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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 IN RE: GRAND JURY SUBPEONA  
4 SERVED ON ACLU,

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6 New York, N.Y.  
7 December 11, 2006  
2:40 p.m.

8 Before:

9 HON. JED S. RAKOFF,

10 District Judge

11 APPEARANCES

12 MICHAEL J. GARCIA

13 United States Attorney for the  
Southern District of New York

14 JENNIFER RODGERS

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Assistant United States Attorney

15 PROSKAUER ROSE LLP

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17 BY: CHARLES S. SIMS

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18 Attorneys for Movant

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20 AMERICAN CIVIL LIBERTIES UNION FOUNDATION

Attorneys for Movant

21 BY: STEVEN R. SHAPIRO

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BY: STEVEN R. SHAPIRO

1 (In open court)

2 (Case called)

3 THE DEPUTY CLERK: December 11, 2006, In Re: Grand  
4 Jury Subpoena served on ACLU. Counsel, please state your names  
5 for the record.

6 MS. RODGERS: Jennifer Rodgers and David Raskin for  
7 the government. Good afternoon, your Honor.

8 MR. SIMS: Charles Sims for the ACLU with Josua Dratel  
9 and Steve Shapiro.

10 THE COURT: Good afternoon, and there are two other  
11 people in the courtroom.

12 MR. SIMS: My colleagues, your Honor.

13 MS. STERN: Emily Stern, your Honor.

14 MS. FIGUEIRA: Elizabeth Figueira, your Honor.

15 THE COURT: The reason I asked that question is I have  
16 sealed the courtroom, although one of the issues that we'll  
17 need to discuss in a minute is whether these proceedings should  
18 in any or all respects be sealed, but, pending that decision,  
19 the courtroom has been sealed and the transcript of these  
20 proceedings will be sealed and copies available only to counsel  
21 for the respective sides and the Court, except upon further  
22 order of the Court, which may follow perhaps even today. We'll  
23 see.

24 To set the stage, there was delivered to my chambers  
25 early this morning and in some sense filed in the sense of mark

1 filed U.S. District Court by the clerk's office at 9:01 this  
2 morning an order to show cause and accompanying memorandum  
3 seeking to quash a grand jury subpoena. And the subpoena,  
4 which is annexed as Exhibit 1 to proposed order to show cause,  
5 calls for the production of "any and all copies of a document  
6 marked 'secret' dated 12-20-2005 with the heading Information  
7 Paper that was received by the ACLU in or about October 23,,  
8 2006, and any and all copies of any other document marked  
9 'secret' that were received in October or November 2006 from  
10 the same source as provided the 12-20-05 document referenced  
11 above."

12         The thrust of the motion to quash is the allegation  
13 that the subpoena is really a misuse of the grand jury for the  
14 purpose of obtaining and suppressing a document that the ACLU  
15 has in its possession by prohibiting the ACLU from obtaining  
16 any copy of the document.

17         So there are two issues before the court. One is the  
18 merits or demerits of the application itself, and the second is  
19 the issue of whether these proceedings should be sealed or  
20 denied.

21         Just to complete the preface, shortly after receiving  
22 the copies of the papers, the Court attempted first to get a  
23 joint conference call of counsel. Unfortunately the assistant  
24 was not at her phone at that time. I don't mean this  
25 pejoratively. There was no reason that she would have known

1 that the court was going to be calling. So I placed two  
2 separate calls, one to Mr. Sims to inform him that I would hear  
3 this matter at least initially today at 2:30. In the course of  
4 that conversation, Mr. Sims volunteered that he had attempted  
5 to file this with the clerk's office without being subject to  
6 sealing but that the clerk's office had not acceded to his  
7 request. I expressed no opinion on that, went on to say that  
8 we'll take that issue up here today, and the other call, I then  
9 reached out for Mr. Dasin, chief of the criminal division, so  
10 that he could inform Ms. Rodgers that there was this hearing  
11 today, and I mentioned to him that there would be the  
12 additional issue of sealing it or not.

13 So I think that completes all the prefatory matters.  
14 Let me hear on either of those issues first from the government  
15 and then from the ACLU counsel. I start with the government  
16 only because I've had the advantage of seeing the papers from  
17 the ACLU so I know their basic position.

18 MS. RODGERS: Thank you, your Honor. Well, which  
19 issue would your Honor prefer to start with?

20 THE COURT: Why don't we go to the merits first.

21 MS. RODGERS: Well, your Honor, the government would  
22 actually prefer to not get to the merits right now and to ask  
23 for some additional time.

24 THE COURT: Then let's get to the sealing issue.

25 MS. RODGERS: Okay. The government believes this

1 matter should be sealed. It involves a grand jury  
2 investigation and pursuant to Rule 6(e), any hearing that deals  
3 with grand jury matters are to be sealed even in the papers  
4 that have already been filed under seal at least for the  
5 moment.

6 There are references to the government's grand jury  
7 investigation. Inevitably any discussion of the merits,  
8 obviously the government papers are going to have to in some  
9 part refer to the grand jury investigation because of the  
10 challenge that the ACLU has issued that our grand jury  
11 investigation does not, in fact, cover the subpoena, and, of  
12 course, the allegations of that.

13 THE COURT: But at the moment they're only seeking to  
14 not have sealed their initiating papers. A witness before the  
15 grand jury, for example, is free, is he not, he or she, to tell  
16 the world that he appeared before the grand jury and what he  
17 said.

18 MS. RODGERS: That's correct, your Honor, but of  
19 course the government has to respond to this matter and to  
20 allow the ACLU to put its papers in the public forum, and for  
21 the government to have to file its papers under seal and to not  
22 permit it to respond on the merits seems unfair at best and  
23 would not give a full picture of what's going on. Of course,  
24 to give that full picture would violate the secrecy rules of  
25 the grand jury.

1 I think I can say this is an ongoing investigation  
2 broader than this particular matter and there's no question  
3 that discussing it in public would potentially be detrimental  
4 to that investigation.

5 THE COURT: Supposing the court were to find arguendo  
6 that the subpoena had been improperly promulgated and should be  
7 quashed. Would it be your position that that determination  
8 should be under seal? Don't we have all the time courts of  
9 appeals, let alone the district court, issuing fairly full  
10 statements about grand jury matters excising the names and some  
11 other particulars, but In Re: John Doe, in effect, must appear  
12 a thousand times in the public record.

13 MS. RODGERS: I think two things, your Honor. One is  
14 that there wouldn't be any harm in the government's view to  
15 sealing it now and letting this play out and see where the  
16 Court comes out on the issue with the subpoena and then  
17 unsealing everything if at that time of a determination that's  
18 appropriate.

19 But secondly, I do think, looking ahead a little bit,  
20 it may still be harmful to the investigation for this matter to  
21 be fully fleshed out in papers as the government hopes that it  
22 will be before a decision is made by the Court.

23 THE COURT: Am I right that your adversary, I should  
24 say, in suggesting, am I right in reading the subpoena as being  
25 a request that they not be able to keep even a copy of the

1 document?

2 MS. RODGERS: That's correct, your Honor.

3 THE COURT: And what's your authority for that?

4 MS. RODGERS: Well, the authority for issuing a  
5 subpoena is just --

6 THE COURT: No, no. I know the authority for issuing  
7 a subpoena. The authority for issuing a subpoena is well  
8 founded in law, but as a practical matter every AUSA has  
9 subpoenas sitting in his or her desk which they are free to use  
10 in order to assist the grand jury. That's not what I mean.

11 My question is what's the authority for saying that a  
12 subpoenaed party can't keep a copy of any document that they  
13 produced to the grand jury? The grand jury as an investigatory  
14 body may have a need for an original. They even have under  
15 some circumstances need for some of the copies of the copies,  
16 like fingerprint analysis or something like that. But I've  
17 never heard of a case before where a party could arrange to  
18 keep a copy even if it was a copy made for them by the court,  
19 by the government. So what is the authority for saying that  
20 they can't even keep a copy if that's what they are suggesting?

21 MS. RODGERS: Well, your Honor, we're drifting a bit  
22 into the merits, but of course I'm happy to answer the Court's  
23 question.

24 THE COURT: Well, let's drift.

25 MS. RODGERS: I think it might help to explain a bit

1 of the background here which was alluded to in the papers or  
2 actually discussed in the papers. I had a conversation with  
3 Mr. Dougherty, a lawyer at the ACLU, in which I told him that  
4 the government wished to get back this particular document that  
5 it had been given, and I did tell Mr. Dougherty that the  
6 government wanted to get all copies of the document. I  
7 explained to him that it was a classified document and  
8 therefore was essentially contraband that needed to be  
9 restored.

10 Mr. Dougherty didn't refer to me to anyone, for the  
11 time being said he would get back to me. I got a call from  
12 Mr. Dratel representing the ACLU. When I explained to  
13 Mr. Dratel that we wanted all copies of the document back  
14 because it was essentially contraband, Mr. Dratel told me that  
15 the ACLU, being the ACLU wouldn't want to voluntarily give the  
16 documents back in cooperation with the government and would  
17 need some sort of process, and I said what sort of process?  
18 How about a subpoena? He said that's fine, fax me a subpoena,  
19 which I did.

20 So certainly part of the reason for the issuance of  
21 the subpoena three weeks ago today was as a means to gain what,  
22 at that time, I viewed was cooperation from the ACLU in giving  
23 us the contraband documents back. That turned out not to be  
24 the case when I was told that they were, in fact, considering  
25 what to do and that they may want to quash and that they did

1 not, in fact, want to voluntarily comply with the subpoena.

2 THE COURT: Was it the ACLU who first brought to your  
3 attention their possession of this document or was that through  
4 some other source?

5 MS. RODGERS: It was through some other means, your  
6 Honor.

7 THE COURT: So you reached out to them initially  
8 because there was this classified document that should not have  
9 been in your view released and you wanted it back?

10 MS. RODGERS: Correct.

11 THE COURT: And it's not easy to believe that the  
12 ACLU, despite its history, would be cooperative. Well, hope  
13 springs eternal, but it seems to me -- this I know you address  
14 in your briefs -- if either side wanted to, since there seems  
15 to be a huge difference between investigating a wrongful leak  
16 of a classified document and demanding back all copies of it,  
17 and I'm old enough to remember a case called the Pentagon  
18 papers, but, more generally, I wonder what the authority is for  
19 using a grand jury subpoena for that purpose.

20 MS. RODGERS: Well, I do have a response to that, your  
21 Honor. Obviously this will all be addressed at greater length  
22 in papers. There is a legitimate use for the grand jury  
23 subpoena. It is a proper use of the grand jury subpoena.  
24 Obviously there is evidentiary value in getting from the ACLU  
25 at least one copy of this document.

1 THE COURT: Sure. That's not the issue. I don't  
2 think they're claiming that they are not going to give you a  
3 copy.

4 MS. RODGERS: In fact, I think that they are.

5 THE COURT: Well, then I need to clarify that, but my  
6 question, anyway, was as to all copies.

7 MS. RODGERS: Understood. Even with respect to that,  
8 your Honor, there is a legitimate purpose in the grand jury  
9 seeking all copies from the ACLU. For example, we can't know  
10 at this time exactly where the grand jury investigation is  
11 investigation is to go.

12 I have informed Mr. Dratel that at this time the ACLU  
13 is not a target of this investigation, and I'm not saying I  
14 would ever anticipate that that would necessarily change, but  
15 if we were to receive from them in compliance with the subpoena  
16 a thousand photocopies of this classified document that they  
17 had in their possession, then it's possible that that would  
18 change the focus of the grand jury investigation to look at  
19 what they were planning to do with these documents.

20 THE COURT: But that would still not address your  
21 providing them, for example, with one copy of what the document  
22 that in your hypothesis they provided you a thousand copies of.  
23 You could not claim that your investigation was compromised by  
24 the fact that you gave their lawyer a copy of the document that  
25 you required them to produce all copies of. So I think it's

1 not quite the same issue that I'm interested in.

2 My issue, at least for the moment, and there may be  
3 many other issues that will arise as a result of papers that  
4 I'm going to receive from both sides, but my issue at the  
5 moment is under what authority can they be prevented from  
6 keeping, in some sense, whether it's provided to you by the  
7 court or just they're allowed to, you know, go down to Kinkos  
8 and make for themselves a copy of the document. That's is the  
9 issue it seems to me.

10 MS. RODGERS: There certainly might be a way to work  
11 something out like that if their counsel had clearance and  
12 would secure the document in the appropriate way. We have not  
13 had a chance to consult really on this issue since this was  
14 filed.

15 THE COURT: That's why you're going to give me the  
16 brief. Let me turn to your adversary, see what he has to say.

17 MR. SIMS: Your Honor, if I might let me get two facts  
18 clear for the record, and then I'll also whatever questions you  
19 have.

20 First, our papers lay out precisely how many copies  
21 the ACLU has and frankly ever made, and that is there is one,  
22 putting aside backup copies automatically made by a system  
23 which I believe is secured, there's one electronic copy. It's  
24 the one essentially received. It's been isolated, and one  
25 paper copy was made of that in advance of hearing from the

1 government. So that's the sum total of what the ACLU has.

2 THE COURT: Well, the government said if you had a  
3 thousand, you might become a target. So maybe you can breath a  
4 conditional sigh of relief.

5 MR. SIMS: Exactly, and, second of all, although as  
6 you read from the subpoena it has two categories, our papers  
7 also have a declaration saying there is nothing in the second  
8 category. So the only dispute here is about category one  
9 namely, that document, and, finally, let me say that I'm  
10 advised that Ms. Roders has that three and a half page  
11 classified document here today and if the court wants to look  
12 at it, we certainly have no objection.

13 THE COURT: One thing I'll just flag for the  
14 government, to the extent that whatever you give to me relates  
15 to or takes meaning from the content of this document and to  
16 that extent I'll need to see the document obviously under seal  
17 ex parte. If the matter can be determined without my ever  
18 looking at the document, that's fine, too. I've got enough  
19 reading without adding another page. So I'll leave that to the  
20 government. You'll know much better than I can determine at  
21 this point if you need to show me the document to make sense of  
22 what everyone else is saying.

23 MR. SIMS: We would certainly feel more comfortable,  
24 your Honor, if it were not ex parte. Then we know that they're  
25 showing you what --

1 THE COURT: It may come to that but at the moment I'll  
2 put it the burden on the government and we can get to that  
3 later.

4 MR. SIMS: Right. With respect to the filing issue,  
5 the principal, your Honor, I'll refer to which was decided in  
6 the *Butterworth* case makes perfectly clear that witnesses can  
7 talk about their appearances before the grand jury and that  
8 inherently sets up precisely the situation that Ms. Rodgers  
9 says was somehow a basis for secrecy and it clearly isn't. In  
10 all of those situations, obviously the government is bound by  
11 secrecy, but the witness is not.

12 As she described the grand jury secrecy rule of  
13 secrecy, she entirely ignored Rule 6(e)(2)(A) which says no  
14 obligation of secrecy may be imposed on any person except in  
15 accordance with 6(e)(2)(B). 6(e)(2)(B) does say unless  
16 otherwise provides. Then it says the following persons must  
17 not disclose a matter occurring before the grand jury and our  
18 clients, the ACLU, are not within that list.

19 The order we're asking your Honor to make, which is  
20 that our motion papers may be publicly filed, obviously I want  
21 to make it clear would be without prejudice to whatever would  
22 be the case with respect to any subsequent document and if the  
23 government files a brief or supporting papers or whatever in  
24 which they sought secrecy, that would be decided by the court  
25 at that time.

1 I don't see anything in the rest of Rule 6 that  
2 negatives what 6(e)(2)(A) and (E) provide.

3 THE COURT: Well, essentially, as I understood the  
4 government's position, and admittedly this was off the top of  
5 her head without having a chance to research it, she was saying  
6 if a party can come into court through an emergency order to  
7 show cause and say in effect we don't like what the government  
8 is doing in form of a filing of a grand jury subpoena that has  
9 been issued upon us, and the government "because of Rule 6(e)"  
10 and in many cases because of legitimate law enforcement needs  
11 is not going to be able to respond in any public way to almost  
12 anything that's in that submission. It creates potentially a  
13 great unfairness that the -- it's not as if you're on the  
14 responding answer as far as these papers are concerned. You're  
15 the initiator, and you're saying, in effect, we can go public  
16 with our objections to this grand jury subpoena knowing that  
17 the government will never, as a practical matter, be able to  
18 say anything public in response. So it will be a one-way  
19 street. So that may not be a Rule 6(e) or should not. It  
20 should be simply an issue of fairness.

21 MR. SIMS: Well, first of all I think the conjunction  
22 of the *Butterworth* case and the rule of grand jury secrecy  
23 resolves any such conflict. Second of all, the issue presented  
24 in our papers is simply whether or not the government has the  
25 legal power.

1 THE COURT: I haven't read the *Butterworth* case, but I  
2 know the general proposition, but was that a case where someone  
3 was trying to quash a grand jury subpoena or simply a case  
4 where someone was talking to whoever he wanted to talk to and  
5 the government reached out and said don't talk?

6 MR. SIMS: Mr. Dratel will answer that question.

7 MR. DRATEL: There was a Florida statute, your Honor,  
8 basically curtailing a grand jury witness's ability to --

9 THE COURT: It's arguably distinguishable from this  
10 kind of situation where you're the one that's coming in and  
11 saying we're going to file this public document that makes all  
12 sorts of statements and allegations and knowing that the other  
13 side can't publicly respond.

14 MR. SIMS: Your Honor, the question presented by the  
15 motion to quash is a purely legal question having nothing to do  
16 with whether they're investigating the ultimate leaker, if  
17 there is a leaker here or not, and that's a very important  
18 question. The New York Times within the last two months has  
19 published three classified documents or articles reciting  
20 possession of them. Whether or not the press can do so has  
21 been clear I think almost everyone since the Pentagon paper's  
22 case. If the governments's position now is if when they get a  
23 call from the newspaper saying do you have a comment on this  
24 story that we have based on this article, the government can  
25 serve these subpoenas. That is a very important question of

1 power that the ACLU should be able to talk about.

2 THE COURT: Actually, again, that's not the narrow  
3 question being presented here, although I think that question  
4 may arise before this matter is resolved. The narrow question  
5 is simply, whether at this stage of the proceedings, the papers  
6 that you filed this morning should be filed publicly or filed  
7 under seal. That's the immediate question.

8 MR. SIMS: And, your Honor, Rule 6(e)(6), which  
9 permits the Court to seal records, provides that they can be  
10 sealed to prevent the unauthorized disclosure of a matter  
11 occurring before a grand jury, and one of our submissions here  
12 today is there's nothing in these papers that reflect anything  
13 that's occurring before the grand jury.

14 THE COURT: Other than the fact that there's a grand  
15 jury subpoena, but since grand jury subpoenas are issued every  
16 day for thousands of documents per se, that would not tell the  
17 public anything.

18 MR. SIMS: I think it's notable, yes, that Ms. Rodgers  
19 recitation, it seemed to me conceded, that the purpose behind  
20 this subpoena is not investigatory but confiscatory.

21 THE COURT: I didn't interpret her comments to be that  
22 way and as I would with any party, I put this matter on very  
23 promptly so we can get a schedule and get this moving, but I'm  
24 not going to assume that things that the government or any  
25 party says on two hours' notice or five hours' notice or

1 whatever is binding and definitive as to their position. Yes.

2 MR. SIMS: I understand, but, for example, after  
3 Ms. Rodgers made the phone calls on November 17 and 20 saying  
4 we insist that you give us back any and all copies of this,  
5 there's no question that the ACLU had the right to hold a press  
6 conference and describe what happened. There's no possible  
7 grand jury basis for preventing that speech, and these papers  
8 really don't do anything other than make exactly that same case  
9 so.

10 THE COURT: Yes. While we're on that subject, since  
11 we have the other person to that phone call present in court,  
12 as I understand it, let me hear his version of what occurred on  
13 that call.

14 MR. DRATEL: Your Honor, I had one of the  
15 conversations, not the first conversation, but I called  
16 Ms. Rodgers after being retained by the ACLU that Monday, the  
17 20th. Ms. Rodgers essentially stated the nature of the  
18 conversation as I think I set forth in my declaration. I said  
19 the ACLU would not voluntarily return the document.

20 THE COURT: Maybe I misunderstood. What is your  
21 position then or what is the ACLU's position? As I understood  
22 her statement, it was in the initial conversation which I guess  
23 was not with you but with -- who was that with?

24 MS. RODGERS: With Mr. Dougherty who's a lawyer at the  
25 ACLU.

1 THE COURT: Mr. Dougherty.

2 MR. DRATEL: And there's a declaration from him, as  
3 well, in our papers.

4 THE COURT: Well, does he dispute her allegation that  
5 he basically said do you want to cooperate with the service of  
6 process or something like that?

7 MR. DRATEL: That was not in our conversation. I what  
8 I said very specifically was we will not comply voluntarily but  
9 only through the legal process, and I did not establish whether  
10 we would move to quash or comply. In other words, by order of  
11 the court essentially and also, your Honor, just, if I may,  
12 again, in terms of the nature of where we were at the time, I  
13 didn't know at the time what the ACLU's response would be to a  
14 subpoena because it had not been discussed.

15 THE COURT: It sounds to me that just as I don't infer  
16 any waiver of anything Ms. Rodgers may have said here today, I  
17 don't interpret it the way Mr. Sims just interpreted it.  
18 Similarly I don't infer any waiver on the part of ACLU based on  
19 whatever may have been said about cooperation. So at this  
20 point, it's all just background noise.

21 MR. DRATEL: If I may on the issue of sealing because  
22 this is something I have some experience with in terms of cases  
23 with the government. There's no impediment to the government  
24 filing a legal argument that addresses to the best it can all  
25 the arguments that we have made without revealing anything that

1 might be covered by 6(e).

2 As an adjunct to that, the government could file a  
3 sealed affidavit or some other parties could do that. I've  
4 filed papers in the context of nation security cases to  
5 discredit us from the government's entire response to the next  
6 party, in essence to impair the government's tactical position  
7 with respect to my motion. I make the motion and receive a  
8 response.

9 THE COURT: I'm familiar with that kind of approach  
10 and that may be appropriate here or not.

11 Here's what I think makes sense and we do have to  
12 bifurcate the sealing issue from the merits issue. With  
13 respect to the papers that were filed earlier today by the  
14 ACLU, the court is tentatively of a position that those should  
15 not be under seal for very much the reasons expressed by the  
16 defense, but I'll give the government until a time certain  
17 tomorrow that I will set in a minute to put in by letter brief  
18 any opposition to that.

19 This says nothing about the sealing or unsealing of  
20 today's proceeding. This says nothing about the sealing or  
21 unsealing of any further papers in this matter as it's  
22 addressed for the moment, solely and narrowly to the papers of  
23 the moving papers that were filed today.

24 With respect to and I want the government's papers at  
25 some point tomorrow that I can get any response by the end of

1 the day and rule by the end of the day. I'm uncomfortable  
2 having a matter under seal that at least, in my view, should  
3 not be under seal for any prolonged period of time, but my mind  
4 can be changed by whatever the government provides me.

5 With respect to everything else, by which I mean not  
6 only merits but also the question of sealing or unsealing of  
7 today's proceeding or anything else that comes hereinafter,  
8 whether it should be sealed at all, whether it should be sealed  
9 in part, whether it should be in accordance with the procedure  
10 that was just referenced of the public redacted unsealed papers  
11 and unredacted sealed papers, etc., etc., many possibilities  
12 here, I want that addressed in the same papers as the merits.

13 So how long does the government want to respond on the  
14 merits into that further issue?

15 MS. RODGERS: May we have one week, your Honor?

16 THE COURT: Let me ask you this. I will give you the  
17 full week if you need it, but would it not be possible to have  
18 that to me by Friday of this week?

19 MS. RODGERS: I will try, your Honor.

20 THE COURT: If you can't make that, come back and  
21 jointly call me with adversary counsel and we'll give you until  
22 next Monday. Let's at least for the moment leave it that those  
23 papers will be served on the Court and counsel on Friday, the  
24 15th, by five o'clock.

25 Now, how long does defense counsel or petitioner's

1 counsel need?

2 MR. SIMS: Wednesday would be fine, your Honor.

3 THE COURT: Wednesday, and if the government gets  
4 until Monday, and therefore you will need a day or two more,  
5 we'll work that out when they call. Otherwise, Wednesday the  
6 20th at five o'clock. And I don't usually have reply papers.  
7 What I will do is oral argument. I'll give both sides a chance  
8 to reply and go on as long as your voices and my tolerance can  
9 bear.

10 So let's put this down for a hearing on December 21.  
11 This will not be noted on the calendar until and unless I  
12 decide the sealing issue. Yes.

13 MR. DRATEL: Your Honor, I won't be here at that time.  
14 If we can put it on for the following week? I'll be back the  
15 27th, 28th, 29th.

16 THE COURT: Once we get into the holidays, we're going  
17 to have serious delays, and I want to avoid that if I can. I'm  
18 sorry, but there are three counsel here.

19 MR. SIMS: I think, your Honor, just because it's  
20 important to be clear, we appreciate the rulings. Does it have  
21 any impact on what the ACLU can say?

22 THE COURT: Let's talk about that then. Let's just  
23 set the time of the 21st. How about 10 a.m.? Okay?

24 Now, I don't know that the government has made any  
25 application that the ACLU gag in any respect, and I don't know

1 that I have authority to grant such an order, but let me hear  
2 from the government if that's what they want.

3 Okay. So it sounds like you're free to exercise your  
4 first amendment rights as you see fit.

5 MR. SIMS: Thank you.

6 MR. RASKIN: Judge, obviously anything going on in the  
7 courtroom today --

8 THE COURT: Yes, yes. Everyone understands that  
9 everything that's --

10 MR. SIMS: One of the reasons I raise this is last  
11 night a communication was sent around to the ACLU internal  
12 family, not with copies of the papers, but of the fact that we  
13 would be filing a lawsuit and so.

14 THE COURT: That's one of the reasons which, frankly,  
15 it seems to me you have every right to do which is one of the  
16 reasons I'm very skeptical as to the keeping under seal the  
17 initial filing. Maybe the government doesn't care. Maybe the  
18 government doesn't mind you having the initial filing filed  
19 publicly. Let me find out. That would obvious obviate that  
20 little bit of letter brief writing. Hold on. Let me hear from  
21 the government.

22 MS. RODGERS: Your Honor, at this time, we do want  
23 those papers under seal.

24 THE COURT: So the defense is free to say anything  
25 they want, but they obviously cannot distribute those papers

1 until tomorrow when I address the issue.

2 We need a time for the government's letter response  
3 tomorrow. Can you get me that by noon tomorrow?

4 MS. RODGERS: Yes, your Honor.

5 THE COURT: Just fax it to me. My fax number is  
6 122-805-7935 and obviously fax a copy to your adversary, being  
7 careful not to inadvertently include any classified material,  
8 and can the petitioner get me their letter response which  
9 should be no longer than whatever the the government's letter  
10 is by 4 p.m.?

11 MR. DRATEL: Yes, your Honor.

12 THE COURT: I'll rule by 5 p.m. Very good.

13 MR. DRATEL: Your Honor, just one sort of an odd  
14 question. The proceedings here are closed, and we have an  
15 institutional client, and the question is can we inform at  
16 least the director of the ACLU executive of the nature of these  
17 proceedings and what happened today?

18 THE COURT: In a bare bones sense, but not in a more  
19 substantive manner than that.

20 MR. SIMS: Thank you, your Honor.

21 MS. RODGERS: Thank you, your Honor.

22 THE DEPUTY CLERK: All rise.

23 (Adjourned)

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