentencings
15 on the morning of the 7th.

16 So, I don't think I can-- That's not even counting
17 my civil docket. I know I have a patent infringement Markman
18 hearing that day too. Which is a pleasure you all are denied.

19 MR. LOWELL: So, tentative, we keep it on for the
20 6th and see how it goes?

21 THE COURT: Yes, let's see how it goes. But I am
22 going to cancel to accommodate you if I need to. And I may
23 have to cancel for my own reasons. But let's put it there.
24 And if it can be used, we will use it. If I have to cancel
25 for my own purposes or to accommodate you all, in a heartbeat

1 I will do it.

2 MR. LOWELL: Sorry, go ahead.

3 MR. DiGREGORY: Thank you. The time you are setting
4 it was 2 o'clock, Your Honor?

5 THE COURT: 2 o'clock. Even that could be changed.
6 I would be amenable to meeting at 5 if all I had to do was
7 listen to one argument and sign an order.

8 MR. DiGREGORY: Not in this case, Your Honor.

9 THE COURT: I didn't think so.

10 MR. LOWELL: And then, Your Honor, perhaps again for
11 whatever is left that may be teed up for December 6, let's put
12 upon us the obligation to get you whatever the dispute is in a
13 written form the day before that as well.

14 THE COURT: That's right, on the 5th at 4 o'clock.

15 MR. LOWELL: Okay. So, that's a process that would
16 get us the 6(c) order. As I said to you yesterday, we did
17 provide the Government with what will now be a good deal of,
18 90 percent of the appendix idea, which will show how a
19 document was produced in discovery, what it's 6(a) treatment
20 was, what it's 6(c) treatment was. And so, that's fairly
21 substantially along the way.

22 The second triggering event, therefore, is as of
23 today with you making your last rulings on CIPA, two things
24 were supposed to occur. One is, is that now the Government
25 has X days, I think they said 21 days, I don't know if it is

1 20 or 21, I always forget, to trigger their expert disclosure
2 because they didn't need the actual order, they just needed to
3 have the final rulings.

4 So, we should date, we should trigger that date, I
5 think. Their Rule 16 expert disclosures.

6 THE COURT: Yes, I know. I am looking at Mr.
7 Reilly.

8 MR. REILLY: We propose November 30, Your Honor.

9 THE COURT: All right.

10 MR. REILLY: That's 23 days.

11 THE COURT: That's all right. That's fine.

12 MR. LOWELL: There is one other thing that gets
13 triggered by your having made your final CIPA rulings and
14 deciding the expert disclosure.

15 And then I wanted to raise the last and what might
16 be the most important thing. We can submit to you, now that
17 we have that date, that triggers other dates, like our
18 reciprocal expert disclosures--

19 THE COURT: That's right. I would like you to give
20 me an order that sets these dates and I will enter the order.

21 MR. LOWELL: Motions in limine, Daubert motions.

22 THE COURT: Exactly. And put on this order that it
23 vacates previous scheduling orders. This supersedes rather,
24 supersedes.

25 MR. LOWELL: We have done that already except for

1 the trial date. But now this one will indicate that it
2 supersedes even that date.

3 THE COURT: Right. Now, what is your view, your
4 view and Mr. Reilly's view and Mr. Nassiskas', everyone
5 views's on a trial date, Mr. Weiss?

6 MR. LOWELL: Here is what I would like to contribute
7 on the subject. The \$64,000 question that is not only
8 preventing this, but it is having ramifications on your
9 calendar, and, Your Honor, I don't have anywhere near as many
10 cases, but I have two trials that have been trailing behind
11 this case with the great patience of my co-counsel and federal
12 judges in other places in the United States, and they have run
13 out of patience with me. Now, they haven't run out of
14 patience with the process, they understand.

15 But I have told them last time around, which was
16 last fall, okay, April-ish, May-ish trial date for a Los
17 Angeles co-defendant, seven co-defendant case looks good
18 because we have a January date here and four to six weeks
19 sounds like the right amount, so, yeah, give or take.

20 The problem now is we have moved January, clearly.
21 It has moved to at best under this schedule, just doing the
22 math in my mind, probably March, maybe end of March, maybe
23 even the beginning of April. It has moved.

24 THE COURT: Really?

25 MR. LOWELL: At best.

1 THE COURT: You too, Mr. Reilly, you think that's
2 about--

3 MR. REILLY: I think if we keep the same ideas of
4 spacing dates. So, March is actually pretty accurate.

5 THE COURT: I want you to put this in the order too.

6 MR. LOWELL: Absolutely. In fact, we go backwards
7 from that for Giglio and Jencks and some other things. So, we
8 can go backwards from that date. And as I said with Mr.
9 Reilly and Mr. DiGregory, we did it once before, I am sure
10 that I could find with them and us a date. And I can assume
11 that date is mid-March or late March or even early April.
12 Whatever it is, it is. And then I can go to the other people
13 in the world and say, okay, look, I have got a date.

14 THE COURT: Okay, do that.

15 MR. LOWELL: But here is my problem.

16 THE COURT: I will try another case that is pretty
17 big between then and there. I want to you stick in this
18 order, by the way, about ten days before the trial date, I
19 want you to meet and confer and submit to the Court either an
20 agreed upon or separate juror questionnaires.

21 MR. LOWELL: Okay.

22 THE COURT: I do want to use a jury questionnaire in
23 this case. There are very significant problems with selecting
24 a jury in this case owing to the nature of the case and owing
25 to the publicity that this case has been accorded.

1 And I do not like questionnaires, but I know when
2 they have to be used. And this is a case where it has to be
3 used.

4 And there is another point that I suppose we should
5 make explicit. I view it as no different from cases in which
6 I have the specter of race in it where there is some concern
7 that there may be an animus if prospective jurors that should
8 not be operating. And of course, I am referring to
9 anti-Semitism. You had don't ask people, are you an
10 anti-Semite and expect to get a straightforward answer.

11 But I leave to you how that can be reasonably
12 explored.

13 There are also problems, and let me surface them
14 now. We are all, of course, familiar with the constitutional
15 proscription, prohibition against striking any juror purely
16 for reasons of race or gender. We are all very familiar with
17 that principle. And Batson is well established. But, you
18 know, Batson has been extended by a couple of circuits.

19 I would want to know, because I don't want to deal
20 with it on the day of the trial or during the jury selection--
21 I will ask all the voir dire questions, the lawyers will not
22 conduct the voir dire, I will, but I will be interested in
23 what you submit for me to ask. And I am sure that Mr.
24 Nassikas, who has tried cases here, can tell you how I
25 proceed. But, in essence, you participate in voir dire in

1 three ways. I ask all the questions, but you can submit
2 questions in advance and I will consider those.

3 Secondly, when I ask jurors questions individually
4 either at the bench or when they are in here individually, you
5 may come to me out of the presence of the juror and ask me to
6 follow up in a way if you think I have not adequately followed
7 up.

8 And if I agree with you that it is a question
9 narrowly tailored to ferret out an impermissible bias and not
10 unduly intrusive, I will ask that.

11 And then at the end I will ask you whether there is
12 any further voir dire given what you have requested and what
13 you have heard and you think should be asked. So, you do to
14 get an opportunity to participate, but you don't ask
15 questions.

16 Now, the Batson issue comes up because there will be
17 the potential for someone to be in the venire who is, either
18 has an obvious Jewish name or an obvious Arab name or
19 something like that. I had it the last time we picked jurors.

20 I will want to have a date for the submission of
21 briefs at the time that you do the, on whether there is a
22 Batson charge for religion. That's an important point. In
23 other words, can the Government strike someone just because
24 his name ends in Stein or whatever, or can the defense strike
25 somebody because his name is Mohammed.

1 There is an Eighth Circuit case on point, but there
2 is no Fourth Circuit case. And every time I see this issue, I
3 am reminded of the wisdom of Justice Thomas when he said, we
4 shouldn't have these things at all, we shouldn't have these
5 peremptory challenges at all, they will only come back to
6 haunt us.

7 Okay. So, give me an order that has all that in it.

8 MR. LOWELL: We will do that, Your Honor. And here
9 is the last point on scheduling that--

10 MR. WEISS: I am sorry, what was the date that you
11 want the Batson?

12 THE COURT: The same time you submit the, the 10 or
13 14 days before trial, the--

14 MR. LOWELL: The written questionnaire, the joint
15 submission.

16 THE COURT: Right. And also fix a time, if we start
17 the trial on a Tuesday, that would be my preference, a
18 Tuesday, start the trial on Tuesday, then on that Friday in
19 the afternoon schedule a final pretrial where we will deal
20 with things.

21 MR. LOWELL: We will do that. The last point that
22 is going to trump all the points is we can now do this and I
23 will now, and you will, and we all will adjust the rest of our
24 schedules. But the great \$64,000 question--

25 THE COURT: Are they going to appeal.

1 MR. LOWELL: Exactly.

2 THE COURT: But they don't know yet.

3 MR. LOWELL: Well, okay, let's say they don't know
4 yet.

5 THE COURT: Let's indulge that fiction. They will
6 have to decide fairly quickly.

7 MR. LOWELL: Ii was going to only ask, maybe it is
8 so obvious that it doesn't need to be asked, but please let me
9 ask it because I am going to go to two other federal judges
10 and explain the schedule. Look, they know what your rulings
11 have been in 6(c). They don't need a written order to do
12 that. They now know them. They know what your rulings have
13 been on the silent witness rule as we now know. They know
14 what your rulings have been on marking, they know what your
15 rulings have been on any--

16 THE COURT: Markings aren't CIPA.

17 MR. LOWELL: They know what your rulings have been
18 on anything that would tell them or inform them. And it does
19 strike me, and even yesterday you were very kind to say, look,
20 on Tab 69, I am not going to sign the order yesterday because
21 I don't want there to be a piecemeal appeal. And now we are
22 saying, we may not get an order signed by you for CIPA--

23 THE COURT: If the only thing that went to the
24 Fourth Circuit was Tab 69, I would be hard pressed not to keep
25 in place the schedule that you are going to give me. I would

1 keep it in. And I would tell the Fourth Circuit, I would
2 issue an order telling the Fourth Circuit, look, this trial is
3 scheduled then. If at all possible, I hope you will expedite
4 it.

5 There is a new rule that I participated in dealing
6 with, I think it's Federal Rule of Civil Procedure, I have
7 forgotten what it is, but it enables Circuit and District
8 Courts to communicate about things of one sort or another.

9 And I don't have any problem with filing an order
10 that says, I want to go ahead and try this case then. Is it
11 going to be expedited?

12 MR. LOWELL: My question is then, under the schedule
13 we have just adopted, there won't be a final written order in
14 CIPA at best, if we take up your December 9, and let's say we
15 have even this many disagreements, and let's assume--

16 THE COURT: How many?

17 MR. LOWELL: This many was more like seven.

18 THE COURT: All right.

19 MR. LOWELL: Let's say we have those. And then
20 let's say we can implore you not withstanding your schedule to
21 issue the order not withstanding North Carolina, the Circuit,
22 and the holidays and you do that. They are not going to be
23 put to the test, it seems to me, of deciding that formally, in
24 other words actually filing their notice of appeal, now until
25 the beginning of 2008.

1 And if they do, I will have already, as you will
2 have, told a number of participants I am going to trial, and I
3 won't be. And now I have really messed things up--

4 THE COURT: Well, your problem is more difficult
5 than mine because you are looking farther ahead. I have one
6 other major trial to do and I am going to do it. I was going
7 to do this one first. I will now do that one first.

8 And you have got all these other things that go out
9 farther into the future. I don't even know if I will be
10 extant farther into the future, but I sympathize with your
11 problem. And I think it would be very nice of Mr. Reilly and
12 Mr. DiGregory and Mr. Hammerstrom to tell you now, and Mr.
13 Martin, who I am sure will play a role in this, to tell you
14 now whether they intend to appeal. That would be very nice of
15 them, but they don't have to.

16 MR. LOWELL: Well, Your Honor, that just puts us to
17 the test of my, it's not just for me, but--

18 THE COURT: Let me ask this. Have you made any
19 decision yet?

20 MR. DiGREGORY: No. And it is not a decision we can
21 make, Your Honor.

22 THE COURT: Oh, yes, there is.

23 MR. DiGREGORY: Well, if I may. It's not our
24 decision. Regardless of whether or not we want to take an
25 appeal, the process we have to go through involves the

1 Appellate Section of the Criminal Division, it involves the
2 Assistant Attorney General of the National Security Division,
3 Mr. Rosenberg, and then ultimately the Solicitor General who
4 must make the call. We can't speak for any of those people.

5 MR. LOWELL: But that is exactly the point. It
6 would be extremely helpful, sealed, not binding, not
7 prejudicial to them changing their mind, to tell us that it is
8 the opinion of the trial team, and I don't mean today, I don't
9 even mean tomorrow, but I mean before January 10 before I have
10 to walk into another court and try to create a schedule, that
11 their recommendation--

12 THE COURT: I think it would be nice if they would
13 give you some information, but let's not cross that bridge
14 now. This is November. Let's get to December, let's get it
15 done.

16 And then I can see, Mr. DiGregory, that there might
17 come a time mid, late December, early January when you may not
18 have the final word from the Solicitor General, but you know
19 pretty well what is being recommended and what's being
20 considered. And he has to go out and tell a federal judge
21 that he is not going to, he can't tell whether he is going to
22 be able to try this or not because of this.

23 There is nothing anybody can do about it except I
24 could issue an order, but I don't want to do that. I think
25 you are going to do the best you can to get it decided. All I

1 am saying is that as soon as you possibly, conceivably can,
2 tell them whether it's more likely than not likely, a
3 preponderance of the evidence that there is going to be an
4 appeal of numerous matters, then that enables him to get rid
5 of the March date.

6 MR. LOWELL: Here is what I could do. I mean, it is
7 not what I want to do, but I don't have many choices. As soon
8 as they have their opinion, I think it would be at least good
9 for all the parties to know.

10 Having said that, I am keeping this case the
11 priority. When Mr. Reilly and his team and our team create
12 the March 14, April 1 whatever it is, April 10 date, that's
13 the date, that's the day I plan to be here and no other trial
14 will interfere.

15 THE COURT: I think it is fair to say --

16 MR. LOWELL: If they seek to appeal--

17 THE COURT: -- that we will not continue the case
18 ever again.

19 MR. LOWELL: But if they appeal, Your Honor, what I
20 just, maybe it is self-evident, and I am sorry because it is
21 late and I will finish it this way, I will have then told some
22 two other judges that I may begin their case on July or
23 August. And if they appeal, that's kicking this cases off. I
24 can't keep putting that other case off.

25 THE COURT: I agree.

1 MR. LOWELL: If they appeal, then we are talking
2 about this case being in the fall.

3 THE COURT: The bottom line is I sympathize with
4 your problem, but it is your problem. And that doesn't mean
5 that I don't have real sympathy, I do, but fortunately it is
6 not my problem, but I assure you I have enough of my own.

7 But I will do this. We are going to move this
8 along. I want you to submit that order. I will enter the
9 order, and we will move literally heaven and earth to get it
10 done by then.

11 I am going to look at whatever is appealed. And if
12 I think it's manageable, I am going to do something by way of
13 writing an order that advises the Court of Appeals that this
14 matter has been filed since 2005, it has had several trial
15 dates, this has been an enormously complex process, and it is
16 just not reasonable or fair to delay it beyond what it could,
17 and that I request that they give it expedited treatment.

18 Now, I am not going to ask the Fourth Circuit to do
19 that if the mass of material for them to review, because they
20 are not even going to begin to get a flavor if they only give
21 you 20 or 30 minutes for oral argument, that doesn't even
22 begin to convey the flavor of this case.

23 MR. DiGREGORY: I know that there is expedited and
24 there is expedited, but CIPA requires that the Fourth Circuit
25 treat this case, if we appeal, handle it in an expedited

1 matter.

2 THE COURT: That's a good reminder. But as you
3 point out, there is expedited and there is expedited. If I
4 tell them there is a trial date, that tells them how much
5 expedition.

6 MR. LOWELL: Two lasts point. I understand it is my
7 problem and I will deal with it as best I can, and we will
8 work out a schedule.

9 There is two more issues. One, you did say you
10 wanted to tell us something about Brady, I don't know if there
11 is enough time to do it today.

12 And the second thing was your order of last Friday,
13 the part that's under seal as to why the witnesses were
14 allowed and not allowed, reflects, if you remember, our having
15 raised these as designated items in part, which was informed
16 by our conversations with our clients. So, we knew to raise
17 these.

18 Under the normal rules, that order because it is
19 that order would not be shared with our client. We are
20 seeking leave that the underlying reasons for each witness be
21 allowed to be shared with our clients such that we can
22 continue the strategy involved.

23 THE COURT: Can you answer that?

24 MR. REILLY: We will review it.

25 THE COURT: All right. I think that's a

1 reasonable-- And remember, this whole notion about not
2 showing things to the defendants ought to be obnoxious to any
3 good lawyer. These people are on trial for their liberty.
4 And it is kind of obnoxious that they can't see things that
5 really matter to them.

6 MR. LOWELL: That is one issue.

7 THE COURT: I think that it would be important. But
8 if you can't, then I will consider it otherwise. I think the
9 first place to start is Mr. Reilly takes a look at it, sees if
10 there is anything really classified in there that already is
11 not being disclosed to them, then maybe we can redact that or
12 something.

13 I think your request is an understandable and
14 sensible one, and I am sure Mr. Reilly will deal with it first
15 and then I will deal with it ultimately if necessary.

16 MR. LOWELL: Do you need anything from us on the
17 Brady issues?

18 THE COURT: No. I have what I need on the Brady
19 issues. There is a problem about frankly narrowing it. And I
20 am going to think about that. And if I have a problem, I will
21 communicate with you all through some sort of an order.

22 It is clumsy to have the hearings because the
23 defendants have the right to be present at all hearings. And
24 of course, for Brady we don't need a cleared court reporter.
25 But let me see if I can deal with it without your assistance.

1 Anything else today?

2 MR. LOWELL: No. No, sir, not from us.

3 MR. DIGREGORY: No, Your Honor.

4 THE COURT: All right. I thank counsel again for
5 your cooperation.

6 MR. LOWELL: And may I ask to return the documents
7 that I tendered to the Court for you to read, the uncolored
8 ones.

9 THE COURT: Oh, yes. There is only one that I see
10 up--

11 MR. LOWELL: There should be two pieces of paper.

12 THE COURT: Well, I have the one here from the
13 Secretary. Let me see what else is here.

14 MR. LOWELL: I think there was one other one without
15 coloring.

16 THE COURT: There is nothing further here.

17 MR. LOWELL: I will find another substitute. One
18 was the two bullets on the bottom, the one that said capital E
19 and the one that we have now redacted out.

20 THE COURT: Let's do this also with respect to
21 Brady. I have already indicated what I thought was Brady.
22 And I don't want any more argument on whether that's Brady or
23 not. I am clear about that.

24 What I am going to do is issue an order. However,
25 Mr. Reilly, looking ahead, I give you leave to tell me after I

1 issue the order why you think it ought to be narrow. Not why
2 the material is not Brady, all right, but why I framed the
3 order in a way that is excessively broad or wrong. All right.
4 But not reargue whether, for example, a particular item is
5 exculpatory or not. That has been crossed.

6 But when I went through on the transcript and made
7 the ruling, I was not precise in what the Government was going
8 to be required to look for. I am now going to do that on my
9 own, recognizing that I have not had the benefit of your views
10 and your views on it.

11 I suspect that when I do, it won't transgress what
12 you all think, but may what the Government thinks in terms of
13 the breadth.

14 So, you may file a pleading telling me why you think
15 it's wrong. You may file a pleading telling me why you think
16 it is partly right and partly wrong. And then I will resolve
17 finally, if it is necessary. Maybe the order I do is going to
18 be all I need, I may then file an order, the reconsideration
19 motions are denied. That's it.

20 So, we will handle the Brady thing that way.

21 All right. And there are no more documents that I
22 see up here.

23 Once again, I am mindful that this is awfully hard
24 work for everybody. And I appreciate the efforts you are
25 making to minimize the time of the Court, but I urge you to

1 keep doing it.

2 Court stands in recess until 9 o'clock tomorrow
3 morning.

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HEARING CONCLUDED

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

21 COPY

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23 Norman B. Linnell, RPR, CM, VCE

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