

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF GEORGIA  
AUGUSTA DIVISION

UNITED STATES OF AMERICA,            )  
  )  
                          Plaintiff,        )  
  )  
                          vs.                )        1:17CR034  
  )  
REALITY LEIGH WINNER,                )  
  )  
                          Defendant.        )  
-----) )

STATUS CONFERENCE  
BEFORE THE HONORABLE BRIAN K. EPPS  
WEDNESDAY, AUGUST 30, 2017; 9:24 A.M.

**FOR THE GOVERNMENT:**

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1 (Call to Order at 9:24 a.m.)

2 THE CLERK: The Court calls case number 1:17CR34.  
3 United States of America v Reality Leigh Winner. Julie  
4 Edelstein and Jennifer Solari, David Aaron for the  
5 government -- Mrs. Solari and Mr. Aaron appearing via  
6 telephone. Joe Whitley, John Bell, Matthew Chester, and Titus  
7 Nichols for the defendant. Here for a status conference.

8 THE COURT: Good morning, everybody.

9 (Simultaneous group response.)

10 THE COURT: We also have at the government counsel  
11 table a gentleman not identified I think so far -- oh, that's  
12 the agent. Okay. All right. Before we get started with the  
13 substance of the hearing today, there are a couple of things I  
14 want to say. First of all, I have no idea what the substance  
15 of this hearing is today. In the four years I've been here  
16 this is the first time this has ever happened. I clerked for  
17 Judge Story in the Northern District for two years. That never  
18 happened while I clerked for him, and I don't want it to happen  
19 again in this case or any other case that I'm involved in.

20 When parties need to discuss items with the court, there  
21 is a tried and true method for asking for a hearing and  
22 disclosing in advance to the court what it is we're going to be  
23 talking about. That is filing a motion on the docket for  
24 whatever you want the court to do explaining the reasons for it  
25 and requesting therein a hearing on the matter or filing a

1 separate notice or motion on the docket for a hearing. So this  
2 is the first time I have ever walked in here and had no idea  
3 what I am about to have to listen to and rule on and I never  
4 want that to happen again.

5 There are a couple of other what I would call "never"  
6 events that have occurred in this case that I don't want to  
7 happen again either. The first of those is any request for  
8 court action made by way of email or through back-channel  
9 communications with the CISO's office. I never ever want to  
10 hear again from the CISO or from an email address that I need  
11 to do something in this case. I want it on the docket as a  
12 motion so I have advanced, formal notice and we follow the  
13 procedures that are in place so that everybody knows of these  
14 requests and everybody has a chance to litigate them in the  
15 manner that the federal rules contemplate and in the same  
16 manner that we've refined in the more than 200 years that we've  
17 been litigating cases in this republic.

18 So those are my opening remarks and I don't want any  
19 deviation from those in this case again. And I also don't want  
20 a 10-page letter dropped on my desk right before we walk in  
21 here before a hearing with the expectation that I am going to  
22 be able to read it, digest it, consider it, and walk in here  
23 ready to rule on it. That is a "never" event in my mind, also,  
24 and so that letter we won't discuss today. I don't have time  
25 in the 15 minutes that I received it before stepping out here

1 today to meaningfully digest it and decide what action needs to  
2 be taken based upon it.

3 So with those remarks in mind, let's begin with the  
4 substance of whatever it is we're going to be talking about  
5 today. Who wants to talk first and who's going to tell me why  
6 we're here?

7 MR. BELL: Your Honor, on behalf of the defendant  
8 we're here for the Court's status conference. I think the  
9 Court wanted regular status conferences just to update on how  
10 the case is progressing in terms of the trial. I apologize. I  
11 asked that letter be sent back because I understood from last  
12 night emails that that issue might be raised and if it was  
13 raised I wanted to provide it for the Court. We're not asking  
14 for court action on that at this time.

15 THE COURT: Okay.

16 MR. BELL: I hear what you're saying. It was not an  
17 attempt to try to get court action, but it was in response to  
18 what I thought might be, but, you know, we haven't had a chance  
19 to talk with opposing counsel about that. It is just some  
20 emails after hours last night.

21 THE COURT: Okay. Okay. So why are we here? Who  
22 can tell me why we're here this morning? I didn't request the  
23 hearing. The parties did.

24 MR. BELL: Your Honor, on behalf of the defendant I  
25 am not aware that we requested the hearing. I know that the

1 Court had indicated I think when we had the last status  
2 conference that the Court might be holding regular status  
3 conferences to update things. I'll be glad to bring the Court  
4 up to date of where things stand or not.

5 THE COURT: Well, let me tell you what I understand.  
6 I understand that an email was sent and copied on counsel for  
7 all parties requesting that we be here today.

8 Is that right, Mrs. Widener?

9 Yeah, she's got the email here. It says that Mr. Chester  
10 -- is he on the line?

11 MR. BELL: Mr. Chester is here.

12 MR. CHESTER: I am right here, Your Honor.

13 THE COURT: Mr. Chester, this email was from you and  
14 it requested we get together today. Why are we here?

15 MR. CHESTER: Judge, Your Honor, by way of  
16 introduction, it is nice to meet you. Thank you for granting  
17 my pro hac vice motion so we could be here today. I appreciate  
18 you giving me the opportunity to practice law in this district.

19 Judge, we had conversations with the government about the  
20 current scheduling order. We had discussed with the government  
21 the feasibility of some of the deadlines that the Court I know  
22 set early on as an aggressive scheduling order. After  
23 discussions with government personnel, it was decided -- the  
24 parties decided -- we thought it was best to reach out to the  
25 Court and in an effort to be open and transparent and advise

1 the Court of the issues in connection with that scheduling  
2 order which is why we requested the hearing.

3 I hear you loud and clear, Your Honor. You don't want  
4 that to happen again. It will not happen again. So I  
5 apologize for that.

6 THE COURT: I mean, you understand that; right?

7 MR. CHESTER: I did.

8 THE COURT: I can't walk in here with no idea of what  
9 we're going to talk about.

10 MR. CHESTER: Understood, Judge.

11 THE COURT: And even now I still don't know what  
12 we're talking about. Specifically, what is it you are asking  
13 me to do?

14 MR. CHESTER: Judge, there are -- with respect to the  
15 scheduling order, I think, again, both parties are here to  
16 advise you again in a way being open and transparent that what  
17 is and what is not accomplishable under the scheduling order  
18 the Court set.

19 THE COURT: Okay. Do you have an alternative  
20 scheduling order you'd like to present?

21 MR. CHESTER: We have a solution for Your Honor and  
22 that would be going forward and I can talk about some of the  
23 impediments, but the solution that I would have, Judge, is what  
24 I've seen in other Espionage Act cases which is status reports  
25 on a regular basis -- 30 to 60 days -- where we update the

1 Court on the various impediments that I can advise the Court on  
2 if it chooses and at some point after several of those status  
3 reports it would be my expectation we could set some hard and  
4 fast deadlines. Unfortunately, the way we -- where we're at in  
5 this ---

6 THE COURT: I'll tell you that's not going to happen.  
7 I think one of the easiest ways for litigation to get out of  
8 hand, whether it's civil or criminal, is for us to get off a  
9 scheduling order and on to a footing where anybody can cry that  
10 today has been a tough day and I wasn't able to get to it or,  
11 oh, these are the five reasons why this deadline is so onerous  
12 on me, and so, you know, if I just left it up to the lawyers,  
13 we wouldn't try this case until this time next year, and, yet,  
14 we've got a defendant who's in jail right now pending trial --  
15 your client -- who has no criminal history to speak of; right?

16 MR. CHESTER: I agree, Your Honor. Yes.

17 THE COURT: So we've got to get this thing to trial  
18 as soon as possible and the only way we're going to do that is  
19 to have hard and fast deadlines in the case and specific  
20 requests to change specific dates for specific reasons.

21 MR. CHESTER: Okay. I am happy to discuss some of  
22 those if you would like, Your Honor. I mean, from our  
23 standpoint, for example, we have been advised by Mrs. Solari  
24 that the meat of this case will be in the classified discovery  
25 that the government just produced on Friday. Mr. Bell,



1 Mr. Nichols have their security clearance on our team. The  
2 rest of the lawyers, despite our best efforts getting the forms  
3 in within a week, do not.

4 Obviously, we can't review that material until we have our  
5 security clearances, understandably. Once we get those  
6 clearances -- even if I could get them tomorrow, I understand  
7 from my last conversation with Ms. Rodriguez-Feo it may take 60  
8 to 90 days for me to get my security clearance. This trial is  
9 set less than 60 days from now.

10 Once I get that clearance and we have the ability to go in  
11 there and review the material, there are going to be issues  
12 that I know are going to come up. For example, we are likely  
13 going to need expert assistance in this case. There's several  
14 elements of an Espionage Act case as Your Honor is well aware  
15 that regularly require expert assistance from the defense  
16 side -- sometimes even from the government's side. Once we --  
17 once we can identify that which we can't get until we get in  
18 there in the SCIF to review the material, that expert will need  
19 his or her own security clearance. That expert will need to  
20 view the classified material so he or she can render an opinion  
21 in this case. That is one impediment.

22 Once we get in the SCIF, Judge, another impediment might  
23 be depending on what's there I expect there -- I agree with  
24 what Mrs. Solari has advised me which is that the meat of this  
25 case will be in those materials. I also expect there to be

1 quite a bit of volume of classified material. There may or may  
2 not be. I don't know yet. I don't have my clearance, but if  
3 there is not, we may have discovery requests that need to go to  
4 the government. We may be able to work out accommodations.  
5 That may trigger further litigation.

6 What I did when I first got on this case, Judge, is we  
7 went back and we reviewed every Espionage Act case that had  
8 litigation -- the ones that didn't resolve themselves in quick  
9 pleas. The average amount of time from indictment to trial was  
10 727 days when we reviewed all of them. I am not suggesting  
11 that we need 727 days. I know that's not what the Court wants.  
12 I certainly don't want that.

13 THE COURT: Well, let me tell you why this case is  
14 probably different from the vast majority of those. It is a  
15 single-defendant, single-count case alleging conduct that  
16 occurred over a very isolated period of time. It couldn't be  
17 simpler than that. Would you agree those other cases are not  
18 good comparatives for that reason?

19 MR. CHESTER: Judge, I think facially I would agree  
20 with you that this is a single defendant, single count.  
21 Nonetheless, the elements that the government will have to  
22 prove in this case -- harm to the national security, that the  
23 information wasn't already in the public domain, other elements  
24 of an Espionage Act case -- are substantially more complex than  
25 just a single-defendant, single-count case.

1 THE COURT: Right. It's not a felon in possession  
2 indictment.

3 MR. CHESTER: I agree.

4 THE COURT: Certainly. But it's not an international  
5 conspiracy to spill secrets from the government with drop-off  
6 sites and coconspirators and the like either. I mean, it's  
7 pretty simple in terms of an espionage case.

8 MR. CHESTER: Judge, I would, again, respectfully  
9 just suggest that there is going to be some complexity to this  
10 case and it is going to take time and I think even both parties  
11 even recognize that it will take time for us to work our way  
12 through these things. We will be as diligent as we can. We  
13 have the motivation to do so because as Your Honor mentioned  
14 our client is in jail. We don't want her to be in jail any  
15 longer than she has to be in jail. That being said, we also  
16 need to get our clearances, review the material, have the  
17 appropriate amount of time to determine, do we need experts?  
18 Do we need additional discovery? Do we need to file pretrial  
19 litigation?

20 THE COURT: I guess my first response to that is,  
21 yes, your attorney -- I mean, your client is entitled to  
22 counsel, but how many lawyers does it take before you satisfy  
23 that constitutional requirement? I mean, how many do we  
24 already have with security clearances that can walk in there  
25 today and look at the discovery?

1 MR. CHESTER: We have two.

2 THE COURT: Two. Well, how many do you need before  
3 you satisfy the constitutional right to counsel?

4 MR. CHESTER: Judge, I think -- I don't know what the  
5 case law is on that. I understand your point. Mr. Bell and  
6 Mr. Nichols could certainly go in there and begin reviewing  
7 that discovery.

8 THE COURT: In other words, if you put in a notice of  
9 appearance in this case two days before trial are we going to  
10 delay trial by three months --

11 MR. CHESTER: Of course ---

12 THE COURT: -- before you get your clearance?

13 MR. CHESTER: Of course not, Judge. Of course not,  
14 Judge, and that's not what I am suggesting. We did our best to  
15 get whatever forms we got from the government as quickly back  
16 to the government as we have, but the security clearance isn't  
17 simply the grounds for why we're asking that the scheduling --  
18 that we revisit the scheduling order.

19 THE COURT: Well, but I want to be clear that the  
20 delay in you getting your security clearance is not because of  
21 delay by the CISO in getting that done. The delay is in your  
22 appearance to begin with. Mr. Bell and Mr. Nichols were in it  
23 from the beginning and the CISO worked very diligently to make  
24 sure they had their clearances in place on the day the  
25 discovery was going to be produced by the government that they

1 needed to review and I was involved in that intimately because  
2 I realized this case needs to get moving and we wanted to  
3 coordinate all of that.

4 We wanted to be absolutely sure they were ready to review  
5 that on day one of that information being produced, and so I  
6 hear you, but when I compare your timeline of 720 days to try  
7 this case with the timeline we set in the case, yours is  
8 unacceptable and I'll entertain specific requests to change  
9 specific deadlines, but we're not going to give carte blanche  
10 authority to conduct discovery as you deem it convenient, and  
11 the concern about having ten lawyers get security clearances so  
12 all of them can look at the stuff is not a concern of mine.

13 MR. CHESTER: I understand, Your Honor. If you want  
14 me to speak specifics, I can. The next deadline is  
15 September 15<sup>th</sup>. That is the defendant's deadline under Section  
16 Five of CIPA. Mr. Bell and Mr. Titus -- Mr. Nichols, excuse me  
17 -- have their security clearances. They haven't gone and  
18 looked at a single document. They just received those  
19 clearances. So that is, essentially, two weeks from today that  
20 we need to designate which documents in the classified material  
21 we can use for trial. We can't do that. I should say they  
22 can't do that; I don't have a clearance. They are not going to  
23 be able to do that.

24 They are going to need to have adequate time to review it  
25 as an initial matter to determine is everything there; as a

1 separate matter to determine do we need expert help; and as a  
2 third matter after those two things, then they might be able to  
3 determine what they can use for trial. Until those first two  
4 hurdles are cleared, I don't think Mr. -- and I don't want to  
5 speak for Mr. Bell and Mr. Nichols -- I don't think those  
6 things can be adequately identified to comply with that  
7 September 15<sup>th</sup> deadline.

8 THE COURT: The standard deadline for filing of  
9 pretrial motions after review of all discovery and determining  
10 whether everything is there in this court is 14 days and I  
11 don't think the volume here is unusual in that regard. My  
12 understanding of the volume here is that it's not. What kind  
13 of timeline would you -- I mean, if you had your way we would  
14 set that deadline sometime in mid-November, I would guess;  
15 right?

16 MR. CHESTER: What's hard for me, Judge -- and I want  
17 to be as respectful to the Court as I can. What's hard for me  
18 is without knowing anything about those documents, it's hard  
19 for me to give the Court this date. I know you want hard  
20 dates. I want -- and I'm happy to work that out, but --

21 THE COURT: Right.

22 MR. CHESTER: -- but I am operating completely blind  
23 here.

24 THE COURT: Well, so if we went with your way of  
25 handling the case, the first thing we have to do is get you a

1 clearance and then you're going to need time to do all the  
2 things that you just talked about and so to accomplish all  
3 those things, what would be your -- what would be your estimate  
4 as to how much time you need for that?

5 MR. CHESTER: Do you mind if I confer with Mr. Bell?

6 THE COURT: No problem.

7 MR. CHESTER: Thank you, Your Honor. Your Honor,  
8 respectfully, what I might suggest is those of us that have  
9 security clearances can visit that -- those SCIFs -- very soon  
10 and could report to the Court a specific deadline by which we  
11 can comply. If it's ten documents in there, I think we can  
12 give a deadline that will be, you know, not too onerous. If  
13 it's a million pages, I don't know what it is.

14 THE COURT: I think Ms. Edelstein can probably solve  
15 a lot of that for us.

16 Ms. Edelstein, can you just -- certainly, we're in open  
17 session here. So I don't want you to talk about --

18 MS. EDELSTEIN: Sure.

19 THE COURT: -- much in the way of the nature of the  
20 stuff, but just in terms of volume can you just kind of break  
21 it down in terms of the volume of discovery that is not  
22 classified and anybody from that defense team can review now  
23 versus the volume of discovery that is classified?

24 MS. EDELSTEIN: Yes, Your Honor. Good morning, Your  
25 Honor.

1 THE COURT: Good morning.

2 MS. EDELSTEIN: The government has produced to the  
3 defense an unclassified discovery over 8000 pages and a  
4 considerable amount of digital data and the information that I  
5 have been cleared to provide in an open setting about  
6 classified discovery is that the government agency has produced  
7 approximately 400 pages in classified discovery.

8 THE COURT: All right. So 8000 pages everybody on  
9 the defense team can currently review. It's only 400 pages  
10 we're talking about that's classified.

11 MS. EDELSTEIN: That's correct, Your Honor.

12 THE COURT: Okay. That really helps out a lot.

13 Mr. Chester, does that alleviate some of the concerns you  
14 have about timing? And, if so, what would you propose for that  
15 September 15<sup>th</sup> deadline?

16 MR. CHESTER: Judge, I don't want to wrestle -- 400  
17 pages sounds like a very small amount. I mean --

18 THE COURT: Right.

19 MR. CHESTER: -- I'd like -- so if that's everything  
20 that is relevant to this case, I think that's something we  
21 could set fairly soon. The problem is I'm concerned that that  
22 is not everything that we're going to need in this case which  
23 is one of the impediments I discussed. If there are more  
24 classified materials that we think should be in there that  
25 aren't in there, that's going to trigger requests to the



1 defense.

2 THE COURT: You know, at the heart of this is just a  
3 fundamental disagreement about how you approach litigation. My  
4 approach and my requirement here is that we set specific  
5 deadlines.

6 MR. CHESTER: Okay.

7 THE COURT: If we don't, litigation goes on forever.  
8 There's not a case on the docket in this court that doesn't  
9 have a specific deadline associated with it. Whether it's a  
10 civil case that's in the middle of mediation -- I've got a date  
11 right now for them to report back to me about the status of  
12 that, and if they tell me that they're still trying to  
13 negotiate terms, guess what we do? We set another date --

14 MR. CHESTER: Sure.

15 THE COURT: -- so we can get back together again.

16 MR. CHESTER: Fair enough, Your Honor.

17 THE COURT: So I will not let any case that I'm a  
18 part of go forward without specific deadlines that, of course,  
19 we can change if extraordinary circumstances occur. So that's  
20 what I am trying to get at.

21 MR. CHESTER: I got you. Fair enough. You know, as  
22 long as circumstances change, we can come back to the Court and  
23 have a discussion with the Court about it, fair enough. We can  
24 set a specific deadline.

25 THE COURT: Right. And with the understanding that

1 these deadlines -- I use the word "extraordinary". I mean, you  
2 come back with extraordinary circumstances that we couldn't  
3 foresee at the time we set these, we'll talk about extending  
4 them, but, otherwise, they're just not written on a chalk  
5 board. I mean, it is kind of spray painted on concrete.

6 MR. CHESTER: Your Honor, I mean, if you're asking me  
7 for a specific deadline, I think November, assuming I can get  
8 my -- assuming -- well, I take that back. I think November  
9 would be fair, Your Honor.

10 THE COURT: Okay.

11 MR. CHESTER: Set a deadline and we'll take a look at  
12 the classified material. If there are issues, we'll report  
13 back. But we can set a deadline of a specific date if that's  
14 what the Court so chooses.

15 THE COURT: Okay. Well, certainly, the outstanding  
16 issue there is security clearances for your law firm because  
17 right now no one from your law firm has one; right?

18 MR. CHESTER: That's my understanding, Your Honor.

19 THE COURT: And how many do you think that you need  
20 in place before you can begin a meaningful review of the  
21 materials? How many lawyers are there from your firm seeking  
22 those clearances?

23 MR. CHESTER: I think there are five of us.

24 THE COURT: Okay. And do you need all five to be  
25 cleared before you can start and complete the process?

1 MR. CHESTER: No. We don't need all five. The  
2 minute one of us is cleared, we will begin working on it. I  
3 can promise you that.

4 THE COURT: Okay. Well, who out of your team would  
5 be the one that that duty would fall on to look at the  
6 classified information and make those determinations?

7 MR. CHESTER: We haven't gotten that far yet, Judge.  
8 I would say that there are two lawyers in our Atlanta office --  
9 Mr. Whitley, Mr. Switzer -- are probably geographically closest  
10 to SCIFs. My guess is it would be one or both of them that  
11 would start that process. The rest of us would support  
12 whenever we get our clearances as soon as we can get it.

13 THE COURT: I am a little surprised at that. In my  
14 law firm when I was your age on my team I was kind of that  
15 middle person that got stuck with everything. So I was  
16 anticipating ---

17 MR. CHESTER: I am sure I'll get stuck with plenty,  
18 too, Your Honor.

19 THE COURT: Right. Right. So the other piece of  
20 this then would be the security clearance issue. I know you  
21 said the estimate was about 60 days. From what date was that  
22 60 days?

23 MR. CHESTER: My understanding is from the date when  
24 we submitted our forms back to the government.

25 THE COURT: Okay.

1 MR. CHESTER: I turned mine around within a week.

2 THE COURT: Sure.

3 MR. CHESTER: I think that was maybe two weeks ago.

4 THE COURT: Okay. So we're not 60 days out from  
5 that. We're probably like probably 45.

6 MR. CHESTER: I think that's fair.

7 THE COURT: Okay. Ms. Rodriguez-Feo, I hate to call  
8 you out in court, but if you don't mind giving us maybe an  
9 update. If you don't mind stepping up here to the lecturn  
10 beside Mr. Chester here and just telling us what is it looking  
11 like in terms of the defense team -- these lawyers that have  
12 just joined the case -- in terms of the timeline for them to  
13 get those clearances.

14 MS. RODRIGUEZ-FEO: Yes, Your Honor. So we have been  
15 processing their clearances on an expedited, prioritized basis  
16 which is what allowed us to estimate 60 to 90 days from the  
17 time that we received all of the information back to our  
18 office.

19 THE COURT: Right.

20 MS. RODRIGUEZ-FEO: Obviously, as the CISO in the  
21 case I don't deal specifically with the personnel issues  
22 because we have a separate group that deals with the personnel  
23 issues. So I'm -- they are reporting back to me and giving me  
24 updates regarding the clearances. I have been told that there  
25 are two attorneys that are currently eligible for clearance.

1 Ms. McCook and Mr. Barnard are both currently eligible to  
2 receive security clearances. I have been in touch with both of  
3 them to schedule the security briefings that are required prior  
4 to them obtaining access. I understand that one is in  
5 Knoxville and one is in the DC area. So we will have to  
6 logistically schedule those in-person briefings. I do  
7 understand that Mr. Barnard will likely receive his clearance  
8 first being that we have a meeting scheduled for next Tuesday  
9 in DC.

10 THE COURT: Okay. So McCook and Barnard -- all they  
11 need to be is sworn in, basically; right?

12 MS. RODRIGUEZ-FEO: Correct.

13 THE COURT: Whatever that term is. Read in. Is that  
14 right?

15 MS. RODRIGUEZ-FEO: They do. They need to sign the  
16 nondisclosure agreements and be read in. Yes, sir.

17 THE COURT: Okay. And that'll take place as soon as  
18 you can get to them?

19 MS. RODRIGUEZ-FEO: Correct. I believe Tuesday of  
20 next week we have something scheduled for the briefing for  
21 Mr. Barnard.

22 THE COURT: All right. And then what about the  
23 remaining three? Any kind of timeline on those?

24 MS. RODRIGUEZ-FEO: So I'll have to check back with  
25 our personnel team. What I am understanding at this time is

1 that, obviously, we can predict 60 to 90 days, but that's a  
2 prediction without having the information that comes through on  
3 the background investigations in front of us. In order to  
4 grant access early on on the expedited basis we need a go ahead  
5 for what's called an "interim allowance", and at this time I am  
6 being told that no one else is eligible for that interim  
7 allowance which means we have to go back to personnel and the  
8 FBI to look into the details of the background investigations.  
9 I can report to the Court and to defense counsel and the  
10 government as soon as I hear more from my personnel department.

11 THE COURT: Okay. What is your best gut instinct  
12 about how long it might take to get those others cleared? I  
13 know you don't like to do that.

14 MS. RODRIGUEZ-FEO: Your Honor, it's really hard to  
15 say without having the information in front of me.

16 THE COURT: Right.

17 MS. RODRIGUEZ-FEO: It could be longer than 90  
18 days --

19 THE COURT: Okay.

20 MS. RODRIGUEZ-FEO: -- if we receive information that  
21 they have further requirements regarding their background  
22 investigations.

23 THE COURT: So right now we just don't have any idea.

24 MS. RODRIGUEZ-FEO: Yes, Your Honor.

25 THE COURT: Okay. All right.

1 Well, Mr. Chester, if you don't mind stepping back up.

2 Thank you very much, Ms. Rodriguez-Feo.

3 MS. RODRIGUEZ-FEO: Yes, Your Honor.

4 THE COURT: We got a better idea now. We got two  
5 that looks like they're ready to go pretty quickly. Would  
6 those two be ones you would look to to pull some of the  
7 laboring on getting those documents reviewed?

8 MR. CHESTER: Yes.

9 THE COURT: Okay. So let's look again at the  
10 schedule. September 15<sup>th</sup> is that next deadline. If you have  
11 two of your lawyers come online, I guess you would say, by  
12 Wednesday of next week, how long will they then need to review  
13 those 400 pages plus the 8000 that y'all have had for a little  
14 bit of time now?

15 MR. CHESTER: Yeah, and we've been reviewing the 8000  
16 just so the Court is aware.

17 THE COURT: So the 8000 is really not that big of a  
18 deal. It is more the 400. How long do you think y'all need to  
19 review that stuff and get the pretrial motions filed? Keeping  
20 in mind the standard is 14 days from the date of production by  
21 the government.

22 MR. CHESTER: The review can happen, I think, quickly  
23 if it's 400 pages. The concern I have is they can't discuss  
24 with anybody else on our team that doesn't have a clearance  
25 what they've seen and what steps should be taken from that.

1 THE COURT: Right. And it goes back to my thought  
2 of, you know, okay, two lawyers might not be enough. Three  
3 probably is. Four gets you in the range of satisfying the  
4 Constitution and then some. So how many do we really need to  
5 satisfy that right to counsel keeping in mind at the same time  
6 we've got to satisfy her right to a speedy trial?

7 MR. CHESTER: I understand. What I would say is  
8 Ms. McCook is the youngest member of our team, I believe.  
9 Mr. Barnard is the most recent member of our team. Mr. Whitley  
10 is the most senior member of our team along with Mr. Bell, of  
11 course, who I don't want to take any disrespect.

12 MR. BELL: Thank you.

13 THE COURT: I don't know that he took exception to  
14 being excluded from that --

15 MR. CHESTER: No offense.

16 THE COURT: -- description.

17 MR. CHESTER: So in a traditional setting, as Your  
18 Honor is well aware, a younger lawyer would probably do some of  
19 the leg work and then after that leg work would confer with a  
20 more senior lawyer of, "Here's what I have seen; --

21 THE COURT: Right.

22 MR. CHESTER: -- let's talk about strategy." So the  
23 concern with not having Mr. Whitley read into the case is going  
24 to prevent decisions from being made, for example, on what sort  
25 of pretrial motions need to be filed, what sort of experts need



1 to be retained, you know. I put myself a notch below  
2 Mr. Whitley. I can't talk to them as well because I don't have  
3 my clearance. That's the only concern I have.

4 So I want to give you a hard date, but I -- you know, I  
5 don't want to say 14 days and I have to come back and say, "I  
6 don't have my clearance; they can't talk to me; they're not in  
7 a position to make decisions on behalf of Ms. Winner;" and set  
8 myself up to fail before Your Honor which is something I do not  
9 want to do.

10 THE COURT: All right. Well, let's look at it both  
11 ways, then. I guess my first question would be if we just --  
12 if we said four lawyers was enough, when would we set the  
13 deadline? If we didn't worry about the other lawyers getting  
14 clearances before the pretrial motion deadline, what kind of  
15 time do you think would be reasonable for those four lawyers to  
16 look through the 400 pages and then decide and file pretrial  
17 motions?

18 MR. CHESTER: Okay. So let me make sure I understand  
19 the Court's question. So you're talking about the four lawyers  
20 that are --

21 THE COURT: Cleared.

22 MR. CHESTER: -- that are cleared?

23 THE COURT: Yeah, if we just went -- and I am going  
24 to ask it both ways because I got to consider what to do here.

25 MR. CHESTER: I understand.

1 THE COURT: But if we just went with the four lawyers  
2 that you got cleared already and said they were going to ride  
3 the horse all the way through pretrial motions if no one else  
4 gets approved, how much time do you think would be necessary  
5 for them to review the 400 pages and then file a pretrial  
6 motion?

7 MR. CHESTER: I think a review of the 400 pages could  
8 take place in a week or two.

9 THE COURT: Okay.

10 MR. CHESTER: Just reviewing the documents.  
11 Decisions about what to file and when to file amongst those  
12 lawyers I'm guessing would take, you know, let's say -- let's  
13 say a month from that to determine what to do and then begin  
14 the process of filing and filing those motions -- researching  
15 and filing those motions.

16 THE COURT: Well, the two weeks doesn't surprise me.  
17 The one month to kick around what to do next does. I mean, you  
18 got motion to suppress. You got motion to dismiss indictment.  
19 You know, there are a fair number of motions you can file, but  
20 not an infinite variety and number of them; right? So I would  
21 think that it wouldn't take a month to make those decisions.

22 MR. CHESTER: The only thing I am factoring in there,  
23 Judge, is the notion of having to employ experts as well. For  
24 example, I don't have to go into detail on this, Judge, but,  
25 again, there are several elements of an Espionage Act case that

1 we are going to require expert help on. I can just tell you  
2 that right now.

3 THE COURT: But that's trial prep. That's not  
4 pretrial motions; right?

5 MR. CHESTER: Well, I think, respectfully, Judge, I  
6 think that having an expert on our team, whether they be a  
7 consulting expert or testifying expert, is going to inform our  
8 decisions, on whether there are pretrial motions to file.

9 THE COURT: I don't understand that. I mean, there  
10 are legal bases for filing pretrial motions. I don't know why  
11 an expert needs to tell you whether you have that basis or not.

12 MR. CHESTER: Let me see if I can give an example  
13 that might make some sense. So one of the elements of this  
14 offense that Ms. Winner has been charged with is whether or not  
15 the disclosure of this particular document harmed the national  
16 security of the United States. Having an expert on our team  
17 who is versed in what that means and what relative to that  
18 document was already out in the public domain in terms of  
19 harming the national security is going to inform our strategy  
20 on going forward basis.

21 THE COURT: At trial. But how does that affect  
22 pretrial motions? You can't file a summary judgment in a  
23 criminal case.

24 MR. CHESTER: I know I can't file a summary judgment  
25 in a criminal case, Judge. I do think that if I wait until a

1 month before trial to engage an expert, the notion of a public  
2 domain defense in this case, Judge, is going to be very time  
3 consuming.

4 THE COURT: Right. But we're not talking about trial  
5 right now. We're talking about pretrial motions. Why do you  
6 need time to consult with an expert before you file pretrial  
7 motions?

8 MR. CHESTER: Well, you've put me on the spot. I  
9 think I would say that if we file vagueness motions as it  
10 relates to what the term "national defense information" means,  
11 whether harm has to be proven, whether harm has been adequately  
12 alleged in the indictment -- I think those are things that our  
13 arguments are going to be informed by opinions that we get from  
14 experts.

15 THE COURT: Okay. All right. Well, I am going to  
16 take that under consideration. So this two weeks plus one  
17 month deadline. Now let's go the opposite route. What if we  
18 -- if we're talking about getting everybody on board from your  
19 law firm before we file pretrial motions, I guess what you  
20 would propose in that regard is that we just set this  
21 September 15<sup>th</sup> deadline off the date of the clearance of the  
22 remaining three or one key member of that group?

23 MR. CHESTER: Well, I would suggest that I think  
24 either or both of Mr. Whitley or myself need to be -- need to  
25 have our clearances and need to be read in so we can

1 participate in those discussions about what pretrial litigation  
2 can be filed.

3 THE COURT: Okay. So that would be your  
4 preference -- you and Mr. Whitley -- and then we would set it  
5 then. Would you need the same two weeks to review and one  
6 month to make a decision if -- what we're assuming is that  
7 there is going to be a delay of time; right?

8 MR. CHESTER: Yes.

9 THE COURT: And y'all are going to be working on the  
10 discovery in the meantime. So once you two get cleared,  
11 assuming all of the discovery has already been looked at, how  
12 much time would y'all need to confer with everybody and make  
13 those decisions?

14 MR. CHESTER: Mind if I confer with ---

15 THE COURT: Sure. Yeah.

16 MR. CHESTER: Judge, again, I would suggest once  
17 Mr. Whitley and I get cleared the review will be ongoing as you  
18 mentioned by the folks that have already been cleared. So that  
19 time will have passed. There won't be any delays as a result  
20 of that. Again, I would say another three to four weeks for us  
21 to get in, discuss it, strategize, research, prepare, and file  
22 pretrial motions.

23 THE COURT: Okay. Well, look, I know this took a  
24 while and I kind of pressed you a little bit, but it's very  
25 helpful to me the information that you've given me in that

1 regard.

2 MR. CHESTER: I appreciate it, Judge. Thank you.

3 THE COURT: What about the other deadlines? So let's  
4 just say that we've pushed these back. I know the government  
5 response deadline we'll talk with them about, but trial -- once  
6 you get pretrial motions filed in the case -- let's just say we  
7 push these deadlines back in the manner that you're talking  
8 about where we're pushing your pretrial motions deadline back,  
9 let's just say, eight weeks for the sake of conversation here  
10 today assuming the clearance process is pretty quick for you  
11 and Mr. Whitley. We're looking at the full month of September,  
12 the full month of October to complete that process until you  
13 get your motions filed by the first of November. After that,  
14 how long are you thinking you would need? What is a reasonable  
15 amount of time from that date until trial?

16 MR. CHESTER: So the -- and I will give you a date.  
17 This is going to be a longer answer than I know you just asked  
18 me.

19 THE COURT: Right.

20 MR. CHESTER: The two unknowns that I can think of  
21 off the top of my head are the expert issues and the CIPA  
22 hearings. I know Ms. Edelstein has more experience than any of  
23 us in this courtroom with CIPA -- certainly a lot more than me.  
24 My understanding is of both of those issues are that they may  
25 take significant amounts of time. Depending on assuming we

1 pick classified information to use in trial and the government  
2 says we need to redact and substitute language and there's  
3 haggling over that substitute language, that may take some time  
4 and, again, Ms. Edelstein can certainly talk more about that in  
5 her experience than me.

6         Again, the expert thing is going to take us some time.  
7 So, again, I would like to get to a point where, you know, I  
8 can see the classified material before I commit myself. If  
9 Your Honor wants a date today, we can set a date today with the  
10 understanding that, again, with extraordinary circumstances  
11 changing we can come back and revisit it.

12         So if you want a date, I mean, I guess I'd like to hear  
13 from Ms. Edelstein and her experience with these CIPA hearings  
14 as to how long they generally take and how that might impact  
15 the schedule after that pretrial motion deadline.

16         THE COURT: Because, I mean, you look at expert prep  
17 which is the main thing you're talking about you're concerned  
18 about -- I would think with most of these issues you're already  
19 kind of formulating strategy. You already talked about the  
20 extent to which it's available in the public, expert testimony  
21 perhaps about damage to the national interest and the like.  
22 So, I mean, you've already gotten kind of the core of that that  
23 you need probably to start identifying the subject matters on  
24 which you need experts. That processing to me, I would think,  
25 could go ahead and start, particularly since you've already

1 gotten the 8000 of the 8400-page discovery, and so I don't know  
2 that once you get to the criminal pretrial motions deadline  
3 there would be a lot left for you to do in that regard.

4 How much -- how much time do you think -- assuming that we  
5 can roll right through the CIPA part of this, I am going to  
6 work as hard on that as possible.

7 MR. CHESTER: So will we.

8 THE COURT: I don't ask any more of the lawyers than  
9 I ask out of myself, and so it took me like five days, I think,  
10 to turn around the last order we had to write in this case, but  
11 it wasn't because I was on vacation. I was. It was because I  
12 had some people I had to clear some language through to make  
13 sure that CISO was not offended by any of the things that we  
14 had proposed in there. So that back and forth took a little  
15 longer. I wanted to enter it the next day after the motion was  
16 ripe for my review and I want everybody to treat it with that  
17 sense of urgency.

18 So with those things in mind and the thought that, you  
19 know, you have a couple of experts you might want to retain  
20 that you can probably go ahead and start talking to, tell me  
21 when a reasonable time to try it would be.

22 MR. CHESTER: I would say four months after those  
23 deadlines we previously discussed.

24 THE COURT: Okay.

25 MR. CHESTER: If you want a date, again, with the



1 ability to come back if circumstances change, but if you want a  
2 date, that's what I would say -- I would suggest.

3 THE COURT: Okay. So that would be -- instead of  
4 November 1<sup>st</sup> for criminal pretrial motions deadline, just  
5 generally speaking; so you talking about November, December,  
6 January, February, first of March?

7 MR. CHESTER: Somewhere in that range. Yes, Your  
8 Honor.

9 THE COURT: Okay. All right. Is there anything else  
10 that you wanted to talk with me about in terms of the schedule?

11 MR. CHESTER: Nothing. Thank you, Your Honor. Thank  
12 you for your time.

13 THE COURT: I appreciate it. All right.

14 Ms. Edelstein, we've talked a lot without involving you  
15 much. Give me your thoughts on these topics.

16 MS. EDELSTEIN: Thank you, Your Honor. So the way  
17 that CIPA works -- and I know that we've tried to present this  
18 information to you -- is that it's an iterative process. So  
19 from the government's perspective the next thing that needs to  
20 happen is that a Section Five needs to be filed. As Your Honor  
21 knows, the government complied with its Friday deadline and at  
22 this point the next thing that really needs to happen is the  
23 Section Five deadline. I am happy to speak about the things  
24 that have to occur after that, but it's really hard to project  
25 out the case without knowing when the Section Five will be

1 filed and what it will look like.

2 THE COURT: Well, I assume, Mr. Chester, when we  
3 talked about criminal pretrial motions the same thoughts would  
4 probably be expressed by you in terms of the deadline for that  
5 Section Five CIPA motion; right?

6 MR. CHESTER: The only caveat to that being assuming  
7 that 400 pages is the entirety of the universe we're ever going  
8 to get --

9 THE COURT: Right.

10 MR. CHESTER: -- classified material is relevant, I  
11 think that's fair.

12 THE COURT: Okay.

13 MR. CHESTER: The only caveat is if we think there  
14 should be additional things and we ask the government and the  
15 government says no, we have to come before Your Honor on a  
16 discovery dispute, that might change that deadline.

17 THE COURT: Okay.

18 MR. CHESTER: But if that 400 is it, then, you know,  
19 I think that would be fair.

20 THE COURT: Okay. All right. Well, I want y'all to  
21 understand, too, that when it comes to discovery matters I'm  
22 available at your discretion. If there is a discovery matter  
23 that pops up on a Tuesday morning and you want to talk to me  
24 about it, I'll make time on Tuesday to get on the phone with  
25 you guys and talk about whatever the problem is. We do it in

1 civil cases a lot. There aren't as many discovery issues in  
2 criminal cases because the open file discovery policy that the  
3 government follows in a case.

4 I'm not telling you that's an assurance that the  
5 government has given you everything you need for the case, but  
6 that's why we don't have as many discovery issues in criminal  
7 cases. But if you run into any kind of disagreement that you  
8 want some direction from me in terms of what should happen  
9 next, I don't want to, you know, waste six weeks on motions and  
10 responses and replies. My preference is to get you guys here  
11 very quickly and talk about it, and, typically, what I find  
12 with discovery is that we're able to get it resolved almost  
13 immediately when you do it that way. So I wanted to make sure  
14 we keep that in mind.

15 Ms. Edelstein, did you have any other -- so if they filed  
16 their Section Five motion at the same time they filed their  
17 other pretrial motions somewhere in the end of October,  
18 beginning of November -- if we went with that deadline, then do  
19 you have any thoughts on when after that we need to set the  
20 next deadline which is for the government response to the  
21 defense motion and Section Five CIPA notice?

22 MS. EDELSTEIN: Sure. If we're talking about the  
23 initial response to the notice in which the government will  
24 opine on whether the defense's notice under CIPA Section Five  
25 is adequate in and of itself, we can do that pretty quickly. I

1 think that we can probably respond to that in, I'd say, two  
2 weeks.

3 THE COURT: Okay.

4 MS. EDELSTEIN: But in terms of moving on to the  
5 Section Six stage it's going to require very extensive  
6 coordination with other government agencies which is in  
7 addition to, you know, the coming up with the arguments and the  
8 briefing. That's something the government has to do, but the  
9 government also has this extra burden of coordination.

10 THE COURT: Right.

11 MS. EDELSTEIN: And that could take a considerable  
12 amount of time.

13 THE COURT: Okay. So when do you think -- what's the  
14 reasonable timeframe given the 400 pages that we're dealing  
15 with here and maybe some additional content that the defense  
16 notifies us that they want to present at trial? What kind of  
17 timeline are you thinking would be reasonable for the Section  
18 Six hearing?

19 MS. EDELSTEIN: Assuming that no other classified  
20 discovery is turned over, I think that probably within, I'd  
21 say, maybe six weeks we could get ready, but I'm also -- I'm  
22 also saying that off the cuff without having coordinated with  
23 the other members who are on the phone and also with the  
24 relevant government agencies.

25 THE COURT: Okay. Six weeks and that would be from

1 the date that the government files the Section Five notice or  
2 from the date that you file your response brief?

3 MS. EDELSTEIN: You're asking whether that's the date  
4 from the defense filing their Section Five notice?

5 THE COURT: Right. Or from the date of your response  
6 to that notice.

7 MS. EDELSTEIN: So I would say it would be  
8 approximately six weeks from whenever we have an adequate  
9 Section Five notice. So if the defense were to file their  
10 Section Five notice and the government came back and said,  
11 "Okay. We understand what classified information the defense  
12 is trying to notice", then it would -- then that would be six  
13 weeks, but say that the government comes back two weeks and  
14 says, "This notice doesn't have enough specificity in it", for  
15 example, and the defense has to file a new notice, then  
16 whenever we have that properly-noticed Section Five, then it  
17 would be six weeks from that date.

18 THE COURT: Okay.

19 MS. EDELSTEIN: And, again, the six weeks is an  
20 estimate.

21 THE COURT: Okay. And what if I kind of pressed you  
22 the same way I did Mr. Chester and said I am working on this  
23 case at midnight if I need to because I want to get this thing  
24 tried as quickly as possible; I am available any time I need to  
25 be for this case to get it rolling and get it where it needs to

1 be as quickly as possible -- how much time could we knock off  
2 that six weeks?

3 MS. EDELSTEIN: Judge, I can assure you that is the  
4 way the government is operating. The CIPA motion that was  
5 filed on Friday is -- in cases I've been involved with, I  
6 cannot even stress to you how short to you a timeframe it was  
7 for the government to get together with the motion. It's not  
8 only the prosecutors but there are other agency employees who  
9 are demonstrating that ethic that we're asking for.

10 THE COURT: Okay. So the six weeks, is that with  
11 that in mind -- that type of effort in mind?

12 MS. EDELSTEIN: Yes, sir, Your Honor. The  
13 coordination that it requires is extremely extensive.

14 THE COURT: Okay. All right. Is there anything  
15 further regarding the schedule of deadline? What about trial?  
16 How long after we have that Section Five hearing before trial?

17 MS. EDELSTEIN: You know, it's not knowing how the  
18 Five and Six are going to proceed. I don't know that I could  
19 in good faith tell you a reasonable estimate for a trial in  
20 this case.

21 THE COURT: Well, to me trial prep starts now; right?

22 MS. EDELSTEIN: Absolutely, Your Honor.

23 THE COURT: And so I don't know this process of going  
24 through the Section Five hearing and everything should really  
25 sidetrack that. To me we ought to be moving on both of those

1 things at the same time.

2 MS. EDELSTEIN: And we fully intend to, Your Honor.

3 THE COURT: And so give me what you think is a  
4 reasonable trial date if all of this occurs in a fluid motion  
5 without any extraordinary developments.

6 MS. EDELSTEIN: So if -- let's just say for  
7 argument's sake we have an adequate Section Five notice in  
8 November. Then I think that perhaps March this case could go  
9 to trial.

10 THE COURT: Okay. Well, when you say "perhaps", I  
11 want you to be honest with me. Tell me what you think is  
12 reasonable.

13 MS. EDELSTEIN: Your Honor, this is an unusual CIPA  
14 case. CIPA cases are often drawn out for years as the defense  
15 has indicated.

16 THE COURT: Right.

17 MS. EDELSTEIN: I am familiar with a CIPA case in  
18 which a CIPA Section Four motion wasn't filed until two years  
19 in the process. However, as Your Honor has indicated in terms  
20 within CIPA cases this case is also unusual because we do have  
21 a pretty straight forward case in terms of the conduct, single  
22 defendant, a number of factors that you recognized, and,  
23 accordingly, we think discovery should be cabined in this case  
24 which will move along these deadlines pretty quickly.

25 THE COURT: Okay.

1 MS. EDELSTEIN: So working along the assumption that  
2 discovery is cabined as the government believes that it should  
3 be in this case, I do think we could bring this case to trial.

4 THE COURT: Okay. All right. Is there anything else  
5 you'd like to say today in any regard whether in respect to  
6 these scheduling issues or any other topic?

7 MS. EDELSTEIN: I will quickly point out just because  
8 I know we're not here to discuss elements of defense, but the  
9 defense did say that the government has to prove damage that  
10 occurred from the defendant's disclosure and that is not an  
11 element of defense. So I just wanted to make sure that's clear  
12 for the record.

13 THE COURT: All right. Thank you much.

14 Mr. Chester, Mr. Bell, Mr. Whitley, anything further that  
15 we need to talk about in this case today from your perspective?

16 MR. BELL: No, Your Honor.

17 THE COURT: Okay. We do need to move into a closed  
18 session where the only people who can be present in the room  
19 are those who have security clearances because I want to make  
20 sure that Ms. Rodriguez-Feo and her office has a chance to go  
21 through some of I think the precautions we need to observe in  
22 this case to make sure we're all on the same page about that  
23 before we leave today, and I think that means that the people  
24 participating by phone will not be participating anymore  
25 because that's not a secure line.



1 Is that right, Ms. Rodriguez-Feo?

2 MS. RODRIGUEZ-FEO: Yes, Your Honor.

3 THE COURT: Okay. So Mrs. Solari, are you there?

4 MRS. SOLARI: Yes, sir, Your Honor.

5 THE COURT: And, Mr. Aaron, are you there?

6 MR. AARON: Yes, Your Honor.

7 THE COURT: I am going to have to ask that you sign  
8 off. Before I do that, is there anything that you two would  
9 like to add to the discussion we've already had?

10 MRS. SOLARI: Nothing from me, sir.

11 David?

12 MR. AARON: Nothing from me, Your Honor.

13 THE COURT: Okay. And before we hang up,  
14 Mrs. Solari, there was a phone message I left for you last week  
15 about a 2703 request that you filed with the court. Did you  
16 get that message?

17 MRS. SOLARI: Yes, sir. I received a forwarded  
18 message from Nancy Greenwood from one of your law clerks about  
19 a 2703. So I responded back to Nancy. She asked me could --  
20 did someone call me directly? Because if they did, I am very  
21 sorry, Your Honor. I missed that.

22 THE COURT: Yeah, I left you a voice message sometime  
23 last week.

24 MRS. SOLARI: Oh, I'm sorry. I didn't purposely  
25 ignore you. I just wasn't aware of it. I apologize. Would

1 you like me to contact you later on in the day to deal with  
2 that?

3 THE COURT: Yes.

4 MRS. SOLARI: Okay, sir. I'll do that.

5 THE COURT: Okay. So nothing further from either one  
6 of you?

7 MRS. SOLARI: No, sir.

8 THE COURT: All right. We'll have you sign off at  
9 this time. Thank you very much.

10 MRS. SOLARI: Thank you, Your Honor.

11 MR. AARON: Thank you.

12 THE COURT: All right. We're going to take a short  
13 recess so that we can set up the room in the manner that we  
14 need to, and, certainly, if you don't have a security clearance  
15 and you're not involved in this case, I'm sorry to do this, but  
16 we're going to have to ask you to leave the room at this time.

17 (The hearing is concluded.)

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Lisa H. Davenport, RPR, FCRR  
Federal Official Court Reporter