Boston judge considers dismissing case against LaRouche Campaign

At a one-and-a-half-hour hearing in Federal District Court in Massachusetts on May 4, Judge Robert Keeton heard argument from defense attorneys in the *U.S. v. The LaRouche Campaign et al.* case, that the government's criminal case has been so seriously damaged that either it, or the forced bankruptcy declared against two of the corporate defendants, should be thrown out. Judge Keeton reserved judgment until further papers could be filed.

Due to the obstructions put in the way of the joint defense by the government's seizure of the legal office run by Campaigner Publications, however, Judge Keeton postponed the opening of the trial from June 1 to at least July 8. Assistant U.S. Attorney John Markham, flanked by government officials who were involved in the bankruptcy case, had argued for a one-week extension.

The May 4 hearing

Excerpts from the court transcript of the May 4, 1987 hearing in Boston follow.

The Court: Well, unless other defense counsel wish to be heard first, I think it may be useful to hear your proposals and let me invite reactions to them then from defense counsel.

Mr. Markham: The situation, as I understand it from speaking with defense counsel, is that when the interim trustees asserted control over the premises pursuant to the Court order, various personal papers of individual defendants and various work product papers that their lawyers had developed and some of the discovery materials—the very bulky discovery materials that I had made available to the defendants pursuant to Rule 16 were on the premises.

Now, the trustees take the following position. If there is something on the premises of the bankrupt that is not the lawful property of the bankrupt, they don't want it. That goes for whether it's a sweater, a photograph or a document. The trustees are very happy to return those materials once it can be determined which pieces of paper belong to the defendants.

Now, the problem comes in the following situation. The trustee, while it recognizes its obligation if there is, in fact, anything in those premises that does not belong to the bankrupt, to give it back; it also has an obligation to all of the creditors of the bankrupts not to allow things to disappear that are, in fact, the property of the bankrupt.

I have raised this dilemma with defense counsel because while the trustee is happy to take a look at the materials and if they're not the bankrupt materials to give them back in their original form, obviously this would have to be done pursuant to a Bankruptcy Court order out of Virginia. I have been told by the representative of the trustee that he anticipates no problem whatsoever with such a bankruptcy order since presumably these defendants will join the application for such an order. But in any event, the bankruptcy trustees themselves will seek such an order. Once that order is in place—and any say that can be done even this week—the problem would become that the trustee would have to make some sort of determination about what document is being released.

In the case of Category 1, your Honor, which is the documents that the Government has previously furnished the defense counsel, to the extent that those documents happen to be on the premises, that's easy because the trustee can just take a look at this non-privileged material. They can even hand it to me. If the defense counsel say this is discovery material, I can say, yes, indeed, it's discovery material; and it can be taken out.

The Court: Well, now, let me just express a concern about their handing anything to you. I am quite serious in saying to you that you'd better be building a Chinese wall because there are conflict of interest problems here. And if anything is done that impairs the rights of a defendant in this criminal proceeding, there may not be a remedy for it.

Mr. Markham: Your Honor, I understand that, and I appreciate that. And I can assure you that the United States has and will continue to maintain a wall so that nothing that is privileged or confidential or otherwise private that happens to come under the possession or control of the trustee pur-

suant to that Court order will in any way be transferred to any of the prosecutors on this case.

I led, your Honor, with what I understood from talking to defense counsel was the most bulky part of the materials, which is to say the materials that I have already given them by way of discovery. Those would be bulky, because on those—

The Court: What is concerning me is your suggestion that the trustee or any of the trustee's representatives might confer privately with you about what is to be returned without opposition.

Mr. Markham: No, your Honor. I'm sorry if I left that impression. What I meant to suggest was with respect to that one category of documents, since I have heard from many defense counsel that they are badly in desire of getting those documents back, it would be very simple if defense counsel would point those documents out, go—well, let me do it this way.

What we have in mind—what the trustees would be willing to do, as I understand it, would be to have defense counsel go through the premises with the trustee, point out every scrap of paper that defense counsel say is needed to get this case ready for trial. The United States would be nowhere around.

But your Honor, as I understand it, those documents fall into three categories. Category 1 are documents that the United States, John Markham, has given them copies of, Rule 16 materials, vast quantities of documents. To the extent that the defense counsel identify those documents, if defense counsel are really serious about wanting to get them back to prepare, those documents surely could be easily determined to be non-trustee property, whether because they have some sort of serial number markings on them or because defense counsel could take that limited set of documents to somebody familiar with what has been produced in discovery who can say indeed those are discovery documents which we have provided. I just suggest that as an easy way that cannot possibly compromise a privilege because I gave them those documents so I know what they are.

Now, with respect to the other documents which are the non-Government-provided documents, those, as I understand it, fall into two categories, and I understand this because I have been speaking with defense counsel. Category 1 are correspondence to and from lawyers to clients or related documents such as notes that clients are writing up in order to assist their counsel in preparing for the case. To the extent that those documents are on the premises, it is the urgent wish of the United States prosecutors in this case that they be released forthwith to the defense counsel. We have not looked at them. We do not want to look at them. That has never been the intention or the purpose behind the bankruptcy.

The problem is going to be—and I think it is solvable, but I raise the problem first. The problem is going to be getting those documents to the trustee so that the trustee can take a look at them and say, yes, indeed, this is not a bankrupt asset document; this looks like something that belongs to an individual or that an attorney has asserted he needs for the defense of the case.

I point out in this regard, your Honor, that the people acting as trustees are not the United States trustee. They are three private lawyers, I believe from downtown Alexandria, Virginia. They are not employed by the United States. I have not ever talked to one of them. They are not an agent of the United States. They are under a Court-ordered obligation to either run the company or finalize it, liquidate it, depending on what is available under bankruptcy law and practice.

Those three individuals could easily meet—and their representative has indicated to me that they are quite willing to do so—meet with the defendants, go through the premises forthwith—not the defendants; the defense counsel—point out the various documents that come under these various categories. And to the extent that the trustee feels comfortable releasing these things without even looking at them because of their nature—i.e., the discovery materials, the xeroxed copies of all the notebooks and the like—that can be easily done.

To the extent that there are handwritten notes or the like that the trustee might want to take a more careful look at before he releases them, something that he has to make a decision on given his interests, which are very divergent from our interests, then perhaps a situation could develop where those limited number of documents, unless the trustee is willing to let them go, can first be copied and given to the defense so that they have access to the copies.

And to facilitate the matter—and I don't mean to try to be breaching the Chinese wall which we had already determined to be a good idea and you have reminded me twice we should continue to think is a good idea—perhaps even the United States could pay for the copying of those documents so the defense counsel could have them forthwith. Thereafter, your Honor, the originals of those documents could perhaps be shipped under the control of the trustee either to a magistrate here or a magistrate in Alexandria who can look at them and say, indeed, these are defendants' property, the originals should be given.

I think we can come up with a procedure that is not going to take too long but, in any event, we ought to embark on right away to identify the numbers of documents that they're talking about, report back to the Court with a plan and then determine the trial date from thereafter.

(Several defense counsel standing.)

(Laughter)

Mr. Reilly: If I could, your Honor. The first place I'd like to start, your Honor, is why we're all jumping up and maybe viewing a little askance Mr. Markham's willingness now to be so cooperative. I think you have to look first at the

timing of the Government's action here.

In April of 1985 they got a civil contempt order. It was their position in Virginia that that civil contempt order alone two years ago was enough to put these organizations into bankruptcy. For two years they sat on it, and five weeks prior to trial they bankrupt these organizations and seize the legal office.

They had full knowledge of what they were doing. They knew from the search they had in October when they searched these very offices that they were legal offices. The FBI agent Mr. Egan has kidded me and every other defense counsel about our going down to Leesburg to work down there. They know from the motions to suppress that we have filed that it is our very strong position that that's a legal office and they have no business being there. And yet they go to the Bankruptcy Court to get an order which specifically authorizes them to seize a legal office. They file discovery in bankruptcy. The Government's request for discovery, interrogatories:

> "With regard to any subpoena the debtor may receive, please state whether any of the debtor's employees were moved or transferred to avoid grand jury subpoenas."

That's an interrogatory in this supposedly separate Chinese wall proceeding.

"Whether any employee or associate of the debtor has charged more than the amount authorized by a credit cardholder against a credit card since November 1, 1986."
It is clear from the way the Government has operated here that they knew what they were doing and they had a reason for doing it. It's also clear that we have been massively prejudiced by what the Government has done here. The office that was seized was a legal office. I have spent one day a week down there for the last two months. I consider it in that sense my legal office.

I have files and letters from my client to the Government. The concept of me having to go through with a Government attorney through an office that I continue to be mine (sic) and point out to them what I want back from the legal office that I am working into is not one, your Honor, I feel I can go along with. The documents that are down there include things like the legal archives for the last 15 years of my client NCLC. And the Government in this case has made quite a bit about what's been happening the last 15 years against the NCLC and has forced me to spend days plowing through all the various litigation over the last 15 years.

That's down there. I want it back. And I don't want to go through it with a U.S. Attorney or with a representative from the U.S. trustee to argue with them and explain to them why I should get my legal office back. The status of codefendants in this case, your Honor, as to—not as to who is going to be representing them but as to how it affects us, I have an attorney/client relationship with the clients of Mr. Alcorn and Mr. Feinberg. I have shared attorney/client information with them. I have discussed my strategy with them in this case.

I now understand that their representative is meeting with Mr. Markham and planning with Mr. Markham how we're going to deal with these codefendants and how we're going to release documents to them.

The Court: Whom do you mean by "their representative"?

Mr. Reilly: The representative of the trustees. I understand from Mr. Markham he has met with the representative of the trustee to discuss how they're going to take care of these annoying codefendants. So suddenly somebody who I understood was on my side is now on the Government's side.

I talked to Mr. Lewis, who is the codefendant—who is the trustee for the entity which has the building where the legal office is, last week. I couldn't get any of the information from him that apparently Mr. Markham gets from his representative.

So in terms of a Chinese wall, it's clear that the trustees consider themselves to be much more on the Government's side. And when you look at it, it makes perfect sense. I'm not criticizing the trustee. The trustee's role here is to be a fiduciary for the creditor, and the creditor is the United States Government.

So he is a trustee for the Government. He is supervised by an employee of the Government, the U.S. trustee, and it is clear where his loyalty should lie and has to lie. And the problem is not at all with the trustee. The problem is with the Government choosing at this time to bankrupt these people and creating these problems.

The invasion of the attorney/client privilege here, your Honor, when the Government wants to talk about a Chinese wall, I suggest there will be the necessity for substantial evidentiary hearings. But what we know right now is that the pleadings that were filed by the Virginia bankruptcy Government Attorney are full of and based on material that was seized by the Criminal Division up here in Boston.

We know that when the Government went in to seize these offices, they did not go in based on the affidavit from the man who did the search. They did not go in with a representative of the trustee. They went in with Mr. Schiller, the representative of the Government. That's who did the seizure here, and that's who supervised it.

We know that the trustee is dealing with and is negotiating with Mr. Rasch and Mr. Schiller and that the defendants are unable to get ahold of it. The Government has argued that the search was videotaped and, therefore, we shouldn't be concerned. Well, we know or at least we have reason to believe right now that the offices were seized at 7 o'clock in the morning; that until 2 o'clock in the afternoon on the day of the seizure the Government representatives

were in that office, in what I consider to be my legal office, going through what I consider to be my legal documents. And I will be very surprised if they have seven hours of videotapes to assure me and to assure my client that they weren't going through—that they weren't going through the material there. And I also know that when our clients attempted to put observers in there to say, "Allow us to see what you're doing," the observers were excluded.

Finally, your Honor, the defendants' ability in general to represent themselves is being overwhelmed here. And I think it's something the Court has to address itself to. There is a very small group of individuals here who are running these organizations. There's maybe a hundred people. They have had in the last six months this indictment, two state indictments, fourteen state investigations, a grand jury investigation down in Virginia, all of which they have fought. And now five weeks prior to trial they get bankrupt. And what has happened here is that on a very practical level is these people are getting to the point where the Government has overwhelmed their ability to defend themselves.

As I suggest to your Honor there's been documents filed to you showing that in February of last year there was a meeting called by Mr. Weld to coordinate strategy against the LaRouche group, and it's clear from the actions that have happened here that the strategy that has been coordinated is to overwhelm these people. And I can't think of anything more overwhelming than seize the legal office.

Right now, your Honor, I don't—I am unable to come up to you and say this is what I think you should do because I still haven't yet fully digested what's happened, and I think there's going to be a lot more confusion before it gets straightened out. I suggest at a minimum, however, your Honor, to allow this defendant to defend itself and to allow us as attorneys to have some hope of representing our clients, we need a very substantial continuance because the confusion here has been all created by the Government, and it's confusion which has really overwhelmed the defense of this case. So I would ask as a first matter a very substantial trial continuance. . . .

Mr. Collins: Good morning, your Honor. Robert Collins for Robert Greenberg. I am not satisfied with the order in this respect, Judge, not on the talk about continuance. I know that certain matters will not be resolved here today. But I would like before I left here today to know or have a representation by this gentleman Schiller over here who respresents the Government or the trustee-in-bankruptcy's representative that he will turn over any files that belong to my client or pertain to him forthwith to me. And I do not want him to examine my client's files. And I ask the Court now to order the trustee not to look at my client's file under any circumstances or any legal papers that I have filed jointly with any of my co-counsel, and I'd like that protective order right now. I think it's gone far enough. When I look at Mr. Schiller, I see him at a table with Mr. Markham, his association is clear. It's the U.S. Government, U.S. Government. His name appears on papers under the name of Mr. Hudson, who is his boss down in Virginia or represents the district in some manner.

The Court: Well—

Mr. Collins: Judge, I find it very disturbing that my client's files are under the detention of the U.S. Government. Whether or not they represent to you that they have not looked at them or not, I want an order from the Court telling them not to look at it.

The Court: You have made it plain you want the order. You have also asked for me in another motion to enjoin—stay the bankruptcy proceedings. Now, the first problem I have with both the request you have just now made to me and that one is: Show me my jurisdiction. The memorandum that you have filed in support of that motion hasn't addressed the question of jurisdiction.

Now, here is the problem. I think there is a serious question about whether this Court and the criminal matter before it has jurisdiction to enjoin or stay a bankruptcy proceeding in another jurisdiction or to order things to be done in that bankruptcy proceeding. It seems to me it's probable I do not have that kind of jurisdiction, and the jurisdiction I do have is the jurisdiction to protect your clients by appropriate orders with respect to this proceeding if anything is done by them that impairs the rights of the defendants in this proceeding.

Now, if anybody thinks I have jurisdiction to stay that proceeding or to enter the order you have just asked me to enter, Mr. Collins, first show me statute, precedent, whatever, that says that a Court having before it a criminal proceeding has jurisdiction to enjoin or stay bankruptcy proceedings in another court. . . .

The Court: Now, it won't do us any good to have argument without precedent, without authority. If you can show me authority for my doing the kind of thing you are asking me to do, I will consider it. Statutes, decisions, whatever, show me some authority rather than argument; because when it comes to the argument, it seems to me the answer to the arguments you are making about the need for the protection is, of course, the Court has the authority to give you that protection by the ultimate sanction of dismissal if there are such interferences with those interests that that is required.

And if either one branch of the Government or another branch of the Government behaves in a way that makes that necessary, that's the remedy that is always available to this Court. And that makes it at least unnecessary and, absent some other authority to show me jurisdiction, probably inappropriate for me to try to step in with orders that would both give you that protection and preserve this prosecution. . . .