UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	
-vs-	Case No. 1:05-cr-225
STEVEN J. ROSEN and KEITH WEISSMAN, Defendants.	

HEARING ON MOTIONS

November 16, 2006

Before: T.S. Ellis, III, Judge

APPEARANCES:

Kevin V. DiGregory, W. Neil Hammerstrom, Jr., 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

THE COURT: All right, you may call the next matter.

THE CLERK: 1:05-criminal-225, the United States versus Steven J. Rosen and Keith Weissman.

Would counsel please note your appearances.

THE COURT: All right, for the Government.

MR. DiGREGORY: Good afternoon, Your Honor. Kevin DiGregory and Neil Hammerstrom, Assistant United States Attorneys. And Thomas Reilly and Michael Martin, trial attorneys with the United States Department of Justice Counterespionage Section of the National Security Division.

THE COURT: For the defendant Steven Rosen.

MR. LOWELL: Good afternoon, Your Honor. Abbe Lowell, Keith Rosen and Erica Paulson for defendant Dr. Rosen, and he is here as well. Thank you.

THE COURT: All right. And for the defendant Weissman.

MR. NASSIKAS: Good afternoon, Your Honor. It is John Nassikas, Baruch Weiss and Kate Briscoe on behalf of defendant Keith Weissman.

THE COURT: All right. Good afternoon to all of you. This is a status conference set by the Court. At the time that I set it, in a fit of unwarranted optimism, I had in mind dealing with a great many issues. It appears though that I am on a pace to reach a thousand hours on the bench this year. But I do have a number of matters that I wish to deal

with today, and also I want to deal with something about the future today, perhaps a trial date.

First of all, I want to be clear that I have in mind the motions that are pending. I believe I have that in hand, but I would like to have counsel confirm that I am correct.

There are, I believe, nine motions that are outstanding. There is docket 351, a Government motion for clarification following the Court's lengthy opinion on the constitutionality of the statutes as applied to this case.

Docket number 148, which is the motion by the plaintiff to seek the Court's assistance under Rule 15 to take depositions overseas in Israel.

There is a motion, docket number 149 through 151, which is a motion relating to the disclosure of grand jury material that is a violation of Rule 6(e), and the consequences that the plaintiff contends flow from that.

There is a docket number 273, which is a motion by the plaintiff for Brady material. Which, as I understand it, is the plaintiff's motion seeking the statements obtained by the FBI from acquaintances or friends of the defendants when they were interviewed.

I don't know whether that's-- I am going to ask you in a minute whether any of these are resolved.

There is a motion to suppress, docket number 274, and this relates to the defendants' motion to suppress the use

of information obtained from the defendants using deception.

Then there is a motion to dismiss the indictment based on the defendants' allegation that AIPAC was coerced into dropping their support by paying for the lawyers, that they were coerced by the Government. And there is a motion to dismiss the indictment on that ground.

There is a motion to correct a misstatement of allegation, that's in docket number 347. That's a defendants' motion. And I granted that motion by an order that was entered either yesterday or the day before.

So, that really is not in play. There was no opposition to that. And, in essence, I think what the defendants sought to have corrected is a statement in the opinion that said that they obtained a document rather than information about the document. And I corrected the opinion at the request of the defendant to indicate that it was information about the document and not the document itself.

Then there was a motion to reconsider the relevancy of time gaps, docket number 374.

Now, that motion I will also deal with. I will enter the order shortly. I have denied that motion. I believe that the reasons I gave for the relevance, irrelevancy of those time gaps in the first instance remain valid even in the face of additional arguments made by the defendant.

So, what we have then is the motion for

clarification, which I will deal with in a moment; the Rule 15 motion; the Rule 6(e) motion; the motion for Brady material--I should have given you the docket numbers.

The motion for clarification is 351. The Rule 15 is 148. The Rule 6(e) is 149 through 151. Brady is 273. Suppression motions, 274. The motion to dismiss the indictment on the grounds of pressuring their employer is 317.

And the only other matter that I haven't mentioned is a Government's CIPA, I think it is a Section 5 motion, docket number 333.

Now, let me ask the parties, have I omitted any motions that you believe are outstanding? First, Mr. DiGregory?

MR. DiGREGORY: May I have a moment to confer, Your Honor?

THE COURT: Yes.

MR. DiGREGORY: Thank you.

THE COURT: Wait, I will come to you, Mr. Lowell, let's do it this way.

All I am asking is do I have the universe of outstanding motions?

MR. DiGREGORY: The only one that I believe you haven't mentioned, Your Honor, is a motion for reciprocal discovery filed by defense counsel regarding Touhy notices that they have filed.

THE COURT: You know, as a matter of fact, I do recall that now.

MR. LOWELL: Your Honor, if it would be helpful, I believe it might be docket entry 360-61.

THE COURT: All right, thank you, that's helpful.

MR. LOWELL: And then there is one other when you are ready.

THE COURT: All right, Mr. Lowell, I am ready.

I think that's all you had, Mr. DiGregory?

MR. DiGREGORY: Just a moment more, Your Honor.

THE COURT: All right.

MR. DiGREGORY: Thank you.

That's all for now, Your Honor. Thank you.

THE COURT: All right, Mr. Lowell, what else have I omitted?

MR. LOWELL: Your Honor, the defendants have also filed a motion for notice under CIPA Section 6(f), as in Frank, and I believe that is docket number 362.

THE COURT: All right, thank you.

Mr. Nassikas, have I omitted any?

MR. NASSIKAS: No, Your Honor, that covers it.

THE COURT: All right. Now, the first thing I am going to do is to deal with the motion for clarification filed by the Government.

In this motion the Government, with respect to the

memorandum opinion that the Court entered, a fairly lengthy memorandum opinion relating to the constitutional challenge to the statute as applied to these defendants-- And in that lengthy opinion I concluded that the statute was constitutional as applied to these defendants given the construction of the statute that the Court went through, including scienter requirements.

Now, the Government makes two requests in their motion for reconsideration. First, it seeks clarification that it need not prove all of the elements of 793(d) and (e) as the indictment charges only a conspiracy to violate (g), and aiding and abetting a violation of (d).

Well, with respect to that matter, the opinion didn't require the Court to decide any particular issue that involved that question. It addressed the constitutionality of the prosecution under these statutes on vagueness and First Amendment grounds as applied, vagueness as applied.

So, this is not a motion really for clarification. It's a motion for give us some guidance for the future.

And so, I am going to deny that, but let me go on and say something about that because I think it's prudent to do so.

In any conspiracy prosecution, the Government need not prove that a particular defendant did every act in the substantive offense, but what the Government must prove is

that the defendant agreed to join a conspiracy which contemplated that members of the conspiracy would commit all of the acts, all of the elements of the substantive offense.

And the defendants, even if they don't commit each and every act or element of the substantive offense, have to have all the mens rea elements necessary for the substantive offense.

In other words, just to point out a very simple straightforward thing, somebody who drives a person from A to B, and that person who sits in the car has drugs on them, just because that person agreed to drive them from A to B doesn't mean that that person joined a drug conspiracy.

You have to show that that person who drove them from A to B knew that the purpose of the drive was to further the drug conspiracy, which was drugs. And the person has to have mens rea; that is, to possess with intent to distribute or to distribute these drugs.

You don't have to show that the driver actually possessed the drugs or sold the drugs, but he has to know all about it before he can be guilty.

I don't even think much of that has much to do with this case, but I point it out.

The Supreme Court has held that to prove a conspiracy, the Government must show that the defendant intended to further an endeavor which, if completed, would

satisfy all the elements of a substantive criminal offense. That's the Salinas decision at 522 U.S. 52 at 65.

So, in other words, he must have agreed to join an enterprise, some members of which would commit all the elements of the substantive offense, but he has to know about it.

Now, as to the second point, the Supreme Court has also stated that conspiracy requires proof of the same mens rea as the substantive offense. As the Supreme Court put it in the Feola case, conspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself.

So, the scienter requirements of (d) and (e), of course, must be proved.

Now, none of this is, I think, in the nature of clarification. So, I am denying the motion for clarification on that ground.

What I have said beyond that is to disclose to you to some extent what I am thinking. This matter will come up in the course of the trial if you have some disagreement. But clearly I have stated very clearly, I think, in this memorandum what needs to be shown.

The Government also seeks clarification to the effect that it need not prove that the defendants knew the

disclosure of the NDI was potentially harmful to the United States. It is hard to know precisely what is not revealed in the opinion.

To the extent that the motion seeks clarification that the Government need not prove at all that the defendants knew that their disclosure was potentially harmful to the United States, that's not clarification, that's reconsideration. So, I will deny it.

The memorandum opinion I think is quite unequivocal stating that the Court imposed the requirement that the Government prove that the defendant knew the information, the NDI, if it is shown to be NDI, would harm the United States.

And there was also another scienter requirement. And there is a second scienter requirement. I pointed out why they are not duplicative and why they are not necessary, particularly in the First Amendment context. I don't want to review the entire memorandum opinion, it is 60 pages, but I don't think that anything raised calls for clarification. It is abundantly clear therein.

So, the motion is denied.

I will ask this, however. I didn't follow this, and I really don't have any interest whether it happened or not, except now, was this matter appealed when I issued it? Did anyone try to get a 1292 or anything of that sort?

Mr. DiGregory, you didn't.

MR. DiGREGORY: No, sir.

THE COURT: Because you prevailed in significant part, although you seem to be interested in prevailing beyond what you've prevailed. And in fact, in prevailing, you have a burden that is not insubstantial. So, in losing, Mr. Nassikas and Mr. Lowell see some benefits to them.

But I take it there was no appeal taken from the issuance of this opinion and the denial of the motion, no 1292(b), is that right?

I would have known about it, you would have to seek my permission first.

MR. LOWELL: That's right, Your Honor. We didn't think we fit into the standards, and we felt like it didn't make sense to proceed that way.

MR. NASSIKAS: That's correct.

THE COURT: All right. Now, I just ask. I am not suggesting that it would have made, I just want to be sure that I haven't missed anything.

Now, I want to go on for a moment to the-- Just a moment.

Now, let's go for a moment, I want to ask a question about this motion to dismiss the indictment. And by the way, of course, any time if we begin to trespass on matters that are under seal or classified-- I would prefer, however, to have as much as this in open court for the public to hear as

possible, and that's essential. Indeed, it is required by the constitution. But I may not be adequately sensitive to when it may be necessary to raise classified information, and I will rely on counsel to advise me of that if it occurs.

There is, however, a motion to dismiss the indictment on the basis of the defendants jointly, they allege that the Government pressured AIPAC into giving up paying for their lawyers or something of that sort.

What I want to know from the defendants, Mr. Lowell, you may go first, is do the defendants consider that that matter requires an evidentiary hearing? Or can this be done on the basis of stipulated facts?

Mr. Lowell.

MR. LOWELL: The answer to your question is yes, Your Honor, but I would ask Mr. Nassikas or Mr. Weiss to address this one to the Court.

THE COURT: Yes, you can do it on stipulation or yes you can--

MR. LOWELL: Yes, I think, we-- The actual name of the motion is a motion to dismiss and for alternative relief. And I think throughout it I think we have raised evidentiary issues that require or we believe--

THE COURT: Have you consulted with Mr. DiGregory on whether all of that can be obviated by means of stipulating facts?

MR. LOWELL: At that point I would like to defer to the principal spokesperson on the subject.

THE COURT: All right, Mr. Nassikas.

MR. NASSIKAS: Your Honor, would you like me at the podium?

THE COURT: No, you can stay there since we are going to be up and down a good deal, but you will have to speak up so the court reporter can hear you clearly.

MR. NASSIKAS: That I shouldn't be a problem, Your Honor.

Your Honor, we do believe an evidentiary hearing would be required. We have not specifically raised the question of agreement on the facts that we have laid out in our reply brief in greater detail than we did in our initial brief following the Government's opposition, Your Honor. But that series of facts that we believe is backed up, that we know is backed up by a series of--

THE COURT: Well, the answer is you haven't yet consulted with Mr. DiGregory on whether he will stipulate to facts that you find adequate to support your motion?

MR. NASSIKAS: No, we have not, Your Honor.

THE COURT: All right.

MR. NASSIKAS: But one further addition to that point, Your Honor. We have only laid out for the Court in the briefing papers the key facts that we are aware of.

We do believe, since we weren't a party to the critical conversations between the U.S. Attorney's Office and AIPAC counsel, we are well aware that there were other conversations that we just don't know the details of, but that's what an evidentiary hearing we believe would further bolster what we have laid out in our brief.

MR. LOWELL: One last point, Your Honor. We could meet and we would be able to stipulate to five out of 15 or ten out of 50, but at the end of the day, I can assure you, there will be many points around which, if the Court believes we have reached the threshold, and we think we have, an evidentiary hearing would occur.

THE COURT: All right. What is your view, Mr. DiGregory?

MR. DiGREGORY: In the first instance, Your Honor, my view is that the defendants have not met the threshold. Even if you assume that everything that they have alleged in their pleadings is true, they have not made out either a Sixth Amendment or a Fifth Amendment violation. So that an evidentiary hearing is not required.

MR. NASSIKAS: Your Honor, if his--

THE COURT: Just a moment. One at a time. Go ahead, Mr. DiGregory.

MR. DiGREGORY: That's our position, Your Honor. And in order for them to obtain an evidentiary hearing, we

submit that they have to convince you that they are entitled to relief based on the facts that they have alleged. We don't think that they have done that either as a matter of fact or as a matter of law.

THE COURT: So, in other words, your view is that even if the Court accepts as true that the Government told AIPAC that we will indict you if you continue to support them, that even assuming that, that doesn't raise either a Sixth Amendment or due process problem?

MR. DiGREGORY: Well, no, Your Honor, that's not exactly my position because that's not a fact that they have alleged in their pleadings.

THE COURT: It isn't?

MR. DiGREGORY: No, sir.

THE COURT: All right. What do you take their pleading to allege?

MR. DiGREGORY: Their pleading has alleged, if I can recall it correctly, their pleading has alleged that at the time, I believe their pleading has alleged that they believe that AIPAC was the subject of an investigation.

THE COURT: And?

MR. DiGREGORY: And their pleading has alleged that because of that fact and because they had, and because AIPAC had begun to advance their legal fees and then decided to abide by the agreement, the bylaws of the organization, which

require only indemnification, that as a result of that AIPAC decided not to go forward and provide them with continuing advancement of their legal fees.

At no point do they allege that AIPAC was the target of an investigation. At no point do they allege that AIPAC was under threat of prosecution. At no point do they allege that AIPAC was engaged in any kind of a negotiation with the Government for a deferred prosecution agreement.

They are trying to travel under the Thompson memorandum, Your Honor, and under the policy memorandum that suggests to Government prosecutors that Government prosecutors, when considering cooperation in determining whether or not to indict someone, whether or not to indict someone, the organization is being supportive of potential or of wrongdoers. They have not alleged that the Government has designated AIPAC a target.

In fact, if you recall the pleading we filed, we attached a letter that was sent by Mr. Lowell to Mr. McNulty when he sought a meeting with Mr. McNulty during which he acknowledged that AIPAC, it was concluded early on by the Government that AIPAC was not under jeopardy of federal prosecution.

Before you even get to the point of considering whether or not factually or legally they are entitled to relief, you have to get beyond the fact that the organization

was not, was not under jeopardy of federal prosecution.

THE COURT: All right. Mr. Nassikas.

MR. LOWELL: Your Honor, may I just respond to that last point because my name was invoked? Well, I mean, he can go first.

I just think, I want to say that this is a problem because the Government is now characterizing and mischaracterizing the allegations that we have put in. And I don't know if you want to get deeply into it because your question was--

THE COURT: Which of the two of you is going to address this?

MR. LOWELL: Well, I would like to defer to Mr. Nassikas, and ask the Court, please, to respond to the point about my letter.

MR. NASSIKAS: Your Honor, I think the key points are that, as we have laid out on pages 2 and 3 of our reply brief, there are a series of specific--

THE COURT: Did you allege or do you allege that the Justice Department told AIPAC that if you continue to pay these folks or to pay for their lawyers, that we will indict you?

MR. NASSIKAS: In effect, yes, Your Honor. In effect yes. That the inference was there, as it was in the Stein case that Judge Kaplan ruled on when--

THE COURT: What do you mean "the inference was there"?

MR. NASSIKAS: Because, Judge, we lay out several different times where the U.S. Attorney or the Assistant U.S. Attorney is asking counsel for AIPAC or AIPAC's Executive Director whether AIPAC is continuing to pay the legal fees of these defendants at a time when AIPAC remained a subject, and the Government concedes this, that AIPAC remained a subject of this investigation.

They were not a target, as Mr. DiGregory says, I will take him at that word. But a subject very much means in today's environment that an organization is under significant threat of ongoing criminal investigation or the potential for prosecution.

THE COURT: You didn't submit an affidavit from anybody at AIPAC that said they were threatened.

MR. NASSIKAS: We have not. We have simply, we have submitted the factual information, Your Honor, where AIPAC counsel has recorded statements made by the U.S. Attorney, Mr. McNulty at the time, by Mr. DiGregory, or others in the Government specifically, deliberately month after month asking, are you continuing to pay, not only the legal fees, the health benefits, are you continuing to be involved in a joint defense agreement, are you going to continue to employ these people.

The most significant of everything I have just described is the legal fee inquiry, Your Honor, because as the timing laid out in the defense paper shows--

THE COURT: In fact, under the Sixth Amendment, nothing else is relevant?

MR. NASSIKAS: That's correct, Your Honor. So, we do make both a Fifth Amendment and a Sixth Amendment liberty and property interest arguments, Your Honor.

And it is interesting, just as a current ongoing case that we have cited, obviously, the Stein litigation in New York, in that case the Court did find--

THE COURT: I am not interested in hearing more about it.

And let me, while I am on the subject, make this clear. I received recently from the defendants something called Notice of Additional Authorities Relevant to Defendants' Outstanding Motions.

Do not file anything without requesting. I do a certain amount, I can update cases. I don't need to know-- Because what you have done now is, in effect, filed an additional brief. I now have to enter an order requiring them to respond to it because you have actually made additional arguments.

The issues in this case are thoroughly briefed. So, in the future neither the Government nor the defendants may

file any additional briefs-- Actually, I say this, and I am reminded of my days of practice, I usually followed the brute force and awkwardness principle too. And whenever I had something to say, I wanted to file it.

Don't do that. My perspective is different now. And we have to be clear about the flow of information. And I can update, I can Shepardize and so forth.

So, I am not interested in hearing what's happened in that case.

MR. NASSIKAS: Your Honor, the only point--

THE COURT: What that Court publishes in a decision is all I am interested in, and I have that.

MR. NASSIKAS: The only reference there, Your Honor, was to the fact that there the prima facie case in the decision was described which led to the evidentiary hearing, which through the subpoena power allowed more documents, more testimony to expand--

THE COURT: I am familiar with that.

MR. NASSIKAS: Thank you, Your Honor.

THE COURT: Now, Mr. DiGregory --

MR. DiGREGORY: Yes, sir.

THE COURT: -- do you have anything further you want to say about this? I am not going to decide it today. And I have briefs.

He says you did threaten them. He says by asking

them all the time, are you still paying their legal fees, that there was an implicit threat while they were still a subject that they might become a target or be indicted if they continued to do that.

MR. DiGREGORY: We have never conceded that they were the subject of investigation, Your Honor. In fact, in our pleading we noted that in a meeting on October 27 of 2004, we specifically answered the question: Are we a target of your investigation? No.

And in fact, Mr. Lowell's letter that I referred to and that he wants to talk about here today is a letter that recognizes that he knew that AIPAC was not a target of a federal investigation. In fact, that they were not under jeopardy of federal prosecution.

So, the point that I was trying to make is simply that they don't get to square one even if, even if they may be entitled under the law to Sixth Amendment relief. And we contend that they are not entitled to relief under the Constitution, under the United States Constitution's Sixth Amendment right to counsel because right to counsel did not attach until the indictment.

They are claiming in their pleading that right to counsel attached long before they were ever indicted in this case.

THE COURT: Yes, I understand that argument. And I

know what the New York Court said about it.

All right, Mr. Lowell --

MR. LOWELL: Very briefly.

THE COURT: -- now you can talk about your letter.

MR. LOWELL: And I won't repeat anything that was said.

First, as to the issue of whether they were a target or not, it is besides the point, because all that exchange occurred even prior to the AIPAC witnesses being interviewed and going into the grand jury.

Mr. DiGregory certainly would not tell this Court that there has been an occasion in which, having made a preliminary decision about somebody, once you have heard their testimony, they have not changed that either up or down in the scale of whether or not they are a suspect or not.

But more importantly, this doesn't fall on whether somebody is a target. And the reason we need an evidentiary hearing, Your Honor, goes as follows. A lawyer for AIPAC said to us on more than one occasion that in order to get AIPAC out from under this, and quoting the availability and applicability of the Thompson memo--

THE COURT: Are you a witness in this?

MR. LOWELL: I might be.

THE COURT: Well, then you might have to withdraw.

MR. LOWELL: Well, I might be, and we will have to

face that issue when we get to that issue.

THE COURT: We are nearly there. I have to decide whether an evidentiary hearing, and you are now in the process of telling me what you would testify to--

MR. LOWELL: No. I think the pleadings have already put forward memos, Your Honor. I am not a witness to the memo that somebody sent or wrote.

THE COURT: But you are now telling me what you, what these people told you--

MR. LOWELL: No, sir, not necessarily to me, but what we have put in the memo. And I just want to answer your question about evidentiary hearing.

If an AIPAC lawyer says, the Thompson memo is being used, and if an AIPAC lawyer says, this is the way to get AIPAC from out under this, then an evidentiary hearing revolves the issue lickety-split. Either he made that up or he was told that by the Government. And they are not telling us. And I might not need to be a witness.

THE COURT: Has he said under oath that he was told that by a lawyer?

MR. LOWELL: No, because there has been no evidentiary hearing in which to have that occur.

THE COURT: Well, maybe before you get there, you may have to produce that affidavit.

MR. LOWELL: You may call that as the threshold,

Your Honor, in which case we will try, but that is not what the law has been on this subject. And they are adverse--

THE COURT: Well, there is no law except what's in the Southern District.

MR. LOWELL: Right.

THE COURT: And there are--

MR. LOWELL: You can imagine that AIPAC is not being very cooperative in our fact finding given that what we are alleging is that they have improperly cut our clients off from rights that they have. But we can always try.

THE COURT: All right. Mr.-- I think I have heard enough on this motion.

I think clearly the prospect of deciding this matter on stipulated facts is not in the cards. I do have to decide the issue whether the threshold, as Mr. Lowell pointed out or put it, has been crossed. And if not, what is required to cross the threshold.

Whether the defendants could then respond to that by doing something to cross the threshold depending upon what I decided is another matter. Or they may already have crossed the threshold, in which case I will schedule an evidentiary hearing.

All right. Let's move on.

Mr. Lowell, what is the Brady, docket number 273? Can you refresh my recollection on that?

MR. LOWELL: Your Honor, Mr. Rosen, if I can, my colleague, will address you.

THE COURT: Yes. All right, Mr. Rosen, can you refresh my recollection on that?

MR. ROSEN: I can, Your Honor, thank you.

THE COURT: I recall it had something to do with the Government's interviews of the acquaintances of the defendant.

MR. ROSEN: That's correct, Your Honor. And we, we contended that we had reason to believe that those interviews involved exculpatory material and requested an order that those 302's or notes of those interviews--

THE COURT: All right. Well, then they responded and say it doesn't request exculpatory material.

MR. ROSEN: I think they argued as a matter of law. I don't know that they set forth what the interviews said yes or no.

THE COURT: Well, if they did that, they would produce them. But what they said is-- And it is the duty of the Government in all matters to consider whether they have any Brady material. It isn't either the practice or the law that this Court has to review in camera everything the Government has and decide whether it is Brady or not. That duty is given to the prosecution by the law. And if they fail in that duty, then any prosecution would fail as a result if they fail to produce Brady material.

So, I am trying to get to the point, I think I know what you all said, although I want you to come back and tell me why you thought it was Brady in a minute--

MR. ROSEN: Yes, Your Honor.

THE COURT: But you filed a motion that said, look, they interviewed these acquaintances, we think that there is Brady material in these interviews. I don't remember exactly why you had reason to believe that.

But then the Government comes back and says, we have this material, it's not Brady.

That, unless you can give me some compelling reason, seems to be the end of the matter unless the Government is wrong. If the Government is wrong, then they jeopardize any conviction that they would get if they get one.

MR. ROSEN: I think, Your Honor, that what we suggested in the papers is that the Government, beyond the question of their analysis of the interviews in deciding whether on the facts it is exculpatory or not, that their view of what exculpatory means in this context was incorrect. That they were taking what we were saying as what was in these interviews as inadmissible opinion testimony by these individuals.

Whereas, we were suggesting that what they had to offer was somehow different and material to the trial in this case.

So, I think perhaps that the issue that is--

THE COURT: Surely you don't think that it is Brady if some friend of the defendant said, oh, I know these people, I have known them for 20 years, they are wonderful people, they are salt of the earth, they would never violate any law. That is not Brady.

MR. ROSEN: And that's not what is at issue here, Your Honor.

THE COURT: All right.

MR. ROSEN: What is at issue here, from what we understand, and we don't have the full range of these interviews, is that these interviews included people who were the heads of AIPAC at various different times, who were involved in the same types of conduct that our clients are being charged with here, and that they described for the Government the manner in which they operated and how their understanding of what they did comported with the law.

And that information sets the context in which our clients, who were their subordinates, would have done their jobs on behalf of AIPAC.

So, the testimony these individuals have would go to the very question of the scienter in this case since they would testify about what AIPAC, we believe, or they told the Government we believe what AIPAC was doing, how it operated, how they operated in the sense of not having any reason to

believe they were doing anything improper. And that they, as the heads of the organization, their understanding would be passed down through the people that worked for them.

THE COURT: Well, just because they didn't understand they were doing something wrong doesn't mean they weren't doing something wrong and doesn't mean they didn't have the scienter. You know, not everyone properly understands every criminal statute.

Indeed, you can't imagine the number of defendants I have had in this courtroom who want to argue that they never had any mixture and substance containing cocaine, all they had was powder.

MR. ROSEN: Of course, Your Honor.

THE COURT: They don't understand. So, I am not sure-- I get the drift what you are saying.

MR. ROSEN: This is a willfulness case, Your Honor, as the Court is aware, where the scienter is different.

THE COURT: So is the cocaine thing, is willful.

All right, Mr. DiGregory.

MR. DiGREGORY: With the Court's permission, Mr. Reilly will address this issue.

THE COURT: All right, Mr. Reilly.

MR. REILLY: Thank you, Your Honor.

I don't believe there is much to add. We don't believe that the information that they have proffered that was

available in the interviews is Brady for the reasons the Court has said--

THE COURT: Well, I take it you can represent to the Court that you have examined this material with your Brady obligations in mind, and that indeed you have had in mind their argument about the need that the Government has to prove mens rea. And they say, look, here are officials who probably are saying that we did this and we didn't think it was wrong. And you have considered whether that's Brady?

MR. REILLY: We have considered that. And we don't believe it is Brady, Your Honor. We are not admitting that that came up in the interviews at all.

But we have considered their argument, and if that is in there, we have considered that that is not Brady.

THE COURT: All right, I have in mind the same thing, and I will consider that matter further.

Let me go now to the-- Do we need an evidentiary hearing, Mr. Lowell or Mr. Nassikas, on the motion to suppress?

MR. NASSIKAS: That is Mr. Weiss, Your Honor, if that's all right.

THE COURT: All right, Mr. Weiss.

MR. WEISS: Yes, Your Honor. There are some facts that are not in dispute, but there are some facts that are.

THE COURT: Tell me a little bit about why we need

an evidentiary hearing there so that I can assess how long we need or whether we need one or whatever.

MR. WEISS: Yes, Your Honor. In our view, the agents lied to the defendants in telling the defendants that they were not under criminal investigation, that they weren't the targets of the investigation, and in telling them that they were talking to them simply because they needed to do a background investigation of Franklin.

In our view, the defendants relied on that. And it was because of these misrepresentations that the defendants spoke to the agents. And that as a result, their statements were not voluntary under the law.

THE COURT: All right. Now, what do you think would be a matter for the Court to hear and resolve factually about that?

MR. WEISS: Yes, Your Honor. As to the statements made by the agents to the defendants, I don't think, you certainly can ask the Government for their view, I don't think there is a dispute because we have tapes of some of the conversations. So, I don't see how they can be disputed.

And there are 302's--

THE COURT: Well, I am not asking you what isn't disputed. I want to know what you think is disputed? What would be the substance of an evidentiary hearing?

MR. WEISS: Yes, Your Honor. I think where there is

a factual dispute is whether or not there was any reliance on the misrepresentations. We say there was. The Government says there was not.

And whether under the totality of the circumstances the ultimate statements were voluntary or involuntary.

THE COURT: All right.

MR. WEISS: The only area where I think there is no dispute is what did the agents say to the defendants. Everything else I think still is in dispute.

THE COURT: All right. Thank you, Mr. Weiss.

Who is up to bat for this? Mr. DiGregory?

MR. DiGREGORY: Mr. Martin, Your Honor, may it please the Court.

THE COURT: All right, sir.

MR. MARTIN: Your Honor, I was actually hopeful that this would be an area where we would not need an evidentiary hearing because, as Mr. Weiss suggested, the statements of the defendants as well as the Government agents are recorded, and you have that CD that we supplied.

THE COURT: Yes. Now, I meant-- I am glad you raised the CD. I am electronically challenged. My law clerks are not. But, surprisingly, I do a good bit of this myself, but I do not use a computer.

And I would prefer that you give me transcripts of the discussions that you and Mr. Weiss and Mr. Lowell

presumably, or both defendants, believe I need to see for this. And I would like you to do that promptly.

MR. MARTIN: We would be happy to, Your Honor.

THE COURT: Now, once I have that and I know what was said-- Mr. Weiss says that these agents told the defendants, look, you-all are not targets, we are investigating Franklin, but we need to have some information about Franklin. And that, Mr. Weiss says, was flatly not true. And, therefore, they felt, as they were misled, they felt secure in making certain statements that they would not have made had they been fully apprised of their status as being investigated; and, therefore, their statements were not knowing and voluntary.

MR. MARTIN: And I have a response to that as well, Your Honor. Actually on page 2 of our opposition, in the first footnote we cite a couple of Fourth Circuit cases which specifically address the point of a defendant's subsequent testimony about their mental impressions at the time they were interviewed by the Government.

And if I could just quote briefly from one of them, which is the United States versus Braxton, in which the Fourth Circuit rejected a similar argument. They stated, "subsequent testimony by an accused about his prior subjective mental impressions and reactions is always influenced by his self interest."

And in another Fourth Circuit case, the United States versus Wertz, also rejecting the same type of argument, "the conduct of the defendant at the time of his statement is far more credible and reliable"--

THE COURT: I don't have any doubt about those principles. This will come perhaps as a surprise to you, but I hear motions to suppress in many cases week in and week out.

MR. MARTIN: Right.

THE COURT: Those cases all stand for sensible propositions about how to weigh the evidence. But doesn't the Court, in order to determine whether these statements are admissible, have to make a determination as to whether they were knowingly and voluntarily made?

MR. MARTIN: Yes, you do.

THE COURT: Now, of course, that would decide only part of it. The jury would still have to decide that issue as well. That's correct, isn't it?

MR. MARTIN: Well--

THE COURT: The answer is yes.

MR. MARTIN: Yes. Thank you.

THE COURT: So, in deciding whether it is knowing and voluntary, don't I have to have some factual context? And here, perhaps the defendants, if they wish to testify in this, they would tell me that they were lulled into a false sense of security. And you would say, hey, look at this Fourth Circuit

case that says that's unreliable.

To which I would say, of course I know that it may be less reliable now, but isn't it still something I'm at liberty to take into account?

The Fourth Circuit didn't say you could never hear that. Every time I hear a motion to suppress, a defendant may get on the stand and tell me certain things. And, of course, at that point in time the defendant sees very clearly what his interest is and what the facts out to be found to be, but that doesn't mean I don't hear the defendant and take it into account and make own judgment as to what the facts are.

And when it comes to his state of mind, that's the same thing, isn't it? What the Fourth Circuit is saying is, be very careful because it's very self-interested testimony, and the facts and circumstances at the time are far more probative.

MR. MARTIN: That's correct.

THE COURT: So, what's your view on whether I need an evidentiary hearing to decide this issue?

MR. MARTIN: I don't think you need one, because even if the defendants get on the stand and say, I was really duped by this, I was totally deceived, the case law is clear that deception standing on its face, just all alone, is not sufficient to suppress a statement. You have to look at the totality of the circumstances.

So, even accepting as true that the defendants were deceived, which we are not willing to concede, but even accepting that--

THE COURT: Let's be clear too. There is no rule that precludes the Government from using deception in investigations. It would be silly if there were. There are undercover investigations going on all the time. And in order to uncover criminal conduct, the Government must use that kind of circumstance or that kind of deception.

But I think I do have to consider in this instance whether these statements are initially admissible for consideration by the jury. The jury can still consider whether they were knowing and voluntarily made.

What you are saying is that the facts that are alleged here and the circumstances of these, I can tell right from that, I don't need any further evidence?

MR. MARTIN: Absolutely. Because, again, even if--

THE COURT: Even if they were deceived --

MR. MARTIN: Correct.

THE COURT: -- even if they were misled or lulled into a false sense of security, your view is that's irrelevant?

MR. MARTIN: It's not irrelevant. But what I am saying is that even if they were deceived, accepting that to be true, that is just one factor in the totality of the

circumstances test that you have to apply.

THE COURT: You are saying that I can assume that they were deceived, and that the Government still prevails even if I assume they were deceived?

MR. MARTIN: Yes, because if you look at all of the other circumstances during the interviews, they counsel against separation.

THE COURT: All right. All right, I will consider this matter too, Mr. Weiss. And I will treat this as I will the other one, and decide whether a hearing is required and schedule one if I need one, or proceed to decide the matter otherwise.

Now, let me turn to--

MR. LOWELL: Your Honor, just before you leave that matter.

THE COURT: Yes.

MR. LOWELL: You have directed the Government and us, if we have it, to provide you with transcripts.

THE COURT: Yes.

MR. LOWELL: And I want to make clear also for the Court that the record would be, I suspect, that there are maybe one or two conversations that are taped, but some of the issues that we have put in our motion are only subject, from our point of view, to an FBI 302 memorandum, so it's an FBI agent's statement to the file.

THE COURT: But I have that 302.

MR. LOWELL: You do, but one of the reasons one would want an evidentiary hearing is to test the statements of somebody who is, in effect, talking to themself in their file.

But what the Court may want are the underlying notes, if any exist, underlying that 302 as well. So at least we have the full record for whatever reason you can refer to it.

THE COURT: Well, I will stick with the record that I have for now, Mr. Lowell. If I need more, I will ask for it.

All right, let's go now to the-- I realize how much I have outstanding. But what I would like to know from counsel now is that assuming these matters are resolved within the next month to six weeks, what is the Government's view on how long it would take to try this matter? And when-- Have you-all discussed potential trial dates, Mr. DiGregory?

MR. DiGREGORY: Only in the most general sense. Yesterday Mr. Rosen and Mr. Reilly and Mr. Hammerstrom and Mr. Martin--

THE COURT: Well, I didn't give you any advance warning. And I should have, I should have told you to consult about that. I may take a recess and permit you to do it.

Let me cover one more thing, Mr. DiGregory, without covering any classified information. What is this Government

CIPA Section, is it a Section 5 motion that is outstanding? That is docket number 333.

MR. DiGREGORY: Quite frankly, we were puzzled by that, Your Honor.

THE COURT: Maybe it is a notice, not a motion.

MR. DiGREGORY: Yes.

THE COURT: Can you summarize, without--

MR. REILLY: No. Sorry.

THE COURT: All right, I understand. I may have to do that in a few minutes. I may clear the courtroom and have counsel summarize for me where we stand in the CIPA process. But that will be only in a cleared courtroom.

MR. REILLY: With respect to docket 333, I can advise the Court that no action of the Court is required at this time.

THE COURT: All right. I still may be interested in knowing the status of that process just so that I can gauge when we can try this thing.

MR. LOWELL: Your Honor, whether it is from recess or otherwise, I think not only do you have the motions you have, I suspect we probably can make a report that is itself not classified just on the issue of the schedule as to where we stand in the 6(a) and then following a 6(c) proceeding. That certainly has been on the public docket that we have been in a 6(a) and that there is such a thing as a 6(a), et cetera.

But that has to be factored in, of course, because that's been the nature of the give and take between the Government and the defense counsel as to where we stand for purposes of figuring out what happens next towards a trial date.

I think we can probably do that on the record. I don't think we need to clear the courtroom for that.

THE COURT: I prefer not to close the courtroom.

All right, do so, without getting into anything that is classified. In other words, just tell me how many months, weeks, days.

MR. REILLY: A lot of this is going to depend on us getting to you the draft order that memorializes and lays out--

THE COURT: All the rulings I made in camera. Or not in camera--

MR. REILLY: It was in camera. Off the bench.

THE COURT: Right.

MR. REILLY: Once we get the order to you, you need time to draft your order and issue the order.

The Government will then need, based upon the volume in the order, approximately four weeks from when we receive the order to get all the necessary approvals to file a motion pursuant to CIPA Section 6(c) with respect to the classified information that is subject to disclosure under the relevancy

rulings in the 6(a) order.

The defense will then need time to respond to our 6(c) motion.

We will then come before the Court again in a 6(c) hearing, which could be lengthy.

And then the Court will have to issue a 6(c) order. Which the Government will then have to review to determine whether we can go forward with the disclosures that are going to be required by the Court under the 6(c) order for classified information.

THE COURT: All right. Just for the benefit, and I think it is salutary for the public to know as well, essentially what happened is that the Government and the defendant pointed out, defendants, pointed out a bunch of classified information they wanted to use. I then made rulings about the relevancy of that. The Government won some, the defendants won some.

Now, those rulings have to be-- That's what you are working on now?

MR. REILLY: Correct.

THE COURT: And essentially what the Government is doing is seeing whether this material can be, the material that I ruled was relevant can be put in a form that isn't classified.

MR. REILLY: Or that there are limitations upon the

use or substitutions or stipulations that can apply.

THE COURT: Right. And then that will come before the Court.

MR. REILLY: Correct.

THE COURT: And then as a result of that, I will issue a final order on that.

MR. REILLY: Correct.

THE COURT: Now, that order is subject to appeal.

MR. REILLY: Correct.

THE COURT: And given what you are doing and what you-all know, how soon will I be able to make that order? And that, of course, will be under seal. But how soon will I be able to issue that order so that the question of whether or not there is an appeal will be evident?

MR. REILLY: We expect, and we talked about this yesterday with defense counsel, we expect to get the Court by December 8 the draft 6(a) order.

THE COURT: Go on.

MR. REILLY: After that, it's up to the Court to actually issue the final order. And that's when the clock starts ticking for any appeal on that order.

We anticipate, however, that we will need four weeks from the issuance of that order to file the 6(c) motion.

THE COURT: And I think you also anticipate that when on December 8 the order is submitted to the Court, that I

may look at it and say, I need some questions answered, I need some things resolved, and I need to have some input from counsel on these things.

MR. REILLY: That's a likely possibility.

THE COURT: I might point out also for public consumption that in many cases I wouldn't do that, but in this case the lawyers are quite good on both sides, and I always do get some bright lights shined in dark places for me by counsel for the Government and all counsel for defendants.

So, that's likely to happen. And then I will issue the order, which is really an order under 6(c).

MR. REILLY: It is under 6(a).

THE COURT: 6(a), okay. And then that will be either appealed or not appealed.

MR. REILLY: Correct.

THE COURT: All right. Now, having gone through that, I think what I will do is take a recess now. I want to block out time as soon as reasonably possible so that I save that time.

You know, in this district there is a pretty significant cascade of cases that continue to come. And if I don't preserve a significant block of time, it's going to be difficult for me.

So, I want to do that now, fully aware that I may not be able to do it then, it may be at the Fourth Circuit or

who knows. But I want to try to do that.

So, I will rely on all of you to convene and now when I recess consider how much time you think this might take and give me your best estimate.

Now, what you have to avoid is April because I am trying a capital murder case in April. I have another capital murder case, but that one isn't coming up for several months after that.

There are other big cases, but this one I want to put somewhere in the new year that is practical and sensible so that I can preserve that time because this matter deserves to be resolved one way or the other, if the Government wishes to pursue it.

Which you do?

MR. REILLY: We do.

THE COURT: All right. Well, I have-- So be it. I am here to adjudicate. If you wanted to abandon it or they wanted to do something else, fine with me. I have no interest in it.

All right. I will recess now. And when I return, we will do that. And that will be all I think I can reasonably accomplish today.

There is another sealed hearing at 5 o'clock here, but I will postpone that until I finish this hearing.

MR. NASSIKAS: Your Honor, just for the Court's

attention, there is one other motion similar to the fees motion that we believe also would benefit from an evidentiary hearing, that is the 6(e) motion.

THE COURT: Yes, I knew that. I have that one in mind.

MR. NASSIKAS: And we never have had an oral argument on that motion at all. But we do believe it shows a parallel pattern of coercive Government behavior that should be reviewed in an evidentiary hearing.

THE COURT: All right, I will have that in mind, but I am pretty well up to date on that motion.

MR. NASSIKAS: Fine. Thank you, Your Honor.

THE COURT: All right. I will take a recess now. We will reconvene in 15 minutes.

Mr. Wood, would you advise counsel out there that it will be about 5:30 before we begin that under seal hearing.

THE MARSHAL: Yes, sir.

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

THE COURT: All right, did I allow sufficient time, Mr. DiGregory, Mr. Lowell, Mr. Nassikas? What have you got? Mr. Reilly.

MR. REILLY: Yes, Your Honor.

MR. DiGREGORY: Mr. Reilly will handle this.

MR. REILLY: Just to reiterate, we are going to get

you a draft order. We have been working together with defendants and the Government to minimize the disagreements amongst us. There are still a few. And when you get it, you will see where we disagree.

So, there will be things for you to resolve, in addition to whether you agree with what we agree on.

THE COURT: Well, didn't I resolve the basic issues in the rulings I made?

MR. REILLY: To a large extent we believe you have. There are some areas which you can imagine where we disagree about what was said, the meaning of what was said or how it should be written in the order.

THE COURT: All right.

MR. REILLY: So, there are some minimal areas.

THE COURT: Do you have the transcript?

MR. REILLY: There are transcripts which we will provide to the Court and highlight where in the transcripts the disagreements lie.

THE COURT: That will be help very helpful.

MR. REILLY: And we are hopeful to get that to the Court by December 8, but we have just received transcripts from some of the hearings. So, our meet and confer process is continuing.

THE COURT: All right.

MR. REILLY: We have talked now about what the next

step should be as far as blocking out time. And we submit that we should block out time for the 6(c) hearing the week of March 12 in 2007. And the way we came to that date is it flows backwards to the issuance of the 6(a) order.

The March 12 6(c) hearing would allow the Court, if we got the Court's order by January 16 of 2007, that, we believe, would be enough time to allow all the pleadings and all the processes that need to happen to allow a fruitful 6(c) hearing to occur.

And then going back from when you issue the order in January to setting a date prior to that on the calendar for planning purposes, if you want to bring us in, if you have questions about what is going to be in the order about our disagreements, and maybe setting that late in December or early in January, before the middle of January, after you receive the draft order in the next week or two.

THE COURT: All right. Go on.

MR. REILLY: And then--

THE COURT: That I don't think I will set until I see everything. And then you will just have to come in sometime probably in the first week in January, if I need it.

MR. REILLY: In our discussions--

THE COURT: I have trials already set in January.

MR. REILLY: Just given the travel schedules for that period of time, we are hopeful that maybe the Court would

set a date. And then if you don't need us or you want to reset it, we can do that, but that we can plan travel for the holidays.

THE COURT: January 18 is the earliest I could do it. So, January 18 for a possible CIPA hearing.

MR. REILLY: Well, it wouldn't be a CIPA hearing. It would be a hearing where you would call us in to talk to us about what the draft order is going to say.

THE COURT: Well, that is CIPA.

MR. REILLY: Everything flows from when the CIPA order is issued. And we were trying to get the 6(c) hearing before your April trial.

So, depending upon the timing of that, it might be difficult to get the March date if the order doesn't come before January 18. Everything flows from when you actually issue the order.

THE COURT: I take it I will have the order on the 8th of December?

MR. REILLY: That's our target. We are still working through all the transcripts. We are trying to minimize the disagreements so that when you get it, you don't have to do as much.

THE COURT: Let me see the 2006 book.

MR. LOWELL: Your Honor--

THE COURT: Wait a minute, I have this here.

MR. REILLY: And at worst, we will have the draft order to you on December 15.

THE COURT: Well, we can tentatively set it then for the 21st of December.

MR. LOWELL: Your Honor, one question is, if we were successful in getting it to the Court, the 6(a) draft with the highlighted where we don't agree, by the 8th, that might give the Court enough time to fashion its questions if it has any.

If past is prologue, it is probably more likely that this draft order will be submitted to the Court on the 15th.

THE COURT: That's why I set the 21st.

MR. LOWELL: So, that gives the Court enough time?

THE COURT: Yes.

MR. LOWELL: The 6(c) part that we are doing our best at sort of depends, and we don't know how many agreements or disagreements the Court will have us, on the Court having enough time for the Court to issue its 6(a) order on or about, and we can't tell, of course, but assuming we could guess, giving you it on the 15th, we were hoping the Court might make its ruling by January 15.

If it does, then the dates that Mr. Reilly was talking about about what would happen next, they need four weeks, we need X weeks, then there is the 6(c) hearing--

THE COURT: Yes, he said March 12.

MR. LOWELL: That, obviously, depends on when the

Court issues its 6(a) order. I don't know if we have given the Court enough time by saying-- We are assuming for our schedule a January 15 or so Court 6(a) order. That may or may not work.

THE COURT: All right. Well, that's I think a sensible observation.

Let's see now. If I get it on the 8th or the 15th, and I should have no difficulty, even if I require a hearing on the 21st, I should be able to resolve everything soon thereafter. Certainly before January 15.

MR. LOWELL: Okay.

THE COURT: Now, I have before me unresolved motions, some of which are dispositive. So, those will continue to go into the mix. And they could be a show stopper in here somewhere.

Now, what would happen after I get it done by the 15th? Then what?

MR. REILLY: The Government--

THE COURT: Then you need time.

MR. REILLY: We need four weeks to file our 6(c) motion.

THE COURT: So, that would be filed when?

MR. REILLY: February 12.

THE COURT: And then--

MR. REILLY: The defendants would then have--

MR. LOWELL: We would probably need the same, Your Honor. The Government has had some notion of what they are going to substitute even without your 6(a). We have no idea.

So, just to be safe, if we were going to try to make sure we don't come back unnecessarily, you should give the defendants the same four weeks you gave the Government. Which would then put our written response --

THE COURT: All right.

MR. LOWELL: -- to their 6(c) request for institution on March 12.

THE COURT: All right. So, there is no hearing on March 12?

MR. LOWELL: Right. Now that we have started mapping this out, it would be defendants' 6(c) filing on March 12.

THE COURT: And take these dates down because I am now in a position where I am too busy to do the order, I am going to have you-all do the order and submit it.

MR. LOWELL: So then if that were the case, the next step would be defendants' 6(c) submission on no later than March 12.

THE COURT: All right. Now we need a hearing date.

MR. LOWELL: And now we need hearing date. And we are bumping up against your April trial.

THE COURT: The hearing date could easily be in

March.

MR. LOWELL: Yes. And again, if past is prologue, depending upon how much time you need to read the two 6(c)'s, I think it would be wise to know that this is a multiple day hearing. Mr. Reilly has informed us that he thinks it wouldn't take less time than the 6(a) hearing.

THE COURT: Well, then we should set it for, begin on March 26. And I will put aside three days for it. March 26, and I will put aside three days for it.

All right, what's next on the list?

MR. WEISS: Your Honor, I am sorry for interrupting you. I think I am going to be carrying the laboring oar on this issue for Mr. Weissman. And starting that week we have a prepaid family trip--

THE COURT: All right. I will accommodate that.

MR. WEISS: -- in Israel for Passover.

THE COURT: Yes, I will accommodate that. But we are going to have to need to move it up. What about March 20?

MR. NASSIKAS: I mean, Your Honor, we could accommodate that. That would be the week, if it is possible, to be away, that's a spring break for the local schools.

So, we are never going to make it a perfect week for any of us, I am sure. But Mr. Weiss' calendar is more important.

THE COURT: Well, if it is March 12, the 15th is a

Holiday, isn't it?

MR. NASSIKAS: I don't see March 15 being a holiday.

THE COURT: Maybe it isn't. Just a moment.

No, it's not.

Let's begin the hearing on March 14 and let's see if we can get it done. That accommodates counsel on both problems.

All right. Then where does that leave us for blocking off trial dates?

MR. REILLY: We don't believe at this point in time we are able to accurately tell the Court when we could block off time for a trial given that the next thing that happened is we do all this all over again, we have the hearings, we have the back and forth on the order, we have the final resolution of that.

So that it's not, in our view, efficient to block off time for trial at this point. Rather to get further along in the process and see how things are going in the 6(c) process to figure out the right time for trial.

THE COURT: Mr. Lowell, is that your view too?

MR. LOWELL: I think it is, reluctantly, Your Honor. Because, assuming the world's most efficient system in what you have just said, if you have a hearing on March 14-- And let's assume that we have a lot of your time, and let's assume that we could squeeze it into three or four, within the period

of three or four trial days, hearing days.

So, that means we would get your rulings from the bench, just as we did in the 6(a) process, we will have taken notes, we will hopefully get as expeditious transcripts as we can, and then it will take us a bit to fashion where we agree or disagree on a 6(c) order.

And let's again assume the best, we would probably be in a position to submit to you the equivalent of what we are now going to do in a week or two on 6(a), we will do it 6(c), when would that happen? That would be first week of April optimistically, if nothing glitched.

So then if we were able to get you a draft 6(c) order in the beginning of April when you are in trial, I don't know how long the Court will have to review it, make its decision. So then somewhere in mid to late April you will issue your final 6(c) order.

And then the Government will have a decision to make. And I don't know how long it will take to make that decision, of course, because we don't know what your order will be.

So then we are saying that, okay, depending, if you block ed out a time, you wouldn't be able to begin to block out a time on the 6 issues until the beginning of May.

Now, in that time we also have other hearings, other motions. And I know you have a busy court schedule.

So, I think what we are saying is if you wanted to have a target date, the best we could probably tell you now is, unfortunately, we don't see that this can start as a trial until the very beginning or middle of May. But I am not even sure that the Government thinks that's a wise thing to say given the uncertainty of the 6(c) process.

And I can't disagree with them.

THE COURT: All right. I take your-- At this point I am going to preserve May and June.

And that doesn't mean that anything is set. It simply means I am going to preserve those months because in there somewhere I don't think this case should take two months by any means to try. It will be tried in far less time than that, but I want to be sure that we get it in as soon as we can.

So, I am going to preserve those months.

I want counsel to prepare a scheduling order consistent with what we have reviewed today.

The hearings that we scheduled, refresh my recollection, Mr. Lowell or Mr. Reilly, there was one in--

MR. LOWELL: There is a hearing, if you need it, to call the parties together on December 21 to talk to us about the draft 6(a) order.

THE COURT: All right, let's make that at, let's make that at 10 o'clock.

What's the next one?

MR. LOWELL: The next hearing that you have down for us is the hearing on the 14th of March to begin the 6(c) or maybe complete the 6(c).

THE COURT: That begins at 10 o'clock.

MR. LOWELL: How many days, Your Honor, does your calendar permit that week?

THE COURT: That's a Wednesday?

MR. LOWELL: That is a Wednesday.

THE COURT: That is probably a Wednesday, Thursday and a Friday afternoon.

MR. LOWELL: Start Wednesday at 10, but then Thursday starting in the afternoon or--

THE COURT: No, no. Starting all day on Wednesday. We will either start at 9:30 or whenever. It depends. I sometimes do pleas and other things between 9 and 10.

MR. LOWELL: So, should we say 10 for the order?

THE COURT: Say 10 for the order.

MR. LOWELL: And then should we block full the next days, Thursday and Friday, for the 6(c) hearing?

THE COURT: No, Friday afternoon only.

MR. LOWELL: Friday afternoon only?

THE COURT: Yes.

MR. LOWELL: So we will start all day on the 14th, and then we will continue at 2 o'clock? Is that 2 or 1 p.m.?

THE COURT: On Friday? 2 o'clock.

MR. LOWELL: Friday at 2. I am thinking we don't have it right, so let me say it again.

We will have a full day of the 6(c) hearing on March 14. And if the Court would advise what the order should say for the 15th.

THE COURT: That's the Thursday?

MR. LOWELL: That's the Thursday.

THE COURT: The full day.

MR. LOWELL: Full day. And then on Friday--

THE COURT: If we need it on Friday, 2 o'clock on.

MR. LOWELL: Now, we understand. And that is the hearing schedule that we have now just agreed to.

THE COURT: All right. And put in the other deadline dates that you are focusing on as well in this order so that--

MR. LOWELL: Yes, when they have to submit their 6(c) and we would submit our 6(c).

THE COURT: Precisely.

MR. LOWELL: We will say that the 6(a) order will be submitted to the Court no later than December 15.

THE COURT: In the meantime, of course, I will go back to work on these motions and consider whether evidentiary hearings are needed on these that I discussed with you today.

MR. DiGREGORY: Your Honor, for the purposes of

drafting your scheduling order, would you like us simply to note that the CIPA Section 6(c) hearing begins on the 14th at 10 a.m. and just for our calendars and your calendars understand that we will be back the next day and Friday if necessary? Or do you like all three days reflected?

THE COURT: Go ahead, so the Clerk's Office knows that I am engaged, put all three days.

MR. DiGREGORY: Yes, sir.

MR. REILLY: Those will be closed hearings, Your Honor.

THE COURT: Those would be closed hearings. And we will need this gentleman to sweep the courtroom and do everything else.

Anything else to be accomplished-- There is much to be accomplished, but we cannot do it all today.

Mr. Prabhu, are your people here?

MR. PRABHU: It is just me, Your Honor.

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

Mr. Nassikas, did you have something?

MR. NASSIKAS: Just, Your Honor, one final matter.

Our understanding was that I think in mid-September the Government may have reported in response to the Court's request for a leak investigation. We have never heard anything and don't know if there is anything that can be

shared with us.

We did hear from CBS News--

THE COURT: It's ongoing. I know about it.

MR. NASSIKAS: Okay. But we have--

THE COURT: I am watching it.

MR. NASSIKAS: I mean, just for the Court's benefit, we did hear from some senior officials at CBS News that no one at CBS News has been contacted.

THE COURT: Oh, I know what's happening.

MR. NASSIKAS: Okay. Thank you, Your Honor.

THE COURT: All right. Thank you.

MR. LOWELL: Thank you for your time, Judge.

MR. DiGREGORY: Thank you, Your Honor.

HEARING CONCLUDED

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

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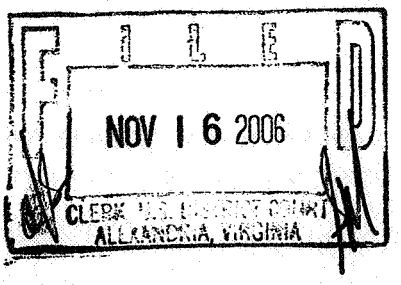
Norman B. Linnell, RPR, CM, VCE

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



UNITED STATES OF AMERICA	)	
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v.	)	**Case No. 1:05cr225**
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	)	
STEVEN J. ROSEN	)	
	)	
and	)	
	)	
KEITH WEISSMAN	)	

ORDER

Now before the Court is the government's motion to clarify certain aspects of the August 9, 2006 memorandum opinion (Docket No. 351), denying the defendant's constitutional challenges to 18 U.S.C. § 793. For the reasons stated from the bench,

The motion is **DENIED.**

The Clerk is directed to send a copy of this Order to all counsel of record.

Alexandria, Virginia
November 16, 2006

T. S. Ellis, III
United States District Judge

383