THE AIPAC PROSECUTION SUFFERS A CRIPPLING BLOW

Most of you know about the AIPAC criminal case that has been simmering below the main media radar since it was filed in May, 2005. In a nutshell, the indictment alleges that Lawrence Franklin, a DOD/Pentagon official working in Defense Secretary Rumsfeld's office (with everyone's favorite public servants Doug Feith and Paul Wolfowitz), passed top-secret information relating to Iran and Iraq to Steve Rosen, AIPAC's then-policy director, and Keith Weissman, a senior Iran analyst with AIPAC. Franklin pled guilty and was sentenced in January, 2006.

In the three, count em three, years since Franklin's plea, the government has pressed on with the prosecution of Franklin's co-defendants Rosen and Weissman. That may be nearing an end though with a critical decision issued by the trial judge in the case, Judge Thomas Ellis of the Eastern District of Virginia (EDVA) on February 17. The opinion is not only important for the AIPAC case, but for many, if not all, of the secrecy cases that are currently in play in Federal courts across the country.

A little background is in order. The defendants, Rosen and Weissman, sought to introduce the expert testimony of Bill Leonard, a retired United States government official with substantial experience and expertise in the field of information classification, as part of their defense at trial. Leonard, who retired last year, was formerly the director of the government's Information Security Office responsible for oversight of the entire U.S. classification system.

Leonard, from all appearances, was willing to testify, however, fearing prosecution himself, he insisted on a subpoena and then personally

moved to quash the subpoena on the ground that his testimony might be barred by 18 USC 207, which restricts the activities of former executive branch officers and employees. The government, not wanting to be crucified by their own former guy, through the Department of Justice joined in Leonard's motion to quash. Defendants Rosen and Weissman's attorneys, obviously, opposed the motion to quash and argued that section 207 did *not* preclude Leonard's testimony, and asserted that the court should enter an order directing Leonard to give said testimony at trial. Effectively, Leonard was seeking cover from the court so he could not get jerked around by the government for being wiling to testify. Very smart move by a very smart man, especially since the Bush/Cheney DOJ prosecutors were threatening that he might be liable for up to a year in jail if he testified.

Judge Ellis roundly slapped down the government and gave Leonard the court's blessing and order to testify as requested by the defense. But the more interesting, by far, portion of Ellis's opinion is contained in the discussion portion. From the February 17 memorandum opinion:

> It is apparent from the indictment's allegations, the elements of the charged offenses, and the parties forecasted trial testimony that a major battleground at trial will be the parties' dispute over whether the information defendants are alleged to have obtained and disclosed in each of the various episodes qualifies as NDI (National Defense Information)….. This dispute will be expressed at trial largely through the testimony of competing experts. And it is clear from the parties' forecasts of their experts' trial testimony that this NDI dispute will be a major focus of the trial.
> …
> In such a prosecution, evidence that information is classified does not, by itself, establish that the information

> is NDI; evidence that information is classified is, at most, evidence that the government intended that the designated information be closely held. Yet, evidence that information is classified is not conclusive on this point; it is open to a defendant to show that the government in fact fails in the attempt to hold information closely because, for example, the information was leaked or was otherwise in the public domain. Further, the government's classification decision is inadmissible hearsay on the second prong of the NDI definition, namely whether unauthorized disclosure might potentially damage the United States or aid and enemy of the United States.

Now the interesting thing here is that the court is accepting that classified information, whether or not it ought to be classified, and whether or not it will necessarily harm the United States if made public, is not the exclusive domain of the Executive, but may be intruded upon by the court. That is pretty important to a lot of cases currently being litigated (and routinely discussed on this blog) including, but not limited to, *al-Haramain* and the consolidated wiretapping cases in front of Judge Vaughn Walker in NDCA and *Binyam Mohamed v Jeppesen DataPlan*. Without specifying to what degree, the court even intimates that some part of the decision may ultimately be made by the jury.

You know, from a logic perspective this is not all that earth shattering, but from a legal perspective,it is pretty eye opening and sure does poke an eye in the spirit of the Bush/Ceney, and now Obama, theory that the "executive is everything on classification". It is a shame the memorandum opinion isn't usable as precedent particularly, but it is bound to make the rounds of knowledge among judges and litigants. In fact, it wouldn't be surprising if

a copy anonymously got delivered to Vaughn Walker's and Mary Scroeder's chambers. Here is what Steve Aftergood had to say:

> More than almost any other litigation in memory, the AIPAC case has placed the secrecy system itself on trial. In Freedom of Information Act lawsuits and other legal disputes, courts routinely defer to executive branch officials on matters of classification. If an agency head says that certain information is classified, courts will almost never overturn such a determination, no matter how dubious or illogical it may appear to a third party.
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> But in this case, it is a jury that will decide whether or not the information in question "might potentially damage the United States or aid an enemy of the United States." Far from granting automatic deference on this question, Judge Ellis wrote that "the government's classification decision is inadmissible hearsay"!

Yep.

The other interesting portion of Judge Ellis' discussion involved the superlative credentials of Bill Leonard. Ellis clearly understands that Leonard is basically the whole ball of wax in the case for Defendants Rosen and Weissman and their desired acquittal, and he so indicates. But, in so doing, Ellis makes sure to clearly prick the government by delineating some of Leonard's dead on criticisms of the government's classification abuses:

> It remains to review briefly defendants' forecast of Leonard's trial testimony. Understandably characterizing Leonard's experience and expertise as "unsurpassed", defendants, by counsel, advise that Leonard has examined the alleged NDI and classified and

> unclassified documents in this case and is prepared to offer testimony, *inter alia*, in general, as follows:
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> > 1. A description of the classification practices and procedures of the government, **including the (in his opinion) pervasive practice of over-classification of information, namely the practice of classifying information that is neither closely held, nor damaging to the national security if disclosed**;
> >
> > 2. **A description of the "back channel practice", i.e. the practice of high-level officials disclosing classified information to unauthorized persons (e.g. journalists and lobbyists) for the purpose of advancing national security interests**;
> >
> > 3. His opinions as to whether the alleged NDI in this case qualifies as such, namely whether the information allege to be NDI was (i) closely held by the government and (ii) would be potentially damaging to the United States or helpful to an enemy of the United States if disclosed to an unauthorized person; and
> >
> > 4. Whether, in the circumstances of this case, the defendants reasonably could have believed that their conduct was lawful.
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> Given Leonard's work experience and professional qualifications, it is not surprising that defendants consider him their "most important and irreplaceable"

> witness. (Emphasis added)

Ouch. Bill Leonard thinks that what went on in the Bush/Cheney Administration in terms of over-classification and secrecy is a bunch of bull, and he is going to take them to the woodshed on it. And he isn't real crazy about their selectively leaking of classified information to help themselves and punish others either. Most significantly, he is ready, willing and able to take the stand and say so under oath. Booyah!

As Judge Ellis noted, the case has already been reduced to effectively a battle of experts on multiple elements that will determine whether or not there is reasonable doubt. That is never good for the prosecution in a technical criminal case – jurors eyes and attention just glaze over and that is that, and all it takes for reasonable doubt. Here, however, there is then the additional factor that when the foundation is laid for Leonard's testimony, by going over his *curriculum vitae*, well it's over. It will be a battle of midgets v. a giant; the Michael Jordan of classification experts. And the best part, when the government tries to paint him as just a defense schlub, the defense attorneys will just go back over Leonard's goverment credentials again and then whip out the fact that Leonard actually fought appearing and testifying, and had to be forced in by subpoena and court order to do so. Then he unloads with his criticism and testimony against the government's acts in this case, and their practices in general. Again, here is Steve Aftergood's similar take on the meaning of Judge Ellis' decision on February 17:

> In other words, the prosecution probably just lost this case.

That is exactly right. Game. Set. Match.