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April 12, 2007

Clerk of the Court
U.S. Courthouse
401 Courthouse Square
Alexandria, VA 22314

Re: United States of America v. Steven J. Rosen, et al.
Criminal No. 1:05-cr-225 (TSE)

Dear Clerk:

Attached please find a Corrected Memorandum of Amcha – the Coalition for Jewish Concerns as Amicus Curiae in Support of Defendants' Motion to Strike the Government's CIPA §6(c) Requests. The revised Memorandum corrects a typographical error contained on page 3 of the brief. The original brief states Captain Dreyfus was pardoned on "September 19, 1999" but should read "September 19, 1899."

If you have any questions, please do not hesitate to contact me.

Very truly yours,

Anne M. Sterba

AMS:dob
Enclosure

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA,	**Criminal No. 1:05-cr-225 (TSE)**
vs.	
STEVEN J. ROSEN	
KEITH WEISSMAN,	
Defendants.	

CORRECTED MEMORANDUM OF AMCHA – THE COALITION FOR JEWISH CONCERNS AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS' MOTION TO STRIKE THE GOVERNMENT'S CIPA §6(c) REQUESTS

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AMCHA – The Coalition for Jewish Concerns submits this memorandum as *amicus curiae*, in support of Defendants' motion to strike the government's CIPA §6(c) requests. For the reasons set forth below, the American Jewish community has a special and compelling interest in ensuring that all of the evidence presented in the trial against Messrs. Rosen and Weissman be available to the public for review and scrutiny. Based on past history, as exemplified by the events surrounding and following the secret treason trial of Captain Alfred Dreyfus, those in society with an agenda that includes trying to prove that the Jewish people are somehow disloyal or less loyal to the countries in which they reside than people of other faiths, are highly likely to spread lies and innuendo on those subjects based on their speculation regarding any "secret evidence" that is not available to the public for evaluation.

I. STATEMENT OF FACTS

On February 16, 2007, the government filed a motion in this case requesting that the Court allow it to introduce certain classified documents into evidence. The government proposed to introduce the classified documents to the jury in their full form, while hiding from public view substantive portions of these documents through a technique it calls "substitution." In addition, the government proposed implementing the "silent witness" rule, a largely untested procedure, which would require particular witnesses to testify by referring only obliquely to passages in particular exhibits without the public being able to scrutinize these exhibits and thus evaluating the significance of the testimony of these "silent witnesses."

Messrs. Rosen and Weissman responded to the government's motion on March 9, arguing that the government's request amounted to closing the trial to the public. In response, several press organizations filed an emergency motion to intervene in the trial. On March 15, the Court held a hearing on the motions, in which the Court requested that both parties address whether Messrs. Rosen and Weissman's constitutional rights would be sufficiently protected if the government's procedures were enacted and whether the government's procedures amounted to a closure of the trial. In addition, the Court denied the motion to intervene by the press organizations without prejudice, requesting that the press and the public intervene should it appear that a closure order has issued, or is forthcoming.

II. INTERESTS OF AMICUS CURIAE

AMCHA – The Coalition for Jewish Concerns is a nonprofit organization organized under the laws of New York and headquartered in New York City. It was founded in 1992 by Rabbi Avi Weiss. AMCHA is an organization dedicated to raising a voice of conscience on behalf of endangered Jews around the world. AMCHA has a substantial interest in making sure the evidence presented against Messrs. Rosen and Weissman remain open to full scrutiny and evaluation by the public so as to prevent the entire Jewish community from being subjected to

false and unwarranted attack by those purporting to rely on what they argue the "secret evidence" must be.

III. ARGUMENT

A. THE SPECIFIC INTEREST OF THE AMERICAN JEWISH COMMUNITY IN HAVING ALL OF THE EVIDENCE AVAILABLE FOR SCRUTINY BY THE PUBLIC

In January 1895, Captain Alfred Dreyfus stepped onto the shore of Devil's Island. He remained in that notorious prison for more than five years, until the President of France -- faced with overwhelming evidence of his innocence – pardoned him on September 19, 1899.

The Dreyfus affair began in October of 1894, when a little-known French artillery officer named Alfred Dreyfus was arrested and accused of treason against the Republic of France. The French military alleged that Dreyfus, who was Jewish, had leaked sensitive military information to the German government. Though the press was told that an investigation had been concluded and the proof of Dreyfus's guilt was certain, there was no public disclosure of what this evidence was. On December 19, 1894, Dreyfus was brought before a court martial, shut away from the public eye. Three days later, he was convicted on the basis of secret evidence neither he nor his lawyer saw, and the contents of which were not made public.[1]

Over the next twelve years, the world watched intently as a tremendous scandal unfolded. Due to the diligent efforts of Dreyfus's brother, more and more exculpatory evidence was uncovered. Meanwhile, as the prosecution's evidence gradually became public, it became clear that Dreyfus's conviction had been based on perjured testimony, forged documents, and supposed documents that did not exist. It was ultimately determined that there had never been sufficient evidence to charge Dreyfus, and that he had been singled out as a traitor based solely

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[1] Egal Feldman, The Dreyfus Affair and the American Conscience: 1895-1906. 3 (1981)

upon his Jewish heritage, by two anti-Semitic intelligence officers.[2] The entire episode stirred anti-Semitic sentiment in France, deepened religious rifts already present in French society, and undermined public confidence in the military, the courts, and the French Republic. News of the scandal spread beyond the borders of France, spurring waves of anti-French sentiment across the Western Hemisphere.

While Alfred Dreyfus was on trial, and while he was imprisoned on Devil's Island, there arose throughout France a wave of anti-Jewish feeling so profound and pervasive that, one hundred years later, French President Jacques Chirac wrote that:

> "[the Dreyfus Affair], like the blade of a plow, tore French society apart; it separated families and divided the country into two enemy camps that confronted each other with extraordinary violence."[3]

Why did the secret trial of Alfred Dreyfus cause such widespread anti-Jewish feelings in France? After all, Dreyfus was only a single individual. Much of the anti-Jewish sentiment created by the Dreyfus Affair was due to the fact that the evidence against Dreyfus had been shielded from the public. Those who wished to accuse Dreyfus, and more broadly the entire Jewish population of France, of dastardly crimes against the French Republic, were free to do so because the evidence adduced against Dreyfus was not available for the public to scrutinize and evaluate.

As one historian has written:

> The Dreyfus case created an enormous uproar, with the many anti-Semitic newspapers and politicians screaming about Jewish treason. Even those who did not scream much about Jews were generally still strident about the treason and its irresolute prosecution. They knew neither the charges nor the evidence, but this did not matter: Newspapers daily published

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[2] Robert L. Hoffman, More than a Trial: The Struggle over Captain Dreyfus 2 (1980)

[3] Jacques Chirac, Letter on the Centenary of "J'Accuse" (1998), reprinted in France and the Dreyfus Affair: A Documentary History, at 191-192 (Michael Burns, ed., Bedford/St. Martin's 1999)

> further details of supposed evidence and horrendous crimes attributed to Dreyfus, retailing as factual the rumors then current. When rumor did not suffice, fresh stories of crimes and evidence were invented by the ever imaginative press.[4]

The American Jewish community has a particular interest in ensuring that the trial of Messrs. Rosen and Weissman does not lead to the same result. Any use of "secret evidence" runs the risk of deepening anti-Jewish sentiment in the United States by perpetuating the myth of an overly-powerful "Jewish lobby" composed of people loyal to Israel first and the United States second. Trying these two men for disclosing critical "national defense information" to foreign officials, without letting the public know what the alleged information was, will allow enemies of the Jewish people to exaggerate the significance of that evidence and will leave the press and the public to subsist only on rumors and speculation – rumors and speculation that cannot be rebutted by the actual facts because those facts will be presented only by "substitutions" or "silent witnesses."

The government says in its papers that the trial will be open to the public. It says that it is seeking "only" that there be "substitutions" and the use of "silent witnesses." But the Court should not be distracted by the formalistic invocation of bureaucratic jargon. What the government is urging is that there will be secret evidence presented at trial against Messrs. Rosen and Weissman.

Secret documents and secret testimony.

Any such secret evidence or secret testimony will allow those in our society with an agenda that includes, for whatever reason, criticism of the American Jewish community or Israel, to stir up hatred against Jews by referring to the secret evidence of the guilt of the "powerful Jewish pro-Israeli lobbyists." They will find in every substitution a hidden perfidy. They will

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[4] Robert L. Hoffman, More than a Trial: The Struggle over Captain Dreyfus 2 (1980) (emphasis added).

find in every witness who is not permitted to refer to the substance of the document, the seeds of a nefarious conspiracy.

And the danger of the calumnies that will be leveled against the American Jewish community as a result of any such secret evidence is substantial. Particularly in a post-9/11 world in which loyalty to the United States is a standard constantly invoked, this Court must do everything in its power to ensure that evidence is open and available to the public so that lies and innuendos about what is hidden do not cause great damage. Recall the advice of Justice Louis Brandeis that:

"Men feared witches and burnt women." Whitney v. California, 274 U.S. 357, 376 (1927).

The dangers involved are not pure speculation. Even a cursory search of the Internet reveals many who are standing poised to level charges against the entire American Jewish community. See, e.g., an article entitled "Jewish Terrorist: AIPAC Spy Case" published on a website entitled "Jew Watch" which is billed as "the Internet's largest scholarly collection of articles on Jewish history." See www.jewwatch.com/jew-terrorists-aipac-pentagon-history-050119.html.

B. THE PRESS AND THE PUBLIC HAVE THE RIGHT TO ATTEND ROSEN AND WEISSMAN'S TRIAL AND TO SEE THE EVIDENCE AGAINST THEM.

The press, as well as the public, has a First Amendment right to attend criminal trials and pretrial proceedings in the United States. Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984). The Supreme Court has repeatedly argued that the right of the public to attend criminal trials is critical to the proper functioning of the judicial system:

> Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the fact finding process, with benefits to both the defendant and to society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in

> and serve as a check upon the judicial process – an essential component in our structure of self government.

Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982).

This right protects public confidence in the judiciary by allowing it to observe the machinery of justice, ensuring that standards of fairness are observed and that deviations from these standards are corrected in a timely manner. Id. at 508. Furthermore, allowing public access to criminal trials preserves the "community therapeutic value" of trials by giving the public a forum in which they may express their response to a crime peaceably and to ensure wrongs are righted properly. See Press-Enterprise, 464 U.S. at 509. Closing the door to the courtroom plugs an outlet for "community concern, hostility, and emotion," which may lead to overly harsh reactions from the public such as vigilantism or other extrajudicial forms of "self-help." Richmond Newspapers Inc. v. Virginia, 448 U.S. 555, 564 (1980) (Burger, C.J.). Particularly in cases where the defendants are members of an identifiable minority, such forms of "self-help" may come in the form of a backlash against that minority group.

The right to attend a criminal trial may only be suppressed in particular situations. The Supreme Court ruled in Press-Enterprise that trials should remain open unless the government can show there is "an overriding interest based on findings that closure is essential to preserve higher values." Press-Enterprise, 464 U.S. at 510. Given the important function of public trials in the United States, that interest has to be a weighty one. A bare assertion that disclosure of classified information would harm national security alone is insufficient to justify closure; a court must determine that the government's interest in closing the trial outweighs the interest in preserving openness on a case-by-case basis. See In re Washington Post, 807 F.2d 383, 392 (4th Cir. 1986) (citing In re Knight Publishing, 743 F.2d 231 (4th Cir. 1984)).

The government's effort to present redacted versions, or worse, summaries of the evidence against Messrs. Rosen and Weissman to the public will result in a trial that is carried

out in a courtroom that is, *de facto*, closed. The government agrees that it has a "strong interest in ensuring that the defendants' conduct in this case... is presented in open court." Government's Response to Defendants' Motion to Strike, 5. Nonetheless, it seeks to keep evidence – indeed, the very evidence on which Messrs. Rosen and Weissman's guilt or innocence may depend – shielded from the public eye through a series of substitutions, redactions, and summaries. Such a procedure is particularly dangerous, because while it may carry the gloss of a public trial, it would effectively result in key evidence being kept from public scrutiny.

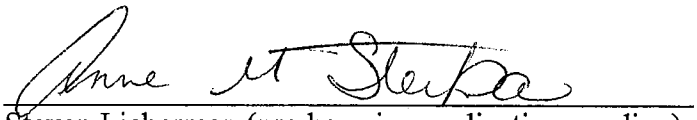
Striking the government's §6(c) requests would also have a number of important salutary benefits. Allowing the public to observe the use of declassified documents as evidence would trigger commentary on whether the executive branch has over-classified documents, or whether the use of such evidence is overly prejudicial to the Defendant. It would lead to discussions of the proper procedures for using classified evidence in a prosecution, and may potentially lead to procedures which better balance the right of public access to criminal trials and the government's need to maintain sensitive documents in secret.

Denying the public the right to view this trial in full and in the open would perpetuate the perception that the government is using classified information both as a sword in prosecutions as

well as a shield, deepening distrust in even good-faith trials of those suspected of espionage or conspiracy to commit acts of terrorism; this would undermine efforts by the United States to counter real threats to national security.

Dated: April 12, 2007

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the following **CORRECTED MEMORANDUM OF AMCHA - THE COALITION FOR JEWISH CONCERNS AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS' MOTION TO STRIKE THE GOVERNMENT'S CIPA §6(c) REQUESTS** was served this 12th day of April 2007, by electronic mail on the following counsel:

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Nasri ~~V. B. Hage~~