EMPTYWHEEL MAKES CIPA HISTORY

Yesterday, Judge Aileen Cannon issued a surly order, acceding to Jack Smith's request to protect witnesses. In reversing herself, Cannon scolded Smith for not making a more fulsome case to seal information.

> Only now, after failing to meaningfully "raise argument[s] or present evidence that could have been raised" in these responses, Wilchombe, 555 F.3d at 957, the Special Counsel moves for reconsideration and argues, in no uncertain terms, that the Court committed "clear error" by applying an unobjected-to legal standard [ECF Nos. 267, 282]

Ultimately, Cannon argued the 11th Circuit precedent on this — but not on other — types of pretrial motions is undecided.

> Having done so, the bottom line is this. The Eleventh Circuit has not specifically addressed the instant question: whether, in a criminal proceeding, the First Amendment qualified right of access attaches to discovery materials referenced or attached in support of a publicly filed Rule 12(b) motion to compel discovery under Rule 16. Nevertheless, the most faithful application of Supreme Court and available Eleventh Circuit authority is that Defendants' MTC in this case is not subject to a public right of access, whether constitutional or common law in nature, because it is a still, ultimately, a discovery motion as distinct from a substantive pre-trial motion requiring judicial resolution on the merits.

Remember: One reason Trump has these materials to attempt to publicly release is because Smith was more generous in discovery than the rules require. Cannon did not permit Smith to seal information that would otherwise be Jencks, aside from information identifying witnesses.

> The Court reaches a different conclusion as to the Special Counsel's broad-based request to seal the substance of all substantive Jencks statements referenced in and/or attached to the MTC [ECF No. 278 p. 2 (arguing for wholesale sealing of potential witnesses' statements to avoid "influenc[ing] the testimony of other witnesses or the jury pool")]. By granting this sweeping and undifferentiated request—which the Special Counsel also raises in seal requests associated with Defendants' substantive pretrial motions [See ECF No. 348 pp. 6–7]—the Court would be authorizing the categorical sealing of large portions of the record attached in support of critical pretrial defense motions.

Meanwhile, in SDNY, I won (or rather, Judge Jesse Furman used my intervention (and that of Inner City Press) as an excuse to grant disclosure of something even more rare: Redacted transcripts from the CIPA 6 conference in the Josh Schulte case.

> [T]he Court concludes that CIPA overrides any common law right of public access to the transcripts of a closed CIPA Section 6 hearing, at least where, as here, the court determines that the classified information may not be disclosed or used at trial. But the Court concludes that the public has a qualified right of public access to such transcripts under the First Amendment. It follows that the transcripts at issue here, redacted to protect national security or to preserve other higher

> values, must be unsealed.

As Furman noted, he had already disclosed some of this in a conference on jury instructions; he had distinguished those who disseminated already-released classified information if they knew it was classified (and therefore, by re-disseminating it, would confirm that it was classified) from those who did not have means to know.

> I gave you two hypotheticals. I think one is where a member of the public goes on WikiLeaks today and downloads Vault 7 and Vault 8 and then provides the hard dive with the download to someone who is not authorized to receive NDI, and I posed the question of whether that person would be guilty of violating the Espionage Act and I think your answer was yes. That strikes me as a very bold, kind of striking proposition because in that instance, if the person is not in a position to know whether it is actual classified information, actual government information, accurate information, etc., simply providing something that's already public to another person doesn't strike me as — I mean, strikes me as, number one, would be sort of surprising if that qualified as a criminal act. But, to the extent that the statute could be construed to [] extend to that act one would think that there might be serious constitutional problems with it.
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> I also posed the hypothetical of the New York Times is publishing something that appears in the leak and somebody sharing that article in the New York Times with someone else. That would be a crime and there, too, I think you said it might well be violation of the law. I think to the extent that that would extend to the New York Times reporter for reporting on what is in the leak, or to the extent

> that it would extend to someone who is not in position to know or position to confirm, that raises serious constitutional doubts in my mind. That, to me, is distinguishable from somebody who is in a position to know. I think there is a distinction if that person transmits a New York Times article containing classified information and in that transmission does something that confirms that that information is accurate — right — or reliable or government information, then that's confirmation, it strikes me, as NDI. But it just strikes me as a very bold and kind of striking proposition to say that somebody, who is not in position to know or does not act in a way that would confirm the authenticity or reliability of that information by sharing a New York Times article, could be violating the Espionage Act. That strikes me as a kind of striking proposition.
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> So all of which is to say I think I have come around to the view that merely sharing something that is already in the public domain probably can't support a conviction under this provision except that if the sharing of it provides something new, namely, confirmation that it is reliable, confirmation that it is CIA information, confirmation that it is legitimate bona fide national defense information, then that confirmation is, itself, or can, itself, be NDI. I otherwise
> think that we are just in a terrain where, literally, there are hundreds of thousands of people unwittingly violating the Espionage Act by sharing the New York Times report about the WikiLeaks leak.

Furman has given the government an opportunity to further redact the transcripts, but ordered

them otherwise released on May 3 — meaning they'd be available before the follow-up hearing in the Assange extradition case, on which — because they pertain to the First Amendment — they may have bearing.

I'm not entirely sure this move is as unprecedented as Furman makes out. Some of the CIPA materials in the Scooter Libby case were released.

But particularly because this may affect the Assange extradition and particularly because the CIPA hearings in the Trump case are sure to be contentious, I would not be surprised if the government appeals this decision.

Thanks, again, to National Security Counselors' Kel McClanahan to agreeing to argue this for me. You can support them here or here.

Update: Here's my post explaining the High Court order inviting assurances about Assange's First Amendment protections. DOJ has 6 more days to issue those assurances.