AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era – Democratic Rights/Free Speech

**United States v. Rosen, 487 F.Supp. 2d 703** (E.D. Va. 2007)

*Steven Rosen and Keith Weissman were charged with conspiring to communicate national defense information to persons not entitled to receive it. Rosen and Weissman were lobbyists for the American-Israel Public Affairs Committee (AIPAC) and over the course of several years received classified information about American policy relating to Iran from an employee of the Department of Defense. They then communicated the information to members of the media, other policy analysts, and to Israeli government officials. Rosen was further charged with aiding and abetting for his role in helping the transmittal of the information from the DOD employee. The federal government eventually caught the DOD employee, Lawrence Franklin. The government then ran a sting operation that involved Franklin passing on fabricated classified information to his contacts, and Rosen and Wiessman were charged with violating the terms of the Espionage Act of 1917 based on the evidence uncovered during that sting operation.*

*Rosen and Weissman were fired by AIPAC, but the criminal charges against them were eventually dropped given the legal uncertainty surrounding a prosecution for conveying classified information to a friendly government. Among the pretrial issues to be resolved, however, was the question of how the government was to present its case in court. The Classified Information Procedures Act (CIPA) outlines a system that would allow judicial scrutiny of classified materials deemed relevant to a trial. If national defense information (NDI) is deemed to be important evidence, the government has the option to declassify the materials for use in a public trial or substitute a summary of facts contained in the classified materials. If the prosecution and defense cannot agree on the summary of facts, then the government might be forced to drop aspects of the case that rely on classified materials. For the Rosen trial, the government proposed instead that classified materials be introduced in the courtroom, but that the public be allowed only to see the substitute summaries that the defense had contested. The judge denied that motion on the grounds that the proposal was at odds with the statutory procedure and was also inconsistent with the requirements of the First and Sixth Amendment.*

DISTRICT JUDGE ELLIS.

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The government's proposal is, in effect, a variant and a substantial expansion of the so-called "silent witness rule," a rule that has been used and judicially approved in certain, but not all circumstances. . . . [T]he effect of using the procedure in this case would be the exclusion of the public from substantial portions of the trial.

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The government urges that the use of the silent witness rule, codes, and redacted recordings are "substitutions" authorized by CIPA. Defendants disagree, noting the government's proposed procedure is nowhere authorized by CIPA, either explicitly or implicitly. Defendants are correct, a conclusion that follows from CIPA's plain language, but also from the, fact that the government's proposed procedure simply cannot fit within CIPA's confines even assuming the statute's plain language would not otherwise preclude it.

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. . . . In this context, the silent witness rule, applied across the board as the government proposes here, essentially robs defendants of the chance to make vivid and drive home to the jury their view that the alleged NDI is no such thing, as essentially similar material was abundant in the public domain. Importantly in this respect, it is hard to see how defendants could effectively show, via the silent witness rule, that the details of differences between public source material and the alleged NDI are neither minor nor trivial.

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In sum, the government's proposed across the board use of the silent witness rule and use of coded testimony is, at best, an unwieldy inconvenience fraught with potential for confusion. At worst, it unfairly shackles defendants to a script written by the prosecution, bewilders the jury and all but the most well-coached government witnesses, and undermines the right to a public trial. Given this, the government's proposed procedure must be rejected, as it does not provide defendants with "substantially the same ability to make [their] defense as would the disclosure of the specific classified information" at issue.

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. . . . It is clear that the government's proposal precludes the public from hearing and evaluating the evidence on a crucial and contested element of the case, namely, whether the information at issue is NDI and whether defendants knew it to be such. Moreover, the quality and quantity of material the government proposes to exclude from public view is significant. . . .

The analysis of defendants' constitutional argument properly begins with the recognition that defendants and the public have a fundamental right to a trial open to the public. The right to a public trial contributes to just adjudication, stimulates public confidence in the judicial system, and ensures that the public is fairly apprised of the proceedings in cases of public concern. A public trial contributes to just adjudication in several ways: (i) requiring witness' testimony to be public deters perjury; (ii) requiring a judge's rulings to be made in public deters partiality and bias; and (iii) requiring prosecutors to present their charges and evidence publicly deters prosecutorial vindictiveness and abuse of power. In these ways, the presence of the public encourages accurate factfinding and wise use of judicial and prosecutorial discretion, thereby contributing to public confidence that justice has prevailed at trial. In short, justice must not only be done, it must be seen to be done.

Given the important interests at stake, it is now well-settled that defendants in criminal cases and the public both have a right to a trial open to public scrutiny. . . . It is also well-settled that the standard governing whether the public trial right has been infringed is the same whether the right is asserted by the press under the First Amendment or by a defendant under the Sixth Amendment. Under this constitutional standard, a trial is presumptively open, and may be closed only if certain criteria are met. These criteria are set forth in *Press-Enterprise Co. v. Superior Court of California* (1984) and its progeny, as follows:

1. An overriding interest must exist to close the trial,
2. The closure is no broader than necessary to protect that interest,
3. The court considers reasonable alternatives to closure, and
4. The court makes specific findings on the record concerning the existence of the overriding interest, the breadth of the closure, and the unavailability of alternatives to facilitate appellate review.

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. . . . While it is true, as an abstract proposition, that the government's interest in protecting classified information can be a qualifying compelling and overriding interest, it is also true that the government must make a specific showing of harm to national security in specific cases to carry its burden in this regard. . . .

Here, the government has not met its burden; instead, it has done no more than to invoke "national security" broadly and in a conclusory fashion, as to all the classified information in the case. Of course, classification decisions are for the Executive Branch, and the information's classified status must inform an assessment of the government's asserted interests under *Press-Enterprise.* But ultimately, trial judges must make their own judgment about whether the government's asserted interest in partially closing the trial is compelling or overriding. . . . Here, the government has not proffered any evidence about danger to national security from airing the evidence publicly, let alone an item-by-item description of the harm to national security that will result from disclosure at trial of each specific piece of information as to which closure is sought. . . .

Moreover, quite aside from the government's failure to provide any evidence of harm to national security from an open trial, the government's assertion of an overriding interest justifying a trial closure is undermined by the substance of the proposed procedure, to wit, that the jury and uncleared witnesses will be permitted to receive unredacted classified information. Given that the government appears willing to trust its confidential information to jurors, alternates, and uncleared witnesses, including (potentially) defendants, it is difficult to credit fully the government's claim that the classified information at issue is deserving of rigorous protection.

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For the same reasons, there is no basis to conclude that the government's proposal is narrowly tailored to protect any national security interests. Since the government has not identified with specificity which of the classified information to be kept from public view would harm national security if disclosed to the broader public, or how the national security would be affected, it is impossible to evaluate whether the proposed closure is as narrowly tailored as possible to protect that asserted interest.

Likewise, assuming that an overriding interest exists here because disclosure of some or all of the classified information at issue would damage national security, it is evident that reasonable alternatives to closure exist here. . . .

Although the conclusions concerning the other *Press-Enterprise* factors obviate the need for factual findings, the absence of any affidavit describing the ensuing harms to national security should the trial not be closed is noteworthy. . . .

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For these reasons, defendants' motion to strike must be granted, and the government's motion to close the trial, styled a CIPA § 6(c) motion, must be denied. . . .