

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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JEROME CORSI,

Plaintiff

v. Civil Action 18-2885 (ESH)
ROBERT MUELLER, et al.,

Defendants

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Washington, D.C

2019 Wednesday, October 2,
2:40 p.m.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE ELLEN SEGAL HUVELLE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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P R O C E E D I N G S

THE COURTROOM DEPUTY: This is civil action 18-2885, Jerome Corsi versus Robert Mueller, et. al.

Counsel, please approach the lectern and identify yourselves for the record, starting with the plaintiff.

MR. KLAYMAN: Your Honor, Larry Klayman on behalf of Dr. Jerome Corsi. Nice to be before you again. It has been some years.

And I would ask, if I may, Your Honor, Mrs. Corsi may sit with Dr. Corsi. She is in the back there.

THE COURT: Yes.

MR. KLAYMAN: Thank you very much.

MS. TULIS: Good afternoon, Your Honor, Elizabeth Tulis from the Department of Justice Civil Division for the government defendants.

MS. SMITH: Laura Smith from the Civil Division for Mr. Mueller in his personal capacity.

THE COURT: I would like Mr. Klayman to begin.

We are here on three motions. The government has made a motion to dismiss, Mr. Mueller has also made motions to dismiss, and you have made a motion for leave to amend the complaint to add a count based on First Amendment

retaliation. I would benefit greatly if I could make sure I understand all the allegations so I don't have any confusion here. Okay?

Now, first of all, did your client ever actually meet Mr. Mueller -- I can't tell -- face to face?

MR. KLAYMAN: He was dealing with the top prosecutors in the office, Aaron Zelinski, and Mr. Cohen, and Jeannie Rhee.

THE COURT: Do I take that to be a no?

MR. KLAYMAN: Excuse me?

THE COURT: I take that to mean he did not meet Mr. Mueller.

MR. KLAYMAN: Not to the best of my knowledge.

THE COURT: So when you say that Mr. Mueller threatened him, that's not quite accurate, correct?

MR. KLAYMAN: What we're saying is, Your Honor, is they did so at the direction of Mr. Mueller, of the special counsel, Robert Mueller. These were the top prosecutors in the office, Aaron Zelinski and Jeannie Rhee and the others. In fact, Jeannie Rhee was a partner of Robert Mueller, they were very close, at WilmerHale.

THE COURT: You are assuming -- when you say, at their direction, it isn't based on what anybody said. It

is your inference that because he was the special counsel that he must be running the show.

MR. KLAYMAN: He is the one that has the mandate from the justice department. He is the one who is responsible. He is the guy in charge. The buck stops on his desk.

THE COURT: Well, that's an interesting point, the buck stops here. You agree with me that, at least for purposes of Bivens, there is no respondeat superior liability.

MR. KLAYMAN: No, I don't agree with that, Your Honor. But we did, in any event, plead that it was at his direction. There is an important case here, Trulock versus Freeh, which I litigated when I was running Judicial Watch. We cited it.

THE COURT: I read it.

MR. KLAYMAN: Yes. In fact, we named FBI Director Louis Freeh, at that time, and at that point we didn't have any discovery, and we alleged that he ordered his FBI agents to violate the First Amendment and 14th Amendment rights of my client, Trulock. And the Fourth Circuit allowed that case to go forward. It denied the motion -- it reversed on a grant of a motion to dismiss --

THE COURT: I have to ask --

MR. KLAYMAN: -- by the Eastern District.

THE COURT: Did they raise the issue of respondeat superior? I didn't see it in here. I know there was a question of qualified immunity, and there wasn't much that anybody had to say about the First Amendment. I'm sure you argued very well, but the fact of the matter is, I don't think they addressed your allegation.

MR. KLAYMAN: Your Honor, it has been many years, but I'm sure they did. They were very thorough. They had their top people on the case from the Justice Department. It's not every day that you sue the director of the FBI.

THE COURT: I'll look, but I don't know that the Fourth Circuit ever dealt with it.

MR. KLAYMAN: Let me point this out as well, Your Honor, is that we're entitled, if Your Honor want to question us, to take discovery on this point before Your Honor even considers a motion to dismiss on this point. We can sit Mr. Mueller down for deposition and ask him, and get his documents, get his e-mails, his texts, everything else.

THE COURT: I'm sure would you like to get

discovery, but all I want to know is, what is the evidence in your complaint that -- other than the fact he is in charge of the office. That's all I want to know.

Do you have any other evidence?

MR. KLAYMAN: The evidence is the mandate that he got from the Department of Justice which puts him in charge, him, Robert Mueller, in charge. He is responsible for what goes on in the office, and he had to have communicated with his former partner, Jeannie Rhee, at WilmerHale, who was the top prosecutor in that office.

THE COURT: He had to by inference, not that he did. You don't know whether he did or not.

MR. KLAYMAN: We need discovery to look into that.

THE COURT: You don't know, sitting here today, whether he directed anybody to threaten the plaintiff. Correct? That's a yes or no.

MR. KLAYMAN: I know by virtue of his mandate.

And, your Honor, I might add one other thing, and I'm sure Your Honor may have seen this. I mean, there was so much publicity going on in this case with regard to my client, Dr. Jerome Corsi --

THE COURT: I read a lot of it. He did a lot of

talking to the press.

MR. KLAYMAN: Yes, he did.

THE COURT: Made for interesting reading.

MR. KLAYMAN: He did. And consequently, because this is all over the media, I'm sure that Special Counsel Mueller must have seen that, and seen what he was alleging, that Mueller himself was responsible for what was going on here.

THE COURT: Well, I don't know whether he alleged that, but I just -- if you could go back to the question, do you know whether he directed Jeannie Rhee to threaten your client that he would go to jail if he didn't agree to certain facts he contested? Do you know that as we sit here?

MR. KLAYMAN: Well, I'm the lawyer, Your Honor.

THE COURT: I know. Do you have facts that could help me on that beyond the mandate?

MR. KLAYMAN: I've been a lawyer for 42 years. I've been in Washington for many years. I know the way things work in Washington.

THE COURT: All right.

MR. KLAYMAN: Prosecutors don't go off the reservation like this unless the top dog is telling them

what to do.

THE COURT: Okay. That's an inference.

Second of all, where is your law to say that for purposes of personal, individual liability, he can be liable for actions of subordinates?

MR. KLAYMAN: I just cited the Trulock case as one example.

THE COURT: Can you give me a page? I couldn't find anything about --

MR. KLAYMAN: Your Honor, let me say something. I have great respect for you, I have great respect for this Court, but it seems to me right now that you are looking for a way to dismiss Special Counsel Robert Mueller.

THE COURT: Well, they are.

MR. KLAYMAN: We live in a world, Your Honor -- let me just say something here -- we live in a world where the American people are now beginning to understand that in Washington there is a certain protected class that is held above the law. We know that no one is above the law. In fact, that is in some of the decisions dealing with qualified immunity, dealing with Bivens, is that Special Counsel Robert Mueller should not get any special consideration because of his former position,

either in terms of special counsel or FBI director or anything else.

We pled what we needed to plead in the complaint. We're entitled --

THE COURT: That's for me to decide.

MR. KLAYMAN: I know it is, Your Honor. I'm an advocate here.

THE COURT: Okay. But you will help me if I could kindly just make sure I understand what is happening in this complaint, which is my job. That is what a motion to dismiss and Bivens motion is all about.

Can you tell me, does Count IV still exist now that you dismissed Bezos, the Washington Post and the reporter, is there an allegation that this defendant, Mueller, had anything to do with the interference of contractual relations with people like David Jones?

MR. KLAYMAN: The fact that the Washington Post was dismissed, I tried keep the case narrow, I reconsidered it, Dr. Corsi agreed, there is an operative part of the factual of this complaint which deals with the Washington Post. As we alleged, the Washington Post received leaked grand jury information concerning matters that were -- that Dr. Corsi was dealing with, which were in the

scope of special counsel's investigation. So yes, they are part of this case in terms of the facts. They're not defendants.

THE COURT: I know that. I'm only focusing on Count 4, which has to do with him no longer getting this 15,000 a month. I wasn't sure, once we got rid of the main actors in that, whether or not there was any allegation in there that Mr. Mueller did anything to cause his termination vis-a-vis David Jones and InfoWars.

MR. KLAYMAN: It's the same argument that I just made, Your Honor, is that these things in a case that's this high profile with such high powered federal prosecutors -- and I'm a former alumnus of the Department of Justice myself. I never rose to the level of Aaron Zelinsky or Jeannie Rhee or the others on this case. But in this particular case, with the spotlight on Special Counsel Robert Mueller, with the fact that he had a press secretary that was involved, obviously, in informing him what was going on in the case, the fact that there is so much media coverage, the fact that mandate runs to him, obviously Robert Mueller was the guy who made the decisions here on what was going to happen. And let's --

THE COURT: No, I want my question answered, sir.

I just want to know what he did to cause this gentleman to lose this job of \$15,000 a month.

MR. KLAYMAN: Yes. They subpoenaed his book publisher. Well, that's just one thing. Also, they interfered with his relationship with InfoWars by leaking grand jury information, and leaking information that could have only be obtained through surveillance of him without probable cause at the time. This has nothing to do with the crime that was alleged to have been committed, if it had ever been put to paper in terms of the plea agreement, of course, a plea agreement. So, yes, it is part of what went on in that office, and he is responsible for what went on in that office.

THE COURT: So you are saying that the leaked grand jury -- you gave me two examples in your complaint. One had to do with something about a doctor.

MR. KLAYMAN: Yes, there was a doctor in Fort Lauderdale where they leaked information and allegations were made in the media that somehow Dr. Corsi had done something improper with that doctor. That doctor was put in front of the grand jury.

THE COURT: The other one had to do with, he was a person of interest or -- to the prosecutor. But you are

saying that those two pieces of information landed up causing him to lose his book deal because that interfered with Amazon and with InfoWars?

MR. KLAYMAN: That was not with regard to the book deal specifically, although all of this leakage of grand jury information -- and I might add, Dr. Corsi is not the only one who was subjected to it throughout this regrettable investigation --

THE COURT: Please --

MR. KLAYMAN: I'm going to answer your question. -- is that it all contributed to him losing his positions with regard to InfoWars. The book ultimately was published, but he suffered a lot of loss of reputation, emotional distress. The cumulative impact of this entire affair, and I use the word "affair," was to harm him emotionally, in terms of his reputation, and financially. He is on his knees financially, Your Honor.

THE COURT: Why did he sue InfoWars?

MR. KLAYMAN: He sued InfoWars because InfoWars defamed him. Regrettably, working for InfoWars at the time was Roger Stone, the infamous Roger Stone, who, by the way, is going the trial November 4. Roger Stone, by using InfoWars, defamed Dr. Corsi. They also defamed me, and

they feared Stone allegedly was doing the same thing with Corsi, trying to intimidate him in terms of testifying if he ever should be called before the trial that is scheduled for November 4 -- and he will testify truthfully if he is -- trying to intimidate him in terms of his testimony, because Stone fears the testimony, and in the process defame his lawyer as well, which was me. So yes, there is litigation pending.

THE COURT: Defamation by InfoWars, what did they say about Dr. Corsi?

MR. KLAYMAN: I would be happy to go through it, Your Honor.

THE COURT: Just answer the question: What was defamatory?

MR. KLAYMAN: That he is a liar, an alcoholic, that he can't be believed.

THE COURT: And did one of those, he can't be believed, have to do with the fact that, before the grand jury, he did admit that there was a scheme with Stone to try to cover up Stone's -- to explain away Stone's August e-mail?

MR. KLAYMAN: I'm not going to speak for Dr. Corsi on that. His testimony speaks for itself.

THE COURT: You're the lawyer though.

MR. KLAYMAN: To the extent that Your Honor knows what's going on proves the grand jury leaks, because I have never written or said anything about that, but the fact that you know about it, I guess, validates the grand jury leaks.

THE COURT: I only learned about it because he spoke to the papers. He disclosed, did he not, the supposed draft indictment and statement of offense?

Can I make this part of the record, because I think it is pretty important.

MR. KLAYMAN: Sure, you can put that in there.

THE COURT: This is the statement of offense that was presented to him, I assume, at some point to get him to plea. This is the indictment or the draft, this is an information that is the subject of what you say is false.

MR. KLAYMAN: Among other things. He is not an alcoholic. He is not an alcoholic.

THE COURT: No, no. This is the proposed information plea agreement by the prosecutors.

MR. KLAYMAN: I understand. But you asked me why Dr. Corsi sued infowars.

THE COURT: No, no, I am going to make this part of record, the plea agreement, the information and the

statement of offense which your client gave to the Washington Post.

MR. KLAYMAN: Happy to have it as part of the record.

THE COURT: Okay.

MR. KLAYMAN: Because it shows one other thing which is essential to this case.

THE COURT: Which is?

MR. KLAYMAN: That Dr. Corsi had his First Amendment rights violated in such a way that it implicated Bivens. Your Honor made a ruling on that in a case with regard to the Voice of America.

THE COURT: I know that case.

MR. KLAYMAN: I commend you for it, because it is a correct decision. The difference between that case and this case is that we have Robert Mueller in this case.

THE COURT: No, this is a criminal case. That was civil.

MR. KLAYMAN: This is not criminal. We're in a civil court right now, Your Honor.

THE COURT: No, no. He was conducting a criminal investigation. The people in the Navob case, N-A-V-O-B, that was an employment matter.

MR. KLAYMAN: But I commend you for that decision, you made the right decision, Your Honor.

THE COURT: Thank you.

MR. KLAYMAN: It confirms with Trulock, it confirms with the Hartman case, and Judge Kotelly issued one, Loumiet, at 12 cv 1130 on November 28, 2017.

Four cases stand for the proposition that this case should proceed against Robert Mueller under Bivens.

THE COURT: Can I ask a question about those cases, but first, let us -- you've read the information, it is a short paragraph.

MR. KLAYMAN: I've read it.

THE COURT: Okay. And the statement of offense?

MR. KLAYMAN: I haven't read it recently. I didn't think it was going to come up today.

THE COURT: But reading this, is it your position that there is no probable cause? That's what I don't understand. He said -- he explains it, talking to the press, it was an intentional lie.

MR. KLAYMAN: With all due respect -- I respect you, like I said, but I'm a strong advocate. You know me as a strong advocate, I'm sure, is that this has nothing do with this case. You are not here to litigate whether

there was probable cause. You didn't sit on the grand jury. You are not Judge Beryl Howell. With respect to the grand jury leaks, I asked Beryl Howell to look into the grand jury leaks. She wouldn't.

THE COURT: I didn't know that.

MR. KLAYMAN: Yes, and in this and other cases. We can get to that, too, because this is our only remedy for you to order the remedies cited by the government with regard to grand jury leaks. You should order a evidentiary hearing on the grand jury leaks, and if you find that there were, hold appropriate persons, including Mueller, in contempt of court.

THE COURT: Let me ask you this: Your remedy is -- what are you seeking against Mr. Mueller in Count II? Are you suing him in his official or individual capacity?

MR. KLAYMAN: We're suing him in both. That's why -- let me -- I can get to another issue.

THE COURT: Well, let's stick with --

MR. KLAYMAN: We're suing him individually, but we're suing him in both capacities.

THE COURT: But you said it's not Bivens, so how can you sue him -- what is your basis for suing him in both capacities?

MR. KLAYMAN: Well, we're suing the office of special counsel for the grand jury leaks, for instance, that he authorized, and we're suing him individually for violating the first and fourteenth constitutional rights of my client. The First Amendment claims are particularly strong --

THE COURT: I just want to focus on the grand jury leaks, Count II. Count II, just so I understand, you are suing him both individually and officially.

MR. KLAYMAN: That's correct.

THE COURT: And the remedy is contempt.

MR. KLAYMAN: The remedy would be contempt. Your Honor has the authority under the statute cited by the government to order a contempt proceeding on that, and if you find contempt, to mete out the appropriate remedy.

THE COURT: You went to the grand jury judge, who is in charge, what was her response?

MR. KLAYMAN: There was no response. She never responded to my communication.

THE COURT: What is to stop you from going back there? The procedure says the grand jury judge, who is still there, is to handle matters --

MR. KLAYMAN: I'm asking Your Honor to refer the

matter to her. I think you have more weight than I do with Judge Howell. I like Judge Howell. I think she likes me, but she ignored this. This is a very politicized case. There has never been a case more political than this in my lifetime; probably yours, too, Your Honor, we're a similar age.

THE COURT: I had all of the Abramoff cases. I've had plenty of political cases. Let's go on--

MR. KLAYMAN: -- Williams and Connolly. I commend you for that too. I know you are seasoned trial lawyer, and I think you understand that we're entitled to have this case go forward. If Your Honor has any questions about Mueller's involvement, we can take discovery on that issue. We could take it in front of you, bring him in here.

THE COURT: You agree, on qualified immunity you don't get discovery necessarily.

MR. KLAYMAN: They invoked the Westfall Act. We're entitled to discovery under the Westfall Act if they invoke it. That case is Wuterich, W-U-T-E-R-I-C-H, versus Mertha, 562 F.3d 375 (D.C.Cir.2009). We're entitled to discovery. This isn't my first rodeo on these case kinds of cases, Your Honor.

THE COURT: At one point in time, in your pleading

by the way, I thought we were going to have an easy time of it. You -- I quote you, let's see -- said that he acted within the scope of his employment, I will give you, so I thought that was pretty clear.

MR. KLAYMAN: Well, if that was said, I don't recollect that being said, but clearly we've said it about a hundred times otherwise, and he didn't act within the scope of his employment. Let me read to you this, because there is another D.C. case, Rasul versus Myers, 512 F.3d 644 (D.C.Cir.2008), which looks to the restatement with regard to qualified immunity: Conduct not within the scope of employment, if it is different in kind from that authorized far beyond the authorized time or space limits or too little actuated by the purpose of the master.

And, Your Honor, in the Trulock case, where we dealt with qualified immunity and the Fourth Circuit said, No qualified immunity, we're going forward with that case, Trulock is at 275 F.3d 39 (4th Cir. 2001) at pages 397 to 398, quote: "A public official may not misuse his power to retaliate against an individual for the exercise of a valid constitutional right."

Now, the Fourth Circuit is a very prestigious circuit, it is not far from here, in Richmond, Your Honor.

It's D.C. circuit. Second Circuit, Fourth Circuit are the most prestigious circuits in this country, and that's what they said about qualified immunity.

THE COURT: Can I go back to your Trulock. There was a small discussion of respondeat superior, and they say the complaint alleges that Sanchez was speaking at the request of the FBI. There is no allegation that any of these three individuals were personally complicit in his alleged misrepresentation. It says that there cannot be, in a Bivens suit, respondeat superior.

So that is your case, sir.

MR. KLAYMAN: And they went on to find that Trulock would be subject to moving forward -- not Trulock, Freeh, in the First Amendment area. That language you read, I believe, was with regard to the 14th amendment claim. It is factually specific. The First Amendment claim we allege, as we did here, that going in, breaking into Trulock's house, getting into his computer, breaking in without his password, without a warrant, constituted a deprivation of free speech, because he was trying to publish a book about the FBI's failure to investigate --

THE COURT: Sir, sir. You are --

MR. KLAYMAN: -- the theft of nuclear codes by-

THE COURT: I read the case. I don't need to be reminded. But I'm just telling you, as to Freeh and the supervisors, if Lee says to the Fourth Amendment they found no respondeat superior, they found no respondeat superior, but they didn't find the allegations which had been made by you to be sufficient.

Can I go back a minute to --

MR. KLAYMAN: Let me just clarify that. That was only in the context of the 14th amendment.

THE COURT: Fourth. You've made your point. I understand.

Now, you said to me in your pleading, your opposition to the government's motion, quote: "The tortious conduct set forth herein were also clearly performed within the scope of his office or employment," end quote.

So is that your position now, or have you changed it?

MR. KLAYMAN: That's a misquote, Your Honor.

THE COURT: It is not a misquote. I just read it.

MR. KLAYMAN: I know, but I'm not bound by it. That's me, that's not my client. So that is not applying with regard to the Bivens action. I don't know where you

are -- you are pulling that out right now.

THE COURT: This has to do with the abuse of process and tortious interference.

MR. KLAYMAN: In that context, we can certainly plead in the alternative, and there's another case --

THE COURT: Go back to what we're talking about, Mr. Klayman. I don't need a case, I want to know --

MR. KLAYMAN: That was a misquote, and I'm correcting it right now. If, in fact, it says what you say it says, there is a case style, and this is an important case, too, again, a circuit case, Fields versus Wharrie, there is no immunity to a prosecutor, and that's 740 F.3d 1107 (7thCir.2014), for presenting false testimony in the course of a prosecution.

And that's what was happening here. They were coercing -- trying to coerce my client to lie under oath, otherwise he was going to be indicted for perjury. He is in his early 70s, he would be put away for life, and he had the strength to stand up to the prosecutor and say no.

THE COURT: Mr. Klayman, it is important to get some things clear. There are two charges here for abuse of process and tortious interference. Those are torts, they have nothing to do with Bivens or First Amendment

retaliation, but they do have to do with the fact of whether or not he can have a -- the U.S. can substitute for him. That's a question of whether or not he was operating in the scope of his employment.

You state clearly, and I will quote it again: "The tortious conduct set forth herein were also clearly performed within the scope of his office and employment."

I just want to know if that is your position regarding the two torts in Counts 3 and 4.

MR. KLAYMAN: I'll have to go back and look at the context, Your Honor. I can certainly file a supplement on that and give you my position on that.

THE COURT: No, we're here today. I want your position. I want to know whether you are claiming something to do with the Westfall certification.

MR. KLAYMAN: Yes, I'm claiming that he was not acting within the scope of his authority. I'm saying there are two reasons to bring --

THE COURT: So you are telling me --

MR. KLAYMAN: -- Mueller here. Number one, with regard to what you are asking for, if you are not going to accept what is pled in the complaint, let's put him on the stand or we can take a supervised deposition with a master

or whatever you want. I'll treat him respectfully, and so will Dr. Corsi.

THE COURT: Is your only goal here to have discovery?

MR. KLAYMAN: No, it is not my only goal. My only goal is to get a remedy here.

THE COURT: What do you say on --

MR. KLAYMAN: I'm old enough, I don't need to take any more depositions if I don't have to.

THE COURT: What do you say in response to the clear law that 6(e), there is no private right of action under 6(e)?

MR. KLAYMAN: What I say is that a case of first impression, we've never had a factual situation before where the chief judge refuses to look into allegations of grand jury leaks, not just from me but from a number of different people.

Again, it is another story. I mean this with complete respect. I don't live in Washington any more, Your Honor. I don't want to live in Washington any more --

THE COURT: Is this relevant?

MR. KLAYMAN: I'll tell you what's wrong with it. What is wrong with it is that our justice system is broken

down, that many people, not saying you, on the judicial bench protect the powers to be, protect the Washington club.

THE COURT: Okay.

MR. KLAYMAN: And they're immune, whether Democrat or Republican. I've always been nonpartisan in that regard. I sued George W. Bush for illegal surveillance and other things. I've sued them for Haliburton. The fact is, where we are today, if you are a part of this elite Washington establishment, even the courts protect you. I hope that doesn't happen here.

THE COURT: I have immunity, thank you.

Let's see if we can figure out what else I need to know to understand your complaint.

So, you agree with me that for purposes of the Westfall certification, even if he committed a wrong, that doesn't preclude the government from stepping in. You know the case from law school, a handyman goes to fix your Maytag machine and rapes you, your employer can be liable for that. Doesn't matter, in other words, that you commit --

MR. KLAYMAN: Let me give you an example.

Your prior law firm, Williams & Connolly, I've

litigated them for nearly my entire adult life, particularly David Kendall, who is a very fine lawyer. The government invoked -- this was over a variety of matters involving Hillary Clinton and Bill Clinton -- the government invoked Westfall. So the government came in for the government under Westfall, but they also had a private lawyer. That was David Kendall, from your former firm, Williams & Connolly. So they can have private representation, Mueller can have private representation. They can have the government there to protect the government's interests as well.

But before that happens, before Westfall is invoked, I'm entitled to discovery on behalf of my client as to whether or not the special counsel was acting within the scope of his authority. I'm entitled to that discovery. That's why I gave you that case.

THE COURT: Can you give me any kind of discovery that would be relevant here? You didn't ask for discovery. I mean you didn't file any specific --

MR. KLAYMAN: In this court, Your Honor, you have to get pass the motion to dismiss, as you know, before we have a case management conference and before Your Honor sets a discovery schedule. So I was trying to adhere to

the local rules of this Court.

THE COURT: You haven't ask for any jurisdictional discovery.

MR. KLAYMAN: We've asked for discovery generally in our briefs, yes, with regard to the these matters.

THE COURT: But no specific --

MR. KLAYMAN: Yes, we did, we asked for it in the context of Westfall.

THE COURT: So you're abandoning your position that he was operating within the scope of his employment.

MR. KLAYMAN: Yes.

THE COURT: Well, we'll ignore that statement by you.

Can you tell me of any Bivens action that has been recognized not just for First Amendment retaliation prosecution but one where it involves an investigation and plea negotiations?

Is there any criminal case that Bivens has been applied to where we have Mr. Corsi -- Dr. Corsi was never indicted, never went back to the grand jury and lied, never took the plea, so I want to know whether the threat of a plea, say, "you go along with this or we're going to send

you to jail for a long time," is there any case like that, that Bivens has been applied?

MR. KLAYMAN: Your Honor, I will file a supplemental pleading. I don't have that right now. But if you put together Bivens, you put together your case with regard to Voice of America and the Safavi case, the Hartman case, U.S. Supreme Court 547 U.S. 252 --

THE COURT: Well, you know --

MR. KLAYMAN: Can I finish for the record?

Loumiet, 12 cv 1130, November 28, 2017, Judge Kotelly's order, and the Trulock case, and the Fields versus Wharrie case that I just cited with regard to false testimony, clearly false testimony is outside of the scope of official conduct suborning perjury, threatening people to suborn perjury. So, yes, it falls within Bivens, and even if this is a case of first impression, and I suspect there are cases out there.

THE COURT: It is important if it is a case of first impression.

MR. KLAYMAN: I don't think it is a case of first impression.

THE COURT: Give me one where somebody didn't plea, didn't lie, according to him, and didn't get

indicted. He was not a defendant. Some people would say that's a nice thing to have happened. Tell me a case where somebody, they say to you, "If you don't say this, we're going to indict you," but they don't indict him, and he doesn't take the plea, and he is standing here today not as a defendant.

MR. KLAYMAN: Your Honor, I will take a look. I didn't think that it was necessary, given the cases that we have, but let's just use a little logic here, if we may.

Are you telling me that when I was a Justice Department lawyer, I could tell somebody to lie? I would lose my license for that.

Are you telling me that is not a crime to coerce somebody into lying? That is what is played in the complaint. Is that --

THE COURT: Let's go back.

In the complaint, what is the lie that he is supposedly being forced to say?

MR. KLAYMAN: He supposed to say he had contact with WikiLeaks in conjunction with Roger Stone.

THE COURT: That he was sort of like a intermediary.

MR. KLAYMAN: Correct.

THE COURT: Do I ignore the fact that he tells the New York Times that that was basically true, but he wasn't intentionally lying? I don't know how I can jibe those things. I don't know how you, in good faith --

MR. KLAYMAN: What he told the New York Times is, A, not on the record; B, I'm not going to testify for my client. I was not there in the grand jury proceeding. My co-counsel, David Gray, in that matter, I came in later, was there.

THE COURT: He was the lawyer.

MR. KLAYMAN: Yes.

THE COURT: Okay. But --

MR. KLAYMAN: I came in later, but I was not there during that period.

THE COURT: We know from what I am going to put in the record, there was this e-mail, a long e-mail, and I -- it will be in the record, but he did send something.

You know, you say the only reason that Mueller should know that it was a lie is he told them; he, Dr. Corsi.

Well, why does Mueller have to believe him?

You are sort of taking the position, "I told you, Mr. Mueller, that isn't true; therefore, you can't indict me." That's what you're saying.

Is there any other reason that you can't threaten him with an indictment?

MR. KLAYMAN: You can't threaten somebody with an indictment when you know it not to be true. The fact is that he was not indicted. And there were other things that were going on too, Your Honor, which is part of this whole course of conduct. His religion was being mocked by Jeannie Rhee. You want to get outside the record, I can speel like crazy here.

THE COURT: No, no, I'm in the record. I'm not talking about harassment. I'm just telling you that there is, in this statement of offense, he wrote an e-mail on August 2, which you may say he didn't intend to be a go-between, the WikiLeaks and Stone. But you have to admit that that e-mail is subject to certainly different interpretations.

My only point for you, sir, is that because your only basis for saying that, "I was threatened with an indictment that was unfair or a retaliation of my First Amendment rights," is that, "I told him that I wasn't the intermediary." Why does he have to believe that?

MR. KLAYMAN: Dr. Corsi -- and again, discovery will bear this out, if they want to move for summary

judgment, that's their right after discovery. They can do that, and Your Honor can reconsider this entire matter. But the fact is, we pled what we had to plead in the complaint, and that's where it stands on 12(b)6 right now, as a matter of law.

THE COURT: I am going to your one specific paragraph. You say in there that, "Mr. Mueller knows it wasn't true because I told him."

I'm asking you, why does that in any way show that Mueller acted improperly?

MR. KLAYMAN: He had to know, Your Honor. First of all, Your Honor is up to date --

THE COURT: He had --

MR. KLAYMAN: -- on the public relations and what is in the media. Dr. Corsi was at the center of Mueller's attempts to link the president with Russian collusion. That's why they worked on him to do it.

THE COURT: Why is it that Mueller has to know that he is threatening him with something that is not true? The only evidence is that -- according to your complaints, is that Dr. Corsi told him it's not true. Dr. Corsi told him he was not an intermediary.

MR. KLAYMAN: And that's enough. I take issue

with the government, and other defense counsel do this too, citing the Twombly case. The judges get to decide what is plausible or not. You know what? You didn't get to decide that, Your Honor, with all due respect to you, if it is plead in the complaint. If you look at page 2 --

THE COURT: Of the complaint?

MR. KLAYMAN: No, the Twombly case, Bell Atlantic Corporation versus Twombly, 550 U.S. 544. This is taken out of context by any judge that wants to get rid of a case for whatever political purpose he or she decides of the day. I go through this all the time, not just with appointees of Democrat administrations but also Republican. Frankly, it's a disgrace.

Twombly does not say that. It says: "This case presents the antecedent question of what a plaintiff must plead in order to state a Section 1 claim."

This is a Sherman Act case. I'm a former antitrust lawyer with the antitrust division.

"Federal Rule of Civil Procedure 8(a)(2) requires only a short and plain statement of the claim showing that the pleader is entitled to relief in order to give the defendant fair notice of what the claim is and the grounds upon which it rests." Conley versus Gibson, 355 U.S. 41.

I have a little more to read. This is important because this is routinely misquoted not just by the government when it sits in the role of defense counsel, but private counsel throughout, defense counsel.

"While a complaint attacked by a Rule 12(b)6 motion to dismiss does not need detailed factual allegations, the plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions and a formulaic recitation of a cause of action's elements will not do."

"Factual" -- This is crucial: "Factual allegations must be enough to raise a right to relief above the speculative level of the assumption that all of the complaint's allegations are true."

Applying these general standards to a Section 1 claim, stating a claim requires a complaint with enough factual matter, just enough factual matter to suggest an agreement. Asking for plausible grounds does not impose a probability requirement at the pleading stage. It simply calls for enough --

THE COURT: Mr. Klayman, no, no, I'm speaking. I'm speaking.

MR. KLAYMAN: Okay. If I may finish afterwards.

THE COURT: I'm trying to get answers.

You say here defendants knew this to be false, and that's paragraph 55, and you go on in 56: "Plaintiff Corsi informed defendants that the testimony they wanted from him was not true."

I just want to understand, yes or no, is that the basis for your statement that he threatened him to testify to things that were not true, they were not true based on what Dr. Corsi told him.

MR. KLAYMAN: That is not all of it, and what I'm saying is --

THE COURT: Is there something in the complaint --

MR. KLAYMAN: Yes, it is in the complaints, Your Honor. We set off a number of facts. The facts are detailed. Then we say that the prosecutors were acting at the direction of Special Counsel Mueller.

THE COURT: I know that.

MR. KLAYMAN: Are you telling me it is not plausible that Mueller doesn't know what's going on? Are you telling me --

THE COURT: No, that's not what I'm discussing.

MR. KLAYMAN: -- that we went through \$45 million

in investigation, and the head guy doesn't know what is going on?

THE COURT: No. I'm asking, how do the prosecutors, including Mr. Mueller, know that they are threatening him with an information which we've now put in the record, and a statement of offense that was for his consideration, how did they know it's false. And the only allegation is -- in the complaint is, this statement of offense is false, or parts of it, because he told them. That's what I want to understand.

You are saying: You, Judge, should believe that they threatened him to have him testify falsely because he told them it was false.

MR. KLAYMAN: Yes, he told them it was false.

THE COURT: And that is the basis of your claim. That's all I want to know.

MR. KLAYMAN: That's a basis of my claim, not the basis.

THE COURT: I don't know what else there is.

MR. KLAYMAN: The threats are when someone is browbeating you, mocking your religion, calling you a liar because you wrote a book about where the birth certificate of Barack Obama --

THE COURT: But where in the complaint, let's --

MR. KLAYMAN: You've been going outside of the complaint, so I thought --

THE COURT: I'm only using the information. I'm using the information because you didn't tell me in the complaint what were the charges, so I had to get them. Your client was kind enough to give it to me.

MR. KLAYMAN: Your Honor, if you want more specificity in the complaint, I can certainly add that specificity into the complaint. And we've done oral argument, and you can have the magic language, and we'll put it in there. But I believe the complaint is specific enough, and that's why I was saying, if you are telling me it is not plausible that Mueller knew what was going on and didn't order it, then we live on a different planet. We live on Pluto.

THE COURT: Okay. I'll be in Mars.

Now, you ask -- in the second cause of action, you say: "Wherefore, plaintiff requests" -- this is 6(e) -- "preliminary injunctive relief and permanent injunctive relief." That's all you ask for. Civil contempt is a big difference --

MR. KLAYMAN: That is equitable relief, which

means you can order a contempt proceeding or you can refer it.

THE COURT: I don't think I can. I can refer it to Judge Howell?

MR. KLAYMAN: Yes. You can use your judicial authority to do the right thing.

THE COURT: Have you filed a formal paper consistent with the rule about complaining about 6(e)?

MR. KLAYMAN: I haven't. Because at this point, when I began representing Dr. Corsi, the grand jury was no longer in operation.

THE COURT: But she is still there. If it had been a contempt, it would be a contempt on her authority, right?

MR. KLAYMAN: I have experience here in other matters where she simply turned a blind eye to that issue.

THE COURT: But you recognize that that exists, to go to her.

MR. KLAYMAN: It does. But as a practical matter, it does not exist. This is our only adequate remedy.

THE COURT: It does not exist because she has not been receptive.

MR. KLAYMAN: Rule 6(a) --

THE COURT: Can you answer, is that the reason it does not exist? She has not been receptive.

MR. KLAYMAN: That's one reason, but there is another reason. The rules of criminal procedure is legislation. It was legislated by Congress. Granted, it does not set forth a specific remedy, but certainly equitable remedies are within the power of this Court to enforce.

You here, Your Honor, you took an oath -- you generally, judges -- to enforce the law. When you see -- also, your bar association rules, if you see that a crime is being committed, you have a duty to report that to appropriate authorities.

So I'm asking you --

THE COURT: I'm not in control --

MR. KLAYMAN: -- to use your authority to get an investigation of this once and for all.

THE COURT: You are asking me to supplant Judge Howell, who is the chief judge and responsible for grand jury.

MR. KLAYMAN: I'm not asking you to supplant her, I'm asking to you make a referral.

THE COURT: I don't make referrals. You can file before her yourself. That's the procedure.

MR. KLAYMAN: My previous referral, with all due respect, was thrown in the trash.

THE COURT: All right. But you admit that the procedure exists and it didn't work for you.

MR. KLAYMAN: Well, they nothing works in this town any more when you are dealing with someone like Robert Mueller. It doesn't matter whether it is him, a Republican or anybody else.

THE COURT: You will agree that your complaint asked for injunctive relief against Mueller for Count II.

MR. KLAYMAN: Yes.

THE COURT: You agree that I don't have any power to enjoin.

MR. KLAYMAN: I believe you can enjoin the government because he was working as a official of the Department of Justice to not leak any more information.

We're going through a volatile period. We are going through a likely impeachment. There are counter allegations about what went on in the Mueller investigation. Stuff can start flying out of files again. It's very harmful.

THE COURT: It may be that --

MR. KLAYMAN: So in joint future grand jury leaks, you can do that.

THE COURT: Has there been a grand jury leak involving your client since the investigation ended in March 2019? Mueller has resigned, he is no longer special counsel.

Count II is against Mueller only, right? Your 6(e), it says Mr. Mueller.

MR. KLAYMAN: Well, which would be his office. That's why I say, we did bring a case in official and personal capacity.

THE COURT: You say Defendant Mueller, I don't know if it is official or personal. If it is official, then you have a whole different --

MR. KLAYMAN: It's both. They violated my client's constitutional rights of secrecy, of privacy. We have a right of privacy in our constitution. We can put in other contexts too.

THE COURT: You would agree with me, sir, would you not, that you don't have the right to sue Mr. Mueller for any kind of injunctive relief.

MR. KLAYMAN: I don't agree with that, no.

THE COURT: You know that you can only sue him individually for money damages under Bivens.

MR. KLAYMAN: And we have. It is not an adequate remedy.

THE COURT: Count II.

MR. KLAYMAN: With regard to Rule 6(e), I'm not asking to go through the statute cited by the government. I'm asking you to go through your authority in a factual situation that has never before been at issue, as far as I know, in front of this Court or any other court. And as I previously said, and Your Honor already knows, the grand jury is no longer in operation.

THE COURT: So why would an injunction make any sense?

MR. KLAYMAN: To enjoin future conduct. There's a whole body of case law, and I can supplement with that as well.

THE COURT: I don't need that. I need to know what imminent threat there is that justifies an injunction given the fact that he is not there any more. It may be that the grand jury stuff gets disclosed --

MR. KLAYMAN: You can do what Judge Amy Berman Jackson did, in my view, in the instance of Roger Stone

correctly, and put a gag order on everybody in that regard, not to be leaking to harm people.

We're coming up on a trial on November 4 of Roger Stone. My client is person number one, material witness number one.

THE COURT: Is he going to testify?

MR. KLAYMAN: It has not been determined. If he is subpoenaed to testify, he will do so truthfully. Getting back to your previous question, that's correct why Stone defamed him and defamed me. This is a reaction to what could happen. I mean, it likely will happen. The stuff is going to start leaking again.

THE COURT: I should take Count III -- I'm sorry -- II, as a claim both individual only for injunctive relief against Mueller and in his official capacity, which means the government has the right to step in.

MR. KLAYMAN: That's correct. And individually.

THE COURT: I don't know that they have a right to step in individually, but okay. All right. We'll talk to the government about that.

I guess I have one or two questions about your motion to amend, if I may.

MR. KLAYMAN: If I may add, Your Honor, as we pled in that, as you are gathering your thoughts, under rule 15A, leave to amend is to be freely granted. You can even move to amend after trial, as you know. Your Honor is a very fine trial lawyer, as well as judge.

THE COURT: Only if it is not futile. That's what I'm worried about.

MR. KLAYMAN: It is not futile for the reasons we've discussed.

THE COURT: What do you think about the arguments that plea bargaining is not without -- I'm sure, if you were ever a prosecutor -- without its hard side to it. If they believe -- just hypothetically, if they believe what is in this information to be true, can you, in good faith, tell me they couldn't say, "Plead to this or else you don't get a deal, you don't get a deal." I mean, he has the right not to get a deal.

MR. KLAYMAN: You may know where that -- I was successful in getting two preliminary injunctions against the National Security Agency for illegal surveillance.

THE COURT: Right.

MR. KLAYMAN: Judge Leon called it almost or well in at the time. The NSA grabs every single e-mail

communication --

THE COURT: Can you stick with the First Amendment claim.

MR. KLAYMAN: I'm telling you -- you asked me how they know. They knew my client was telling the truth because they had access to the NSA, FBI, to all of his communications, and they knew that, in fact, he was never in communication with WikiLeaks. The government knows that. To the extent it denies that, it is simply lying.

THE COURT: Okay. I don't know that that is what they said at the --

MR. KLAYMAN: We know the NSA grabs every communication going back five years. There is now a request to reauthorize provisions of the USA Freedom Act and Patriot Act. The government has always had the ability, and undoubtedly they used it in this case, and that's why we're alleging illegal surveillance as well, under the Fourth Amendment.

They knew what the facts were. My client was being set up. He was being set up to get him to say something to implicate the president, to harm the president, to take the president down. Because he is a supporter of the president, he became public enemy number

one, which is the way it is in this town today.

THE COURT: Mr. Klayman, skip the "this town today." I've heard it now. I want to go back.

Is there anything, just hypothetically, take my hypothetical for a minute, what is wrong with the government playing hardball and saying, "We think you did this. Here is your e-mail, sir, here is what we know. We don't buy it. We're going to indict you. If you want a deal, this is what you agree to"; he says, "I don't want a deal. It's not what I am going to do"; and lo and behold, lucky him, he doesn't get indicted. Under those circumstances, where is the problem?

And don't talk to me about this town. Tell me what is wrong with my hypothetical.

MR. KLAYMAN: It is a beautiful town, I lived here for over 20 years. I'm talking about the way things go on in the courts and politically right now.

THE COURT: I don't need to be educated on your view of the town.

MR. KLAYMAN: Here is the point. This was not just, "We don't think you are telling the truth," this was -- what was said is, "We want you to say this, and if you don't say this and you don't implicate the president,

and you don't implicate communications with WikiLeaks, you are going down, and you are going to be doing life imprisonment." If that is the way this country operates today, I want out.

THE COURT: You are not going to have that option necessarily.

MR. KLAYMAN: Maybe I will.

THE COURT: But there is nothing in any of these statement of facts that really takes down the president, doesn't even mention the president.

What I'm trying to understand, if the prosecution has evidence including e-mails, they have evidence, they don't -- your client may not agree with it, and obviously he is free to say that, and he is free not to take the plea, but what is wrong with the prosecutor saying, "I'm going to indict you for this if you don't plea to what I say"?

MR. KLAYMAN: Because it went beyond that. They were telling him to lie. They told him specifically what to lie about.

THE COURT: What was the lie?

MR. KLAYMAN: That he had communications with WikiLeaks. They knew that he didn't. They have access to all of his e-mails, all of his text messages. He turned

over all of his computer material to them.

THE COURT: Didn't he destroy stuff?

MR. KLAYMAN: He didn't destroy anything. That was what Stone was alleged to have done, not my client.

THE COURT: Okay. I have one further question about your First Amendment so I can understand. These are all very novel, and creative on your part, allegations.

Your case, the one that you are rightly proud of, Trulock --

MR. KLAYMAN: Thank you for the compliment.

THE COURT: Yes, you did a good job.

-- says something that I think is very important. Trulock, T-R-U-L-O-C-K, versus Freeh, the former FBI head, 275 F.3d 391 (4thCir.), argued by Mr. Klayman. They sent it back down you afterwards, obviously due to his advocacy.

They said, to establish a First Amendment retaliation claim, which is what you bring here, a plaintiff must prove three elements, that is speech was protected.

Which speech, in your mind, is protected here?

MR. KLAYMAN: The right to tell the truth.

THE COURT: So was that ever violated?

MR. KLAYMAN: Yes, it is violated, because he is

being threatened with retaliation if he does tell the truth.

THE COURT: But he never did testify falsely.

MR. KLAYMAN: Obviously my client didn't. He wasn't indicted. But he was only indicted -- not indicted for this reason, Your Honor: Above all the people who were charged in this -- who were, excuse me, under investigation who were targets, Dr. Corsi was the only one who ever pushed back. He is the only one who said, "No, I will not roll over."

It was not General Michael Flynn. He wasn't George Papadopoulos. He wasn't a cast of characters.

THE COURT: But does that put him in a position under the next one. His speech was protected, so you are saying that speech was to tell the truth. But he did tell the truth. We know that.

MR. KLAYMAN: But he was retaliated against. And that's why your case is so important, Your Honor. Your case is a landmark case.

THE COURT: Thank you. We've finished with all the compliments. I think my case is distinguishable.

Second, defendants allege --

MR. KLAYMAN: It is distinguished.

THE COURT: It is distinguishable.

The second: "The defendant allege retaliatory action adversely affected his constitutionally protected speech."

So in what way did these threats of indictment adversely effect his constitutionally protected speech?

He never lied, he said. We'll take that as a given. What retaliatory action adversely affected his constitutional --

MR. KLAYMAN: As a result of him trying to tell the truth, he was vilified, he had grand jury information leaked. There was illegal surveillance. In all kinds of ways his reputation was destroyed, his family was implicated. That's why Ms. Corsi is here. They lost nearly everything. They can't make a living any more.

THE COURT: It says, "adversely affected his constitutionally protected speech," not that he suffered something, but that generally speaking, it means in the law that in some way his right to free speech was chilled.

Was he chilled?

MR. KLAYMAN: Yes, because he was threatened and retaliated against.

THE COURT: Did he in any way cave?

MR. KLAYMAN: He was seriously considering caving. During that period, he was significantly harmed. He was viewed as a felon in the public domain. He still suffers from that stigma.

THE COURT: I know you are talking about harm. This is the element of it. It is not a question of whether he suffered harm. It is whether his alleged retaliatory action adversely affected his speech. That means that in some fashion his speech had to be affected.

MR. KLAYMAN: He was threatened with prosecution unless he said what the prosecutor wanted. Now, look at Trulock --

THE COURT: I'm reading to you from Trulock.

MR. KLAYMAN: Yes, and they found that, in fact, it was true for Trulock. Because Trulock was out there, he was still talking about what really happened with Wen Ho Lee. He was trying to write a book. They didn't prevent him from publishing the book. He could have gone to a publisher with or without the approval of the department of energy or the FBI. But it was enough that they retaliated against him to have the Fourth Circuit say this thing should proceed pass a motion to dismiss.

THE COURT: Thank you very much, Mr. Klayman.

MR. KLAYMAN: Thank you, Your Honor.

THE COURT: All right. Let's hear from the government.

MS. TULIS: Good afternoon, Your Honor.

THE COURT: One second. I am going to mark here as Exhibit A, with the consent, do you have any objection of putting in the papers that he gave to the press, Dr. Corsi, which includes a statement of offense and an information and a plea agreement?

MS. TULIS: Your Honor, the government has no objection to the Court taking judicial notice of public documents such as newspaper articles.

Obviously, as Your Honor of course knows, you may take judicial notice of documents such as articles in the press, for the purpose of the content of those articles rather than the truth of any matters in the articles. I would need to look at the documents to know specifically what they are, but we -- the government does not make -- can't make any representations about the authenticity or truth of any of the matters you might be looking at right now.

THE COURT: Well, unless I'm wrong -- Mr. Klayman, you can correct me -- when this was

given to the Washington Post by Dr. Corsi, it represented the papers that he had been presented with during his discussions with Jeannie Rhee and three other prosecutors, correct?

What was published in the newspapers was given to them. Do you want to look at them?

Mr. Klayman, I'm asking whether I correctly understood that these were the papers presented to your client during the plea negotiations by three or four prosecutors, and that he then turned around and took those papers and gave them to the press.

I'll show you the papers. They were published in the newspapers. I'm not taking these papers or --

MR. KLAYMAN: That's correct. But that's all that went on in the proceedings with the prosecutor.

THE COURT: No, no. But these were the proposed plea papers. Correct? That's all I'm asking.

MR. KLAYMAN: At that time, and there were other threats made too.

THE COURT: All right. So I'm marking these.

MS. TULIS: Yes, Your Honor. Just to be clear --

THE COURT: This is Court's Exhibit A.

MS. TULIS: -- to these being included as

documents that Mr. Corsi represented being given to him.
We are not --

THE COURT: This is what he is saying, somewhere in there he is claiming that, "What is in there, I'm not going to agree to, because it is a lie, and they're threatening me with this lie," right?

MS. TULIS: Again, Your Honor, to the extent you want to incorporate these as allegations of Mr. Corsi, in terms of what he was given, that we don't object to the Court taking judicial notice of the fact Mr. Corsi has alleged certain things or that he was given certain documents and that he is alleging that these are the contents of the documents he was given.

The government -- what I can't do at this point, Your Honor, is agree that those are, in fact, documents he was given, if Your Honor makes -- understands.

THE COURT: Well, it's easier dealing with Mr. Klayman, believe it or not.

MS. TULIS: I apologize, Your Honor. Again, we want to make sure that we keep this as a facial motion to dismiss.

THE COURT: I understand. I'm not putting it in for the truth of it, but the whole case turns around the

fact that they say, "You have to plead, and if you don't, you are going to go to jail for life."

So what is it that they're asking him to plead to?

He says it's these documents. If you want to contest that, this is not a question of summary judgment. This is merely he says, "This is what they wanted me to plead to."

MS. TULIS: Absolutely, Your Honor. We do not have any objection to Your Honor referring to those documents for purposes of understanding what Mr. Corsi is alleging in this case.

THE COURT: Okay. What, in your view, is his alleged retaliatory action that adversely affected his constitutionally protected speech, and do you agree that there is protected speech here?

MS. TULIS: Your Honor, if I may, because I'm only representing the government defendants, if you have questions about the proposed First Amendment claim, I'll have Ms. Smith address those.

THE COURT: Okay. Then we should -- I'm sorry, I didn't organize myself here on that basis. I guess the only thing I have to ask you is your response.

Now that Mr. Klayman has decided to abandon his

position that this was within the scope of employment, he seems to be looking for a discovery to challenge the Westfall, what do you say about that?

MS. TULIS: Your Honor, I will also let Ms. Smith address the Westfall Act. With respect to the complaint as pleaded, the government's position is that it is facially deficient in all the aspects that are detailed in our briefing. For those reasons, the government has moved to dismiss under Rule 12(b)1 and under Rule 12(b)6.

THE COURT: Let me get this straight.

What is your argument on the Fourth Amendment; you, the government, and not Mueller --

MS. TULIS: Yes, Your Honor.

THE COURT: -- standing.

MS. TULIS: Yes, Your Honor. Clapper v. Amnesty International makes clear that such speculative and unsupported allegations that are not plausible on their face cannot support standing for a Fourth Amendment claim of the sort he --

THE COURT: Do you consider these similar to the claims that the same gentleman, on behalf of Dr. Corsi, Mr. Klayman made in his Klayman versus Obama, Klayman versus National Security Agency, and Montgomery versus

Comey? Are these the kinds of claims that were made there?

MS. TULIS: Your Honor, if anything, Mr. Corsi's claims are even thinner in terms of alleging an injury that could support standing, so those cases certainly provide a ground to dismiss for lack of understanding.

THE COURT: Why are the current ones thinner?

MS. TULIS: I believe the only allegations, the only factual allegation in support of Mr. Corsi's Fourth Amendment claim is that he routinely speaks with persons located overseas.

THE COURT: He says in PRISM areas. I don't know how you know where those areas are.

MS. TULIS: Exactly, Your Honor.

MR. KLAYMAN: Your Honor, I have to interrupt you. That is false.

THE COURT: No, no, it is not your turn. We can't do that.

MS. TULIS: Your Honor, correct. So he does also -- he states -- he purports, alleges that the regions are surveilled by PRISM. That is a speculative allegation for the reasons we explained. But even if that allegation were credited, taken as true, he has not plausibly alleged that his communications have been, are being, or would be

acquired incidental to the targeting of non-U.S. persons who would be reasonably believed to be located overseas in such regions.

So even if you take as true the latter allegation, it still doesn't take his theory out of the realm of a purely speculative chain of inferences to get to any kind of injury for purposes of Article 3.

THE COURT: I can't remember if this is within your argument or Mueller's. If he is saying now that it is both in Mueller's individual capacity and his official, where does that leave us? And it is not a Bivens action.

MS. TULIS: Are we discussing the Fourth Amendment claim, Your Honor?

THE COURT: 6(e), Count II.

He has told us today that he sued Count II, only Defendant Mueller. Where does that put us, if we have an individual claim, not under Bivens, and an official one?

MS. TULIS: Your Honor, with respect to an official claim, since that's all I'm here to speak to, Your Honor can speak to the putative claim under Rule 12(b)6 on multiple grounds. One of them is that it's not plausibly alleged that there was any 6(e) violation. But in addition, there is no cause of action for which the elements

are alleged for the reasons Your Honor already identified.

The right of action for a claim with respect to a violation of the criminal rule 6(e) is very limited according to the D.C. Circuit, and it has to be brought in a special proceeding that is effectively ancillary to the grand jury proceedings and, under local rules, that would involve making a decision under seal to the chief judge who supervises the grand jury.

So there is no freestanding cause of action in the normal civil procedure sense where you file a complaint, get discovery --

THE COURT: Isn't it true -- I understand all those arguments, but isn't it true that if you are suing Mueller in his official capacity, that means you are suing the government? There is no Mueller at that point. It is not a Westfall issue. You are really the entity being sued at that point.

Put aside the individual, the individual you can sue under Bivens for damages. He is not asking for damages. He said in the complaint he wants a preliminary injunction. We know that under Bivens or under liability for individuals personally, it is only damages and nothing else. That is clear.

I'm trying to understand where we are when he says officially.

MS. TULIS: Yes, Your Honor. I think one complication here, the only context in which the D.C. circuit has recognized actions with respect to a purported violation of the criminal rule 6(e) is in these proceedings that relate to the grand jury proceedings.

So, for instance, the scant case law that exists involved, for instance, I believe previously, for instance, an office of independent counsel and allegations with respect to leaks by independent counsel in the office of that counsel.

I don't know that the --

THE COURT: They were prosecuted in front of grand jury judge. I know that. That is not my question.

MS. TULIS: I understand, Your Honor.

THE COURT: My question is, let's say he alleges a Fourth Amendment violation.

MS. TULIS: Okay.

THE COURT: I'm just taking a hypothetical. He says, he is not looking for Bivens, not looking for damages, he is looking for some kind of injunction. So that is the government, and he is suing Mueller under personally and

officially.

What is the action against the government? What is your response in that situation?

MS. TULIS: With respect to the Fourth Amendment claim?

THE COURT: Yes.

MS. TULIS: Your Honor, I --

THE COURT: Can you sue the government directly for a constitutional violation based on the act of an official? That ought to be a simple question.

MS. TULIS: Your Honor, I believe --

THE COURT: Do you know the answer?

MS. SMITH: No, Your Honor, you may not sue the United States.

THE COURT: We'll get to it. Let's hear from your co-counsel. I think she understands my question.

Let's start again. Your name.

MS. SMITH: My name is Laura Smith. I'm here from the civil division on behalf of Robert Mueller in his individual capacity.

THE COURT: Okay. You are from the civil torts or from federal programs or civil?

MS. SMITH: Torts.

THE COURT: All right. So he is saying in Count II, maybe also in Count I, "I'm suing the government; I'm suing in Count I, Mueller under Bivens, and I'm suing the government," I think. I don't know.

Mr. Klayman, yes or no, are you suing the government in Count I, or just Mueller for damages?

MR. KLAYMAN: Let me just make sure I know which one Count I is, Your Honor.

THE COURT: That's the Fourth Amendment.

MR. KLAYMAN: We're suing both. In fact, in Judge Leon's case we got an injunction against the government.

THE COURT: Fine.

MR. KLAYMAN: The fact -- when there is a constitutional violation there is no immunity here. That was not a correct statement.

THE COURT: We haven't heard the statement. All right. I just --

MR. KLAYMAN: By the way, let me just point one other thing out with that case. That was vacated ultimately because it was moot, because we had the U.S. Freedom Act. But the law still stands in terms of this District Court in what Judge Leon ruled.

THE COURT: It doesn't bind me. I think it is vacated. So I don't know what purpose one could cite it for. That's neither here nor there.

I'm trying to understand, we have a Count I and Count II. The U.S. Government, he is suing based on Mueller official acts. And one is a constitutional tort, the other is a statutory tort.

What is the black-letter law?

MS. SMITH: Would you like me to address Count I and then Count II?

THE COURT: Sure.

MS. SMITH: Count I is Mr. Corsi's Fourth Amendment claim. FDIC versus Meyers said you can't recover from a federal agency for an alleged constitutional violation. But as we explained in our briefs, you can in some cases seek equitable or injunctive relief from the federal government.

THE COURT: Right.

MS. SMITH: It sounds like Your Honor is already aware that you can not receive equitable relief from a federal employee in his or her individual capacity.

THE COURT: Right. Can you get damages against the federal government if one of their agents illegally

searched someone?

MS. SMITH: The federal government has not waived sovereign immunity on constitutional claims. So the FTCA is a limited waiver of sovereign immunity that does not cover constitutional torts.

THE COURT: It doesn't cover constitutional torts. If, though, there is a tort or constitutional violation, you do go by way of the APA?

MS. SMITH: I think it would depend on the tort.

THE COURT: They are constitutional claims. There are ways to bring constitutional claims against the federal government other than the Federal Tort Claims Act.

MS. SMITH: Yes.

THE COURT: That is strictly torts.

MS. SMITH: Yes.

THE COURT: So he can't bring them directly here -- or can he? That is all I want to know. Can Mr. Klayman sue the federal government in Count I, under Fourth Amendment, or statutory claim under II directly? He can for injunctive relief.

MS. SMITH: I'm sorry, I didn't hear you.

THE COURT: Can he for injunctive relief?

MS. SMITH: Correct. I believe what the United

States has argued in its official capacity brief is that he lacks standing to seek this sort of injunctive relief that might otherwise be available.

THE COURT: Yes, they have. But my question is, could he even get it. Put aside standing, is he legally entitled to get injunctive relief from the federal government here, based on acts of the special counsel?

MS. SMITH: I doubt it, but I would have to defer to my colleague.

MS. TULIS: Your Honor, I think I understand your question now. As a general matter, setting aside the specific deficiencies of this complaint --

THE COURT: I'm asking a legal question.

MS. TULIS: As a general matter, there can be suits brought for constitutional violations against the government for injunctive relief only.

THE COURT: All right. And damages can only be brought against an individual.

MS. SMITH: Correct.

THE COURT: All right. Maybe it is not your part of the argument, is there any injunctive relief here possible, period, whether you can sue the government for it or not?

MS. SMITH: I share Your Honor's confusion about what exactly Mr. Corsi is seeking here.

THE COURT: He said in the complaint he wants preliminary injunctive relief and permanent. He's never changed that, so I'm bound by that.

MS. SMITH: I'm not sure exactly what he wants, but he certainly can't get it from Mr. Mueller in his individual capacity.

THE COURT: No. He wants to make sure nobody leaks anything, I guess. That would be an injunction against the entire federal government, I guess. I don't know. I'm having trouble with it myself.

You are here on Mueller's behalf. So he has a series of cases that he has cited. Trulock is one, Hartman is another. He cited Judge Kotelly in L-O-U-M-I-E-T and Haynesworth, I think.

How do you distinguish those; is that within your brief?

MS. SMITH: It is, Your Honor. Loumiet is on appeal right now. That case came shortly after Abbasi. It also came before the D.C. Circuits opinion in Liff versus Office of Inspector General.

So the idea that that case firmly establishes a

right to First Amendment retaliation Bivens claims in this circuit is simply not true.

THE COURT: Which case is it? You said that there has been a case?

MS. SMITH: Loumiet is on appeal right now. The D.C. Circuit has issued an opinion in Liff, L-I-F-F, versus Inspector General.

THE COURT: What did that hold?

MS. SMITH: That looked at the constellation of remedies available to somebody who was alleging retaliation and Bivens --

THE COURT: Do you have the cite by chance?

MS. SMITH: I can give it to you, but I don't know it off the top of my head.

THE COURT: We have it.

Okay. So you are saying -- did that case reject some kind of First Amendment retaliation claim?

MS. SMITH: It didn't squarely reject the sort of claim that Mr. Corsi is asserting, which really doesn't have any sort of analogue in the D.C. Circuit, but the type of analysis that Mr. Klayman is urging is inconsistent with that taken by the D.C. Circuit in the Liff lift case.

THE COURT: So you would agree that in Loumiet,

the man was -- "prosecuted" is not quite the right word. He was the subject of an enforcement action, right?

MS. SMITH: That's my understanding.

THE COURT: He cites a Seventh Circuit case called W-H-A-R-R-I-E. He cites his Fourth Circuit case, Trulock, and he cites Hartman and Haynesworth.

What do you say about those cases?

MS. SMITH: First I'll address Fields versus Wharrie, which is the Seventh Circuit case.

That case found that absolute immunity did not block 1983, not a Bivens claim to benefit someone wrongfully convicted when a prosecutor he procured false testimony. That case was about the distinction between investigative acts and prosecutorial acts, and how the absolute prosecutorial immunity applies in that context. It was a 1983 case, and Mr. Corsi, unlike the plaintiff in that case, was never prosecuted.

THE COURT: The fact that it's a 1983 versus Bivens doesn't matter much. It is the same law that applies, whether it is a 1983 or Bivens. One is local, one is federal.

MS. SMITH: The question of availability of a remedy would be different, but the applicable law tends to

be the same.

Your Honor also asked about Trulock.

THE COURT: There was a case about a distinction between investigatory and --

MS. SMITH: Investigatory and prosecutorial acts.

THE COURT: They said this was investigatory and that you could be sued for it.

MS. SMITH: Right. It was a case about a person had been wrongfully convicted based on false testimony --

THE COURT: Given that case and given Hartman, and given Moore versus Valder, how can you argue absolute immunity?

I'm perplexed. Doesn't this fall squarely within Moore versus Valder, the case I know well? Because this was investigatory, it had to do with preparing or arguing with witnesses about their testimony before the grand jury?

MS. SMITH: It may be that some of what Mr. Corsi is talking about here falls within the investigative bubble. The problem that we have here is that the allegations are so vague and speculative that we're not even really sure what he thinks anyone did to violate his

rights, so it makes it very difficult to point to whatever particular action is at issue and decide what particular immunity would apply.

THE COURT: I think we've got it. I understand it to be that they wanted him to plead along the lines of the papers presented to him, and he resisted because he said it wasn't true that he acted as a go-between, between Stone and WikiLeaks. That's what I understand the case to be.

MS. SMITH: And that may very well be, but that's not what is in the complaint.

THE COURT: He says it is not true, and the example he gave is that -- having to do with the go-between. That's the only example he has given us today. I think that's exactly what he says. And that's the basis of his -- certainly abuse of process in his First Amendment.

They wanted him to falsely testify under oath that he acted as a liaison between Roger Stone and WikiLeaks, leader Julian Assange, concerning the public release of e-mails obtained from the DNC. He is arguing that he figured this out as a matter of inference, that's paragraph 21, not that he actually knew anything.

And they obviously, based on their proposed information in statement of offense, didn't actually

believe all that. But that's what he says right here.

So, put aside the vagueness of it for a minute and tell me how this is covered by absolute immunity.

MS. SMITH: We've asserted absolute immunity only to the extent that Mr. Corsi is challenging, for example, charging decisions and presentations to the grand jury. The way the complaint was drafted left open that possibility, so we felt it appropriate to cover the waterfront.

To the extent that absolute immunity doesn't cover some of what has been so vaguely alleged here, then Mr. Mueller, in his personal capacity, has the defenses of lack of proper service, the fact that it would be inappropriate to apply a Bivens remedy even this novel context, the fact that Mr. Corsi has not alleged any personal involvement on the part of Mr. Mueller, and the fact that there is no allegations of clearly established constitutional right violations. All of these entitle Mr. Mueller's suit dismissal in his individual capacity.

THE COURT: Let's just finish up.

Loumiet, how do you distinguish that, other than you think it is bad law?

MS. SMITH: Well. Again that was a case where

there were actual proceedings brought against the plaintiff.

THE COURT: Hartman?

MS. SMITH: Hartman was a case about whether probable cause -- I assume Your Honor means the Supreme Court Hartman.

THE COURT: Yes.

MS. SMITH: Hartman was the case about whether probable cause has been proven in the context of a prosecution claim. It did not recognize the First Amendment Bivens claim. The Supreme Court recognized that in its subsequent decision in *Abbasi, Ziglar versus Abbasi*.

THE COURT: I thought they recognized it in the other case, what was it, R-I-E-H-L-E, that there was no First Amendment claim recognized.

MS. SMITH: I think the D.C. Circuit has also recognized that.

THE COURT: Okay. So Hartman, you say, established -- we can debate on whether it recognized such a claim, but you have to have at least a no probable cause allegation. Some of Haynesworth has survived.

MS. SMITH: Haynesworth was a case about someone who was actually prosecuted, which is distinguishable in

the obvious reasons. But here, the only allegation is a threat of prosecution.

Again, these other cases were all pre Ziglar versus Abbasi, which tells us that when we're looking about the propriety of implying the Bivens remedy, it is a novel concept if you are going beyond Bivens, Davis, and Carlson.

THE COURT: And the Seventh Circuit case, Wharrie?

MS. SMITH: I believe that's the Fields case, Fields versus Wharrie?

THE COURT: Yes.

MS. SMITH: And I believe you asked about Trulock as well?

THE COURT: Yes, there were two.

MS. SMITH: Trulock relied on the Conley standard for pleading which was retired -- excuse me -- in Bell Atlantic versus Twombly, the no set of facts language. So it is no longer a good law in terms of pleading standard.

THE COURT: Which did?

MS. SMITH: Trulock versus Freeh, the Fourth Circuit case. It is also a case that was pre-Iqbal, which made it extremely clear that personal participation is absolutely required for Bivens liability, the Supreme

Court case, and it also came before Ziglar versus Abbasi, which concerned the propriety of expanding the Bivens remedy.

THE COURT: When was Iqbal?

MS. SMITH: 2007, Your Honor.

THE COURT: Time goes by quickly.

Any further responses to his arguments?

Don't we have a power to impose civil contempt in a case like this, when I don't control the grand jury?

MS. SMITH: I'm not sure of the answer. I've tried to find out.

THE COURT: It is novel, that's for sure. I know that Judge Norma Holloway Johnson had a trial on one of these during Star's investigation. There was another case. Marion Barry, I think, which also involved Aubrey Robinson as the head of the grand jury. But I never heard of some other being involved.

Anything else you want to respond to, Mr. Klayman?

MS. SMITH: No, Your Honor. To the extent Mr. Klayman has raised any points relevant to the individual capacity claims, they've been fully addressed in our briefs. I won't take up any more of your time than

I need to.

THE COURT: Thank you.

You have five minutes, sir.

MR. KLAYMAN: Thank you, Your Honor.

I may respond to that presentation. If Your Honor has any more questions, happy to answer it.

With regard to what was alleged in terms of the illegal surveillance, we're very, very clear in our complaint that it dealt with obtaining the name of Andrew Stettner, who is the son of Mrs. Corsi, the stepson of Dr. Corsi. There was no way that they could know that name unless text messages were being intercepted.

THE COURT: Why not? What is Mrs. Corsi's name?

Previously did she go by another name before she became Mrs. Corsi?

MR. KLAYMAN: I never asked her. That was not her maiden name in any event. In any event, that's what we allege in the complaint.

And then the author, Jim Garrow, who developed assistant DEAF system, did an analysis of Dr. Corsi's cell phone and found that it was being subject to government surveillance. In that respect it is more --

THE COURT: You used the word "attempted"

surveillance. I couldn't tell what you meant, that they concluded that there was an attempt --

MR. KLAYMAN: I misspoke. That there was surveillance, that they were getting into the cell phones, the government was getting into the cell phones.

In that respect, the point I'm making is that our allegations here are more specific than they were with regard to the cases in front of Judge Leon, where he enjoined the intelligence agencies, the NSA. Because in that case, all we had was an order by the Foreign Intelligence Surveillance Court which allowed to access to Verizon telephone records. Here we have specific allegations of violations of the Fourth Amendment.

THE COURT: Do you have just -- is this a Fourth Amendment claim, or is it a claim based on FISA?

MR. KLAYMAN: It is a Fourth Amendment claim.

FISA, I don't know if you've ever been on the court or not, but that's a Star Chamber proceeding. There is no private right there to participate. They've been debating whether to have a public advocate represent private interests, but it never happened.

THE COURT: So is it basically irrelevant whether he is making telephone calls to people in certain foreign

territories?

MR. KLAYMAN: It is not irrelevant. That's another section, that's section 702, which is about ready to be reauthorized. Every communication overseas --

THE COURT: Is that the Patriot Act, 702?

MR. KLAYMAN: Foreign Surveillance Intelligence Act, section 702.

THE COURT: Are you claiming they violated that.

MR. KLAYMAN: I am claiming that they violated that, and the Patriot Act, which is now the U.S.A. Freedom Act.

THE COURT: You are arguing that they violated 702 --

MR. KLAYMAN: Both.

THE COURT: -- the Patriot Act and the Fourth Amendment.

MR. KLAYMAN: Yes, that's when I objected to her saying it was only a question of making overseas calls. It is not. Every overseas call is picked up under 702. It is surveilled.

THE COURT: What you do mean, every overseas call is picked up?

MR. KLAYMAN: Every call that you, Your Honor,

would make to wherever your family hails from or wherever is picked up by the National Security Agency, FBI and CIA.

THE COURT: No matter where I call?

MR. KLAYMAN: No matter where you call.

THE COURT: But you're just saying it's stored --

MR. KLAYMAN: So be careful.

THE COURT: -- but not that they listen to it. There was a point in time that they were picking it up as a mega data, right?

MR. KLAYMAN: Yes, but in fact, the Inspector General of the NSA has done a number of studies in which they found that people were, at the NSA, listening to content. In a period of six months, this was cited in the Leon case, 3,000 overseas messages were listened to by NSA employees.

THE COURT: What period of time was that?

MR. KLAYMAN: This is going back a few years.

THE COURT: When did it end?

MR. KLAYMAN: I don't think it ever ended.

THE COURT: They didn't renew it.

MR. KLAYMAN: Well, this is why our cases triggered the U.S.A. Freedom Act. Congress then enacted that. But we now know, for instance, that President Trump,

his family, his colleagues, were also surveilled despite the U.S.A. Freedom Act, so the illegal surveillance continued on. And, of course, Dr. Corsi was implicated with regard to President Trump and Russian collusion and everything else.

THE COURT: Okay.

MR. KLAYMAN: One other thing, and it is a small point, but nit is also a major point in a way, that Dr. Corsi was allowed to amend his testimony in front of the grand jury, in front of Special Counsel Robert Mueller. They permitted him to do that. And despite the amended testimony, they accused him of lying and threatened him with prosecution.

So I wanted to clear that up on the record. But this was a gradual process. It was a browbeating for many, many months. They thought they could squeeze water out of a lemon. I don't mean to call Dr. Corsi a lemon, but they were trying to squeeze the lemon, and the lemon couldn't -- couldn't be squeezed.

And they knew -- and this is important, Your Honor, it gets back to the surveillance -- is that the government has access to every communication you make over internet, e-mail, telephone, cell phones. Of course, we

allege the illegal surveillance. They knew that what he was telling was the truth, but they beat the heck out of him anyway because they needed that testimony to save face because their investigation was going down.

And we now know, it is not even dispute, from the standpoint of Special Counsel Mueller, that there was no proveable Russian collusion, regardless of anything else that's being alleged on Capitol Hill.

THE COURT: The only thing they were charging him with were false statements. I don't need to worry about Russian collusion. The question is whether there is some probable cause for the basis of the charge of false statements. Whether it had anything to do with anything more is not before me. Okay.

MR. KLAYMAN: Thank you for your time. I commend you on giving us this opportunity. There are not many judges in this courthouse any more that will hold oral argument on these highly charged issues, and I thank you for that.

THE COURT: You are welcome. I take it under advisement. Thank you.

(Whereupon at 4:17 p.m., the hearing adjourned.)

