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Thursday, March 30, 2006

3/29/2006 8:59:00 PM

Judge hints he could dismiss AIPAC case

by Ron Kampeas

JTA News and Features

A federal judge has hinted that he might dismiss the classified information case against two former officials of the pro-Israel lobby, the American Israel Public Affairs Committee.

Hearing a defense motion for dismissal last Friday in an Alexandria court, District Judge T.S. Ellis III expressed reservations about the breadth of a never-used 1917 statute at the core of the case.

"What I'm really expressing discomfort about is that it's always nice to have a clear precedent to follow," he said. "I think we are in new, uncharted territory, so I'm going to consider this matter very carefully."

Ellis gave the sides until tomorrow to submit additional arguments, but the smiles around the defense table suggested they had fared better than expected at the hearing.

Steve Rosen, AIPAC's former foreign policy director, and Keith Weissman, its former Iran analyst, were indicted last August on charges that they relayed classified information to fellow AIPAC staffers, journalists and diplomats at the Israeli Embassy in Washington.

AIPAC fired Rosen and Weissman last March, saying that information arising out of the investigation suggested they did not comport with AIPAC's standards. Federal prosecutors have made clear that AIPAC is not suspected of wrongdoing.

Free-speech advocates have raised alarms about the World War I-era statute that bans the retention and dissemination of "information relating to the national defense," saying its broadness collides with First Amendment protections because it could criminalize even casual conversations about the armed forces.

Now it is up to Ellis to decide if the statute passes First Amendment muster and should go to trial as planned on April 25.

Last week's vigorous hearing anticipated one of the core arguments to be tested if the case does go to trial: whether the statute, which criminalizes not just the relaying of classified information but its retention, includes oral communications.

The indictment focuses primarily on conversations about U.S. policy on Iran, al-Qaeda and other areas that Rosen and Weissman allegedly conducted with a number of government officials, especially Larry Franklin, a former mid-level Iran analyst at the Pentagon.

Franklin pleaded guilty Jan. 20 to leaking classified information. He was sentenced to more than 12 years in prison.

"How do you give back what you heard?" asked Rosen's lawyer, Abbe Lowell, who led defense arguments in last week's hearing, referring to oral exchanges of information.

Ellis picked up the point, asking Kevin DiGregory, who is leading a large prosecution team, "What are they supposed to do, have a lobotomy?"

DiGregory countered that he would prove at trial that Rosen and Weissman conspired to solicit and disseminate the classified information, and that the nature of the information transfer was not at issue. In other words, he argued, the issue was conduct, not speech.

"All speech is conduct," Ellis replied.

DiGregory said that excluding oral exchanges from the statute would tie prosecutors' hands. Dismissing the case would set a precedent that could allow, say, a spy to have a contact read aloud a classified document, as long as he did not physically hand it over, he argued.

Ellis seemed most concerned by the First Amendment implications of the statute, asking Lowell and DiGregory to consider hypothetical cases.

Lowell, who served as chief counsel to Democrats on the U.S. House of Representatives' Judiciary Committee during President Clinton's impeachment hearings, parried the hypothetical case put to him by Ellis, in which a disgruntled government official calls a lobbyist and suggests to him that the United States might take military action against another nation.

To know that he is committing a crime by just listening, Lowell said, the lobbyist would have to know that the government official is reading from a classified document and is not authorized to leak it.

DiGregory would not count out using the statute against journalists, but said prosecutors would probably be more hesitant in going after the press.

"Because of the function the media serves in this country, we would have to carefully scrutinize whether to take action," he said. But he added, "If you look at the statute, it plainly applies to journalists, anyone, whoever."

Ellis said he would rule later on the defense's slate of subpoenas of top Bush administration officials, including Condoleezza Rice, the secretary of state; Stephen Hadley, the national security adviser; and David Satterfield, the deputy ambassador in Baghdad. He suggested that he was likely to approve the subpoena of Satterfield, one of the government officials identified in the indictment as leaking information to Rosen.

The defense plans to press the government on why it is charging Rosen with accepting the leak while not prosecuting Satterfield with leaking the information in the first place.

On another motion, Ellis asked Lowell to try one last time to get three Israeli diplomats < to whom Rosen and Weissman allegedly relayed the classified information < to give depositions voluntarily. One of them is Naor Gilon, who until last summer was the chief political officer at the Israeli Embassy in Washington.

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