

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**UNITED STATES OF AMERICA** :  
 :  
 **v.** : **CRIMINAL NO. 08-CR-522**  
 :  
 **NAM QUOC NGUYEN, et al.** :

**ORDER**

AND NOW, this            day of            , 2009, after a review of the motion of the Defendants and the Government's response thereto, it is hereby ORDERED that the Motion to Compel the Government to Conform to the Court's Order to Provide a Bill of Particulars and to Amend Schedule of Pretrial Submissions of Defendants Nam Quoc Nguyen, Nexus Technologies, Inc., Kim Anh Nguyen, and An Quoc Nguyen is DENIED.

BY THE COURT:

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HONORABLE TIMOTHY J. SAVAGE  
United States District Court

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**UNITED STATES OF AMERICA** :  
 :  
 **v.** : **CRIMINAL NO. 08-CR-522**  
 :  
 **NAM QUOC NGUYEN, et al.** :

**GOVERNMENT'S RESPONSE TO ORDER TO SHOW CAUSE AND IN OPPOSITION  
TO DEFENDANTS' MOTION TO COMPEL AND TO AMEND SCHEDULE**

COMES NOW the United States, by and through its undersigned counsel, and hereby responds to the Court's Notice of a Show Cause Hearing (Docket No. 134) and opposes Defendants' Motion to Compel and to Amend Schedule of Pretrial Submissions (Docket No. 133). Defendants Nexus Technologies, Inc., Nam Nguyen, Kim Nguyen, and An Nguyen request that the Court compel the Government to produce a revised bill of particulars directly linking specific individuals to each payment alleged in the substantive charges and overt acts in the Superseding Indictment and provide identifying information missing from the bill of particulars provided on December 8 and 9, 2009. The Government opposes Defendants' request, as the Government has already provided, to the degree it is able, all the information ordered by the Court, both through identification of officials and the provision of particular documents from discovery, which were attached to the bill of particulars. The Government is unable to provide more because the Government does not have the information Defendants request.

The information provided by the Government is sufficient for identification of individuals for Rule 15 depositions, the purpose for which the Court ordered the bill of particulars. Nonetheless, Defendants seek additional information beyond that to which they are entitled in an apparent effort to unfairly restrict the evidence that the Government may present at trial. If the Motion were granted, it would obligate the Government to prove facts at trial that go above and

beyond those the law requires for conviction. Therefore, the Government respectfully submits that this motion should be denied.

In addition, sanctions, including dismissal of an indictment, are reserved for only the most egregious of cases. The Government did not violate the Court's December 2, 2009 Order, but even if it had, imposition of sanctions would be completely inappropriate due to the absence of harm to Defendants and the Government's extensive good faith efforts to comply to the best of its ability.

### **DISCUSSION**

#### **A. Defendants' Motion to Compel**

A bill of particulars is not a discovery tool. Rather, a bill of particulars is meant as a complement to an indictment when the indictment is too vague and indefinite to inform a defendant of the charges brought against him. See, e.g., United States v. Moses, 2002 WL 32351156 (E.D. Pa. April 5, 2002) (citing United States v. Addonizio, 451 F.2d 49, 63-64 (3d Cir. 1971)). A bill of particulars "is intended to give the defendant only the minimum amount of information necessary to permit the defendant to conduct his own investigation." United States v. Smith, 776 F.2d 1104, 1111 (3d Cir. 1985). However, "a bill of particulars is not intended to give a preview of the case or unduly restrict the government's presentation of its case or unduly restrict the government in presenting its proof at trial." United States v. Rosa, 891 F.2d 1063, 1066 (3d Cir. 1989) (recognizing unfairness can result from a bill of particulars that forces the government to commit itself to a specific version of the facts before it is in a position to do so); United States v. Young & Rubicam, Inc., 741 F. Supp. 334, 349 (D. Conn. 1990) (collecting cases). See also United States v. Carson, 8:09-cr-0077 (C.D. Ca. May 18, 2009) (Docket No. 75

at 2) (“At the same time, it is important to keep in mind what a bill of particulars is not. It is not a vehicle to expand the Government’s discovery obligations under Rule 16, nor is it a means to force the Government to offer a preview of its ultimate evidence at trial.”) (Attached as Exhibit A); United States v. Boffa, 513 F. Supp. 444, 485 (D. Del. 1980) (noting that a reason for restricting the applicability of a bill of particulars is to avoid “freezing” the Government’s evidence in advance of trial).

Defendants’ Motion, which seeks far more information than a bill of particulars is designed to provide, is predicated on the assumption that the Government is currently in possession of the requested information identifying the specific recipient of each payment or offer of payment described in the Superseding Indictment and is withholding it from the Defendants. That is not the case. Aside from Official A, identified in the letter to the Defense of October 29, 2009,<sup>1</sup> the Government is not in possession of evidence proving which specific official received the payments identified in the Superseding Indictment. The Government previously informed Defendants and the Court that it is not in possession of that information.<sup>2</sup>

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<sup>1</sup> The same day as the Superseding Indictment was filed, the Government identified the name, title, and employing agency of Official A to Defendants, and specific payments received by Official A are clear from the Superseding Indictment, as acknowledged by Defendants. Thus, Overt Acts 59, 61, 63, and 67 and Counts Two, Three, Four, Eight, Eleven, Twelve, Thirteen, Seventeen, Twenty, Twenty-One, Twenty-Two, and Twenty-Six, in which payments are identified as going to Official A, are not at issue in the instant motion.

<sup>2</sup> Defendants complain in the Motion to Compel that no officials have been identified that work for Southern Flight Management Center (“SFMC”) (Mot. to Compel at 2). However, because the Superseding Indictment does not allege that SFMC officials received any payments, there are no specific payments to which SFMC officials would be linked in the bill of particulars. Rather, the Government alleges overt acts in furtherance of the conspiracy to bribe Vietnamese Government officials in connection with SFMC. See Sup. Ind. Overt Acts 3-8. (Defendants erroneously identify Overt Acts 9-10 as referencing SFMC. However, those Overt Acts reference Southern Services Flight Center, SSFC.)

As the Government stated at the December 2, 2008 hearing on Defendants' pretrial motions, the Government is only in possession of the identity of Official A. (Transcript of Hearing at 21-23, attached as Exhibit B.) The Government did not link the payments to specific officials in the bill of particulars because it is not possible for it to do so.<sup>3</sup>

In its bill of particulars, the Government provided all available information as to the identities of possible recipients of the payments and their places of employment. To supplement that identification, the Government categorized and provided over 100 pages of evidence, already supplied to Defendants during discovery. Contrary to Defendants allegation that "the government merely took every name found in the emails, business cards and business records of people who work for the alleged government entities and listed them in the bill of particulars," (Mot. to Compel at 2), which would have been a much larger volume of documents, the Government specifically sought and provided documents that are evidence that the named officials received offers or payments of bribes and documents that identify the titles and positions of those officials.

For example, regarding the first official listed in the bill of particulars, the Government provided: (1) emails between Defendants regarding the fact that this individual made all decisions on a particular deal, providing his specific position description, discussing the

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<sup>3</sup> Defendants know who the recipients are and, as alleged in the Superseding Indictment, laundered the bribes in part to hide the identity of the recipients. Thus, to allow Defendants to use a bill of particulars to lock the Government into proving that specific individuals received payments, when it is not required to do so at trial, unfairly prejudices the Government to a significant degree, particularly in a bribery case. See United States v. Glaze, 313 F.2d 757, 759 (2d Cir. 2002) (finding that Defendant bribe recipient had enough information regarding identification of specific bribe payments in a bill of particulars, where the company paying each bribe was identified and noting that requiring the government to engage in "one-to-one mapping" in specifying tainted payments would improperly restrict the Government's proof at trial).

“commission” demanded by this official and other officials in his office, and discussing official actions provided in exchange for the offered bribes; (2) emails between this official and the Defendants discussing “commissions” on a contract; (3) a copy of his business card with his title and employing agency; and (4) the wire transfers constituting the bribes to officials within his organization. However, this official was not the only recipient of the payments and therefore to say that he, and he alone, was the intended recipient of this payment would unfairly lock the Government’s evidence, which a bill of particulars is not supposed to do. Rosa, 891 F.2d at 1066 and Boffa, 513 F. Supp. at 485.

Generally, the Government may satisfy its burden in a bill of particulars through the identification of documents which provide the requested information. See e.g. Carson, Exhibit A at 4 (stating that the Government could provide information regarding the recipients of bribes by pointing to documents containing the information). Here, the Government not only provided a list of names of officials, but provided specific documents that, combined with the Superseding Indictment and the bill of particulars, are clearly helpful to Defendants and sufficient to satisfy the Government’s burden in the bill of particulars. These documents assist Defendants in identifying the potential recipients of payments and thereby assist them in preparing a defense by identifying individuals they may wish to interview or call as witnesses, including through Rule 15 depositions, the only stated purpose of for Defendants’ demand for a bill of particulars that

could serve as the basis of the Court's ruling.<sup>4</sup> The bill of particulars provides Defendants with more than enough information to request Rule 15 depositions.<sup>5</sup>

Beyond the names, identities, and employers already provided, and the documents designed to illuminate their links to the payments at issue, the Government cannot provide the information requested by Defendants. Moreover, the Government should not be required to do

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<sup>4</sup> In the Motion to Compel, Defendants identify four reasons why they require a bill of particulars: (1) it is necessary with respect to notice of Rule 15 depositions; (2) to determine whether or not the recipients of the bribes were foreign officials; (3) to determine whether the individuals violated the Pennsylvania commercial bribery statute; and (4) to determine whether or not the payments or offers were actually made. (Mot. to Compel at 3.) Only the first of these is a possible legal justification for issuance of a bill of particulars, in that it is related to Defendants' preparation of a defense; the other purported reasons are thinly-veiled attempts to lock the Government into proving more facts at trial than are required to prove violations of the law, and, consequently can not be legal justifications for the issuance of a bill of particulars. As laid out extensively in the Government's Opposition to Defendants' Second Motion to Dismiss (Docket No. 122 at 6-11), and stated in the Defendants' Second Motion to Dismiss (Docket No. 110), "whether the recipients of the bribes are foreign officials under the FCPA turns on whether the entities employing them are 'agencies or instrumentalities' under the FCPA," (Def. Motion to Dismiss at 5) (emphasis added). The specific identities of the employees are irrelevant to that determination. All the entities employing the officials who received bribes have been specifically identified and all are properly and fully alleged to be agencies and instrumentalities of foreign governments. Anything beyond that is a matter of proof for trial, not for a bill of particulars. Defendants also claim that they require a bill of particulars "to determine whether the payments or the offers to pay were actually made..." This is patently a matter for the jury at trial. Defendants are not seeking to fill holes in the indictment, but rather they are using the bill of particulars to lock the Government into proving more than the law requires, which is expressly not a reason for which a bill of particulars should be granted, as discussed above.

<sup>5</sup> This issue may well be moot, as it is unlikely that the Defendants will meet the required standard for Rule 15 depositions in any event, in light of the fact that the taking of depositions in criminal cases -- unlike civil cases -- is generally disfavored. United States v. Ismaili, 828 F.2d 153, 161 (3d Cir. 1987). See also United States v. Drogoul, 1 F.3d 1546, 1551 (11th Cir. 1993) ("In particular, because of the absence of procedural protections afforded parties in the United States, foreign depositions are suspect and, consequently, not favored."); United States v. Mueller, 74 F.3d 1152, 1156 (11th Cir. 1996) (depositions in foreign countries are particularly disfavored); United States v. Alvarez, 837 F.2d 1024, 1029 (11th Cir. 1988) ("Foreign deposition testimony, because of the absence of a sanction for perjury, is suspect.").

so because, under the case law, it is not required to prove the identity of the officials receiving the bribes at trial. As argued in its initial Opposition (Docket No. 109) and at the hearing, under the FCPA, the Government is required to prove only that the defendant knew, should have known, or was deliberately ignorant of the fact that all or a portion of the payment or offer of payment would be given or made, directly or indirectly, to any foreign official. In fact, not even the Defendants have argued that the Government is required to specifically identify the recipients to prove its case.

Likewise, under the Travel Act, the Government is only required to prove that a facility in foreign commerce was used with the intent to facilitate the promotion of an unlawful activity; namely, violation of the Pennsylvania commercial bribery statute. In fact, the Government is not even required to prove that the Defendants themselves violated the Pennsylvania commercial bribery statute; rather, the Government must prove only that they intended to do so.<sup>6</sup> As the Fourth Circuit noted in United States v. Pomponio, 511 F.2d 953, 957 (1975):

The "unlawful activity" specified in the Act may be bribery under either state or federal law and reference to such law is necessary only to identify the type of "unlawful activity" in which the defendants intended to engage. Proof that the unlawful objective was accomplished or that the referenced law has actually been violated is not a necessary element of the offense defined in section 1952.

Accord United States v. Finazzo, 704 F.2d 300, 307 (6th Cir. 1983) (holding that the Travel Act requires only unlawful activity in furtherance of the underlying offense, not accomplishment of

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<sup>6</sup> At the hearing on December 2, 2009, the Government stated that, with one exception relating to jurisdiction, to prove a Travel Act violation predicated on the Pennsylvania commercial bribery statute, it would have to "make out a case under the Pennsylvania commercial bribery statute." The Government was in error. As the Government correctly argued in its Opposition to the Second Motion to Dismiss, violations of the Travel Act are sufficiently pled when they show the use of a facility in interstate commerce with intent to promote the unlawful activity, and the Superseding Indictment sufficiently alleges those elements. (Docket No. 122 at 15-17.)

the underlying offense); United States v. Rizzo, 418 F.2d 71, 74-75 (7th Cir. 1969) (holding that reference to state law under a Travel Act is necessary only to identify the type of unlawful activity in which the defendants intended to engage; it is not necessary to allege the elements of the state substantive offense intended to be committed or that the unlawful objective intended was accomplished).

The Eighth Circuit further articulated that the Government need not prove the underlying offense in McIntosh v. United States, 385 F.2d 274, 276-77 (8th Cir. 1967):

The proscribed conduct is the use of interstate facilities with the requisite intent to promote some unlawful activity, rather than the commission of acts which may be in violation of the state law. The inclusion in the indictment of an allegation that the unlawful activity was in violation of state law does not mean, as appellants argue, that prosecution under Section 1952 must fail in the absence of proof that the unlawful objective (here extortion) was fully accomplished. Consummation of the state substantive offense is not the indispensable gravamen of a conviction under Section 1952. Reference to the state law is necessary only to identify the type of unlawful activity in which the accused was engaged.

\* \* \*

We glean from the language of the Marshall opinion that although the "unlawful activity" of extortion must be one defined and proscribed by state law, it need not be an accomplished fact to sustain a conviction under Section 1952, so long as the other elements of the statute are alleged and proven.

(internal citations omitted.) See also United States v. Kubacki, 237 F. Supp. 638, 643 (E.D.Pa 1965) ("The fallacy of defendants' argument is that it places undue emphasis on the state crime of bribery. The prohibited conduct under § 1952 is interstate travel or use of interstate facilities in aid of or to distribute the proceeds of unlawful activities. The state crimes of bribery and extortion serve only as a background identification of the unlawful activities in aid of which the proscribed travel was undertaken.").

All the Government is required to prove is that Defendants used a facility in foreign commerce with the intent to violate the Pennsylvania commercial bribery statute. Proving that does not require proof of who received the bribes. Thus, much like the obligations of proof under the FCPA, in the case at bar the Government needs only prove that the wire transfers were sent, using a facility in foreign commerce, with the intent that they be used to bribe any employee of a customer. It does not matter who the intended recipient was or, in fact, whether they ever received it. All that must be proved at trial is that Defendants intended that the transfer be used for such a purpose.

Ultimately, the Government cannot specifically identify the individual that received each payment, because it does not possess that information. However, because the Government is not required to prove the specific individuals who received the bribes under either the Travel Act or the FCPA, it is not an infirmity in the Superseding Indictment. To require the Government to specifically identify the specific recipient of each specific bribe in a bill of particulars, by which it would be then be bound at trial, would constructively add a new element of proof to the Government's case.

**B. Sanctions**

Because the Government did not violate the Court's December 2, 2009 Order (Docket No. 130), no sanction by the Court is necessary or appropriate. From the time the Government received the Order, it worked diligently and faithfully to respond to the Court's directive. The Government reviewed thousands of documents in this case, and filed a bill of particulars which included all identifying information of which it was aware regarding the identity of foreign officials who received improper payments from the defendants. In compliance with the Order,

where the Government knew, or could determine from the extensive document review, the name of the recipient of a bribe alleged in the Superseding Indictment, it disclosed that information. Where the Government knew or could determine the job title of the recipient of a bribe alleged in the Superseding Indictment, it disclosed that information. The Government did not disclose the name and/or title of a bribe recipient only in those situations where it did not possess that information, and the Government advised the defendants that it would provide an amended bill of particulars if it obtained additional details regarding the identities of the foreign officials. Moreover, as part of the bill of particulars, the Government provided to the defense emails, letters, wire transfers, and business and other documents reflecting that the named officials received offers or payments of bribes. The Government did not withhold any information in its possession concerning the identity of any the bribe recipients.

Accordingly, the Government met its affirmative obligations under the Order to the best of its ability. It responded to the Court's December 2 Order with diligence and good faith, and did not knowingly and willfully fail to meet any of its responsibilities. Even if the Government's response was somehow deficient, however, that failure would not justify the extraordinary remedy of dismissing the Superseding Indictment as suggested in this Court's Order dated December 10, 2009 (Docket No. 134). As the above discussion makes clear, the precise identity of the bribe recipients is not an element of either the FCPA or the Travel Act charges and the Government is not required to prove the identity of those officials at trial. Because the Government's actions have not prejudiced the defense, therefore, and the Defendants have more than sufficient information to prepare a defense, avoid unfair surprise at trial, and plead double jeopardy, no remedy is required.

As the Third Circuit has noted, dismissal of an indictment is a “drastic remedy.” United States v. Gagliardi, 285 Fed. Appx. 11, 16 (3d Cir. 2008), quoting United States v. Morrison, 449 U.S. 361, 366 n.2 (1981). Indeed, it has become well settled that district courts cannot exercise supervisory power to dismiss an indictment where the government's misconduct fails to prejudice the defense. In a series of decisions beginning in the early 1980s, the Supreme Court has severely limited a court's use of its supervisory power to reverse a conviction or dismiss an indictment. In United States v. Hasting, 461 U.S. 49, 505-07 (1983), for example, the Supreme Court held that the lower court's exercise of “supervisory power to discipline the prosecutors of its jurisdiction” was inappropriate where the alleged error was harmless. Five years later, in Bank of Nova Scotia v. United States, 487 U.S. 250, 254 (1988), the Court expanded on this analysis, holding that, “as a general matter, a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants.”<sup>7</sup>

Following Hasting and Bank of Nova Scotia, numerous circuit courts have concluded that supervisory power cannot be used to dismiss an indictment absent prejudice to the defense. In United States v. Van Engel, 15 F.3d 623, 631-32 (7th Cir. 1993), the appellate court reversed the district court's dismissal of 12 of 89 counts of an indictment as a sanction for the government's purported interference with the defendant's right to counsel through the lengthy criminal investigation of his attorney, noting that “[a] federal judge is not authorized to punish the

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<sup>7</sup> Other Supreme Court decisions confirm the holdings in Hasting and Bank of Nova Scotia. See, e.g., United States v. Morrison, 449 U.S. 361, 366-67 (1981) (district court erred in dismissing an indictment based upon a violation of the defendant's right to counsel where there was no prejudice to the defendant from the violation); United States v. Payner, 447 U.S. 727, 735-37 (1980) (supervisory power does not authorize court to suppress evidence unlawfully seized from a third party); United States v. Blue, 384 U.S. 251, 255 (1966) (“the remedy [for a Fifth Amendment violation] does not extend to barring the prosecution altogether”).

misconduct of a prosecutor by letting the defendant walk, unless the misconduct not only violated the defendant's rights but also prejudiced his defense.” See also United States v. Santana, 6 F.3d 1, 11 (1st Cir. 1993) (“Payner, Hasting, and Bank of Nova Scotia form a trilogy admonishing federal courts to refrain from using the supervisory power to conform executive conduct to judicially preferred norms by dismissing charges, absent cognizable prejudice to a particular defendant.”); United States v. Isgro, 974 F.2d 1091, 1096-97 (9th Cir. 1992) (“[i]n its recent jurisprudence, \* \* \* the Supreme Court has moved \* \* \* toward a rule that a court should not use its supervisory powers to mete out punishment absent prejudice to a defendant”).<sup>8</sup>

Further, because the Government did not intentionally withhold any information in its possession in providing a bill of particulars, any failure to comply fully with the Court’s Order plainly does not rise to anything near the level of outrageous government conduct warranting dismissal. In United States v. Voight, 90 F.3d 1050 (3d Cir. 1996), the Third Circuit rejected the defendant’s claim on appeal that the government’s use of his attorney as a confidential informant implicated the Fourth and Sixth Amendments and merited dismissal of the indictment. The Court of Appeals found that because the government scrupulously avoided obtaining confidential defense strategy, “there was no basis for the district court to invoke its supervisory authority to

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<sup>8</sup> The Third Circuit’s decision in United States v. Serubo, 604 F.3d 807 (3d Cir. 1987), which held that dismissal of an indictment may be proper as a result of prosecutorial misconduct before the grand jury even where no actual prejudice has been shown, predated both Hasting and Bank of Nova Scotia, which require a district court to find prejudice to the defendant before dismissing an indictment based on prosecutorial misconduct. In any event, the Serubo court held that an indictment may be dismissed in the absence of prejudice to the defendant only where “there is evidence that challenged activity was something other than isolated incident unmotivated by sinister ends, or that type of misconduct challenged has become ‘entrenched and flagrant’ in this circuit,” *id.* at 817. Both sinister motivations and entrenched and flagrant misconduct are entirely absent in this case.

dismiss the indictment inasmuch as [the defendant] has failed to demonstrate any significant government misconduct.” Id. at 1071 n.10 (emphasis added). See United States v. Scott, 223 F.3d 208, 211 (3d Cir. 2000) (affirming district court’s refusal to dismiss indictment in absence of egregious government misconduct); United States v. Nolan-Cooper, 155 F.3d 221, 233-35 (3d Cir. 1998) (rejecting claim that sexual misconduct between defendant and undercover agent was sufficiently outrageous to warrant dismissal of indictment); (United States v. Martino, 825 F.2d 754, 762-63 (3d Cir. 1987) (reversing district court’s dismissal of two counts of indictment because government’s issuance of a grand jury subpoena in a pseudonym was neither prosecutorial misconduct nor the type of outrageous conduct necessary to find a due process violation). Similarly, there is a complete absence of significant government misconduct in this case that would justify dismissal of the Superseding Indictment.

In sum, even if the Court were ultimately to conclude that the Government’s submission was insufficient, there was no harm to Defendants, and the imposition of sanctions, including dismissal of the Superseding Indictment, is inappropriate.

**CONCLUSION**

For all the above reasons, the Government respectfully submits that Defendants' Motion should be denied and no sanctions should be imposed.

Respectfully submitted,

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United States Attorney

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Criminal Division, Department of Justice

//s//  
\_\_\_\_\_  
JENNIFER ARBITTIER WILLIAMS  
Assistant United States Attorney

//s//  
\_\_\_\_\_  
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Trial Attorney, Fraud Section

CERTIFICATION

I certify that on this date a true and correct copy of the foregoing document has been served upon the following counsel via electronic means:

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Date: December 11, 2009

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL MINUTES - GENERAL

Case No. SACR 09-0077 JVS Date May 18, 2009

Present: The Honorable James V. Selna

Interpreter Mandarin Interpreter: Judy Arase

Karla J. Tunis

*Deputy Clerk*

Sharon Seffens

*Court Reporter.*

Douglas McCormick / Hank Bond Walther

*Assistant U.S. Attorney*

<u>U.S.A. v. Defendant(s):</u>		<u>Present</u>	<u>Cust.</u>	<u>Bond</u>	<u>Attorneys for Defendants:</u>	<u>Present</u>	<u>App.</u>	<u>Ret.</u>
1.	<b>Stuart Carson</b>	X		X	1. <b>Nicola T. Hanna</b> <b>Eric Raines</b>	X		X
2.	<b>Hong Carson</b>	X		X	2. <b>Kimberly A. Dunne</b>	X		X
3.	<b>Paul Cosgrove</b>	X		X	3. <b>Kenneth Miller</b>	X		X
4.	<b>David Edmonds</b>	X		X	4. <b>David W. Weichert</b>	X		X

**Proceedings:** Defendants' Joint Motion for Bill of Particulars (fld 4-22-09)

Cause called and counsel make their appearances. The Court's tentative ruling is issued. Counsel make their arguments. The Court DENIES IN PART AND GRANTS IN PART the defendants' joint motion indicated above and rules in accordance with the tentative ruling as follows:

By the present Motion, the Stuart Carson *et al.* ("defendants") seek the particulars concerning 236 unlawful payments ("bribes"), referenced in paragraph 14 of the Indictment, and the particulars concerning lavish entertainment, holiday, gifts, and vacations (collectively "Entertainment"), referenced in paragraphs 19, 20, 22, and 23 of the Indictment. The bribes are core factual allegations in the Government's case for violations of the Foreign Corrupt Practices Act ("FCPA") and the Travel Act.

I. Legal Standard.

Defendants move under Rule 7(f) of the Federal Rules of Criminal Procedure which provides:

The court may direct the government to file a bill of particulars. The defendant may move for a bill of particulars before or within 10 days after arraignment or at a later time if the court permits. The government may amend a bill of particulars

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subject to such conditions as justice requires.

Fed. R. Crim. Pro. 7(f). At bottom, the Court must ensure that the Indictment has fairly informed a defendant of the charges against him. Unites States v. Long, 706 F.2d 1044, 1054 (9<sup>th</sup> Cir. 1983). The indictment must do so in a manner that provides “sufficient precision to enable him to prepare for trial, to avoid or minimize the danger of surprise at the time of trial, and to enable him to plead his acquittal or conviction in bar of another prosecution for the same offense.” United States v. Giese, 597 F.2d 1170, 1180 (9<sup>th</sup> Cir. 1979) (internal quotation marks deleted). At the same time, it is important to keep in mind what a bill of particulars is not. It is not a vehicle to expand the Government’s discovery obligations under Rule 16, nor is it a means to force the Government to offer a preview of its ultimate evidence at trial. Id.; Unites States v. Young & Rubicam, Inc., 741 F. Supp. 334, 349-50 (D. Conn. 1990). However, a fair understanding of the theory of the Government’s case is paramount. Unites States v. Ryland, 806 F.2d 941, 942 (9<sup>th</sup> Cir. 1986.)

## II. Discussion.

Defendants cannot fairly contend that they are unable to divine the theory of the Government’s case. The Indictment runs 36 pages, and details 59 overt acts, including at least 30 specific payments. The allegations are grouped as to specific customers of Control Components, Inc. (“CCI”). Yet that leaves undisclosed, the balance of the payments and the details of the Entertainment and travel.

The Court recently considered a motion for a bill of particulars in a complex securities fraud in United States v. Mikus. (See Reply, Ex. A.) There the Court observed:

While discovery cannot be used to obscure a defendant’s ability to understand the Government’s theory, here the discovery meshes with the Indictment and alleviates the need for a bill of particulars. For example, the Government represents that recordings of all the telephone conferences cited in the Indictment have been produced. (Consolidated Opposition, p. 5.) Each of the communications constituting a statutory violation is identified by date, method of transmission, and recipient. There is no contention that the Government has not produced the raw evidence of each of these communications.

(Id., Ex. A, p. 2; emphasis supplied; footnote deleted.) The instant Indictment does not provide the framework to “mesh” the discovery with the Indictment. Had the Government identified each unlawful payment in the Indictment, the defendants could fill in the details with the discovery. However, as defendants point out in their Reply, the discovery produced to date

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leaves them to guess which transactions and events will form the Government's bribery case. (*Id.*, p. 6.) Similarly, the documents do not enable the defendants to mesh that evidence with specific Entertainment alleged in the Complaint.

The Court agrees that the scope of the defendants' request is overly broad, and reflects the approach of a diligent civil litigator rather than the tailored requirements of Rule 16 of the Federal Rules of Criminal Procedure.<sup>1</sup> Nevertheless, limited additional information is required here.<sup>2</sup>

*Bribes.*

The bribes are at the heart of this case. Although not pled as such, each bribe is a separate and independent crime. Thus, the bribes are not mere overt acts to be swept away along with nominally benign conduct in furtherance of the conspiracy. *See Giese*, 597 F.2d at 1180; *United State v. DiCesare*, 765 F.2d 890, 897-98 (9th Cir. 1985). They are the core of the case.

With respect to each of the 236 alleged bribes not described in the Indictment, the Government shall provide within 20 days the following information:

- The date of the payment.

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<sup>1</sup>For example, the defendants want to know "whether the government intends to present evidence of such payments at trial." (Motion , p. 2, ¶ 1.) This is an unabashed, and impermissible, request for a peek at the Government's trial strategy. *United States v. Ryland*, 806 F.2d 941, 942 (9th Cir. 1986); *United States v. Brodie*, 326 F.Supp.2d 83, 91 (D.D.C 2004).

<sup>2</sup>To the extent that the defendants argue that the Government has buried them in documents, the Court is decidedly not convinced. The Government's production to date totals approximately 33,000 pages. (Government Memorandum, p. 9.) This equates to about 11 bankers boxes, a volume of production which is quite modest in the world of complex litigation. Moreover, the Government has pointed the defendants to the relevant Bates number series where the evidence of the 236 payments and the Entertainment can be found. (*Id.*, p. 10 & nn. 4,5.) In each category, there are about 4,500 to 4,800 pages. It is not a question of requiring the defendants to review the documents, a clearly manageable task, but whether the review will inform the defendants of the basics of the Government's case.

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CENTRAL DISTRICT OF CALIFORNIA

## CRIMINAL MINUTES - GENERAL

- The amount of the payment.
- The name of the recipient and business affiliation of the recipient, or if the recipient is an intermediary, the business affiliation of the individual who was intended to benefit from the payment.

The Government may satisfy this requirement through the identification of one or more documents which provide the data.

The Court believes that the burden on the Government is minimal since it presumably already knows the particulars which support its recitation in the Indictment of precisely 236 bribes.

*Entertainment.*

\_\_\_\_\_ With respect to each item of Entertainment, the Court takes a different view. This is information which clearly falls into the category of how the Government will prove its case. United States v. Feola, 651 F. Supp. 1086, 1132 (S.D.N.Y. 1987) (“As a general rule, the defendant does not ‘need’ detailed evidence about the conspiracy in order to prepare for trial properly. It is well settled that defendants need not know the means by which it is claimed they performed acts in furtherance of the conspiracy nor the evidence which the Government intends to adduce to prove their criminal acts.”); see Ryland, 806 F.2d at 942.

The documents which relate to Entertainment are modest in volume and identified by the Government. (Government Memorandum, p. 10 n.5.) This is not a case where the Government has buried the relevant discovery in a mountain of documents. United States v. Bortnovsky, 820 F.2d 572, 574-75 (2d Cir. 1987.) Rather, with regard to Entertainment, the Government has pointed to a universe that can fit in two bankers boxes. While the defendants deride the scope of document discovery—from a \$15 meals to rounds of golf at private country clubs,<sup>3</sup> the simple truth is that even the provision of the proverbial but no longer existent 10-cent cup of coffee could be an overt act. The claim that defendants are unable to determine where “government draws the line between legitimate business entertainment and unlawful conduct” is beside the point for the same reason—the intrinsic lawfulness of an overt act is beside the point. (Reply, p. 7.) Moreover, the defendants’ recitation of particulars from the discovery indicates that they can readily identify instances of Entertainment from the discovery. One presumes that the Government is not salting the Entertainment documents with evidence of extraneous expenditures.

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<sup>3</sup>Reply, p. 6.

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CRIMINAL MINUTES - GENERAL

At oral argument, defendants contended that some Entertainment may be deemed a bribe by the Government, and that the Court’s reasoning with regard to bribes ought to compel production of the particulars concerning Entertainment. At oral argument, the Government represented that all of the instances of Entertainment which it deems are bribe are set forth in the Indictment. This is sufficient to meet the defendants’ concerns.

*Safe Harbor.*

Provided that the Government complies in good faith with this order and its discovery obligations under Rule 16, this order shall not preclude the Government from later identifying other alleged bribes.

\* \* \* \* \*

While the Court denies the Motion in large measure, the Court nevertheless appreciates the complexity of the case and the need to ensure a fair opportunity to defend. The latter factor affects the timing of identification of trial witnesses and exhibits, the production witness statements, 302s, Jenks materials, and other materials. However, those are issues for another day.

III. Conclusion.

The Motion is granted only to the extent set forth above.

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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL NUMBER

V.

NAM QUOC NGUYEN : 08-522  
KIM ANH NGUYEN  
AN QUOC NGUYEN

WEDNESDAY, DECEMBER 2, 2009  
COURTROOM 9-A  
PHILADELPHIA, PA 19106

-----  
BEFORE THE HONORABLE TIMOTHY J. SAVAGE, J.  
-----

MOTIONS HEARING

APPEARANCES:

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PROCEEDINGS RECORDED BY STENOGRAPHY-COMPUTER,  
TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION

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1 (THE CLERK OPENS COURT.)

2 THE COURT: GOOD MORNING. PLEASE BE  
3 SEATED.

4 ALL COUNSEL: GOOD MORNING.

5 THE COURT: WE HAVE A NUMBER OF MOTIONS  
6 THAT ARE BEFORE US TODAY. LET ME START WITH A MOTION  
7 FOR A HEARING UNDER SECTION 2 OF THE CLASSIFIED  
8 INFORMATION PROCEDURES ACT, WHICH IS DOCKET NUMBER 96.

9 MISS RECKER, THE GOVERNMENT HAS NOT YET  
10 MOVED, SO DO YOU THINK THIS MAY BE A PREMATURE MOTION?

11 MS. RECKER: YOUR HONOR, I BELIEVE THAT  
12 UNDER CIPA WE DON'T HAVE TO WAIT FOR THE GOVERNMENT TO  
13 MOVE, BECAUSE WE HAVE REQUESTED THE COURT HOLD THIS  
14 CONFERENCE. AND THE REASON WE WOULD LIKE TO HOLD THAT  
15 CONFERENCE IS THAT WE BELIEVE THAT UNDER CIPA WE ARE --  
16 BECAUSE WE ARE CLEARED, THERE EXISTS A MECHANISM BY  
17 WHICH WE CAN BALANCE THE NEED TO PROTECT NATIONAL  
18 SECURITY WITH OUR NEED TO LOOK AT THE FISA DOCKET. AND  
19 MY COLLEAGUE, AMY CARVER, WILL BE ARGUING THE FISA  
20 ISSUES SPECIFICALLY. BUT WITH RESPECT TO CIPA, WE  
21 BELIEVE THAT THIS CONFERENCE MUST BE HELD AND INDEED I  
22 THINK THAT SECTION 2 -- I WILL LOOK THAT UP -- SECTION 2  
23 OF CIPA REQUIRES THAT ONCE A PARTY REQUESTS SUCH A  
24 HEARING OR SUCH A CONFERENCE BEFORE YOUR HONOR THE COURT  
25 MUST GIVE THAT CONFERENCE.

1 THE COURT: YOU DO THINK SO, HUH?

2 MS. RECKER: YES.

3 MS. WILLIAMS: YOUR HONOR, THE GOVERNMENT  
4 WAS ABLE TO FIND CASE LAW CITED IN ITS BRIEF WHERE THE  
5 COURT HELD THAT IF A DEFENDANT REQUESTS A SECTION 2 CIPA  
6 HEARING THAT IS TRULY UNNECESSARY THE COURT MAY DECLINE  
7 THAT REQUEST. IT'S THE GOVERNMENT'S POSITION THAT IN  
8 FACT THIS IS A PREMATURE MOTION. WHEN THE GOVERNMENT  
9 DOES MAKE ITS CIPA FILING IN JANUARY TO THE EXTENT THE  
10 GOVERNMENT IS REQUESTING EX PARTE IN CAMERA  
11 CONSIDERATION, THE GOVERNMENT WILL LAY OUT THE ARGUMENTS  
12 AND THE FACTUAL SUPPORT FOR THAT, AT WHICH POINT THE  
13 COURT CAN MAKE A REASONED JUDGMENT BASED ON THAT. UNTIL  
14 THE GOVERNMENT MAKES ITS FILING AND LAYS ALL OF THAT  
15 OUT, IT SEEMS THAT WE CAN'T HAVE A REASONABLE DISCUSSION  
16 ABOUT HOW THE MOTION SHOULD BE TREATED.

17 MS. RECKER: IF I MAY, YOUR HONOR.  
18 SECTION 2 DOES STATE THAT ANY PARTY MAY MOVE AND ONCE  
19 THE PARTY DOES SO THE COURT SHALL PROMPTLY HOLD A  
20 PRETRIAL CONFERENCE. WE ARE NOT -- AND WE DISPUTE HOTLY  
21 THAT OUR REQUEST IS UNNECESSARY. INDEED, OUR REQUEST IS  
22 VERY NECESSARY, BECAUSE WE BELIEVE THAT THE GOVERNMENT'S  
23 FISA -- WE HAVE SEEN ABSOLUTELY NO INDICATION WHATSOEVER  
24 FROM ANY OF THE CHARGES RESULTING IN THE INDICTMENT AND  
25 THE DISCOVERY THAT HAS BEEN DECLASSIFIED AND RETURNED TO

1 US THUS FAR SHOWS ANY HINT THAT OUR CLIENTS WERE ENGAGED  
2 ON BEHALF OF A FOREIGN POWER TO GATHER CLANDESTINELY  
3 FOREIGN INTELLIGENCE. AND SO WE BELIEVE THAT WE HAVE  
4 THE ABILITY TO BRING A FRANKS V DELAWARE CHALLENGE AND  
5 THE NEED FOR US TO SEE THE FISA DOCKET IS NOT  
6 UNNECESSARY IN ORDER TO BRING THAT CHALLENGE --

7 THE COURT: WHAT IS IT THAT YOU WANT TO  
8 SEE?

9 MS. RECKER: PARDON ME?

10 THE COURT: WHAT DO YOU WANT TO SEE?

11 MS. RECKER: WE WOULD LIKE TO SEE THE  
12 PROBABLE CAUSE AFFIDAVIT. I BELIEVE UNDER FISA IT'S  
13 CALLED A CERTIFICATION. WE WOULD LIKE TO SEE THE  
14 APPLICATION. WE WOULD LIKE TO SEE THE ORDER ENTERED BY  
15 THE FISA COURT, BECAUSE WE DON'T BELIEVE THAT THIS --  
16 THAT THE GOVERNMENT HAD IN THIS CASE PROBABLE CAUSE TO  
17 ACTUALLY CONDUCT THE FISA SURVEILLANCE.

18 THE COURT: AND WHAT IF I REVIEW THEM IN  
19 CAMERA EX PARTE AND DETERMINE THAT THEY DO?

20 MS. RECKER: WE WOULD HAVE TO ABIDE BY  
21 YOUR HONOR'S ORDER, IF THAT IS YOUR DECISION. BUT WE  
22 BELIEVE THAT --

23 THE COURT: I HAVE ALREADY READ ALL THIS  
24 INFORMATION.

25 MS. RECKER: OKAY, YOUR HONOR.

1 THE COURT: I DON'T KNOW WHY YOU WOULD  
2 NOT WANT TO GIVE THEM SOME OF THIS STUFF THAT I SAW.  
3 THEY ARE NOT GREAT SECRETS.

4 MS. WILLIAMS: WELL, YOUR HONOR, THE CASE  
5 LAW IS VERY CLEAR AND THE STATUTE IS VERY CLEAR THAT  
6 WHEN THE ATTORNEY GENERAL MAKES THE DECLARATION THAT OUR  
7 ATTORNEY GENERAL DID, THEN THE COURT REVIEWS THE  
8 MATERIALS EX PARTE AND IN CAMERA AND DISCLOSES IT ONLY  
9 WHEN NECESSARY TO MAKE AN ACCURATE DETERMINATION ABOUT  
10 THE LEGALITY OF COLLECTION.

11 THE COURT: I DON'T KNOW WHAT THAT MEANS.

12 MS. WILLIAMS: I'M SORRY?

13 THE COURT: WHAT DOES THAT MEAN?

14 MS. WILLIAMS: THE "ONLY ONE NECESSARY"  
15 LANGUAGE?

16 THE COURT: YES. WHAT DOES IT MEAN?

17 MS. WILLIAMS: WELL, YOUR HONOR, MY

18 INTERPRETATION --

19 THE COURT: NECESSARY TO WHOM?

20 MS. WILLIAMS: NECESSARY TO THE COURT'S  
21 DETERMINATION, YOUR HONOR.

22 THE COURT: WELL, I ALREADY GOT IT.

23 MS. WILLIAMS: YES.

24 THE COURT: THAT IS WHAT AN IN CAMERA EX  
25 PARTE EXAMINATION IS. AND THEN RELEASE IT, IT SAYS.

1 MS. WILLIAMS: IF THE COURT --

2 THE COURT: IF NECESSARY TO WHAT  
3 DETERMINATION?

4 MS. WILLIAMS: WELL, IF THE COURT  
5 REQUIRES CONTRIBUTION FROM DEFENSE COUNSEL, AN ARGUMENT  
6 FROM DEFENSE COUNSEL, IN ORDER TO MAKE A DECISION ABOUT  
7 WHETHER THE COLLECTION WAS LEGAL, IT'S MY UNDERSTANDING  
8 THAT THAT IS WHAT THE ONLY NECESSARY LANGUAGE MEANS.

9 THE COURT: IT SEEMS TO ME THAT WE ARE IN  
10 AN AREA WHERE THE GOVERNMENT, INSTEAD OF TAKING AN  
11 IRONCLAD STONEWALL, THAT IT COULD PROBABLY WORK OUT  
12 SOMETHING WITH THE DEFENSE TO SHOW THEM ENOUGH TO  
13 SATISFY THE DEFENSE WITHOUT EVER REALLY REVEALING ANY  
14 SECRETS --

15 MS. WILLIAMS: WELL, YOUR HONOR, THE  
16 GOVERNMENT HAS DISCLOSED A LARGE AMOUNT OF MATERIALS  
17 THAT WERE COLLECTED PURSUANT TO THE FISA AND  
18 DECLASSIFIED.

19 THE COURT: I'M NOT TALKING ABOUT THAT.  
20 WE ARE TALKING ABOUT THE PROBABLE CAUSE ISSUE.

21 MS. WILLIAMS: AH.

22 THE COURT: IT SEEMS TO ME THAT THE  
23 GOVERNMENT HAS -- WELL, THE ATTORNEY GENERAL HAS THE  
24 DISCRETION TO MAKE A DETERMINATION THAT SOME OF THAT  
25 INFORMATION CAN BE TURNED OVER TO THE DEFENSE AND IT MAY

1 SATISFY THE DEFENSE.

2 MS. WILLIAMS: I UNDERSTAND, YOUR HONOR.

3 THE COURT: I DON'T KNOW IF MISS RECKER  
4 IS LISTENING TO WHAT I SAID, THAT I ALREADY REVIEWED  
5 THIS STUFF. AND I'M SUGGESTING THAT IF THE DEFENSE SAW  
6 IT, OR SOME OF IT, WE WOULD NOT BE ARGUING THIS POINT.

7 MS. WILLIAMS: I UNDERSTAND, YOUR HONOR.

8 THE COURT: YOU GET MY MESSAGE?

9 MS. RECKER: YES, YOUR HONOR.

10 THE COURT: SO AM I CORRECT THAT THE  
11 GOVERNMENT HAS THAT ABILITY?

12 MS. WILLIAMS: WELL, YOUR HONOR, AS A  
13 MATTER OF POLICY, THAT IS NOT SOMETHING THAT THE  
14 GOVERNMENT DOES. I DO HAVE HERE WITH ME, YOUR HONOR, AN  
15 INDIVIDUAL FROM OFFICE OF INTELLIGENCE IN WASHINGTON,  
16 D.C. WHO CAN SPEAK MORE TO THE ISSUES OF THE POLICY AND  
17 THE GOVERNMENT'S AUTHORITY ON THESE FISA ISSUES, SOMEONE  
18 WITH MORE EXPERIENCE THAN I, DAVID FARNHAM. AND HE IS  
19 AVAILABLE, SHOULD THE COURT WISH TO HEAR FROM HIM ON  
20 THIS ISSUE.

21 THE COURT: I MIGHT. BUT THE POINT I'M  
22 MAKING TO YOU, MISS WILLIAMS, IS THAT, OUT OF AN  
23 ABUNDANCE OF CAUTION, THE GOVERNMENT SAYS NOTHING GETS  
24 DISCLOSED, WHEN IN FACT IF THEY LOOK AT IT CLOSELY THEY  
25 MAY REALLY CONCLUDE THAT A LOT OF THIS STUFF COULD BE

1 HANDED OVER TO DEFENSE WITHOUT COMPROMISING ANY NATIONAL  
2 SECURITY INTERESTS AND WITHOUT DISCLOSING METHODS OF HOW  
3 IT WAS GATHERED. OKAY. AND IT WOULD SEEM TO ME, IF  
4 FROM WHAT I HAVE READ, I DON'T THINK THERE IS ANYTHING  
5 THE DEFENSE REALLY DOES NOT ALREADY KNOW. OKAY. SO  
6 WHAT WE ARE DOING IS, WE ARE DOING THIS BECAUSE THIS IS  
7 THE WAY WE ALWAYS DO IT. THIS IS THE WAY WE ARE DOING  
8 IT HERE. AND I CAN SAY THAT IN A LOT OF CASES THE  
9 GOVERNMENT SHOULD NOT SHARE ANYTHING WITH THE DEFENSE.  
10 THIS DOES NOT APPEAR TO BE THAT KIND OF CASE.

11 NOW, I DO UNDERSTAND THE RESTRICTIONS  
12 THAT ARE PLACED UPON THE COURT. SO WHAT I'M SUGGESTING  
13 IS THAT IT MAY NOT BE A BAD IDEA FOR THE PARTIES TO TAKE  
14 A LOOK AT THIS STUFF TOGETHER. DO YOU UNDERSTAND WHAT  
15 I'M SAYING?

16 MS. WILLIAMS: I UNDERSTAND COMPLETELY,  
17 YOUR HONOR. THERE IS --

18 THE COURT: WHAT DOES MR. FARNHAM SAY  
19 ABOUT THAT?

20 MS. WILLIAMS: MAY HE APPROACH, YOUR  
21 HONOR?

22 THE COURT: AND THE WORST THING YOU CAN  
23 DO WITH ME, MISS WILLIAMS, AS YOU WELL KNOW, IS TO TELL  
24 ME THIS IS THE WAY IT HAS ALWAYS BEEN DONE.

25 MS. WILLIAMS: ABSOLUTELY, YOUR HONOR.

1 SHOULD MR. FARNHAM GO TO THE WITNESS  
2 STAND OR THE PODIUM, YOUR HONOR?

3 THE COURT: WHEREVER HE WANTS. WHEREVER  
4 YOU ARE COMFORTABLE.

5 MS. WILLIAMS: I THINK THE PODIUM  
6 PROBABLY.

7 THE COURT: CAN YOU TALK STANDING UP?

8 MR. FARNHAM: GOOD MORNING, YOUR HONOR.

9 THE COURT: GOOD MORNING.

10 BY THE COURT:

11 Q. YOU HAVE BEEN LISTENING TO WHAT I HAVE BEEN  
12 SAYING?

13 A. YES, YOUR HONOR.

14 Q. WHAT IS THE PROBLEM?

15 A. THE PROBLEM IS THAT THE ATTORNEY GENERAL HAS  
16 MADE A DETERMINATION THAT IS BINDING ON US AND ON THE  
17 COURT GIVEN THE NATURE OF THE STATUTE'S LANGUAGE.

18 Q. AND WHAT IS THE REAL PROBLEM WITH GOING TO THE  
19 ATTORNEY GENERAL AND SAYING, IN THIS CASE, THIS IS WHAT  
20 THE JUDGE HAS SUGGESTED?

21 A. WE CAN GO TO THE ATTORNEY GENERAL AND SAY THAT  
22 BUT, AS OF THIS PRESENT MOMENT, THE STATURE OF THE CASE  
23 IS THAT THE FBI HAS, AS YOU HAVE SEEN IN THE CLASSIFIED  
24 FILING, WHICH I WON'T ELABORATE ON, THAT THE FBI HAS  
25 MADE A DETERMINATION AND BASED UPON THAT, THE ATTORNEY

1 GENERAL HAS EXERCISED THE CLAIM OF PRIVILEGE, WHICH THEN  
2 TRIGGERS THE STATUTORY LANGUAGE WHICH REQUIRES THE COURT  
3 TO CONDUCT AN EX PARTE IN CAMERA REVIEW AND DETERMINE  
4 WHETHER OR NOT PROBABLE CAUSE EXISTED. IF THE COURT  
5 REACHES THAT DETERMINATION, THAT IS THE END OF IT.  
6 NOTHING GETS TURNED OVER. ONLY IF YOUR HONOR IS UNABLE  
7 TO REACH A DETERMINATION FROM AN EX PARTE IN CAMERA  
8 REVIEW DOES THE STATUTE PERMIT ANYTHING TO BE TURNED  
9 OVER.

10 THAT IS THE PROCEDURE THAT HAS BEEN  
11 FOLLOWED FOR SEVERAL DECADES AND THAT IS THE PROCEDURE  
12 THAT WE BELIEVE SHOULD BE FOLLOWED NOW.

13 Q. WHAT DOES THE LANGUAGE IN THE STATUTE MEAN  
14 "EXCEPT TO THE EXTENT THE PROCESS REQUIRES DISCOVERY OR  
15 DISCLOSURE"?

16 A. THAT WOULD MEAN, YOUR HONOR -- I HAVE NOT  
17 BRIEFED IT, AND I'M APPEARING HERE NOT AS A TRIAL  
18 ATTORNEY. MY DESCRIPTION IS ATTORNEY ADVISOR. SO I'M  
19 NOT ARGUING. BUT MY UNDERSTANDING OF THAT IS AFTER YOU  
20 HAVE MADE THE DETERMINATION PROBABLE CAUSE EXISTS, THE  
21 DOCKETS WERE LEGAL, THE FISA SURVEILLANCE WAS  
22 APPROPRIATE AND PROPER, EVERYTHING STAYS SECRET UNLESS  
23 THERE IS SOMETHING IN THE NATURE OF BRADY MATERIAL THAT  
24 THE GOVERNMENT IS NOT ALREADY TURNING OVER. THAT WILL  
25 BE THE MATERIAL THAT WAS GENERATED NOT FROM THE

1 APPLICATIONS TO THE FISA COURT BUT FROM THE SURVEILLANCE  
2 THAT WAS CONDUCTED. AND THE UNITED STATES ATTORNEY'S  
3 OFFICE IS WORKING WITH THE FBI TO DECLASSIFY THOSE  
4 MATERIALS AND TO TURN THOSE OVER, IF THEY HAVE NOT  
5 ALREADY DONE SO, I BELIEVE THEY MAY HAVE ALREADY DONE  
6 SO, BUT I DON'T WANT TO SPEAK FOR THEM. SO THE  
7 APPLICATIONS AND THE DOCKETS ARE ONE THING AND YOU HAVE  
8 THE FISA -- WE USE THE JARGON, TAKE, THE FISA TAKE.

9 Q. DO YOU SEE WHAT IT SAY? IT SAYS YOU DENY THE  
10 MOTION EXCEPT. EXCEPT. THAT IS EXCEPT. THE ANTECEDENT  
11 MEANS DENIAL OF THE MOTION. THAT IS MY PROBLEM HERE.  
12 SO YOU ARE SAYING ONCE I DENY THE MOTION I JUST HAVE TO  
13 GIVE THEM BRADY MATERIAL.

14 A. IF THERE IS SOMETHING IN THE FISA TAKE --

15 Q. THAT IS NOT AN EXCEPTION TO A DENIAL OF THE  
16 MOTION. YOU ARE GIVING ME AN EXCEPTION TO DISCLOSURE,  
17 NOT AN EXCEPTION TO THE RULING ON THE MOTION.

18 A. WELL, I BELIEVE THAT IS WHAT THE EXCEPTION  
19 REFERS TO, IS THAT THEY ARE SEEKING DISCLOSURE. THE  
20 GENERAL MOTIONS -- THEY ARE SEEKING DISCLOSURE -- ON THE  
21 ONE HAND, THEY ARE SEEKING DISCLOSURE OF THE FISA  
22 APPLICATIONS, WHAT WE PRESENT TO THE FISA COURT, WHICH  
23 IS WHAT WE ARE SAYING SHOULD REMAIN CLASSIFIED. THEY  
24 ARE ALSO SEEKING TO SUPPRESS THE FISA TAKE. THAT IS ALL  
25 A PART OF THIS 1806 PROCESS. SO IT IS NOT JUST TO GET

1 ACCESS TO THE APPLICATIONS THAT WENT TO THE FISA COURT.  
2 IT'S ALSO TO SUPPRESS WHAT THE FBI TOOK FROM THAT  
3 SURVEILLANCE. SO WHEN YOU DENY AND SAY NO, WE ARE NOT  
4 GOING TO SUPPRESS, THE EXCEPTION IS, YOU KNOW, WE ARE  
5 NOT SUPPRESSING IT, THE GOVERNMENT GETS TO USE IT, YOU  
6 DON'T GET TO SEE THE APPLICATIONS. BUT IF THERE IS  
7 SOMETHING IN THAT FISA TAKE WHICH IS SOMETHING THAT  
8 SHOULD BE DISCLOSED, BECAUSE OF BRADY, THEN THAT HAS TO  
9 BE TURNED OVER.

10 SO I THINK THE EXCEPTION RELATES TO THAT,  
11 NOT TO THE DENYING OF THE MOTION. THE MOTION GETS  
12 DENIED. BUT, YOU KNOW, DENIED IN PART, AFFIRMED IN PART  
13 OR GRANTED IN PART.

14 THE COURT: MISS RECKER.

15 DON'T GO FAR, MR. FARNHAM.

16 MS. RECKER: YOUR HONOR, MR. FARNHAM'S  
17 POINT SEEMS TO BE THAT THE ONLY INSTANCE IN WHICH WE ARE  
18 ENTITLED TO ANY OF THE FISA INFORMATION WOULD BE IF IT  
19 CONSTITUTED BRADY. BUT WE BELIEVE THAT THE FISA WARRANT  
20 WAS UNLAWFULLY CONDUCTED IN THE FIRST INSTANCE. AND I  
21 WOULD LIKE TO MAKE A FRANKS V DELAWARE ATTACK, BUT I  
22 CAN'T DO THAT UNLESS I HAVE ACCESS TO THE APPLICATION.  
23 FRANKS V DELAWARE HELD THAT IF THE PROBABLE CAUSE  
24 AFFIDAVIT EITHER DELIBERATELY MISREPRESENTED FACTS OR  
25 ENGAGED IN A RECKLESS DISREGARD FOR TRUTH OF THE FACTS

1 THEN WE HAVE A RIGHT TO CHALLENGE THE WARRANT IN THE  
2 FIRST INSTANCE. AND I CAN'T DO THAT UNLESS I'M ABLE TO  
3 SEE THE INFORMATION THAT HE SAYS WE DON'T NEED TO SEE.

4 THE COURT: YOU THINK I CAN MAKE THAT  
5 DETERMINATION?

6 MS. RECKER: I'M NOT SURE, YOUR HONOR. I  
7 WON'T SAY THAT YOU CAN, BUT I'M NOT SURE. BECAUSE I  
8 DON'T KNOW -- FIRST OF ALL, I DON'T KNOW WHAT IS IN IT.  
9 BUT, SECONDLY, I DON'T KNOW -- WE HAVE RECEIVED IN THE  
10 LAST WEEKS HARD DRIVES, DVD'S AND CDS OF EVIDENCE. AND  
11 I DON'T KNOW IF IT'S NECESSARY TO HAVE THE CONTEXT  
12 SUFFICIENT TO MAKE A DETERMINATION THAT THERE WAS NO  
13 CLANDESTINE GATHERING OF INTELLIGENCE ON BEHALF OF A  
14 FOREIGN POWER.

15 THE COURT: WE ARE GOING TO TALK ABOUT  
16 THAT WHEN WE TALK ABOUT THE SUPPRESSION MOTION. OKAY.  
17 WE ARE GOING TO GET INTO A LITTLE BIT MORE DETAIL THAN  
18 THAT. BUT I REALLY WANT TO KNOW WHAT YOU THINK THAT  
19 LANGUAGE MEANS IN SUBSECTION G BECAUSE MR. FARNHAM GIVES  
20 A PLAUSIBLE EXPLANATION. MISS WILLIAMS JUST BREATHED A  
21 SIGH OF RELIEF.

22 MS. RECKER: I'M SORRY, YOUR HONOR, I'M  
23 NOT SURE I COMPLETELY UNDERSTAND YOUR HONOR'S QUESTION.

24 THE COURT: WELL, I WANT TO KNOW WHAT --  
25 IT SAYS THAT I HAVE TO REVIEW IT EX PARTE IN CAMERA, AND

1 THEN IF I DENY THE MOTION, THAT IS THE END OF IT,  
2 EXCEPT, THERE IS EXCEPT LANGUAGE, AND I DON'T UNDERSTAND  
3 THAT TOTALLY.

4 MS. RECKER: YOUR HONOR, THE EXCEPT  
5 LANGUAGE INCORPORATES WHAT I'M ASKING FOR. DUE PROCESS  
6 ALLOWS ME TO MAKE THE CHALLENGE AND I BELIEVE THAT --

7 THE COURT: WELL, THEN IF THAT WERE THE  
8 CASE THEN THERE WOULD NEVER BEEN ANY IN CAMERA OR EX  
9 PARTE EXAMINATION.

10 MS. RECKER: THAT IS NOT TRUE  
11 NECESSARILY, YOUR HONOR, BECAUSE IN THIS CASE --

12 THE COURT: SO WHERE IS THE LINE?

13 MS. RECKER: THE LINE IS, FROM EVERYTHING  
14 WE KNOW, THERE IS NO EVIDENCE OF CLANDESTINE GATHERING  
15 OF INTELLIGENCE INFORMATION. THERE ARE CERTAIN CASES  
16 THAT I HAVE BEEN INVOLVED IN WHICH THAT WAS NOT A  
17 QUESTION. NOW, THE FOREIGN INTELLIGENCE TAKE CAN  
18 INCLUDE INTELLIGENCE GATHERING, AS WELL AS CRIMINAL  
19 ACTIVITY, AND I SUBMIT IN THIS CASE, YOUR HONOR, THERE  
20 SIMPLY WAS NO FOREIGN INTELLIGENCE GATHERING.

21 THE COURT: WHERE IS THE CLANDESTINE  
22 INTELLIGENCE GATHERING DEFINED IN THE STATUTE?

23 MS. RECKER: YOUR HONOR, THAT IS FOUND IN  
24 TITLE 50, SECTION 1801.

25 THE COURT: WHERE IS IT?

1 MS. RECKER: (B) (2) .

2 THE COURT: WHERE?

3 MS. RECKER: TITLE 50, SECTION 1801  
4 (B) (2) .

5 THE COURT: DOES IT DEFINE IT?

6 MS. RECKER: ANY PERSON WHO KNOWINGLY  
7 ENGAGES IN A CLANDESTINE INTELLIGENCE GATHERING  
8 ACTIVITIES FOR OR ON BEHALF OF A FOREIGN POWER --

9 THE COURT: MY QUESTION IS, WHERE DOES IT  
10 DEFINE CLANDESTINE INTELLIGENCE GATHERING?

11 MS. RECKER: THAT IS NOT DEFINED.

12 THE COURT: IS IT ANYWHERE IN THE  
13 STATUTE?

14 MS. RECKER: NOT THAT I'M AWARE OF.

15 MS. WILLIAMS: I DON'T BELIEVE IT IS,  
16 YOUR HONOR.

17 THE COURT: IT WOULD HAVE BEEN HELPFUL,  
18 WOULDN'T IT?

19 MS. WILLIAMS: SURE WOULD, YOUR HONOR.

20 THE COURT: THAT IS WHAT YOU ARE GETTING  
21 HUNG UP ON. AND CONGRESS HAS NOT GIVEN US THE BENEFIT  
22 OF THE DEFINITION. SO WHAT DO WE DO?

23 MS. RECKER: WELL, IN THAT INSTANCE --

24 THE COURT: DO WE RELY ON COMMON SENSE  
25 LITERAL INTERPRETATION OF THE TERM?

1 MS. RECKER: I BELIEVE THAT IS  
2 APPROPRIATE, YOUR HONOR. AND I THINK THAT IN THIS CASE  
3 ANY COMMON SENSE UNDERSTANDING OF COMMERCIAL BRIBERY,  
4 WHICH IS ESSENTIALLY WHAT THE GOVERNMENT HAS CHARGED  
5 HERE, BUT WE WILL ARGUE THAT LATER --

6 THE COURT: DON'T MIX UP WHAT THEY CHARGE  
7 WITH WHAT THEY WERE LOOKING FOR.

8 MS. RECKER: WHAT --

9 THE COURT: ANOTHER ISSUE SOMEWHERE DOWN  
10 THE LINE. BUT YOU CAN'T MIX UP WHAT THEY ARE LOOKING  
11 FOR AND WHAT THEY HAVE PROBABLE CAUSE TO BELIEVE WAS  
12 GOING ON WITH WHAT THEY ULTIMATELY CHARGED THEM.

13 MS. RECKER: THAT'S CORRECT, YOUR HONOR.  
14 I CAN ONLY EVALUATE WHAT THEY WERE LOOKING FOR. BY  
15 LOOKING AT THE CHARGES AND BY LOOKING --

16 THE COURT: I KNOW WHAT YOUR ARGUMENT IS.  
17 TELL ME WHAT THAT LANGUAGE MEANS.

18 MS. RECKER: CLANDESTINE INTELLIGENCE  
19 GATHERING?

20 THE COURT: NO, THE EXCEPT LANGUAGE.

21 MS. RECKER: WELL, I BELIEVE THAT THE  
22 EXCEPT LANGUAGE ENABLES US, BECAUSE IT REQUIRES THE  
23 COURT TO TAKE INTO ACCOUNT DUE PROCESS, AND THAT DUE  
24 PROCESS REQUIRES DISCOVERY IN THIS INSTANCE BECAUSE I  
25 BELIEVE THAT WE HAVE THE ABILITY UNDER DUE PROCESS TO

1 CHALLENGE WHETHER OR NOT THIS WARRANT INCORPORATED A  
2 RECKLESS DISREGARD FOR TRUTH. THAT IS A FOURTH  
3 AMENDMENT ARGUMENT, YOUR HONOR.

4 THE COURT: DO YOU WANT TO RESPOND?

5 MR. FARNHAM: NO, YOUR HONOR. I WAS JUST  
6 CLEARING MY THROAT.

7 THE COURT: I THOUGHT YOU WERE GIVING ME  
8 A LAWYER'S SIGNAL.

9 MR. FARNHAM: NO, SIR.

10 THE COURT: DO YOU WANT TO RESPOND, MISS  
11 WILLIAMS?

12 MS. WILLIAMS: NO, YOUR HONOR. I THINK  
13 MR. FARNHAM HAS ALREADY ADEQUATELY STATED THE  
14 GOVERNMENT'S POSITION.

15 THE COURT: MR. FARNHAM, YOU CAN SIT  
16 DOWN. WE ARE GOING TO GET TO YOU PROBABLY AGAIN, I  
17 THINK.

18 LET'S DEAL WITH THE MOTION TO AMEND OR  
19 CORRECT THE PRETRIAL SUBMISSION. DIDN'T WE GET RID OF  
20 THAT, DOCUMENT NUMBER 97?

21 MS. RECKER: YOUR HONOR, THIS MOTION IS  
22 PART AND PARCEL OF OUR MOTION FOR A BILL OF PARTICULARS.

23 THE COURT: I AGREE.

24 MS. RECKER: AND SO --

25 THE COURT: LET'S DO THE BILL OF

1 PARTICULARS .

2 MS. RECKER: OKAY .

3 THE COURT: THAT IS DOCUMENT 95. LET ME  
4 HEAR FROM THE GOVERNMENT .

5 MS. HAMANN: YOUR HONOR, REGARDING THE  
6 MOTION FOR A BILL OF PARTICULARS, THE REQUEST FROM THE  
7 DEFENSE IS NARROWED, IT'S FOR THE IDENTITIES OF THE  
8 GOVERNMENT OFFICIALS WHO RECEIVED THE PAYMENTS THAT ARE  
9 ALLEGED IN THE INDICTMENT. THE GOVERNMENT WOULD FIRST  
10 NOTE THAT, AS PRESENTED IN ITS BRIEF, THE GOVERNMENT IS  
11 NOT REQUIRED TO PROVE AT TRIAL WHO THOSE OFFICIALS ARE,  
12 AND; THEREFORE, IT'S CERTAINLY NOT REQUIRED TO PLEAD  
13 THEM OR PROVIDE THEM IN A BILL OF PARTICULARS .

14 TO THE DEGREE THAT THAT REQUEST IS BOUND  
15 UP IN AN AFFIRMATIVE DEFENSE UNDER FOREIGN LAW THAT  
16 -- WE WOULD NEED SOME UNDERSTANDING WHY SOMETHING MORE  
17 THAN THE FACT THAT THEY WERE EMPLOYEES OF AGENCIES AND  
18 INSTRUMENTALITIES OF THE GOVERNMENT OF VIETNAM WOULD BE  
19 NEEDED .

20 ONE OF THE THINGS THAT IS NOTED BY THE  
21 DEFENSE IS THEY SAY THAT PRODUCTION OF MOUNTAINS OF  
22 DOCUMENTS IS NOT SUFFICIENT TO MEET THE OBLIGATIONS, AS  
23 ARGUED BY THE GOVERNMENT. HOWEVER, IN COUNT ONE OF THE  
24 CASES THAT WAS CITED BY THE DEFENSE THE COURT STATED  
25 VERY CLEARLY THAT IN THIS CASE THE COURT FINDS THAT THE

1 INDICTMENT ITSELF IS VERY DETAILED, THE GOVERNMENT HAS  
2 PROVIDED BASICALLY OPEN DISCOVERY OF ITS EVIDENCE, MUCH  
3 OF IT IN COMPUTER-SEARCHABLE FORMAT, AND THE LENGTH OF  
4 TIME FROM THE FILING OF THE INDICTMENT AND PRODUCTION OF  
5 THE GOVERNMENT'S EVIDENCE UNTIL THE DATE OF TRIAL  
6 PROVIDES AMPLE OPPORTUNITY FOR PREPARATION, SUCH THAT  
7 THE REQUEST FOR A BILL OF PARTICULARS BY THE DEFENDANTS  
8 IS DENIED.

9 THE COURT: MISS HAMANN, MISS HAMANN,  
10 THIS IS THE ONLY THING I HAVE LISTED TODAY SO YOU CAN  
11 SLOW DOWN.

12 MS. HAMANN: I'M SORRY, YOUR HONOR.

13 THE GOVERNMENT HAS PLED EVERYTHING THAT  
14 IT'S REQUIRED TO PLEAD. IT HAS PLED WITH SUFFICIENT  
15 SPECIFICITY. A BILL OF PARTICULARS IS GRANTED EITHER  
16 WHEN IT'S NECESSARY TO UNDERSTAND THE CHARGES, WHEN IT'S  
17 NECESSARY TO PLEAD DOUBLE JEOPARDY OR TO AVOID UNDUE  
18 SURPRISE.

19 BECAUSE THE GOVERNMENT WOULD NOT NEED TO  
20 PROVE THESE OFFICIALS' IDENTITIES AT TRIAL, NONE OF  
21 THOSE THREE REQUIREMENTS WOULD APPLY HERE AND THERE IS  
22 NO NEED FOR A BILL OF PARTICULARS.

23 THE COURT: HOW ARE YOU GOING TO PROVE  
24 THE CASE AT TRIAL?

25 MS. HAMANN: I'M SORRY, YOUR HONOR?

1 THE COURT: HOW DO YOU PROVE YOUR CASE AT  
2 TRIAL?

3 MS. HAMANN: AS FAR AS THE FOREIGN  
4 OFFICIAL ELEMENT GOES, THE GOVERNMENT IS REQUIRED TO  
5 PROVE THAT THE DEFENDANTS MADE AN OFFER, IF THROUGH A  
6 THIRD PARTY, WHICH IT WAS DONE THROUGH A THIRD PARTY IN  
7 THIS CASE, KNOWING OR HAVING REASON TO KNOW THAT SOME OR  
8 A PORTION OF THAT MONEY WOULD GO TO ANY GOVERNMENT  
9 OFFICIAL.

10 IT DOES NOT REQUIRE THAT WE PROVE WHICH  
11 GOVERNMENT OFFICIAL --

12 THE COURT: DOES THE GOVERNMENT KNOW WHO  
13 THE OFFICIALS ARE?

14 MS. HAMANN: IN ONE CASE WE DO, YOUR  
15 HONOR.

16 THE COURT: NOW YOU TELL ME WHY YOU DON'T  
17 WANT TO TURN THAT OVER.

18 MS. HAMANN: WE HAVE TURNED THAT OVER,  
19 YOUR HONOR.

20 THE COURT: DID YOU IDENTIFY IT, OR IS IT  
21 IN THAT MOUNTAIN OF DISCOVERY THAT YOU HAVE GIVEN THEM?

22 MS. HAMANN: WE SENT A SEPARATE LETTER TO  
23 THE DEFENDANTS IDENTIFYING THE OFFICIAL AND POINTED TO  
24 SOME OF THE DOCUMENTS RELATED TO HIM. HE IS DESCRIBED  
25 IN THE INDICTMENT AS OFFICIAL A, AND WE HAVE PROVIDED

1 THE IDENTITY AND THE NAME OF THE ORGANIZATION THAT HE  
2 WORKS FOR TO THE DEFENSE, YOUR HONOR, BY LETTER OF  
3 OCTOBER 29TH.

4 THE COURT: DON'T YOU THINK INSTEAD OF  
5 ARGUING WHAT A BILL OF PARTICULARS WAS FOR, YOU COULD  
6 HAVE TOLD ME THAT FIRST?

7 MS. HAMANN: SORRY, YOUR HONOR. WE  
8 DID --

9 THE COURT: INSTEAD OF GIVING ME A  
10 TUTORIAL ON THE LAW OF BILL OF PARTICULARS?

11 MS. HAMANN: YES, YOUR HONOR.

12 THE COURT: DO YOU HAVE THAT INFORMATION?

13 MS. RECKER: I HAVE THE IDENTITY OF ONE  
14 OF THE FOREIGN OFFICIALS. BUT WHAT THE GOVERNMENT IS  
15 COMPLETELY IGNORING IS THE FACT THAT THEY CHARGED TRAVEL  
16 ACT COUNTS THAT INCORPORATE PENNSYLVANIA STATE --

17 THE COURT: WE DON'T KNOW WHERE THAT IS  
18 GOING YET.

19 MS. RECKER: I'M SORRY, YOUR HONOR?

20 THE COURT: WE DON'T KNOW WHERE THAT IS  
21 GOING YET.

22 MS. RECKER: THAT'S CORRECT, YOUR HONOR.  
23 BUT --

24 THE COURT: THAT MAY NOT BE AN ISSUE IN  
25 THIS CASE.

1 BUT GO AHEAD.

2 MS. RECKER: OKAY, YOUR HONOR. I'M NOT  
3 SURE IF YOU WOULD LIKE ME TO EXPAND ON MY BILL OF  
4 PARTICULARS --

5 THE COURT: TELL ME.

6 MS. RECKER: -- REQUEST. BUT THE TRAVEL  
7 ACT INCORPORATING PENNSYLVANIA STATE BRIBERY REQUIRES --

8 THE COURT: GO AHEAD.

9 MS. RECKER: -- REQUIRES FOCUS ON THE  
10 RECIPIENT OF THE BRIBE. NOT ONLY THE RECIPIENT, BUT  
11 WHETHER OR NOT THE RECIPIENT'S EMPLOYER CONSENTED TO THE  
12 BRIBE. IF WE DON'T KNOW WHO THE RECIPIENT OF THE BRIBE  
13 IS, I DON'T KNOW HOW THE GOVERNMENT CAN SAY IN GOOD  
14 FAITH THAT THEY HAVE GIVEN US ADEQUATE NOTICE OF THE  
15 CHARGES IN THIS CASE. WE SIMPLY CANNOT ADDRESS THE  
16 TRAVEL ACT COUNTS WITHOUT SOME IDEA OF WHO THE FOREIGN  
17 OFFICIALS ARE.

18 I MIGHT ADD --

19 THE COURT: I DON'T KNOW WHY THE  
20 GOVERNMENT WANTS TO PROCEED WITH THE TRAVEL ACT ANYWAY  
21 BUT GO AHEAD.

22 MS. RECKER: I MIGHT ADD, YOUR HONOR,  
23 THAT IN THE LAST WEEK WE HAVE RECEIVED A MOUNTAIN OF  
24 EVIDENCE AND --

25 THE COURT: MISS RECKER, I'M NOT ONE WHO

1 ACCEPTS ANY ARGUMENT THAT IT'S SOMEWHERE CONTAINED IN  
2 ALL OF THE STUFF WE GAVE YOU. YOU DON'T HAVE TO GO  
3 THERE.

4 MS. RECKER: THANK YOU, YOUR HONOR.

5 THE COURT: WHAT IS IT THAT YOU ARE  
6 LOOKING FOR, THE IDENTITIES OF WHOM?

7 MS. RECKER: I'M LOOKING FOR THE  
8 IDENTITIES OF THE FOREIGN OFFICIALS THE GOVERNMENT  
9 ALLEGED WERE BRIBED --

10 THE COURT: HOW ABOUT THE HONG KONG  
11 COMPANY PERSON?

12 MS. RECKER: WE KNOW WHO THE INTERMEDIARY  
13 IS, YOUR HONOR. THE GOVERNMENT HAS IDENTIFIED THAT  
14 PERSON FOR US. WE DON'T KNOW WHO THE PAYMENTS ARE MADE  
15 TO ALLEGEDLY, EXCEPT WITH ONE EXCEPTION.

16 THE COURT: DO THE IDENTITIES OF THE  
17 PERSONS THAT YOU SEEK HAVE ANY IMPLICATION WITH RESPECT  
18 TO YOUR RULE 15 MOTION?

19 MS. RECKER: YES, THEY DO. THAT IS WHY  
20 THE MOTIONS ARE CONSIDERED TOGETHER.

21 THE COURT: I'M GOING TO GRANT THE  
22 MOTION, THE GOVERNMENT SHALL IDENTIFY BY NAME, TITLE,  
23 THE GOVERNMENT AGENCY OF EACH PERSON IT CONTENDS WERE  
24 THE RECIPIENT OR INTENDED RECIPIENTS OF EACH BRIBE, NO  
25 LATER THAN DECEMBER 8TH, 2009.

1 AND WITH RESPECT TO THE DATE FOR THE RULE  
2 15 MOTIONS, THEY WILL BE FILED NO LATER THAN  
3 DECEMBER 15TH, 2009.

4 MS. HAMANN: YOUR HONOR, IF I MAY. THE  
5 GOVERNMENT REQUESTS MORE TIME THAN BY DECEMBER 8TH TO  
6 IDENTIFY THE --

7 THE COURT: NO.

8 MS. RECKER: YOUR HONOR, I HAVE ONE  
9 ADDITIONAL --

10 THE COURT: YOU ALREADY HAVE THEM. YOU  
11 HAVE THE INFORMATION, YOU KNOW WHO IT IS. GIVE IT TO  
12 THEM. IT DOES NOT TAKE YOU A WEEK TO FIGURE OUT WHO IT  
13 IS THAT YOU ALREADY KNOW ABOUT THAT YOU MADE THE BASIS  
14 OF YOUR CHARGES ABOUT.

15 MS. HAMANN: YES, YOUR HONOR.

16 MS. RECKER: I HAVE ONE ADDITIONAL  
17 REQUEST RELATIVE TO A BILL OF PARTICULARS. AS I SAID  
18 BEFORE, IN THE LAST WEEK WE HAVE BEEN INUNDATED WITH A  
19 MOUNTAIN OF EVIDENCE. AND I'M NOT COMPLAINING ABOUT  
20 THAT, BUT WE HAVE RECEIVED --

21 THE COURT: IF YOU DIDN'T GET ENOUGH YOU  
22 WOULD COMPLAIN. NOW YOU ARE COMPLAINING YOU GOT TOO  
23 MUCH. GO AHEAD.

24 MS. RECKER: NO, I'M NOT COMPLAINING  
25 ABOUT TOO MUCH. WHAT I'M SIMPLY GOING TO ASK THE COURT

1 TO CONSIDER IS REQUESTING THE GOVERNMENT TO IDENTIFY  
2 WHICH TELEPHONE CALLS, BECAUSE WE'VE GOT IN EXCESS OF  
3 3,000. AND IF WE WERE TO BEGIN TODAY TO LISTEN TO THESE  
4 TELEPHONE CALLS, I'M NOT SURE WE WOULD HAVE THEM ALL  
5 LISTENED TO BY THE TIME OF TRIAL. AND I'M NOT  
6 COMPLAINING ABOUT THE TRIAL DATE. BUT WHAT I'M SAYING  
7 IS IT WOULD BE VERY HELPFUL TO THE DEFENSE IF THE  
8 GOVERNMENT WERE TO IDENTIFY WHICH OF THOSE 3,000  
9 TELEPHONE CALLS AND WHICH OF THE MORE THAN 4,000 E-MAILS  
10 THAT WE RECEIVED DAYS AGO THEY INTEND TO INTRODUCE AT  
11 TRIAL.

12 MS. WILLIAMS: YOUR HONOR, THE  
13 GOVERNMENT --

14 THE COURT: I KNOW THE ANSWER, BUT GO  
15 AHEAD.

16 MS. WILLIAMS: THE GOVERNMENT WOULD  
17 ROUTINELY PROVIDE THE DEFENSE WITH VERY DETAILED  
18 EXHIBITS LIST BY WHATEVER DEADLINE THE COURT SETS. I  
19 GUESS I'M UNSURE WHETHER MISS RECKER IS REQUESTING THAT  
20 KIND OF A DISCLOSURE NOW. THE GOVERNMENT SIMPLY DOES  
21 NOT HAVE THAT ANSWER RIGHT NOW. IT'S CERTAINLY NOT  
22 REQUIRED UNDER A BILL OF PARTICULARS --

23 THE COURT: MISS RECKER, HERE IS THE  
24 PROBLEM WITH THE REQUEST.

25 IF THEY WERE TO DESIGNATE CERTAIN CALLS

1 THAT THEY INTEND TO USE AT THIS POINT IN TIME AND THEN  
2 DETERMINE LATER THAT THEY WANT TO USE SOMETHING ELSE, OR  
3 SOMETHING IN ADDITION TO THOSE THAT THEY IDENTIFY NOW,  
4 YOU WOULD BE COMPLAINING THAT THEY DID NOT TELL YOU AND  
5 THAT THEY WERE HIDING THE BALL. THEY HAVE NOT MADE  
6 THEIR DECISION YET WHAT IT IS THEY ARE GOING TO DO OR  
7 WHAT THEY ARE GOING TO USE AND I'M NOT GOING TO REQUIRE  
8 THEM TO DISCLOSE THAT TO YOU NOW.

9 MS. RECKER: IF I MAY SUGGEST A POSSIBLE  
10 COMPROMISE, YOUR HONOR.

11 THE COURT: THEN COMPROMISES ARE THINGS  
12 THAT PARTIES CAN WORK OUT TOGETHER.

13 MS. RECKER: VERY WELL, YOUR HONOR.  
14 THANK YOU.

15 THE COURT: YOU CAN GO AHEAD. I'M  
16 LISTENING TO YOU. I'M JUST TRYING TO GIVE YOU SOME  
17 SUGGESTION HOW YOU SHOULD ALL WORK ON THIS CASE, BUT GO  
18 AHEAD.

19 MS. RECKER: WELL, COUNSEL FOR THE  
20 GOVERNMENT MENTIONED THE CASE UNITED STATES VERSUS KEMP.  
21 IT WAS A CASE I WAS INVOLVED IN. AND IN THAT CASE THE  
22 GOVERNMENT HAD OVER 26,000 TAPE RECORDED TELEPHONE  
23 CALLS. IN AN EFFORT TO STREAMLINE THE PROCESS, THE  
24 GOVERNMENT WAS REQUIRED TO NARROW THAT LIST OF 26,000  
25 CALLS TO A MORE MANAGEABLE LIST OF 2600. AND THAT WAS A

1 MECHANISM IMPOSED UPFRONT. AND IT WAS EXTREMELY HELPFUL  
2 TO THE DEFENSE IN WADING THROUGH THE VOLUME OF  
3 MATERIALS.

4 I'M SIMPLY SUGGESTING, YOUR HONOR, THAT  
5 THERE COULD BE SOME COMPROMISE IN THIS CASE GIVEN THE  
6 AMOUNT OF MATERIAL THAT WE JUST RECEIVED AND THE PENDING  
7 TRIAL DATE.

8 THE COURT: I UNDERSTAND WHAT YOU ARE  
9 ASKING. I DON'T KNOW THAT I'M IN A POSITION TO ORDER  
10 SUCH COOPERATION OTHER THAN ENCOURAGING IT.

11 MS. RECKER: THANK YOU, YOUR HONOR.

12 THE COURT: JUDGE BAYLSON ENTERED THAT  
13 ORDER YOU ARE TALKING ABOUT?

14 MS. RECKER: HE DID, YOUR HONOR. I DON'T  
15 REMEMBER THE EXACT SPECIFICS OF THE ORDER BUT I DO  
16 RECALL THAT THAT IS HOW THE MANAGEMENT OF THE VOLUME OF  
17 MATERIAL WAS ACCOMPLISHED. AND IN THAT CASE, I MIGHT  
18 ADD, THE GOVERNMENT PRODUCED --

19 THE COURT: DO YOU HAVE A COPY OF THE  
20 ORDER?

21 MS. RECKER: WHEN I GET BACK TO THE  
22 OFFICE, YOUR HONOR, I WILL TRY TO FIND THAT.

23 THE COURT: AND YOU MIGHT WANT TO SEND IT  
24 TO ME, IF YOU GUYS ARE NOT ABLE TO WORK OUT AN  
25 AGREED-UPON DISCLOSURE.

1 MS. RECKER: YES, YOUR HONOR.

2 MS. WILLIAMS: YES, YOUR HONOR. THANK  
3 YOU.

4 THE COURT: YOU SMILE. YOU CAN READ  
5 BETWEEN THE LINES.

6 MS. WILLIAMS: PERIODICALLY, YOUR HONOR.

7 THE COURT: I'M GOING TO HOLD OFF ON THAT  
8 MOTION FOR A HEARING UNDER CIPA RIGHT NOW.

9 MS. RECKER: OKAY, YOUR HONOR.

10 THE COURT: THE ALTERNATIVE IS I CAN DENY  
11 IT WITHOUT PREJUDICE. BUT I'M NOT GOING TO DO THAT  
12 BECAUSE THAT REQUIRES YOU FILE SOMETHING AGAIN. SO I'M  
13 GOING TO HOLD OFF ON IT. I WOULD REVIEW IT AND I'LL  
14 GIVE YOU, BOTH SIDES, A CHANCE TO ADDRESS ANY QUESTION  
15 THAT I MIGHT HAVE, IF I HAVE ANY.

16 ALL RIGHT, THE MOTION TO DISMISS THE  
17 INDICTMENT FOR FAILURE TO STATE A CRIMINAL OFFENSE.  
18 THAT IS DOCKET NUMBER 99.

19 WHO'S GOING TO ARGUE THAT?

20 MS. RECKER: I'M GOING TO ARGUE THAT,  
21 YOUR HONOR.

22 THE COURT: GO AHEAD.

23 MS. RECKER: AS YOUR HONOR IS AWARE, THE  
24 GOVERNMENT HAS INDICTED THESE DEFENDANTS ON ONE COUNT OF  
25 CONSPIRACY UNDER THE FOREIGN CORRUPT PRACTICES ACT AND

1 THE TRAVEL ACT, AS WELL AS SUBSTANTIVE COUNTS UNDER FCPA  
2 AND PENNSYLVANIA COMMERCIAL BRIBERY STATUTE UNDER THE  
3 RUBRIC OF THE TRAVEL ACT.

4 WE FILED A MOTION TO DISMISS BECAUSE WE  
5 BELIEVE THAT THE CHARGES IN THE INDICTMENT FAIL TO STATE  
6 A CLAIM. THE FCPA PROHIBITS PAYMENTS TO FOREIGN  
7 OFFICIALS TO OBTAIN BUSINESS. AND THE QUESTION HERE IS  
8 PRECISELY WHO IS IT THAT THE DEFENDANTS ARE PROHIBITED  
9 FROM PAYING? WE KNOW FROM THE CHARGES THAT THE  
10 GOVERNMENT IS NOT ALLEGING THAT THE FOREIGN OFFICIALS  
11 WERE PART OF THE VIETNAMESE GOVERNMENT ITSELF. INSTEAD,  
12 THEY ARE ALLEGING THAT THE ALLEGED BRIBE RECIPIENTS WERE  
13 EMPLOYED BY AGENCIES OR INSTRUMENTALITIES OF THE  
14 VIETNAMESE GOVERNMENT.

15 AND THE FACT IS, YOUR HONOR, THE  
16 GOVERNMENT HAS STRETCHED THE DEFINITION OF AN AGENCY OR  
17 INSTRUMENTALITY TO FIT ITS FACTS. THE INDICTMENT  
18 ITSELF, THE LANGUAGE IN THE INDICTMENT, THE GOVERNMENT  
19 SAYS WE ARE TRYING TO ARGUE WHETHER OR NOT THEY CAN  
20 PROVE THEIR CASE DOWN THE ROAD BUT THAT IS NOT TRUE. WE  
21 ARE LOOKING SPECIFICALLY AT THE LANGUAGE IN THE  
22 INDICTMENT. AND THAT LANGUAGE GOES BEYOND AGENCY OR  
23 INSTRUMENTALITY.

24 AS A RESULT, THIS CASE, THIS INDICTMENT,  
25 IT FALLS SQUARELY WITHIN THE HOLDING OF UNITED STATES

1       VERSUS PANARELLA, A DECISION AUTHORED BY JUDGE BECKER.  
2       IN THAT CASE, JUDGE BECKER SAID THAT A CHARGING DOCUMENT  
3       FAILS TO STATE AN OFFENSE IF THE SPECIFIC FACTS ALLEGED  
4       IN THE CHARGING DOCUMENT FALL BEYOND THE SCOPE OF THE  
5       RELEVANT CRIMINAL STATUTE AS A MATTER OF STATUTORY  
6       INTERPRETATION.

7                       I SUBMIT, YOUR HONOR, THAT THE GOVERNMENT  
8       HAS LAYERED INTO THIS INDICTMENT A NUMBER OF DIFFERENT  
9       CONCEPTS THAT ARE NOT CONTAINED WITHIN THE STATUTE. FOR  
10      EASE OF REFERENCE, I HAVE MADE A CHART OF THE  
11      GOVERNMENT'S CHARGES BECAUSE THE INDICTMENT IS QUITE  
12      LENGTHY.

13                     I WONDER IF I MAY HAND THAT UP TO YOUR  
14      HONOR.

15                     AS YOUR HONOR CAN SEE FROM THIS CHART,  
16      THE LANGUAGE IN THE FCPA STATUTE IS QUITE SPARSE. AND  
17      WE ARE FOCUSED ON AGENCY OR INSTRUMENTALITY. BUT THE  
18      LANGUAGE IN THE INDICTMENT GOES MUCH BEYOND ALLEGING  
19      AGENCY OR INSTRUMENTALITY. THERE ARE SIX DIFFERENT  
20      ALLEGED ENTITIES AND EACH OF THESE HAS A DIFFERENT  
21      DESCRIPTION, ALTHOUGH SOME OF THE DESCRIPTIONS ARE  
22      SOMEWHAT SIMILAR.

23                     SO, FOR EXAMPLE, THE GOVERNMENT, WITH  
24      RESPECT TO THE ENTITY FSFC CALLS IT AN AIRLINE OWNED AND  
25      OPERATED BY THE VIETNAM PEOPLE'S ARMY WHICH ENGAGED IN

1 ACTIVITIES RELATED TO THE VIETNAMESE GOVERNMENT  
2 MANAGEMENT OF CIVIL AND MILITARY AVIATION.

3 AGAIN, ECHOING THAT CONCEPT OF RELATED  
4 TO, THE GOVERNMENT DESCRIBES SFMC AS BEING ENGAGED IN  
5 ACTIVITIES RELATED TO THE VIETNAMESE GOVERNMENT'S  
6 MANAGEMENT OF CIVIL AVIATION.

7 VTA, VUNG TAU AIRPORT, THE GOVERNMENT  
8 SAYS WAS AN AGENCY AND INSTRUMENTALITY OF CIVIL AVIATION  
9 ADMINISTRATION.

10 VSP IS A JOINT VENTURE WHOLLY OWNED AND  
11 CONTROLLED BY THE GOVERNMENT OF VIETNAM AND THE  
12 GOVERNMENT OF THE RUSSIAN FEDERATION, WHICH IS ENGAGED  
13 IN THE EXPLOITATION OF NATURAL RESOURCES.

14 PVGC THE GOVERNMENT CLAIMS IS A  
15 SUBDIVISION OF PETRO VIETNAM, WHICH ITSELF IS WHOLLY  
16 OWNED AND CONTROLLED BY THE GOVERNMENT OF VIETNAM AND  
17 ENGAGED IN THE EXPLOITATION OF NATURAL RESOURCES.

18 AND LAST, AGAIN, WE COME TO A DEFINITION  
19 THAT INCLUDES THE CONCEPT OF RELATED TO. I SUGGEST,  
20 YOUR HONOR, THAT THIS CASE IS A PERFECT EXAMPLE OF WHAT  
21 JUDGE BECKER WARNED AGAINST, THAT YOU CAN'T ADD FACTS  
22 INTO THE CHARGE. EVEN IF YOU TRACK THE LANGUAGE OF THE  
23 STATUTE, IF YOU ADD IN EXTRA FACTS, YOU DISTORT THE  
24 MEANING AND YOU THEREBY TAKE THE CHARGES BEYOND THE  
25 SCOPE OF THE STATUTE. AND I THINK THAT THAT IS THE

1 SITUATION THAT WE HAVE HERE.

2 NOW, THE FCPA STATUTE DOES NOT DEFINE  
3 AGENCY OR INSTRUMENTALITY. AND IF YOU LOOK AT THE  
4 LEGISLATIVE HISTORY OF THE STATUTE, YOU SEE THAT THE  
5 CONGRESS SPECIFICALLY WAS AIMING TOWARD FOREIGN  
6 OFFICIALS, ELECTED OFFICIALS AND POLITICIANS. THESE  
7 WORDS ARE NOT CLEAR ON THEIR FACE BUT IF YOU --

8 THE COURT: WHICH WORDS?

9 MS. RECKER: AGENCY AND INSTRUMENTALITY.  
10 IF YOU LOOK AT THEIR DEFINITIONS UNDER  
11 BLACK'S LAW DICTIONARY --

12 THE COURT: ISN'T INSTRUMENTALITY MUCH  
13 BROADER THAN AGENCY?

14 MS. RECKER: I'M NOT SURE, YOUR HONOR.

15 THE COURT: IN THE COMMON SENSE.

16 MS. RECKER: IN THE COMMON SENSE, I  
17 THINK --

18 THE COURT: WHY ADD INSTRUMENTALITY IF  
19 IT'S THE SAME AS AGENCY?

20 MS. RECKER: YOUR HONOR, I DON'T THINK  
21 THAT INSTRUMENTALITY IS THE SAME AS AGENCY. AND IF YOU  
22 LOOK AT THE BLACK'S LAW DICTIONARY DEFINITION OF  
23 INSTRUMENTALITY, YOU SEE THAT THE INSTRUMENTALITY MUST  
24 PERFORM A FUNCTION OF ANOTHER ENTITY.

25 AND SO I THINK THAT IT IS -- IF YOU ARE

1 TO CONSIDER THE COMMON LAW SENSE OR THE DEFINITIONAL  
2 SENSE OF THESE WORDS, I THINK THAT THE GOVERNMENT'S  
3 LANGUAGE ABOUT OWNERSHIP AND CONTROL AND RELATED TO  
4 SIMPLY TAKE THIS CASE OUTSIDE THE BOUNDARIES OF THE FCPA  
5 STATUTE. THERE ARE OTHER STATUTES THAT DO DEFINE  
6 INSTRUMENTALITY. I'M NOT SURE THAT THEY ARE ENTIRELY  
7 RELEVANT, ALTHOUGH THEY GIVE SOME GUIDANCE.

8 THE COURT: IT SEEMS TO ME THAT THE  
9 ARGUMENT YOU MAKE IS NOT TO THE SUFFICIENCY OF THE  
10 ALLEGATIONS, BUT AS TO THE SUFFICIENCY OF PROOF AT  
11 TRIAL.

12 MS. RECKER: THAT IS NOT TRUE, YOUR  
13 HONOR, BECAUSE I DON'T KNOW WHAT THE GOVERNMENT IS GOING  
14 TO PROVE AT TRIAL.

15 THE COURT: I DON'T EXPECT YOU TO AGREE.

16 MS. RECKER: I'M SORRY, YOUR HONOR?

17 THE COURT: I DID NOT EXPECT YOU TO  
18 AGREE.

19 MS. RECKER: I DON'T AGREE, BECAUSE THE  
20 LANGUAGE IN THE INDICTMENT ITSELF IS WHAT I'M FOCUSING  
21 ON. AND IT'S THE LANGUAGE IN THE INDICTMENT ITSELF THAT  
22 TAKES US OUTSIDE THE BOUNDARIES OF THE FCPA STATUTE.

23 THE COURT: SO LET ME SEE IF I CAN GET  
24 YOUR ARGUMENT SUCCINCTLY. YOU ARE SAYING BY THE  
25 ALLEGATION OF THE ADDITIONAL FACTS, THAT THE GOVERNMENT

1 IS TRYING TO BRING THE ENTITY WITHIN THE DEFINITIONS OF  
2 THE STATUTE.

3 MS. RECKER: THAT'S CORRECT, YOUR HONOR.  
4 AND THAT IS EXACTLY WHAT IS PROHIBITED IN UNITED STATES  
5 VERSUS PANARELLA. IN THAT CASE, THE INDICTMENT TRACKED  
6 THE LANGUAGE OF HONEST SERVICES FRAUD BUT IT ADDED A  
7 LITTLE TAIL. THE LANGUAGE OF --

8 THE COURT: LET ME ASK YOU THIS. DO YOU  
9 THINK THAT IN EVERY CASE THAT THE GOVERNMENT'S MERE  
10 TRACKING OF THE STATUTE FULFILLS ITS OBLIGATION IN AN  
11 INDICTMENT?

12 MS. RECKER: THERE ARE CASES --

13 THE COURT: ANSWER THE QUESTION.

14 MS. RECKER: THERE ARE CASES THAT HAVE  
15 HELD THAT, YES, YOUR HONOR.

16 THE COURT: IT HAS. GIVE ME AN EXAMPLE.

17 MS. HAMANN: I'M SORRY, YOUR HONOR, I DID  
18 NOT QUITE HEAR.

19 THE COURT: WHAT DOES THE HOBBS ACT  
20 STATUTE SAY?

21 MS. HAMANN: THE HOBBS ACT STATUTE?

22 THE COURT: GIVE ME AN EXAMPLE.

23 MS. WILLIAMS: MAY WE HAVE A MOMENT, YOUR  
24 HONOR?

25 THE COURT: THE GOVERNMENT HAS CHANGED

1 ITS CHARGING IN THIS DISTRICT, BECAUSE HOW THEY USED TO  
2 CHARGE A CONSPIRACY WAS, IT WAS A CONSPIRACY TO  
3 INTERFERE WITH COMMERCE BY ROBBERY; WHEN INDEED, NONE OF  
4 THE CHARGED DEFENDANTS EVER CONSPIRED TO COMMIT TO  
5 INTERFERE WITH ROBBERY, WITH COMMERCE? WHAT THEY DID  
6 IS, THEY CONSPIRED TO ROB WHICH HAPPENED TO INTERFERE  
7 WITH COMMERCE. AND THAT WAS A PRACTICE OF TRACKING THE  
8 STATUTE. SO I DON'T THINK TRACKING THE STATUTE DOES IT  
9 FOR THE GOVERNMENT.

10 MS. RECKER: WELL, I DON'T THINK IT DOES  
11 IT FOR THE GOVERNMENT IN THIS PARTICULAR CASE FOR THE  
12 SIMPLE REASON THAT AGENCY AND INSTRUMENTALITY ARE FAR  
13 TOO VAGUE AND SUBJECT TO DIFFERENT INTERPRETATION, AS IS  
14 EVIDENCED BY THE WAY THE GOVERNMENT INTERPRETED IT IN  
15 THE CHARGES IN THIS CASE. IF YOU LOOK AT RELATED TO --

16 THE COURT: LET ME ASK YOU THIS. WOULD  
17 YOU BE MAKING THE ARGUMENT IF THEY SAID THAT IT WAS JUST  
18 THE SFSC?

19 MS. RECKER: I'M SORRY, YOUR HONOR?

20 THE COURT: INSTEAD OF PUTTING IN THE  
21 LANGUAGE THAT THE AIRLINE, THE ADDITIONAL LANGUAGE --

22 MS. RECKER: I WOULD NOT BE MAKING THE  
23 PANARELLA ARGUMENT, THAT'S CORRECT. BUT MY ARGUMENT  
24 WOULD STILL REMAIN THAT THE TERMS AGENCY AND  
25 INSTRUMENTALITY ARE TOO VAGUE TO BE CONSTITUTIONAL.

1 THE COURT: THAT IS A DIFFERENT ISSUE.

2 MS. RECKER: THAT IS A DIFFERENT ISSUE.

3 MY PANARELLA ISSUE, THOUGH, APPLIES TO THIS INDICTMENT  
4 BECAUSE THEY HAVE ADDED ALL THIS LANGUAGE WHICH, I  
5 SUBMIT, THEY FELT WAS NECESSARY BECAUSE OF THE VAGUENESS  
6 OF THE DEFINITION OF AGENCY AND INSTRUMENTALITY, WHICH  
7 THERE IS NO DEFINITION OF AGENCY AND INSTRUMENTALITY.  
8 AND SO WHAT THE GOVERNMENT IS TRYING TO DO IS  
9 ESSENTIALLY GUILD THE LILY, BECAUSE IN CASE WE DON'T  
10 KNOW WHAT THOSE TERMS MEAN, AND I SUGGEST WE DON'T, I  
11 SUGGEST THAT THEY ARE SUBJECT TO INTERPRETATION, THE  
12 GOVERNMENT HAS ADDED ALL THIS LANGUAGE IN HERE THAT  
13 COMPLETELY EXPANDS THE DEFINITION OF AGENCY AND  
14 INSTRUMENTALITY TO FIT THE FACTS IN THIS CASE.

15 THE COURT: LET ME ASK YOU THIS. DO YOU  
16 AGREE THAT THIS ADDITIONAL LANGUAGE IS A MATTER OF PROOF  
17 THAT THE GOVERNMENT WOULD HAVE TO PROVE AT A TRIAL;  
18 OTHERWISE, THEY WOULD NOT BE ABLE TO SATISFY THE BURDEN  
19 THAT IT WAS INDEED AN INSTRUMENTALITY?

20 MS. RECKER: I DON'T THINK IT'S A MATTER  
21 OF PROOF. I THINK THE GOVERNMENT HAS TO PROVE AGENCY OR  
22 INSTRUMENTALITY, BUT I DON'T --

23 THE COURT: BUT HOW DO THEY DO THAT?

24 MS. RECKER: WELL, THAT IS A MATTER OF  
25 THEIR PROOF AT TRIAL, YOUR HONOR.

1 THE COURT: I THINK IT SAYS IT RIGHT  
2 HERE.

3 MS. RECKER: THESE ADDITIONAL FACTS  
4 CONSTITUTE AGENCY OR INSTRUMENTALITY.

5 THE COURT: THAT IS WHAT THEY ARE TRYING  
6 TO SAY THAT THAT WOULD PROVE -- IF THEY PROVE THOSE  
7 FACTS, THEY THEN SATISFY THEIR BURDEN OF SHOWING THAT IT  
8 WAS AN INSTRUMENTALITY.

9 MS. RECKER: I DISAGREE, YOUR HONOR, AND  
10 I THINK THAT PANARELLA TELLS US THAT YOU CAN'T CONSIDER  
11 ADDITIONAL FACTS THAT TAKE YOU OUTSIDE THE BOUNDARIES OF  
12 THE STATUTE. IN THAT CASE, THE GOVERNMENT ADDED --

13 THE COURT: HERE IS YOUR PROBLEM IN THIS  
14 PARTICULAR CASE, IS THAT YOU ARE DEALING WITH A  
15 SOCIALIST GOVERNMENT.

16 MS. RECKER: THAT IS EXACTLY THE PROBLEM.

17 THE COURT: JUST ABOUT EVERYTHING IS AN  
18 INSTRUMENTALITY OF THE GOVERNMENT.

19 MS. RECKER: RESULTING IN A COMPLETELY  
20 ABSURD RESULT. IN THE INSTANCE OF A COMMUNIST COUNTRY,  
21 YOU END UP WITH EVERY SINGLE PERSON IN THAT COUNTRY WHO  
22 IS EMPLOYED IS EMPLOYED BY THE GOVERNMENT. AND I DON'T  
23 THINK THAT THE LEGISLATIVE HISTORY OF THE FOREIGN  
24 CORRUPT PRACTICES ACT SUPPORTS THAT BROAD  
25 INTERPRETATION. I JUST DON'T THINK THAT THAT IS

1 SUPPORTABLE BY THE STATUTE THAT WE ARE DEALING WITH.

2 THE COURT: DO YOU WANT TO ADDRESS THAT?  
3 HOLD OFF ON THE TRAVEL ACT UNTIL SHE ADDRESSES THIS ONE.

4 MS. HAMANN: YOUR HONOR, TO BRIEFLY  
5 ADDRESS THE LAST ISSUE MENTIONED BY MISS RECKER FIRST  
6 REGARDING WHAT CONGRESS'S INTENT IN THE FCPA WAS, IF YOU  
7 LOOK AT THE LEGISLATIVE HISTORY, INCLUDING THE HOUSE  
8 REPORT, THE HOUSE SPECIFICALLY SAYS THAT BASED ON THE  
9 SCANDALS THAT LED TO THE PASSAGE OF THE FCPA, THE  
10 SECTORS THAT THEY WERE CONCERNED ABOUT, THEY WERE  
11 LOOKING AT, THAT THEY WANTED TO ADDRESS BRIBERY IN,  
12 INCLUDED DRUGS AND HEALTHCARE, OIL AND GAS PRODUCTION  
13 SERVICES, FOOD PRODUCTS, AEROSPACE, AIRLINES AND AIR  
14 SERVICES AND CHEMICALS, PRECISELY THE -- MANY OF THE  
15 INDUSTRIES THAT ARE ADDRESSED IN THE INDICTMENT THAT WE  
16 ARE DISCUSSING TODAY.

17 AND IN TERMS OF THE DEFINITION OF AGENCY  
18 AND INSTRUMENTALITY, THERE IS A FAIR AMOUNT OF GUIDANCE,  
19 MUCH OF IT THAT IS LAID OUT IN THE DEFENSE'S MOTION FROM  
20 THE FOREIGN SOVEREIGN IMMUNITIES ACT, FROM ERISA, FROM  
21 CONGRESS'S INTENT IN PASSING THE FCPA. AND PARTICULARLY  
22 IN SOCIALIST GOVERNMENTS THERE IS ACTUALLY CASE LAW  
23 REGARDING WHAT IS AN AGENCY OR INSTRUMENTALITY IN A  
24 SOCIALIST COUNTRY, SUCH AS VIETNAM.

25 IN THE CASE, BELGRADE V SIDEX

1 INTERNATIONAL FURNITURE CORPORATION, THE COURT WAS  
2 LOOKING AT WHAT WAS AN AGENCY OR INSTRUMENTALITY THAT  
3 WAS SOCIALLY OWNED IN YUGOSLAVIA WHILE YUGOSLAVIA WAS  
4 STILL A COMMUNIST STATE. AND THE COURT IN THAT CASE DID  
5 FIND THAT IN THOSE CASES, YES, PRETTY MUCH EVERYTHING IS  
6 GOING TO BE AN AGENCY OR AN INSTRUMENTALITY. THAT IS  
7 THE NATURE OF THOSE KIND OF ECONOMIES. BUT WE DON'T  
8 FEEL THAT, AS YOUR HONOR HAS ALREADY SAID, THIS IS A  
9 MATTER OF PROOF AT TRIAL. AND IF THERE IS INSUFFICIENT  
10 PROOF, OR IF THE DEFENSE FEELS THERE IS INSUFFICIENT  
11 PROOF, THAT IS MORE APPROPRIATE TO A RULE 29 MOTION THAN  
12 A MOTION TO DISMISS, YOUR HONOR. THE INDICTMENT IS  
13 SUFFICIENTLY --

14 THE COURT: DOES THE GOVERNMENT CONTROL  
15 OF AN ENTITY RENDER THAT ENTITY A DEPARTMENT AGENCY OR  
16 INSTRUMENTALITY?

17 MS. HAMANN: IT IS CERTAINLY ONE OF THE  
18 FACTORS IN THAT SORT OF ANALYSIS, YOUR HONOR. IN GSX  
19 CORP, ONE OF THE CASES CITED BY THE DEFENSE, THEY LAY  
20 OUT A MULTIFACTOR ANALYSIS IN TERMS OF DETERMINING  
21 WHETHER A COMPANY OR AN ORGANIZATION IS AN AGENCY OR  
22 INSTRUMENTALITY UNDER THE FOREIGN SOVEREIGN IMMUNITY  
23 DEFINITION OF THAT, WHICH IS TO BE READ MORE NARROWLY  
24 THAN THE FOREIGN CORRUPT PRACTICES ACT. BUT THOSE  
25 FACTORS INCLUDE OWNERSHIP, CONTROL BY THE GOVERNMENT,

1 THE CIRCUMSTANCES OF THE CREATION OF THAT ORGANIZATION,  
2 THE PURPOSE OF THE ORGANIZATION, THE FINANCIAL  
3 ENGAGEMENT OF THE GOVERNMENT WITH THAT ORGANIZATION AND  
4 THE EMPLOYMENT PRACTICES OF THAT ORGANIZATION. AND IN  
5 GSX CORP, SETTING ASIDE THE OWNERSHIP ANALYSIS, WHICH IS  
6 AN ANALYSIS UNDER A DIFFERENT PRONG OF THE FOREIGN  
7 SOVEREIGN IMMUNITIES ACT DEFINITION OF INSTRUMENTALITY,  
8 THEY FOUND THAT CONTROL WAS ONE OF THE MOST SIGNIFICANT  
9 FACTORS IN MAKING AN ANALYSIS AS TO WHETHER IT WAS AN  
10 AGENCY OR INSTRUMENTALITY.

11 THE COURT: DO YOU THINK THAT THE BODY OF  
12 CIVIL LAW ON SOVEREIGN IMMUNITY, AS IT RELATES TO  
13 INSTRUMENTALITY SUCH AS SOVEREIGN MAY GIVE US SOME  
14 GUIDANCE, MISS RECKER?

15 MS. RECKER: I THINK, YOUR HONOR, THAT IT  
16 IS AVAILABLE TO THE COURT FOR CONSIDERATION.

17 THE COURT: YOU THINK IT MIGHT BE  
18 HELPFUL?

19 MS. RECKER: I THINK IT MIGHT BE HELPFUL.  
20 I DISAGREE WITH THE GOVERNMENT'S CHARACTERIZATION OF THE  
21 CASE LAW.

22 FOR EXAMPLE, CONTROL --

23 THE COURT: IS SEPTA AN INSTRUMENTALITY  
24 OF THE COMMONWEALTH OF PENNSYLVANIA?

25 MS. RECKER: I DON'T KNOW ANYTHING ABOUT

1 SEPTA'S STRUCTURE OR ORGANIZATION, BUT I THINK THAT --

2 THE COURT: YOU DON'T. AMY DOESN'T, BUT  
3 YOU MIGHT.

4 MS. WILLIAMS: I DO NOT, YOUR HONOR.

5 MS. RECKER: I THINK THAT --

6 THE COURT: SOVEREIGN IMMUNITY BECAUSE  
7 IT'S AN INSTRUMENTALITY OF THE COMMONWEALTH. BECAUSE  
8 IT'S CONTROLLED AND FUNDED BY THE COMMONWEALTH.

9 MS. RECKER: WELL, YOUR HONOR HAS JUST  
10 INTRODUCED ANOTHER POTENTIAL DEFINITION OF  
11 INSTRUMENTALITY, WHICH IS TO SAY, THAT AN ENTITY THAT IS  
12 FUNDED BY A GOVERNMENT CAN BE AN INSTRUMENTALITY OF THAT  
13 GOVERNMENT.

14 I THINK THAT IF CONGRESS HAD WANTED TO  
15 PARSE THROUGH EXACTLY WHAT CONSTITUTES AN  
16 INSTRUMENTALITY, IT SHOULD HAVE SAID SO IN THE STATUTE  
17 AND IT DIDN'T. SO THAT -- LET ME GET BACK TO OWNERSHIP  
18 AND CONTROL.

19 IN THE FOREIGN SOVEREIGN IMMUNITIES ACT  
20 ARENA, WE HAVE THE SUPREME COURT CASE OF DOLE FOODS V  
21 PATRICKSON AND THE NINTH CIRCUIT CASE THAT PRECEDED IT.  
22 AND IN THAT CASE THE COURT HELD THAT FOR PURPOSES OF  
23 BEING AN INSTRUMENTALITY -- AND THE STATUTE ALSO SO  
24 HOLDS -- THAT THERE MUST BE A DIRECT OWNERSHIP BY THE  
25 GOVERNMENT OF A MAJORITY OF THE SHARES. SO NOW WE ARE

1 ALREADY PARSING THROUGH HOW MANY SHARES NEED TO BE  
2 OWNED. AND IN THAT CASE, IN DOLE FOODS, THE COURT, THE  
3 SUPREME COURT HELD THAT AN INTERMEDIARY OWNER OF A  
4 SUBSIDIARY -- IF THE GOVERNMENT OWNED AN INTERMEDIARY  
5 WHICH OWNS A SUBSIDIARY DOES NOT CONSTITUTE SUFFICIENT  
6 OWNERSHIP FOR PURPOSE OF THE FOREIGN SOVEREIGN  
7 IMMUNITIES ACT.

8 SO BY VIRTUE OF RAISING THE QUESTION, WE  
9 HAVE ALREADY EXPANDED THE POSSIBLE DEFINITION INTO HOW  
10 MANY SHARES NEEDS TO BE OWNED, DO THEY HAVE TO BE  
11 DIRECT? IF YOU CONSIDER NOTIONS OF CONTROL, WE KNOW  
12 THAT CONGRESS HAS EMBEDDED IN THE FCPA A SPECIFIC  
13 DEFINITION OF CONTROL, WHEN IT IS TALKING ABOUT THE  
14 ACCOUNTING CONTROLS THAT A PUBLICLY TRADED COMPANY HAS  
15 TO INCORPORATE.

16 THE COURT: WHAT ARE THE INDICIA OF  
17 CONTROL?

18 MS. RECKER: WELL, IN THE FOREIGN  
19 SOVEREIGN IMMUNITIES ACT, THE INDICIA OF CONTROL, AS SET  
20 FORTH IN THE STATUTE, IS DIRECT OWNERSHIP OF A MAJORITY  
21 OF SHARES.

22 IF YOU LOOK AT THE FCPA ACT IN THE  
23 SECTION THAT SETS FORTH WHEN A PUBLICLY TRADED COMPANY  
24 HAS TO INSTITUTE ACCOUNTING CONTROLS, IN OTHER --  
25 WHETHER FOREIGN OR DOMESTIC COMPANIES -- THE STATUTE

1 SPECIFICALLY SAYS THAT IN INSTANCES WHERE THE PUBLIC  
2 ISSUER HAS 50 PERCENT OF THE VOTING POWER, THEN THEY  
3 HAVE TO MAKE A GOOD FAITH EFFORT TO INCORPORATE THESE  
4 ACCOUNTING CONTROLS.

5 SO WE ARE ALREADY TALKING ABOUT VERY  
6 SPECIFIC DEFINITIONS THAT SIMPLY ARE NOT IN THE STATUTE.  
7 AND I SUBMIT THAT IT IS NOT FAIR. I THINK IT VIOLATES  
8 DUE PROCESS TO BE DECIDING NOW, AFTER AN INDICTMENT HAS  
9 BEEN BROUGHT, HOW MANY SHARES, DO THEY HAVE TO BE  
10 DIRECT, WHAT KIND OF CONTROL, IS IT VOTING CONTROL, IS  
11 IT VETO POWER, WHICH IN THE DOLE FOODS V. PATRICKSON  
12 CASE THE COURT SPECIFICALLY SAID VETO POWER IS NOT  
13 SUFFICIENT. SO I THINK, YOUR HONOR, BY VIRTUE OF THE --

14 THE COURT: YOU ARE SAYING THE MAJORITY  
15 OF THE STOCK IS --

16 MS. RECKER: DIRECT OWNERSHIP --

17 THE COURT: -- VETO CONTROL, SO IT REALLY  
18 DOES NOT MATTER?

19 MS. RECKER: WELL, IN THAT CASE, THOUGH,  
20 YOUR HONOR, THE GOVERNMENT HAD VETO POWER OVER WHAT THE  
21 SECOND LAYER OF SUBSIDIARY COULD DO, EVEN THOUGH IT DID  
22 NOT DIRECTLY OWN THE MAJORITY OF THE SHARES.

23 BUT I THINK, YOUR HONOR, WHAT IS  
24 IMPORTANT TO NOTE IS THAT BY VIRTUE OF THE CONVERSATION  
25 THAT WE ARE HAVING, IT SIMPLY IS NOT CLEAR, AND BECAUSE

1 IT IS NOT CLEAR --

2 THE COURT: TO YOU.

3 MS. RECKER: IT'S NOT CLEAR TO ME, YOUR  
4 HONOR. AND I DON'T THINK THAT, UNDER DUE PROCESS  
5 STANDARD --

6 THE COURT: DON'T MISREAD MY ASKING  
7 QUESTIONS AS ANY DOUBT ON MY PART.

8 MS. RECKER: OKAY, YOUR HONOR.

9 I THINK THAT BY VIRTUE OF THE FACT THAT  
10 WE ARE HAVING THIS CONVERSATION, WE HAVE REMOVED THIS  
11 CASE OUT OF A CLEAR UNDERSTANDING OF THE STATUTE. AND I  
12 THINK THAT UNDER DUE PROCESS ANALYSES, THE INDICTMENT,  
13 THE CHARGES HERE SIMPLY FAIL, BECAUSE IT IS VAGUE ENOUGH  
14 AND SUBJECT TO INTERPRETATION THAT IT NEEDS TO BE  
15 RESOLVED IN FAVOR OF THE DEFENDANT AND AGAINST THE  
16 GOVERNMENT. AND THAT IS KNOWN AS THE RULE OF LENITY.  
17 AND I SUBMIT, YOUR HONOR, THAT EVEN NOTWITHSTANDING THE  
18 EXTRA LANGUAGE THAT THE GOVERNMENT HAS ADDED IN THIS  
19 INDICTMENT THAT I THINK CAUSES IT TO FAIL UNDER  
20 PANARELLA, I THINK THAT THE WORDS AGENCY AND  
21 INSTRUMENTALITY SIMPLY DO NOT ADMIT TO A SUFFICIENTLY  
22 CLEAR UNDERSTANDING THAT IT ISN'T IN ACCORDANCE WITH DUE  
23 PROCESS, THAT THESE DEFENDANTS ARE HELD TO BE CHARGED  
24 APPROPRIATELY IN THIS CASE.

25 I THINK THAT THE STATUTE IS THEREFORE

1 UNCONSTITUTIONALLY VAGUE, BECAUSE MEN OF COMMON  
2 INTELLIGENCE MUST NECESSARILY GUESS AT ITS MEANING AND  
3 DIFFER AS TO ITS APPLICATION.

4 SHALL I PROCEED TO THE TRAVEL ACT COUNTS?

5 THE COURT: SO WHY DON'T YOU SUMMARIZE  
6 WHAT THE INDICIA OF CONTROL ARE?

7 MS. RECKER: YOUR HONOR, I DON'T BELIEVE  
8 THE STATUTE GIVES US --

9 THE COURT: WHY DON'T YOU TELL ME WHAT I  
10 SHOULD APPLY.

11 MS. RECKER: I THINK THAT YOUR HONOR IS  
12 UNABLE TO APPLY ANY SORT OF TEST, BECAUSE I THINK THAT  
13 IN DOING SO WE ARE ENGAGING IN AN EXERCISE OF SUPPLYING  
14 INFORMATION IN THE STATUTE WHERE IT DOES NOT EXIST. AND  
15 I SUBMIT THAT AGENCY AND INSTRUMENTALITY CAN ADMIT TO  
16 DIFFERING INTERPRETATIONS.

17 THE COURT: LET ME ASK YOU THIS. GIVEN  
18 WHAT WE KNOW NOW, IS THERE ENOUGH TO SUBMIT TO THE JURY  
19 FOR THE JURY TO DETERMINE THAT?

20 MS. RECKER: YOUR HONOR, I DON'T KNOW  
21 THAT -- I'M NOT MAKING A RULE 29 ARGUMENT.

22 THE COURT: I UNDERSTAND.

23 MS. RECKER: BUT --

24 THE COURT: I'M ASKING YOU IF YOU THINK  
25 THROUGH THIS. GO AHEAD.

1 MS. RECKER: I WOULD SAY NO, YOUR HONOR,  
2 BECAUSE I DO NOT BELIEVE THAT A DEFINITION THAT INCLUDES  
3 SOMETHING AS VAGUE AS RELATED TO A GOVERNMENT FUNCTION  
4 SUFFICIENTLY PRESENTS A VIOLATION UNDER THE FOREIGN  
5 CORRUPT PRACTICES ACT. I DON'T KNOW WHAT RELATED TO A  
6 GOVERNMENT FUNCTION MEANS. I THINK THAT THE  
7 EXPLOITATION OF NATURAL RESOURCES WAS EXPLICITLY HELD  
8 NOT TO BE AN APPROPRIATE DETERMINING FACTOR IN THE DOLE  
9 FOODS V PATRICKSON CASE. I'M UNABLE TO ILLUMINATE YOUR  
10 HONOR ANY FURTHER BECAUSE I DON'T THINK THAT THE STATUTE  
11 ADMITS TO ANY KIND OF CONCRETE UNDERSTANDING.

12 THE COURT: EXPLOITATION OF NATURAL  
13 RESOURCES OF VIETNAM. ANYBODY THAT'S DOING THAT NOT  
14 DOING IT ON BEHALF OF THE GOVERNMENT OF VIETNAM?

15 MS. RECKER: I'M SORRY, YOUR HONOR. IS  
16 ANYONE DOING THAT?

17 THE COURT: WHOEVER IS DOING THAT, WHO IS  
18 EXPLORING THE NATURAL RESOURCES FOR EXPLOITATION OR  
19 EXPLOITATION IN ITSELF.

20 MS. RECKER: WELL, I DON'T KNOW IF  
21 ANYBODY ELSE IS DOING IT. AND THE INDICTMENT CERTAINLY  
22 DOES NOT TELL US WHETHER OR NOT ANYBODY ELSE IS DOING  
23 IT. I KNOW THAT ONE OF THESE ENTITIES IS 50-50  
24 APPARENTLY OWNED BY VIETNAM AND RUSSIA. I ALSO KNOW  
25 THAT ONE OF THESE ENTITIES --

1 THE COURT: DO WE AGREE THAT THEY ARE TWO  
2 FOREIGN GOVERNMENTS?

3 MS. RECKER: THEY ARE TWO FOREIGN  
4 GOVERNMENTS, BUT I DON'T KNOW THAT 50-50 -- 50 PERCENT  
5 OWNERSHIP IS NOT A MAJORITY OWNERSHIP. AND I DON'T  
6 BELIEVE THAT THIS INDICTMENT HAS ANY ALLEGATIONS  
7 WHATSOEVER THAT BRIBES HAVE BEEN PAID TO ANYBODY IN  
8 RUSSIA.

9 THE PVGC IS EVEN MORE PROBLEMATIC AND  
10 PROBABLY FITS MORE SQUARELY WITH DOLE FOODS, BECAUSE THE  
11 ENTITY WHICH IS ENGAGED IN THE EXPLOITATION OF NATURAL  
12 RESOURCES OF VIETNAM IS A SUBDIVISION OF PETRO VIETNAM  
13 AND THERE IS NO ALLEGATION WHATSOEVER OF WHO PETRO  
14 VIETNAM IS. I DON'T KNOW WHO PETRO VIETNAM IS. THE  
15 INDICTMENT DOES NOT TELL US WHO IT IS. PVGC IS A  
16 SUBDIVISION OF AN ENTITY. WE DON'T KNOW ITS  
17 RELATIONSHIP WITH THE GOVERNMENT OF VIETNAM.

18 THE COURT: SO YOUR ARGUMENT WITH RESPECT  
19 TO THE VAGUENESS UNDER THE FCPA IS ALL INVOLVED IN THE  
20 DEFINITION OF INSTRUMENTALITY, RIGHT?

21 MS. RECKER: THAT'S CORRECT, YOUR HONOR,  
22 BECAUSE I DON'T THINK AGENCY IS EVEN APPLICABLE HERE.

23 MS. HAMANN: YOUR HONOR, AS AN INITIAL  
24 MATTER, WE WOULD DISAGREE THAT AGENCY IS NOT APPLICABLE.  
25 FOR EXAMPLE, IN ADDRESSING PVGC, PETRO VIETNAM GAS

1 COMPANY, TO SAY THAT PVGC IS UNCLEAR AS TO WHAT IT IS,  
2 BECAUSE WE DESCRIBE IT AS A SUBDIVISION OF AN ARM OF THE  
3 VIETNAMESE GOVERNMENT, WE WOULD FIND THAT TO BE THE  
4 EQUIVALENT OF SAYING THAT THE FBI IS NOT SUFFICIENTLY  
5 DESCRIBED IF IT'S DESCRIBED AS A SUBDIVISION OF THE  
6 DEPARTMENT OF JUSTICE. PETRO VIETNAM IS A PART OF THE  
7 VIETNAMESE GOVERNMENT. IT IS ENGAGED IN -- ITS PRIMARY  
8 PLACE IS THE STATE-OWNED OIL AND GAS COMPANY RESPONSIBLE  
9 FOR THE EXPLOITATION OF NATURAL RESOURCES.

10 I THINK CONGRESS WAS CLEAR AS TO ITS  
11 INTENT AND RELIED ON A LARGE AND RELIABLE BODY OF LAW AS  
12 TO WHAT AGENCY AND INSTRUMENTALITY MEAN. I THINK THAT  
13 THERE HAS BEEN SOME CONFLATING OF THE DEFINITION UNDER  
14 THE FOREIGN SOVEREIGN IMMUNITIES ACT, WHICH DOES INFORM  
15 THIS ANALYSIS, PARTICULARLY IN LIGHT OF DOLE FOODS. THE  
16 FOREIGN SOVEREIGN IMMUNITIES ACT, WHICH DOES PROVIDE A  
17 DEFINITION OF AGENCY AND INSTRUMENTALITY, PROVIDES TWO  
18 PRONGS OF ANALYSIS. THE FIRST PRONG IS THAT IT'S WHOLLY  
19 OWNED. AND THAT WAS THE PRONG THAT THE COURT WAS  
20 EVALUATING IN DOLE FOODS. THE SECOND PRONG IS THAT IT'S  
21 AN ORGAN. AND ORGAN WAS THE WORD THAT WAS BEING  
22 ANALYZED IN GSX CORP, WHICH HAS THIS FACTOR ANALYSIS  
23 THAT HAS A SEPARATE FACTOR OF CONTROL THAT IS NOT  
24 NECESSARILY THE SAME AS OR EQUATED TO WHOLLY OWNED.

25 BUT I THINK FUNDAMENTALLY, YOUR HONOR,

1 FROM THE GOVERNMENT'S PERSPECTIVE, WE HAVE MORE THAN  
2 ADEQUATELY PLED THIS.

3 THE COURT: WELL, WITH RESPECT TO THAT  
4 ARGUMENT --

5 MS. HAMANN: YES, YOUR HONOR.

6 THE COURT: WHAT ABOUT PVGC?

7 MS. HAMANN: IN TERMS OF THE QUESTION OF  
8 OWNERSHIP?

9 THE COURT: WHOLLY OWNED.

10 MS. HAMANN: IT'S NOT THAT IT'S A CASE  
11 WHERE IN DOLE FOODS -- AND THESE ARE, OF COURSE, FACTS  
12 THAT THE GOVERNMENT WOULD PROVE AT TRIAL. IT'S A  
13 SUBDIVISION OF PVGC. IT'S NOT A WHOLLY-OWNED SUBSIDIARY  
14 OF PVGC -- OF PETRO VIETNAM. IT IS A PART OF PETRO  
15 VIETNAM. AGAIN, I THINK A CLOSE ANALOGY WOULD BE THAT  
16 THE FBI IS PART OF THE DEPARTMENT OF JUSTICE, AS PVGC IS  
17 A PART OF PETRO VIETNAM. BUT, AGAIN, THAT IS SOMETHING  
18 THAT THE GOVERNMENT WOULD NEED TO PROVE AT TRIAL WHICH  
19 WE INTEND TO PROVE.

20 AND I WOULD ADD, OF COURSE, AS YOUR HONOR  
21 WELL KNOWS, WE CAN PROVE FACTS WELL BEYOND THOSE THAT  
22 ARE ALLEGED IN THE INDICTMENT THAT ARE RELEVANT TO THIS  
23 DETERMINATION.

24 THE COURT: ANY REPLY BEFORE YOU TALK  
25 ABOUT THE TRAVEL ACT?

1 MS. RECKER: YES, YOUR HONOR. BECAUSE  
2 THE GOVERNMENT SAYS THAT PETRO VIETNAM IS THE VIETNAMESE  
3 GOVERNMENT, I'M NOT SURE THAT MAKES IT SO. I DON'T  
4 UNDERSTAND FROM THE CHARGES --

5 THE COURT: THAT MAY BE TRUE.

6 MS. RECKER: IT MAY BE TRUE; IT MAY NOT  
7 BE TRUE. I DON'T KNOW.

8 THE COURT: IT MAY BE TRUE WHAT YOU JUST  
9 SAID.

10 MS. RECKER: AND THE VERY --

11 THE COURT: BUT, BUT.

12 MS. RECKER: THAT'S RIGHT. AND THE VERY  
13 FACT THAT THERE IS SO MUCH WE DON'T KNOW AND THERE ARE  
14 SO MANY VAGARIES TO THESE DEFINITIONS, I SUBMIT, YOUR  
15 HONOR, THAT THIS FALLS SQUARELY WITHIN PANARELLA AND  
16 THAT WE SIMPLY CAN'T ENGAGE IN THIS DISCUSSION OF  
17 CONTROL AND OWNERSHIP AND MAJORITY SHARES AND VETO  
18 POWER. I SUBMIT, YOUR HONOR, THAT NONE OF THIS IS IN  
19 THE STATUTE, AND IT DOES NOT MAKE ANY SENSE FOR US TO  
20 APPLY IT TO THE STATUTE NOW. IN FACT, THAT IS AN  
21 UNCONSTITUTIONAL ENDEAVOR.

22 MAY I MOVE ON TO THE TRAVEL ACT?

23 THE COURT: NO.

24 DOES THE GOVERNMENT HAVE A CASE THAT SAYS  
25 THAT WHERE -- WE ARE TALKING ABOUT THE TRAVEL ACT NOW.

1 MS. RECKER: I MAY TALK ABOUT THE TRAVEL  
2 ACT?

3 THE COURT: DOES THE GOVERNMENT HAVE A  
4 CASE THAT SAYS WHERE THE PAYMENT ORIGINATED RATHER THAN  
5 WHERE IT WAS RECEIVED IS ENOUGH?

6 MS. HAMANN: YOUR HONOR, WE WOULD SAY  
7 THAT ALI SAYS THAT ORIGINATION IS CERTAINLY A FACTOR IN  
8 DETERMINING WHETHER IT FALLS --

9 THE COURT: I ASKED YOU IF IT IS ENOUGH.

10 MS. HAMANN: IN AND OF ITSELF, NO, YOUR  
11 HONOR.

12 THE COURT: OKAY. GO AHEAD WITH YOUR  
13 ARGUMENT --

14 MS. RECKER: YOUR HONOR, THE TRAVEL ACT  
15 REQUIRES FOCUS ON --

16 THE COURT: -- IF YOU MUST.

17 MS. RECKER: -- ACCEPTANCE OF THE BRIBE.  
18 THAT IS THE FIRST EXAMINATION. BECAUSE WITHOUT  
19 PENNSYLVANIA STATE JURISDICTION OVER THE ACCEPTANCE OF  
20 THE BRIBE, IT DOES NOT BECOME A CRIME UNDER PENNSYLVANIA  
21 STATE LAW.

22 THE COURT: WOULD YOU AGREE, MISS HAMANN,  
23 IF IT DOES NOT MAKE OUT A CASE UNDER THE PENNSYLVANIA  
24 BRIBERY STATUTE THAT YOU CANNOT PROVE THE TRAVEL ACT?  
25 YES OR NO?

1 MS. HAMANN: WITH AN EXCEPTION, YOUR  
2 HONOR.

3 THE COURT: WHAT WITH AN EXCEPTION? I  
4 DID NOT GET THE YES OR NO FIRST.

5 MS. HAMANN: YES, WE WOULD AGREE WITH AN  
6 EXCEPTION.

7 THE COURT: WHAT'S THE EXCEPTION?

8 MS. HAMANN: THE EXCEPTION WOULD BE THAT  
9 THE TRAVEL ACT WAS DESIGNED TO ADDRESS SITUATIONS WHERE  
10 STATE AUTHORITY WAS INSUFFICIENT, AND WHERE THE  
11 STANDARDS OF THE TRAVEL ACT ARE MET AND THE REASON WHY  
12 THE STATE BRIBERY STATUTE CANNOT REACH IT, BECAUSE OF A  
13 JURISDICTIONAL ISSUE, IT WAS THE INTENT OF THE TRAVEL  
14 ACT TO PREVENT INDIVIDUALS FROM EVADING THE STATE  
15 CHARGES BY SIMPLY CROSSING STATE LINES, AND THAT THE  
16 TRAVEL ACT IN THOSE CASES WOULD STEP IN TO COVER THE  
17 JURISDICTIONAL GAP, THAT THAT WAS THE INTENT OF THE  
18 TRAVEL ACT.

19 THE COURT: DO YOU HAVE A CASE ON POINT?

20 MS. HAMANN: YES, YOUR HONOR. IT IS  
21 UNITED STATES V WELCH.

22 THE COURT: WHAT DOES IT SAY?

23 MS. HAMANN: IT SAYS THAT THE PURPOSE OF  
24 THE TRAVEL ACT IS TO ADDRESS INSUFFICIENT STATE  
25 AUTHORITY, AND THAT THE ELEMENTS NECESSARY TO SUSTAIN A

1 TRAVEL ACT CONVICTION ARE TRAVEL IN INTERSTATE OR  
2 FOREIGN COMMERCE OR USE OF ANY FACILITY IN INTERSTATE OR  
3 FOREIGN COMMERCE WITH THE INTENT TO PROMOTE, MANAGE,  
4 ESTABLISH, CARRY ON OR FACILITATE THE PROMOTION OF  
5 MANAGEMENT AND SO FORTH, YOUR HONOR.

6 THE POINT OF THE COURT IN WELCH IS THAT  
7 IT'S THAT INTENT TO USE INTERSTATE COMMERCE IN VIOLATION  
8 THAT IS THE REQUISITE ELEMENT OF THE TRAVEL ACT.

9 MS. RECKER: YOUR HONOR, I DON'T KNOW  
10 WHAT COURT UNITED STATES V WELCH IS, BUT I SUBMIT THAT  
11 THERE WOULD BE ABSOLUTELY NO REASON WHATSOEVER --

12 THE COURT: CAN YOU GIVE HER THE CITE?

13 MS. HAMANN: IT IS UNITED STATES COURT OF  
14 APPEALS FOR THE 10TH CIRCUIT, YOUR HONOR, 327 F.3D,  
15 1081. IT IS ALSO CITED IN OUR BRIEF, YOUR HONOR.

16 MS. RECKER: YOUR HONOR, THE 10TH CIRCUIT  
17 DOES NOT HAVE ANY CONTROL OVER WHAT WE DO HERE. AND I  
18 SUBMIT THAT --

19 THE COURT: DO YOU THINK IT SAID ENOUGH  
20 THERE?

21 MS. RECKER: I DON'T THINK IT DID. AND I  
22 SUBMIT, YOUR HONOR, THAT THERE IS NO REASON AT ALL FOR  
23 THE TRAVEL ACT TO APPROPRIATE STATE LAW IF STATE LAW  
24 MEANS NOTHING. THE TRAVEL ACT COULD VERY SIMPLY --  
25 CONGRESS COULD HAVE SAID IN THE TRAVEL ACT WHAT COUNSEL

1 FOR THE GOVERNMENT IS ALLEGING IT SHOULD SAY. IT DOES  
2 NOT SAY THAT. AND IF THE COUNTS FAIL UNDER PENNSYLVANIA  
3 STATE LAW, WHICH I SUBMIT THEY DO HERE, AS A MATTER OF  
4 CHARGING --

5 THE COURT: IS IT A SUFFICIENCY ARGUMENT  
6 OR JURISDICTIONAL ARGUMENT?

7 MS. RECKER: IT'S A JURISDICTIONAL  
8 ARGUMENT, YOUR HONOR.

9 AND THESE COUNTS FAIL BECAUSE THE  
10 INDICTMENT ITSELF DOES NOT ALLEGE ENOUGH ACTIVITY ON  
11 BEHALF OF THE ACCEPTOR OF THE BRIBES THAT HAPPENED IN  
12 PENNSYLVANIA.

13 THE COURT: MISS HAMANN, WHAT DO YOU SAY?

14 MS. HAMANN: YOUR HONOR, ONE OF THE  
15 THINGS THAT WAS SPECIFICALLY NOTED IN PARISE, WHAT, FOR  
16 CONVENIENCE SAKE, I WILL REFER TO AS PARISE TWO, WHICH  
17 WAS JUDGE BARTLE'S FIRST OPINION BEFORE REHEARING. HE  
18 NOTED -- IN GOING THROUGH THE JURISDICTIONAL ELEMENTS OF  
19 THE JURISDICTIONAL STATUTES WITHIN PENNSYLVANIA, HE  
20 NOTES SPECIFICALLY THAT NONE OF THE CONDUCT IN THE  
21 PARISE CASE CONSTITUTING AN ELEMENT OF THE AGENT'S  
22 REPORT OF OFFENSE, INCLUDING THE MAKING OF THE DEAL AND  
23 THE TAKING OF THE BRIBES THAT OCCURRED WITHIN THE  
24 COMMONWEALTH AND THAT THAT INDICTMENT DID NOT CHARGE  
25 ATTEMPT OR CONSPIRACY AND; THEREFORE, TWO OF THE

1 ELEMENTS OF JURISDICTION UNDER PENNSYLVANIA LAW, CONDUCT  
2 OCCURRING OUTSIDE THIS COMMONWEALTH, IS SUFFICIENT UNDER  
3 THE LAW OF THIS COMMONWEALTH TO CONSTITUTE A CONSPIRACY  
4 TO COMMIT AN OFFENSE WITHIN THIS COMMONWEALTH, WHEN AN  
5 OVERT ACT OF SUCH CONSPIRACY IS COMMITTED WITHIN THE  
6 COMMONWEALTH. AND CONDUCT OCCURRING WITHIN THIS  
7 COMMONWEALTH ESTABLISHES COMPLICITY IN THE COMMISSION OF  
8 OR AN ATTEMPTED SOLICITATION OR CONSPIRACY TO COMMIT AN  
9 OFFENSE IN ANOTHER JURISDICTION WHICH IS ALSO AN OFFENSE  
10 UNDER THE LAW OF THIS COMMONWEALTH.

11 WE WOULD SAY THAT THOSE WERE NOT  
12 AVAILABLE TO THE GOVERNMENT IN PARISE, BECAUSE NO SUCH  
13 CONSPIRACY OR AIDING OR ABETTING HAD BEEN CHARGED. IN  
14 THIS CASE WE HAVE CHARGED THOSE CONSPIRACIES AND WE DO  
15 ALLEGE ACTIVITIES THAT WOULD FALL WITHIN THE  
16 JURISDICTIONAL REACH OF THE STATUTES AS CITED AND THAT  
17 GOVERNMENT --

18 THE COURT: YOU ARE NOT CHALLENGING THE  
19 HOLDING OF PARISE; YOU ARE JUST TRYING TO DISTINGUISH  
20 IT?

21 MS. HAMANN: WE THINK PARISE IS  
22 DISTINGUISHABLE, YOUR HONOR, YES. AND THAT THE  
23 GOVERNMENT SHOULD HAVE THE OPPORTUNITY TO PROVE ALL  
24 FACTS AT TRIAL THAT ARE RELEVANT TO A JURISDICTIONAL  
25 DETERMINATION SINCE THEY ARE SUFFICIENTLY ALLEGED IN THE

1 INDICTMENT.

2 MS. RECKER: YOUR HONOR, THE GOVERNMENT  
3 IS TRYING TO EXPAND THE JURISDICTIONAL REACH OF A STATE  
4 STATUTE.

5 THE COURT: I UNDERSTAND WHAT THEY ARE  
6 TRYING TO DO.

7 MS. RECKER: OKAY, YOUR HONOR.

8 THE COURT: I UNDERSTAND WHAT THEY ARE  
9 TRYING TO DO.

10 MS. RECKER: THANK YOU, YOUR HONOR.

11 THE COURT: OKAY. WHAT ELSE DO WE HAVE  
12 HERE? THAT WAS A MOTION TO DISMISS, FOR FAILURE TO  
13 STATE A CRIMINAL OFFENSE FOR VAGUENESS, WHICH WAS DOCKET  
14 NUMBER 110, CORRECT?

15 MS. RECKER: THAT'S CORRECT, YOUR HONOR.

16 THE COURT: THAT LEAVES US WITH JUST ONE,  
17 IS THAT CORRECT, MOTION TO SUPPRESS?

18 MS. RECKER: THAT'S RIGHT, YOUR HONOR.

19 MS. CARVER: GOOD MORNING, YOUR HONOR.

20 I'M AMY CARVER, I WILL BE ARGUING ON BEHALF OF THE  
21 DEFENDANTS.

22 THE COURT: OKAY.

23 MS. CARVER: THE BASIS FOR OUR MOTION TO  
24 SUPPRESS WAS A CHANGE THAT WAS MADE TO FISA -- A CHANGE  
25 UNDER THE PATRIOT ACT AMENDMENTS TO FISA IN 2001, THAT

1 CHANGED THE STANDARD UNDER WHICH DEFENDANTS COULD BE  
2 INTERCEPTED. THE CHANGE WENT FROM THE STATUTORY  
3 LANGUAGE WAS PURPOSE OF THE INTERCEPTION TO A  
4 SIGNIFICANT PURPOSE OF THE INTERCEPTION AND THE CHANGE  
5 IS THAT A SIGNIFICANT PURPOSE OF THE INTERCEPTION MUST  
6 BE NATIONAL SECURITY. BEFORE IT WAS THAT THE PRIMARY  
7 PURPOSE HAD TO HAVE BEEN A NATIONAL SECURITY -- A  
8 GATHERING OF FOREIGN INTELLIGENCE INFORMATION FOR  
9 NATIONAL SECURITY PURPOSES.

10 THIS CHANGE NOW ALLOWS LAW ENFORCEMENT TO  
11 USE THIS LOWER STANDARD, SIGNIFICANT PURPOSE STANDARD,  
12 TO OBTAIN A FISA WARRANT TO INTERCEPT U.S. PERSONS WHEN  
13 BEFORE THEY WERE REQUIRED TO CERTIFY THAT IT WAS THE  
14 PRIMARY PURPOSE.

15 NOW, THE CHANGE IS IMPORTANT BECAUSE THE  
16 WHOLE REASON WHY THE FISA FRAMEWORK WAS DEEMED  
17 CONSTITUTIONAL FOR -- SINCE ITS PASSAGE IN 1979, EVEN  
18 BEFORE IT, THERE WAS -- A DISTINCTION WAS MADE BASED ON  
19 SURVEILLANCE CONDUCTED BY LAW ENFORCEMENT FOR THE  
20 PURPOSE OF INVESTIGATING A CRIME WHICH WOULD REQUIRE  
21 TRADITIONAL WARRANTS BASED ON PROBABLE CAUSE AND  
22 SURVEILLANCE THAT WAS CONDUCTED BY INTELLIGENCE  
23 OFFICIALS FOR THE PURPOSE OF OBTAINING INTELLIGENCE  
24 INFORMATION. THE NATIONAL SECURITY JUSTIFICATION  
25 JUSTIFIED A DIFFERENT AND LESS STRINGENT STANDARD THAT

1 WAS APPLIED BY -- UNDER FISA.

2 ONCE THE CHANGE WAS MADE WITH THE PATRIOT  
3 ACTS AMENDMENTS THE JUSTIFICATION WAS -- HAS VANISHED  
4 BECAUSE THE COURTS -- SORRY, THE GOVERNMENT CAN NOW  
5 OBTAIN A FISA WARRANT EVEN IF THE PURPOSE OF THE WARRANT  
6 IS TO INVESTIGATE TRADITIONAL DOMESTIC CRIMES AND NOT IF  
7 THEIR PRIMARY PURPOSE IS FOREIGN.

8 THE COURT: THAT IS A FACIAL CHALLENGE,  
9 RIGHT?

10 MS. CARVER: THE STATUTE HAS BEEN APPLIED  
11 TO THESE DEFENDANTS.

12 THE COURT: ARE YOU MAKING A FACIAL  
13 CHALLENGE?

14 MS. CARVER: I'M NOT MAKING A FACIAL.  
15 I'M MAKING AN AS-APPLIED CHALLENGE WITH RESPECT TO THESE  
16 DEFENDANTS.

17 THE COURT: HOW CAN YOU DO THAT?

18 MS. CARVER: WELL, WE KNOW THAT THEY WERE  
19 INTERCEPTED UNDER FISA AND WE RECEIVED THE NOTICE FROM  
20 THE GOVERNMENT. I MEAN, THE PROBLEM THAT DEFENDANTS  
21 ENCOUNTER IS THAT WE DON'T HAVE ANY OF THE FISA  
22 MATERIALS TO KNOW THE BASIS UNDER WHICH THEY WERE  
23 INTERCEPTED. WE DO KNOW, THE GOVERNMENT DID SHARE WITH  
24 US A PART OF THEIR FISA CERTIFICATION --

25 THE COURT: THEY HAVE?

1 MS. CARVER: IN A FOOTNOTE IN THEIR  
2 RESPONSE, WE HAVE A PHRASE FROM THE CERTIFICATION, AND  
3 THE GOVERNMENT -- ACCORDING TO THIS PHRASE, THE  
4 GOVERNMENT CERTIFIED THAT THE PRIMARY PURPOSE WAS NOT TO  
5 GET -- OBTAIN EVIDENCE OF DOMESTIC CRIMES. I THINK IT  
6 WAS NOT TO OBTAIN EVIDENCE FOR CRIMES OTHER THAN THOSE  
7 UNDER FISA OR RELATED TO FOREIGN INTELLIGENCE CRIMES.

8 SO WE HAVE A LITTLE PIECE OF IT, BUT WE  
9 DON'T HAVE THE WHOLE THING. BUT BASED ON THAT  
10 CERTIFICATION, THE GOVERNMENT STILL HAS NOT SAID THAT  
11 THE PRIMARY PURPOSE WAS FOREIGN INTELLIGENCE GATHERING,  
12 JUST THAT IT'S NOT THE INVESTIGATION OF DOMESTIC CRIMES.  
13 THAT IS ALL THAT WE HAVE. AND IT'S SUBMITTED THAT THAT  
14 STILL DOES NOT SATISFY THE PRE-PATRIOT ACT STANDARD,  
15 WHICH REQUIRES THE PRIMARY PURPOSE BE THE GATHERING OF  
16 FOREIGN INTELLIGENCE INFORMATION. AND THIS PRE-PATRIOT  
17 ACT STANDARD, WE ARE NOT ARGUING THAT THE -- THAT THAT  
18 STANDARD IS NOT CONSTITUTIONAL. EVERY COURT WHO HAS  
19 LOOKED AT THAT HAS --

20 THE COURT: WHAT WOULD YOUR ARGUMENT BE  
21 THAT YOU ARE SAYING THAT WHEN THEY CHANGED THE STATUTE  
22 TO SIGNIFICANT PURPOSE RATHER THAN PRIMARY PURPOSE, THAT  
23 THEY ARE TREADING ON UNCONSTITUTIONAL GROUND, IS THAT  
24 WHAT YOUR ARGUMENT IS?

25 MS. CARVER: YES, YOUR HONOR.

1 THE COURT: AND WHAT DO YOU SAY IF IN  
2 FACT THE PURPOSE OF THIS CASE WAS TO GATHER FOREIGN  
3 INTELLIGENCE INFORMATION?

4 MS. CARVER: IS IT THE PRIMARY PURPOSE?  
5 I MEAN, IT CAN HAVE ONE PURPOSE, BEING A FOREIGN  
6 INTELLIGENCE CRIME, BUT IF THERE -- THERE COULD BE --  
7 THERE COULD BE MANY REASONS WHY THEY WANT TO --

8 THE COURT: WHAT IF IT WAS THE PURPOSE?

9 MS. CARVER: THE PURPOSE, THE ONLY  
10 PURPOSE?

11 THE COURT: WHAT IF IT WAS THE PURPOSE?

12 MS. CARVER: THE PURPOSE.

13 THE COURT: DO WE AGREE SOLE PURPOSE IS  
14 SYNONYMOUS WITH THE PURPOSE?

15 MS. CARVER: YES. IF IT IS THE SOLE  
16 PURPOSE THEN WE WOULD NOT HAVE A CHALLENGE UNDER THE  
17 PATRIOT ACT. THAT REALLY IS THE OLDER STANDARD.

18 THE COURT: THEN YOU WOULD NOT HAVE AN  
19 APPLIED CHALLENGE, CORRECT?

20 MS. CARVER: CORRECT.

21 THIS CHANGE IN THE STANDARD ALSO  
22 IMPLICATES THE PROBABLE CAUSE NOW UNDER FISA. IF THE  
23 GOVERNMENT HAS -- AND STATED IN THEIR PAPERS, AND WE  
24 WOULD AGREE THAT THERE IS A DIFFERENT AND LOWER PROBABLE  
25 CAUSE STANDARD UNDER FISA THAT IS DIFFERENT THAN THE

1 PROBABLE CAUSE THAT WOULD BE NEEDED TO GET A TRADITIONAL  
2 WARRANT IN THE DOMESTIC CRIMINAL CRIMES CIRCUMSTANCES.

3 THE COURT: MS. HAMANN, ARE YOU MAKING AN  
4 ARGUMENT ON THIS OR MS. WILLIAMS?

5 MS. HAMANN: MR. HINNEN IS, YOUR HONOR.

6 THE COURT: WHO?

7 MR. HINNEN: YOUR HONOR, TODD HINNEN FROM  
8 THE NATIONAL SECURITY DIVISION OF THE DEPARTMENT OF  
9 JUSTICE.

10 THE COURT: IS THIS A FACIAL CHALLENGE OR  
11 AN APPLIED CHALLENGE?

12 MR. HINNEN: YOUR HONOR, I HAVE SPENT  
13 MANY HOURS TRYING TO FIGURE THAT OUT, THE ASSERTION OF  
14 WHETHER IT'S A FACIAL OR AS-APPLIED CHALLENGE --

15 THE COURT: DO YOU HAVE ENOUGH  
16 INFORMATION -- NOW LISTEN CAREFULLY TO WHAT I ASK.

17 DO YOU HAVE ENOUGH INFORMATION FROM THAT  
18 FILE THAT YOU HAVE THAT IS CLASSIFIED TO MAKE A  
19 DETERMINATION? YOU DON'T HAVE TO TELL ME WHAT IT IS,  
20 WHETHER THEY COULD MAKE AN APPLIED CHALLENGE?

21 MR. HINNEN: YES, YOUR HONOR. I BELIEVE  
22 WE DO. AND I BELIEVE --

23 THE COURT: THAT MAY SOLVE THE PROBLEM,  
24 BUT GO AHEAD.

25 MR. HINNEN: I BELIEVE YOU DO, AS WELL.

1 THE COURT: GO AHEAD.

2 MS. CARVER: WE DO NOT HAVE THAT  
3 INFORMATION.

4 THE COURT: THERE'S A POINT WHERE  
5 DISCLOSURE DOES NOT HURT ANYBODY.

6 GO AHEAD.

7 MS. CARVER: SO IN THE ABSENCE OF THAT  
8 INFORMATION, THE CHALLENGE THAT WE MADE WAS NOT TO THE  
9 EXECUTION OF THE SEARCH, OR WHETHER THE SEARCH FOLLOWED  
10 THE FISA ORDERS, BECAUSE OF COURSE WE DON'T HAVE THE  
11 FISA ORDERS. AND WE DON'T KNOW -- WE JUST RECEIVED THE  
12 BULK OF THE DISCOVERY THAT HAS BEEN DECLASSIFIED THIS  
13 WEEK. SO WE DID NOT MAKE A CHALLENGE AT THIS TIME TO  
14 THE COLLECTION OR THE EXECUTION OF THE ORDERS. WHAT WE  
15 DID MAKE A CHALLENGE TO WAS THE BASIS FOR FISA  
16 SURVEILLANCE AGAINST THESE DEFENDANTS IN THE FIRST  
17 PLACE. AND BECAUSE THE STATUTE ALLOWS FOR SURVEILLANCE  
18 WHERE THE PRIMARY PURPOSE IS NOT THE GATHERING OF  
19 FOREIGN INTELLIGENCE INFORMATION, WE SUBMIT THAT IT  
20 VIOLATES THE FOURTH AMENDMENT.

21 THE COURT: YOU SEE, THE PROBLEM IS THAT  
22 YOU CAN'T MAKE ANYTHING OTHER THAN A FACIAL CHALLENGE.

23 MS. CARVER: IT'S FACIAL IN THE SENSE  
24 THAT --

25 THE COURT: AND YOU ARE HOPING THAT YOU

1 CAN MAKE AN APPLIED ONE IN THE ABSENCE OF HAVING THE  
2 INFORMATION.

3 MS. CARVER: CORRECT, YOUR HONOR.

4 THE COURT: HOW CAN YOU MAKE AN APPLIED?

5 MS. CARVER: WELL, IT'S APPLIED IN THE  
6 SENSE THAT THESE DEFENDANTS WERE THE SUBJECT OF FISA  
7 SURVEILLANCE.

8 THE COURT: HOW CAN YOU MAKE IT APPLIED?  
9 YOU DON'T KNOW WHAT THE BASIS IS.

10 MS. CARVER: WE WOULD SUBMIT --

11 THE COURT: YOU DON'T KNOW WHETHER OR NOT  
12 IT WAS THE PURPOSE OR A SIGNIFICANT PURPOSE.

13 MS. CARVER: WE ONLY KNOW THAT THE  
14 PRIMARY PURPOSE WAS NOT THE GATHERING OF INFORMATION FOR  
15 DOMESTIC CRIMINAL ACTIVITY.

16 THE COURT: OKAY.

17 MS. CARVER: AND THAT IT TIES IN, ALSO,  
18 WITH OUR MOTION UNDER 3504, WHICH IS A MOTION UNDER  
19 REALLY IT'S 1806(F) TO GET THESE FISA MATERIALS TO BE  
20 ABLE TO SEE AND TO MAKE A DIFFERENT CHALLENGE THAN THE  
21 ONE THAT WE MADE.

22 THE COURT: HOW DO I EXPLAIN ANY RULING I  
23 MAKE IN THIS CASE?

24 MR. HINNEN: WELL, YOUR HONOR, I THINK  
25 THE COURT FIRST HAS TO DECIDE THE NATURE OF THE

1 CHALLENGE THAT IS BEING BROUGHT HERE, WHETHER IT IS IN  
2 FACT A FACIAL CHALLENGE STATUTE OR AN AS-APPLIED  
3 CHALLENGE, AND I THINK THE EXPLANATION OF THE RULING  
4 WILL HINGE ON THAT INITIAL DETERMINATION.

5 THE COURT: WELL, THEN, TELL ME HOW THEY  
6 CAN MAKE AN APPLIED CHALLENGE WITHOUT KNOWING WHAT IS IN  
7 THE AFFIDAVITS AND CERTIFICATIONS?

8 MR. HINNEN: I THINK THE MECHANISM FOR AN  
9 APPLIED CHALLENGE IS THAT SET FORTH IN SECTION 1806 OF  
10 THE STATUTE. AND I'M MINDFUL OF YOUR COLLOQUY WITH MR.  
11 FARNHAM EARLIER, AND YOUR ADVISEMENT TO THE GOVERNMENT  
12 TO CONSIDER WHETHER DISCLOSURE HERE WOULD BE HELPFUL OR  
13 HARMFUL OR THAT KIND OF THING. BUT ON THE PAPERS --

14 THE COURT: NOW THAT YOU BRING THAT UP,  
15 WHAT IS YOUR TAKE ON THAT?

16 MR. HINNEN: MY TAKE IS PRECISELY THE  
17 SAME AS MR. FARNHAM'S. THAT IT IS A DETERMINATION THAT  
18 HAS BEEN MADE BY THE ATTORNEY GENERAL. HE SUBMITTED THE  
19 NECESSARY AFFIDAVIT TO TRIGGER THE CONCLUSION.

20 THE COURT: BECAUSE OF THE VERY NATURE OF  
21 THE CASE.

22 MR. HINNEN: IN PART, I THINK BECAUSE OF  
23 THE NATURE OF THE CASE. I HAVE NOT --

24 THE COURT: SURE. BUT NOW WE ARE IN A  
25 DIFFERENT STAGE OF THE CASE THAN WHEN THAT DETERMINATION

1 HAD BEEN MADE.

2 MR. HINNEN: CORRECT. WE ARE NOW IN A  
3 STAGE OF THE CASE THAT IS BOUND BY SECTION 1806 OF THE  
4 FISA STATUTE.

5 THE COURT: AND THE ATTORNEY GENERAL IS  
6 CERTAINLY FREE TO MAKE A DECISION NOW, CORRECT?

7 MR. HINNEN: HE IS, YOUR HONOR.

8 THE COURT: GO AHEAD. I INTERRUPTED YOU.

9 MR. HINNEN: I WAS SIMPLY GOING TO SAY  
10 THAT THE HOLDING THE COURT REACHES IN THE CASE WILL  
11 HINGE ON WHETHER THE COURT DECIDES THAT THIS IS AN  
12 AS-APPLIED CHALLENGE, BECAUSE THE DEFENDANTS CAN'T  
13 MAKE -- I'M SORRY, A FACIAL CHALLENGE, BECAUSE THE  
14 DEFENDANTS CAN'T MAKE AN AS-APPLIED CHALLENGE.

15 THE COURT: OKAY. SO LET'S ASSUME THAT I  
16 DETERMINE THAT IT IS AN APPLIED CHALLENGE.

17 MR. HINNEN: IF YOU DETERMINE THAT IT IS  
18 AN APPLIED CHALLENGE, YOUR HONOR, THEN I DON'T THINK IT  
19 CAN GO FORWARD IN THIS FORM. I THINK IT THEN HAS -- IT  
20 THEN BECOMES SUBJECT TO THE EXCLUSIVE STATUTORY MEANS  
21 CONGRESS PROVIDED FOR AN EVALUATION OF WHETHER THE  
22 COLLECTION WAS LAWFUL UNDER FISA.

23 THE COURT: CORRECT. AND HOW DO I MAKE  
24 KNOWN TO THE PARTIES THE BASIS FOR MY DECISION?

25 MR. HINNEN: I THINK THE COURT CAN SIMPLY

1 SAY THAT THIS IS NOT A PROPERLY STATED AS-APPLIED  
2 CHALLENGE. THAT THERE IS ONE --

3 THE COURT: WHAT IF I SAY IT'S A PROPERLY  
4 STATED APPLIED CHALLENGE BASED ON MY REVIEW OF  
5 INFORMATION THAT THE DEFENSE DOES NOT HAVE?

6 MR. HINNEN: CERTAINLY THE COURT CAN  
7 TREAT IT AS A MOTION UNDER 1806 AND USE THE 1806  
8 PROCEDURES TO RESOLVE THE CASE.

9 THE COURT: I KNOW THEY DIDN'T FORMALLY  
10 STATE IT AS AN 1806 CHALLENGE BUT I'M TREATING IT AS  
11 SUCH.

12 NOW, HOW DO I MAKE KNOWN TO THE PARTIES  
13 THE BASIS FOR MY DECISION, WHATEVER IT MIGHT BE?

14 MR. HINNEN: I THINK THE PRACTICE IN  
15 GENERAL HAS BEEN FOR THE COURT TO SIMPLY SAY THAT IT HAS  
16 REVIEWED THE PAPERS IN EX PARTE IN CAMERA AND DETERMINED  
17 THAT THE STATUTORY PREREQUISITES HAVE BEEN MET.

18 THE COURT: OKAY. AND I DO THAT IN  
19 CONCLUSIONARY STATEMENTS WITHOUT ANY FACTUAL BASIS?

20 MR. HINNEN: THE COURT GENERALLY ISSUES  
21 RELATIVELY SPARE ORDERS IN THESE INSTANCES BECAUSE OF  
22 THE PROTECTION THAT THE STATUTE IS MEANT TO PUT IN PLACE  
23 WITH RESPECT TO THE INFORMATION.

24 THE COURT: AND HOW DOES ANYONE KNOW  
25 WHETHER OR NOT THE DECISION I MADE WAS BASED ON MORE

1       FACTS?

2                       MR. HINNEN:   WELL, YOUR HONOR, I THINK  
3       THAT CONGRESS RELIED LARGELY IN THIS PARTICULAR INSTANCE  
4       ON YOU AND IN ALL INSTANCES ON THE ARTICLE III JUDGES  
5       WHO WOULD BE REVIEWING THIS INFORMATION IN CAMERA EX  
6       PARTE --

7                       THE COURT:   REVIEWING ANOTHER ARTICLE III  
8       JUDGE'S DECISION?

9                       MR. HINNEN:   REVIEWING ANOTHER ARTICLE  
10       III JUDGE'S DECISION WITH RESPECT TO SOME OF IT.   YES,  
11       YOUR HONOR.

12                      THE COURT:   SO HOW DOES A DEFENDANT THEN  
13       MAKE A DECISION AS TO WHETHER OR NOT THEY HAVE AN  
14       APPEALABLE ISSUE?

15                      MR. HINNEN:   I THINK THAT THE DEFENDANT  
16       --

17                      THE COURT:   SO THEY WILL FILE AN APPEAL,  
18       IF THEIR MOTION IS DENIED, AND NOT REALLY HAVING AN  
19       BASIS UPON WHICH TO FILE THAT APPEAL.

20                      MR. HINNEN:   I TAKE THE COURT'S POINT.

21                      THE COURT:   AND WITHOUT CONDUCTING --  
22       WELL, WITHOUT HAVING THE ABILITY TO CONDUCT A RULE 11  
23       INVESTIGATION.

24                      MR. HINNEN:   I TAKE THE COURT'S POINT  
25       THAT ONE OF THE THINGS THAT SHOULD WEIGH IN THE ATTORNEY

1 GENERAL'S DECISION IS THE JUDICIAL ECONOMY OF BEING ABLE  
2 TO RESOLVE THE ISSUE WITH A SUFFICIENT DEGREE OF  
3 OPENNESS TO ALLOW THE DEFENDANTS TO DETERMINE WHETHER OR  
4 NOT THEY NEED TO TAKE THAT APPEAL WHERE HE FEELS THAT  
5 THAT IS NOT OVERBORNE BY THE IMPORTANCE OF PROTECTING  
6 THE INFORMATION.

7 THE COURT: THAT IS WHAT I MEANT. I  
8 THINK IT HAS TO BE DONE ON AN INDIVIDUAL BASIS WHEN WE  
9 GET TO A STAGE LIKE THIS. THAT WAS THE POINT I WAS  
10 MAKING WITH MR. FARNHAM. I JUST THINK THAT THIS CASE IS  
11 NOT LIKE EVERY OTHER CASE MAYBE. EVERY CASE THAT I DEAL  
12 WITH, IN MY VIEW, IS UNIQUE. BUT I WOULD SUSPECT THAT  
13 IT'S NOT THE SAME AS A LOT OF CASES THAT YOU HAVE TO  
14 ARGUE THIS POINT ABOUT. YOU DON'T HAVE TO COMMENT.  
15 OKAY.

16 IT'S MY FEELING, OKAY, AFTER HAVING  
17 REVIEWED ALL OF THE DOCUMENTS AND, OF COURSE, YOU KNOW,  
18 I'M SOMEWHAT CONSTRICTED AS TO WHAT I CAN SAY AND DO,  
19 TOO, BUT I DON'T KNOW THAT IT WOULD BE GREAT HARM WITH  
20 CERTAIN INFORMATION HAVING TO BE SHARED WITH DEFENSE ON  
21 THIS ISSUE. THAT IS MY POINT.

22 MR. HINNEN: I UNDERSTAND THAT, YOUR  
23 HONOR. THE COURT HAS MADE THAT ABUNDANTLY CLEAR THIS  
24 MORNING. THAT IS --

25 THE COURT: TELL ME HOW YOU ARE GOING TO

1 PROCEED ON THAT.

2 MR. HINNEN: I WAS JUST GOING TO SAY THAT  
3 IN THE FIRST INSTANCE UNDER THE STATUTE, THE ATTORNEY  
4 GENERAL'S DETERMINATION TO MAKE AND TO FILE AN AFFILAVIT  
5 OR NOT BUT MINDFUL OF THE COURT'S ADVISEMENTS THIS  
6 MORNING WE'LL CERTAINLY CONSIDER WHETHER THERE IS THE  
7 POSSIBILITY IN THIS CASE AND WHETHER THE EQUITIES  
8 BALANCE OUT SUCH THAT THE DISCLOSURE WOULD NOT, AS THE  
9 ATTORNEY GENERAL'S AFFIDAVIT SAYS, ARE NATIONAL  
10 SECURITY.

11 THE COURT: OKAY. I WOULD LOVE YOU TO DO  
12 THAT. HOW MUCH TIME DO YOU NEED, 12 HOURS?

13 MR. HINNEN: YOUR HONOR, I THINK A LITTLE  
14 BIT MORE TIME THAN THAT WOULD BE APPRECIATED.

15 THE COURT: 24. YOU SAID A LITTLE BIT.  
16 I WILL GIVE YOU TWICE. WHAT DO YOU NEED, ABOUT A WEEK?

17 MR. HINNEN: A WEEK, I THINK, WOULD  
18 PROBABLY BE SUFFICIENT.

19 THE COURT: I WOULD APPRECIATE THAT.

20 MR. HINNEN: HOW WOULD THE COURT LIKE TO  
21 BE NOTIFIED OF THE CONCLUSION OF THE GOVERNMENT'S  
22 CONSIDERATION?

23 THE COURT: YOU CAN NOTIFY ME DIRECTLY  
24 AND, MISS RECKER, YOU HAVE AUTHORITY TO SPEAK ON BEHALF  
25 OF EVERYBODY ELSE ON THAT CREW?

1 MS. RECKER: I DO, YOUR HONOR.

2 MR. TANN: YES, YOUR HONOR.

3 MR. MOORE: YES, YOUR HONOR.

4 THE COURT: YOU CAN DO IT THROUGH ONE OF  
5 THE ATTORNEYS HERE, CONTACT ME, WE'LL GET HER ON THE  
6 LINE AND YOU CAN GIVE US YOUR ANSWER.

7 MR. HINNEN: YES, YOUR HONOR.

8 THE COURT: YOU ARE COMFORTABLE WITH ME  
9 TAKING HIS PHONE CALL EX PARTE, MISS RECKER?

10 MS. RECKER: YES, YOUR HONOR.

11 THE COURT: YOU CAN CALL ME.

12 MR. HINNEN: YES, YOUR HONOR.

13 THE COURT: THANK YOU. YOU MAY PROCEED.  
14 DID YOU LOOSE TRACK?

15 MS. CARVER: I LOST TRACK.

16 MS. RECKER: YOUR HONOR, I BELIEVE THE  
17 ONLY REMAINING MOTION IS ONE THAT I AM GOING TO  
18 WITHDRAW.

19 THE COURT: WHICH ONE?

20 MS. RECKER: AND THAT IS THE NOTICE OF  
21 INTENT TO RAISE AN ISSUE OF FOREIGN LAW.

22 THE COURT: WHERE IS THAT? I DON'T HAVE  
23 THAT.

24 MS. RECKER: IT'S NOT A MOTION PER SE. I  
25 WASN'T SURE EXACTLY HOW TO COMPLY WITH THE RULE.

1 THE COURT: BECAUSE WE TALKED IN THE  
2 ORDER ABOUT THAT BEING A POSSIBILITY. SO YOU ARE JUST  
3 ADVISING US THAT YOU WILL NOT BE MAKING SUCH A MOTION.

4 MS. RECKER: CORRECT.

5 THE COURT: OKAY. I HAVE A QUESTION FOR  
6 THE GOVERNMENT. YOU MAKE MUCH OF THE GOOD FAITH  
7 EXCEPTION. IS THAT BECAUSE THE GOOD FAITH EXCEPTION IS  
8 MADE BY THE GOVERNMENT IN EVERY SUPPRESSION MOTION IN  
9 EVERY CRIMINAL CASE?

10 MS. WILLIAMS: YOUR HONOR, THIS IS MY  
11 FIRST IN THE FISA CONTEXT. MAY I CONSULT WITH MR.  
12 FARNHAM ON THIS ONE?

13 THE COURT: BECAUSE I HAVE A PROBLEM WITH  
14 THAT IN THE CONTEXT OF FISA. GO AHEAD.

15 MS. WILLIAMS: YOUR HONOR, MR. FARNHAM  
16 CAN CERTAINLY SPEAK DIRECTLY TO THIS, BUT IT'S NOW MY  
17 UNDERSTANDING THAT IN THESE CASES THE GOVERNMENT'S BRIEF  
18 DOES TYPICALLY CONTAIN BOTH ARGUMENTS. THE ARGUMENT  
19 THAT EVERYTHING WAS IN FACT PROPER AND LAWFUL AND THE  
20 GOOD FAITH EXCEPTION. HOWEVER, THE GOOD FAITH EXCEPTION  
21 IS NEVER RELIED UPON BY THE GOVERNMENT OR THE COURT  
22 BECAUSE, IN FACT, THE FISA SURVEILLANCE AND COLLECTION  
23 WAS ENTIRELY APPROPRIATE AND LAWFUL. AND THAT HAS  
24 ALWAYS BEEN THE DETERMINATION OF EVERY COURT THAT HAS  
25 CONSIDERED THIS ISSUE.

1 THE COURT: THEY NEVER REACHED THAT?

2 MS. WILLIAMS: THEY NEVER REACHED THE

3 ISSUE, CORRECT.

4 THE COURT: I WAS JUST CURIOUS. WHAT DO

5 YOU SAY ABOUT THAT, MISS CARVER?

6 MS. CARVER: YOUR HONOR, I WOULD, I

7 GUESS, COMPARE IT TO -- IN THE REGULAR WARRANT CONTEXT

8 THAT HAS NEVER BEEN APPLIED IN THE FISA CONTEXT, THAT IF

9 THERE IS A GENERAL WARRANT, GOOD FAITH EXCEPTION DOES

10 NOT APPLY, BECAUSE THE WARRANT ITSELF IS INVALID. SO

11 THERE IS NO REASONABLE BASIS FOR AN OFFICER TO RELY ON

12 IT.

13 I GUESS THE ARGUMENT -- SO THE CLAIM IS

14 THAT IT WAS OVERBROAD AND THE GOOD FAITH EXCEPTION WOULD

15 APPLY. WE HAVE NOT SEEN ANY OF THE MATERIALS TO KNOW

16 ONE WAY OR THE OTHER WHETHER THAT ARGUMENT COULD BE

17 MADE. BUT IT'S OUR POSITION THAT THIS WARRANT WAS

18 INVALID FROM THE OUTSET, SO THE GOOD FAITH EXCEPTION

19 COULD NEVER APPLY.

20 THE COURT: SO IF I UNDERSTAND YOUR

21 INITIAL ARGUMENT, YOU WANT ME TO BE CLEAR, FROM MY

22 REVIEW, OF THE DISTINCTION BETWEEN INVESTIGATING

23 CRIMINAL CONDUCT AND GATHERING FOREIGN INTELLIGENCE IS

24 THAT THE BENCHMARK?

25 MS. CARVER: YES, YOUR HONOR. AND I

1 BELIEVE THAT THE COURTS WHO HAVE JUSTIFIED THIS  
2 DIFFERENT STANDARD FOR FOREIGN INTELLIGENCE GATHERING  
3 PURPOSES HAVE DRAWN THAT DISTINCTION. IF THE PURPOSE IS  
4 TO GATHER INFORMATION FOR DOMESTIC CRIMINAL ACTIVITY,  
5 THERE ARE PROCEDURES IN PLACE FOR THEM TO DO THAT; GET A  
6 GENERAL WARRANT BASED ON PROBABLE CAUSE. THIS EXCEPTION  
7 TO THE WARRANT REQUIREMENT IS BASED ON THE FACT THAT IT  
8 IS FOR A DIFFERENT PURPOSE, FOR NATIONAL SECURITY.

9 THE COURT: WHAT WOULD YOU THINK IF IN  
10 FACT -- WELL, NEVER MIND. JUST GOING THROUGH MY NOTES  
11 HERE. THERE IS NO QUESTION OF STANDING IN THIS CASE,  
12 CORRECT?

13 MR. HINNEN: WITH RESPECT TO THE MOTION  
14 TO SUPPRESS, YOUR HONOR? I BELIEVE THE AGGRIEVED PERSON  
15 NOTICES LAY THE STANDARD TO REST.

16 MS. CARVER: AND, YOUR HONOR, I BELIEVE  
17 IT ALSO RELATES TO THE CORPORATE DEFENDANT HAS STANDING  
18 ON BEHALF OF THE FACT THAT THE INDIVIDUAL DEFENDANTS  
19 WERE AGENTS OF THE CORPORATE DEFENDANT.

20 THE COURT: LET ME ASK THE GOVERNMENT.  
21 WHAT IS THE LEGISLATIVE HISTORY WITH RESPECT TO THE  
22 CHANGING OF THE TERMINOLOGY FROM PRIMARY PURPOSE TO  
23 SIGNIFICANT PURPOSE?

24 MR. HINNEN: WELL, YOUR HONOR, THERE IS  
25 RELATIVELY LITTLE LEGISLATIVE HISTORY TO THE PATRIOT

1 ACT.

2 THE COURT: THAT WAS A SECRET.

3 MR. HINNEN: THAT WAS NOT SECRET, YOUR  
4 HONOR. BUT THERE IS -- ALTHOUGH IT WAS NOT SECRET,  
5 THERE WAS LITTLE OPEN ON-THE-RECORD DEBATE ON THE FLOOR  
6 OF CONGRESS WITH RESPECT TO THE SPECIFICS OF THE PATRIOT  
7 ACT. I THINK THAT THE CHANGE IS WITHIN THE SORT OF  
8 DEVELOPMENT OF THIS BODY OF LAW FROM KEITH TO THE  
9 ENACTMENT OF FISA. AND IT IS CONSISTENT WITH THE FISA  
10 COURT OF REVIEWS OPINION IN THE IN RE SEALED CASE THAT  
11 COURTS HAVE LONG AND SORT OF MISCONSTRUED WHAT CONGRESS  
12 INTENDED IN FISA IN THE FIRST PLACE, AND THAT IS A  
13 POSSIBLE ANSWER TO THE COURT'S QUESTION.

14 THE COURT: BUT WE DON'T KNOW?

15 MR. HINNEN: THERE IS NOTHING ON RECORD.

16 THE COURT: NOTHING AT ALL? THAT IS  
17 INTERESTING, BECAUSE ACCORDING TO THE DEFENSE, THAT IS A  
18 SIGNIFICANT SIGNIFICANT CHANGE.

19 MR. HINNEN: YOUR HONOR, WE CERTAINLY  
20 DON'T BELIEVE THAT -- WE UNDERSTAND THAT IT'S A  
21 SIGNIFICANT CHANGE. WE DON'T THINK IT'S A CHANGE OF  
22 CONSTITUTIONAL SIGNIFICANCE.

23 THE COURT: I UNDERSTAND YOUR POSITION  
24 BUT IT'S STRANGE THAT THERE IS NOTHING THERE.

25 MS. CARVER: YOUR HONOR, I WOULD ACTUALLY

1 DISAGREE. I THINK THAT --

2 THE COURT: YOU THINK THERE IS  
3 LEGISLATION.

4 MS. CARVER: WE POINTED OUT AT LEAST  
5 THREE SENATORS' COMMENTS IN OUR BRIEF.

6 THE COURT: WELL, IT WAS SOME CONCERNS.

7 MS. CARVER: RIGHT, CONCERNS.

8 THE COURT: I'M TALKING ABOUT, I WANT  
9 LEGISLATIVE HISTORY FOR THE BASIS FOR MAKING THE CHANGE.  
10 AND YOU WOULD AGREE WITH THE GOVERNMENT WE DON'T HAVE  
11 IT.

12 MS. CARVER: CORRECT.

13 THE COURT: ALL RIGHT. SO I HAVE TWO  
14 STEPS TO TAKE, DON'T I? I HAVE TO FIND OUT WHETHER OR  
15 NOT THE CERTIFICATION SATISFIED THE FISA REQUIREMENTS  
16 AND WHETHER THERE WAS PROBABLE CAUSE, CORRECT? AGREED,  
17 MISS CARVER?

18 MS. CARVER: YES, SIR.

19 THE COURT: AND THE GOVERNMENT SAYS THAT  
20 CONGRESS HAS GIVEN ME THE AUTHORITY TO MAKE THAT  
21 DECISION ON MY OWN.

22 MS. CARVER: NOT NECESSARILY, YOUR HONOR.  
23 I MEAN, CONGRESS DID PERMIT DEFENSE PARTICIPATION. I  
24 MEAN, THERE IS LANGUAGE IN THE STATUTE THAT GIVES US A  
25 CHANCE TO PARTICIPATE. AND THAT IS -- IT IS IF IT IS

1 NECESSARY TO MAKE AN ACCURATE DETERMINATION ABOUT THE  
2 LEGALITY OF THE SURVEILLANCE, THE COURT MAY DISCLOSE TO  
3 THE AGGRIEVED PERSON WHO WOULD BE THE DEFENDANTS --

4 THE COURT: WHY DON'T YOU GIVE ME AN  
5 EXAMPLE OF WHEN THAT WOULD KICK IN?

6 MS. CARVER: IT WOULD BE NECESSARY IF  
7 THERE IS -- FOR INSTANCE, IF THERE WAS A  
8 MISREPRESENTATION OF A FACT IN THE CERTIFICATION.

9 THE LEGISLATIVE HISTORY ALSO SUGGESTS  
10 THAT SURVEILLANCE RECORDS --

11 THE COURT: WOULD THAT HAVE TO BE A  
12 CLEARLY ERRONEOUS STANDARD?

13 MS. CARVER: THE CERTIFICATION IS -- IN  
14 THE FIRST INSTANCE, IS REVIEWED BY THE FISA COURT UNDER  
15 A CLEARLY ERRONEOUS STANDARD, AND THEN THE DISTRICT  
16 COURT HAS A DEFERENTIAL STANDARD TO LOOKING AT IT.

17 MR. HINNEN: WITH RESPECT TO THE  
18 CERTIFICATION, YOUR HONOR, YES, THE CLEARLY ERRONEOUS  
19 STANDARD WOULD APPLY.

20 MS. CARVER: BUT THERE IS THIS LANGUAGE  
21 IN HERE THAT ALLOWS THE DEFENDANTS TO HAVE ACCESS TO  
22 THESE DOCUMENTS.

23 THE COURT: DO YOU HAVE ANY LEGISLATIVE  
24 HISTORY ON THAT?

25 MS. CARVER: THERE IS. I DON'T HAVE --

1 THE LEGISLATIVE HISTORY WAS CITED IN THE SECOND CIRCUIT  
2 CASE OF DUGGAN AND ALSO A CASE OF BELFIELD OUT OF THE  
3 DISTRICT OF DC. BOTH THOSE CASES, I THINK, WERE CITED  
4 IN THE GOVERNMENT'S BRIEF.

5 THAT DISCUSSES CIRCUMSTANCES UNDER WHICH  
6 DEFENDANTS COULD HAVE ACCESS TO THIS INFORMATION. AND  
7 IT INCLUDES IF THERE IS A MISREPRESENTATION OF A FACT IN  
8 THE SUPPORTING CERTIFICATION WHICH --

9 THE COURT: HOW DO I KNOW IT'S A  
10 MISREPRESENTATION OF FACTS SO THAT I CAN THEN LET YOU  
11 PARTICIPATE?

12 MS. CARVER: THAT IS WHY WE NEED TO  
13 PARTICIPATE, TO BE ABLE TO GIVE YOUR HONOR SOME CONTEXT  
14 TO THE MATERIALS THAT ARE AVAILABLE.

15 THE COURT: DO YOU THINK IT MEANS IF I  
16 FIND THAT THERE IS NOT QUITE ENOUGH INFORMATION WITHIN  
17 THE CERTIFICATIONS TO MAKE THAT DETERMINATION?

18 MS. CARVER: PERHAPS.

19 THE COURT: WHAT IF THE CERTIFICATIONS  
20 ARE SO FACT FILLED THAT I CAN MAKE THAT DETERMINATION?

21 MS. CARVER: WELL, THAT IS JUST -- THAT  
22 IS ONE BASIS FOR --

23 THE COURT: PARDON?

24 MS. CARVER: THAT IS JUST ONE BASIS FOR  
25 ALLOWING DEFENSE --

1 THE COURT: GIVE ME SOME MORE.

2 MS. CARVER: ANOTHER BASIS WOULD BE [F  
3 SURVEILLANCE RECORDS THAT HAVE BEEN PROVIDED INCLUDE A  
4 SIGNIFICANT AMOUNT OF NONFOREIGN INTELLIGENCE  
5 INFORMATION. THAT WOULD CALL INTO QUESTION THE  
6 GOVERNMENT'S COMPLIANCE WITH MINIMIZATION PROCEDURES AND  
7 STANDARDS THAT WERE CONTAINED IN THE ORDER. AND IT IS  
8 SUBMITTED HERE THAT WE HAVE VOLUMES OF INFORMATION THAT  
9 ARE NONFOREIGN INTELLIGENCE RELATED, AND THERE WOULD BE  
10 A REASON TO BELIEVE THAT THE PROCEDURES THAT WERE IN  
11 PLACE DID NOT PROPERLY MINIMIZE THE COLLECTION OF  
12 INFORMATION.

13 THE COURT: ANYTHING ELSE?

14 MS. CARVER: NOTHING ELSE THAT WOULD BE  
15 APPLICABLE HERE, YOUR HONOR.

16 THE COURT: HOW ARE YOU GOING TO DEFINE  
17 CLANDESTINE INTELLIGENCE ACTIVITIES?

18 MR. HINNEN: YOUR HONOR, I JUST DON'T  
19 THINK THAT IS RAISED BY ANY OF THE PAPERS HERE TODAY.

20 THE COURT: I'M RAISING IT.

21 MR. HINNEN: YOU KNOW, I THINK THE  
22 GENERAL RULES OF STATUTORY CONSTRUCTION WOULD APPLY IN  
23 THE ABSENCE OF A STATUTORY DEFINITION OR  
24 CONGRESSIONAL --

25 THE COURT: YOU DO LISTEN CLOSELY.

1 MR. HINNEN: -- OR LEGISLATIVE HISTORY  
2 THAT THE COURT COULD REFER TO THINGS LIKE LAW  
3 DICTIONARIES OR ORDINARY DICTIONARIES, COMMON USAGE OF  
4 THOSE KINDS OF TERMS.

5 THE COURT: BECAUSE FOREIGN INTELLIGENCE  
6 INFORMATION HAS A VERY BROAD MEANING, AS DEFINED IN THE  
7 STATUTE, AGREED?

8 MR. HINNEN: WITH RESPECT --

9 THE COURT: I MEAN, IT SEEMS TO ENCOMPASS  
10 ALMOST ANY ACTIVITY THAT HAS SOME BEARING ON FOREIGN  
11 GOVERNMENT HAVING DEALINGS IN THE UNITED STATES.

12 MR. HINNEN: WITH RESPECT TO THE UNITED  
13 STATES PERSON, YOUR HONOR, I THINK IT'S NARROWER. I  
14 THINK THE STATUTE SAYS IT HAS TO BE NECESSARY TO  
15 THE ABILITY OF THE UNITED STATES TO PROTECT AGAINST ONE  
16 OF THE ENUMERATED CRITERIA IN THE STATUTES. AND I THINK  
17 THERE IS LEGISLATIVE HISTORY ON WHAT NECESSARY MEANS,  
18 AND IT MEANS NOT MERELY SORT OF CONVENIENT BUT ACTUALLY  
19 IMPORTANT TO A DETERMINATION.

20 THE COURT: IT CAN ACTUALLY RELATE TO  
21 HAVING OPERATIVES IN THE UNITED STATES WHO GATHER JUST  
22 PUBLIC INFORMATION, COULDN'T IT?

23 MR. HINNEN: I SUPPOSE IF THE CASE RAISED  
24 THAT ISSUE, YES, THE GOVERNMENT COULD ARTICULATE AN  
25 ARGUMENT THAT THAT WAS FOREIGN INTELLIGENCE INFORMATION.

1 THE COURT: BECAUSE IT'S REPORTING BACK  
2 ACTIVITIES HERE THAT MAY BE USED BY THE FOREIGN  
3 GOVERNMENT.

4 MR. HINNEN: CORRECT, YOUR HONOR. YES.

5 THE COURT: ALL RIGHT. HERE IS A CONCERN  
6 I HAVE AND IT'S ABOUT MINIMIZATION. NOW, THE STATUTE  
7 REQUIRES THE ATTORNEY GENERAL TO PROMULGATE MINIMIZATION  
8 PROCEDURES, RIGHT?

9 MR. HINNEN: THAT'S CORRECT, YOUR HONOR.

10 THE COURT: WHAT ARE THE SANCTIONS IF  
11 THEY ARE NOT FOLLOWED?

12 MR. HINNEN: THERE IS A STANDARD OF  
13 PRACTICE BEFORE THE FISA COURT, BEFORE THE ARTICLE III  
14 JUDGES THAT SIT ON THE FISA COURT. IN ADDITION TO THE  
15 ATTORNEY GENERAL PROMULGATING THEM, WE ARE REQUIRED TO  
16 FILE THEM WITH THE COURT. AND THEN IF WE DON'T COMPLY  
17 WITH THE MINIMIZATION PROCEDURES, WE HAVE TO FILE WHAT  
18 IS KNOWN AS A NOTICE OF NONCOMPLIANCE WITH THE FISA  
19 COURT. AND THE FISA COURT HAS THE BROAD AUTHORITY THAT  
20 IS GRANTED TO ARTICLE III JUDGES TO FASHION HIS OWN  
21 REMEDIES IN THOSE CIRCUMSTANCES, HIS OR HER OWN  
22 REMEDIES.

23 THE COURT: AT THAT STAGE?

24 MR. HINNEN: AT THAT STAGE, YES.

25 THE COURT: I MAKE NO DETERMINATION AS TO

1 WHETHER OR NOT MINIMIZATION WAS FOLLOWED, IS THAT  
2 CORRECT?

3 MR. HINNEN: I THINK THE COURT ACCURATELY  
4 STATED THE TWO-STEP PROCESS THAT THE STATUTE REQUIRES  
5 THE COURT TO GO THROUGH, AND I DON'T THINK IT INCLUDES A  
6 REVIEW OF THE MINIMIZATION PROCEDURES.

7 MS. CARVER: YOUR HONOR, WE WOULD SUBMIT  
8 THAT AS PART OF A MOTION TO SUPPRESS THAT WE WOULD BE  
9 ABLE TO CHALLENGE THE MINIMIZATION PROCEDURES. THEY ARE  
10 PART OF THE WHOLE EXECUTION OF THE FISA ORDER, AND TO  
11 SEE WHETHER THEY WERE FOLLOWED OR NOT FOLLOWED, BUT WE  
12 OF COURSE DO NOT HAVE THE MINIMIZATION PROCEDURE.

13 THE COURT: SO YOU ARE SAYING THAT YOU  
14 WOULD ARGUE THAT IF MINIMIZATION HAD NOT BEEN FOLLOWED,  
15 THAT THEY DID NOT SATISFY THE CERTIFICATION REQUIREMENT?

16 MS. CARVER: I DON'T BELIEVE IT'S A  
17 CERTIFICATION REQUIREMENT, BUT I THINK IT'S AS PART OF  
18 THE EXECUTION OF THE FISA ORDER THAT THEIR SEARCH DID  
19 NOT COMPLY WITH THE FISA ORDER AND WAS OVERBROAD, I  
20 GUESS, IN THE EXECUTION OF THE SEARCH.

21 MR. HINNEN: I WOULD DISAGREE WITH THAT,  
22 YOUR HONOR. I THINK THAT IS SOMETHING FOR THE  
23 ADMINISTRATION OF THE FISA COURT ITSELF WITH RESPECT TO  
24 THE IMPLEMENTATION OF THE ORDER GRANTED AND THAT IT'S  
25 HANDLED, YOU KNOW, IN THE MANNER I SUGGESTED WITH THE

1 FILING OF A NOTICE OF NONCOMPLIANCE AND ANY REMEDY THAT  
2 THE FISA COURT DEEMS FIT.

3 MS. CARVER: YOUR HONOR, UNDER 1806(E)  
4 DEFENDANTS ARE ALLOWED -- ARE ENTITLED -- AGGRIEVED  
5 PERSONS ARE ENTITLED TO FILE A MOTION TO SUPPRESS. AND  
6 ONE OF THE BASIS FOR FILING A MOTION TO SUPPRESS IS THAT  
7 THE SURVEILLANCE WAS NOT MADE IN CONFORMITY WITH AN  
8 ORDER OF AUTHORIZATION OR APPROVAL, AND THE MINIMIZATION  
9 PROCEDURES ARE PART OF THE FISA ORDER OR APPROVAL.

10 THE COURT: DO YOU DISAGREE WITH THAT?

11 MS. HINNEN: I DISAGREE --

12 THE COURT: 1806(E)(2).

13 MR. HINNEN: 1806(E)(2), YES, I DON'T  
14 THINK INVITES THE DISTRICT COURT JUDGE TO PEEL BACK THE  
15 MINIMIZATION PROCEDURES AND DETERMINE WHETHER THE  
16 MINIMIZATION PROCEDURES WERE ADEQUATE.

17 THE COURT: WELL, I AGREE WITH MISS  
18 CARVER ON THE POINT, BECAUSE THAT IS ONE OF THE  
19 REQUIREMENT STANDARDS APPLIED, THAT THEY CAN CHALLENGE  
20 IT UNDER THE STATUTE AND THE APPROVAL MANDATES  
21 COMPLIANCE WITHIN THE MINIMIZATION, THE STANDARD  
22 MINIMIZATION PROCEDURES.

23 MR. HINNEN: CORRECT, YOUR HONOR.

24 THE COURT: IF THEY DIDN'T DO IT, THEN  
25 IT'S A PROPER ISSUE FOR A MOTION TO SUPPRESS.

1 MR. HINNEN: I WOULD NOTE --

2 THE COURT: I'M NOT AGREEING THAT THAT  
3 WASN'T DONE IN THIS CASE.

4 MR. HINNEN: I UNDERSTAND, YOUR HONOR.

5 I WOULD NOTE THAT ONE OF THE ITEMS THAT  
6 IS INCLUDED IN THE DEFINITION OF FOREIGN INTELLIGENCE  
7 INFORMATION IS EVIDENCE OF A CRIME AND THAT THE  
8 MINIMIZATION PROCEDURES SPECIFICALLY PROVIDE THAT THE  
9 GOVERNMENT MAY RETAIN AND PROVIDE THE LAW ENFORCEMENT  
10 EVIDENCE OF THE CRIME. SO I THINK IT WOULD BE DIFFICULT  
11 FOR A DEFENDANT TO ARTICULATE AN ARGUMENT THAT THEY  
12 SUFFERED PREJUDICE AS A RESULT WHEN THE EVIDENCE THAT IS  
13 THE BASIS FOR THE CRIMINAL CHARGES ARE, BY DEFINITION,  
14 WITHIN THE DEFINITION OF THE FOREIGN INTELLIGENCE  
15 INFORMATION.

16 THE COURT: YOU ARE TALKING ABOUT 2 (A)?

17 MR. HINNEN: I'M TALKING ABOUT --

18 THE COURT: A PERSON WHO KNOWINGLY  
19 ENGAGES IN CLANDESTINE INTELLIGENCE GATHERING ACTIVITIES  
20 FOR OR ON BEHALF OF A FOREIGN POWER, WHICH ACTIVITIES  
21 INVOLVE OR MAY INVOLVE A VIOLATION OF THE CRIMINAL  
22 STATUTE OF THE UNITED STATES?

23 MR. HINNEN: YOUR HONOR, MR. FARNHAM IS  
24 INDICATING THAT THAT WOULD BE WITHIN THE SCOPE OF THE  
25 COURT'S REVIEW, REVIEW OF THE MINIMIZATION PROCEDURES.

1 WHAT I WAS REFERRING TO WAS, I BELIEVE 1801(H)(3), THE  
2 PART OF THE DEFINITION OF MINIMIZATION PROCEDURES THAT  
3 ALLOWS FOR THE RETENTION DISSEMINATION TO LAW  
4 ENFORCEMENT.

5 THE COURT: THAT IS A DIFFERENT ISSUE.

6 MR. HINNEN: I'M SORRY, SIR?

7 THE COURT: THAT IS A DIFFERENT ISSUE.

8 MR. HINNEN: YES.

9 THE COURT: BECAUSE, QUITE FRANKLY, I WAS  
10 SURPRISED MYSELF WHEN I READ THAT IS ALL INCLUDED.

11 MR. HINNEN: I'M SORRY?

12 THE COURT: THE OTHER VIOLATIONS ARE  
13 INCLUDED IN THE DEFINITION. I THOUGHT THAT IT WAS GOING  
14 TO BE AN ISSUE THAT THIS WAS A BYPRODUCT OF FOREIGN  
15 INTELLIGENCE GATHERING AND; THEREFORE, WAS PROHIBITED,  
16 BUT THE STATUTE SAYS OTHERWISE.

17 MR. HINNEN: I THINK YOUR HONOR CLEARLY  
18 ANTICIPATES THAT CRIMINAL EVIDENCE GATHERED AS A  
19 BYPRODUCT BY FOREIGN INTELLIGENCE MAY BE USED FOR LAW  
20 ENFORCEMENT PURPOSES.

21 THE COURT: I HAVE LEARNED THAT.

22 MR. HINNEN: YES.

23 THE COURT: ANYTHING ELSE YOU WANT TO  
24 ADDRESS?

25 MS. RECKER: NO, YOUR HONOR.

1 THE COURT: DOES THE GOVERNMENT HAVE  
2 ANYTHING ELSE IT WANTS TO SAY?

3 MS. WILLIAMS: NO, YOUR HONOR.

4 THE COURT: SO LET'S SEE WHAT WE HAVE  
5 RULED ON TODAY.

6 I GRANTED THE MOTION FOR BILL OF  
7 PARTICULARS.

8 I GRANTED THE MOTION TO ALLOW THE DEFENSE  
9 TO FILE ITS RULE 16 MOTION.

10 MS. RECKER: YOUR HONOR, IS THAT RULE 15,  
11 FOREIGN DEPOSITIONS?

12 THE COURT: YES.

13 MS. RECKER: I THOUGHT I HEARD YOU SAID  
14 16. I WASN'T SURE.

15 THE COURT: IF I DID I MISSPOKE.

16 I HEARD THE ARGUMENT ON THE MOTION TO  
17 DISMISS THE INDICTMENT FOR FAILURE TO STATE CRIMINAL  
18 OFFENSE AND FOR VAGUENESS. I HEARD ARGUMENT ON THAT.  
19 I'M GOING TO RULE ON THAT.

20 AND WE HAD THE MOTION TO COMPEL  
21 DISCLOSURE OF ELECTRONIC SURVEILLANCE. DID WE TALK  
22 ABOUT THAT ONE?

23 MS. WILLIAMS: WE DISCUSSED THAT, I  
24 THINK, IN THE CONTEXT OF THE MOTION FOR SECTION 2, CIPA  
25 HEARING.

1 MS. RECKER: THAT'S CORRECT, YOUR HONOR.

2 THE COURT: SO I'M GOING TO HOLD OFF ON

3 THOSE TWO.

4 AND THEN ON THE MOTION TO DISMISS THE  
5 SUPERSEDING INDICTMENT FOR FAILURE TO STATE A CRIMINAL  
6 OFFENSE AND ^ VAGUENESS. THAT IS 110. SO WE CAN ROLL  
7 99 AND 110 TOGETHER?

8 MS. RECKER: THAT'S CORRECT, YOUR HONOR.

9 MS. HAMANN: YES, YOUR HONOR.

10 THE COURT: THEN WE HAVE THE SUPPRESSION  
11 MOTION. THAT IS IT, RIGHT? DID EVERYBODY FEEL THEY HAD  
12 ENOUGH TIME TO TALK ABOUT THIS CASE TO GIVE ME YOUR  
13 GREAT KNOWLEDGE AND WISDOM?

14 MS. RECKER: YES, YOUR HONOR.

15 MS. WILLIAMS: YES, YOUR HONOR.

16 THE COURT: VERY WELL. I TRUST THAT YOU  
17 WILL TEND TO FINDING OUT FROM THE ATTORNEY GENERAL  
18 WHETHER IT MIGHT BE WORTHWHILE TO MAKE LIMITED  
19 DISCLOSURES TO SATISFY THE DEFENDANTS --

20 MR. HINNEN: WE WILL, YOUR HONOR, AND WE  
21 WILL NOTIFY --

22 THE COURT: -- THAT THEY MAY NOT HAVE A  
23 BASIS FOR MOTION TO SUPPRESS.

24 MR. HINNEN: WE WILL, YOUR HONOR. WE  
25 WILL NOTIFY THE COURT ABOUT THE CONCLUSION OF THAT

1 CONSIDERATION WITHIN A WEEK.

2 THE COURT: I THINK JUST -- I THINK IT'S  
3 NOT A BAD IDEA THAT THEY HAVE SOMETHING IN PLACE LIKE  
4 THAT. THIS IS GOING TO COME UP AGAIN, AND I THINK WHAT  
5 IT MIGHT DO IS TO MAKE MORE TRANSPARENT THE GOVERNMENT  
6 CONDUCT THAT MAY HAVE BEEN WHOLLY JUSTIFIED, AND THEN WE  
7 ELIMINATE THE POSSIBILITY OF CLAIMS THAT PERSONS'  
8 CONSTITUTIONAL RIGHTS WERE VIOLATED. OKAY?

9 MR. HINNEN: YES, YOUR HONOR.

10 THE COURT: I'M SUGGESTING THAT IN A  
11 GENERAL WAY.

12 MR. HINNEN: I UNDERSTAND, YOUR HONOR.  
13 IN GENERAL, THE ATTORNEY GENERAL IS VERY DEDICATED TO  
14 TRANSPARENCY. BUT AS I KNOW THE COURT APPRECIATES,  
15 THERE ARE OTHER ISSUES AT PLAY HERE.

16 THE COURT: I DO KNOW. AND I'M NOT AT  
17 ALL SUGGESTING THAT THERE BE DISCLOSURE OF THE MEANS.

18 MR. HINNEN: YES, SIR.

19 THE COURT: OKAY. I'M NOT SUGGESTING  
20 THAT.

21 MR. HINNEN: YES, SIR.

22 THE COURT: THAT, CERTAINLY, I THINK  
23 NEEDS TO BE PROTECTED.

24 MR. HINNEN: YES, YOUR HONOR.

25 THE COURT: ANYTHING ELSE FROM ANYBODY

1 ELSE? ALL THE OTHER DEFENDANTS HAVE ENOUGH TO SAY?

2 MR. TANN: NO, YOUR HONOR.

3 THE COURT: YOU DIDN'T HAVE ENOUGH TIME?

4 MR. TANN: NO. WE HAD PLENTY OF TIME.

5 THE COURT: ANYTHING ELSE?

6 MS. RECKER: NO, YOUR HONOR.

7 MS. WILLIAMS: NO, YOUR HONOR.

8 MS. HAMANN: NO, YOUR HONOR.

9 THE COURT: THANK YOU, ALL.

10 (COURT ADJOURNED AT 11:00 A.M.)

11 I CERTIFY THAT THE FOREGOING IS A CORRECT

12 TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE

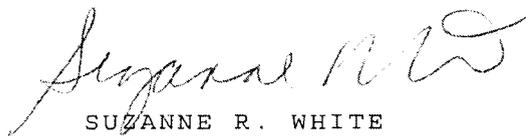
13 ABOVE-ENTITLED MATTER.

14

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16 DATE

12/3/09



SUZANNE R. WHITE

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OFFICIAL COURT REPORTER

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