

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ALSUP

RAHINAH IBRAHIM, an individual, )  
 )  
Plaintiff, )  
 )  
VS. ) NO. C 06-0545 WHA  
 )  
DEPARTMENT OF HOMELAND SECURITY, )  
et al, )  
 ) San Francisco, California  
Defendants. ) Monday  
 ) December 12, 2013  
 ) 7:30 a.m.

**EXCERPT OF BENCH TRIAL PROCEEDINGS**

**APPEARANCES:**

**For Plaintiff:** McMANIS-FAULKNER  
Fairmont Plaza, 10th Floor  
50 W. San Fernando Street  
San Jose, California 95113  
**BY: ELIZABETH PIPKIN, ESQ.**  
**CHRISTINE PEEK, ESQ.**  
**RUBY KAZI, ESQ.**  
**JENNIFER MURAKAMI, ESQ.**

**For Defendants:** U.S. DEPARTMENT OF JUSTICE  
Civil Division  
Federal Programs Branch  
20 Massachusetts Avenue, NW  
Washington, DC 20001  
**BY: PAUL FREEBORNE, ESQ.**  
**JOHN THEIS, ESQ.**  
**LILY FAREL, ESQ.**  
**KAREN BLOOM, ESQ.**

**Reported By: Debra L. Pas, CSR 11916, CRR, RMR, RPR**  
*Official Reporter - US District Court*  
*Computerized Transcription By Eclipse*

P R O C E E D I N G S

DECEMBER 2, 2013

7:30 a.m.

(Prior proceedings held herein, reported  
but not transcribed.)

\* \* \* \* \*

**THE COURT:** Now, this is -- in addition to what I'm  
about to say, I do want the government to advise whether or not  
the two items I just described are something that the press can  
see or not, in their view.

But we've been at it now for two hours. We're going to  
take a break in a minute.

I feel -- I have done many trials. I think trials are  
important. In our system, trials are supposed to be public.  
And on the criminal side -- this is not a criminal case, but on  
the criminal side, it's right there in the Constitution, the  
right to a public trial. On the civil side, it's common law.  
And it's not -- it's not to protect so much the individual  
litigants. It's to protect the public to have access to what  
is going on in their public institutions, so that the public  
will have confidence that decisions are being made in a fair  
and just and evenhanded way.

That's an important consideration that -- so any member of  
the public, whether they're a member of the press or not, is  
entitled in the ordinary case to appear and to listen and take  
notes and blog about it -- B-L-O-G -- or write about it for the

1 newspapers.

2       The *Kamakana* case is, perhaps, in our Court of Appeals,  
3 the most strident statement on that subject, and I try my best  
4 to follow that.

5       In other kinds of cases where you have civil litigants,  
6 the big companies in our district and elsewhere think that the  
7 U.S. District Court is a wholly-owned subsidiary of the -- of  
8 their companies, and they try to keep everything from the  
9 public claiming it's confidential business information, when,  
10 in fact, it's not really confidential business information.  
11 It's not a trade secret. It doesn't rise to the level of what  
12 *Kamakana* says has to be before the courtroom is closed.

13       This is not a corporate case. This is one involving the  
14 government and issues of national security, so there are  
15 different considerations on the secrecy side. But on the other  
16 hand, they're the same considerations on the public disclosure  
17 side.

18       So I just want to say, that's a very important  
19 consideration is the access of the public to this proceeding.

20       All right. I want to change the subject to something  
21 else.

22       I want to categorically reject one proposition. I did so  
23 earlier, but I want to say it again. If information is  
24 publicly available in some other way, the government does not  
25 have the right to retroactively clamp it down and remove it

1 from the public domain by saying it's SSI.

2 So if a police report has the information in it, the  
3 government cannot retroactively come in and say: Wait a  
4 minute, that should never have been in the police report.

5 Or if it was -- if some expert from -- what's the name of  
6 your experts?

7 **MS. PIPKIN:** Professor Kahn.

8 **THE COURT:** Yes. If Professor Kahn has independently  
9 done a study and can testify that this is the way it works  
10 within the government, he can testify to that. He's come by  
11 that information on his own, and he can testify to it.

12 And even if it could have been protected by SSI within the  
13 government, those documents won't become public. But the fact  
14 that if he has independently come up with it -- so, for  
15 example -- and I'll make this up, because I -- if the -- if the  
16 government was contending that the ABC list and its very  
17 existence was secret and should be SSI, and the plaintiff was  
18 able to prove and wanted to try to prove that there was such a  
19 list and could do it from independent sources, the government  
20 cannot clamp that down and say: No, you can't even mention it  
21 because that's SSI, if there is an independent public source  
22 for that information.

23 So in my view, the plaintiff has the right to try to prove  
24 its case. And if it can prove its case entirely through  
25 publicly available information, even if the same -- the same

1 information is within the government designated as SSI, the  
2 plaintiff can still use that publicly available evidence if  
3 it's admissible.

4 It has to be admissible, of course. You can't put in  
5 newspaper stories. That's hearsay. But if you -- if the  
6 information is out there, then the plaintiff can try to put it  
7 in through admissible sources. And that's okay, in my view.

8 Now, the government seems to disagree with that. So we  
9 have a fundamental disagreement there, and I invite you to take  
10 an emergency writ if you want. But that's the way I'm going to  
11 rule in this case. And I'm not going to make the public step  
12 out or the newspapers step out of the room if the counsel, in  
13 good faith, has a publicly available way to try to prove  
14 something.

15 So I know that there's a bunch of things that you think  
16 should be a shroud of secrecy around it, like how these lists  
17 work. But if an expert wants to come in and has a way to prove  
18 it up with something other than SSI, the fact that they are  
19 internal government documents designated as SSI that cover  
20 exactly the same thing will not prevent that witness from  
21 testifying to the public with the newspapers right here to  
22 write it all down.

23 That's the way I feel. That ought to be the law. That  
24 has to be the law. That's the only way to run this country,  
25 and the only way to run a courtroom.

1       So I invite you to take an emergency writ if you don't  
2 agree with that proposition.

3       Now, a different proposition, though. What if the only  
4 information is SSI and has been designated SSI, and the  
5 plaintiffs don't have any other way to prove it except through  
6 the information that the government has turned over under the  
7 protective order and the SSI?

8       Now, on that scenario the government has a stronger case.  
9 And the main concern that I as a judge have, first, is -- I  
10 have two concerns: One, I do think the public ought to be --  
11 if it's legal, the public ought to be able to hear that  
12 information. The statute doesn't actually say what you do when  
13 you get to trial.

14       That troubles me that it does -- it does say it has to be  
15 under protective order for use with counsel, but the -- for  
16 example, what if it was going to be used in a civil case where  
17 there's a jury? Do we somehow say you can't have a jury  
18 because the jury is going to learn about it? I don't know.  
19 That's troubling. We don't have a jury here. But it's not  
20 limited to bench trials.

21       So the disclosure could have been in a jury case. The  
22 only reason we don't have a jury here is that this -- as the  
23 case now is postured, the jury issues have dropped out.

24       So there is a legitimate interest in having the public  
25 hear parts of this information. Is that enough under the

1 statute? The statute doesn't say, per se, how you address the  
2 situation at trial. And I'm not prepared to rule on that yet.

3 I think this is a -- we have national security on the one  
4 hand. We have the interest and how do you run an orderly trial  
5 on the other. I'm just not sure what the right answer to that  
6 problem is.

7 Now, the next related question is: Can the district  
8 judge, in order to run a coherent trial, make rulings on  
9 whether something should be de-designated or classified from  
10 being sensitive security information?

11 I don't know the answer to that either. You lawyers want  
12 the judge to do all of your homework for you, and you come up  
13 with FOIA cases and other kind of -- you don't -- you need to  
14 go find a decision where another judge has been in a trial like  
15 me, having to rule on SSI like we have here, and give me that  
16 case.

17 And the lawyers have let me down, and I need to ask you to  
18 do a better job on that. I'm not going to rule on that either.

19 Now, I'm not at this point yet, so don't panic. But I'm  
20 going to do my best to see how this trial goes. But it could  
21 be that we suspend this trial and I direct you to file writs in  
22 the Court of Appeals. And if you want to go to the D.C.  
23 Circuit, God bless you. If you want to go to the Ninth  
24 Circuit, God bless you. You can fight it out then, and we will  
25 just keep the whole case in suspense until you come back and I

1 get some direction from a Court that has jurisdiction to tell  
2 me what to do.

3 In my view, my tentative view would be that any  
4 information that is three years old ought not to be kept secret  
5 from the public. But I can't say there wouldn't be some nugget  
6 of information in here somewhere that would deserve to be kept  
7 secret. There possibly would be. But the government has taken  
8 a sweeping position that all of this is SSI. Probably, that's  
9 overbroad. But a Court of Appeals might feel much differently  
10 about it and say that my view is not respectful enough of the  
11 need for preserving national security, because this is part of  
12 our national security system.

13 I don't know the answer to this problem, so I'm flagging  
14 the issue for you. I'm flagging the procedural problem.

15 (Further proceedings held herein, reported  
16 but not transcribed.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from  
the record of proceedings in the above-entitled matter.

*Debra L. Pas*

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Debra L. Pas, CSR 11916, CRR, RMR, RPR

Friday, December 6, 2013