UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

v. 15 CR 0093 (VEC)

SHELDON SILVER,

Defendant.

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New York, N.Y.

February 11, 2016
2:30 p.m.

Before:

HON. VALERIE E. CAPRONI,

District Judge

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
BY: CARRIE H. COHEN,
ANDREW D. GOLDSTEIN,
HOWARD S. MASTER,
JAMES M. McDONALD,
Assistant United States Attorneys

STROOCK & STROOCK & LAVAN LP
Attorneys for Defendant
BY: JOEL COHEN
- and -
MOLOLAMKEN, LLP
BY: JUSTIN V. SHUR
JUSTIN M. ELLIS
ROBERT K. KRY

ALSO PRESENT: JEREMY A. KUTNER
DAVID McCRAW
DANIEL M. KUMMER
ABBE D. LOWELL
MANUEL ORTEGA, Esq.

(Case called)

MS. COHEN: Good afternoon, your Honor. Carrie Cohen, Andrew Goldstein, Howard Master, and James McDonald for the government, along with our paralegal specialist, Anthony Coccaro.

THE COURT: Good afternoon.

MR. COHEN: Joel Cohen for Mr. Silver.

MR. SHUR: Justin Shur for Mr. Silver as well.

MR. KRY: Robert Kry for Mr. Silver.

MR. ELLIS: Justin Ellis for Mr. Silver.

MR. KUTNER: Good afternoon. Jeremy Kutner and David McCraw for *The New York Times*.

THE COURT: I'm sorry. Give me your names again.

MR. KUTNER: Jeremy Kutner and David McCraw.

A VOICE: Daniel Kummer from NBC Universal, and with me is my law clerk, Gabrielle Lyons.

THE COURT: Is your law clerk in front of the bar? Okay. Terrific.

And you're all just reporters. Not just reporters, you're the esteemed members of the press corps who are covering this.

PRESS REPRESENTATIVE: We hope to be here the whole time.

THE COURT: You're not going to be here the whole time -- well, you might be.

Let me just note for the record that Mr. Silver's appearance was waived for this court appearance. It will not waived for anything in the future, from here on. He was here for the actual motion, so I don't have a problem with him not being here for this, but he has to be here from here on out.

Okay. I'm going to start this afternoon hearing from the parties on the legal issue of whether the motion, the transcript of the motion and the related papers, should remain sealed. In my view, this is strictly a legal argument about whether the motion and related papers are "judicial documents" to which a First Amendment and common law right of access attach or not. And even if there is a right of access, whether the privacy interests of nonparties overcome that right of access. I believe that argument can and therefore must be held in open court.

So the parties have some guidance, if I order the materials released, it will be with at least the redactions proposed by the government which were designed to protect the privacy interest of nonparties. My plan is to first hear from Mr. Silver, then from the government, then from the press, if the attorneys from the press want to be heard, and any attorney for the nonparties who want to be heard. After those arguments, if anyone wants to be heard on what redaction should be made if the materials are unsealed, I may have to close the courtroom, as it is not clear to me -- I'm sorry, as it is

clear to me we can't have a meaningful discussion of the redactions without disclosing the very material that some are seeking to redact. We'll deal with that issue when the time comes.

So with that intro, Mr. Cohen.

MR. COHEN: Mr. Kry will speak for us, but we do have a housekeeping issue that we'd like to take up with your Honor either in the robing room or at sidebar.

THE COURT: Okay. Why don't we come to sidebar.

(Pages 5 - 7 SEALED by order of the Court)

(At the sidebar)

MR. COHEN: The lawyer for one of the third parties has contacted your chambers. He has been associated with his client that he would like to argue for. However, for him to announce his presence in the courtroom here would help the press to figure out who his client is in two seconds.

THE COURT: Yes, I'm skeptical of that. He's going to need to make a showing of that for me to be persuaded.

MR. COHEN: I don't know how to do that without inviting him up.

MS. COHEN: I can share with you one of the bases, not that I'm speaking for him, but [redacted]

MR. COHEN: [redacted]

THE COURT: Except that he has a very active practice, and he has clients other than her. And so the notion that him giving his name will automatically identify his client, which

is the argument, that is, if he puts his appearance on the record, we're all going to know who is associated -- first off, right now, the press has no idea what the issue is.

MR. COHEN: I think that's fair.

THE COURT: For now, it seems to me, I don't really see the problem with him identifying himself as representing a third party that has an interest in this matter. To the extent the concern is that if you associate his name with her [redacted], which is his big argument, that that should be blocked, then if you don't block her [redacted], people are going to be able to put one and two together to figure out who she is, that's something that seems to me we can discuss when or if I seal the courtroom to discuss it. And if he loses that argument, then the harm that he's concerned about is going to happen anyway if he's right. If he wins the argument, it's irrelevant, because then it's just Mr. Lowell represents someone who has an interest in this matter with no ability to associate it back to her in particular.

MR. COHEN: Well, my concern is as well, I'm more sympathetic to his argument than perhaps Ms. Cohen is, I'm sort of hard-pressed to make his argument for him. I'd feel more comfortable if he was able to address that with your Honor. If your Honor goes -- you have his letter, obviously. If your Honor chooses to then bar the press from the courtroom, if he could make the best argument he can make on the first leg of

the decision-making, maybe that obviates the problem some.

THE COURT: Maybe what we'll do -- my problem with it is the first leg, there's no reason for that to be sealed. There's just no reason for it. It's a legal issue.

MR. SHUR: Judge, if I may, because I'm going to be handling the first leg of it, when you're talking about the privacy interest and, I guess, the four factors that the Second Circuit looks at in determining whether privacy interests outweigh the need for disclosure, and you're getting into the allegations themselves, right, as far as how reliable the information is or whether it's traditionally a public or private matter, all of that analysis to argue that, you need to get into the allegations themselves, which are under seal.

THE COURT: Well, you're going to have to do the best you can. I think the issue is not quite live. We can revisit the issue when I get through everybody else who wants to talk and is prepared to identify themselves on the record, and then we'll deal with Mr. Lowell's issue. Okay.

MR. GOLDSTEIN: Thank you, Judge.

MS. COHEN: Thank you, your Honor.

MR. COHEN: Thank you.

(Continued on next page)

(In open court)

THE COURT: Okay. So who's arguing for the defendant?

MR. SHUR: I am, Judge.

THE COURT: Okay.

MR. SHUR: Your Honor, we concede that they are judicial documents. I think the question is the right -- or the presumption of the right to access, as your Honor knows, is not absolute and, in fact, in sealing these materials, in the first instance, recognized that with respect to these particular subject matters, Mr. Silver's fair trial rights and privacy interests at issue outweighed the right to public access.

THE COURT: True, but my bigger concern at the time was fair trial rights --

MR. SHUR: Yes.

THE COURT: -- because this all came about, as I recall, two or maybe three weeks prior to the scheduled start of trial. So my concern was because I think the subject matter of the motion would have generated press attention kind of over and above the criminal case, that that was going to make it difficult for us to pick a jury in that time frame. But now we're to the point where -- and I understand you have a motion, and I'm not prejudging your motion for a new trial for judgment of acquittal, but any retrial, realistically, is not three weeks away. It's three months away or even longer. And so the

passage of time really mitigates a fair trial concern.

MR. SHUR: I would disagree respectfully, Judge. I understand your point as far as not being as close in time, meaning a second trial, if we were to prevail on our post-trial motion or on appeal, for that matter. But I think the prejudice that we're talking about and the jeopardy to Mr. Silver's fair trial rights, there's a significant risk given the nature of the information. I think your Honor noted when where discussing this the first time sort of the reaction that potentially would happen in the press and that it would be difficult -- even if that evidence ultimately didn't come into trial, it would be difficult for jurors having been exposed to that information in the press. I don't think the fact that the trial's happening three weeks, three months, or even three years after that press attention is a significant change.

THE COURT: Okay. So to the extent that's the defendant's argument, I am confident that a vigorous voir dire would be able to deal with any jurors who, if there ever is a retrial, were aware of the story, remembered the story, and it in any way affected their view of the facts of the case. I think voir dire could deal with that. This is not information of such a nature that a searching voir dire, under which the courts are required to do, won't deal with any prejudice to the defendant.

MR. SHUR: Well, I guess I would ask this: Given the

potential risk, for the Court to simply maintain the status quo, meaning, revisit this issue -- keep the materials under seal, revisit the issues after the post-trial motions are resolved and after Mr. Silver's appeal is exhausted. Therefore, it's not so much about mitigating risk, you're eliminating the risk. And I don't think --

THE COURT: Tell me what authority I have for keeping under seal judicial documents where so far the only prejudice you've identified is fair trial rights of the defendant, recognizing that there are privacy interests associated with nonparties, which is a little bit of different issue, and I think those can be mitigated through redactions.

MR. SHUR: Well, I think the case law that supports the notion that the Court has the authority to permanently seal materials deals with primarily privacy rights, for a good reason, because there's no trial down the road. It typically happens after the trial, and there's not going to be a future trial.

THE COURT: Right. But if those interests can be dealt with through redactions, then what's my authority for denying the fourth estate over here access to information that is traditionally open and to which there's a public -- there's both a common law right of access and a First Amendment right of access?

MR. SHUR: Specifically focusing on the fair trial

right issue, we're not asking that it be sealed permanently. All we're asking for is that it remain under seal until it's clear that there will be no trial down in the future; and, therefore, there are no fair trial rights that could be jeopardized.

THE COURT: Right. But you're arguing I should take that risk to zero, and I don't know that the First Amendment or the common law right of access allows me to so denigrate the First Amendment right that I'm going to take -- that I'm going to elevate the fair trial interest, which I think can be largely mitigated through voir dire given the fact that I'm not now talking -- look, at the time I had no problem, I thought it was a no-brainer, that the defendant's fair trial rights were paramount because the ability to deal with whatever publicity there would be through voir dire, I was not comfortable that we could really do that given the very short passage of time. But now, I am comfortable that I can deal with any potential fair trial rights of Mr. Silver, and so now I'm left with the First Amendment right of the public and the press.

MR. SHUR: Right. I guess two things, Judge. The first is we would disagree that voir dire would eliminate the risk to Mr. Silver's -- or mitigate, even, the risk that Mr. Silver's fair trial rights would be violated. I think it's difficult in open court to really sort of flesh that out further without getting into the allegations.

THE COURT: But I know what the allegations are, and so I'm aware that the subject matter of the disclosure could be something that people -- in and of itself could create concerns in potential jurors. But now we're talking about a defendant who's already been convicted. So to the extent you've got jurors who are concerned about abuse of public power, you've got a defendant who would have been convicted; that's going to have to be dealt with on voir dire. It seems to me that the added information that's under seal is minor compared to the fact that he stands convicted by a jury of two schemes to defraud the people of New York. In comparison --

MR. SHUR: Right. I guess I would disagree with sort of the characterization of the matter under seal and comparing it to sort of the conviction. I think it's a little bit of apples and oranges, and I think it would have a greater impact; and I just don't feel I could sort of go further than that.

The second thing is in terms of balancing the risk that Mr. Silver's fair trial rights would be violated if there were to be a second trial against what I think is fairly minimal in terms of keeping the materials under seal for what will be relatively a short period of time --

THE COURT: You know that's not true. He's not even scheduled for sentencing until April, and then you're going to appeal, and then it's going to go upstairs. And those guys, you know, they work very hard, but it could be two years.

MR. SHUR: I understand, Judge. I think, on balance, the Court has the authority to keep the materials just to maintain the status quo until Mr. Silver exhausts his appellate rights.

THE COURT: Okay.

MR. SHUR: And I think also, just focusing on the fair trial rights prong of it for a moment, I think it's also relevant that the public interest in this matter is minimal. I mean, I think, actually, the filing from the *New York Times* highlights this point in that I believe the letter from the *Times* says the public has a right to know more about the trial. That's the public interest in this matter, to know more about the trial. And as your Honor knows, this evidence never came out at trial because your Honor ruled it was irrelevant and inadmissible.

THE COURT: I think what I ruled is that based on what I knew at that time, I didn't think it would be admissible under 403; but depending on how the defense played out, that could change my ruling. And, I mean, at some level that argument, which I think appeared in maybe your papers and maybe some of the nonparties' papers, is this notion that if the motion is denied -- if the ruling of the Court is that the evidence would not be admissible, somehow or another, there's no public interest in it. But I don't read the case law on why there's a First Amendment right of access to judicial

proceedings to be that narrow.

I mean, it would be nice for me to say: Well, everybody knows that if I keep evidence out, that must be the right decision. It's only if I let stuff in that there's a public interest in what I'm doing. But I don't think that's right. I think the public has an interest in what goes on in criminal trials, which includes both the evidence that is admitted and the evidence that is excluded, for whatever reason, whether it's not reliable or unduly prejudicial or whatever. I mean, that's why there's a public right of access to criminal cases.

MR. SHUR: I understand, Judge. My only point is simply that given how tangential the information that is under seal is to the proceedings, that the public's interest in that material is minimal when you're evaluating sort of this balancing test as far as Mr. Silver's fair trial rights versus keeping the materials under seal, not permanently, but all I'm talking about right now is just to maintain the status quo until all of the post-trial motions and the appeal has been resolved.

THE COURT: Okay. One other question -- anything further before I ask a question I have of you?

MR. SHUR: There's the privacy rights prong. I don't know if you'd like me to address that or hold off.

THE COURT: If you think you can.

MR. SHUR: I think that's the challenge, Judge. And I know we've addressed this in our papers, but the four prongs that the Second Circuit looks to in determining whether privacy interests outweigh the need to disclose materials and the right to public access, I think, all weigh in favor of keeping these materials under seal. I do think it'll be difficult to walk through each prong and analyze them without divulging the materials under seal, though.

THE COURT: Okay. So I'll give you a buy for now. If we go under seal, I'll revisit the issue.

MR. SHUR: Thank you, Judge.

THE COURT: Before then, though, do you have -- does the defense question whether the government had a good faith basis to make the motion in the first instance?

MR. SHUR: Well, I guess a few things, Judge.

THE COURT: I understand that you disagree and you think that their argument was ridiculous. I'm assuming that you would say that.

MR. SHUR: I want to make sure I understand the judge's question. Is it that the defense's position on the government's filing the motion and sort of teeing up the issue in that fashion, or is it --

THE COURT: The conclusions they drew from the evidence.

MR. SHUR: Okay. We don't believe that the government

acted in bad faith, but we don't believe that the information is reliable, at least from what's in the record.

THE COURT: Okay.

MR. COHEN: May I add one more fact to that, your Honor?

THE COURT: Sure.

MR. COHEN: We did ask the government in advance to give us the motion rather than file it even under seal and let us decide what it stood for and whether we would not raise an issue during cross-examination that would allow them to try to offer that evidence with a ruling from your Honor. The government declined to do that. In that respect, the government could have obviated this issue right here. We would not be in this predicament now. I'm not saying they acted in bad faith, but I'm saying that they did place us in this predicament.

THE COURT: All right. I hear you. I'm not viewing that as an aspersion on the government.

MR. COHEN: Nor have I cast any.

THE COURT: Okay. But based on what they've just said, I am going to order the government to provide the evidence to the Court. If it's not obvious what the evidence is, that is, am I going to be able to follow the evidence and figure out your conclusion, then you're also ordered to provide me a narrative of what the evidence shows. You're ordered to

do that by close of business on Tuesday, which is the 16th. If the defendant wishes to put something in in opposition, that is, disagreeing with the narrative or telling me why the evidence doesn't show what the government says it shows, your response is due close of business on the 17th.

MR. COHEN: Thank you.

THE COURT: Okay. Does the government want to be heard?

MR. GOLDSTEIN: Since the defense concedes these are judicial documents and I believe that there is a First Amendment right to access which we think is clear, the one issue that I did want to raise for the Court in response to what Mr. Shur said was that in the *Lugosch* case, which your Honor pointed the parties to, there is a discussion of the importance of contemporaneous access to the judicial records. And so the Court does, as your Honor know, have to weigh not only sealing versus unsealing, but also the need for contemporaneous access and the public's interest in contemporaneous access to the documents.

With regard the defense's argument that there's no or minimal public interest at issue here, we do disagree with that. The government did make this motion. We believe we did it in good faith, and the motion had the potential to affect the shape of the trial. And the Court, in response to the motion, we don't believe that you denied it flat out; you left

open the possibility that, depending on the arguments and the evidence that the defense put forward, they could open the door to some of the issues that we raised. And given that and given that there were then choices that were made during the trial in light of your Honor's comments, there is a public interest in the public understanding what it was that formed the basis for that.

So in addition to affecting the conduct of the trial, it may also -- as we put in our papers, it could also affect the sentencing of the defendant.

THE COURT: Okay. Gentlemen from the press, Mr. Kutner, Mr. McCraw.

MR. KUTNER: Thank you, your Honor. We first just want to thank the Court for taking up this sealing issue sua sponte and so soon after the conclusion of the trial. We very much appreciate it.

Just four quick points based on what's been said here. The first is that, as the Second Circuit has recognized, one of the major considerations in deciding whether or not to seal or close is asking whether or not there's a substantial probability of prejudice. I think all that's been discussed here today is sort of vague presumption that maybe there might be some, but not that what would be added here would be additive to what happened and that there would be something additional. I don't think we've reached that threshold.

Second, the Second Circuit has also been clear that voir dire is a perfectly acceptable method of dealing with trials, just as -- just as in dealing in sort of public issues and having so much press attention as this one. This Court and this circuit is more than capable of handling these issues on voir dire, through searching voir dire.

And, third, and I think extremely critical here, motions in limine, as expressed by the *Waller* case, are critical and fundamental to the operation of a fair trial. In that case, the Court said that a motion in limine and decisions in that regard are just as critical as the trial itself. The kinds of evidence that come in and out often determine whether or not someone pleads or not, how the trial itself progresses. And so the public interest in the Court's decision-making on whether or not to admit certain evidence, which is the bulk of what was discussed at the sealed hearing and also was the basis of the various papers submitted by the parties, is of extreme importance.

And, finally, I would just reiterate what the government pointed out in the *Lugosch* case. Contemporaneous access is what is required under the First Amendment, and delaying for upwards of two years would simply be violative of the First Amendment. And I think you'll find, if you look at other courts in this district that have dealt with similar issues, many courts have actually delayed the unsealing only

until the impanelment of the jury, much less waiting till the end of the trial and certainly not until after resolution of all appeals.

THE COURT: All appeals.

MR. KUTNER: Right. So I think the weight of the case law goes far in the other direction, and I think that provides a much better path forward with regard to the fair trial rights.

THE COURT: Okay. Thank you.

MR. KUTNER: Thank you.

THE COURT: NBC.

MR. KUMMER: Daniel Kummer for NBC Universal and WNBC-TV. I'm not going to repeat Mr. Kutner's arguments, and we certainly join in them vigorously. I just want to make a couple very, really, more general observations. This is the first access matter that I can I recall in my career as a media lawyer, which goes on for -- has gone on for a few years, in which we came in with absolutely no idea what it is we are seeking access.

THE COURT: Yes, really put you in a bad position, doesn't it?

MR. KUMMER: You were in a bad position. We respect that. And we could tell from your order that you were doing your best and saw no other way, but that -- it is a really extraordinary situation. The one thing we do -- we don't even

know generically what type of document, what type of evidence, who this person -- who these third parties might be. What we do know is that it involved a motion in limine, which is at the core of the Article III court's balls-and-strikes function. And, therefore, as your Honor noted at the outset and as defends concedes, there's really no question this is a judicial document, but it's a very special kind of judicial document that's really at the core of what this Court does in terms of its adjudicative function and therefore is entitled to very strong presumption of access.

Secondly, it sounds like we're going to be -- that there's going to be a discussion of the privacy interest in which we're going to be excluded. We respect that in terms of your Honor's conduct of the hearing. I just would simply note, in terms of privacy interests of third parties, that one factor to take in mind is these are third parties who were dealing with one of the most powerful men in the state. And to the extent you do that, there's a certain inherent assumption of risk that your dealings with that person, whatever they may be, may become the subject of public interest and, indeed, high public interest. But beyond that, since we have no facts to work with, there's nothing really to plug into the analytic framework that I think everyone in the court agrees is applicable.

Finally, that sort of brings me to my last point in

terms of the public being in the dark about this. Fundamentally, what we have here is a discussion between the executive branches of the United States government and the judicial branch of the United States government and a former extremely powerful member of the legislative branch of the government of the state, and the only people excluded from that conversation right now in terms of knowing what it's about are the people for whom all those people govern.

THE COURT: Good point.

MR. KUMMER: Thank you.

THE COURT: Okay. There are lawyers for the third parties who are concerned that arguing in open court might tend to reveal who their clients are. I'm not entirely sure that that is accurate, but I'm going to err on the side of allowing them to try to persuade me. But to do so, I'm going to have to ask everybody else to leave. But before I do, I've got a couple of other things that we can say in open court.

So let me just say to the parties, you all addressed the issue of redacting the original motion, the response to the original motion, and to the transcript of the hearing. There are a number of other documents that are now under seal in this matter. I think, rather than reading them into the record, what I will do is we'll send the list by e-mail to the government and to the defense and to, as relevant, the attorneys for the third parties. What I need you to do is to

let me know by close of business Tuesday whether you believe, if the matter is going to be unsealed, whether there need to be any redactions made to those filings. I have looked at them. I don't think there do have to be, but I'm willing to hear from the parties. That's due close of business Tuesday. If you're getting the drift, I want to get this resolved and either out in the open or not quickly.

MR. KUTNER: Your Honor, if I may, before any --

THE COURT: Before you get thrown out?

MR. KUTNER: Yes. Would it be at all possible for the parties to discuss the general subject matter or, you know, to some degree of generality? It's slightly difficult for the media to address the privacy prong without at least some sense of what we're dealing with.

THE COURT: I don't think we can. I would if I could, but I'm not quite sure I can figure out a way to do that.

MR. KUTNER: Would it be possible to discuss at least the categories of the type of people that -- are we dealing with other public officials? Are we dealing with private citizens not mentioned in the trial? People who were mentioned in the trial? At least some sense of who might be involved.

THE COURT: Let me do this: What I'm going to propose is sealing -- I'm going to seal the courtroom, but I'm going to ask all of you people who are interested in what's going on to stay around because I may well be able to tell you at the end

what the answer is and give you some sense of what the subject matter is, or a better sense, and that will also allow me to talk to the parties not quite so cryptically so that there's no misunderstanding about what they're arguing and what I'm hearing.

MR. KUTNER: Thank you, your Honor.

THE COURT: So to make my record for oral argument regarding the specific redaction to be made in the motion in limine, related briefing, and oral argument transcripts, I'm going to ask the media and the public to leave, please, so that we may close the courtroom.

I have determined, considering the factors laid out in *Waller v. Georgia*, that it's necessary to close the courtroom in order to proceed with argument. As I previously indicated, I find that we cannot have a reasonable discussion about the redactions and with the attorney for the third parties in open court. More fully stating the basis for the closure would reveal the information sought to be protected. So I'll make a full record when we are under seal in the event this decision is appealed.

I have considered alternatives to closing this part of the proceeding, and I think there is no alternative that will adequately protect the privacy interest of third parties. Because I'm only closing this one portion of the broader oral argument regarding whether the government's motion in limine

and related documents should be disclosed, I find that closure on the redaction issue alone is no broader than necessary to protect the third parties' privacy interest.

So, again, if you're interested in if I can tell you at the end what my actual ruling is going to be, stay nearby, because we will reopen the courtroom after I hear from these folks.

MR. KUTNER: And you'll let us know when?

THE COURT: Yes.

(Pages 26 - 79 SEALED by order of the Court)

(In closed court)

THE COURT: Okay. Who do we have left?

MR. LOWELL: Your Honor, my name is --

THE COURT: Can I just make sure that everybody that we've got left in the courtroom either represents a party or represents the government.

MS. COHEN: We have representatives from the government here, your Honor.

THE COURT: I see representatives from the government. I see these two individuals who are my interns, so they're court.

You with the defense? Okay. That's everybody.

MR. LOWELL: You can hear me? I didn't want to use the microphone if I don't have to.

THE COURT: You don't have to use the microphone, but you have to speak up.

MR. LOWELL: My name is Abbe Lowell from the law firm of Chadbourne & Parke. I'm here with Kimberly Zafran, also of the same firm. We represent one of the third parties. I appreciate the ability to address you in the context of the narrow closing you've just done. I don't know if you want me to go ahead and say what I was going to say or wait for others to identify themselves first.

THE COURT: Well, actually, hang on. What I have to do is finish making my record on why we're under seal. So just

stay put.

Okay. So to further elucidate my findings on sealing the courtroom, I find that there is no way we can discuss the dispute over the extent of redactions needed to reasonably protect the privacy of third parties without disclosing the very information, in particular, that Mr. Lowell's client wants redacted. Although neither of the women are named in these documents, Mr. Lowell has suggested that his client will be identifiable if the redactions he proposes are not made and, indeed, if we even disclose the fact that he is counsel for one of the third parties.

Because the motion in limine alleges that the third-party women engaged in an extramarital affair with the defendant and that the defendant used his official position to benefit these women in return for his own personal gain, allegations that concern family affairs and intimate and embarrassing conduct, these third-party women have a privacy interest in not being exposed. Moreover, these women were not parties to the criminal prosecution, so their privacy interests should be protected.

For all of these reasons, I believe it's appropriate to seal this portion of the argument. That is not to say that the transcript of this portion of the oral argument will not ultimately be disclosed with redactions, depending on my ruling on the broader issue.

Okay, Mr. Lowell, is anyone here representing the other woman as well?

MR. ORTEGA: Yes, your Honor, Manuel Ortega.

THE COURT: Okay.

MR. ORTEGA: I'm representing the other party.

THE COURT: Do you have the same concern that if your identity is disclosed, people are going to go directly from Mr. Ortega to whoever your client is?

MR. ORTEGA: More so because of the -- [redacted]

THE COURT: Are you suggesting [redacted]

MR. ORTEGA: [redacted]

THE COURT: Okay. I'll hear you more. I'm concerned that these allegations of both of you -- and I'm not suggesting you're not raising them in good faith, but you may be putting a lot more faith and confidence in kind of public knowledge that [redacted] -- to either of the Jane Does than is warranted, but be that as it may.

All right. Mr. Lowell, why don't you start with why it is.

MR. LOWELL: Let me address that last first. I think, of all the concerns I have, it is the least, and I wanted to

raise it just so that we could air it.

THE COURT: Okay.

MR. LOWELL: And having aired it, I think your observation that it's not the likeliest connecting of the dots is true.

THE COURT: Okay.

MR. LOWELL: But there is that possibility. And the more we disclose beyond that, the more the possibility of the dots becoming clearer to those who are looking to connect dots.

So of my concerns, I think, ultimately, if it should come out that I were representing one of the party or parties, is the way I would phrase it, who has a third-party privacy interest, it is not cataclysmic. But it was a concern, and it's in the continuum about which I wanted to address the Court.

THE COURT: Okay.

MR. LOWELL: So why I wanted to address the Court and needed to do it in closed court is because your ruling on finding the basis for the government to have put forward the evidence that they've suggested will help me, if I get access to it in the same way that I've been getting access, to address whether I think, at the end of the day, that this material really is a judicial document. I know that --

THE COURT: The material isn't. Just to be clear, I want the evidence for my purposes to kind of do a reality check

on it. I think I should do that, but I'm not hearing from the defense: This is outrageous. This evidence no way adds up to what the government is saying.

MR. LOWELL: The only thing I was going to add to the equation for the Court to consider when you see it is the concern I raised in a letter, and it went something like this: Advocates, adversaries in our system are supposed to be as zealous as they can. No matter what the basis was for the potentiality of the government to raise this and wherever it came from, it could be way out there in the planetary orbits, in other words, if the trial was Mercury, this could have been Pluto.

THE COURT: Yes, but it wasn't. I mean, the connection was and the reason why it was -- I think I probably said this at the time. I haven't reread the transcript -- but if what the government came in to me with was Sheldon Silver was having an extramarital relationship with his next-door neighbor, and it was disconnected to what was going on in Albany, disconnected to his use of public authority to benefit his girlfriend, then it would have been: No way. It's not coming in. This is outrageous. This is just being done to dirty up the defendant. That is not what this allegation is. This allegation is he was benefiting and giving special access to a lobbyist, [redacted], with whom he was having an extramarital affair. So that is a misuse of public

power to benefit him personally.

MR. LOWELL: And I get that the topic isn't the same as if it were the next-door neighbor. What I was going to suggest was two parts.

THE COURT: Okay.

MR. LOWELL: Part one was what is the basis for that? In other words, if it was true that in realtime the speaker of the assembly was giving access to an individual with whom he or, in the case of a woman speaker, she was having an improper extramarital affair, and it was part of the trajectory of what might be the overall theme of that public official's conduct, I'm with you. If it was based on a napkin being submitted to the U.S. Attorney's Office that said that, then the topic still may be germane to your consideration, but you also have to factor in what is the support for that proposition, which I think you're about to do by having asked the government what the basis is for that. That's what I was trying to say.

THE COURT: Understood. And I think maybe I was several steps past you because from the motion in limine I have a pretty good sense, although, frankly, I'm not -- I can't separate in my head right now what was the evidence pointing to your client versus the evidence pointing to the other client, but I'm sure the government will fill us in.

MR. LOWELL: And the second part the Court will look at as well is the temporal nature of the alleged conduct that

was improper versus whatever the charges were. In other words, again, you in your hypothetical said -- or not hypothetical. You said if a public official was giving improper access to somebody with whom he was having an affair as opposed to maybe somebody he had an affair [redacted] years ago, that would also attenuate whether or not it fits into the category. Now, that having been said --

THE COURT: Again, my recollection on that was it was contemporaneous.

MR. LOWELL: That having been said, I hope I'll get access to be able to address it. So what I really need is the time --

THE COURT: Again, let me be clear. That is between you and the government. I'm not ordering the government to share their evidence with you or with Mr. Ortega, nor am I suggesting that the evidence, which was not admitted into trial, would become a judicial document.

MR. LOWELL: Okay. Let me use the time you have given me graciously to address the only part that a third party in my situation should be able to address differently than the people that are sitting at the tables, which is the very strong words of the Second Circuit in *Amodeo* -- I don't know how you say it.

THE COURT: I don't either.

MR. LOWELL: I don't either. It's like a Mozart thing perhaps.

And I don't have to quote it to you because it pops off the page. It talks about the extraordinary privacy interests of innocent third parties should weigh heavily. I just said I wouldn't quote it, but I just did. But it also talks later on about the type of privacy issue when -- and you quoted it in open court when you talked about it being about family affairs or embarrassing conduct with people who are in current relationships.

THE COURT: Mr. Lowell, let me ask you something. What do you make of what the -- I think it was the NBC lawyer, Mr. Kummer, said, which is the privacy interest of a third party -- and they don't know what the nature of the -- as you know, they don't know what we're talking about -- but the privacy interest of a third party who gets involved with a public official, that that may be less than the privacy interest of someone who was having an affair with their next-door neighbor who was not a public official and who was not using that relationship to interact with state government.

MR. LOWELL: So the answer to that question is that while the point that buyer beware, if you are involved with somebody that the public has a greater interest in, then you should know that the risk of your involvement will be exposed, makes sense depending on the nature of the exposure. So let's say there was uncharged conduct that somebody else was having influence with the speaker for the reasons that he was charged.

Whatever that was close to the line, but I don't think in this day and age, being the frail humans that we all are, to say that if somebody should have an amorous relationship based on affection and love [redacted] with somebody, they are taking the risk that someday that public official will do something wrong, be charged, be indicted, go to trial, have that possibility be raised as something that could be relevant. That's a stretch to the idea of assumption of the risk. And that argument of the media was if you deal with a public official, you ought to know that it's likely to be more likely that you get hurt by it.

THE COURT: Right. But, of course, again, they don't know what the facts are, so they're limited to kind of the general argument. But in this particular case, the facts as you've just ticked them off aren't the facts; right? So the facts are that your client, according to the government, had a relationship with the most -- one of the three most powerful men in New York state government, a personal relationship, a sexual personal relationship, and used that relationship for purposes of gaining access for [redacted]

So the question is, under those circumstances, how great are the privacy interests of the person who may be deeply in love with Mr. Silver but also was using that relationship for her business purposes?

MR. LOWELL: That really is -- first of all, I don't concede the facts as you have stated the government's position to be about the [redacted] nature of the improper sexual relationship, nor that it was used for [redacted].

THE COURT: Okay.

MR. LOWELL: So let me state that. Secondly, as I've alluded to, I believe if we had to have a mini trial as to what happened, when it happened, and why it happened, it would be an [redacted], not [redacted] to the most relevant charges that you presided over. So I want to say those two things.

But the third thing is what you're basically then allowing the possibility to happen is that we do have to get into a mini trial of somebody not charged and for an event that was not part of the counts against the speaker for allowing that. If it was payment by my client to the speaker for [redacted], it's chargeable. I supposed in some theory of honest services in this day and age, you could have charged somebody with basically soliciting or receiving sexual favors for the purposes of getting official conduct done, but that wasn't charged. So, consequently, somebody who's in the third-party privacy status has not the risk that I thought the media lawyer came up with a good argument to say.

THE COURT: Okay. So can you address the issue of why it is not adequate, assuming that --

MR. LOWELL: That's the last piece --

THE COURT: -- I'm going unseal.

MR. LOWELL: And I think that's the last piece.

THE COURT: I suspect it's not coming as any great surprise to anybody in this room that's the way I'm leaning. Why aren't the government's redactions adequate?

MR. LOWELL: Well, the government's redactions are far from enough, but I want to just make sure that I'm clear as well as the following. [redacted]

THE COURT: [redacted]

MR. LOWELL: [redacted]

THE COURT: [redacted]

MR. LOWELL: [redacted]

[redacted]

THE COURT: [redacted]

[redacted]

MR. LOWELL: [redacted]

[redacted]

[redacted]

THE COURT: [redacted]

MR. LOWELL: [redacted]

[redacted]

THE COURT: [redacted]

MR. LOWELL: [redacted]

THE COURT: [redacted]

MR. LOWELL: [redacted]

[redacted]

[redacted]

THE COURT: [redacted]

[redacted]

I presume that there are a number of women [redacted].

MR. LOWELL: [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

So, for example, to go backwards from the government's redactions, which were a good first attempt but never sought to take [redacted] out of the transcript, you wouldn't have to be a fifth grader to figure out [redacted]. I think --

THE COURT: Well, again, that presupposes that there is only [redacted]. The redactions, as redacted by the government, it does not say that the woman was [redacted] that dealt with him or anything about it. It just says that she lobbied him and that he gave her access.

MR. LOWELL: I understand that if you take, for example, [redacted] and then that takes that identifier out of the transcript but keeps in [redacted] I think, again, [redacted]

[redacted] but I think I've certainly shown that if you're thinking about -- that if you accept the premise that the law requires you to bend over as much as reasonable, balancing other factors, to protect the privacy of a third party not charged, etc., then I'm suggesting that you need to make way more redactions than the government -- not way more. Sorry -- a few more redactions than the government suggested because I think the connection of [redacted] is one that really connects [redacted]. So that's what I'm suggesting.

THE COURT: Understood, Mr. Lowell. But I guess my concern is that I'm balancing a First Amendment right here. And it seems to me that the fact that Silver was in a relationship with [redacted], that that is what -- the two things that made the evidence even arguably relevant was that [redacted] and Mr. Ortega's client [redacted] or [redacted]. That is use of government power to benefit a woman with whom he's having a relationship. That's what makes it relevant. And if you take out the fact that [redacted], then it is just sort of disclosing titillating information.

MR. LOWELL: And, again, the "is" in your sentence I still, at least for the record, still have to contest with the

Court as to "is having a relationship." You would, I think, agree if they knew each other [redacted] years ago [redacted] and they had an affair, and it stopped and then she [redacted] and she decided to [redacted], the government could still make the argument that it was only because they had that relationship that she got [redacted], not the merits of [redacted], not anything. It was [redacted]. That would be more attenuated than if it was in the [redacted] and she was getting [redacted] could not get because [redacted] that relationship. So that is where is gets a little dicey because we have to have a mini trial as to when was the relationship? How extensive was it? When did it end? Was it in the current tense, etc.? And if that's the reason, you're concerned that it raises a subject matter that might have been relevant to the trial, but it still doesn't address the issue that -- the idea that she's not charged; it wasn't part of what he was charged with; it might have been relevant depending on how the trial went, but that never came about. So now we have, in the words of the law, a truly private person whose interests the law asks to be kept private.

I'm suggesting that I believe that you can make redactions that would make -- you said to the defendant's lawyers, it is not my job to take the risk down to zero, when

it was coming to his right to a fair trial; and you said an extensive voir dire could remedy that. But it is, under the law, way more than taking it down to zero that I think the law requires the Court to do, to protect the privacy interests of a third person. What I'm suggesting is this is probably closer to above 50/50 than if you were to release the material that identifies that there was [redacted], that it is -- if you're not careful about the language, you make that risk not zero, not 10, not 50, but above 50. And I think when it says the Court has held the privacy interests of innocent third parties should be weighed heavily in the Court's balance, that means that are we have to do better than making it a minimal risk; we have to make it a very small, small, small risk that that would be the action that makes the connection if we're truly going to protect the privacy interests of my client.

Now, I think it would be not very credible for me to stand at this podium and say you can't chop up these papers and the transcript enough that you make that risk within the margin of error. I think one could. I think it is a much stronger argument after a while when you're cutting out things like [redacted] and everything but the words "the," "and," "if," etc. that it's, for all intents and purposes, keeping the entire proceeding still under seal. But

I wanted to suggest to the Court, because I heard what you were saying and thought you were heading in the direction of thinking that the proper balance, for all the reasons you've said, is some sort of redaction as opposed to keeping everything under seal, that more redactions are absolutely necessary. And the "more" part for us, we have indicated, I think we submitted to you --

THE COURT: You did.

MR. LOWELL: -- an additional couple of things that I think would make a difference. It wouldn't make the risk zero, but it would make it better.

THE COURT: But the things you're redacting, again, my concern with them are you're trying to redact the thing that is why it's relevant, and that's my concern.

MR. LOWELL: It's relevant, yes.

THE COURT: That seems to me --

MR. LOWELL: I totally agree. I totally agree with you, but that's not the test. We accept that anything that's a judicial paper has something in it that's relevant. That's the first part of the test that got it there. Relevance brings you --

THE COURT: Well, not necessarily.

MR. LOWELL: But where does relevance dictate what steps you have to take to protect the privacy of a "innocent third party"?

THE COURT: Mr. Lowell, it would have been a judicial document if the government -- if I had a different set of AUSAs and they were irresponsible and they brought to me the same in limine motion, but it wasn't [redacted] who was [redacted] him, but it was his next-door neighbor. That, it seems to me, would be a different kettle of fish. The evidence -- it would be a judicial document because it's an in limine motion that the Court ruled on that was involved in a criminal case. But the evidence itself was so irrelevant that redacting it to kind of fully redacting it or even maybe excluding it, because you couldn't do it without disclosing -- essentially, no matter what redactions you made, if it was clear what we were talking about, it would disclose who the woman was, that's a different issue. This is if the whole reason the motion was not a slam dunk, you got to be kidding, was because your client is [redacted].

MR. LOWELL: I think where I have come off the road that I was trying to address is that you and I are on the same page that the first level of relevance is exactly as you said. And the U.S. Attorney's Office has acted amazingly appropriately in the way they've tried to address this issue, for example, by giving me a heads-up when they knew of my existence, etc.

Relevance is incredibly important because you have identified a hypothetical in which it probably could be better

argued that this wasn't a judicial document because of its attenuated nature to the next-door neighbor, whatever. Okay. I get that. You then asked me why isn't some form of relevance in also the weighing of what I redact to protect the privacy interest? And I don't see in the Second Circuit law any language that says, in determining how to best protect the privacy and to protect the privacy that the Second Circuit says is a paramount interest, you add the element of relevance once again in order to thread that needle or go through that prism. I don't see that language. I don't know where it's from. It's, like, once you get to the point of agreeing that there's a third party and it has to do with marital affairs or what the Court says, family affairs, and it says embarrassing conduct with no public ramifications, that is the affair, the affair.

THE COURT: I disagree it has no public ramifications.

MR. LOWELL: The affair?

THE COURT: Yes, because [redacted].

MR. LOWELL: The alleged affair, I should say.

THE COURT: The alleged affair.

MR. LOWELL: Again, [redacted] I will continue to contest. That being said, I don't see that there's precedent for the idea that I have, you have to, or anybody has to try to figure out how something is now second -- relevant again for deciding how to protect the privacy. You're here because you intend to try to protect the privacy interests

of these third parties. That's what you're doing.

THE COURT: I want to make --

MR. LOWELL: The government has agreed to redact for that purpose. So once you do that, at least you have to make it an effective effort, or else why start it? If we're going to say: Look it, press. I'm going to give you a hint. We're going to make it harder for you to figure it out. So instead of taking five minutes, it will take five weeks, we haven't done a very good job. So it seems to me that once you cross the trigger that we're supposed to do something to protect the privacy, it's incumbent on all of us to accomplish that in a way that's effective, or why bother doing it at all?

THE COURT: It seems to me that I have to take reasonable steps. I am still not persuaded, Mr. Lowell, that [redacted] means that a disclosure that he was having a relationship with [redacted] is going to lead people to the conclusion that it is [redacted].

MR. LOWELL: Well, when you say "lead them to" -- it won't lead them to the proof beyond a reasonable doubt standard of a criminal trial that they have made that case, but in the court of public opinion and in the media's being less than always responsible and the impact -- I mean, why are we protecting [redacted] or anybody's privacy at all? She's in a [redacted] and

others. It doesn't mean that the fact that somebody at a high level will not cataclysmically be able to prove that this was the relationship the government was referring to. But the standard by which it will impact on family matters and embarrassing conduct is lower than that. And because it's lower than that, you should take greater steps to ensure it doesn't happen.

This is not an exercise in making it harder for the people that were a moment ago sitting in the box. It's an effort to say: We'll do the best. You used the word "reasonable." Maybe it's just that I'm saying I think it's reasonable to take out anything that is identifying because, if not, as I said to you before, then why bother to do it at all? Because you'll just only delay them for five more minutes. And I've made my point.

THE COURT: I hear you.

MR. SHUR: Judge, if I may, I just wanted to add one more point with respect to Mr. Lowell's client. On the issue of whether the government's redactions would shield Mr. Lowell's client's identity, the government's papers, even the redacted version, it's not just that [redacted], but it says who was [redacted].

THE COURT: What page? I'm sorry. What page?

MR. SHUR: [redacted]

THE COURT: Of their motion?

MR. SHUR: Yes, Judge. It's the [redacted] paragraph at the end.

THE COURT: [redacted] to see him?

MR. LOWELL: I think the sentence -- I'm sorry. Go ahead.

MR. SHUR: No.

MR. LOWELL: What page? I'm sorry, Judge. I wasn't following. This is the government's motion?

MR. SHUR: Right.

MR. LOWELL: [redacted]

MR. SHUR: [redacted] paragraph.

Judge, I don't know the answer to that, [redacted]

MR. LOWELL: [redacted]

[redacted]

THE COURT: [redacted]

MR. LOWELL: [redacted]

[redacted]

MR. COHEN: [redacted]

[redacted]

MR. LOWELL: But the point, just -- and I don't want to beat it to death -- but that phrase, [redacted]

But the answer is, [redacted]. So, again, is this supposed to be an exercise to see how long we can delay the press connecting the dots or taking the best shot we can to say we did what we could? Now, someday they may do it anyway, but telling them [redacted] is the same thing as telling them that [redacted].

THE COURT: I disagree with that. And I think in answer to your question, it seems to me that inherent in what the Court has to do in connection with this and similar issues is at some point there's a balance, and the greater the public interest, the more that weighs, given the fact that we've got presumptive First Amendment and common law access to these documents, and that's where I guess we may be parting company is that because -- it is precisely because of -- the thing that

you're trying to keep under seal is precisely why there's a public interest in the information. So the First Amendment access weighs heavier under those circumstances than if it were something that was an entirely nonparty, completely unrelated to any public interest.

MR. LOWELL: I get that the divide in the way you've defined the issue exists, and you and I start with the same premises as to what would be easy to decide is if it was an allegation of some improper relationship with a next-door neighbor that has no connection. And then on the other side, you and I, I'm sure, would agree that if it wasn't about a human relationship but some sort of business dealing or financial arrangement, I wouldn't be arguing and sitting here at the podium, because that's almost like uncharged 403 that probably would have come in at trial. We're in that middle area.

Again, I conclude the way I said I would not repeat myself, but it's only because you said "what about," that I think that it basically makes my client a sort of casualty of the war that existed in a way that I disagree with the media lawyer who said that's the risk you take, because it wasn't in the context of that in which she took that risk, if that risk was taken. And so I again ask the Court that if you're favoring a solution that balances the privacy interests of third parties, that we do it in a way -- not word by word, but

there are a few words that did not get redacted that make it less likely that you have failed at what you are out to do, which is to try to protect the privacy interests of a third party.

THE COURT: While still providing the public with the information to which they're entitled.

MR. LOWELL: Again, I'm sorry, this is one area we disagree. I just don't see that language in the *Amodeo* case or the ones I have cited. I just don't see it.

THE COURT: Okay. Mr. Ortega.

MR. ORTEGA: Thank you, your Honor. And I also would like your Honor to allow me the opportunity to make some comments concerning the issues before the Court and doing it in a closed courtroom.

I believe that our position is somewhat more -- somewhat different than the other individual that's named in the government's motion. My client, I believe, has not been proven or not really established that they had some sort of intimate sexual relationship. There is no -- as far as I'm aware, there's no additional evidence that I've been provided, aside from the former speaker having a cell phone [redacted] and the other interested party having a cell phone and that [redacted], which is -- that in and of itself does not make for an inappropriate relationship, inappropriate that would allow the

press to speculate that she, the interested party, was a girlfriend.

[redacted]

THE COURT: What connection -- I don't even know who your client is, and I don't need to know. What is the connection between your client and Mr. Silver --

MR. ORTEGA: The connection is --

THE COURT: -- [redacted]

MR. ORTEGA: [redacted]

THE COURT: [redacted]

MR. ORTEGA: [redacted]

THE COURT: [redacted]

MR. ORTEGA: [redacted]

THE COURT: [redacted]

MR. ORTEGA: [redacted]

THE COURT: [redacted]

MR. ORTEGA: [redacted]

[redacted]

MR. COHEN: [redacted]

THE COURT: [redacted]

MR. ORTEGA: [redacted]

[redacted]

THE COURT: [redacted]

[redacted]

MR. ORTEGA: [redacted]

[redacted]

[redacted]

MR. ORTEGA: [redacted]

[redacted]

THE COURT: [redacted]

MR. ORTEGA: [redacted]

[redacted]

[redacted]

THE COURT: [redacted]

MR. ORTEGA: [redacted]

[redacted]

THE COURT: Absolutely. Unfortunately, we listened to an awful lot of evidence in this case about [redacted]

[redacted]

MR. ORTEGA: [redacted]

[redacted]

[redacted] --

THE COURT: The government's suggestion is that they --

MR. ORTEGA: That they had an affair because they [redacted].

THE COURT: That would be the return.

MR. ORTEGA: Big deal, with all due respect, that [redacted]. That does not make it an affair.

THE COURT: They don't have to prove it beyond a reasonable doubt at this point.

MR. ORTEGA: Right. But if they make the suggestion, her privacy interests --

THE COURT: All right. How does --

MR. ORTEGA: -- are far outweighed.

THE COURT: [redacted] So I'm not quite sure how your client gets identified at all.

MR. ORTEGA: [redacted]

THE COURT: Hang on.

MR. ORTEGA: [redacted]

[redacted]

THE COURT: Right, but the pertinent --

MR. ORTEGA: I would think that that whole sentence should go.

THE COURT: But with the redactions, what you've got is that the government learned that [redacted]

MR. ORTEGA: Again, I'm not privy to the other evidence.

THE COURT: I'm just saying I don't see how it identifies your client. [redacted]

MR. GOLDSTEIN: [redacted]

THE COURT: I'm sorry?

MR. GOLDSTEIN: [redacted]

THE COURT: [redacted] I don't see how that tends to identify your client.

MR. ORTEGA: Well, I would think that the --

THE COURT: And what's significant --

MR. ORTEGA: [redacted]

THE COURT: [redacted].

MR. ORTEGA: Judge, I believe also -- I just think that that still will identify her because of the fact that if you do -- [redacted] And I don't believe -- I think that her privacy interests are by far outweighed by further disclosure, the prejudice that is going to inure to her because, in fact, [redacted]

[redacted]

So I think that's the reason, the underlying reason, why we're in a different position than maybe the other person identified in the government's motion. And the prejudice to her is her livelihood. And I think that that by far outweighs the public's right to know.

I thank your Honor for this opportunity.

THE COURT: Thank you.

MR. LOWELL: Judge, I have a housekeeping matter. Can I do that?

THE COURT: Sure.

MR. LOWELL: I'm sorry. [redacted]

THE COURT: [redacted]

MR. LOWELL: [redacted]

THE COURT: [redacted]

MR. LOWELL: [redacted]

[redacted]

You asked one question, and I was remiss not to just answer the other two points that one of the reporters lawyers said. For example, they said: Can't we know anything? Can we know whether or not the person was somebody who was, him or herself, a public official?

THE COURT: Correct.

MR. LOWELL: So it's not. And they said was the person named at trial? And I'm pretty sure that the answer to that, although the people at the table will know, is not.

THE COURT: I believe that is correct.

MR. LOWELL: So I just wanted to make sure that was clear on the record as well.

THE COURT: Okay. Well, we'll come back to that, whether there's any objection to me telling that. I have a different notion of what I'm going to tell them.

Mr. Cohen.

MR. COHEN: Your Honor, needless to say, we recognize, as Mr. Silver's counsel, that we have a harder road to hoe with this application than the third parties.

THE COURT: Relative to privacy interest, that's correct.

MR. COHEN: Correct. With respect to that, your

Honor, I remember when we argued this case some months ago, two, three weeks before trial, I said that any reporter worth their salt would figure out who the government was talking about in the motion. I have no question about it. I'm going to urge your Honor, and I know you will, [redacted]

THE COURT: [redacted]

MR. COHEN: [redacted]

THE COURT: [redacted]

MR. COHEN: [redacted]

THE COURT: Mr. Cohen, I guess what I will say is they are going to speculate. They're not going to know.

MR. COHEN: Well, if you were to ask the reporters who you just excluded from this part of the proceeding, your Honor, that the government is making an allegation that there were two women with whom he had inappropriate amorous affairs, and you asked these folks, under oath or not, who they think that would

be [redacted]
[redacted]
they will tell you right away that's the case.

You have asked, for example, in the case of [redacted], [redacted]. The government investigated Mr. Silver for at least a year and a half. They spoke to a lot of people, as you know. They subpoenaed [redacted] They subpoenaed [redacted] client. Okay. Those are [redacted]. I don't know of [redacted] they have interviewed with respect to which anybody could conclude that there's some [redacted], the press would jump to that right away.

THE COURT: I can think of another.

MR. COHEN: Pardon?

THE COURT: I can think of another that's been speculated.

MR. COHEN: Okay. However --

THE COURT: And there may be more. I don't hold on to all of the gossip about Mr. Silver.

MR. COHEN: I hear you.

THE COURT: But I've read of another woman who's speculated as having a relationship with Mr. Silver.

MR. COHEN: But why do we want to increase this speculation?

THE COURT: We don't. But, Mr. Cohen, I've got to balance what the public right -- the public interest against the obligation to protect privacy interests.

MR. COHEN: I hear you, your Honor. And you have certainly gone the whole nine yards to try to do that, but it seems to me with the allegation that is so prurient as this one is, and it clearly is -- I even speculate that some of these folks know exactly what we're talking about. No personal knowledge of it. They probably figure it's something like that. These folks will be on it right away. Now, it may be that some of the -- how do I say this -- some of the newspapers won't publish it or won't speculate as to the names in print.

THE COURT: [redacted]

MR. COHEN: [redacted]

THE COURT: [redacted]

MR. COHEN: [redacted]

[redacted]

THE COURT: [redacted]

MR. COHEN: [redacted]

[redacted].

THE COURT: [redacted]

MR. COHEN: [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Not only that, in the government's submission, as Mr. Shur brings to my attention, in reference to Mr. Ortega's client, there's a reference to, I guess what's commonly known as, [redacted].

[redacted]

THE COURT: Here's my problem, Mr. Cohen. What I don't know is whether she is [redacted].

MR. COHEN: Well, the government would probably have a pretty good answer to that. They've spoken to a lot of people.

THE COURT: Eventually, I'll get to hear from the

government.

MR. COHEN: Okay. But will they be able to identify other people, I doubt it, who fit into that category that your Honor's talking about?

THE COURT: Anything further? Okay. All right.

MR. ORTEGA: Excuse me, Judge. [redacted]

THE COURT: I'm sorry. I'm not seeing it.

MR. ORTEGA: [redacted] --

THE COURT: Yes.

MR. ORTEGA: -- [redacted]

THE COURT: Again, this is a little bit like the discussions I've had with Mr. Lowell. It's the fact -- it's the use of state power that is why there's a public interest. So if he had just [redacted], it would not -- your client would be in an entirely different position. But it was his use of his power with the state that makes the information relevant

and gives a public interest in the information. That is, it is not simply an extramarital affair. If it were simply an extramarital affair, I would have stopped this a long time ago, and we would be done with it. It's not.

So I understand your objection. Maybe the people up on the 17th floor will disagree with me, but I don't think that is going to happen.

MR. ORTEGA: Fine.

THE COURT: Mr. Goldstein.

MR. GOLDSTEIN: Thank you, your Honor. Just wanted to make two points and then answer any questions that your Honor might have. The first with regard to Mr. Lowell's argument about whether or not it's -- the Court should look at the relevance of the information being redacted. We think the law is quite clear that because any redactions or sealing needs to be narrowly tailored. That here, the proposed redactions that the government gave to the Court, we were trying to give the Court a way to balance the third-party interests and the interests of the public. And the fact that [redacted] was a lobbyist and access was given to a lobbyist was relevant to the motion and was relevant to the Court's comments during the argument on the motion that the defendant might open the door to this evidence coming in, depending on the arguments that were made. And so the fact of being a lobbyist we did not redact because we thought that there was a public interest in

knowing that fact. It also goes to the government's good faith in making the motion in the first place.

The other point I just wanted to raise and see if your Honor is willing to reconsider, in asking us for the underlying evidence, we're happy to provide it. My concern is that if that then goes into your decision about sealing or unsealing here, that either your Honor or an appellate court would find that whatever we've given you are now judicial documents that were used to help you make a substantive decision in this matter. We don't think that the parties have ever challenged the actual good faith basis that we had to make the motion, and the motion itself sets forth in quite some detail what our good faith basis was.

So we could provide the evidence to the Court. Our only concern is that then opens the door to further embarrassment or further release of documents that we understand the defense and the third parties do not want to have made public.

MR. COHEN: May I address that, your Honor?

THE COURT: Yes.

MR. COHEN: I think it would be helpful, which is sort of what I alluded to before that we tried to do at the beginning of this motion practice three months ago, if the government would give that to us, and we can then inform the government whether we think it's necessary for that to become a

document or not, that might be a helpful way to go about it. That's what we wanted to do the first time. That might be helpful. And maybe if your Honor allowed us to share it with the respective counsel to the extent it bore on them.

THE COURT: Does the government have a view on that, of sharing it?

MR. GOLDSTEIN: Most of the documents they have, the recording that's mentioned.

THE COURT: When was the recording made? So Mr. Lowell's argument being that from a timing perspective, there's a disconnect between the evidence -- the government's evidence relative to when they were involved with each other and [redacted].

MR. GOLDSTEIN: The recording was made in [redacted], which was well after she [redacted]. The recording itself talks about their affair in sort of in the past, but they're clearly affectionate in a very personal way on that recording.

THE COURT: Can you be less cryptic?

MR. COHEN: Your Honor, I heard the word "affair" from Mr. Goldstein. I didn't hear the word "affair." That tape is not a terrific tape, but I didn't hear the word "affair" or words to that effect on that tape. [redacted] has not heard the tape.

THE COURT: I would assume not. I've never had an

extramarital affair. I assume when people do, they don't talk about our affair.

MR. COHEN: That's too much information, Judge.

THE COURT: Sorry. I wouldn't expect two people who are having an affair or had had an fair to say: We had an affair. Let's don't tell anybody.

MR. COHEN: To the extent Mr. Goldstein was suggesting that it's not there, I don't think he was suggesting it in bad faith.

THE COURT: I didn't understand him to say that.

MR. LOWELL: Can I jump in just on that part, please?

THE COURT: Yes. But can I get the answer to my question first.

MR. GOLDSTEIN: I forget the exact words used. We didn't put them in the motion. But there are times in the recording where they refer to each other by very affectionate names.

THE COURT: Honey, sweetheart, darling?

MR. GOLDSTEIN: Sort of like that, your Honor.

MR. LOWELL: I'm sorry. I thought you were done with that point.

MR. GOLDSTEIN: One other issue in terms of sharing the evidence with the third parties. We do have a protective order in the case, and so I'm not sure what the reason would be necessarily to share the evidence with the third parties; but

we'd have to make an application to the Court or have the Court order us to do that.

THE COURT: Okay.

MR. LOWELL: As to the [redacted] recording, I wanted to make sure that the Court understood that it wasn't a telephone conversation between my client and the speaker; it was [redacted], as I understand it --

THE COURT: There had been a prior [redacted]?

MR. GOLDSTEIN: That's correct.

MR. LOWELL: In other words, people may talk in that context about something that could allude to a former something or other in a way they might not even do on a phone, because people do think when they're talking not thinking it's being recorded or not transmitted over the wires, as the folks at the front table make their cases over all the time, they do talk differently.

That said, I wanted the Court to understand -- and I didn't know if you heard this or not, I had not -- as you know, it is not talking about an event in the current tense of [redacted]. It may have the words of familiarity. No one's denying that they've known each other at that point [redacted]. It is not denying that [redacted] and, at least hypothetically, that they [redacted]

[redacted], to which you still might talk in very familiar and friendly ways. And it might be the point, therefore, that what we're doing is saying -- your relevance point is what I was trying to say, what makes it the point that you want to balance by including relevance [redacted], I don't think works, because I have to sort of put on trial that there wasn't something going [redacted] could be very different. So that's why I was saying to you I wasn't conceding that it was in the present tense, at least in that sense.

The fact that the government's done well at trying to say, look, this is how we, the government, are balancing, based on what we think our rights are, is why [redacted]. And now that you understand the nature of the tape better, I think it indicates why I was saying to you I can't concede that it was of greater public interest or that she assumed the risk or she should be a casualty that should know better because [redacted] makes it relevant. It's not. You and I would agree if it was a high school sweetie, not relevant; college sweetie, not relevant; [redacted], I'd still say not relevant when you consider other things that happened, when somebody puts character in evidence, or somebody

claims the entrapment defense as to when a court looks back and says, how far backwards do I go? That's why I raise the point.

THE COURT: But they were whispering; right?

MR. GOLDSTEIN: They were, your Honor. If the Court just looks at page 4 of the government's motion --

THE COURT: Have they seen your motion?

MR. GOLDSTEIN: We did because, in order for them to submit their own redactions, they saw the motion.

THE COURT: That's right. That's right.

MR. GOLDSTEIN: And so page 4, the first paragraph talks about how they were discussing inquiries into affairs by state legislators. The defendant responding: I don't think he, a reporter, caught us.

THE COURT: Yes.

MR. GOLDSTEIN: So they were -- to the extent that when Mr. Lowell's suggesting that the affair was prior to [redacted], I'm not sure it's relevant to any of what the Court has to determine here. Certainly, the discussion was a very affectionate, whispered discussion as they were talking about their relationship.

THE COURT: It certainly suggests something that was largely contemporaneous to the time of the discussion.

MR. GOLDSTEIN: That's correct, your Honor.

THE COURT: Okay.

MR. LOWELL: I'm sorry, Judge. I would have not risen

except that's not a fair inference from a trier of fact. If I had an affair with somebody in --

THE COURT: I don't have to make a finding of fact.

MR. LOWELL: It doesn't suggest that it was contemporaneous. It suggests that whatever their relationship was could still be talked about in hushed terms at the point at which they're [redacted]. I got to tell you that if I had had --

THE COURT: They were in the room together. They were the only people in the room.

MR. LOWELL: Right.

THE COURT: Why would you whisper?

MR. LOWELL: Oh, my gosh, I just think that's people do that were involved in relationship. I was involved in the impeachment of the president of the United States, and he was speaking in private without anybody there in similar sort of hushed terms. I can't explain what human behavior is. I can only explain that it's an unfair inference to say that if they were whispering to each other and said we didn't get caught, they could have been talking about not getting caught at any time, not the day before yesterday.

THE COURT: You could be right.

MR. SHUR: Judge, just if I may, one point similar to what Mr. Cohen said regarding Mr. Ortega's client as far as the [redacted]

THE COURT: Thank you for reminding me. I'm wondering if greater redactions could not and should not be made under the circumstances to that page and that paragraph. I'm not sure how relevant it is. In fact, I don't see any relevance that links [redacted] -- the fact that it was [redacted]. [redacted]. Does that satisfy your column?

MR. SHUR: I was actually bringing up a different issue, Judge, which is --

THE COURT: But give me credit for the one that I dealt with.

MR. SHUR: [redacted]. This is at the top of page 4 -- I'm sorry. This is page 3, Judge, the top of page 3, first paragraph.

THE COURT: Top of [redacted] the first paragraph?

MR. SHUR: Yes.

THE COURT: Yes. But it blocks the date and the year.

MR. SHUR: Right. I'm talking about [redacted]

[redacted]

MR. GOLDSTEIN: I would just note, your Honor, that even if that is true, [redacted].

THE COURT: I guess, unless you happen to know her voice or her whisper.

MR. GOLDSTEIN: Correct, correct.

THE COURT: What would you propose, Mr. Shur?

MR. SHUR: Well, I guess the larger point is that I think more redactions would be necessary if --

THE COURT: What are you proposing?

MR. SHUR: On this particular issue, that this whole paragraph should be redacted, but I think there are other issues as well.

THE COURT: All right. I don't think that's narrowly tailored. Okay. I'll take your point under advisement. We

may be able to -- I may propose other redactions to deal with the phone issue as well.

What else? Do you have something else? You said you had another point.

MR. SHUR: Oh, no, that was my only point, Judge.

THE COURT: Oh, okay. So that paragraph. Are there other places in this that you think this comes up?

MR. SHUR: About this particular issue? I certainly think there are other places where there's a risk that the third parties' identities would be revealed. The defense did not provide proposed redactions because our position is that there's no way to sufficiently redact this where you're going to shield the identities of the third parties. And, basically, what you're left with is, as Mr. Lowell suggested, just "the," "of," "ands." If you try to even tailor it back slightly, all you're left with, as we discussed earlier, was simply that Mr. Silver allegedly engaged in extramarital affairs, which I don't think has any real public value. And while we haven't talked about it, Mr. Silver does have privacy interests. And in terms of third-party interests, it's not just these two other individuals, but his family, his wife, his children, they all have privacy interests as well.

THE COURT: They do, but in the balance, I'm not sure how heavy they weigh.

MR. COHEN: Your Honor, may I add one last point.

Given that we have a better sense of your Honor's thinking now, although I'm sure you haven't finally decided, I wonder if both Mr. Silver's counsel and my colleagues here might have until -- Monday's a holiday -- Tuesday to propose any additional redactions?

THE COURT: Yes, I'll take any additional redactions on Tuesday. The other thing that I want on Tuesday is -- I think Mr. Goldstein's point is a good one. I would be prepared to say that all this material is somewhat like discovery material in a civil case, and it doesn't become a judicial document just because I take it for purposes of getting a somewhat better feel, although I agree that the government has laid out in some detail what the evidence is. The only reason I'm considering it is because of the less than full-throated "yes" we think the government had a reasonable basis for reaching the conclusion that Silver was having an affair with these women. If you agree after you look at all this evidence that you withdraw that position and say, yes, the government had a good faith basis for drawing the conclusion it did, then I have no reason to get the information.

MR. COHEN: So, as I understand it, your Honor is directing them to provide it to us, and then we'll let you know that we're withdrawing that issue?

THE COURT: Or not.

MR. COHEN: All right.

THE COURT: And if you don't, then the government is required to give it to me by close of business Tuesday with an explanation of what they're giving me, and you have until close of business Wednesday to respond.

MR. COHEN: That works for us.

THE COURT: Okay.

MR. GOLDSTEIN: We would just point out that the defense has most, if not all, of our good faith basis, but we can walk them through it, your Honor.

THE COURT: If you could walk through it so they know exactly what you're talking about.

Okay. Anything further?

MR. COHEN: The one issue is whether you can tell these folks maybe if they're waiting outside, and our position is you can't because there's no way for you to redact your thoughts in a way to make anything meaningful to them.

THE COURT: Well, here's what I'm prepared to tell them. That I have considered all of the arguments from everybody, and the Court intends to unseal the materials with redactions. We're still working on exactly what the redactions are. In answer to the question that was put by somebody, the third parties were not mentioned during trial. And what was the other issue?

MR. GOLDSTEIN: Your Honor --

MR. LOWELL: Whether they were public officials.

MR. GOLDSTEIN: It certainly is possible that the [redacted] was mentioned in the -- sort of as a side name in the course of testimony at trial. I don't want -- I don't think your Honor can say definitively that [redacted] the name, did not ever come up during the trial.

THE COURT: How about this: There are two nonparties. At least one of them was not mentioned during trial?

MR. LOWELL: And perhaps both.

THE COURT: And perhaps both.

MR. LOWELL: [redacted]

MS. COHEN: [redacted]

MR. LOWELL: [redacted]

MR. COHEN: [redacted]

MR. LOWELL: [redacted]

THE COURT: The whole point was that she was getting a [redacted].

MR. ORTEGA: But I don't believe that that [redacted] makes her a public official at that point in time. [redacted]

MS. COHEN: [redacted]

[redacted]

THE COURT: And then became a lobbyist?

MS. COHEN: And then became a lobbyist. The word "public official," depends how you define it.

MR. LOWELL: [redacted]

THE COURT: Right. I'm not going to answer the question because I'm not sure what the question was and therefore --

MR. LOWELL: Well, then, Judge, I would ask that you do what you said you were going to do before. I ask that you answer the person to say you've decided that you will unseal with redactions. You haven't decided the redactions, and that's all for now, because then trying to answer his interrogatories, I'm not even sure we agree as to what reference they were. So I would say less than more.

THE COURT: I'm going to answer their question that at least one of the third parties that are involved was not mentioned during trial. I'm also going to identify the two lawyers because I don't think it was a good reason to keep your identity secret.

Okay. Mr. Ortega, what's your first name?

MR. ORTEGA: Manuel.

THE COURT: Okay. Can we open the courtroom.

(Continued on next page)

(In open court)

THE COURT: Okay. Folks, welcome back. We're back on the public record. I have considered all of the arguments of all of these very competent, able attorneys. What I can tell you today is that the Court intends to unseal all of the materials associated with the motion that's under seal but with redactions. We are still working on the redactions. An opinion will be issued next week which will lay out in more detail my analysis for the parties.

I'm going to tell you I'm going to stay release of the opinion for one week. If somebody wants to go upstairs and see if the Second Circuit will stay it further, that's up to them. But it's going to be stayed one week from the time it's issued, so you won't get anything next week. It will be, at the earliest, two weeks hence.

In response to -- I can't remember who asked me, maybe it was Mr. Kummer -- to give more information, we can't give you very much more information. But what I can do is answer at least one of the questions that was posed. And the answer to that question is of the nonparties that are involved with the motion, we are confident that at least one of them was never mentioned during trial.

And with that, we are adjourned. Thank you all.

MS. COHEN: Thank you, your Honor.

(Adjourned)