

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Charles R. Breyer, Judge

IRVIN MUCHNICK,	)	
	)	
Plaintiff,	)	
VS.	)	NO. C 15-3060 CRB
	)	
DEPARTMENT OF HOMELAND SECURITY,	)	
	)	
Defendant.	)	
	)	

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San Francisco, California  
Friday, October 28, 2016

**TRANSCRIPT OF PROCEEDINGS**

**APPEARANCES:**

For Plaintiff:

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BY: **ROY S. GORDET**  
**ATTORNEY AT LAW**

For Defendant:

OFFICE OF THE UNITED STATES ATTORNEY  
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**ASSISTANT UNITED STATES ATTORNEY**

Reported By: Kelly L. Shainline, CSR No. 13476, RPR  
Court Reporter Pro Tem

1 Friday - October 28, 2016

10:02 a.m.

2 **THE CLERK:** Calling Civil Action 15-3060. Irvin  
3 Muchnick versus Department of Homeland Security.

4 Counsel, please approach the podium and state your  
5 appearances.

6 **MR. GORDET:** Good morning, Your Honor. Roy Gordet  
7 representing plaintiff, Irvin Muchnick.

8 **MR. SCHARF:** Jim Scharf for defendant, Department of  
9 Homeland Security.

10 **THE COURT:** Good morning. So I have looked at this,  
11 and I think I need some background information because I'm not  
12 all that familiar with A files, though, of course I have some  
13 familiarity with it.

14 I assume you are familiar with A files. I know you're  
15 with the Department of Justice, but are you especially assigned  
16 to the Department of Homeland Security?

17 **MR. SCHARF:** I'm not. I'm an Assistant United States  
18 Attorney in the civil division, and so I defend the  
19 United States, its agencies and employees, whenever they're  
20 sued. I've done some FOIA work. This is my first case  
21 involving an A file, but I read every single case, and we've  
22 only found four of them.

23 **THE COURT:** No. No. I'm not suggesting that you're  
24 not prepared. What I'm interested in isn't necessarily in the  
25 record, but I thought in terms of context it would be helpful.

1           **MR. SCHARF:** I brought them. I brought both the -- so  
2 this case is now whittled down to 20 documents spanning  
3 43 pages, and I brought those documents in both redacted form  
4 and unredacted form, and I've actually previously tendered that  
5 to the Court at the last case management conference.

6           **THE COURT:** Right. And I've looked at them. But my  
7 background questions were going to go to what's in an A file.

8           **MR. SCHARF:** I can maybe help you.

9           **THE COURT:** Okay. Well, here's what I'm trying to  
10 understand. In this particular case, we have the plaintiff  
11 seeking documentation as to what did the Department of Homeland  
12 Security know or do in connection with the visa application of  
13 Mr. Gibney.

14           **MR. GORDET:** Yes.

15           **THE COURT:** And a number of things have been public,  
16 which isn't, I would say, the average case or not.  
17 Mr. Gibney's court record in Ireland, that is to say, what  
18 disposition -- what he was charged with and the disposition of  
19 those charges is a matter of public record.

20           **MR. SCHARF:** It should be.

21           **MR. GORDET:** I believe so, Your Honor.

22           **MR. SCHARF:** And I believe that there's no evidence  
23 that Mr. Gibney has been convicted of anything. These are just  
24 allegations; right?

25           **MR. GORDET:** I believe Mr. Gibney fled the

1 jurisdiction before there were proceedings.

2           **THE COURT:** Well, I was trying to figure out. I was  
3 going through some of the chronology, and you can correct me if  
4 I'm wrong, but I think this is from the record, is that he  
5 comes to the United States in 1992.

6           He fills out an application for a visa, and when he does  
7 so, the application for the visa asks the question: Have you  
8 ever been arrested? And I've had cases on that, and perhaps  
9 other questions as well.

10           And the answer he gave actually as of 1992 seems to be  
11 correct because the allegations of pedophilia really surface in  
12 1993 after, after he had been granted an application to come  
13 and remain in the United States.

14           He then goes back to Ireland, and in Ireland he's arrested  
15 as we understand that term to be, to me. And there is some  
16 litigation of the criminal charges, and ultimately the Supreme  
17 Court in Ireland rules that the statute of limitations applies.  
18 Now, that's what I understand from what's in the file.

19           Okay. Then -- do you want to come up, sir, because  
20 you're -- is this the party?

21           **MR. GORDET:** This is Mr. Muchnick, yes.

22           **THE COURT:** You can come right up and sit here. I  
23 really want to make sure that I'm accurate in -- at least I  
24 have an understanding as to what occurred.

25           **MR. SCHARF:** Your Honor, my only --

1           **THE COURT:** He's not going to appear. He's just --  
2 he's the client.

3           **MR. SCHARF:** No, we have no problem with the client  
4 being here.

5           My only concern is I know I have to be extremely careful,  
6 in presenting this argument, to not reveal the confidential  
7 contents of the documents that we submitted to you in camera.

8           **THE COURT:** I'm not referring -- well, be that as it  
9 may, I'm now referring to public documents, to what is known  
10 publically, and that is a factor.

11           In other words, when I finally get to rule on the FOIA  
12 request, I have to -- and protect privacy interests, one of the  
13 factors in a privacy interest is, is it private, or is it  
14 public. And if it's public, that certainly diminishes the  
15 privacy interest.

16           And I think that's -- but I don't want to -- I don't want  
17 to say anything, or if I say something, you can correct me if  
18 it's not publically known. And maybe you can say, Well, you're  
19 surmising that, Judge, but there's no public knowledge of it.  
20 So I think I'm sort of describing the public process or the  
21 public knowledge of what occurred.

22           So now into Ireland, the charges were dismissed or  
23 ruled -- I don't know what their -- of course, it's common law  
24 system. I don't know -- I don't know exactly what terminology  
25 the Irish Supreme Court used, but it's clear that as a result

1 of that decision, the criminal proceedings did not continue in  
2 Ireland. I think that's right.

3 He returns to the United States, and my understanding is  
4 he came back to the United States because -- no, not the  
5 motivation, but he had a visa to permit him to return to the  
6 United States, to enter the United States.

7 He then is asked -- okay. At some point, again, he  
8 applies for citizenship, and that application is ultimately  
9 denied. And in the course of that application, there is a  
10 question -- a series of questions that were propounded to him  
11 and the responses that were given -- this is the normal  
12 operating procedure -- and he was not granted citizenship or  
13 permanent residency, I think that's right, in the  
14 United States.

15 Now, the word "permanent residency" probably is a term of  
16 art that I'm not quite sure I really understand. And I'm  
17 trying to figure out in my mind, What is his status in the  
18 United States. Is he here on the application? I mean, on the  
19 visa. Is he a -- you know, he is obviously -- unless you  
20 advise me of the contrary, he's obviously permitted to remain  
21 in the United States, or at least he's here in the  
22 United States.

23 **MR. GORDET:** That's our understanding, Your Honor,  
24 yeah.

25 **THE COURT:** And what is missing in all of this is, how

1 is a person permitted to remain in the United States when, in  
2 fact, the circumstances of the Ireland experience or what  
3 occurred in Ireland are publically known, that's number one.

4 And number two, if, and I would use the word "if," he gave  
5 false answers in connection with an application, how is it that  
6 that somehow doesn't bring into question the term of his  
7 initial visa permit or his initial visa.

8 So I'm sitting here trying to understand this because I'm  
9 sure there's an answer to this, but let's talk about the  
10 theoretical rather than what existed here.

11 Let's say I, as an example, am granted a visa to come to  
12 the United States. And subsequent -- and I answer all the  
13 questions and I don't answer falsely. Okay. So I mean, I have  
14 that visa application.

15 And then a series of events occur which would normally  
16 disqualify a person from getting a visa, which maybe is an  
17 assumption that I don't know, that I can't figure out, but I  
18 have to assume that if somebody has been charged with the types  
19 of offenses that Mr. Gibney has been charged with, the  
20 United States, absent other circumstances, would not grant a  
21 visa. We're not a refuge for pedophiles. And there's no issue  
22 here of which I'm aware of, which is the asylum issue. Okay.

23 So I apply -- it's unfortunate I'm using me as an  
24 example -- but I apply, and then some things surface and I go  
25 back to Ireland and then I come back to the United States.

1           Now, if we froze events at that point, of course, my  
2 question would be, does the visa in the United States, one,  
3 expire?

4           And two, if it doesn't expire, is there a process where  
5 Department of Homeland Security reviews visa applications in  
6 light of undiscovered information and then takes some conduct,  
7 or takes some action. I have no idea whether that's the case  
8 or not.

9           But that's not necessarily the case I wanted to posit  
10 because the case I wanted to posit goes on from there. And it  
11 involves, at that point, me. Because I'm the applicant, I  
12 filled out a form, and perhaps, theoretically, I'm not honest  
13 in the form that I fill out for further relief; that is, to be  
14 a citizen. And so it's denied.

15           But my question would be, by virtue of that activity, does  
16 that then go -- didn't -- did somebody in the Department of  
17 Homeland Security say, Well, you know this person lied to us  
18 today, or whenever that application, I think we have to go back  
19 and question the legitimacy of allowing that person to remain  
20 in the United States.

21           There may be reasons to allow him to remain in the  
22 United States. There's nothing that you have submitted to me  
23 that indicates any reasons why he's allowed in the  
24 United States, nor any investigation, that I can see, of going  
25 back and looking at the original application or the



1 continuation of the visa.

2 So my question to you, and you may not be in a position to  
3 answer this because it's not -- while it is not in anything  
4 that you have submitted to me, I'm just characterizing it in  
5 broad strokes, it seems to me that it may very well reflect  
6 upon the types of activities that individuals may have a  
7 legitimate interest that would override a -- what I call a  
8 compromised privacy concern that would then result in  
9 disclosure.

10 So I guess my question to you is -- I guess your answer --  
11 well, maybe my question is, are any of these documents that you  
12 have submitted to me germane to that inquiry; that is, how is  
13 he presently -- how is he presently able to reside in the  
14 United States by virtue of the things that he has allegedly  
15 done in Ireland?

16 And you may not be in a position to answer that because  
17 you're not a Department of Homeland Security person, you're an  
18 attorney who is charged with the responsibility of representing  
19 the Department of Homeland Security.

20 So that's my question to you.

21 **MR. SCHARF:** Those are great questions. Let me answer  
22 those questions in two ways.

23 First, I am working closely with an agency attorney from  
24 the Department of Homeland Security, so if the Court were to  
25 ask these questions through maybe an order for supplemental

1 briefing, within a couple of weeks I could answer them by  
2 getting the assistance of somebody with procedural expertise.  
3 So we may be able to answer your questions that way.

4 My knowledge of this case is necessarily limited to the  
5 documents that we produced and withheld. But there is one  
6 document, and if you construe your question as to why haven't  
7 we deported him and the -- there is a document -- they didn't  
8 ask for it, but I thought it was going to be relevant so I --  
9 if you recall at the last case management conference, I said,  
10 They've asked for 19 documents but there's a twentieth document  
11 that relates to the documents that they asked for, and that is,  
12 we filed with the Court at Docket Number 28 at 1, and it is a  
13 one-page memo concerning a request for investigation sent by  
14 USCIS to ICE, and --

15 **THE COURT:** What is the date of that? I'm just  
16 interested whether I'm looking at the same thing.

17 **MR. SCHARF:** We submitted that --

18 **THE COURT:** No, no. What is the date of the document?

19 **MR. SCHARF:** I would have to -- I would have to pull  
20 it out. And I will do that to give you the date.

21 **THE COURT:** I'm looking at something which is number,  
22 in my -- it's Number 28. So -- but I don't know if that  
23 corresponds. I can show it to you and ask you if we're talking  
24 about the same document.

25 Would you hand this to them.

1           **MR. SCHARF:** It's the document that --

2           **THE COURT:** Take a look at it. Take a look. You're  
3 being handed something. Is that it?

4           **MR. SCHARF:** No.

5           **THE COURT:** That's not it?

6           **MR. SCHARF:** No, no. What it is it's the result of an  
7 investigation, and to me, it answers the question of why they  
8 didn't deport him, and I can't really reveal the contents of  
9 that document because we submitted it to you in camera.

10          **THE COURT:** Right.

11          **MR. SCHARF:** It was the document that we submitted to  
12 you with a letter and --

13          **THE COURT:** Do you know which one that is?

14          **MR. SCHARF:** It was a special filing. We talked about  
15 it at the last case management conference. I said, There's one  
16 more document, you need to see it, we're going to submit it.  
17 And then the letter, and then we --

18          **THE COURT:** I've got my trusty brain trust now going  
19 back and seeing if we can find it.

20          **MR. SCHARF:** And that's the only document that I can  
21 think of that really answers that question.

22          **THE COURT:** That relates to that?

23          **MR. SCHARF:** Right.

24          **THE COURT:** Okay. Well, that may answer all sorts of  
25 questions. It may answer some questions. But they haven't

1 requested it.

2           **MR. SCHARF:** Well, what happened is they had  
3 originally requested the whole file, and then through this  
4 litigation, they whittled down the request to 19 documents.  
5 And I looked at those, and those were good documents to  
6 request, but there was a twentieth document that related to --

7           **THE COURT:** Angie, would you show this to counsel and  
8 ask him if this is it.

9           **MR. SCHARF:** Yeah, so that is my letter regarding the  
10 document, and what doesn't -- you don't --

11           **THE COURT:** There's a document attached?

12           **MR. SCHARF:** There's a document that's unredacted that  
13 we gave you --

14           **THE COURT:** Okay.

15           **MR. SCHARF:** -- that corresponds to that letter.

16           **THE COURT:** Let me now see if I can find it.

17           **MR. SCHARF:** And I have it here.

18           **THE COURT:** Okay. Why don't you hand it up and I'll  
19 look at it.

20           **MR. SCHARF:** And I assume you want it in unredacted  
21 form.

22           **THE COURT:** Yeah.

23           I see. I see. I see. Okay. So I need to look at the  
24 document, and I'll consider that document along with the other  
25 requests.

1           And I will assume for the sake of this hearing that that  
2 document has also been requested.

3           **MR. GORDET:** Thank you, Your Honor.

4           **THE COURT:** And that you have interposed an objection,  
5 you supplemented your Vaughn Index, and you have interposed an  
6 objection with respect to that document.

7           **MR. SCHARF:** But I still gave it to you in camera.

8           **THE COURT:** Yes, I appreciate that. By the way, I  
9 think that the services seem -- seems to be entirely  
10 forthcoming to the Court, and I appreciate it, and it's far  
11 better than the Vaughn Index but I don't need to get into that  
12 because I have the documents.

13           **MR. GORDET:** All right.

14           **THE COURT:** But let's take a look at the document.

15           **MR. GORDET:** Right now or --

16           **THE COURT:** I'm going to -- counsel is going to hand  
17 it to me.

18           **MR. GORDET:** Oh, I'm sorry.

19           **THE COURT:** I'm not going to give it to you.

20           **MR. GORDET:** No, I understand that, Your Honor.

21           **MR. SCHARF:** You would like that.

22           **THE COURT:** And it's nothing personal, he's just not  
23 going to give it to you.

24           **MR. SCHARF:** And he's learning a great deal about this  
25 file from this hearing, but that's okay. That's okay.

1           **THE COURT:** Okay. We don't have the attachment so  
2 this will be useless. Anyway, I'm now about to get it. He's  
3 handing it to me.

4           **MR. SCHARF:** See if this is the document referenced in  
5 the letter.

6           **THE COURT:** Okay. So I'll look at this.

7           **MR. SCHARF:** It was one of the reasons we were so  
8 willing to submit this in camera is that we didn't think that  
9 you were going to find agency wrongdoing in this case.

10           I'm not sure that's legally relevant to the issues raised  
11 on the motion for summary judgment that I'd be happy to  
12 address.

13           **THE COURT:** Okay. I understand the argument.

14           **MR. GORDET:** But, Your Honor, on the issue of whether  
15 or not there was agency wrongdoing, as we had tried very much  
16 to emphasize in both of our responses to the motion, that  
17 there's Supreme Court precedent and Ninth Circuit precedent  
18 that expressly states, most recently Judge Kozinski in the  
19 *Kowack* case, that we don't have to show malfeasance by the  
20 Court, we're just trying to shed light, open up some -- open up  
21 to the light of day certain agency operations.

22           And so we don't -- we think -- I keep -- we keep getting  
23 the impression that there's a strong pushback, obviously, by  
24 the government on this point about what we need to show about  
25 the agency, whether it really needs to show this wrongdoing.

1           And we feel as though we're crossing. I mean, there are  
2 cases that lean the other way that they must show malfeasance,  
3 and we think the Supreme Court cases like the *Reporters*  
4 *Committee* as well as *Kowack* case say it doesn't have to be a  
5 malfeasance that we're looking to uncover.

6           **MR. SCHARF:** That is a legal dispute we would like you  
7 to resolve. We are relying on the *Favish*, 541 U.S. at page 175  
8 and the District of DC case, the *Canning* case, 567 F Supp. at  
9 109, for the proposition that "Plaintiff must produce evidence  
10 that would warrant a belief by a reasonable person that the  
11 alleged government impropriety might have occurred."

12           And our position is they don't get to peek in the file,  
13 like you have, in order to establish that threshold showing.  
14 And that's what they have to show in order to overcome the  
15 generalized privacy interest.

16           And it gives me no pleasure to assert the privacy interest  
17 of somebody that has been accused of molestation and of being a  
18 pedophile. But it gives me great pleasure to defend the  
19 privacy rights of immigrants. And I just think that it's very  
20 dangerous to disregard those. Just because we're dealing with  
21 a bad person, we shouldn't disregard that law.

22           And I'm reminded of this quotation from *A Man For All*  
23 *Seasons*, Sir Thomas More, and he's asked this question -- if  
24 you'll indulge me.

25           **THE COURT:** We have the whole morning.

1           **MR. SCHARF:** He's asked this question, Would you give  
2 the devil the benefit of the law, and he responds by  
3 constructing an analogy that a law is like a tree in a forest.  
4 And he responds, he says, What would we hide behind if we  
5 chopped down all the trees, all the laws, to get the devil.  
6 What would we hide behind if the devil turned around and  
7 started to chase us.

8           And he responds to this inquiry, Of course, I will give  
9 the devil the benefit of the law for my own personal safety,  
10 and that's kind of how I view this case.

11           And it's kind of interesting that today is the -- it's the  
12 130th anniversary of the statute of limitations -- Statute of  
13 Liberty -- the Statue of Liberty. And I think that's kind of  
14 appropriate because the issues raised in this case are, what is  
15 this legal dispute that we need the Court to resolve?

16           What kind of showing does a third party like the plaintiff  
17 need to make in order to get the confidential file of an alien  
18 without that alien's consent, and have they made that showing  
19 in this case?

20           And we feel strongly that they have not made that showing.

21           **MR. GORDET:** Okay.

22           **MR. SCHARF:** I can argue the law more, but let me turn  
23 it over to my opponent.

24           **MR. GORDET:** Well -- and, Your Honor, we just feel  
25 that Your Honor has raised some issues that show some obvious



1 discrepancies and problems with the file, which has come to  
2 light here prior, which is the reason Mr. Muchnick was doing  
3 this investigation. There was something that wasn't right.

4 **THE COURT:** Well, I don't know -- yeah, I mean, to  
5 weigh in on this is unnecessary, but I think I will.

6 To an individual, an outsider, whether a citizen or  
7 somebody of a foreign country or concerned person, trying to  
8 figure out how is this person still in the United States given  
9 what is publically known as to a series of -- to a series of  
10 facts, information, inferences and so on, but how.

11 I mean, that's the question that's being raised, and in  
12 this fairly high profile -- when I say that, it's -- you know,  
13 I don't want to exaggerate it, but in a case that has achieved  
14 publicity, notoriety and actually a book discussing it, and  
15 while it is a big issue, it seems to be an issue that a foreign  
16 country, that elected representatives in a foreign country have  
17 inquired into.

18 **MR. SCHARF:** Do you think there's a difference between  
19 a citizen asking the question, Why is he still in the country  
20 given these allegations, as opposed to a plaintiff coming  
21 forward with evidence or facts that would warrant a belief by a  
22 reasonable person that the alleged government impropriety might  
23 have occurred?

24 I think those are different questions.

25 **THE COURT:** Well, let's say -- they may be, but how is

1 it not the latter? In other words, how is it not? How do  
2 citizens or interested parties, how do they understand that  
3 this person hasn't been deported? That's what they don't  
4 understand, given the 12 -- given the number of facts that have  
5 been publically disclosed -- and by the way, I mean, it's not  
6 like that the subject has admitted that he committed these  
7 offenses. By the way, I don't even know to your argument  
8 whether that would have made any difference or not.

9 But then how has he been allowed to remain? I think those  
10 are questions about how is the government operating.

11 **MR. GORDET:** Right.

12 **THE COURT:** And is it -- and was some improper act  
13 committed by the government, or is this their procedure? And  
14 if it is their procedure, that is, its recognized procedure, is  
15 there a public interest in disclosing that this is the way they  
16 handle cases given a set of circumstances?

17 Because all of this seems to suggest to me that there may  
18 be -- there may be legitimate inquiry into should procedures be  
19 changed.

20 The public has a right to understand, understand how is it  
21 that the government operates, provided that that concern  
22 outweighs the privacy concerns of the individual whose privacy  
23 is being asked to be invaded because of the -- because of  
24 what's in an A file.

25 And just to finish, this isn't the case where you know and

1 we have to draw a line. We say, I know Mr. X, and Mr. X is  
2 here and I know what he did in country Y, and that was brought  
3 to the attention of the government and he's still here. How  
4 come?

5 And I think that that's a legitimate concern that the  
6 government has that could they, through the back door, get vast  
7 number of A files by saying I know X, and X is a criminal, and  
8 X remains here. How come? And, you know, that is a concern.

9 So I sort of -- I do see your point and I'm just trying to  
10 figure out, in looking at this, whether there is some -- what  
11 is the public interest? What's the government's interest in  
12 maintaining the confidentiality? And what is the individual's  
13 A file, what is his interest?

14 Now, as an example, let's assume just for the sake of  
15 discussion, that the government chose not to deport this person  
16 by virtue of the fact that he did not meet the criteria for  
17 deportation.

18 As an example, is that an important thing for the public  
19 to know? Is that important? And the answer is, I don't know.  
20 I actually don't know. I haven't really thought about it  
21 enough to figure that one out.

22 Is it important -- and maybe it's no, by the way. Maybe  
23 the criteria for revocation of a visa and its commensurate  
24 deportation is a matter of public record.

25 **MR. SCHARF:** It is. And I think the way the Court

1 phrased that question is so illuminating because a plaintiff is  
2 represented by an attorney. The attorney can research that  
3 criteria. The plaintiff -- the attorney can actually make a  
4 request, if you do a FOIA request for what that criteria is if  
5 you cannot find it on the Internet.

6 And then once you learn that criteria, you ask yourself,  
7 What we know about Gibney, is that enough to cause a reasonable  
8 person -- to warrant belief by a reasonable person that the  
9 alleged government impropriety might have occurred.

10 So they could have done that homework. They could have  
11 figured out the criteria. They know something about his --  
12 whether he's ever been convicted or not, and then they could  
13 have come forward with a showing, if their evidence satisfied  
14 the criteria, to create an argument that the government erred  
15 in not deporting him or keeping him here longer.

16 **MR. GORDET:** We don't have to show error.

17 **THE COURT:** Well, wait. Let's assume -- let me move  
18 one step beyond it. Let's say that the criteria is we do not  
19 deport people who have not been convicted of a crime. Okay.  
20 And we all know he was not convicted of a crime. I believe  
21 that to be the case --

22 **MR. GORDET:** Right.

23 **THE COURT:** -- for whatever reasons under the law of  
24 Ireland. Okay.

25 Then let's assume that -- for the sake of this discussion,

1 that in response to action taken by the subject, to the  
2 government he lied in one of his applications. So it's not  
3 that he has not been convicted of a crime, it is the argument  
4 of, well, if you lie to the government, do they have a right,  
5 one, to deport you, even though you didn't lie on the  
6 particular application that you filed.

7 And if they do have a right -- and I don't know yet. If  
8 you do have a right, if you decide, the government decides,  
9 well, I don't know, let bygones be bygones or whatever their  
10 reason is, we choose not to exercise that right.

11 So the decision wasn't necessarily made on the criteria  
12 that I initially identified, but the decision was made that in  
13 our discretion, we choose not to deport this person even though  
14 this person gave an untruthful answer to the -- to whatever  
15 it's called. I would say INS but that just dates me.

16 If they say that, if they say that, is that the sort of  
17 information that is still protected.

18 **MR. SCHARF:** So here's the trick and what makes it so  
19 tricky. You know things from your in-camera review that they  
20 do not know. They cannot come forward and have not come  
21 forward with any facts or evidence to suggest that Gibney lied.

22 And the only way they would be able to articulate those  
23 facts is if we give them those documents, they take a peek and  
24 go, Oh, now that we've seen the documents, we can establish  
25 the -- satisfy the standard articulated by the Supreme Court in

1 the *Favish* case.

2 And so I don't think they have --

3 **THE COURT:** So you say we're not there? Basically you  
4 said we're not there. I have to treat -- I'm not disagreeing  
5 with you, by the way. You're saying I have to treat the  
6 request as the request made. I look at the file, and then what  
7 may be -- and it's all theoretical, maybe there's some other  
8 reasons in there, but they haven't requested those. Nor are  
9 they entitled to look at them from your point of view.

10 **MR. SCHARF:** It's a great argument you make, but they  
11 haven't made it. And even if they did make it, they don't have  
12 the facts to support it to satisfy the *Favish* case.

13 And if you were to allow them to look at these documents  
14 as you have, you would be the very first judge because the  
15 four times this issue has been litigated, and it's all been in  
16 the District of DC, the government, in our papers, has cited  
17 four A file cases; all four of them, the Court ruled for the  
18 government.

19 They haven't cited a single A file case where a Court  
20 allowed them to obtain the documents, particularly not in a  
21 case like this where they haven't made the threshold showing of  
22 facts or evidence that would warrant a reasonable belief that  
23 the alleged government impropriety might have occurred.

24 **MR. GORDET:** Your Honor.

25 **THE COURT:** Yes.

1           **MR. GORDET:** First of all, we're making the assumption  
2 that for every single document that we're looking for, that we  
3 want unexpurgated or unredacted copies. So we believe that  
4 there hasn't been the proper showing to show that there can't  
5 be some segregable portion of those documents that would not  
6 violate anyone's privacy rights. That's the first thing.

7           I also want to refer to the *Union Leader* case, and there  
8 are other cases that support the position that -- first, it's a  
9 First Circuit case, recent case, the *Union Leader* case, where  
10 the Court, the First Circuit, said that it has to look -- a  
11 Court must look at the totality of the circumstances in  
12 weighing the privacy interest of the parties, and so I think  
13 that diminishes the argument that counsel made about the devil  
14 in the trees.

15           I mean, we've got to look at the total picture, and I  
16 raise one document as a sterling example, which is the offer of  
17 employment from 20 years ago. We do not see how an offer -- I  
18 think this would apply to anyone in this room who had a job  
19 offer from 20 years ago in a letter, that somebody would  
20 believe that opening up that job offer from a particular  
21 company would violate that person's privacy rights and, most  
22 certainly, in some expurgated portion of it.

23           **THE COURT:** I don't know. It might.

24           **MR. SCHARF:** Would the Court like some good news  
25 though?

1           **THE COURT:** Some what?

2           **MR. SCHARF:** Some good news. And I think I --

3           **THE COURT:** Oh, good news.

4           **MR. SCHARF:** Good news.

5           **THE COURT:** It's not a place where people give good  
6 news, but yeah, sure, what good news?

7           **MR. SCHARF:** And you correct me if I'm wrong. I think  
8 I speak for both parties when I say that consistent with  
9 Rule 1, the government would like the Court to resolve this  
10 dispute in the fastest and least expensive way possible.

11           **THE COURT:** Well, that's good news.

12           **MR. SCHARF:** Preferably without additional motions or  
13 briefing, although we'd be happy to do a supplemental brief on  
14 the --

15           **THE COURT:** I don't know that I need that.

16           **MR. SCHARF:** We feel that the Court can -- actually,  
17 the Court has already conducted the in-camera review, and we  
18 would like the Court, aided by the briefs and this oral  
19 argument, to decide the issue. Just let us know confidentially  
20 what information in those 20 documents you'd like us to  
21 produce, and we will, and then I'll submit a verification to  
22 the Court that I will do that.

23           In other words, I am willing to submit this issue to the  
24 Court without further briefing or litigation.

25           **THE COURT:** I think that's pretty good. That's good



1 news.

2 **MR. GORDET:** If the Court believes it's good news,  
3 then we have to concur with the Court's view so long as when  
4 emphasized, the possibility of the Court exercising some kind  
5 of redaction or permission --

6 **THE COURT:** Well, I think I would redact. I think --  
7 one of the things that I am concerned about is -- and the  
8 government raises it -- any disclosure as to methods by which  
9 they obtained particular information.

10 **MR. SCHARF:** Our techniques and procedures.

11 **THE COURT:** That's right, technique. And I'm  
12 concerned about that. Actually, I don't think that's even in  
13 play in this case, to tell you the truth.

14 **MR. GORDET:** And that's more 7(E), Your Honor, where  
15 there's this difference -- I was reading the cases -- about the  
16 means and procedures versus the applicability, and so some  
17 aspects can be protected.

18 **THE COURT:** So what I might do is this. What I might  
19 do is this. I might issue a tentative or an indication of a  
20 ruling.

21 I mean, I don't want to prolong litigation, and it seems  
22 to me that, you know, when people say, Well, there hasn't been  
23 a case, that's generally a pretty good argument, actually, for  
24 judges who don't want to -- you know, I'm just one of  
25 846 District Court judges, and the law really shouldn't come

1 from any of us, it should come from appellate courts, in my  
2 view. Maybe initially it comes from a District Court judge,  
3 but we're talking about a national policy, we're talking about  
4 something much larger than what I see on a regular basis.

5 That doesn't mean -- because our structure is such that  
6 initially, District Court judges make decisions, and they ought  
7 to make decisions based upon the law, what they perceive to be  
8 correct application of the law. I understand that.

9 But I also believe that setting aside the District Court  
10 judge's ego, if that ever can be achieved, that this is a  
11 dispute between two entities, two people, or one person and a  
12 governmental entity, that if they come in, if the parties come  
13 in and say, Look, Judge, I think it can be resolved, and we're  
14 willing to go along with a disposition that will disclose some,  
15 if not some of this information, sure, I'd take that up.

16 So I think what I'm going to do is issue a tentative so it  
17 has no binding effect. If the parties can accept that, you  
18 know, number one, they can achieve it by way of simply  
19 achieving it. If they can't, then I'll have to reduce it to  
20 some sort of order.

21 **MR. SCHARF:** And in terms of the mechanics, we were  
22 before Judge Beeler recently.

23 **THE COURT:** Yes.

24 **MR. SCHARF:** And she used a similar procedure, and  
25 what she did is, I gave her the documents to review in camera,

1 and then she highlighted the sections that she wanted us to  
2 produce. And then she gave them back to us, these highlighted  
3 documents, and then we produced the documents -- I guess we had  
4 to do further redactions to -- consistent with us producing the  
5 highlighted versions.

6 **THE COURT:** So I think the answer is, I'm going to try  
7 that without prejudice to -- well, of course, the government  
8 refusing to do so and the defense arguing that that's not  
9 adequate.

10 **MR. GORDET:** But we would still be in the dark to some  
11 degree, Your Honor.

12 **THE COURT:** You'll always be in the dark. I mean,  
13 there's no way of getting -- unless he simply hands you the  
14 A file, then you're not in the dark anymore. But that's not  
15 going to happen.

16 **MR. GORDET:** No, but in this tentative ruling  
17 Your Honor was suggesting, you're not really going to be  
18 disclosing anything, it sounds like. You'd just be -- will you  
19 be --

20 **THE COURT:** Well, I may give you some reasons. In  
21 other words, I may say disclose -- attached I may give  
22 two versions of it. That is, one -- I may very well take the  
23 documents, redact the documents, give them back to the  
24 government as a sealed exhibit, a returned -- it won't be a  
25 return, but it will be an acknowledgment of document filed

1 under seal, with the suggestion that it be disclosed to the  
2 plaintiff, one.

3 Two, I will write something explaining the rationale of  
4 making the choices that I made. So you're not completely in  
5 the dark, nor is the government.

6 Three, if the government agrees you get it, you get that  
7 stuff. They'll just turn it over to you. If they disagree,  
8 then you won't get it.

9 If you disagree with the -- after having received the  
10 documents, still have concerns that you disagree with the  
11 Court's rationale, then I'll write a formal order and you can  
12 appeal it.

13 I don't know how else -- I mean, it just seems to be that  
14 I ought to take the government up on its offer to -- to -- I  
15 guess the right word is terminate the litigation.

16 **MR. GORDET:** That sounds reasonable, Your Honor. I  
17 just wanted to make a couple of points here about we reject  
18 this notion that categorizing the case and the documents as  
19 being in an A file as having some major significance.

20 We believe that all of the briefing related to the policy  
21 issues and every other issue on all the different exemptions is  
22 more important -- should be more important to the Court than  
23 just saying, Well, there's been four A file cases and none of  
24 them made any disclosure. I wanted to make that point.

25 And also in connection with that, that there are cases

1 which we cited concerning the nexus between the administrative  
2 agency and its criminal agency or its criminal oversight  
3 purposes or functioning, and that we don't believe that --  
4 well, nothing we've seen certainly gives any indication that  
5 the documents being withheld related to law enforcement  
6 properly. They seem to be more involved with whether this  
7 person comes in, not from a law enforcement purpose.

8 So that 7(E) exemption, those arguments, we think, are on  
9 very shaky ground, and especially -- and dovetailed with the  
10 issues of the privacy. I just wanted to make those points to  
11 Your Honor.

12 **MR. SCHARF:** And the only thing I wanted to say, we're  
13 amenable to your procedure. It may very well, though, take you  
14 adopting your tentative as a final decision in order to resolve  
15 this case.

16 **THE COURT:** So I've got to do all the work anyway.

17 **MR. SCHARF:** Yeah, you might have to do -- you might  
18 have to --

19 **THE COURT:** That's okay. That's okay. I mean, I  
20 think you're entitled to that. You know, this isn't -- I don't  
21 want to -- it's not my idea to sweep reasons under the rug.

22 I'm not -- I mean, trials, court proceedings are very  
23 important to be public. I strongly believe that. Obviously  
24 there may be concerns, security, so forth, where you wouldn't  
25 make a particular document public. But lawsuits are public.

1 It's the public's business.

2 It's at least the public's right in our democracy to know  
3 what's going on, and I feel very strongly about that, and I  
4 know you both do about that. It just has to be cabined in a  
5 way not to compromise certain other interest.

6 But, again, it's, you know -- the perfect is the enemy of  
7 the good, and I want to see what we can do in terms of  
8 something that seems to resolve. It may not resolve all the  
9 issues, and so forth, and you may have to -- we may be back  
10 here fighting about something or another.

11 **MR. GORDET:** We'd be interested in resolving it,  
12 Your Honor.

13 **THE COURT:** Well, let's see where we go on it.

14 **MR. GORDET:** Sure.

15 **THE COURT:** Let's see where we go.

16 **MR. SCHARF:** And I have an extra copy of the  
17 20 disputed documents in both redacted and unredacted form if  
18 you want an extra copy. You probably already have that.

19 **THE COURT:** Would you like that?

20 **LAW CLERK:** Yes.

21 **THE COURT:** Yes, give them to us.

22 **MR. SCHARF:** Don't take a peek.

23 And I removed that one document that --

24 **THE COURT:** I have that. I have that one now.

25 **MR. SCHARF:** So redacted, unredacted, limited to the

1 20 documents in dispute.

2 And I also have a copy of our revised Vaughn Index. The  
3 only -- the catch on reading the documents is if you want to  
4 know the document number, you have to cross reference it on  
5 the -- because those documents only have page numbers, but the  
6 Vaughn Index indicates what document number corresponds to  
7 those page numbers.

8 So, for example, if you look at our briefs where we list  
9 the 19 or 20 documents by document number, you can't tell those  
10 document numbers from the actual documents. You need this key,  
11 the Vaughn Index, and I can give you another copy of that if  
12 you want.

13 **MR. GORDET:** Okay.

14 **MR. SCHARF:** Now you can have everything. Decide the  
15 case.

16 **THE COURT:** Well, I have another question. I think  
17 what prompts this question is other litigation that I've had on  
18 visas because I have had a case in which an individual went  
19 abroad, was an American citizen, wasn't naturalized. I think  
20 he was born in the United States, he went abroad, and he wanted  
21 to bring his family back from Saudi Arabia I think.

22 And I think the issue -- and the argument of the State  
23 Department was that he lied on his application for a visa for  
24 his family and that, therefore, the visa was rejected, the  
25 application was rejected, and they seized his passport.

1           And it's the first time I had seen that a citizen of the  
2 United States' passport can be seized. But they quoted some  
3 regulations which apparently gave them some authority under the  
4 regulations to seize the passport. They said, We're not  
5 denying he's a citizen, because he is, but we're taking away  
6 his passport because he lied to the authorities, which I found  
7 it's interesting in raising issues that it's not this case at  
8 all.

9           But, of course, it triggered my mind as to, Well, if  
10 somebody is here not even as a citizen but has a visa and  
11 arguably lies, what is the procedure that's followed by the  
12 Department of Homeland Security with respect to the  
13 applicant -- the original application if you're here  
14 legitimately in that you have correctly answered the  
15 application.

16           I don't think these documents address that question, to my  
17 belief.

18           **MR. SCHARF:** No. No. But if the Court has -- as you  
19 make your way --

20                                 (Simultaneous colloquy.)

21           **THE COURT:** But if I have inquiry, I can send out a  
22 letter, I can send out an order, and you're prepared to --

23           **MR. SCHARF:** Maybe limit the response to five pages.  
24 Give him an opportunity to respond. Give me 14 days to  
25 respond; of course I agree.



1           **THE COURT:** You may be able easily enough, if I make  
2 an inquiry, simply to file a declaration or whatever it is from  
3 Department of Homeland Security, say this is -- you know, the  
4 Court has asked this. I mean, if you choose to do so.

5           **MR. SCHARF:** We will happily do that.

6           **THE COURT:** All right. I think that helps.

7           **MR. SCHARF:** Thank you so much for the time that  
8 you're spending in helping us resolve this dispute.

9           **THE COURT:** Well, thank you for making an effort to do  
10 so. I think it's important, and I don't want to -- I hope that  
11 I'm not -- suggesting that it ought to be resolved, as you have  
12 done, I don't think in any way detracts from the importance of  
13 this dispute.

14           **MR. GORDET:** We agree.

15           **THE COURT:** It's important, and I want to thank the  
16 plaintiff for bringing this to a head. So we're in recess.

17           **MR. SCHARF:** Thank you.

18           **MR. GORDET:** Thank you, Your Honor.

19                           (Proceedings adjourned at 10:52 a.m.)  
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**CERTIFICATE OF REPORTER**

I, KELLY SHAINLINE, Court Reporter for the United States District Court, Northern District of California, hereby certify that the foregoing proceedings in C 15-3060 CRB, IRVIN MUCHNICK v. DEPARTMENT OF HOMELAND SECURITY, were reported by me, a shorthand reporter, and were thereafter transcribed under my direction into text; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing.

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Kelly Shainline, Court Reporter

Wednesday, July 12, 2017