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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

_____)	
UNITED STATES OF AMERICA)	
)	
v.)	Criminal Docket No. RDB-10-181
)	
THOMAS ANDREWS DRAKE,)	
Defendant)	
_____)	

Baltimore, Maryland
March 31, 2011
9:36 AM to 1:28 PM

**THE ABOVE-ENTITLED MATTER CAME ON FOR
MOTIONS HEARING
BEFORE THE HONORABLE RICHARD D. BENNETT**

A P P E A R A N C E S

On behalf of the Government:

William Michael Welch, II, Assistant U.S. Attorney
John Park Pearson, Assistant U.S. Attorney

On behalf of the Defendant:

James Wyda, Federal Public Defender
Deborah L. Boardman, Assistant Federal Public Defender

Also present:

FBI Special Agent Laura Pino
Lisa Turner, NSA Representative
Ethan Andreas, NSA Representative

Reported by:

Martin J. Giordano, RMR, CRR, FOCR
U.S. Courthouse, Room 5515
101 West Lombard Street
Baltimore, Maryland 21201
410-962-4504

1 PROCEEDINGS OF MARCH 31, 2011

2 **THE CLERK:** All rise. The United States District
3 Court for the District of Maryland is now in session, The
4 Honorable Richard D. Bennett presiding.

5 **THE COURT:** Good morning, everyone.

6 **THE CLERK:** Good morning, Your Honor.

7 **THE COURT:** Good morning, Martin, Martina.

8 **THE REPORTER:** Good morning, sir.

9 **THE CLERK:** Good morning, sir.

10 **THE COURT:** Madam Clerk, if you'll call the case,
11 please.

12 **THE CLERK:** Yes. The matter now pending before this
13 Court is Criminal Docket Number RDB-10-0181, *United States of*
14 *America versus Thomas Drake*. Counsel for the Government is
15 William Welch, John Pearson. Seated behind them is
16 Lisa Turner, Ethan Andreas, and Laura Pino from the FBI.
17 Counsel for the Defendant is Deborah Boardman and James Wyda.

18 This matter comes before the Court for a motions
19 hearing.

20 **THE COURT:** All right. Good morning to everyone.
21 You all may be seated. Good morning, Mr. Welch, Mr. Pearson.

22 **MR. PEARSON:** Good morning, Your Honor.

23 **THE COURT:** And thank you for the long trek here to
24 Baltimore in the typical rainy-day traffic for Baltimore.

25 And, Mr. Wyda and Ms. Boardman, you have a slightly

1 shorter commute, but nice to see you.

2 Good morning, Mr. Drake. Nice to see you, sir.

3 **THE DEFENDANT:** Good morning.

4 **THE COURT:** This is the non-classified motions
5 hearing scheduled throughout the day today, and we have quite
6 a big agenda here to go through, and what I propose to do,
7 counsel, is go one by one through certain motions and hear
8 argument from either side and, as to some, I can rule from the
9 bench. As to others, I'll take it under consideration and
10 render an opinion as quickly as possible, by next week
11 certainly.

12 The first matter that is before me that I think I
13 need to address is that there was a motion filed on Tuesday of
14 this week, a Motion for Leave to File an *Amicus Curiae* Brief,
15 filed by the Government Accountability Project, and is there
16 any representative of that organization here today?

17 **MS. RADACK:** Yes, sir.

18 **THE COURT:** Yes, and your name is?

19 **MS. RADACK:** Jesselyn Radack.

20 **THE COURT:** All right. Ms. Jesselyn Radack, you are
21 the Homeland Security and Human Rights Director; is that
22 correct?

23 **MS. RADACK:** That's correct.

24 **THE COURT:** All right. Counsel, let me just address
25 this quickly. We have a lot of other things to go through.

1 I'll be glad to hear from the Government. I'm inclined to
2 grant the motion to file the brief. I've read the brief. For
3 reasons I think we can flesh out throughout the day today,
4 it's of limited utility to the Court, but I don't know that we
5 need to make a big issue of it. No disrespect to the
6 Government Accountability Project Group, and, for reasons that
7 obviously we're going to be dealing with throughout the day
8 here on the nature of what this case is and what it is not, in
9 terms of the argument that the First Amendment applies to this
10 case, this is not a disclosure case; this is a retention case.
11 The Fourth Circuit opinion in *Morison* is very much dispositive
12 of many of these issues.

13 So I'm not inclined to spend a lot of time debating
14 whether they can file this or not, but I'll be glad to hear
15 from the Government if the Government has strong feelings
16 about it. I've read it. Indeed, Defense counsel has noted,
17 while they've launched a constitutional attack on the
18 Indictment with respect to the submissions as to the Motion *in*
19 *Limine*, the Defense counsel has specifically said this is not
20 necessarily a First Amendment case in the point of view of the
21 Defense theory. So, again, no disrespect to the Government
22 Accountability Project, and I'm sure all the fine work they
23 do, but, as to this, it's of limited use to me, but,
24 Mr. Welch, if you or Mr. Pearson want to be heard on this with
25 respect to barring the submission, I don't know that that's

1 really an answer here on this.

2 **MR. WELCH:** We have no interest in doing that.

3 **THE COURT:** All right, that's fine. So I'm going to
4 grant the motion, Ms. Radack, and thank you for your interest
5 here, and the Motion for Leave to File the *Amicus* Brief, Paper
6 Number 92, will be granted for the reasons indicated on the
7 record here today. It's of some assistance to the Court, and
8 certainly, from the point of view of the Government
9 Accountability Project, this is purely a First Amendment case.
10 I don't believe that's the case, but I've certainly read it,
11 and I hope to benefit from the thoughts that were presented.
12 So the Motion to Submit the *Amicus* Brief will be granted.

13 All right. With that, we have essentially a series
14 of what are deemed to be the non-classified matters, and I see
15 Ms. Christine Gunning, the Security Officer, is here in court.
16 Good morning, Ms. Gunning. I meant to say hello to you
17 earlier.

18 **MS. GUNNING:** Good morning, Your Honor.

19 **THE COURT:** She obviously is a very important person
20 here. I have no classified material up here at the bench so
21 we don't err into getting into those waters, and, with that, I
22 think, according to my review -- and, if I'm mistaken or I've
23 missed anything, tell me -- we have the following pending
24 motions: Motion for Bill of Particulars, Paper Number 49; a
25 Motion to Dismiss Count 2 of the Indictment based on

1 Unclassified Nature of Regular Meetings Document, Paper
2 Number 50; we have Paper Number 51, a Motion for a Declaration
3 of Sections 5 and 6 of the Classified Information Procedures
4 Act, better known as CIPA, are Unconstitutional, filed by the
5 Defendant obviously -- all these are filed by the Defendant;
6 Motion Number 52, Motion to Dismiss Counts 1, 2, 3, 4, and 5
7 of the Indictment because it is contended that the charging
8 statute, 18 United States Code § 793(e) is unconstitutionally
9 vague and overly broad. That's Paper Number 52 that's
10 pending.

11 We have Paper Number 53, the motion by the
12 Government, a Motion *in Limine* to Preclude Evidence of
13 Necessity, Justification, or Alleged Whistleblowing, filed by
14 the Government; Paper Number 54, the Government's Motion *in*
15 *Limine* to Exclude Any Evidence Or Defense Attacking the
16 Legality of the Regulatory Scheme Relating to the Disclosure
17 of Classified Information; Paper Number 55, the Government's
18 Motion *in Limine* to Bar Reference and Admission of Published
19 Newspaper Articles; Paper Number 56, a Motion *in Limine*,
20 Notice of *Ex Parte*, an under-seal filing that we'll leave on
21 the shelf for a while here; and then we have another matter
22 for this open hearing, Paper Number 57, a Motion for Hearing
23 Held in *Camera* Pursuant to Sections 6 and 8 of the Classified
24 Information Procedures Act as to the Defendant Thomas Drake,
25 and then I think that they are the only open motions that

1 we're addressing here starting today.

2 Is that correct from the point of view of the
3 Government, Mr. Welch?

4 **MR. WELCH:** I think one open motion might be 76,
5 which was the request for discovery of the DOD IG documents.

6 **THE COURT:** Yes. Yes. I'm sorry. That's correct.
7 Thank you, Mr. Pearson, as well. That's correct. That is an
8 open motion.

9 All right. With that addition, is that a correct
10 procedural summary from the point of view of the Defendant,
11 Mr. Wyda?

12 **MR. WYDA:** Yes, Your Honor.

13 **THE COURT:** Okay. All right. So we are ready to
14 proceed. Let's first go to the Paper Number 49, the Defense
15 Motion for a Bill of Particulars, Paper Number 49. I read
16 your submissions, but I'd be glad to hear from you, Mr. Wyda,
17 and then I'll hear from the Government. Mr. Wyda or
18 Ms. Boardman. Whatever you --

19 **MR. WYDA:** Your Honor, if it's okay, we're going to
20 bounce back and forth on you a little bit. This is --

21 **THE COURT:** That's fine. However you want to do it.

22 **MR. WYDA:** -- Ms. Boardman's turn.

23 **THE COURT:** That's fine. You can stay there at the
24 table, or you can use the podium. Whatever you desire.

25 **MS. BOARDMAN:** I think I'll use the podium --

1 **THE COURT:** That's fine.

2 **MS. BOARDMAN:** -- because I have so many papers
3 here.

4 **THE COURT:** Okay. Sure.

5 **MS. BOARDMAN:** Your Honor, we have filed a Motion
6 for a Bill of Particulars on two of the counts in this
7 ten-count Indictment, and those two counts are the obstruction
8 of justice count, which is Count 6, and one of the four false
9 statements counts, and that false statement count alleges that
10 Mr. Drake lied to the FBI when he told them he never provided
11 Reporter A with classified information.

12 Your Honor, the basis for our request for a bill of
13 particulars is primarily that the obstruction of justice count
14 is extremely broad in time -- it spans a period of 1.5 years;
15 in the number of alleged acts, which is unknown actually; the
16 number of documents involved -- as Your Honor knows, in
17 discovery, the amount of documents that has been produced is
18 in the thousands. The pages is in the tens of thousands.

19 The types of documents involved in this obstruction
20 of justice count include e-mails, unclassified/classified
21 documents, documents in hard copy, and handwritten notes, and
22 also the obstruction is with respect to two different
23 investigations -- one into general media leaks, and one into a
24 leak to *The Baltimore Sun*.

25 Your Honor, we understand the Government's argument

1 that discovery may cure deficiencies in the Indictment. I
2 mean, that's black-letter law. The problem here is the
3 discovery has actually made this more challenging for us. The
4 discovery is voluminous. What we're asking for in this bill
5 of particulars for this particular count is what we've
6 identified in the motion, which is to specify which documents
7 were allegedly destroyed --

8 **THE COURT:** Well, you have not alleged that the
9 counts are defective in any way, have you?

10 **MS. BOARDMAN:** As far as parroting the elements of
11 the statute, no. The Government has done that, yes, Your
12 Honor. It's more, in order for us to adequately defend both
13 of these -- and I'll get to the false statement count again,
14 because I think that's actually different than the obstruction
15 count, but, in order for us to adequately defend these two
16 charges, we need to know more from the Government, and, Your
17 Honor, that's what we're asking.

18 We're not asking for them to map out their case to
19 us. We're asking for them to be a little more specific as to
20 how the investigations were impeded or obstructed, what
21 documents they allege Mr. Drake destroyed.

22 Now, the Government has responded to that point by
23 saying, "Mr. Drake knows what documents he destroyed." That's
24 just not a fair response. If the Government is going to
25 allege he destroyed documents, they need to identify for us

1 what documents he allegedly destroyed. To the extent they're
2 unknown to anyone or to the Government, there is nothing we
3 can do about that; I understand that.

4 Your Honor, I'd like to move to Count 7. Count 7 is
5 a false statement count, and it's actually been challenging
6 for us to prepare a defense to this count. This count alleges
7 that Mr. Drake lied to the FBI on November 28th, 2007, by
8 telling them that he did not provide classified information to
9 Reporter A. The word "classified information" is not defined
10 in the count.

11 Now, what we would like to know -- and I can't
12 imagine this would be hard for the Government to identify --
13 is what the classified information is that they claim he
14 provided to the reporter. If it is limited, Your Honor, to
15 two of the documents that are the subject of willful retention
16 counts, if it's just, "Regular Meetings," and, "What a
17 success," then that's fine. If the Government can confirm
18 that, I will withdraw my motion with respect to that count,
19 and no bill of particulars is necessary, but I can't imagine
20 it would be at all burdensome for the Government just to
21 identify what the classified information is that he allegedly
22 gave to Reporter A; otherwise, we can't defend this false
23 statement count.

24 Just to expand on that a bit, Your Honor, when we
25 talk about classified information, it could be a document, or

1 it could be verbal communication. There is, at the very
2 least, a binder full of classified documents in the SCIF, so I
3 would just ask the Court to issue an order requiring a bill of
4 particulars for the false statement count, Number 7, and also
5 for Count 6, the obstruction of justice count.

6 I'm happy to take any questions from the Court.

7 **THE COURT:** Yeah. Clearly, generally, as you're
8 well aware, the law is very much against you on this point, I
9 think, as a general proposition, Ms. Boardman. That doesn't
10 mean Defense counsel should be precluded from filing motions
11 for bill of particulars, but, as I read through the
12 Indictment, as I look through your request for additional
13 information, and then I look at the Indictment, for example,
14 Paragraph 14 of the Indictment, which is incorporated by
15 reference as to both Counts 6 and 7, it seems fairly well
16 detailed in terms of the allegation.

17 So, as to both of those counts, Count 6 and 7 --
18 Count 6, the obstruction of justice count, and Count 7, the
19 false statement count -- there is Paragraph 14, among
20 Paragraphs 1 through 14 incorporated by reference, and
21 Paragraph 14 is fairly specific, and, in fact, Count 7
22 specifically charges the very -- the exact date on which the
23 false statement is alleged to be made, so I'm not really --

24 **MS. BOARDMAN:** Your Honor, if I can respond to those
25 points.

1 **THE COURT:** Sure, go ahead.

2 **MS. BOARDMAN:** The first is I agree with Your Honor
3 that the law is not in our favor. We readily acknowledge
4 that --

5 **THE COURT:** Sure.

6 **MS. BOARDMAN:** -- which taking them into
7 consideration is why we filed the motion with respect to two
8 of the counts. We're not on a fishing expedition. The next
9 point is Paragraph 14 expands a bit on Count 6; I will admit
10 that, Your Honor. Paragraph 14 does nothing to shed light on
11 Count 7, which is: What classified information did Mr. Drake
12 provide Reporter A according to the Government? That is
13 absent from Paragraph 14. So, to the extent Paragraph 14
14 cures any defect in Count 6, which I still don't think it
15 does -- and I can talk about that in a minute -- it does
16 nothing with respect to Count 7. We know the date on which he
17 allegedly made the statement. We just don't know the
18 information, and I am struggling to find why that is difficult
19 for the Government to identify it for us.

20 Like I've said, if it's just the two documents, I'm
21 happy to close my book and move on to the next motion, but, if
22 it's more than that, we'd like to know what it is.

23 **THE COURT:** All right. Well, thank you,
24 Ms. Boardman.

25 **MS. BOARDMAN:** Thank you.

1 **THE COURT:** Thank you very much.

2 And, with that, Mr. Welch or Mr. Pearson, I'd be
3 glad to hear from you.

4 **MR. WELCH:** Thank you, Your Honor.

5 In fact, the law is against Ms. Boardman on this
6 issue, and really what the fundamental problem is with respect
7 to this motion is it is a fishing expedition, and it is a
8 motion that goes to the heart of revealing the Government's
9 theory of the case. In particular, as it relates to the
10 request for Count 6, the questions asked of the Government are
11 incredibly exhaustive. I mean, the first question,
12 Question 7(a), asks us, two months in advance of trial, to
13 list out all of our exhibits, to then identify whether all of
14 those exhibits have been altered, destroyed, mutilated in any
15 way.

16 The second question asks us to identify the time and
17 date of destroyed documents, and whether a destroyed document
18 is classified or unclassified. How are we supposed to know
19 whether a destroyed document is classified or unclassified?
20 And so the request --

21 **THE COURT:** I think you don't need to spend a lot of
22 time as to Count 6, Mr. Welch. Just if you'll focus on
23 Count 7, because Count 7 clearly has great specificity. On a
24 specific date, it's alleged that there is a false statement
25 made to agents of the Federal Bureau of Investigation, and I

1 guess the real inquiry there I think Ms. Boardman is focussed
2 upon is just if there is a particular statement, document, if
3 there is any particular scope of exactly what the alleged
4 false statement was, is her question.

5 **MR. WELCH:** Yeah, and they were able to identify the
6 two that are implied, two classified documents, and then we've
7 given them all the underlying FBI 302s of his interviews where
8 he talks about the classified information or the information
9 that he believed could be classified that he imparted to
10 Reporter A.

11 **THE COURT:** So your response is that there are two
12 classified documents that you, in fact, have specified?

13 **MR. WELCH:** That's right.

14 **THE COURT:** Okay.

15 **MR. WELCH:** And they found them without any problem.

16 **THE COURT:** Okay.

17 **MR. WELCH:** And then there is the statements that he
18 made to the FBI --

19 **THE COURT:** In connection with those two documents?

20 **MR. WELCH:** -- in which he -- and there you have it.

21 **THE COURT:** All right. All right. Well, thank you,
22 Mr. Welch.

23 Ms. Boardman, if that's the case, apparently the
24 Government is saying that you have them, that there is no
25 secret here. Obviously we're not going to discuss them in

1 open session here, but there are two classified documents, and
2 there are responses in connection with those two classified
3 documents. So where is there lack of notice or insufficient
4 specificity for you to defend your client on that?

5 **MS. BOARDMAN:** Your Honor, I think there still is.
6 If I understood Mr. Welch correctly -- and I'm sure he'll
7 correct me if I'm wrong -- there are the two documents we've
8 identified -- "What a success," and, "Regular Meetings" -- and
9 then what I understand him to say is there are other documents
10 possibly, and there is other information referenced in
11 Mr. Drake's 302s. It's that other, amorphous, undefined world
12 of allegedly classified information with which we seek a
13 little more clarification. These 302s are not two pages long.
14 They are extremely lengthy. These three sessions with the FBI
15 went on for several hours -- I think a total of 19 hours, in
16 fact -- and so the notion that it's just --

17 **THE COURT:** Clearly the charge in Count 7 relates
18 just to the false statements allegedly made on November 28th,
19 2007.

20 **MS. BOARDMAN:** That's a good point, Your Honor.
21 Even that one, I think that 302 is 25 pages long, and I'm sure
22 the Government will also submit other evidence from the two
23 subsequent meetings with the FBI that relates to that. So
24 even that 22-page or 25-page 302 does not identify with
25 specificity the alleged classified information. All we're

1 looking for is for them to tell us the documents that he
2 allegedly provided her. To the extent it's just oral
3 communications and those are described in the 302, we will go
4 with the 302.

5 **THE COURT:** All right. Well, thank you,
6 Ms. Boardman, and certainly, even though the law is very much
7 against a criminal defendant in terms of what the Government
8 is and is not required to lay out with specificity, the bill
9 of particulars, I think, is really without merit here, and
10 I'll just rule from the bench on that.

11 The Indictment clearly alleges the essential
12 elements of the crime. I've read carefully Count 6 and 7.
13 I've noted the incorporation by reference as to Counts 1
14 through 14 and particular specificity found in Paragraph 14 --
15 they're not count -- Paragraphs 1 through 14, and, as to
16 Count 6 and 7, those paragraphs were incorporated by
17 reference.

18 I've looked at Paragraph 14. Clearly, there is
19 sufficient information provided to the Defendant under the law
20 to permit the Defendant to prepare a defense and to plead
21 double jeopardy as to any future prosecution for the same
22 offense, which is the criteria that must be established, as is
23 well established, and I know Defense counsel recognizes that a
24 defendant is not entitled to a bill of particulars as a matter
25 of right, and the question becomes whether or not the

1 Indictment is sufficient, as I've said, to permit the
2 Defendant to prepare a defense and even be able to plead
3 double jeopardy in a subsequent matter.

4 It's really not meant as a discovery tool. There
5 has been exhaustive discovery here, and I'm satisfied in terms
6 of the number of visits that Defense counsel have been able to
7 make to the SCIF room, the secured room for classified
8 information here at the courthouse, and satisfied hearing
9 argument here this morning that there is focus upon two
10 classified documents and an FBI 302 of some 25 pages in length
11 perhaps relating specifically as to Count 7 and the false
12 statement count. And 25 pages, I would note for the record,
13 pales in comparison to the volume of material here as we lift
14 heavy notebooks back and forth. So the pleadings in this case
15 are being measured by the pound; not by the page here.

16 So I'm satisfied the Defendant has received full
17 discovery in this case. There is just no defect in this
18 Indictment that would warrant a granting of the bill of
19 particulars, so, for those reasons, Paper Number 49 will be
20 denied for the reasons stated on the record.

21 All right. And so, with that, we now have Paper
22 Number 50, the Defendant's Motion to Dismiss Count 2 of the
23 Indictment based on unclassified nature of what is referred to
24 as a "Regular Meetings" document, and, with that, I'll be glad
25 to hear from you, Ms. Boardman or Mr. Wyda.

1 **MS. BOARDMAN:** It's me again, Your Honor.

2 Your Honor, we have filed a Motion to Dismiss
3 Count 2. Count 2 alleges that Mr. Drake willfully retained a
4 document containing information relating to the national
5 defense in violation of the Espionage Act, § 793(e). It
6 alleges that the document is classified. The document at
7 issue in Count 2 is entitled, "Regular Meetings." It's a
8 two-page meeting schedule related to an NSA program.

9 There is no dispute, Your Honor, that this two-page
10 document was posted on the agency-wide intranet, and
11 significantly, it had classification markings on it. Those
12 classification markings were "Unclassified." It said,
13 "Unclassified," in the header and the footer on both pages of
14 the document. Mr. Drake didn't put those markings there.
15 Those markings were placed there by the person who created the
16 document and posted it on the intranet.

17 **THE COURT:** Ms. Boardman, if I can, by the way, a
18 little bit of a housekeeping matter.

19 **MS. BOARDMAN:** Yes?

20 **THE COURT:** There was some suggestion that the
21 document that we're going to be discussing here on your motion
22 as to Count 2 that there was a violation by the Government
23 under *Brady versus Maryland*, the 1963 opinion, in terms of the
24 prosecution having not essentially divulged that document, and
25 then, in my reviewing the Government's response, the

1 Government has suggested that, in fact, this document was
2 provided to Defense counsel some six months ago, and, if there
3 is just a mistake, that's fine. I just want to clarify that.
4 There is a suggestion in the footnote that there was a *Brady*
5 violation, and, based upon my review of the Government
6 response, that doesn't appear to have been the case.

7 **MS. BOARDMAN:** I'm happy --

8 **THE COURT:** I know that the documents are voluminous
9 here, and, if it's just a mistake, that's fine. I'm not
10 taking you to issue. Do you still believe there was a *Brady*
11 violation here?

12 **MS. BOARDMAN:** Your Honor, here is what I think: I
13 think it's more nuance than I think Your Honor's current
14 impression, and I can tell you what happened and how it
15 unfolded, because I think it's responsive to your question.

16 **THE COURT:** Well, I think that you've indicated --

17 **MS. BOARDMAN:** We do not have the document --

18 **THE COURT:** It's a March 22, 2010, memorandum --

19 **MS. BOARDMAN:** Correct.

20 **THE COURT:** -- and you suggested that it was not
21 provided to you or Mr. Wyda until February 4th, some ten
22 months after the Indictment was issued and that it is *Brady*
23 material.

24 **MS. BOARDMAN:** Correct.

25 **THE COURT:** And, under *Brady versus Maryland*, in

1 terms of having the effect of being exculpatory as to the
2 Defendant, but, having reviewed the Government's response that
3 was under seal, specifically there is a notation that the
4 document was, in fact, was among the discovery and was made
5 available to the Defense on September the 3rd.

6 Have I correctly summarized your response just on
7 that point, Mr. Welch? I think I have, haven't I?

8 **MS. BOARDMAN:** I think so.

9 **MR. WELCH:** Yes, the document --

10 **THE COURT:** I'll hear from your argument on this
11 later, but I just wanted to clarify the matter.

12 **MR. WELCH:** Right.

13 **MS. BOARDMAN:** I'm happy to clarify. Your Honor, we
14 did not receive that document until February the 4th. The
15 first time we ever saw that memorandum was on February 4th.
16 What the Government has responded -- and they actually put it
17 in a public filing. It's in their opposition to the Motion
18 for a Bill of Particulars, so I feel comfortable talking about
19 that.

20 **THE COURT:** Okay, go ahead.

21 **MS. BOARDMAN:** They have responded by saying that
22 they gave us Grand Jury testimony in September of one of the
23 investigating agents, and, in that testimony, they claim that
24 the information in the memo that we got in February is the
25 same as what's in the Grand Jury testimony that we got in

1 September, and our view is, one, it's not the same, which I'm
2 happy to go into there; they're different contents. And, two,
3 even if it was similar enough, we should have gotten that memo
4 long before we got it, and we actually only got it after we
5 asked for it, and, once we got it, on the face of it, because
6 it says, in fact, this document that they're claiming is
7 classified that was found on his computer, was posted on NSA
8 intranet with "Unclassified" top and bottom.

9 We didn't know that for sure until February of this
10 year, so we never sought -- we didn't overlook the memo. We
11 got it for the first time in February, and their claimed
12 disclosure of the information through Grand Jury testimony
13 back in September, I don't think is accurate.

14 **THE COURT:** Well, we can explore this in more detail
15 later, then.

16 **MS. BOARDMAN:** Sure.

17 **THE COURT:** As you well know, Ms. Boardman, I don't
18 take allegations of *Brady* or *Giglio* violations lightly.

19 **MS. BOARDMAN:** Yes, Your Honor.

20 **THE COURT:** I take great caution on this, but I'm
21 not really sure if that's -- we can perhaps explore this later
22 *in camera* if necessary with counsel. I don't really know --

23 **MS. BOARDMAN:** I think that would be appropriate.

24 **THE COURT:** I don't know that there has really been
25 a *Brady* violation here, and I think I'm just trying to quiet

1 the waters here a little bit, because I don't know that that's
2 really been the case, but all right. Go ahead just on the
3 merits if you want to proceed, please.

4 **MS. BOARDMAN:** Very good. Thank you, Your Honor.

5 **THE COURT:** Thank you.

6 **MS. BOARDMAN:** As the Court knows, I was talking
7 about the "Regular Meetings" document, and this is the subject
8 of Count 2. The Government has alleged in the Indictment that
9 this is a classified document. The Government has also
10 alleged in the Indictment and relies on, for the other four
11 willful counts, the importance of classification markings in
12 giving a receiver of the information notice of what the
13 classification is. So that's the standard on which the
14 Government relies for four of the five counts charged, but yet
15 the fifth count, in which Mr. Drake and anyone who saw this
16 document on the intranet, is that the "Unclassified" marking
17 on this document doesn't mean anything, so they dismiss the
18 classification markings that they deem highly relevant and
19 important with respect to the other four retention counts,
20 but, for this one, they want it the other way.

21 Your Honor, if this Court is going to let a
22 prosecution of a willful retention count go forward -- and
23 we're not challenging the other four on these particular
24 grounds -- it cannot do so when, on the face of the document
25 and under the Government's own standards for classification,

1 it was marked "Unclassified," and it's important to note, Your
2 Honor, that that document, as it appeared on the intranet at
3 NSA, this two-page "Meetings" document, appeared exactly the
4 same way on Mr. Drake's computer. There was no alteration.
5 There is no evidence that he tried to doctor it. This was an
6 unclassified document posted on an agency intranet, and, Your
7 Honor, for those reasons, it is legally insufficient and
8 should not proceed.

9 **THE COURT:** All right. Thank you, Ms. Boardman.

10 Mr. Welch?

11 **MR. WELCH:** Thank you, Your Honor. That sounded
12 like a Rule 29 argument. What Ms. Boardman is arguing is an
13 issue of proof. There is no requirement that a national
14 defense document even have a classification marking on it in
15 order to convict under 793(e). In fact, the *Lee* case out of
16 the Ninth Circuit makes that abundantly clear. Classification
17 markings are an indicia to establish intent and knowledge, and
18 the Government's theory on this particular count is that,
19 despite that marking, the Defendant knew that it was
20 classified.

21 **THE COURT:** And your proffer in your papers has been
22 that the Government will proffer evidence of the Defendant's
23 knowledge that it was classified?

24 **MR. WELCH:** Correct, and it's --

25 **THE COURT:** Is it essentially that there was a

1 mistake in it being stamped "Unclassified"?

2 **MR. WELCH:** That's right.

3 **THE COURT:** All right. So, as I understand it, just
4 so I can crystallize this, the Government's position is that
5 the document to which is made reference in Count 2, that, on
6 or about November 28, 2007, Mr. Drake having unauthorized
7 possession of the document relating to the national defense --
8 namely, a two-page classified document and referred hereunto
9 as a "Regular Meetings" document -- did willfully retain that
10 document, and your position on this is that, despite an error
11 with respect to that particular document having "Unclassified"
12 stamped on it, it still related to the national defense, and
13 he willfully retained it, and the Government is going to
14 proffer evidence with respect to the willfulness of that
15 retention?

16 **MR. WELCH:** Yeah, that's right, and, for example, I
17 mean, one piece of evidence that we proffered is his knowledge
18 of the prepublication review requirements, and, for example,
19 what goes unmentioned in all of these pleadings by the Defense
20 is that it's not just an unclassified document; it's an
21 unclassified FOUO, for official use only, meaning not for
22 public dissemination, and, as a result, he had an obligation
23 to go to Prepublication Review, because those are the people
24 who guard against the mistakes.

25 **THE COURT:** Well, would not Count 2 be correctly

1 stated -- Counts 3 and 4 and 5 all specify a date, and they
2 name a classified document. In point of fact, Count 2 should
3 correctly be worded, "On or about November 28, 2007, in the
4 District of Maryland, the Defendant, Thomas Andrews Drake,
5 having unauthorized possession of a document relating to the
6 national defense -- namely, a two-page classified document and
7 referred herein as a "Regular Meetings" document -- did
8 willfully retain the document, and failed to deliver the
9 document to the officer and employee of the United States
10 entitled to receive it."

11 In fact, it's an error to say that it was a
12 classified document, correct?

13 **MR. WELCH:** No, because the pleading, where we
14 reference in the Indictment that it's a classified document,
15 that is the evidence that will be offered by the official
16 classification authority. She will say, "That is a classified
17 document." So the classification marking point on this --

18 **THE COURT:** So you're saying it's not erroneously
19 charged.

20 **MR. WELCH:** Correct.

21 **THE COURT:** You're saying it's just that the
22 document itself had "Unclassified" stamped on it.

23 **MR. WELCH:** And it --

24 **THE COURT:** And it clearly is a matter that the
25 Defense can pursue at trial with respect to the willfulness

1 element and the intent element, correct?

2 **MR. WELCH:** Most definitely, and, you know, it's
3 information that we put forward to the Grand Jury, and they
4 rejected the inference that the Defense now wants you to draw
5 in this particular setting, and motions to dismiss clearly are
6 not, you know, a substitute for Rule 29 or for Rule 29(c) or a
7 jury verdict.

8 **THE COURT:** I understand. All right. Thank you,
9 Mr. Welch.

10 Ms. Boardman, I'll be glad to hear further from you
11 on this.

12 **MS. BOARDMAN:** Your Honor, just two points:
13 Mr. Welch has claimed that we have omitted the reference, "For
14 Official Use Only." That's actually not true. In our opening
15 motion, we informed the Court that it was marked,
16 "Unclassified/For Official Use Only."

17 **THE COURT:** Yes.

18 **MS. BOARDMAN:** And, as Your Honor knows, or as I --

19 **THE COURT:** Clearly, your Paper Number 50, you so
20 indicated that.

21 **MS. BOARDMAN:** That's correct. I did that. And
22 "For Official Use Only" only applies to unclassified
23 materials. It cannot apply to classified.

24 **THE COURT:** The Government's response was under
25 seal, Ms. Boardman, but clearly I've also reviewed the

1 colloquy of one of the summarizing case agents in response to
2 a question from a grand juror, and it appears to me, having
3 reviewed that, that there was a discussion about this before
4 the Grand Jury, and the Grand Jury was aware of the fact that
5 the Government took the position that it's classified despite
6 what apparently was a stamped error, but the Grand Jury was
7 aware of the position, correct -- the explanation of the
8 Government?

9 **MS. BOARDMAN:** Your Honor, I disagree with that. I
10 don't want to cast aspersions to the Government, I really
11 don't, but, since this has been brought up, I think it's
12 important to -- I actually think what was said to the Grand
13 Jury was sort of misleading. There were two questions about
14 this document, and they were: Is it correct that an
15 initial --" and I emphasize "initial" "-- version of this
16 document was done by someone other than a classification
17 expert?

18 "A. Yes. It was put online as a resource for those attending
19 the meetings.

20 "Q. And initially was it posted at the unclassified level?

21 "A. Correct. It was posted by a person who is not a
22 classification advisory officer as 'Unclassified.'"

23 There is no mention of how long it was posted
24 "Unclassified." When you hear the words "initially" in both
25 of those questions, in my mind, I'm immediately left to think

1 that there was a subsequent version, that maybe after that, it
2 was posted differently. I think there is a potential for
3 confusion with the Grand Jury. We're not here to challenge
4 that necessarily, per se, but, to the extent that the Grand
5 Jury charged based on that testimony, I don't think that that
6 would be fair. I think that's an inaccurate or at least
7 incomplete and slightly misleading characterization of the
8 document.

9 **THE COURT:** All right. Well, thank you,
10 Ms. Boardman.

11 On that, counsel, I'll take this under advisement
12 and give this a little more consideration. I understand the
13 Government's position on this that it's, in fact, a classified
14 document and certainly, if Count 2 survives the Motion to
15 Dismiss, it certainly will go to the matter of intent as the
16 Government certainly acknowledges, but, as to that, at least
17 initially, I'm going to take that *sub curiae*, and we'll render
18 an opinion on that as quickly as possible.

19 All right. With that, I think we are to Paper
20 Number 51, the Defendant's Motion for a Declaration that
21 Sections 5 and 6 of the Classified Information Procedures Act
22 are Unconstitutional, and Ms. Boardman, you're up?

23 **MS. BOARDMAN:** It's me again, Your Honor.

24 **THE COURT:** That's quite all right.

25 **MR. WYDA:** Ms. Boardman filed her motions first,

1 Your Honor.

2 **THE COURT:** I understand. I understand. I'm sure
3 you'll be up at some point in time, Mr. Wyda.

4 **MS. BOARDMAN:** Your Honor, we submitted lengthy
5 briefs on this motion and a supporting memorandum and reply
6 briefs, and the Government has also briefed this extensively.
7 I'm happy to give the Court an oral overview of the briefs.
8 I'm also happy to take questions, but --

9 **THE COURT:** Why don't you do both, because, as you
10 know, I'm very likely to have questions, but go ahead.

11 **MS. BOARDMAN:** Very good. Your Honor, the gist of
12 the challenge of the constitutionality of CIPA is the
13 following.

14 **THE COURT:** By the way, correct me if I'm wrong.
15 There is not one Court in the United States that has held that
16 these sections are unconstitutional, correct?

17 **MS. BOARDMAN:** That's correct, Your Honor. It's
18 never been addressed by the Fourth Circuit or the Supreme
19 Court --

20 **THE COURT:** No, no. Every court --

21 **MS. BOARDMAN:** -- or the district courts.

22 **THE COURT:** There have been courts that have
23 addressed it, and they've addressed these same constitutional
24 challenges that you've raised, and I'm not criticizing you for
25 raising them. I'm just trying to make sure that these

1 sections, there is no Court that has ruled in support of the
2 position you're offering here today, correct?

3 **MS. BOARDMAN:** That's correct, Your Honor.

4 **THE COURT:** Okay.

5 **MS. BOARDMAN:** You could be the first.

6 **THE COURT:** All right. Thank you for the
7 invitation, Ms. Boardman.

8 **MS. BOARDMAN:** Yes.

9 (Laughter.)

10 **THE COURT:** I'll weigh that with great caution, but
11 go right ahead.

12 **MS. BOARDMAN:** Your Honor, Section 5 of the
13 Classified Information Procedures Act and Section 6 of that
14 Act place upon defendants in a case like this, to include
15 Mr. Drake, unconstitutional burdens. First, they require
16 Mr. Drake to disclose, well before trial, the substance of his
17 anticipated testimony, to the extent it's classified of
18 course. They require him to disclose, well in advance of
19 trial, the substance of any cross-examination that we may have
20 of the Government's witnesses. They essentially require him
21 to identify every piece of classified information that could
22 conceivably come out at trial, and that's all for the benefit
23 of the Government. That's Section 5.

24 Then we get to Section 6. That also imposes an
25 extraordinary burden that rises to the level of being

1 unconstitutional on Mr. Drake. Section 6, which we will be in
2 the thick of in a few weeks during our CIPA hearing, requires
3 Mr. Drake, in response to the Government's motion for a
4 hearing, which they've made, requires him to tell the Court
5 and the Government the relevance of every document and every
6 piece of anticipated testimony, including his own; the use of
7 his own testimony; the admissibility of his own testimony.
8 This is absolutely unparalleled and unprecedented in any
9 procedure that Congress has instituted.

10 What this does, Your Honor, is --

11 **THE COURT:** We're obviously on a different playing
12 field, though, aren't we, Ms. Boardman, in that we're on the
13 playing field of national security and classified documents --

14 **MS. BOARDMAN:** Your Honor --

15 **THE COURT:** -- which is why no Court has ever ruled
16 in support of your position?

17 **MS. BOARDMAN:** Well, I think the reasons for the
18 rulings are varied, and I think you're correct. I do think
19 we're in a different arena. I don't think we're on a
20 different playing field. We are still on the same level
21 playing field that applies to every court in America. Every
22 criminal prosecution needs to be fair to the Defendant and
23 ensure that he gets a fair trial. CIPA proceedings, or cases
24 governed by CIPA that involve classified information, do not
25 change that. The goal of all of these pretrial proceedings,

1 as Your Honor knows, will be to make sure that the playing
2 field is as level as it would be if this case did not involve
3 classified information.

4 Your Honor, CIPA --

5 **THE COURT:** Under Sections 5 and 6, to what extent
6 is the Government in any way seeking any kind of notice of the
7 possible testimony of Mr. Drake at trial?

8 **MS. BOARDMAN:** That's a good question. Under
9 Section 5 of CIPA, which I need to have here next to me --

10 **THE COURT:** Go right ahead.

11 **MS. BOARDMAN:** -- requires Mr. Drake to provide
12 pretrial notice of all classified information that he believes
13 could reasonably be admitted through him or come out through
14 his cross-examination or direct testimony to the Government,
15 and so we are required under Section 5 to submit that notice
16 if we want to disclose any classified information. So that's
17 where the obligation comes in.

18 **THE COURT:** Well, how does this work in terms of --
19 it seems to me that the reason this position has been rejected
20 in the past, Ms. Boardman, is that to accept your position
21 would place us in a rather logistical nightmare in terms of if
22 Mr. Drake does or does not decide to testify at trial, doesn't
23 it?

24 **MS. BOARDMAN:** Well, I mean, if Mr. Drake decides to
25 testify at trial and Mr. Drake has not provided notice under

1 Section 5 before trial of his anticipated classified
2 testimony, Your Honor can preclude that testimony, and that's
3 the very point of why this is unconstitutional. It places a
4 burden on Mr. Drake ahead of time on his right not to testify,
5 on his right to testify. Those two rights should come without
6 a price. I mean, that's what the Supreme Court said in
7 *Wardius*, and that is an analogous case to this situation.

8 Right now, Mr. Drake sits there very different than
9 if I were charged with a crime, than if Your Honor were
10 charged with a crime. He sits there with a Fifth Amendment
11 right that has an asterisk next to it, and that asterisk says,
12 "You can't testify, or you can't remain silent unless you tell
13 the Government what you're going to say ahead of time."

14 That --

15 **THE COURT:** Well, that's not -- no, that's not --
16 you're not being required to --

17 **MS. BOARDMAN:** Yeah.

18 **THE COURT:** I see nothing that's requiring you to
19 give hypothetical trial testimony, but Section --

20 **MS. BOARDMAN:** Your Honor, Section 5 --

21 **THE COURT:** Sections 5 and 6 require certain notice
22 in terms of documents to which you're going to make reference
23 and theories, but there is no requirement of a hypothetical
24 trial testimony that's being submitted.

25 **MS. BOARDMAN:** There is, Your Honor. In fact, there

1 is, and Courts have held time and again that among those items
2 that need to be listed in Section 5 must include possible
3 testimony from Mr. Drake. Section 5 says, "If a defendant
4 reasonably expects to disclose or cause to disclose classified
5 information in any manner in connection with a trial, the
6 defendant shall notify the Attorney General." So this does
7 not limit it to -- there is no limit on this. It's to any
8 information, to include his testimony, and I can get Your
9 Honor other cases that have expounded on that, but what I'm
10 happy about this discourse is that this is getting to the
11 heart of it, which is that CIPA does not exclude Mr. Drake's
12 testimony.

13 **THE COURT:** Well, there is no question every case
14 that's dealt with this has rejected this position,
15 Ms. Boardman, and I understand your argument, but --

16 **MS. BOARDMAN:** Your Honor, if I --

17 **THE COURT:** I'll give you an opportunity --

18 **MS. BOARDMAN:** Yes.

19 **THE COURT:** -- to go back to it --

20 **MS. BOARDMAN:** Sure.

21 **THE COURT:** -- because one of the things that hit me
22 over this pounds and pounds of material that I've been
23 reviewing is the case law is very well defined in many of
24 these areas. The *Morison* case that we get into later this
25 morning is very well defined on many of these issues, and I

1 certainly understand the need to protect the record here in
2 terms of raising this issue, but I'm just verifying, in terms
3 of looking at the cases out of the Southern District of New
4 York more recently, as well as the Eastern District of
5 Pennsylvania, maybe 15 years ago, these issues have been
6 raised before, and no federal judge in the United States has
7 ever found these notice requirements to be unconstitutional,
8 but I'll hear from you again in rebuttal.

9 Let me hear from you, if I can, Mr. Welch, on this,
10 or Mr. Pearson.

11 **MR. PEARSON:** Good morning, Your Honor. May it
12 please the Court. It's a pleasure to be back in front of you.

13 **THE COURT:** Nice to see you.

14 **MR. PEARSON:** I'll speak on this issue, and it's
15 almost difficult to pick where to begin, whether you want to
16 start with the case law, including the arguably binding
17 precedent from the *Wilson* case in the Fourth Circuit, which
18 rejected a claim that CIPA violated the privilege against self
19 incrimination or the right to confront witnesses, but maybe
20 the easiest place to start is where the Court is, and that's
21 with the overwhelming authority from out-of-circuit cases, and
22 those include the Southern District of New York cases. I
23 think there, you're talking about either *bin Laden* or *Lee*.

24 **THE COURT:** That was just two years ago, I believe,
25 right?

1 **MR. PEARSON:** That's correct, Your Honor.

2 **THE COURT:** All right.

3 **MR. PEARSON:** And that includes a detailed rebuttal
4 of the problems with the Defense argument here. Perhaps the
5 best explanation of this is in the *Wilson* case from the Second
6 Circuit. That was the case where it was an ex-intelligence
7 operative who wanted to get into the details of his
8 intelligence operations, and the Second Circuit held that the
9 pretrial notice is not unconstitutional, and it collects a lot
10 of these cases.

11 On top of that, the District Court opinion in that,
12 *Wilson*, the District Court opinion from the Southern District,
13 also has a great explanation, and it makes clear that the
14 defendant there was raising the exact same issues as the
15 Defendant in this case -- the idea that somehow CIPA requires
16 him to disclose his testimony, and that leads us to maybe, I
17 think, the easiest way to dispose of that, which is we go back
18 to the statute. The statute doesn't require disclosure of
19 testimony. It requires disclosure of classified information,
20 and the case law -- and we've cited it in our brief -- I think
21 has a really eloquent expression of this, and that's: "No
22 penalty is exerted for relying upon the Fifth Amendment
23 rights. You need not reveal when or even whether the
24 Defendant will testify. All that CIPA requires is pretrial
25 disclosure of the classified information on which the Defense

1 intends to rely in the course of the trial."

2 So that's the Fifth Amendment issue right there in a
3 nutshell, and I think the same principles apply in the context
4 of the Sixth Amendment. This is from Page 8 of our brief:

5 "CIPA does not require that the Defense reveal its plan of
6 cross-examination to the Government. CIPA also does not
7 require that the Defendant reveal what questions his counsel
8 will ask, in which order, and to which witnesses." I think,
9 there again, Your Honor, it's just a detailed takedown of
10 these arguments.

11 If you want to take it to the broader level, there
12 is the claim in the Defendant's brief that the governmental
13 interests that CIPA serves, protecting national security --
14 this is from Page 8: "Protecting national security cannot
15 justify the burden that the statute imposes on a defendant's
16 constitutional rights at trial." That's a breathtaking claim
17 that the Defendant's rights override national security, and
18 it's clearly wrong, but it's also a false choice.

19 In this case, CIPA is very clear about what it does
20 and does not require a defendant to provide, and I think the
21 case law and the language of the statute explains why this
22 motion should be denied.

23 **THE COURT:** All right. And, again, Ms. Boardman
24 took exception to my question earlier, and I'll give her
25 another opportunity in a moment on this, but clearly, from my

1 review of the materials, the Government is not seeking notice
2 of a hypothetical trial testimony. I mean, that's not what's
3 involved here in this, and there is no obligation on
4 Mr. Drake's part to submit that.

5 **MR. PEARSON:** Absolutely, Your Honor.

6 **THE COURT:** Okay. Well, thank you, Mr. Pearson.

7 Ms. Boardman?

8 **MS. BOARDMAN:** Judge, I'm concerned -- I mean, I
9 understand we're going to lose this motion. I'm --

10 **THE COURT:** Well, you probably are. I may write an
11 opinion on it, but, I mean, my point is I don't understand why
12 you're insistent that some summary of Mr. Drake's trial
13 testimony, if he chooses to testify, is going to be required.

14 **MS. BOARDMAN:** It's absolutely required, Your Honor.
15 I'm sure you will go back and review the cases. In the
16 cases -- and it's clear under the plain language of Section 5:
17 "Any classified information" is the term. Mr. Pearson said
18 it, and it's in the statute. Any classified information that
19 we want to disclose at trial, we have to give him Section 5
20 notice, or else Mr. Drake risks preclusion of that. "Any
21 classified information" includes any testimony that their
22 expert may talk about, any testimony that Ms. Pino may talk
23 about, that Mr. Andreas may talk about, and anything that he
24 may choose to say that is classified.

25 **THE COURT:** With respect to the classified

1 documents.

2 **MS. BOARDMAN:** That's correct.

3 **THE COURT:** All right. That doesn't --

4 **MS. BOARDMAN:** But any classified information --

5 **THE COURT:** It doesn't require a total summary in
6 terms of his state of mind. It doesn't require a total
7 summary of his testimony in terms of whether or not there was
8 a good faith mistake or whether or not he was negligent in
9 some way, or, on hindsight, he made an error in some fashion.
10 There is no summary required of his total testimony in terms
11 of what's in his heart or his head. That's not being required
12 to be received.

13 **MS. BOARDMAN:** Well, I would beg to differ, Your
14 Honor. I mean, I don't know that I have to say in my CIPA
15 notice: Mr. Drake believed X. I don't. I think what we have
16 to state is, if Classified Information X was in his mind and
17 impacted his decision to, let's say, talk to the reporter,
18 which is relevant to the obstruction of justice count, we have
19 to identify in our CIPA disclosure two months ahead of trial
20 what that Classified Information X is.

21 Now, this might get detailed, because we have to be
22 sufficiently detailed, or else the Government will, I'm sure,
23 jump up and down and say we're not detailed enough. So I hope
24 we remember this discussion when we have our CIPA hearing and
25 we have identified Classified Information X, Y, and Z, and we

1 are reluctant to go into any more detail because it could
2 disclose what's in his mind or what he might testify about,
3 but I think, as a fundamental matter --

4 **THE COURT:** Let me assure you, Ms. Boardman, you are
5 certainly free to address this again at the CIPA hearing.

6 **MS. BOARDMAN:** Okay.

7 **THE COURT:** My memory is usually pretty good on
8 these things.

9 **MS. BOARDMAN:** Okay. I'll remember.

10 **THE COURT:** I understand what you're saying, that
11 the point is that the Government is taking the position here
12 that there is no summary of hypothetical trial testimony that
13 relates to the classified documents to which the Defense or
14 Mr. Drake may make reference if he testifies.

15 **MS. BOARDMAN:** Uh-huh.

16 **THE COURT:** And, as to that, prior constitutional
17 challenges have been denied, but, again, it doesn't mean that
18 the Government is free to explore exactly his total
19 explanation, and I think there is a balance that could be held
20 here, and I think the Courts have previously noted that there
21 is an appropriate balance that can be struck on this issue.

22 **MS. BOARDMAN:** I hope so, because, when we are
23 pressed to prove to Your Honor that something on our CIPA list
24 is relevant, admissible, and why it's useful, it's going to be
25 a very difficult thing for us to do without exposing what it

1 is, what it relates to. I can imagine a situation which Your
2 Honor looks at me and says, "Ms. Boardman, why is that
3 relevant?"

4 "Your Honor, it's relevant because that's what
5 Mr. Drake was thinking, and we need to get into what he was
6 thinking in order for the jury to understand why --"

7 **THE COURT:** Wait a minute. I understand what you're
8 saying. We're not going to have a Pandora's box where we open
9 up a floodgate to a desire to have thousands and thousands of
10 pages of documents because this is what he was thinking about
11 this document, this was in his context of his heart about this
12 document, this is why he may have made a mistake as to this
13 document. There is going to be a limit clearly, Ms. Boardman.

14 **MS. BOARDMAN:** Sure.

15 **THE COURT:** This is a two-week trial scheduled for
16 June; not a two-month trial, but clearly, to the extent that
17 you're making a constitutional challenge on the notice
18 requirements under Sections 5 and 6 of CIPA, a balance can be
19 struck. Although you're insistent that it's summarizing his
20 testimony, I think the other cases have indicated that's
21 really not the case, and certainly I'll be very cognizant of
22 any effort from the Government to require an explanation of
23 exactly what was in his mind or, you know, his heart, as I
24 say, so to speak, because I think I have an instinct for how
25 this case is going to play out, and I'll certainly remember

1 this discussion.

2 **MS. BOARDMAN:** That's very good, Your Honor, and
3 there are other arguments under different aspects, but I'll
4 rest on the papers.

5 **THE COURT:** That's fine. That's fine.

6 **MS. BOARDMAN:** Thank you.

7 **THE COURT:** That's fine. As to this, the Court will
8 rule and also follow up with a written opinion. I am going to
9 have an opinion on this, and I'll do a written opinion on it,
10 but Sections 5 and 6 of the Classified Information Procedures
11 Act do not violate the Defendant's Fifth Amendment privilege.
12 Every Court that has considered the constitutionality of this
13 discovery provision of CIPA generally with respect to the
14 advance notice requirement has rejected the identical claims
15 presented by the Defendant here; specifically, most recently,
16 *United States versus Hashmi*, H-A-S-H-M-I, 621 F.Supp.2d, Page
17 Number 76, in the Southern District of New York.

18 The Court will follow up, however, with a short
19 written opinion on this to supplement my ruling here on the
20 record. And Sections 5 and 6 of CIPA also do not violate the
21 Defendant's Sixth Amendment right in connection with
22 representation of counsel. That argument was specifically
23 rejected by the District of New Mexico in 2000, *United States*
24 *versus Lee*, 90 F.Supp.2d 1324, which essentially addressed
25 this exact same due process challenge. But I will follow up

1 with a short written opinion on this to further establish my
2 reasonings for it in the event there were to be appellate
3 review. In light of the overwhelming case law in favor of the
4 Government on this issue and the dearth of case law in favor
5 of the Defendant, I think it's very important I do a written
6 opinion on it as well to state my reasons for it. I will
7 follow up on that.

8 All right. Now, we are at -- all of these are big
9 events. We're coming up to the main event here, one of the
10 big arguments, and that's Paper Number 52, the Defendant's
11 Motion to Dismiss Counts 1, 2, 3, 4, and 5 of the Indictment
12 on the contention that the charging statute, 18 United States
13 Code § 793(e) of the Espionage Act is unconstitutionally vague
14 as applied and overly broad under the First Amendment, and,
15 with that, I'll be glad to hear from you, Ms. Boardman, or
16 maybe Mr. Wyda. I thought this might be your -- leading up
17 to --

18 **MR. WYDA:** Thank you, Your Honor. I'm relieved to
19 parachute in for Ms. Boardman.

20 **THE COURT:** She never needs you to parachute in for
21 her, Mr. Wyda. She never does.

22 **MR. WYDA:** I think we're all in agreement on that,
23 Your Honor.

24 **THE COURT:** I might have some follow-up for you, but
25 I'm sure you'll try.

1 **MR. WYDA:** Again, I heard loud and clear your
2 reference to the poundage of the filings, and this one might
3 have generated the most poundage, and --

4 **THE COURT:** Sometimes the more poundage requires
5 more argument in case --

6 **MR. WYDA:** I'm going to try not to do that, Your
7 Honor.

8 **THE COURT:** It may be necessary, but go ahead.

9 **MR. WYDA:** I'm going to highlight some things in our
10 arguments. I also think, inevitably, when the parties go back
11 and forth as vigorously as we have in these motions, sometimes
12 both sides, you know, end up characterizing the other side's
13 arguments in a way that may not be helpful, and I'd like to
14 clarify at least a few things that are in our papers. The
15 first thing that I'd like, you know, to set as sort of a
16 framework for this, Your Honor, is we've all been reading lots
17 of 793(e) cases, and I may disagree with you that, at least in
18 the context of the constitutional issues, that the case law is
19 clear. I'll cite to Judge Phillips in the *Morison* opinion --

20 **THE COURT:** That's the current opinion.

21 **MR. WYDA:** Right. That, again, takes at least two
22 votes to win.

23 **THE COURT:** That's right.

24 **MR. WYDA:** You don't win in *Morison* without either
25 Judge Wilkinson or Judge Phillips, and I'm fully embracing

1 their concurrences, Your Honor.

2 **THE COURT:** And, in the *Morison* case, both
3 Judge Wilkinson and Judge Phillips made reference to the First
4 Amendment implications.

5 **MR. WYDA:** Right. And, again, if you'll indulge me,
6 because I get to cite Judge Wilkinson and Judge Phillips in
7 support of my argument so seldom, I'm going to have to read at
8 least a little bit of language from Judge Phillips' opinion.
9 "If one thing is clear, it is that the --"

10 **THE COURT:** I'm sorry, Mr. Wyda. I'm just trying to
11 clarify. You're saying defense lawyers usually don't cite to
12 Fourth Circuit cases in support of their positions?

13 **MR. WYDA:** I cite to Fourth Circuit cases. It's
14 just not often do I get to do it with, you know, such vigor
15 from Judge Wilkinson and Judge Phillips, but, again, the
16 language I'd like to cite, Your Honor, is, "If one thing is
17 clear, it is that the Espionage Act statutes as now broadly
18 drawn are unwieldy and imprecise instruments for prosecuting
19 Government leakers to the press as opposed to Government
20 moles."

21 **THE COURT:** Is that the disclosure case, though,
22 Mr. Wyda?

23 **MR. WYDA:** No, Your Honor.

24 **THE COURT:** The Government hasn't charged --

25 **MR. WYDA:** Your Honor, that is such a frustrating

1 red herring --

2 **THE COURT:** All right.

3 **MR. WYDA:** -- that I'd like to address that later if
4 you'd like --

5 **THE COURT:** All right. Go ahead. Go ahead.

6 **MR. WYDA:** -- but I will do it --

7 **THE COURT:** All right.

8 **MR. WYDA:** I will do it now if Your Honor insists.

9 **THE COURT:** No, no, no. You can address it later.
10 That's fine.

11 **MR. WYDA:** I think the other thing I would say from
12 reading the case law, Your Honor -- and, again, I think Your
13 Honor and Ms. Cole unfortunately have been immersed in this.
14 The one lesson in reading this case law is, Your Honor, there
15 is no case like this in the reported decisions under 793.
16 There is no cases where the documents are so benign. There is
17 no cases where we're talking about documents that were
18 classified but now we're saying are unclassified, that were
19 disseminated as unclassified, but we're now saying are
20 classified, and those are the two documents, Your Honor, in
21 Counts 1 and 2 that our client has acknowledged bringing home
22 to share with a reporter, and, again, despite the Government's
23 efforts, we can't get away from the First Amendment
24 implications that these two documents were brought home to
25 share with a reporter. It's throughout their case, Your

1 Honor. It's throughout their Indictment, and it's going to be
2 throughout their case.

3 This prosecution, it's not just about the documents
4 and the benign nature of the documents and the fact that they
5 failed to give notice under the due process clause of what is
6 criminal and what isn't, but it's also the fact that Mr. Drake
7 engaged in constitutionally protected speech here that is
8 clearly implicating profound constitutional rights at the core
9 of our democracy. This prosecution, Your Honor, make no
10 mistake about it, is a constitutional and a factual mistake.
11 793(e) is unconstitutionally vague as applied in violation of
12 the due process clause, and overly broad in violation of the
13 First Amendment. I want to talk briefly about the due process
14 clause.

15 Again, Section 793(e), according to the *Morison*
16 case, is unenforceable as written. No Court, Your Honor, has
17 approved its plain language as providing fair notice of what
18 conduct the statute prescribes. Again, the parties have been
19 going back and forth probably, you know, frustrating each
20 other a little bit, both in our written work and in sort of
21 our exchanges, but sort of the highlight or arguably the low
22 light of the Government's written presentation is this idea
23 that we're running away from *Morison*. Nothing could be
24 farther from the truth, Your Honor. We're running towards
25 *Morison*. It's the only Fourth Circuit case --

1 **THE COURT:** Well, even in your papers, you
2 acknowledge that you have to approach *Morison* with some
3 difficulty. I forget your exact language, Mr. Wyda. You've
4 accepted *Morison* as a case that you have to deal with.

5 **MR. WYDA:** *Morison* is a very -- again, both sides
6 have to deal with *Morison*. I think there is a great deal that
7 we're embracing, both in Judge Russell's opinion, but, again,
8 for purposes of this motion, in the two concurrences that,
9 again, sort of the Government doesn't prevail in *Morison*
10 without at least one of those votes from the concurrence, so,
11 again, I was encouraged the Court will, as I go on here, pay
12 close attention to those concurring opinions.

13 **THE COURT:** Well, I've read the *Morison* opinion at
14 least twice now. I'm sure I'll read it again --

15 **MR. WYDA:** I'm sure you will.

16 **THE COURT:** -- in other cases.

17 **MR. WYDA:** Again --

18 **THE COURT:** *Morison* actually arose out of this
19 district.

20 **MR. WYDA:** Yes.

21 **THE COURT:** It was Judge Young's opinion and has the
22 affirmance by the Fourth Circuit.

23 **MR. WYDA:** We both had the pleasure of appearing in
24 front of him -- a fine judge.

25 **THE COURT:** Right.

1 **MR. WYDA:** The *Morison* case is relevant to this case
2 in a number of matters. It held that 793(e) cannot be applied
3 as written. At least two key elements of the statute must be
4 limited by jury instructions. Two of the judges deciding
5 *Morison* explicitly noted the necessity of a judicious -- I
6 quote, a judicious case-by-case use of limiting instructions.
7 *Morison* tells us, Your Honor, that that is fact-based
8 constitutional analysis; the facts matter. The different
9 allegations are essential, you know, for you to focus on to
10 make this decision. Throughout all of the *Morison* opinions,
11 it's a case-by-case analysis, and *Morison* supports our
12 arguments in this as-applied analysis. This case is not
13 *Morison*.

14 That case involved satellite photos of Russian naval
15 ships. Nothing could be more clearly involving the national
16 security. Nothing could be more clearly involving our
17 military authorities in war and peace. We're talking about a
18 meeting schedule and an "attaboy" e-mail at NSA, saying, "What
19 a successful meeting we had," that was posted on an intranet
20 site that went to thousands of employees, Your Honor, so
21 that's the constitutional notice that Mr. Drake is under that
22 has to be taken into account before Your Honor can decide this
23 matter.

24 Again, contrast with all the other cases all of us
25 have cited and all of us have read -- *Morison*, Soviet naval

1 preparation; *Rosen*, information relating to terrorist
2 activities in the Middle East; *Abu-Jihaad* --

3 **THE COURT:** You're referring to the *Rosen* case out
4 of the Eastern District of Virginia, Judge Ellis' case?

5 **MR. WYDA:** Uh-huh.

6 **THE COURT:** All right. Go ahead.

7 **MR. WYDA:** *Abu-Jihaad*, the case involving the path
8 of our naval ships; again, the *United States versus Poleson*
9 (phon), computer tapes were stolen containing air tasking
10 orders, and, again, conversely, in this case, Your Honor, one
11 of the things the Government is going to have to prove under
12 the *Morison* instructions is that my client had knowledge, you
13 know, of the damage that would be done to the national
14 defense, under the *Morison* instructions, Your Honor.

15 The notice that my client had regarding the two
16 first counts, Count 1 and Count 2, we've talked about already
17 this morning in the order that we've gone on -- a meeting
18 schedule marked "Unclassified," and, "What a success," a
19 cheerleading e-mail at NSA about a program that has now been
20 deemed unclassified.

21 That is different, Your Honor. Again, under an as-
22 applied analysis, *Morison* is the starting point for all of us.
23 It is the lodestar for all of us, but you've got to apply the
24 reasoning of *Morison* to the facts of this case. There is
25 three key elements -- again, I need to expand on one more

1 thing. Again, Mr. Welch, you know, helped with this point.
2 The law has evolved in a way that frankly isn't helpful
3 regarding this vagueness argument. Again, as Mr. Welch made
4 clear, the *Lee* case now makes clear that classification isn't
5 the story, that the fact that the document is marked
6 "Classified" does not mean it relates to the national defense.
7 Some documents that are classified may relate to the national
8 defense; some documents that are marked "Classified" may not.
9 Some documents that aren't marked "Classified" may relate to
10 the national defense; some documents that are not marked
11 "Classified" may not relate to the national defense. Again,
12 that's important here in the constitutional analysis, because
13 we're trying to figure out what fair notice of what is
14 criminal Mr. Drake was operating under.

15 So the case law, 20 years after *Morison*, is worse,
16 is mirkier. At least in this important constitutional area,
17 it has not received any more clarity. There is three key
18 terms that are at the heart of the constitutional analysis and
19 we're going to be talking about throughout this case. The
20 first is willful. The statute does not provide a precise
21 definition of this requisite mental state. *Morison* provides
22 that the standard has to be a specific intent to violate
23 793(e), and that the Defendant acted with a bad purpose.

24 The second key element, again, that *Morison* and
25 other Courts have had to expand upon so that the statute can

1 have constitutional coherence is the Government must prove
2 beyond a reasonable doubt that the documents contained
3 information that, if disclosed, are potentially damaging to
4 the United States. As part of that, Your Honor, we're also
5 going to have to instruct the jury as to what "closely-held"
6 means -- that it's not available to the public, and the
7 Defendant knew the documents or information was potentially
8 damaging to the United States.

9 Your Honor, that's us embracing *Morison*. That's
10 Judge Russell's opinion. That's telling you that you have
11 to --

12 **THE COURT:** That has to do with instructions that a
13 jury should receive. That's your argument?

14 **MR. WYDA:** Right.

15 **THE COURT:** But it doesn't necessarily support that
16 the count should be dismissed because of unconstitutional
17 vagueness.

18 **MR. WYDA:** Again, I promised I was going to be
19 quick, but --

20 **THE COURT:** No. This is very important. Take your
21 time. I have time.

22 **MR. WYDA:** I'm building, Your Honor, but --

23 **THE COURT:** Okay.

24 **MR. WYDA:** -- again -- you know, so that's the
25 starting point. Judge Russell, under facts far different from

1 us, said this statute can only work constitutionally if we
2 rewrite these two elements and expand upon them and narrow the
3 jury's focus in this matter.

4 **THE COURT:** I don't know if he said we have to
5 rewrite it. Judge Russell stated that there have to be
6 certain instructions attendant to it; that's all.

7 **MR. WYDA:** That might have been my glossing over
8 it --

9 **THE COURT:** Yeah, I don't think Judge Russell
10 said it has to be rewritten.

11 **MR. WYDA:** I'm entitled to a little bit of --

12 **THE COURT:** All right. Sure.

13 **MR. WYDA:** You know, the third element, Your Honor,
14 is, again, the -- you know, what we refer to as the *scienter*
15 requirement, and, again, I think there has been back and forth
16 regarding this, and I'd like to clarify that.

17 This is the *Rosen* decision, which is not a retention
18 case. Frankly, I don't think that's particularly relevant
19 regarding willfulness and relating to the national defense.
20 Those definitions remain the same whether it's a retention
21 case or not, but, again, in the *Rosen* case, it dealt with
22 information that is important, and Judge Ellis wrote a pretty
23 magnificent opinion. He wrote a lot of magnificent opinions
24 explaining this statute at some length, and he honed in on the
25 fact that, for information -- not documents, but when the

1 leaker, the spy, is disclosing information, the *scienter*
2 standard has to be different, that there has to be a specific
3 intent to harm the country, and, again, it was a close
4 statutory analysis based upon the "reason to believe" language
5 in the statute.

6 We're not doing that. I wish I could, but we're
7 not. We're not dealing with information here, but what I do
8 want Your Honor to understand -- and, again, it does take an
9 understanding of the facts of this case to understand the
10 basis of our argument there. Our documents, all of the
11 documents at issue here, all five of them in Counts 1 through
12 5, were found in Mr. Drake's home marked "Unclassified." The
13 Government's claiming that four of them were disseminated as
14 classified. One of them, even they're conceding was
15 disseminated as an unclassified document, which we discussed
16 earlier today.

17 I proffered that. I proffered earlier sort of the
18 nature of these documents, that this is more like information.
19 The problem with information in *Rosen* is it doesn't come with
20 the classification markings, right? You're relating
21 information. It doesn't come with a notice of classification
22 markings, so there is a need for a higher *scienter* standard.

23 Our concern, Your Honor, is that, under these
24 circumstances, with the lack of notice that Mr. Drake has
25 received here, because of the nature, you know, of the two key

1 documents that he's acknowledged bringing home, because of the
2 lack of clarity about their classification -- again, the
3 Government's acknowledged that one of these documents was
4 disseminated as an unclassified document. And, finally, Your
5 Honor, the fact that, again, the Government doesn't seem to be
6 disputing -- no one seems to be disputing Mr. Drake's salutary
7 motive, that this was about disseminating information. He's
8 retaining these documents to give to a reporter. That's in
9 the Government's Indictment. It's going to be in the
10 Government's proof. That's part of the story here, and it
11 doesn't knock out that key element of this.

12 So, under those circumstances, Your Honor, we feel
13 we're entitled to this additional *scienter* requirement.
14 Again, conceding -- you know, *Rosen* is a textual analysis of
15 the statute that doesn't apply to here. We're saying, under
16 our circumstances, where our facts bring us within the
17 reasoning of the statute and the textual analysis, that our
18 lack of notice, our client's clear First Amendment purpose in
19 sharing the two documents with the reporter, require us to
20 need that constitutional protection, or a constitutional wrong
21 will occur.

22 **THE COURT:** So I assume, at some point in time,
23 Mr. Wyda, with this argument, you're going to explain what the
24 utility is of the Intelligence Community Whistleblower
25 Protection Act and the well-defined procedures, because you

1 seem to paint a picture that well-intentioned purposes have no
2 recourse, and that simply is not the case.

3 **MR. WYDA:** Well, again, I'm --

4 **THE COURT:** Just let me interrupt, that you might as
5 well address this now. That is just simply not the case under
6 the law, Mr. Wyda. The Whistleblower Protection Act is a
7 well-defined procedure --

8 **MR. WYDA:** Well, I --

9 **THE COURT:** -- pursuant to which someone in a
10 position that feels that classified information needs to be
11 divulged, that there is some wrong occurring, can not only
12 cooperate with an inspector general's report; there are
13 procedures whereby they can seek to go to the House Permanent
14 Select Committee on Intelligence or the Senate Select
15 Committee, which you posture, which I understand was the
16 thrust of the *amicus* brief, is that, at some point in time,
17 regardless of the classification procedures, one can take it
18 upon himself for a higher calling to decide when he -- when he
19 decides --

20 **MR. WYDA:** I --

21 **THE COURT:** -- that something must be disclosed, and
22 so I invite you to address this as to how that could possibly
23 be the case.

24 **MR. WYDA:** I -- I'm really glad you asked that
25 question, Your Honor, and, again, I'm sorry if my rhetoric,

1 you know, maybe confused things a little bit.

2 Here, now, Mr. Drake's purpose is completely
3 relevant. You've read Judge Wilkinson's eloquent opinion. It
4 was relevant to him. It's relevant to you regarding the
5 constitutional analysis. Let me make perfectly clear, we're
6 going to address these -- that's not a factual issue for the
7 jury. Whether Mr. Drake was right or wrong, whatever his
8 salutary motive was, you're not going to hear that from us at
9 the trial on this matter.

10 **THE COURT:** Well, I understand your argument that it
11 goes to his willfulness. I understand what your argument is.

12 **MR. WYDA:** And, again, this trial is going to be
13 about -- if we get there, is going to be about whether
14 Mr. Drake intended to bring classified documents home. That's
15 what our defense theory is, is what was going on in his *mens*
16 *rea*, and we're happy to try that case --

17 **THE COURT:** Well, I'm glad you will, because that's
18 how the case is going to be tried. This is not some higher
19 calling case that the Defendant is going to launch a defense
20 in this courtroom that he has some higher calling, because
21 there are clearly procedures required, and, when one raises a
22 First Amendment argument here, it's just totally rejected by
23 clear statutory law, and, again, at some point in time, I want
24 you to tell me what you think the thrust of the Intelligence
25 Community Whistleblower Protection Act is, 5 U.S.C. § 8 --

1 **MR. WYDA:** Here is --

2 **THE COURT:** What you think the purpose is.

3 **MR. WYDA:** Here is my argument regarding that, Your
4 Honor -- I hope it satisfies you -- is, you know, Mr. Drake
5 engaged in whistleblowing activity, you know, as you well know
6 from many of the pleadings. You know, he engaged in -- he was
7 a witness in a DOD IG investigation. He did that properly,
8 went through the protocol --

9 **THE COURT:** That's fine.

10 **MR. WYDA:** -- and, again, what we're arguing here,
11 Your Honor, whether -- is going to a newspaper reporter to
12 complain about NSA is constitutionally protected activity?
13 It's not just Jim Wyda saying it. It's Judge Wilkinson saying
14 it. It's Judge Phillips saying it.

15 **THE COURT:** They're not saying that he goes to a
16 reporter with classified information and makes his own
17 judgment as to what he will or will not divulge.

18 **MR. WYDA:** Again, just so we're clear, I don't want
19 to sort of muddy the waters to confuse what -- you know, I
20 think Your Honor understands what we're going to do at trial.

21 **THE COURT:** Sure.

22 **MR. WYDA:** We dispute that the documents are
23 classified --

24 **THE COURT:** I understand. I understand.

25 **MR. WYDA:** -- and we say that Mr. Drake had no

1 intent, but here, today, Your Honor, yes, he does have a First
2 Amendment right to disclose -- to go to a reporter about
3 wrongdoing and fraud at NSA, and, again, it's not Jim Wyda
4 saying it. It's Judge Wilkinson saying it.

5 **THE COURT:** No, Judge Wilkinson doesn't say that.

6 **MR. WYDA:** Your Honor, if you'll indulge me, I'm
7 going to read a tiny bit -- again --

8 **THE COURT:** I've read it at least twice. I
9 understand what your argument is. Your argument is that,
10 under the First Amendment to the United States Constitution,
11 these counts are unconstitutionally vague and should be thrown
12 out by the Court.

13 **MR. WYDA:** Your Honor, if you'll -- again, just if
14 you'd give me another two minutes.

15 **THE COURT:** Go ahead.

16 **MR. WYDA:** All right. So, again, in
17 Judge Wilkinson's opinion, he runs through the parade of
18 horrors of the things that, if this prosecution is allowed,
19 the *Morison* prosecution, again, someone who sold satellite
20 photos of Russian military activities, that's what was giving
21 Judge Wilkinson pause, okay? It's not Tom Drake sending a
22 meeting schedule and an "attaboy" e-mail to a reporter doing a
23 story about fraud and abuse at the National Security Agency.

24 What Judge Wilkinson does in that opinion -- and he
25 cites to the filings of *The Washington Post* and all the media.

1 He said, you know, this is going to chill our important First
2 Amendment work. We need to know about government wrongdoing,
3 and sometimes it can only come from folks internal to the
4 agency, and then Judge Wilkinson writes, "I question whether
5 the spectre presented by the above examples is in any sense
6 real or whether they have much in common with Morison's
7 conduct."

8 He's disavowing sort of the First Amendment issue,
9 you know, with *Morison*. "Even if juries could ever be found
10 that would convict those who truly expose government waste and
11 misconduct, the political firestorm that would follow
12 prosecution of one who exposed an administration's own
13 ineptitude would make such prosecutions a rare and unrealistic
14 prospect."

15 Your Honor, that's our case. Our case is that
16 parade of horrors. This man took information from NSA, two
17 documents, you know, Counts 1 and 2, and shared them with a
18 *Sun Paper* reporter who wrote stories about fraud and abuse at
19 NSA. It's Judge Wilkinson's case that he said could never
20 happen. It happened. This prosecution has never been done
21 before. This is a unique case because of the nature of the
22 documents and the key First Amendment issues are prevalent.
23 Again, we're not running away from *Morison*. Your Honor, if we
24 argue the case of *United States versus Tom Drake* to that
25 Court, I'd get two votes, because our case is so different

1 than the *Morison* matter.

2 **THE COURT:** All right. I believe Judge Phillips has
3 passed on, Mr. Wyda, with all respect.

4 **MR. WYDA:** That's why I was so optimistic, Your
5 Honor.

6 **THE COURT:** If Judge Phillips votes with you from
7 the grave, it's going to be quite a performance down at
8 Richmond if you get that far.

9 **MR. WYDA:** I've been channelling quite a few things
10 lately. Your Honor, let me just try two more minutes if
11 you'll indulge me. Again, I want to --

12 **THE COURT:** Take your time. I'm not in any rush on
13 this. Take your time.

14 **MR. WYDA:** I want to -- again, the Government has
15 implied a couple of times, I think again today, and in their
16 pleadings, which are -- you know, which are substantial and
17 formidable. The suggestion is that, in this context, the
18 First Amendment is diminished, and, again, Your Honor,
19 actually, it's a thread, I think, in your remarks.

20 Again, Judge Wilkinson: "National security is
21 public security; not security from informed criticism. No
22 decisions are more serious than those touching on peace and
23 war. None are more certain to affect every member of
24 society." Again, I have a high respect for this Court, and I
25 know that you understand that, actually, in this context, it's

1 time for the Courts to be more vigilant. This is where we're
2 going to make a terrible mistake.

3 At this trial, there is going to be a great deal of
4 drama about the need for secrecy, the issues at stake. This
5 is a matter of national security, and Tom Drake is very, very
6 vulnerable because of the atmospherics. This is when our
7 system can make mistakes, and this is when we need the
8 judiciary, as Judge Wilkinson pointed out, to make sure that
9 the Government is held to the same constitutional standard in
10 any other case.

11 And, again, I just want to address retention
12 quickly. Your Honor, I think I'll be addressing this in some
13 of the Government's motions *in limine*. The Government smartly
14 chose to bring this as a retention case, but that does not
15 take, you know, the dissemination element of this out of it.
16 You know, that's the first step in transmitting information to
17 a reporter. Every case like that often involves retention,
18 and it's not just me saying that this case is about the
19 reporter. Excuse me, Your Honor.

20 **THE COURT:** Take your time.

21 **MR. WYDA:** And, again, I'm happy -- I've enjoyed
22 citing to Judge Wilkinson. I'll cite to Mr. Welch. It's
23 Paragraphs 9 through 14 of their Indictment. It is all about
24 the documents going to Reporter A. It's their pleadings in
25 this case regarding one of the motions *in limine* where they

1 said, "Mr. Drake's purpose in going to the newspaper reporter
2 was relevant to willfulness."

3 So, especially in this context of this
4 constitutional challenge, we can't get away from the fact that
5 this is more than just a simple possession case. The
6 Government is making Tom's contact with the reporter an issue,
7 and, again, at the core of this case, from the beginning of
8 the case, from the writing of the Indictment, this case is
9 about the First Amendment.

10 Your Honor, this prosecution, on these facts,
11 exceeds constitutional limits that weren't there in the
12 *Morison* case. It is unconstitutionally vague as a matter of
13 the due process clause as applied to Mr. Drake, and it's over
14 broad in violation of the First Amendment.

15 Thank you, Your Honor.

16 **THE COURT:** Mr. Wyda, what parameters would you
17 apply? Given I obviously enjoy engaging with counsel on these
18 questions, what parameters do you apply here? How do the
19 parameters work, Mr. Wyda, on this?

20 **MR. WYDA:** I think I understand your question, Your
21 Honor. Again, I'm --

22 **THE COURT:** No, I'm just giving you a hypothetical.
23 How do the parameters work? Someone decides that the process
24 isn't working particularly well, or an inspector general's
25 report isn't what they had hoped, and someone decides that

1 they just flat-out -- because I know you've still not yet
2 addressed the meaning of the Intelligence Community
3 Whistleblower Protection Act, which provides protection for
4 whistleblowers in the national security framework, and someone
5 decides, "Well, that's just going to take too long," or, "I'm
6 sure if HPSCI, House Permanent Select Committee on
7 Intelligence, is going to listen to me," or, "I'm not sure if
8 the Senate Intelligence Committee is going to respond, so I've
9 decided now that I'm going to have to deal with this," because
10 there is a distinction between disclosing information and
11 disclosing documents as I know the Government will address.

12 So just tell me how this works, Mr. Wyda, in terms
13 of the First Amendment protections as to when someone says,
14 okay, I really must take it upon myself to contact *The New*
15 *York Times* or *The Washington Post* or a blogger, or, even on a
16 lower level, *The Baltimore Sun*, unless it's not a nationally-
17 distributed newspaper. I need to take it upon myself to do
18 this. How does this work? What are the parameters here?

19 **MR. WYDA:** Sure. Let me take a shot at that, Your
20 Honor, and, again, we've made multiple constitutional
21 arguments.

22 **THE COURT:** Go ahead.

23 **MR. WYDA:** One is the vagueness argument regarding
24 the Fifth Amendment, but, regarding the First Amendment
25 argument, Your Honor, again, maybe I'll start with some facts

1 from the case. Tom Drake was a participant in a DOD IG
2 investigation. He operated as a whistleblower. Again, that's
3 throughout the case. You know, that's going to be part of
4 everybody's evidence in this matter.

5 So Tom Drake went about it the right way, and,
6 again, as Your Honor knows from the pleadings we shared with
7 you in an unclassified version of the DOD IG report, he was
8 found basically to be right, that -- you know, that his
9 position was the correct one, and, again, nothing changed.
10 You know, the -- and so he took it into his hands, and he took
11 the risk of going to a reporter in violation of NSA
12 regulations. Again, he did not go through the prepublication
13 review at NSA.

14 **THE COURT:** He didn't go through the whistleblower
15 procedures for people in the national security field.

16 **MR. WYDA:** Well, he went through the DOD IG
17 investigation --

18 **THE COURT:** But then stopped. That was as far as he
19 wanted to go.

20 **MR. WYDA:** Well, again, there was nowhere else to go
21 at that --

22 **THE COURT:** Well, I guess I'm not so much on this
23 respect. I'm just asking you, in terms of your constitutional
24 argument, just how this works in terms of there being this
25 constitutional overbreadth and vagueness given that the Fourth

1 Circuit, in *Morison*, clearly did not find it to be
2 constitutionally defective, and Judge Messitte in the *Ford*
3 case, in another case we haven't mentioned yet --
4 Judge Messitte dealt with this statute. So my question to you
5 about it: Where are these parameters? How is the security
6 system supposed to work if, on grounds of rights of the First
7 Amendment, one is permitted to make their own determination?
8 Seriously, walk me through how it works.

9 **MR. WYDA:** I'm happy to do that, Your Honor, and,
10 again, I can probably go on longer than anybody --

11 **THE COURT:** No, no. I'm curious about it.

12 **MR. WYDA:** Again, I'm separating the two, right?
13 This statute is unenforceable as written as a matter of
14 vagueness under the due process clause, so, again, this is a
15 flawed statute. Again, that's not Jim Wyda speaking. That's
16 Judge Russell speaking. That's a decor of the *Morison* cases.

17 We've got to expand upon the statute, provide
18 limiting instructions so it passes constitutional muster.
19 Even with the allegations in the *Morison* case, we can't let
20 this go forward unless we limit this statute. So, even
21 disclosing satellite photographs, under those terrible facts,
22 far different than ours, that Court recognized -- that
23 District Court, you know, Judge Young, and, you know, the
24 *Morison* Court, in affirmance, recognized that, you know, the
25 Constitution doesn't go away when we're talking about national

1 security. So that's the due process clause that sometimes,
2 you know, I'm speaking about both of them quickly, and I might
3 unintentionally muddy the waters.

4 When we're talking about the First Amendment, the
5 overbreadth -- and, again, there has to be a limit on what an
6 individual can do in revealing sort of the secrets of our
7 national security, okay? But, again, I'm going to keep riding
8 Judge Wilkinson as long as I can. He said that it would be
9 inappropriate to prosecute under this statute. The Government
10 wouldn't do it was his position. We don't have to worry about
11 that parade of horrors, those hypotheticals, because the
12 Government would never do it.

13 **THE COURT:** Mr. Wyda, I understand that. I
14 understand your argument.

15 **MR. WYDA:** Yeah.

16 **THE COURT:** I'm asking you to respond to me in terms
17 of -- given the high level of intellectual review that we're
18 making here, I really want to know. Tell me how this works.
19 Tell me how the Whistleblower Protection Act for the national
20 security professionals, how this is supposed to work.

21 **MR. WYDA:** Well, you're supposed to go through the
22 DOD IG investigations just the way Tom Drake did.

23 **THE COURT:** No, no. But then you're also, at some
24 point -- it's clearly outlined right here. It's clearly
25 outlined what you're supposed to do with respect to -- I think

1 the key language there is urgent concern, and there is the
2 matter of, after going to the Inspector General of the Defense
3 Intelligence Agency, you can ultimately then go through a
4 procedure where you contact the Senate Select Committee on
5 Intelligence, or you contact the House Permanent Subcommittee.
6 It's called HPSCI is the phrase there on Capitol Hill, the
7 Permanent Select Committee on Intelligence, and you go there
8 in a classified briefing, and you can disclose all kinds of
9 horribles. Your voice is not being stilled. There are just
10 precautions which --

11 **MR. WYDA:** I --

12 **THE COURT:** Let me finish, if I can.

13 **MR. WYDA:** I apologize, Your Honor.

14 **THE COURT:** These are just precautions that are
15 taken. In the context of an overbreadth argument, that this
16 is violative of the First Amendment and access of the American
17 people to information, I'm trying to ask how this is supposed
18 to play out. Where is it?

19 **MR. WYDA:** Your Honor --

20 **THE COURT:** Where is it where we don't just
21 essentially have each person making their own determination
22 when they should or should not, in their opinion, leak in the
23 interest of the public interest?

24 **MR. WYDA:** Let me be clear on this. I am not
25 conceding for a second that Tom Drake did anything --

1 **THE COURT:** I understand that.

2 **MR. WYDA:** Anything wrong. No, actually, I think
3 I'm making a point that I haven't made yet today. Once in a
4 while, I stumble into that. I'm not conceding for a second
5 that Tom Drake did anything wrong procedurally as a
6 whistleblower. The reason why he went to the reporter was
7 because it had failed. That's our position.

8 **THE COURT:** Then stop for a minute, Mr. Wyda.
9 That's what I'm asking you: What had failed?

10 **MR. WYDA:** No change had occurred --

11 **THE COURT:** Right, and that's my question to you as
12 the point of this is in terms of, when you make an overbreadth
13 argument, with all due respect to you, there is such a thing
14 as an overbreadth argument by counsel --

15 **MR. WYDA:** Uh-huh.

16 **THE COURT:** -- and it's my role as a judge to ferret
17 these out and perhaps to ferret out whether there is strength
18 in argument, or perhaps to ferret out the fact that inability
19 of counsel to respond reflects a weakness in one's
20 intellectual position, and, given that I ferret out that I
21 believe there is a weakness in your position, I'm trying to
22 give you an opportunity to answer to me.

23 If one decides that it hasn't worked, when does one
24 decide that? This is what is being overlooked, and, again,
25 you're not addressing this. There is a clearly provided

1 procedure here that goes all the way to the corridors of the
2 U.S. Senate and the House of Representatives, pursuant to
3 which anyone having a security clearance under the
4 Intelligence Community Whistleblower Protection Act, does, in
5 fact, have a mechanism and does, in fact, have a voice, and
6 I'm trying to ferret out in your argument as to overbreadth
7 and this argument, as submitted by the *amicus* brief that this
8 First Amendment right of expression and information cannot be
9 stifled. Of what importance is the process which goes all the
10 way to the corridors of Congress, to members of the Senate and
11 the House, so that they are given information when a
12 whistleblower feels that things haven't progressed as he or
13 she desired?

14 **MR. WYDA:** Again, I'm going to take another shot,
15 Your Honor.

16 **THE COURT:** All right.

17 **MR. WYDA:** Again, I don't concede for a minute --

18 **THE COURT:** I understand.

19 **MR. WYDA:** -- that Mr. Drake didn't properly follow
20 procedures.

21 **THE COURT:** Including going to the House and the
22 Senate?

23 **MR. WYDA:** You know, Your Honor, again, he's gone to
24 HPSCI. Again, Your Honor, if you want us to submit an
25 affidavit about the extent to which he -- if that's what's

1 making the difference, Your Honor, we'll submit an affidavit
2 demonstrating to Your Honor the extent to which he
3 participated consistent with that Whistleblower Act. Again,
4 if that's what Your Honor is -- again --

5 **THE COURT:** Well, thank you, Mr. Wyda. These are
6 interesting issues, but they're presented in the context not
7 of law review articles and --

8 **MR. WYDA:** Thank you.

9 **THE COURT:** I've actually read the 1973 Columbia Law
10 Review article that you've cited. I think it's probably one
11 of the longest Law Review articles I've ever read. I can't
12 profess that I've read all of it, but I've tried to read some
13 of the 95 pages of it, whatever it is. It's a very lengthy
14 opinion.

15 **MR. WYDA:** Thank you for that, Your Honor.

16 **THE COURT:** All right. Thank you. And I'll hear
17 from you again in a minute, Mr. Wyda. Thank you very much on
18 this.

19 Mr. Welch or Mr. Pearson, I'll be glad to hear from
20 you.

21 **MR. WELCH:** Yes. Thank you, Your Honor. I want to
22 break my argument into two, and I'm going to concentrate more
23 on the factual argument, this issue of notice, because that
24 seems to be the thrust of what -- not taking away from his
25 other arguments, but the thrust of Mr. Wyda's argument.

1 With respect to the legal argument, the Fourth
2 Circuit law is clear on the various elements that we need to
3 prove. *Gorin* establishes what national defense information
4 is, and, in fact, the Ninth Circuit, in *Boyce* itself, says
5 *Gorin* essentially precludes a constitutional vagueness
6 argument under 793.

7 **THE COURT:** 793(e).

8 **MR. WELCH:** Correct. We have *Morison*. We have
9 *Squillacote*. We have *Truong*. We have a litany of Fourth
10 Circuit cases that address national defense information, that
11 address the issue of willfully, they address the issue of
12 closely held -- all the essential elements for 793(e). So, as
13 a result, there really is no dispute legally as to what the
14 elements are, and, as it relates to 793, a document retention
15 case, we have Justice White's concurring opinion in *New York*
16 *Times*, we have the legislative history of the statute itself.
17 We have the plain language in the statute, and we also have
18 the *Ford* case.

19 So, all of those cases, there is a wealth of legal
20 authority that establishes that this statute is neither
21 overbroad, nor is it constitutionally vague. In addition,
22 with respect to Judge Wilkinson's opinion, when you read his
23 opinion, he recognizes the tension between the First Amendment
24 and the criminal justice interests --

25 **THE COURT:** As did Judge Phillips.

1 **MR. WELCH:** That's right, and then, in the end,
2 though, he resolves that tension, and he resolves it against
3 the First Amendment, if you will. What he says is precisely
4 what the Court has been asking Mr. Wyda: How do we come up
5 with a solution under the First Amendment to every disgruntled
6 employee? Every employee who is not happy with the way things
7 have gone, how do we come up with a solution if we create this
8 First Amendment exception? And, in the end, he said, "That's
9 for Congress. It's not for the judiciary," and, in the end,
10 constitutional vagueness, overbreadth concerns all satisfy the
11 First Amendment protections and issues that may be implicated
12 in a 793(e) disclosure case.

13 So *Morison* controls. *Morison* resolves not only the
14 legal issues, but it resolves the First Amendment issues, and,
15 if it's just two votes, I guess you could just stop at
16 Judge Wilkinson, but I don't see Judge Phillips' opinion being
17 much different either.

18 **THE COURT:** Well, but Mr. Wyda thinks Judge Phillips
19 can vote from the grave on this, with all due respect to
20 Judge Phillips, a wonderful man, but I believe he's passed on.

21 If you would, Mr. Welch, let's just address for the
22 record here before me the parameters of the Intelligence
23 Community Whistleblower Protection Act, because it seems to
24 me, as I've weighed through these pleadings -- and I did. I
25 tried to read a large portion of that Law Review article from

1 Columbia Law School in 1973 upon which the Defense placed
2 great weight, and have read all the cases you've cited, but,
3 again, Mr. Wyda has noted that this is still a developing area
4 of the law, but it seems to me that the Intelligence Community
5 Whistleblower Protection Act is codified at 5 United States
6 Code -- I think the Appendix, Section H, clearly outlines a
7 process where one is permitted to express their views, but
8 maybe, in case I'm missing something, outline for me step by
9 step what one can do, and am I correct or not that one can
10 wind up literally in front of a classified briefing in front
11 of the U.S. Senate or the U.S. House of Representatives?

12 **MR. WELCH:** That's correct, and they can do it
13 without notice to their employer. There are several avenues
14 that they can employ. One of them is to go to the internal
15 IG; for example, the NSA IG. The other one is to go, say, to
16 the DOD IG, which perhaps some may envision as being a little
17 bit more independent from NSA. But the third option is you go
18 through your employer, you go directly to HPSCI, you go
19 directly to the Senate Select Committee, and you say, for
20 example, "I exposed waste, fraud, and abuse, but things didn't
21 change. I want to come to you now, because you have the power
22 of the purse. You have resources. You can do perhaps what
23 didn't occur."

24 And there is no limitation on one's First Amendment
25 ability to do that, and certainly no limitation as a result of

1 your possession of classified information, because you do it
2 within a classified setting to those authorized and entitled
3 to receive that information. And, if you talk to anyone up at
4 HPSCI or the Senate Select Committee, they'll tell you that
5 they have the resources and they take these issues seriously,
6 and so they created this mechanism to balance concerns about
7 waste, fraud, and abuse, which it is important that those
8 issues get raised and vetted against the need to protect on
9 national security. And so that avenue -- those avenues are
10 always available to anyone, whether or not their first foray
11 was successful or not in their own mind.

12 The next aspect that I do want to address is this
13 issue of factual notice, meaning the thrust of Mr. Wyda's
14 argument is, in essence, that "as applied" seems to be a test
15 as applied to each particularized case, but the Courts -- the
16 Supreme Court is fairly clear that "as applied" means in all
17 applications. It's not an individualized test. But I do want
18 to comment on the facts that Mr. Wyda has raised with this
19 Court to make sure that the Court knows that, with respect to
20 the facts of this case, this is not an issue of benign
21 documents, and it's not an issue of insignificant documents.

22 It's very easy, for example, to talk about satellite
23 photographs, and it's easy to talk about battleships and
24 military troop movements as national defense information, but
25 this case is different because NSA does not have battleships,

1 and they don't have satellite photographs, and they don't have
2 troops, but, rather, what they do is they collect intelligence
3 for the soldier in the field. So, when individuals go out and
4 they harm that ability, our intelligence goes dark, and our
5 soldier in the field gets harmed.

6 So, when comments are made about documents being
7 benign or insignificant, it's in the context of what this
8 mission of this particular agency is, and it's simply
9 incorrect to say that these documents are benign or
10 insignificant. In addition, to claim lack of notice also
11 means that one must ignore the fact that this particular
12 defendant, just like in *Morison*, signed nondisclosure
13 agreements, and, unlike in *Morison*, where he only signed a
14 few, this defendant signed five, he got read in each time he
15 signed one, and he got read out each time one expired. So it
16 means he was effectively briefed on the classification
17 process, on the importance of handling classified information,
18 anywhere from ten to twelve times in his career with NSA,
19 either as an employee or a contractor.

20 And, in the end, this is a case about documents, and
21 it is a case about documents that were marked as classified.
22 Mr. Wyda tells you that four of the documents were found at
23 his home either unmarked or marked as unclassified. That is
24 because this defendant manipulated the portion markings on
25 these, rendering them to appear facially as unclassified in

1 order to remove them from NSA successfully, and we'll put on
2 evidence of just how he did that, but to suggest that the
3 documents themselves are not important is completely contrary
4 to what this defendant's own practices were, which was to
5 individually portion mark some of the documents as secret, for
6 example.

7 So, when Mr. Wyda argues lack of notice, we will be
8 putting on evidence that this defendant himself was
9 classifying some of the information as secret, and we will put
10 on information or evidence from the interviews that the
11 subject matter of the documents, he admitted was classified.
12 So, in the end, to argue lack of notice is completely
13 undermined by this defendant's own intent, his own practices
14 in this case.

15 In the end, what I find ironic about the argument of
16 counsel is, on the one hand, they want you to find 793 to be
17 unconstitutionally vague or overbroad because of courts
18 essentially engrafting or adopting common law or judicial
19 definitions to some of the terms, but their solution is no
20 different. Their solution, absent striking the statute down,
21 is for you to make common law as to how you're going to render
22 the statute acceptable, and that flies in the face of what
23 Congress intended when it wrote 793(e) and, in particular,
24 kept the *scienter* requirements strictly confined to
25 willfulness.

1 **THE COURT:** And the one thing I -- correct me if I'm
2 wrong, Mr. Welch, on this. You acknowledge that, to the
3 extent that Counts 1 through 5 are not void for lack of
4 constitutional definition, that there does come a time when,
5 with respect to instructions to the jury, the jury
6 instructions as to the meaning of "willfulness" and whether or
7 not there is an instruction on "potentially damaging to the
8 United States," if it is to be given at all, is to be given in
9 the context of an instruction. That's essentially --

10 **MR. WELCH:** Correct. That's exactly correct.

11 **THE COURT:** That's how I read the case law and the
12 progeny of *Morison's*. All right. Thank you very much.

13 Mr. Wyda, glad to hear from you.

14 **MR. WYDA:** Your Honor, I'm going to take one more
15 shot at your whistleblower question.

16 **THE COURT:** All right.

17 **MR. WYDA:** Again, maybe Mr. Welch will help me
18 understand it better. One thing that's clear is the
19 whistleblower provisions do not remove an American's right to
20 go to the press.

21 **THE COURT:** No, I'm not saying that they do.

22 **MR. WYDA:** Okay. And so this is still
23 constitutionally-protected conduct. Americans can go to the
24 press, whether it's the Whistleblower Act or not. That hasn't
25 removed it. In all candor, I guess one of the reasons why I'm

1 struggling with this, Your Honor, is I actually don't see its
2 relevance to this constitutional challenge. Mr. Drake
3 factually participated as a whistleblower through proper
4 channels, and now the conduct that's in question here is when
5 he took is evidence of fraud and abuse to the press. It's the
6 subject of this prosecution. The --

7 **THE COURT:** The subject of this prosecution is the
8 alleged wrongful retention of classified material and the
9 alleged false statements to agents --

10 **MR. WYDA:** Right.

11 **THE COURT:** -- and the alleged obstruction of
12 justice. That's what the charge is here.

13 **MR. WYDA:** Right, but, Your Honor, again, you've
14 cited the Indictment. I know you've read it well.

15 **THE COURT:** Sure.

16 **MR. WYDA:** And the Government, in its papers, has
17 conceded that it's going to present evidence that his purpose
18 was to give these documents to Reporter A.

19 **THE COURT:** Was to give classified information to
20 Reporter A.

21 **MR. WYDA:** To Reporter A.

22 **THE COURT:** Right.

23 **MR. WYDA:** So, again, make no mistake about it.
24 Both sides and probably everyone knows that the story of this
25 case that will be presented to the jury will be that at least

1 two of these documents were brought home to give to
2 Reporter A. It's not going to be a simple possession case,
3 did he have them, or did he not? We're all in agreement that
4 the evidence of his conduct with Reporter A is relevant to
5 willfulness.

6 Your Honor, "as applied" means "as applied." My
7 position regarding these documents -- and I think, you know,
8 the things speak for themselves, in comparison to the other
9 case law, these -- this is a meeting schedule that was marked
10 "Unclassified." This is a "What a success" e-mail widely
11 disseminated at NSA that is now deemed unclassified.

12 Compare that to the other cases, and it's our
13 position that that's constitutionally significant as an issue
14 of due process and notice and vagueness, so the Government can
15 make its assertions. I'm not backing down for a second that
16 there has never been a case like this. There has never been
17 two documents so benign that are the subject of this type of
18 prosecution against a client whose motives are as salutary as
19 Tom's. This is a different case. This is unlike any of the
20 cases that any of the parties have cited so far, and that's
21 constitutionally significant, and it matters for the
22 due-process analysis, and it matters for the First-Amendment
23 analysis.

24 Thank you, Your Honor.

25 **THE COURT:** All right. Thank you very much,

1 Mr. Wyda.

2 On this, I am going to indicate my rulings clearly
3 now. We'll take a break to give the court reporter and the
4 deputy clerk a little break here, and we'll come back in about
5 ten or fifteen minutes.

6 The Defendant has moved to dismiss completely
7 Counts 1, 2, 3, 4, and 5 of the ten-count Indictment because
8 it has contended that 18 United States Code § 793(e) is
9 unconstitutionally vague as applied and overly broad under the
10 First Amendment. That motion will be denied. I do not find
11 that it's constitutionally deficient in terms of vagueness,
12 because the Defendant had fair notice that his conduct was
13 illegal, and the challenge terms and phrases of § 793(e) have
14 a clear and well-established meaning from the case law, the
15 indicia of that not the least of which are the number -- the
16 record reflects the number of times the Defendant signed
17 nondisclosure agreements; the decisions of the Fourth Circuit,
18 as well as other factors, that gave this defendant more than
19 fair warning of this illegal conduct. For reasons I will
20 state in a written opinion that I will prepare on this issue,
21 there are related manifestations of a fair warning requirement
22 that clearly, I think, the facts of this case show that the
23 Defendant had fair warning as to the alleged charge here, and
24 the status that the Defendant has accorded to himself as a
25 whistleblower does not provide him constitutional ammunition

1 on this particular motion.

2 The *Wilson versus CIA* case that the Second Circuit
3 opinion in 2009, the Supreme Court, once again -- I'm sorry.
4 The Second Circuit followed Supreme Court authority since
5 1980, that Supreme Court authority set forth in *United States*
6 *versus Aguilar*, A-G-U-I-L-A-R, 515 U.S. 593, a 1995 opinion of
7 the United States Supreme Court, made clear that, when a
8 Government employee voluntarily assumes a duty of
9 confidentiality, government restrictions on disclosure are not
10 subject to the same stringent standards that would apply as to
11 general members of the public.

12 Since 1988, it has been quite clear that the Fourth
13 Circuit has made clear that the First Amendment does not
14 exempt this type of information and is not constitutionally
15 vague. Both sides have placed great emphasis on *United States*
16 *versus Morison*, Judge Russell's opinion, 844 F.2d 1057, a
17 Fourth Circuit opinion in 1988. Both sides have presented
18 excellent legal briefings on this point, and the quality of
19 the legal argument is obvious for all to see in terms of the
20 high quality of the legal argument, but, be that as it may,
21 the Fourth Circuit has specifically held that there is no
22 First Amendment violation for vagueness or overbreadth as to
23 this statute, and, indeed, my colleague, Judge Messitte, in
24 2008, down at the Greenbelt federal courthouse, in *United*
25 *States versus Ford*, restated that the holding in *Morison*

1 applies to anyone in the capacity of holding this kind of
2 classified information.

3 With respect to the meaning of these phrases --
4 willful, potentially damaging to the United States, and others
5 which Mr. Wyda has cited, the meaning of these phrases have
6 been well established and supported in the Fourth Circuit case
7 in *Morison* since 1988. It certainly will be addressed in
8 terms of the instructions to be given to the jury in this
9 case, in terms of the precise instructions to be given. It's
10 going to be addressed probably later this morning in terms of
11 the matter of discovery and the matter of the scope of the
12 CIPA hearing that we're going to be addressing later on today
13 in terms of the CIPA hearing to be held toward the end of next
14 month.

15 The meaning of "willfully," as applied to willful
16 retention of documents under § 793, I think, has also been
17 well settled in the Fourth Circuit and is not
18 unconstitutionally vague, and different *mens rea*, I think,
19 apply as applied to information as opposed to documents, but
20 I'll explore that in more detail with a written opinion that
21 will follow on this matter.

22 With respect to the level of proof that has to be
23 presented as to willful retention, that's an issue we will
24 address in terms of the level of proof that is required, but
25 it doesn't amount to a constitutional deficiency under either

1 an analysis for vagueness or for overbreadth.

2 It's essentially, as has been noted not only in the
3 *Morison* case, but was noted by Judge Ellis in the *Rosen* case
4 over in the Eastern District of Virginia in 2006, that the
5 term "willfully" has been interpreted as a specific violation
6 of a known legal duty, and, again, I'll explore that in more
7 detail in a written opinion.

8 With respect to the phrase, "relating to national
9 defense," once again, in the *Gorin* case, as has been noted by
10 the Government, that was not found to be unconstitutionally
11 vague, and then, finally, the matter as to the injury to the
12 United States, it remains to be seen, and I'll hear further
13 argument as to that in terms of whether or not that is even an
14 element in this.

15 For these general summary reasons, again, which will
16 be explored in more detail with a written opinion that will
17 follow in the next week, § 793(e) is not unconstitutionally
18 vague, nor is it unconstitutionally overbroad. The retention
19 of the documents themselves which is at issue here is not
20 protected speech. The retention of the documents is not
21 protected speech. The issue of the matter of the Defendant's
22 intent and his willfulness is another matter that we will
23 address.

24 So, for those reasons, I will deny Paper Number 52
25 and deny the Motion to Dismiss Counts 1 through 5 of the

1 Indictment, and there will be an opinion to follow to set out
2 in more detail the position of the Court with respect to its
3 denial.

4 Now, with that, we will take a 15-minute recess.
5 Counsel, just for scheduling purposes, I'm suffering from an
6 athletic injury that may cause me to go see a sports medicine
7 doctor later on this afternoon, so we might cut off a little
8 bit in the afternoon, and we've also blocked off a half a day
9 tomorrow as well. We'll have to see if we need to go, so --

10 **MS. BOARDMAN:** Very good, Your Honor.

11 **THE COURT:** So, with that, we'll take a 10- or 15-
12 minute recess, and then we'll continue on with the
13 Government's motions *in limine*, Papers 53, 54, 55, as well as
14 also 76. With that, we'll take a recess.

15 **THE CLERK:** All rise. This Honorable Court stands
16 in recess.

17 (Recess taken, 11:31 a.m. - 11:53 a.m.)

18 **THE CLERK:** All rise. This Honorable Court resumes
19 its session.

20 **THE COURT:** Good morning, everyone. I'm sorry to
21 keep you all waiting for a few minutes.

22 All right. We're going to continue now with the
23 next motion. Ms. Gunning, the Security Officer, indicated the
24 Government might want to raise an issue with me at the bench
25 quickly on a matter.

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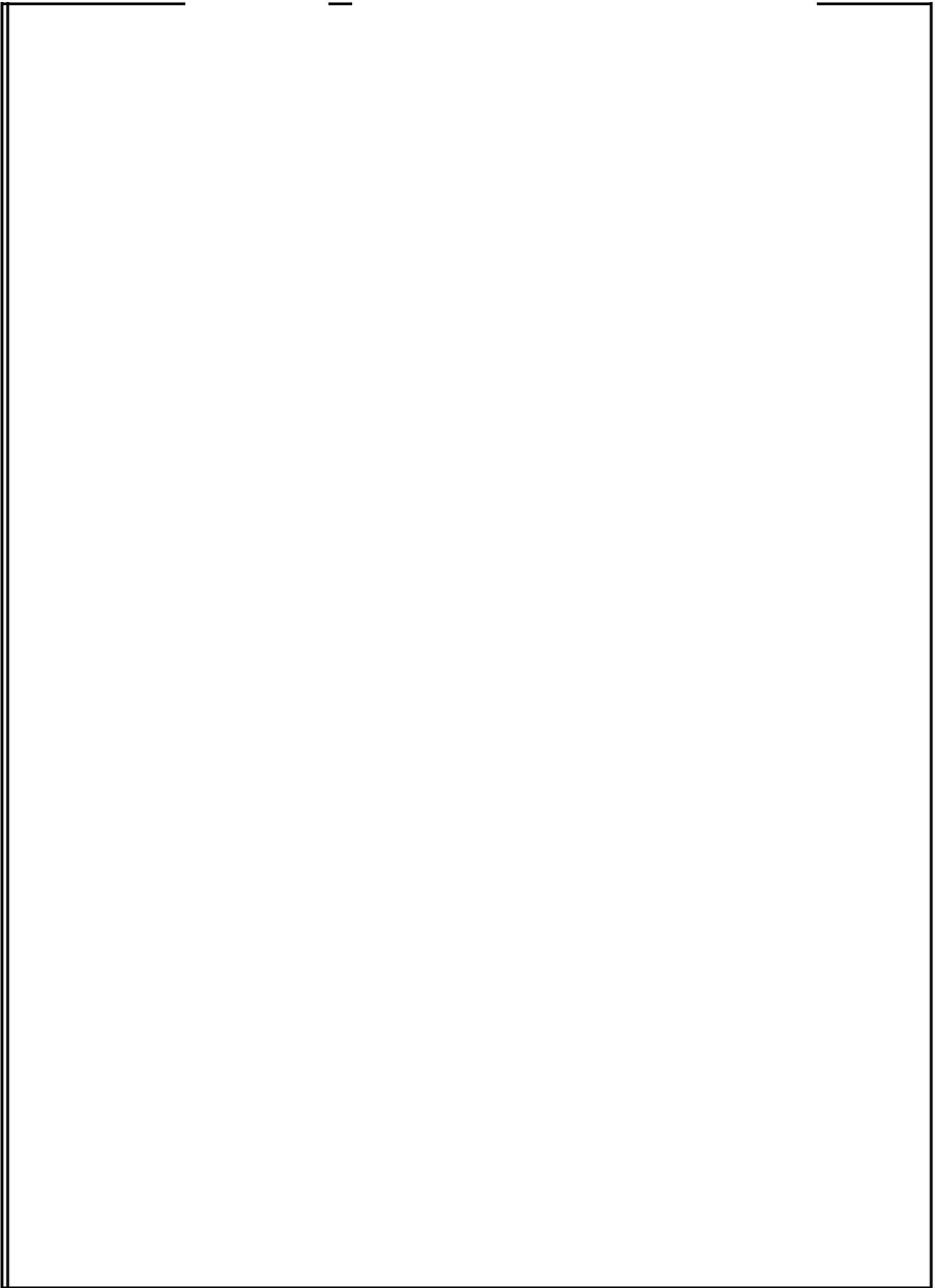
MR. PEARSON: If we can just approach briefly, Your Honor.

THE COURT: Sure. Just why don't you all come up for one second. Mr. Drake, can you stay down there. We can give him a headset if you want to just -- thank you very much.

(Whereupon, the following discussion occurred at the bench.)

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(Whereupon, the bench conference was concluded.)

THE COURT: With that, now we are ready to proceed with the Government's Motion *in Limine* to Preclude Evidence of Necessity, Justification, or Alleged Whistleblowing, and the Government has certainly noted, and you all agree that the matter of this ruling and the scope thereof will go a long way in assisting us in determining how many classified documents we need to deal with at the CIPA hearing. Have I correctly summarized where we are on that particular motion from the point of view of the Government, Mr. Pearson?

MR. PEARSON: Yes, Your Honor.

THE COURT: Mr. Wyda, or Ms. Boardman?

MR. WYDA: Yes, Your Honor. Thank you.

THE COURT: All right. So let's get to this issue now, and I'll be glad to hear from Government counsel, and then from the Defense. Mr. Pearson?

MR. PEARSON: Yes. Thank you, Your Honor. The Fourth Circuit has articulated a clearly defined test for a

1 defendant seeking to admit evidence of necessity or
2 justification, and we've laid that out in our brief.
3 Basically, there are three elements that a defendant must
4 show: That the action was necessary to avoid imminent
5 threatened harm, that there were no other adequate
6 alternatives, and that --

7 **THE COURT:** The *Cassidy* case.

8 **MR. PEARSON:** That's right. *Cassidy* and *Moylan* are
9 the two principal cases from here, and, when you look at where
10 the Defense has been heading with this DOD IG request for
11 documents and then some of the arguments we've been hearing
12 from counsel today, on top of some of the statements in their
13 response to the Government's motion, it's pretty clear that
14 the Defense is intending to justify Mr. Drake's conduct by
15 reference to his participation in this DOD IG investigation,
16 and so that leads us right back into the teeth of both the
17 Fourth Circuit cases and the cases from around the country
18 that say that's simply improper.

19 In terms of specifically where this fits in, I see
20 it in two places in the Defendant's papers. First, they say
21 that they're not planning on putting on an affirmative
22 defense, but they think that evidence related to the DOD
23 investigation is somehow related to a defense of mistake or
24 inadvertence, and, with all due respect to counsel, I have
25 read their brief repeatedly, and I fail to see the logical

1 connection between the DOD investigation participation and any
2 documents the Defendant provided in that classified arena as
3 relevant at all to the issue of him bringing home classified
4 documents and having them in his house, in his basement.

5 So there is just a logical disconnect that I don't
6 think the Defense is able to -- a gap that they're able to
7 bridge, and so we'd ask for it to be precluded for the main
8 counts, but then, in the second half of their motion, they go
9 back on the obstruction counts and state, "To refute the
10 charge that Mr. Drake intended to obstruct justice, the
11 Defense must be able to present evidence of Mr. Drake's
12 motivation for communicating with Reporter A." Motivation is
13 motive, and motive, whether good or bad, is irrelevant. The
14 question for the jury is good or bad intent.

15 **THE COURT:** Well, Mr. Pearson, you've also cited in
16 other portions of your papers, Paper Number 88, you noted the
17 *Aquino* case, I think out of the Third Circuit, in which -- the
18 *Aquino* case, 555 F.3d. You cite that there are essentially
19 five elements with respect to the prosecution of an alleged
20 violation under 18 United States Code § 793(e), the elements
21 being, one, lack of authority to possess, access, or control;
22 two, information relating to the national defense; three, an
23 either tangible or intangible format -- here, it's tangible
24 format -- in fact, it's Page 3 of Paper Number 88 is where you
25 presented this list; four, willfully; and, five, undertake the

1 passive conduct prescribed by the statute, and you
2 specifically noted that motive may be irrelevant, but that the
3 Government must prove that the Defendant willfully retained
4 documents, and essentially you've acknowledged that the
5 Government need only prove that the Defendant engaged in
6 willful and knowing conduct and willful and knowing possession
7 of the alleged charged classified documents, whereas the
8 extent of or the substance of whistleblowing activity may be a
9 question, the facts of whistleblowing activity would relate,
10 would it not, to the issue of willfulness and that the
11 possession may or may not have been through mistake, accident,
12 inadvertence, negligence.

13 So how does the matter of the evidence of
14 whistleblowing activity relate to willfulness? It does, in
15 fact, relate to willfulness; does it not?

16 **MR. PEARSON:** I would submit that it doesn't, Your
17 Honor, because of the difference in the way that this case was
18 charged. If this was a disclosure case, where the Defendant
19 was charged with providing documents to Reporter A or to other
20 individuals, then potentially I think you could make the
21 argument that evidence of participation in a DOD IG
22 investigation would have some relevance to that, but that's
23 not this case. This case, as we've said, and --

24 **THE COURT:** Well, no. But Paragraphs 9 through 12,
25 looking here, in the Indictment -- and these paragraphs are

1 incorporated by reference in the other counts. Earlier this
2 morning, that incorporation by reference, in fact, helped the
3 Government with respect to an issue I was addressing, but I
4 suggest that this helps the Defendant on this issue, because,
5 for example, Paragraph 10 relates to the scheme to retain and
6 disclose classified information. In or about November of
7 2005, Person A contacted Defendant Drake and asked Defendant
8 Drake if he would speak to Reporter A. Defendant Drake had a
9 self-described close, emotional relationship and different
10 special relationship with Person A that included the
11 unauthorized disclosure of unclassified and classified
12 information to Person A while Person A worked as a
13 Congressional staffer." Paragraph 11 relates -- it starts
14 actually at Paragraph 9 in terms of the interest of
15 Reporter A, and it goes through Paragraph 13.

16 How can there not be the context of what was
17 involved here in this case? This may not be a disclosure
18 case, but I think Mr. Wyda has aptly noted, and Ms. Boardman
19 did as well earlier this morning, that clearly there are
20 intentions with respect to ultimately information going to a
21 reporter of a newspaper. How does the matter of the existence
22 of the Department of Defense Inspector General investigation
23 not go to some extent to the question of willfulness that the
24 Defendant is entitled to address at trial?

25 **MR. PEARSON:** I say, again, a couple of reasons.

1 Number one, the existence of the DOD IG investigation, and
2 certainly what other people thought or what other people wrote
3 about that has no impact on the Defendant's state of mind.
4 All right. We all seem to be in agreement that, if intent is
5 the issue, what's relevant is what's going on in the
6 Defendant's mind, documents he reviewed, that, even arguably,
7 if you take the Defense's position, documents that he provided
8 to the DOD IG, but I think you have to take a reasonable
9 approach to, okay, if we're taking that at face value, then it
10 would only be documents provided to the DOD IG; not the larger
11 world of the DOD IG investigation and what other people
12 thought about it.

13 **THE COURT:** Even in your papers, the Government has
14 agreed to the potentiality of a summary chart prepared by the
15 Defendant admitted under Rule 1006 of the Federal Rules of
16 Evidence with respect to perhaps not the details, but the fact
17 of information being provided to a DOD IG investigator, so how
18 does that not raise the issue of Mr. Drake having been
19 involved in whistleblowing activities? It's not a necessity
20 or justification defense. It just relates to the context of
21 this case.

22 **MR. PEARSON:** Right, and I think that that's --
23 that's totally fine, Your Honor, and so I want to make sure
24 that I'm properly holding my argument here.

25 **THE COURT:** Okay.

1 **MR. PEARSON:** The position of the Government is not
2 that there should be no mention of the DOD IG investigation.

3 **THE COURT:** Or perhaps that there could be summary
4 charts.

5 **MR. PEARSON:** Or that there could be some kind of
6 summary chart for the Defense --

7 **THE COURT:** Or perhaps we'll have to address this in
8 terms of -- this is why this motion is very important in terms
9 of the volume of classified material that is or is not
10 necessary to be addressed. Certainly there is some that has
11 to be addressed because this is the context of the case,
12 correct?

13 **MR. PEARSON:** Right. Absolutely, and so that's why
14 I think that the crucial part of that is the extent of the
15 information or evidence on this point, and then, even more
16 importantly, the arguments of counsel either from opening
17 statement, cross-examination of witnesses, any Defense
18 witnesses, and then especially closing argument, about the
19 import of that investigation, and that's where I have the
20 concerns based on reading the Defense opposition and then the
21 arguments that we've been hearing today.

22 If it was simply that the DOD IG investigation is
23 relevant because it gave them a ton of documents and so it
24 must have been inadvertent or mistaken for him to bring some
25 of those documents to his house, I'm not sure that's a legally

1 improper argument. It seems illogical to me, but I'm not sure
2 that's legally improper, but, when you get to the issue of
3 they need to know his motivation, for the obstruction counts,
4 that gets back into the Fourth Circuit and other circuit cases
5 where, if they're going to be arguing his motivation, that's
6 evidence of a necessity or a justification defense, but just
7 under another name.

8 So that's where I think you've got to slice this
9 finely to be sure, and we're not saying DOD IG investigation
10 can never be uttered in front of a jury, but I think you have
11 to take a careful approach to this, because there is clear
12 indication from the Defense that they are intending to argue
13 not just the fact that he participated in this investigation,
14 but that that was his good motivation and, thus, the jury
15 should find him not guilty because of that good motivation.

16 **THE COURT:** Well, the Defense can argue it not in
17 terminology of necessity or justification, but the Defense can
18 argue it in terms of the issue of willfulness or lack thereof
19 of intent, correct?

20 **MR. PEARSON:** Well, here is the only concern I have
21 about that, Your Honor.

22 **THE COURT:** Can't Mr. Wyda or Ms. Boardman note
23 that, with respect to the specific elements of the offense as
24 to willfulness and as to willfully, that willful and knowing
25 conduct is willful and knowing possession of the charged

1 classified documents, and could they not, even under your
2 interpretation of the case law, and Justice White's concurring
3 opinion in *New York Times versus United States*, the 1971 case,
4 could they not argue that this is evidence having to do with
5 his lack of willfulness in terms of what was or was not
6 classified and in terms of -- it may be that the defense
7 ultimately is that he made a good-faith mistake, that he had
8 certain documents that are classified, was certain they were
9 not, and was discussing this with a reporter in terms of what
10 he believed to be his exercise of his First Amendment rights
11 and he made a mistake, and that would go to the context of not
12 only the Department of Defense Inspector General
13 investigation, but would also go in the context of the volume
14 of the cases involved, which I understand is where the
15 Government has acknowledged that it does not object to a
16 summary chart.

17 **MR. PEARSON:** Right. So I think there is two things
18 going on there. First is the facts, and then number two is
19 the argument. So, starting with the argument -- that is, the
20 argument about a mistake -- yeah, they can clearly make a
21 mistake argument, but the problem is that, if you layer in the
22 DOD IG investigation and his participation in that, then it
23 starts to build into, "Well, it's not just that he was
24 mistaken about this; it's that it was proper for him to do
25 this," and that's what they seem to be arguing in the

1 instructions.

2 **THE COURT:** Well, isn't that what my job is, to
3 control the trial and make sure we keep it on track with the
4 issues?

5 **MR. PEARSON:** Absolutely, Your Honor, and that's why
6 we filed this as a Motion *in Limine* --

7 **THE COURT:** Sure.

8 **MR. PEARSON:** -- because we think this is
9 potentially a trial issue. It also factors in obviously into
10 the Motion for Disclosure of the DOD --

11 **THE COURT:** Right.

12 **MR. PEARSON:** -- IG Documents, because, there, and
13 not to jump ahead too much, but, when we see the Defense
14 requests for all the information from the DOD IG report,
15 that's so far afield from what's going on in this case.

16 I mean, the only even arguably relevant issue is:
17 Did the Defendant's participation in the IG investigation
18 somehow color his intent of the possession of the documents at
19 home? But, once you get beyond that, there is no colorable
20 reason for those documents to enter in, even on a discovery
21 basis, and I guess the other issue that I wanted to say is you
22 were talking about the potential arguments from the Defense
23 counsel, when it comes to the facts, is, there is just simply
24 a disconnect because of the process, and we spent a lot of
25 time talking about this before the break.

1 Because of the Whistleblower Protection Act, because
2 of the fact that the Defendant had the ability and clearly
3 knew how to disclose classified information through the IG
4 process. What we're talking about as far as trial, and what
5 we're talking about as far as the charges in the case are him
6 bringing those documents home, and, when you get to the
7 unclassified home context, there is just no reason for that.
8 There is no justification for him to bring those documents
9 home whatsoever, and so --

10 **THE COURT:** Classified or unclassified?

11 **MR. PEARSON:** Classified or unclassified. So there
12 is no reason for that, and then the whole DOD investigation --

13 **THE COURT:** Is bringing home unclassified documents
14 a violation of law?

15 **MR. PEARSON:** No. No, Your Honor. It would be
16 potentially a violation of NSA regulations.

17 **THE COURT:** It's a violation of regulatory policy,
18 but there is no violation --

19 **MR. PEARSON:** But he's not on trial for that.

20 **THE COURT:** But there is no violation of federal
21 criminal law with respect to bringing home unclassified
22 documents, correct?

23 **MR. PEARSON:** That's correct, Your Honor.

24 **THE COURT:** So I guess the issue then becomes the
25 context of the DOD Inspector General investigation, to the

1 extent that one may or may not have a defense as to their
2 intent or lack thereof in terms of the scope of the documents,
3 the volume of documents, and having fouled up and made a
4 mistake with respect to some documents that were unclassified
5 that were brought home, the bringing home of which would not
6 be in compliance with the National Security Administration
7 policy, but not a violation of law, and some that may or may
8 not have inadvertently been brought home, and then you get to
9 the question of what the scope is, because I gather the thrust
10 of the defense is that these documents are voluminous, and,
11 out of all of these documents, there are just a few that, in
12 fact, were classified. I'm just saying that perhaps would be
13 the theory of the Defense. I don't know --

14 **MR. PEARSON:** Right.

15 **THE COURT:** -- but my point is that, to preclude
16 them from going down that path, I think, essentially prevents
17 them from presenting a defense, that we can control the matter
18 of whether or not there is reference to necessity or
19 justification, and I'm fairly confident I'll be able to
20 control the courtroom to do that. It's just a matter of where
21 else we go with this motion, and it seems to me they're
22 certainly entitled to get into this.

23 **MR. PEARSON:** Right, and that's -- you know, the
24 devil's in the details in this one, I'd say, Your Honor.

25 **THE COURT:** Sure.

1 **MR. PEARSON:** So the issues are disclosure of the
2 DOD IG documents, to what extent that's going to help them
3 present a mistake defense, and then, number two, I still think
4 there is just a logical disconnect about the argument that
5 providing an extensive number of documents to the IG at your
6 office through your work process has any bearing on your
7 intent when you bring those documents home.

8 Those two just don't mesh, and so I think that there
9 is utility in entering the order not only for the argument's
10 sake -- that is, opening statement, closing argument -- but
11 also with respect to, more broadly, calling witnesses,
12 cross-examination, introduction of evidence. The idea that
13 introducing every single piece of paper he gave to --

14 **THE COURT:** Again, more a matter of scope?

15 **MR. PEARSON:** Right.

16 **THE COURT:** Not the topic itself, Mr. Pearson.

17 **MR. PEARSON:** That's correct, Your Honor.

18 **THE COURT:** And controlling that, exactly how much
19 is necessary and in what context, that's really where we are
20 on this, correct?

21 **MR. PEARSON:** I would agree.

22 **THE COURT:** All right. Thank you, Mr. Pearson.

23 **MR. PEARSON:** Thank you, Your Honor.

24 **THE COURT:** Mr. Wyda or Ms. Boardman, I'd be glad to
25 hear from you on this.

1 **MR. WYDA:** Your Honor, it's my turn, and I'm
2 actually feeling the same way I did when I saw the
3 Government's motion. Our temptation was to respond, "We're
4 not doing that," in writing. I can do that orally and
5 respond --

6 **THE COURT:** No, you can. Here is how I see this,
7 Mr. Wyda, and, if you feel that you're being curtailed in some
8 way in your defense, let me know. I think that the Fourth
9 Circuit case law is well defined with respect to a necessity
10 defense, and the Government has cited the case law in their
11 papers on this.

12 Essentially, with respect to a necessity or
13 justification defense, the elements are, one, that the
14 Defendant must reasonably have believed that his action was
15 necessary to avoid an imminent threatened harm; two, that
16 there were no other adequate means except those which were
17 employed to avoid the threatened harm; and, three, that a
18 direct causal relationship may be reasonably anticipated
19 between the action taken and the avoidance of the harm, and
20 then the Fourth Circuit has construed this justification
21 defense, I think, fairly narrowly over the years.

22 So it seems to me that, to the extent that there is
23 any effort at saying that this was necessary, that there was
24 justification, I understand your argument earlier this morning
25 in the context of a constitutional challenge, but, in terms of

1 the approach at trial, I don't understand that to be where
2 you're headed from what you've submitted in your papers.

3 You certainly are entitled, and I think this is
4 really what we're going to have to address certainly today,
5 and hopefully will wind up the day with it, but maybe go over
6 it tomorrow, is the matter of the scope of the evidence as to
7 the Department of Defense Inspector General investigation.
8 There is no question at all that you're entitled to introduce
9 evidence and broach the topic that your client was cooperating
10 with an inspector general audit, and that there are a lot of
11 documents, and that this addresses, as I understand it, your
12 client's -- the element of your client's intent.

13 As I interpret the Government's motion, or as I
14 intend to interpret it, it doesn't mean that that evidence
15 is -- although the Government seems very concerned with it
16 amounting to a higher calling, necessity, or justification
17 defense, I'm fairly confident that I can keep this case on
18 track to correct you if you happen to make an inadvertent
19 mistake in that regard, but you're certainly free to have at
20 that in terms of the intent element, and that's how I see it.

21 Now, if you intend to further argue justification or
22 necessity, then please let me know, but I don't see it that
23 way.

24 **MR. WYDA:** No, Your Honor. The only titbit that I
25 heard today from either side that might really distract the

1 jury and take us away from a pretty coherent trial was the
2 suggestion from Mr. Pearson as to how the Whistleblower Act is
3 going to be irrelevant at trial and how much time would apply
4 to that. That seems to me like it would take us into a long
5 distraction, a long debate of whether Tom was right in his
6 whistleblowing activities. Maybe that's Mr. Pearson's intent.
7 Maybe we should file a Motion *in Limine*, but we're good with
8 it.

9 **THE COURT:** Well, the point is that, if there were
10 to be a present -- if I were to permit, which I'm not, a
11 necessity or presentation of a necessity or justification
12 defense, when you're not going there anyway, then you would
13 have the second element being the matter of there being no
14 other adequate means except those which were employed to avoid
15 the threatened harm, and obviously then the matter of the
16 recourse under the Intelligence Community Whistleblower
17 Protection Act, which I referenced in the arguments with
18 respect to the constitutionality of the statute itself, it
19 would be relevant, so I agree with you. I don't really see us
20 needing to go there. So, as far as I'm concerned, I'm
21 prepared to essentially deny in part and grant in part this
22 motion for the following reasons.

23 I grant it with respect to the matter of a necessity
24 or justification or an alleged whistleblowing defense, because
25 that's really not where the Defense is going anyway. It's

1 denied with respect to the matter of introducing evidence of
2 the Inspector General, Department of Defense audit. The fact
3 that your client was acting as a whistleblower and
4 cooperating, you certainly are free to do that. That evidence
5 can come in. It comes in under the issue with respect to the
6 matter of the intent element that must be proven here.
7 Specifically, the elements that have been summarized, as I've
8 said, by the *Aquino* Court, as to the elements, the prosecution
9 under 793(e), and clearly one of the key elements is
10 willfulness, and that's something we're going to really
11 address obviously in terms of the law and instructions to the
12 jury.

13 So, from that point of view, that's the Court's
14 ruling. It's granted in part and denied in part for the
15 reasons stated on the record, Paper Number 53.

16 Is there any need for clarification from the point
17 of view of the Government on that, Mr. Pearson?

18 **MR. PEARSON:** No, thank you, Your Honor.

19 **THE COURT:** All right. Mr. Wyda, any need for
20 clarification from the point of view of the Defense?

21 **MR. WYDA:** No, Your Honor. Thank you very much.

22 **THE COURT:** Okay. All right. So clearly you can go
23 into that.

24 All right. Perhaps we might want to get into this
25 now. This seems to me -- although this is the first part of

1 the motion, before we get into the Motion *in Limine* to exclude
2 any evidence or defense attacking the legality of the
3 regulatory scheme relating to the disclosure of classified
4 information, perhaps this might be an appropriate time to get
5 into the scope of the documents necessary, because both sides
6 have agreed that my ruling on Paper Number 53, which I've now
7 made, would affect the length and scope of the CIPA hearing,
8 the Classified Information Procedures Act hearing, which is
9 closed and is a classified hearing.

10 Mr. Wyda, let me address this with you. It seems to
11 me that where we are is a question of not the entitlement of
12 the Defense to address this. The question is the scope and
13 the need for the volume of documents. I don't perceive a need
14 to introduce and seek to go through every classified document.
15 I think clearly, under Rule 1006, there can be a summary
16 chart, and it can be agreed that there are underlying
17 documents, and there may be some question by the Government as
18 to the accuracy of it, and that may be an issue, but clearly
19 the Defense can create a summary chart. You can note either
20 there are 3,000 documents or 30,000 documents. You can
21 indicate what you believe to be the extent of the universe of
22 it, and, to some extent, some of these documents that can be
23 marked as classified, we can take the procedures at the CIPA
24 hearing and have those be introduced.

25 So the question becomes: What volume do you think

1 is necessary, and then I'll hear from Mr. Welch or
2 Mr. Pearson, because that really is the thrust of where we're
3 going to be in three weeks with our CIPA hearing and try to
4 get some guidance on this. It seems to me this is the
5 appropriate point at which to address that. Do you agree we
6 ought to address that now?

7 **MR. WYDA:** I think that makes perfect sense, Your
8 Honor.

9 **THE COURT:** All right. Mr. Welch, Mr. Pearson, this
10 is the time to address this, it seems to me, right?

11 **MR. PEARSON:** Yes, Your Honor.

12 **THE COURT:** All right. Go ahead, Mr. Wyda. How
13 voluminous do you think this need be, and then I'll hear from
14 the Government?

15 **MR. WYDA:** Your Honor, I mean, we started this
16 process a little bit in anticipation of this, and so our
17 inclination was we wanted the jury to get, through a summary
18 sheet, some sense of the volume of documents that Tom was
19 managing, and then sort of a sampling of the nature of the
20 documents, you know, the seriousness of the documents, and,
21 again, our inclination was five to ten documents that we could
22 run through the CIPA process to show that the documents
23 recovered from the basement which we maintain were DOD IG
24 documents only and were never intended to go to a reporter,
25 but they were brought home by mistake, that these are not

1 somehow evidence of willfulness on Tom's part that he brought
2 home his key DOD IG file.

3 We would be, I think, in some trouble if the
4 documents recovered from the basement were, you know, Tom
5 Drake's final summary of his DOD IG investigation testimony.
6 Tom -- you know, the Government would be arguing like crazy to
7 the jury, "Look, you know, this is what this guy brought home.
8 He thought that was so important that he brought home the key
9 summary." That's not what we have here. We have a completely
10 random e-mail that's in the middle of his DOD IG documents,
11 that's in the middle of the DOD IG time line, and we have two
12 documents that appear to be rough notes that may have gone
13 into other documents. You know, there is a randomness to the
14 documents that we feel we need to show through some small
15 sampling.

16 **THE COURT:** That's fine.

17 **MR. WYDA:** That, again, we don't want to frolic and
18 detour. We're looking forward to a trial on willfulness and
19 Tom's intent.

20 **THE COURT:** All right. By the way, Mr. Wyda, you
21 are a long-term and respected practitioner of this Court, but
22 you know the local rules require us to refer to parties by
23 their last name and not their first name, so --

24 **MR. WYDA:** Oh, I apologize.

25 **THE COURT:** That's all right. Just Mr. Drake as

1 opposed to his first name.

2 Then, again, you believe the universe of documents
3 to be how many do you think that we're talking about?

4 **MR. WYDA:** You know, no more than ten.

5 **THE COURT:** All right.

6 **MR. WYDA:** But, you know, the universe -- right, the
7 summary chart is going to be massive.

8 **THE COURT:** Summary chart -- okay. All right.

9 Mr. Pearson, do you want to be heard, or Mr. Welch?
10 It seems to me this is very manageable; is it not?

11 **MR. WELCH:** I agree.

12 **THE COURT:** All right.

13 **MR. WELCH:** I don't understand where the ten
14 documents are coming from. I just didn't understand whether
15 he's talking about ten documents that they have located either
16 from his e-mail account or one of these electronic documents
17 or these are ten from the search of the site.

18 **THE COURT:** Well, I guess it's up to him to decide
19 from whence they'll come. It seems to me that the way this
20 can work is that, with respect to getting ready for our CIPA
21 hearing, which shouldn't take that long, then, it seems to me,
22 we'll go over these documents, and, to the extent that the
23 Government says, "Well, if this is the analysis, we'd also
24 like to have other documents come in," that both sides can
25 work out the universe of documents. It seems to me that the

1 most important thing would be just to be able to verify the
2 underlying documentation for the summary chart and to have --
3 there should be an agreement as to how many documents we're
4 talking about, and the Defense clearly can argue that --
5 they're free to argue that there are thousands and thousands
6 of documents, and we just have a few documents here, and it's
7 stipulated that these are the number of documents we're
8 talking about, and it seems to me we can work that out.

9 **MR. WELCH:** You're right. I don't need to know
10 where the ten come from right now, so that's fine.

11 **THE COURT:** Right. Whatever it is, to the extent
12 that there is a random sampling, if you want to respond in
13 some way with some other documents, you're free to do that,
14 and the Defense can make its position, so I think that -- I
15 gather that that should help here with respect to -- again,
16 with respect to not only the scope of the CIPA hearing, but
17 also with respect to expert discovery or expert disclosure,
18 this should assist in some fashion.

19 You want to be heard on that, Mr. Wyda? Do we need
20 to address this anymore on the matter of the expert analysis
21 that goes with this, I guess, or not?

22 **MR. WYDA:** No, I don't believe so. There is one
23 other DOD IG issue that I'd like to get to.

24 **THE COURT:** Okay. Go ahead. Address it now. Speak
25 up. This is a good time to do it.

1 **MR. WYDA:** I didn't want to screw up your order.

2 **THE COURT:** Go ahead.

3 **MR. WYDA:** There is the issue of the hard-copy
4 documents that sort of triggered this.

5 **THE COURT:** Right.

6 **MR. WYDA:** Our understanding from the Government --
7 and I don't think I'm misspeaking, but, again, the Government
8 can correct me if I'm wrong. We put in a request for all the
9 documents that Tom shared.

10 **THE COURT:** Mr. Drake.

11 **MR. WYDA:** I'm sorry. I apologize. Mr. Drake.
12 It's been a long relationship, and I apologize.

13 **THE COURT:** That's okay. Go ahead.

14 **MR. WYDA:** That Mr. Drake shared with the Department
15 of Defense Inspector General investigators, many of them hard
16 copy.

17 **THE COURT:** Right.

18 **MR. WYDA:** And so the Government got back to us and
19 explained -- again, my understanding of the state of, you
20 know, the Government's position is that most of them, the vast
21 majority of them have been destroyed. I've gotten a sense
22 that there is some that aren't destroyed, and we want the
23 whole volume. That is part of our defense. You know, it is
24 cumulative, but that's the nature of our volume. We want to
25 be able to portray, you know, the true nature of the volume of

1 documents that Tom --

2 **THE COURT:** When you say you want the true volume,
3 apart from the summary chart and noting how many papers there
4 are, you actually want all the documents themselves?

5 **MR. WYDA:** No, I apologize. I misspoke. I want to
6 add to the summary chart the hard-copy documents as well,
7 because right now we don't have them in that chart.

8 **THE COURT:** Actually, the hard-copy documents
9 themselves, be they ten or a hundred, you want to attach them
10 in a stipulation to the summary chart?

11 **MR. WYDA:** I want to make them part of the summary
12 chart. However we're going to do this, if we currently have
13 4,000 electronic documents and 200 hard-copy documents, we
14 want to present to the jury that Tom was handling 4,200 or,
15 you know, if it's a thousand more, then add a thousand onto
16 it, but we want to capture the full universe, so that's part
17 of our argument, which doesn't seem to be too, too hard.

18 **THE COURT:** So the summary chart would summarize the
19 electronic documents, but not necessarily the hard-copy
20 documents?

21 **MR. WYDA:** No. The problem is, Your Honor -- it's
22 been a while. Maybe you've lost this thread and I haven't
23 done a good job with it.

24 **THE COURT:** That's all right.

25 **MR. WYDA:** We've been discussing the electronic

1 documents.

2 **THE COURT:** Yes.

3 **MR. WYDA:** We don't have the hard-copy documents.

4 **THE COURT:** I understand. I understand.

5 **MR. WYDA:** So, to the extent that Tom gave, separate
6 and apart from the electronic documents, additional documents,
7 we want to present the whole picture of how many documents
8 Tom --

9 **THE COURT:** Well --

10 **MR. WYDA:** -- was handling.

11 **THE COURT:** -- let's talk about how many we're
12 talking about first. How many do you think we're talking
13 about, Mr. Welch, before you address the merits of it? Do you
14 have any idea?

15 **MR. WELCH:** I don't know the answer to that,
16 because, according to DOD IG, they destroyed most of the
17 hard-copy documents and --

18 **THE COURT:** Saved the rest of them electronically,
19 but the hard copies were destroyed. Okay.

20 **MR. WELCH:** Yeah, and, with respect to the hard
21 copy, the hard copies that he may have delivered to them,
22 meaning they may have hard copies that are totally independent
23 of him. The hard copies that may have been delivered to them
24 by him, they can't trace back to him, meaning they don't know
25 specifically what they got from him. You know, that's what

1 they've told us to date --

2 **THE COURT:** Okay.

3 **MR. WELCH:** -- and I need to clarify that, but, you
4 know, to the extent there is a summary chart, it has to be
5 accurate. It has to be reliable. So, if they can't trace a
6 hard copy back to the Defendant, then it shouldn't go on the
7 chart.

8 **THE COURT:** Well, it seems to me maybe the way to
9 deal with this is let's find out exactly what the universe is
10 we're talking about, and we can certainly address this in a
11 conference call sometime in the next week or so. Just let's
12 find out exactly what we're talking about in the way of how
13 many hard copies there are, and then we'll deal with the
14 situation as to the discovery of those and whether or not they
15 should be admitted, and we'll go from there, and whether there
16 is classification that has to be dealt with in the CIPA
17 hearing as well, we'll have to wait and see.

18 Go ahead, Mr. Pearson.

19 **MR. PEARSON:** I was just going to follow up on this,
20 because I was --

21 **THE COURT:** Go right ahead.

22 **MR. PEARSON:** Before I went down for my trial, I was
23 initially dealing with a DOD IG investigation, and just to
24 hopefully shed a little bit more light on this, we're talking
25 about hard copies and electronic copies, and I think it's

1 important to keep in mind -- I think what the Defense is
2 talking about is electronic copies and hard copies of
3 documents as they were provided to the DOD IG.

4 **THE COURT:** Yes. I think that's what he's talking
5 about, yes.

6 **MR. PEARSON:** In the current form, I don't know if
7 there are any more hard copies. What's been represented to me
8 is that the IG has a copy of the audit itself, and then some
9 backup documents that they kept in support of that audit. So
10 some of that contained information provided by the Defendant,
11 and some of it contained information that they gathered
12 independent of the Defendant. So I just want to make clear --
13 and I'm happy to go back and get a fuller sense of what still
14 exists, but I don't think that there is this dichotomy of, you
15 know, they have a stack of hard-copy documents, and then they
16 have a computer file. It's all going to be computerized --

17 **THE COURT:** Why don't we find out what the extent of
18 it is, and we'll see if we really have a major issue here or
19 not. It doesn't sound like we do from the point of view of
20 thousands and thousands of hard-copy pages. I don't think we
21 do.

22 **MR. WYDA:** I do not mean -- one other argument that
23 I think ratchets up the prejudice to the Defense.

24 **THE COURT:** All right. Okay.

25 **MR. WYDA:** So our defense is that the three

1 documents in the basement are not reporter documents. They're
2 DOD IG documents. One of them clearly is. It's an e-mail to
3 the DOD IG investigators. The others are -- you can tell are
4 related in substance, but they're not e-mails.

5 **THE COURT:** All right.

6 **MR. WYDA:** We would like to show the jury that these
7 documents, in fact, were rough drafts of documents that were
8 incorporated into DOD IG documents. To do that, we need the
9 hard-copy documents.

10 **THE COURT:** I understand what you mean.

11 **MR. WYDA:** If we can't do that, we're harmed.

12 **THE COURT:** All right. We'll have to wait and see
13 if there are hard-copy documents, and I understand your
14 argument if there are, and I'll conduct a review of that, and
15 I don't think this issue has been totally joined yet in terms
16 of the first step is just to find out what hard-copy documents
17 there are, and then we will address the issue of the
18 Defendant's proffered need as to the content of that, and
19 seems to me that comes within the scope of the CIPA hearing
20 that we have, because presumably it's classified material
21 there, and that's something we can address at the CIPA
22 hearing. So the first step, Mr. Pearson, is to find out what
23 the universe is, what we're talking about here in terms of the
24 number of hard-copy documents.

25 **MR. PEARSON:** I agree with that.

1 **THE COURT:** And the sooner you can find that out,
2 the better. Sometime next week or whatever you can -- call my
3 office, and Ms. Cole will arrange a conference call with
4 everyone, and we'll deal with that, and then we'll have to see
5 whether there is an issue or not on this.

6 **MR. PEARSON:** Yes, sir.

7 **THE COURT:** Is that agreeable to the Government?

8 **MR. PEARSON:** Yes.

9 **THE COURT:** Agreeable to the Defense, Mr. Wyda?

10 **MR. WYDA:** Yes. Thanks so much.

11 **THE COURT:** Okay. All right. Then, with that, then
12 we are at Paper Number 54, and that is the Government's Motion
13 *in Limine* to Exclude Any Evidence or a Defense Attacking the
14 Legality of the Regulatory Scheme Relating to the Disclosure
15 of Classified Information. Mr. Welch?

16 **MR. WELCH:** Thank you, Your Honor. To crystallize
17 the issue, we filed our motion. They responded. They
18 indicated they did not intend to attack legality, they did not
19 intend to attack constitutionality, but what's clear is they
20 intend to call an expert who is going to talk about the
21 propriety of the classification system. So my comments will
22 be focussed more on what their expert plans to testify about.

23 **THE COURT:** All right. Okay. Go ahead.

24 **MR. WELCH:** They indicated in their response that
25 their expert intended to at least testify in the following two

1 areas: The first is the pervasiveness and consequences of
2 over-classification, and then the second area is the
3 Defendant's state of mind, meaning whether or not he knew or
4 should have known that the documents that he was bringing home
5 were classified.

6 So, as it relates to the first issue, pervasiveness
7 of over-classification is simply irrelevant. I think the
8 Court said it best at our last telephonic status conference,
9 which is the classification system is what it is, and this
10 defendant had to operate within it. Whether you grant the
11 notion that it's overly pervasive or not, it doesn't matter.
12 He needs to operate within the system.

13 **THE COURT:** Would it relate in any way to the
14 Defendant's intent or understanding --

15 **MR. WELCH:** It would not.

16 **THE COURT:** -- in terms of whether material was or
17 was not classified?

18 **MR. WELCH:** It would not, because that expert
19 opinion would be something that he never could have relied
20 upon, meaning -- it certainly is an expert that he never
21 talked to, never consulted with, and to have some independent
22 expert come in and say, "The system is overly pervasive," or,
23 "It overly classifies," doesn't matter with respect to him.
24 He can't ignore what our classification markings on documents
25 and make his own independent judgment as to whether or not

1 he's going to take something home or not.

2 **THE COURT:** Well, I guess my question to you is --
3 I'm just trying to -- and I'll hear from the Defendant in a
4 moment -- is to posit a situation where it may not be a
5 question of whether or not he agrees or doesn't agree with the
6 classification. It may be a situation of whether he does or
7 doesn't understand the classification.

8 **MR. WELCH:** But that's not an issue for an expert.
9 That's an issue --

10 **THE COURT:** Oh, I understand your second element in
11 terms of his state of mind, which is a separate matter in
12 terms of your objection to an expert trying to testify as to a
13 defendant's state of mind, but, as to the pervasiveness or
14 lack thereof of classification, or over-classification, as I
15 understand it, the Defendant is proffering that an expert will
16 say that some of this material is over-classified, that it is
17 not the type of information that is -- let's say
18 hypothetically is not ordinarily classified as classified
19 material, and so there is an over-classification. Does that
20 not address the issue of the Defendant presenting evidence as
21 to his lack of willful intent if there is some argument about
22 mistake or confusion or inadvertence or negligence to some
23 extent?

24 **MR. WELCH:** And I don't disagree that an expert
25 could come in and say, "That document is over-classified," or,

1 "That document should be unclassified." My reading of the
2 response is that an expert is going to come in and talk about
3 the system *in toto* and say, "The system over-classifies
4 documents generally," and it's that sort of expert testimony
5 that really is irrelevant, because it doesn't tell you
6 anything about each charged document. So there is no problem
7 with an expert coming in and saying, "That document is not
8 properly classified. It should be unclassified. That
9 document is benign. It should not be classified." That's
10 fine.

11 My reading of the response is they have someone who
12 is coming in to testify not only about how the system,
13 systemwide, has problems, but then also wants to talk about
14 what are the consequences if you have a systemwide problem
15 with over-classification, and both of those are irrelevant.
16 They don't tell you anything about the accuracy of the
17 classification done by our expert. They don't tell you
18 anything about the documents charged in this case. And they
19 really go to two issues as it relates to the jury.

20 One is the jury can figure out whether or not a
21 document is insignificant or benign or what the consequence is
22 of deeming something classified when it should be
23 unclassified. That doesn't take a rocket scientist to figure
24 that out. And then, secondly, you know, the scope of that
25 sort of testimony is really designed to just sort of get the

1 emotions of the jury charged up, you know, to get them upset
2 that there may be information that's being withheld from them.

3 So it's the scope in talking about the systemwide
4 issues that it appears that their expert is going to talk
5 about, and the 704(b) issue, where they just want to talk
6 about the state of mind of the Defendant.

7 **THE COURT:** Well, I'll deal with that in a second.
8 Thank you, Mr. Welch.

9 Mr. Wyda, or Ms. Boardman?

10 **MS. BOARDMAN:** Yes, Your Honor.

11 **THE COURT:** I assume that you're not going to have
12 an expert that you're going to seek to have testify in terms
13 of your client's state of mind under Rule 704, are you?

14 **MS. BOARDMAN:** Of course not. We can move on from
15 that. We're not doing that, Your Honor.

16 **THE COURT:** So the real issue is that, to the extent
17 we can't hear the expert -- your expert will be proffered
18 under 702 to testify as to his or her opinion, one to
19 establish his or her expertise as to the pervasiveness of
20 over-classification and a view as to whether or not that
21 engenders confusion or not, I gather. Is that what your
22 thrust of it is, or not?

23 **MS. BOARDMAN:** The thrust of it is this: Our expert
24 disclosures are due on Friday, and I think much more light
25 will be shed once we provide those. We're operating in a bit

1 of a vacuum.

2 **THE COURT:** Sure.

3 **MS. BOARDMAN:** The Government has filed an
4 anticipatory motion, and we responded as best we could given
5 the state of affairs.

6 What I want to emphasize, though, and what will be
7 in our expert disclosures is a direct rebuttal to what is
8 contained in their expert disclosures, including not
9 discussion of over-classification. We are not going to have
10 an expert get on the stand and testify that the Government
11 over-classifies and, therefore, you should be upset about
12 that, and the NSA must have over-classified in this case.
13 That's not what we're going to do. That's not our intent at
14 all.

15 What we want to do is rebut the Government's expert
16 on classification, and that's what we intend to do. Let me
17 give a highlight to Your Honor as to what her proposed
18 testimony is, and this is all unclassified, okay?
19 Ms. Murray's proposed testimony includes --

20 **THE COURT:** This is the Government's?

21 **MS. BOARDMAN:** That's correct. The Government's
22 proposed classification expert.

23 **THE COURT:** Okay.

24 **MS. BOARDMAN:** She's going to testify about the
25 purpose of the executive order, which is, quote, to prescribe

1 a uniform system for classifying, safeguarding, and
2 declassifying national security. It's also to protect
3 information critical to national security while balancing an
4 interest in open government.

5 The next thing she's going to testify about is
6 particularly relevant here. She will testify, according to
7 the Government, to help the jury understand the process of
8 original classification, and that original classification
9 authority, which she possesses, which she will testify that
10 she was one of 22 people at NSA with original classification
11 authority, that that authority is non-delegable, and that the
12 uniform system of classification would fail if others could
13 make their own independent determination of the proper
14 classification. Your Honor, I highlight these for two
15 reasons. The words "uniform" will suggest to the jury that
16 what she says as the official classification authority goes,
17 and that, as long as she says it, it's in compliance with the
18 uniform system.

19 We will have an expert who will testify that not
20 that there is over-classification, Your Honor, but that, in
21 fact, people make mistakes, that Government OCAs have
22 inappropriately classified materials, and the jury will
23 determine whether or not this original classification
24 authority is correct in this situation. She also talks about
25 the consequences of if other people take things into their own

1 hands. Well, we're rebutting that with consequences if the
2 classification is inappropriate.

3 So my first response to this motion is: It's
4 premature. Let the Government get our disclosure on Friday.
5 If there is a problem, Your Honor can address it either before
6 our expert testifies, or before trial, but, to the extent Your
7 Honor wants to address it now, this proposed testimony is in
8 direct response to Ms. Murray's testimony, and, as we talked
9 about earlier, it is simply putting the Government's case to
10 the test and keeping a level playing field.

11 **THE COURT:** Well, when you say "Friday," you mean
12 tomorrow; not next Friday?

13 **MS. BOARDMAN:** No. It's due a week from tomorrow.

14 **THE COURT:** A week from tomorrow.

15 All right. It seems to me that, on this, Mr. Welch,
16 I think I need to let this issue crystalize a little more.
17 Why don't we see what we're dealing with.

18 **MR. WELCH:** Sure.

19 **THE COURT:** I think Ms. Boardman's point is well
20 taken on that. Let's just see where we are on this, and I'll
21 withhold ruling on this, and we may or may not have to have a
22 further hearing on it. Let's just wait and see where we are
23 on this --

24 **MR. WELCH:** That's fine.

25 **THE COURT:** -- and then just withhold ruling.

1 Okay. The next motion that I have to deal with, I
2 believe, is Paper Number 55 is the Government's Motion *in*
3 *Limine* to Bar Reference to An Admission of Published Newspaper
4 Articles, and maybe it's better if we hear from what we
5 believe is the intent or the proffer from the Defense that
6 this is even an issue or not and the extent to which newspaper
7 articles will or will not be relevant, and it seems to me,
8 first of all, Mr. Welch, it would be better maybe if I hear
9 from the Defense first on this in terms of -- Ms. Boardman or
10 Mr. Wyda, this isn't your motion, but is this a motion we need
11 to deal with at all? I mean, clearly there is going to be
12 some indication of some information going somewhere obviously
13 that will come into the case, correct?

14 **MR. WYDA:** Right.

15 **THE COURT:** All right.

16 **MR. WYDA:** Your Honor, we need a little bit of
17 relief. I don't think it's what the Government fears or what
18 maybe the Court fears. We don't want to litigate the
19 substance of the articles.

20 **THE COURT:** Nor is the substance of the articles
21 really relevant.

22 **MR. WYDA:** I agree with that, but the facts of the
23 articles has to come in, and it seems like the Government, you
24 know, again, at times, seems to agree with that, so maybe I'm
25 a little bit confused, but, as you pointed out, Reporter A is

1 throughout the Indictment. They're pleading it at Page 3 that
2 they need the information of our client's contact with the
3 reporter for the specific purpose of assisting Reporter A is
4 evidence of our client's willfulness. So they're taking the
5 story up to Reporter A. We need the articles in for a couple
6 of reasons, Your Honor.

7 **THE COURT:** When you say you need the articles in,
8 you need the existence of the article, or the actual
9 content --

10 **MR. WYDA:** We definitely need the existence of the
11 articles in.

12 **THE COURT:** We have hearsay issues that relate to
13 the content of the article; do we not?

14 **MR. WYDA:** We're not offering them for the truth of
15 the matter. We're not going to litigate -- you know, again, I
16 do believe the Court can completely control this, and I have
17 no interest in trying to advocate to the jury that NSA was
18 right or Tom Drake and others, you know, in those articles
19 were right. Here is what we need, Your Honor, and it's sort
20 of throughout the case. We need to be able to show the jury
21 that none of the classified information that the Government
22 alleges they found in our client's home is in the articles.
23 They're saying that Tom went to the newspaper reporter for
24 the -- brought the stuff home for the purpose of going to the
25 newspaper article. That's evidence of willfulness. We need

1 to show that none of that was relevant to the newspaper
2 articles.

3 **THE COURT:** I understand the thrust of where you're
4 going. All right. Let me just hear this motion now in the
5 context of that, Mr. Welch.

6 **MR. WELCH:** Right. In the context of that, it shows
7 that the substance of the articles are not relevant. In other
8 words, we're going to put on proof that he brought the
9 information home because he wanted to talk to a reporter.
10 That does not translate to that we're going to be putting on
11 evidence that the articles contained classified information
12 from him. The articles, in order to put them on, meaning the
13 substance, to admit them, which is what they want to do, you
14 have to admit them for their truth for the purpose that they
15 want to admit them for, which is that the articles are
16 unclassified. That is a statement of fact. That is an
17 assertion of fact.

18 And so what's not relevant is what's in the
19 articles, because this defendant didn't write them. They're
20 not his work product. He couldn't have known what made it in
21 an article and what didn't make it into an article. He
22 brought the documents home because he was asked to do research
23 by the reporter, but what ultimately gets created is a product
24 of the reporter, of the reporter's editors, and I would
25 imagine a lawyer's involved in the process, but they're not a

1 product -- they do not in any way impact his intent.

2 So the articles are not relevant. If they're so --

3 **THE COURT:** The thrust of your argument here is
4 that, even if we attempt to screen out the specifics or total
5 content of the articles, that, whereas the Defendant is
6 proffering that it go towards the issue of intent in terms of
7 what actually shows up in the article, the thrust of your
8 response is that that's a determination not made by the
9 Defendant, but made by the reporter?

10 **MR. WELCH:** That's correct.

11 **THE COURT:** So what evidence do you intend to
12 produce with respect to Paragraphs 9 through 13, where there
13 is reference to Reporter A publishing a series of newspaper
14 articles about NSA? What do you intend to produce in evidence
15 for the Government?

16 **MR. WELCH:** No. We're not going to be putting any
17 articles into evidence. What we're going to be putting into
18 evidence are his statements to the interviewing agents, where
19 he talks about his conversations with Reporter A and the fact
20 that he knew that she was publishing newspaper articles. I
21 don't have a problem with those statements coming in. I think
22 that's somewhat similar to what we were dealing with on the
23 whole DOD IG investigation.

24 Statements are going to be coming in through the
25 interviewing agents that he took documents home, the purpose

1 was so that he could talk to Reporter A. He talked to
2 Reporter A. We'll be putting on statements that he didn't
3 intend to share classified information with Reporter A, which
4 is different from bringing them and leaving them in your home.
5 We're going to put on evidence that, in his mind, he didn't
6 provide unclassified information to Reporter A. That
7 information goes to the willfulness of bringing documents home
8 and retaining them. What ultimately happens with that
9 information is simply not relevant.

10 So, to the extent they're arguing they need the
11 articles to establish his intent, meaning his intent of not
12 providing classified information to the reporter, they're
13 going to have plenty of fodder through the interviews. So not
14 only is it irrelevant; it doesn't prove his intent or state of
15 mind. They have other evidence that they can utilize for that
16 very same purpose, and that is the interview statements that
17 he provides on three separate interviews to the agents.

18 The articles, if they come in, are just full of
19 hearsay. One of the articles or many of the articles talk
20 about multiple sources. They're unidentified. They talk
21 about a broad range of subjects that don't deal with some of
22 the subjects that the Defendant apparently wants to bring up,
23 and you're inviting a lot of speculation, a lot of conjecture,
24 and you're inviting more witnesses who have got to come in and
25 say, you know, the information contained in those articles is

1 simply untrue.

2 If they want to put the articles in, they need to
3 call the reporter, because I'm entitled therefore to
4 cross-examine that reporter and to be able to determine from
5 the reporter whether or not this defendant actually did
6 provide her classified information, because, in his
7 statements, he admits that she was in possession of classified
8 information.

9 So it's not fair to allow the articles to come in
10 for the stated purpose of showing whether they're classified
11 or unclassified, particularly when the Defendant's own
12 statements indicate that she was in possession of classified
13 information. So I think we need to just draw the line. The
14 articles don't come in. We're certainly going to have
15 reference to the articles. We're going to certainly put in
16 evidence of statements made by the Defendant about his
17 contacts with her, but what happens thereafter is really
18 irrelevant to the retention case.

19 **THE COURT:** All right. Thank you, Mr. Welch.

20 Mr. Wyda?

21 **MR. WYDA:** Your Honor, again, just taking us back a
22 couple of steps, the key to our defense is Documents 1 and 2,
23 Tom Drake admitted that he gave them to the reporter.
24 Documents 3, 4, and 5, I think the Government is saying that
25 they're related to the reporter. We say no. The fact that

1 they're unrelated, that they don't show up, and that they're
2 irrelevant to the articles, is essential to our defense. The
3 only fact we --

4 **THE COURT:** Let me just go a step on this. How do
5 they not get into the conundrum of it really being a
6 determination of -- well, no, step back even further. To the
7 extent that there is a Government position that there is no
8 way we know what the basis of the reporter putting in the
9 information or not putting in the information, Mr. Welch
10 proffered that he would then be entitled to call the reporter
11 and cross-examine the reporter, the first response to which
12 might be, "Well, that's fine. You can introduce an article.
13 Note that it didn't refer to X, Y, or Z." The reporter is
14 then called. The Government then calls in rebuttal, or maybe
15 even in anticipation calls the reporter in the case in chief,
16 but then the reality is we go into the whole press issue and
17 disclosure issue, and I see that we've got -- we're going down
18 a deep, dark hole here on that.

19 **MR. WYDA:** Right. And, again, I guess one of the
20 reasons I'm so comfortable with this, Your Honor, is I am
21 completely confident that this Court can explain to the jury
22 this document's relevance, and, you know, how they're supposed
23 to evaluate it. Frankly, what I'm most frightened of is that,
24 if we cut the story off here, that the jury is going to fill
25 in the gap, and we're going to be claiming that Documents 3,

1 4, and 5 had nothing to do with the articles and were only
2 about DOD IG, but we're not going to be able to show them the
3 articles. We're going to be crushed. They're going to be
4 sitting there saying, "Of course they brought them home."
5 They're saying that Tom brought them home for the purpose of
6 sharing them with the reporter, and frankly, Your Honor,
7 that's not true.

8 **THE COURT:** All right.

9 **MR. WYDA:** And we need to be able to display that --

10 **THE COURT:** I understand your argument. Why don't
11 you -- Mr. Welch, as you probably learned by now, the way I
12 tend -- sometimes these arguments are like a tennis match. I
13 like to get people up and down. Respond to this. Here is the
14 crux of the Government's problem, it seems to me, on this
15 motion, Mr. Welch, is the Government has chosen -- in terms of
16 the preparation of the Indictment that was submitted to the
17 Grand Jury, the Government, in Paragraphs 9 through 14, and,
18 again, just as those paragraphs helped you in earlier
19 arguments this morning because they're incorporated by
20 reference, the simple fact of the matter is that the
21 Indictment that was presented by the Government, returned by
22 the Grand Jury, clearly references the matter of Reporter A,
23 references newspaper articles, and it's part of the Indictment
24 in the case, and so I'm trying to fashion a ruling that allows
25 the Defendant to respond to that, and yet we don't go down

1 this deep, dark hole of hearsay implications, and I hear your
2 argument, but it's in the Indictment. The newspaper articles
3 are mentioned in the Indictment.

4 **MR. WELCH:** Right, and so let me make sure that I --
5 I'm a little clearer. I don't think there is a problem with
6 reference to newspaper articles.

7 **THE COURT:** Of course not.

8 **MR. WELCH:** There is a problem with admission of
9 newspaper articles and the substance of the articles.

10 **THE COURT:** Well, at this step, let's break it up.
11 It may not even be a problem, but clearly there is no problem
12 with reference to newspaper articles. There has to be
13 reference to them. They're in the Indictment.

14 **MR. WELCH:** That's right, and because part of the
15 proof will be that it was for the purpose of communicating
16 with the reporter that documents are brought home.

17 **THE COURT:** All right. And so the point is, then,
18 then you get to the matter of the content of the articles, and
19 it seems to me that there is a way to have the content be
20 addressed without going far afield in terms of findings up,
21 down, or whatever. It seems to me that the matter of the
22 content is really what the crux is.

23 There is no doubt in my mind we're not going down
24 the path of having reporters called to the witness stand,
25 because, you know, I'm not inclined to incarcerate a reporter

1 who asserts a privilege. That's the last thing we need right
2 now. I'm sure some of the people from the media in the
3 audience appreciate that caution, but I'm just saying that I
4 suspect that, to the extent that we even think about calling a
5 reporter to the witness stand, I think we're really going down
6 a deep, dark hole here in terms of how this case would proceed
7 and assertions of privilege and everything else.

8 It seems to me that clearly the matter of the
9 newspaper articles is relevant under Rule 401. It is
10 referenced in the Indictment. There are matters of
11 consequence that make a fact sought to be proven more probable
12 than not from the point of view of the Government, the matter
13 of willfulness of intent or lack thereof in terms of seeking
14 to show the Defendant's intent. So the articles are relevant.
15 The matter of the overall topic area and content of the
16 articles in terms of subject matter content, it seems to me,
17 is relevant, and yet we do not need to go down the path of
18 various assertions by other people and the hearsay issue, so
19 why don't you help me with this --

20 **MR. WELCH:** I will.

21 **THE COURT:** -- and we'll see if we can get --

22 **MR. WELCH:** The issue -- the reason they want to put
23 the articles in is to be able to say that the articles don't
24 contain classified information. I want to actually clarify.
25 When I said that, talked about issuing subpoenas to the

1 reporter, I was referring to Mr. Wyda. I mean, if he wants to
2 put the articles in, he's going to need a reporter to
3 authenticate them. I have no interest in subpoenaing the
4 reporter, but, if the issue is to prove that there is no
5 classified information in the articles, that does not defeat
6 the issue of whether or not the Defendant passed classified
7 information to the reporter.

8 **THE COURT:** Ah, stop, stop. Stop one second. Stop.
9 Wait a minute. Point well taken, but that goes to the weight;
10 not the admissibility, meaning you are certainly free to argue
11 that the fact that an article did not contain information, the
12 Defense can argue that *ergo* means that Mr. Drake did not seek
13 to leak that information. The Government is free to argue
14 that the fact that an article does not contain the information
15 does not necessarily, in any way, address his intent with
16 respect to bringing the information home, in the eyes of the
17 Government, illegally with respect to information. That's an
18 issue as to weight, not admissibility, it seems to me.

19 **MR. WELCH:** But I think the issue on weight is that
20 it breaks at that point in time, because the article is a
21 product of the reporter, meaning there are too many
22 intervening people between conversation between defendant and
23 reporter and creation of the article. There is what
24 Reporter A wants to put in it and what it doesn't want to put
25 in it, what the editors want to keep in it and don't want to

1 keep in it, what lawyers say should stay in and should not
2 stay in. So there is a disconnect between proof of the
3 article as proof of the Defendant's intent, because all of
4 these intervening forces that happened at that point in time.

5 **THE COURT:** And, again, that goes to the weight, and
6 you can certainly explore that, it seems to me.

7 **MR. WELCH:** I can't --

8 **THE COURT:** Well, go ahead.

9 **MR. WELCH:** I can't explore it without a reporter on
10 the stand.

11 **THE COURT:** Well, then there would be -- the
12 reporter could not assert, for example -- for example, if
13 necessary, you'd be able to qualify an expert from any major
14 newspaper to go over the context of how that occurs. You're
15 not going into the content or any privileged communication.

16 **MR. WYDA:** We'd stipulate to that, if that helps.

17 **THE COURT:** Yeah. I mean, you can call any editor
18 from any leading newspaper, Mr. Welch. I'll certainly tell
19 you right now, you'd be free to do that, and you could have an
20 editor from *The New York Times*, *Washington Post*, *Baltimore*
21 *Sun*, say, "Here is the process with respect to an article. A
22 reporter does not summarily decide himself or herself all of
23 what we put in. We do screening. We do X, Y, and Z. This is
24 the process." Again, it goes to the weight; not the
25 admissibility.

1 **MR. WELCH:** And then what we'll have to do is we'll
2 have to call someone from NSA who will say, "The newspaper
3 articles contain classified information."

4 **THE COURT:** I'm sorry. What?

5 **MR. WELCH:** "The newspaper articles contain
6 classified information." I mean, if we're going to have to
7 rebut this issue --

8 **THE COURT:** And you may be able to do that, that's
9 fine.

10 **MR. WELCH:** I guess we'll have to do that.

11 **THE COURT:** You can do that.

12 **MR. WELCH:** Yeah.

13 **THE COURT:** And the point is I don't think we get
14 down the path -- it seems to me, Mr. Wyda, that, on this
15 motion, we don't go down the path of detailed content, of the
16 merits of the contentions one way or the other, who said what
17 to whom, who analyzed X, Y, and Z. I'm going to look at this
18 very carefully, but it seems to me that clearly that the fact
19 of newspaper articles is referenced in Paragraphs 9 through 13
20 of the Indictment, the Defense is free to explore that, as
21 well as introduce some redacted form of a content of the
22 overall topic of the newspaper articles, and so, to that
23 extent, I would deny the Government's motion, but we'll have
24 to look at it very carefully, and the Government will be free
25 to respond in the fact that is suggested --

1 **MR. WYDA:** The only other area we want to get into
2 with at least one of the articles -- I think it's just one,
3 Your Honor, and, again, I think it's completely consistent
4 with what we've been talking about. The agents confronted
5 Mr. Drake with one of the articles and said, you know, "Show
6 me where you cooperated with this." Tom was completely
7 open --

8 **THE COURT:** All right.

9 **MR. WYDA:** -- with them about his cooperation
10 regarding the first two documents. We need the jury to hear
11 about that.

12 **THE COURT:** All right. Well, then, for the reasons
13 indicated on the record, hopefully sufficiently articulate so
14 that you understand my ruling, Paper Number 35, the
15 Government's Motion *in Limine* to Bar References and Admission
16 of Published Newspaper Articles, will be denied -- that's
17 Paper Number 55 -- for the reasons indicated on the record,
18 and, again, I will expect, and I'll have to review the
19 exhibits before trial, but what I expect to see are redacted
20 newspaper articles in terms of content. You all can work out
21 the redactions. If I have to rule upon redactions, I will,
22 and the content will come in, and, to the extent that, based
23 on my ruling, the Government wants to introduce a newspaper
24 expert to talk about the process, it may take us a little far
25 afield for an hour or two, but we'll just have to do that. I

1 think it's an important matter for the Defendant to be able to
2 present that evidence, and that is fine. So I've ruled
3 accordingly on Paper Number 55.

4 Then we have Paper Number 57, the Government's
5 Motion for a Hearing Held *in Camera* Pursuant to Sections 6 and
6 8 of CIPA, and we're not going to be able to go into that in
7 too much detail here. To the extent you can, do you want to
8 summarize what your position on that is, Mr. Welch, and I'll
9 hear from Mr. Wyda on this.

10 (Counsel conferring.)

11 **MR. WYDA:** Your Honor, just so we're clear, I was
12 suggesting that, from our perspective, this seems like one
13 that might be lengthy, and I was just asking the Government
14 real quick to see whether they viewed it that way. I'm not
15 sure of your schedule.

16 **THE COURT:** Well, if you want to, let's delay this.
17 We may have to go to this tomorrow, and it also may or may not
18 be -- let's go to 76, and let's leave this one for now. I
19 think this -- according to my list, we have two other motions
20 to go over. We've got Paper Number 57, and then we have Paper
21 Number 76 in terms of -- essentially -- we'll hold that in
22 abeyance, Paper Number 57, the Government's Motion for a
23 Hearing Held *in Camera*, and then we have Paper Number 76. I
24 think we may have addressed this. This is the matter of the
25 request for DOD IG audit documents. I think we've addressed

1 it.

2 **MR. WYDA:** I think we did. Your Honor, I might have
3 just screwed things up. Maybe a half an hour devoted to this
4 issue with Your Honor's schedule makes sense.

5 **THE COURT:** That's fine. We can go to it. Martin,
6 how are you doing down there?

7 **THE REPORTER:** I'm fine, sir.

8 **THE COURT:** Are you getting hungry?

9 **THE REPORTER:** I'm fine.

10 **THE COURT:** All right. Okay. Martina, you're all
11 right?

12 **THE CLERK:** I'm good, Judge.

13 **THE COURT:** All right. We'll go until about 25 of
14 2:00 or so, or 20 to, and call it a day. All right. I think,
15 for purposes of Number 76, I think has been addressed and is
16 now moot. You agree with that, Mr. Wyda?

17 **MR. WYDA:** Yes, Your Honor.

18 **THE COURT:** You agree, Mr. Welch?

19 **MR. WELCH:** Yes.

20 **THE COURT:** Okay. All right. That's moot.

21 All right. So we have one remaining one. I'm
22 withholding ruling and waiting for the Defendant's disclosures
23 on Number 55, the -- I'm sorry. Number 54, the motion *in*
24 *limine* to exclude any evidence in terms of the scope of the
25 Defendant's expert. I've ruled on the others, and I have one

1 that -- few matters as to which I'm going to issue a written
2 opinion. So, with that, let's get started on the Government's
3 motion for a hearing held *in camera* pursuant to Sections 6 and
4 8 of the Classified Information Procedures Act.

5 Mr. Welch, we'll go about a half an hour on this.

6 **MR. WELCH:** We're going to break it up into two,
7 because I don't think the first one is terribly contested.
8 The first one is just simply our request that our hearing on
9 the 25th be *in camera*, and, if I'm -- I don't think there is
10 an objection.

11 **THE COURT:** On April 25th, the CIPA hearing?

12 **MR. WELCH:** That's right. That's right.

13 **MR. WYDA:** No opposition.

14 **THE REPORTER:** I'm sorry, sir?

15 **MS. BOARDMAN:** No opposition.

16 **THE COURT:** Okay.

17 **MR. WELCH:** So the second issue, I think the heart
18 of our arguments really deal with the issue of whether or not
19 the silent witness rule will be employed or not, and I think
20 it probably deserves just a little discussion of how it works
21 and, for example, how it worked in the *Ford* case, but, in
22 substance, the way it will work is, as classified documents
23 are admitted, the jury will be able to see them, witness will
24 be able to see them, obviously the Court and counsel will be
25 able to see them, and the witness will be able to testify in

1 an unclassified fashion, refer the jury to a particular area
2 of the document where the classified information exists, and
3 then, in an unclassified manner, describe, for example, the
4 relevance of the classified information. So they don't
5 obviously actually disclose the classified information, and
6 they provide, in an unclassified context, the relevance of
7 that particular piece of information.

8 In addition, what the jury gets to see is the raw
9 information. They see it unadulterated. Particularly, now
10 where you have heard that one of the main themes of the
11 defense will be that the documents at issue in this case are
12 insignificant, that they're benign, the raw data, the document
13 itself, is probably the best form of evidence for the jury to
14 see.

15 In addition, we're proposing that we're going to
16 have substitutions available as well. So no one is in a worse
17 position than they would be if we followed the standard CIPA
18 process. There will be substitutions that the public will be
19 able to see, just as they would if the silent witness rule
20 were not employed. Counsel, if they want to use the
21 substitutions, can cross a particular witness via the
22 substitutions just as they would if the silent witness rule
23 were not employed, and so, in the end, the individual or
24 individuals who benefit are the jury, because they see the
25 insignificant documents in their true form, and the Defendant

1 will get the fairest trial that he can, because they get to
2 see what it is that he claims he didn't see.

3 As far as the silent witness rule and its legality
4 or its constitutionality, I'm going to rely on our papers. We
5 have set forth that it's permissible under CIPA, and one of
6 the purposes behind CIPA is to afford this Court flexibility
7 in how it deals with classified information and really how the
8 Court tries a classified information case, and this is one
9 means by which it can occur, but, even outside the CIPA
10 context, meaning I think the response by the Defense is that,
11 you know, CIPA is a limiting rule; it's not a procedural rule
12 as we have articulated, but, rather, it's a limiting rule. It
13 gives you only a set number of tools in the tool box, if you
14 will, and, because that's not specified in the statute, you
15 can't use it.

16 Our alternative legal argument is that the Court has
17 the inherent power in dealing with classified information, in
18 dealing with informants, in dealing with trade secrets, to
19 employ these sort of mechanisms to ensure that there is a fair
20 trial, and so I think that goes to the heart of really what
21 this motion is about, is whether or not it's permissible
22 legally first to utilize the silent witness rule, and then,
23 secondly, really factually and from a procedures standpoint of
24 whether or not the Court is amenable to this type of practice,
25 and, as I've indicated, no one is in a worse position if we

1 use it in this particular case, and, in fact, we're going to
2 get the best results that we can if the jury can see the
3 documents at issue.

4 **THE COURT:** I would note that, for the record,
5 Ms. Christine Gunning, the Court Security Officer who assists
6 counsel as well as the Court on these matters, she had a
7 conflict and is not here in the courtroom and we're still
8 here, so we're going to certainly hear some argument today on
9 this, but I'll feel much more comfortable when I have her.
10 That's her purpose as the Court Security Officer, to advise
11 both not only counsel, but the Court on these matters, and so
12 I'd feel more comfortable when I have an opportunity to also
13 allow her to hear the argument on this and hear this, but all
14 right. Thank you, Mr. Welch.

15 Let me hear from you, Mr. Wyda, or --

16 **MR. WYDA:** Ms. Boardman.

17 **THE COURT:** -- Ms. Boardman, if you'd like to
18 address this --

19 **MS. BOARDMAN:** Yes, Your Honor.

20 **THE COURT:** -- in some more detail. Probably we're
21 not going to get this resolved today, but let me hear what you
22 have to say, and I'll have to talk to Ms. Gunning as well on
23 this. We may have to go through this again tomorrow, but go
24 ahead.

25 **MS. BOARDMAN:** Your Honor, I have to say I'm

1 impressed with the relaxed way in which Mr. Welch presented
2 the proposed silent witness rule. He sort of gave off an aura
3 that this is just how it's done in CIPA cases, and that could
4 not be farther from the truth. Just like this morning, when I
5 was challenging the constitutionality of CIPA, Your Honor
6 correctly pointed out that no Court had ever done what I was
7 asking Your Honor to do, I now have the benefit of saying,
8 with all accuracy, that no Court has ever approved the use of
9 the silent witness rule under a case remotely like this one.
10 The Government cannot point to any case that would support its
11 position, certainly not the Fourth Circuit.

12 Your Honor, the silent witness rule is not
13 contemplated by CIPA. Now, we've said in our papers that CIPA
14 preempts it. Even if the Court were to consider the silent
15 witness rule, it is fraught with constitutional peril, and the
16 practical problems associated with it are incalculable. What
17 Mr. Welch did not address, which I'll address later, which is
18 incredibly important, is the impact that the silent witness
19 rule would have on our ability to cross-examine the
20 Government's witnesses. The silent witness rule also
21 completely closes the trial, okay? They haven't even
22 addressed the high burden that they would ever have to come
23 close to meeting in order to close a public trial.

24 Let me first address the case law, because
25 admittedly there is not much case law on it, but the law that

1 is out there, Your Honor, absolutely supports Mr. Drake not
2 being subjected to this use of code and a key proposal in
3 which I am not able to candidly ask the Government's
4 classification expert questions about what's in a document.
5 Let me start with the Fourth Circuit. Your Honor, in the case
6 of *Fernandez*, which I'm sure the Court is familiar with and,
7 since we're going to have a break after this, we'll become
8 more familiar with, the Government claims that the Fourth
9 Circuit called their proposed use of the silent witness rule
10 ingenious.

11 Well, they did, but they also rejected it because
12 they said it was artificial. With the exact thing the
13 Government is proposing, which is this sort of key code
14 proposal, whereby the jury would be looking at a code and we
15 would have to refer to various facts in code is exactly what
16 the Fourth Circuit claimed was an artificial means of
17 presenting evidence, and it is. It's totally artificial.
18 Your Honor has sat through hundreds, if not thousands of
19 trials, understands the dynamic of a trial and
20 cross-examination --

21 **THE COURT:** I'm not that old, Ms. Boardman. I
22 haven't sat through thousands of trials.

23 **MS. BOARDMAN:** I was trying to be deferential, Your
24 Honor.

25 **THE COURT:** Yes.

1 **MS. BOARDMAN:** And, in *Fernandez*, the Court also
2 said it was within the District Court's discretion, because
3 the District Court in that case believed that, in addition to
4 this being completely artificial, that it complicated -- that
5 the complicated keycard system or the proposal might confuse
6 or distract the jury.

7 Now, in *Abu Ali*, another Fourth Circuit case, the
8 Court did not affirm the use of the silent witness rule. The
9 Court did not even address the propriety of it, and, in fact,
10 the District Court didn't even address the propriety of the
11 silent witness rule. *Zettl* -- *Zettl* is an interesting case.
12 It's perhaps the one Fourth Circuit case in which could
13 arguably be read an implicit approval of it. *Zettl* is very
14 interesting.

15 In *Zettl*, the Fourth Circuit was considering whether
16 or not Judge Cacheris in the Eastern District of Virginia, who
17 I clerked for, as a footnote -- whether or not Judge Cacheris
18 properly allowed certain substitutions, and there was a
19 discussion of the silent witness rule, and, in that case, Your
20 Honor, the Defense did not object to the use of the silent
21 witness rule with respect to three documents. The Defense did
22 object with respect to one. That one, everyone agreed, was
23 the heart of the case. That was the document on which the
24 Defendant's fate rose or fell. I mean, that was a key
25 document. The Defense objected. The Government probably

1 pressed. The Judge denied it and said, "Nope, that's got to
2 come into evidence, and you can't use the silent witness
3 rule." That's what *Zettl* approved.

4 Your Honor, there has been mention of the *Ford* case
5 a couple times today, and it's been in the papers, and --

6 **THE COURT:** Judge Messitte's case.

7 **MS. BOARDMAN:** Yes, Your Honor. The only two
8 things -- let me see.

9 The three things that this case has in common with
10 *Ford* are the following: It was in this district, it involved
11 793(e), it involved a former NSA employee. Other than that,
12 there is nothing about *Ford* that is applicable to this case.
13 The silent witness rule or however they did it in *Ford* might
14 have worked or Mr. Ford -- well, it might not have, because he
15 was convicted, but it might have worked for defense counsel at
16 the time, but the defense this that case, Your Honor, was that
17 his girlfriend set him up.

18 The defense counsel stipulated to national defense
19 information. I mean, let's pause to consider that. The
20 defense counsel stipulated that the information found in
21 Mr. Ford's home related to the national defense. That is
22 going to be one of the two huge issues litigated in this case.
23 That will be the sum and substance almost of the
24 cross-examination of Ms. Murray, the classification expert.

25 So, to the extent the silent witness rule or some

1 variation of it was used in *Ford* is completely irrelevant and
2 unhelpful, and, if Your Honor is so inclined, I have the very
3 short cross-examination and direct testimony of their expert
4 there just to illustrate how very different that attorney
5 acted from how Mr. Wyda and I will act in this case. I mean,
6 it's just not relevant to this case.

7 I'll move on from *Ford*.

8 **THE COURT:** Okay.

9 **MS. BOARDMAN:** So there have been two District Court
10 judges that have written extensively about the silent witness
11 rule, and I'm sure Your Honor is aware of it. We cite their
12 opinions in our papers. The judge in the *North* case, and then
13 of course the prolific writer, Judge Ellis. Judge Ellis has
14 written two opinions, both of which are over 15 pages in
15 length, and take us through an analysis of what the inherent
16 problems are with Mr. Welch's proposed course of action, and I
17 won't go through the opinion line by line or even summary,
18 because it's --

19 **THE COURT:** You're talking about the opinion in the
20 *Rosen* case.

21 **MS. BOARDMAN:** I'm sorry. I'm talking about the
22 *Rosen* case, yes.

23 **THE COURT:** All right.

24 **MS. BOARDMAN:** And the two cites are in our paper on
25 that case, Your Honor. Let me just give a few highlights from

1 Judge Ellis' analysis of the silent witness rule.

2 This would exclude the public from the -- exclusion
3 of the public from the trial even partially is a highly
4 unusual result disfavored. The silent comparison of
5 paragraphs or sentences, even where supplemented by codes,
6 would effectively preclude defense counsel from driving home
7 important points to the jury. The silent witness rule robs
8 the Defendant of the chance to make vivid and drive home to
9 the jury our view that the alleged national defense
10 information is no such thing.

11 Judge Ellis also writes, "It is hard to see how
12 defendants could effectively show via the silent witness rule
13 that the details of the differences between public-source
14 material and the alleged national defense information are
15 neither minor, nor trivial." Use of codes, as Mr. Welch
16 proposes, would render virtually impossible an effective line
17 of cross-examination vital to the Defense. Closing arguments
18 would similarly be limited and adversely affected, and I'll
19 just give you one more quote, because I think it really
20 hammers home the point, Your Honor.

21 The Government's proposal is, at best, an unwieldy
22 convenience fraught with potential for confusion for the jury;
23 at worse, it unfairly shackles the Defendant to a script
24 written by the prosecution, bewilders the jury and all but the
25 most well-coached Government witnesses, and undermines the

1 right to a public trial.

2 I have tried in preparation for this argument, Your
3 Honor, and I'm going to fail, I'm sure, but to illustrate for
4 the Court how cross-examination would work in this situation.
5 Actually, before I do that, I have to mention something that
6 we didn't mention in our papers, but we will challenge.

7 The Government proposes to submit as evidence to the
8 jury two classified statements, and these are one-page
9 statements by their original classification authority, their
10 expert. We were going to oppose the admission of those on
11 general hearsay grounds, but what I think the Government is
12 getting at is they want Ms. Murray to take the stand, they
13 want to give her a classified statement, which we will seek to
14 exclude, or they will give her one of the many documents in
15 the classified binder of documents. The jury will have that
16 document. The public will be sitting here, ignorant of the
17 contents of the document.

18 She will then, I think, at the behest of Mr. Welch,
19 say, or he will say, "Please point -- everyone look to
20 Paragraph 1." The jury will then look to Paragraph 1. "Can
21 you tell us, Ms. Murray --" I don't know what he will ask her
22 to say, and whatever she says will not be classified, so that
23 would probably go along swimmingly, and the jury might get a
24 little confused by referring to a keycard and things like
25 that, and then, on cross-examination, there is no effective

1 way to confront her, to test what she has to say, to actually
2 expose whether or not it relates to the national defense.
3 It's just unwieldy. It's unworkable. It's not natural. And
4 the jurors are going to be completely bewildered, and this is
5 not Debbie Boardman complaining. I sound a little whiney on
6 that, and I apologize, but this is what the judge in the *North*
7 case realized, the judge in *Rosen*, and I'm sure judges across
8 the country who haven't written opinions on this.

9 Now, one thing the Government hasn't addressed and I
10 think is very important is -- and this is highlighted in the
11 cases, Your Honor -- is that what they propose is tantamount
12 to closure of the courtroom. They may claim, "Oh, the door
13 will be wide open. These fine folks can come and watch what's
14 happening." These people will have no idea what's going on,
15 and the fact is that is in violation of the Constitution.
16 Mr. Drake has a right to have the world hear the charges
17 against him. They have a right to hear the evidence, and the
18 only way the Government can overcome that, if at all, is to
19 meet the *Press-Enterprise* test, which we've detailed in our
20 papers they haven't even come close to that.

21 So, Your Honor, I can go on about the silent witness
22 rule and all the problems that are associated with it. What I
23 really think should be done -- I'm sure Your Honor wants to
24 know what I think should be done. What I think should be done
25 is I think this is a somewhat of a premature discussion.

1 Generally, this type of issue is discussed during the CIPA
2 process. It's generally -- I'm sure Your Honor knows this,
3 and so forgive me, but it's generally discussed where we
4 notify what we want to disclose under Section 5. We then have
5 to identify what's relevant to use for admissibility. If Your
6 Honor determines, "Yep, that's relevant, that's admissible,"
7 it's incumbent upon the Government then to provide proposed
8 substitutions.

9 Let's address this when they provide their proposed
10 substitutions. If we object to the substitutions, Your Honor
11 will then determine whether or not those substitutions are --
12 give Mr. Drake substantially the same right or put him in
13 substantially the same place had this not been a classified
14 case, and then we go on from there. The substitutions, to the
15 extent there are any, is what is going to protect the
16 classified information to the extent it's classified, make the
17 jury understand what's going on, and of course inform the
18 public.

19 Your Honor, that's all I have for now.

20 **THE COURT:** Thank you, Ms. Boardman. Thank you very
21 much. Mr. Welch, I'd be glad to hear from you in rebuttal.

22 **MR. WELCH:** My comment is: Why don't they want the
23 jury to see the information that they say is so exculpatory?

24 **MS. BOARDMAN:** We do.

25 **THE COURT:** Well, no. Don't interject,

1 Ms. Boardman.

2 **MS. BOARDMAN:** Sorry.

3 **THE COURT:** I don't think that's their argument.
4 She's not suggesting that they don't.

5 **MR. WELCH:** Well, but, by having to use
6 substitutions on those very documents, you change the nature
7 of the documents. You end up generalizing them --

8 **THE COURT:** Well, really, when all is said and done,
9 doesn't that really need to await the CIPA hearing?

10 **MR. WELCH:** And I'm happy to kick it until April
11 25th.

12 **THE COURT:** Yeah. It seems to me let's see where we
13 are in terms of what documents we're talking about. That's
14 probably the most workable way, just as we're dealing with the
15 matter of the Defendant's expert, waiting to see what the
16 Defendant's proffered expert is going to say before I address
17 that. So it seems to me, as to this particular motion, it
18 probably should await the CIPA hearing.

19 All right. I think that we're just about right on
20 schedule here. We're going to break for lunch, and I think we
21 have dealt with all of the pending non-classified motions. Is
22 that correct from the point of view of the Government?

23 **MR. WELCH:** Yeah, that's correct.

24 **THE COURT:** All right. From the point of view of
25 the Defense?

1 **MR. WYDA:** Yes, Your Honor. Pretty impressive.

2 **THE COURT:** Okay. What we'll do is it's 1:25. It's
3 right on schedule, so I don't think we need to have a
4 continuation of this hearing tomorrow, I don't think.

5 **MR. WYDA:** No. That's right, Your Honor. Thank
6 you.

7 **THE COURT:** So the next step here, while we're
8 waiting the Defendant's disclosure of his expert report on
9 April the 8th and then we wait for the CIPA hearing on April
10 the 25th, which obviously will be an *in camera* proceeding and
11 is sealed, is, just for the record, the hearing pursuant to
12 the Classified Information Procedures Act on April the 25th,
13 which will not be open to the public. It seems to me that the
14 next step from the point of view of counsel is to go over the
15 matter of the number of documents we're talking about for the
16 CIPA hearing, and then have you all -- I've cleared off my
17 whole day for obviously the 25th and a few days. That was
18 when the trial was going to proceed, and we've now rescheduled
19 the trial for June.

20 So what can be the mechanics of that and any
21 suggestions here, Mr. Pearson or Mr. Welch, in terms of the
22 mechanics of that, and Mr. Wyda and Ms. Boardman, in terms of
23 trying to get a feel for the agreement or lack thereof as to
24 the number of documents?

25 **MR. WELCH:** Well, we're scheduled to meet on

1 Tuesday. I would actually ask --

2 **THE COURT:** Counsel is scheduled to meet?

3 **MR. WELCH:** Correct. If we could bump that to
4 Wednesday, that would help my schedule, but, if --

5 **THE COURT:** Is that all right? Can you do that on
6 Wednesday, Mr. Wyda?

7 **MR. WYDA:** Sure. I'm not sure where we're scheduled
8 to do it. Is it here?

9 **MR. WELCH:** Yeah.

10 **THE COURT:** Well, now you're rescheduled to do it on
11 Wednesday.

12 **MR. WYDA:** I count that as an extension, Your Honor.

13 **MR. WELCH:** But it seems to me -- and we have given
14 them our binder of classified information. We've given them a
15 few other documents that are classified that we intend to use,
16 and it seems to me that, if they have their ten documents
17 ready for identification on Wednesday and, you know, given the
18 Court's ruling, you know, if it's ten, it's ten, and we just
19 move really straight to substitutions.

20 **THE COURT:** All right. Why don't you just --

21 **MR. WELCH:** Sorry.

22 **THE COURT:** Why don't you try to meet on Wednesday
23 and let me know. Perhaps you can contact Ms. Cole, my law
24 clerk, and we'll schedule a conference call, say, for Friday
25 of next week in terms of -- well, maybe the following Monday,

1 because Friday, we have the Defendant's expert disclosure, so
2 maybe that will crystalize a little bit. My thought is
3 perhaps we have a conference call on Monday, perhaps April the
4 11th. If you'll call Ms. Cole or e-mail her and we'll figure
5 a time, and we'll talk to you on the phone about this, and
6 we'll see where we are. That will be two weeks before the
7 CIPA hearing.

8 **MR. WELCH:** What's going to be important is to get
9 more clarity, more definition on some of the subject areas of
10 particularly oral testimony, and I think that's going to be
11 very helpful to the extent we get more clarity on that, either
12 being able to resolve things by Wednesday, or at least, you
13 know, having productive Section 6 motions and the hearing on
14 the 25th, but it just seems, if it's ten documents, the
15 summary, which we have indicated is fine -- we have our
16 binder. It just seems to me that, as it relates to exhibits
17 and documents, we may be able to pound them through without a
18 lot of objections. I don't want to speak for Mr. Wyda, but we
19 seem to have our universe fairly well defined right now.

20 **THE COURT:** All right. That's fine.

21 Mr. Wyda, anything on this, or Ms. Boardman?

22 **MR. WYDA:** I think we're feeling, you know,
23 cautiously optimistic. I have an unrelated matter that I
24 wanted to raise real quickly.

25 **THE COURT:** Sure.

1 **MR. WYDA:** A scheduling matter. I guess I'm
2 comfortable raising this in open court. I screwed up my
3 calendar on the first day of trial. I --

4 **THE COURT:** You mean June?

5 **MR. WYDA:** My personal calendar, and I will defer to
6 the Court. I'll be here if the Court needs me, but, at
7 4 o'clock, on the first day of trial, I committed to speak at
8 a high school graduation, and I know nobody wants to
9 inconvenience jurors, but, if I could be permitted to leave at
10 3:15, that would allow me to get there. If that's a hardship
11 for the Court --

12 **THE COURT:** No, and I have no doubt that those high
13 school students -- I would not deprive them of an experience
14 they'll remember for the rest of their lives, Mr. Wyda. I
15 have no doubt that, years from now, there will be a number
16 of --

17 **MR. WYDA:** I wish we weren't here in the open
18 courtroom. Could we put this under CIPA or something?

19 **THE COURT:** I have no doubt that they'll remember.
20 You know, when you ask them ten, fifteen years from now, "Who
21 was your high school commencement speaker," they'll remember
22 you.

23 **MR. WYDA:** I'd love Your Honor to come as my
24 sidekick. That was kind of --

25 **THE COURT:** So I will not deprive high school

1 students of that great opportunity, Mr. Wyda.

2 **MR. WYDA:** I feel really proud, Your Honor. Thank
3 you.

4 **THE COURT:** We'll work that out, and that's probably
5 the appropriate way in which to end today's hearing, so maybe
6 we can all agree upon that.

7 **MR. WYDA:** Thank you, Your Honor.

8 **THE COURT:** I don't know that we're all going to
9 come to watch you, but we'll certainly give you time to --

10 **MR. WYDA:** That, I'd prefer not.

11 **THE COURT:** Is this from your old high school
12 itself?

13 **MR. WYDA:** No, it's at Park.

14 **THE COURT:** Okay. All right. Oh, it's the school
15 of one of your children, then?

16 **MR. WYDA:** It's the Board stuff that I'm doing,
17 so --

18 **THE COURT:** That's great.

19 **MR. WYDA:** I get to sign diplomas if my kid actually
20 makes it through.

21 **THE COURT:** That's great. Well, I'm sure your
22 children won't appreciate it, but the other children will,
23 so -- that comes with being a parent. Don't worry about that.

24 **MR. WYDA:** Sure.

25 **THE COURT:** Is there anything further from the point

1 of view of the Government, then? Mr. Welch or Mr. Pearson,
2 thank you very much.

3 Mr. Wyda or Ms. Boardman, anything further?

4 **MS. BOARDMAN:** No, Your Honor. Thank you.

5 **THE COURT:** Thank you for the high quality of your
6 briefs and also the high quality of your arguments. It's been
7 a pleasure this morning. I think we had a very productive
8 four hours here, and we don't need to see each other tomorrow,
9 and I'll probably be talking to you all probably in the next
10 ten days. So, with that, we're right on schedule. The CIPA
11 hearing will start Monday, April 25. We'll have plenty of
12 time for that depending on how long it will take, and the
13 trial is firmly scheduled to start in June as scheduled, and
14 there is absolutely no need from the point of view of the
15 Government to delay the trial. We're right on time, correct,
16 Mr. Welch?

17 **MR. WELCH:** Right.

18 **THE COURT:** Correct, Mr. Wyda?

19 **MR. WYDA:** Even I'm feeling that way, Your Honor.
20 Thank you.

21 **THE COURT:** That's great. Okay. Well, with that,
22 this Court stands in recess. Thank you very much.

23 **THE CLERK:** All rise. This Honorable Court now
24 stands adjourned.

25 (Proceedings adjourned.)

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I, Martin J. Giordano, Registered Merit Reporter and Certified
Realtime Reporter, certify that the foregoing is a correct
transcript from the record of proceedings in the
above-entitled matter.

Martin J. Giordano, RMR, CRR

Date