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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION
HONORABLE A. HOWARD MATZ, U.S. DISTRICT JUDGE

- - -

UNITED STATES OF AMERICA,)
)
) Plaintiff,) Case No.
)
) vs.) CR 10-1031-AHM
)
) (2) ANGELA MARIA GOMEZ AGUILAR,)
) (3) LINDSEY MANUFACTURING COMPANY,)
) (4) KEITH E. LINDSEY, and)
) (5) STEVE K. LEE,)
)
) Defendants.)

CERTIFIED COPY

REPORTER'S TRANSCRIPT OF
PRETRIAL MOTIONS HEARING
Volume 1 (Pages 1 - 55)
FRIDAY, APRIL 1, 2011
2:00 P.M.
LOS ANGELES, CALIFORNIA

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1 you want to get through these and that is not --

2 THE COURT: I do, Mr. Miller.

3 The last motion that the government made was to admit
4 evidence about connection between the Aguilars' company
5 Sorvill and ABB, evidence that was going to come in, as I
6 understand it -- or will come in, I should say, through the
7 testimony of the Basurtos, father and/or son.

8 I conditionally deny that motion without prejudice to
9 the government.

10 If the Basurtos provide the foundation that the
11 government basically pointed to as the basis for this offer
12 of proof -- the government did so at Page 4 of its reply
13 papers -- the government can seek a ruling at that time. So,
14 it's denied without prejudice. Right now, I don't have the
15 basis, in advance and in the abstract, to issue a wholesale
16 blanket ruling permitting it to come in.

17 Okay. Those are my rulings on the government's
18 motions.

19 Now, we'll go to motion 220. That's the defendants'
20 motion to dismiss the Indictment on the ground that the
21 Foreign Corrupt Practices Act is not implicated in the
22 conduct of which the defendants are accused.

23 This is a motion that warrants and will receive a
24 very considered written ruling, and so everything I'm about
25 to do and say is preliminary, except for what I will announce

1 a little later on as the outcome and the result -- or the
2 ruling, I should say, on this motion.

3 In order to provide a context for this motion, let me
4 at least note the following considerations which are in the
5 nature of providing a framework for understanding the ruling.

6 What I'm about to recite undoubtedly will be
7 incorporated into the written ruling, but not necessarily in
8 this sequence or with these words.

9 The First Superseding Indictment charges Lee,
10 Lindsey, and LMC with conspiring to violate the Foreign
11 ~~Corrupt Practices Act, along with substantive Foreign Corrupt~~
12 Practices Act violations.

13 This motion to dismiss has been framed by the
14 defendants in an exceedingly, absolute, and pristine fashion.
15 And by that I mean that it's a reflection of their views that
16 the only issue before the Court is an issue of overriding --
17 excuse me -- of fundamental legal considerations.

18 They have framed the issue -- the defendants have --
19 as whether an officer or an employee of a state-owned
20 corporation qualifies as a foreign official. The Indictment
21 alleges that the state-owned corporation, which whose
22 officers were improperly bribed, is the federal commission on
23 electricity, which provides electricity throughout all of
24 Mexico, except for Mexico City.

25 The Indictment goes on to allege -- I'm going to

1 refer to it as CFE. The Indictment alleges a few additional
2 facts about CFE, and there are some other related facts about
3 CFE that are not in dispute.

4 The Indictment itself alleges that CFE contracted
5 with Mexican and foreign companies for goods and services to
6 help supply electricity to all of its customers throughout
7 most of Mexico. That someone referred to in the First
8 Superseding Indictment as Official 1, who is now known to be
9 Nester Moreno, held a senior level position at CFE.

10 At one point during the course of this alleged
11 ~~conspiracy he was the Sub-Director of Generation. Later, he~~
12 became the Director of Operations, succeeding Official 2, now
13 known as Arturo Hernandez, who had been Director of
14 Operations until Moreno took over.

15 The motion that the defendants have made is based
16 upon their view that neither Official 1 or Official 2 was a
17 foreign official within the meaning of the Foreign Corrupt
18 Practices Act, because neither of them worked for a
19 Department of Mexico, an agency of Mexico, or an
20 instrumentality of Mexico. And the statute itself outlaws
21 payments to people who work for a department, agency, or
22 instrumentality of a foreign government.

23 Putting the issue before me a slightly different
24 way -- and I'm kind of speaking just off the top of my
25 head -- what the defendants have moved -- the basis for the

1 defendants' motion to throw this case out, is that the CFE is
2 not an instrumentality and could not be an instrumentality of
3 Mexico because it's a corporation.

4 Even if I attach an additional gloss -- which is not
5 the precise way the defendants' framed it as being a
6 corporation involved in commerce, it still amounts to the
7 same analysis -- is an entity that is a corporation, outside
8 the scope of the Foreign Corrupt Practices Act?

9 Foreign official -- getting back to the status of
10 Official 1 and Official 2, as I think I just indicated -- is
11 a -- any officer -- this is from the statute -- any officer
12 or employer of a foreign government, or any department,
13 agency, or instrumentality thereof.

14 It is not disputed, for purposes of this motion, that
15 under the Mexican constitution the supply of electricity is
16 solely a government function. There's a provision in that
17 constitution in Article 27 which so provides.

18 It is not disputed that under a certain statute in
19 Mexico, the Public Service Act of Electricity from 1975, the
20 Commission on Federal Electricity was defined as a
21 decentralized public entity with legal person -- personality.
22 There is no dispute, although the defendants say it doesn't
23 really matter, they think it's irrelevant, but there is, in
24 any event, no dispute that Article 10 of that statute
25 provides that the CFE governing board is composed of the

1 Secretaries of Finance and Public Credit and certain other
2 federal departments for the nation of Mexico.

3 There's no dispute that Article 14 of that statute
4 provides that it's the President of the Republic of Mexico
5 who appoints the Director General.

6 It's no dispute that that statute elsewhere provides
7 that the provision of electricity is considered a public
8 service.

9 It is not in dispute that if you log onto the website
10 of CFE, you see that, in the English language translation, it
11 is -- it describes itself -- CFE describes itself as an
12 agency of the federal government, and acknowledges that it
13 was created and owned by the Mexican government.

14 In making their motion, the defendants have said that
15 none of the issues that they're raising depends on any
16 disputed facts, on any further finding of facts, and this is
17 their language, defendants argue that no matter what other
18 characteristics of CFE the government may attempt to prove at
19 trial, and assuming that all of the allegations in the First
20 Superseding Indictment are true, as a matter of law, no
21 state-owned corporation is an instrumentality, meaning that
22 no CFE employee, which in turn would mean neither Moreno nor
23 Hernandez, is a foreign official under the Foreign Corrupt
24 Practices Act, no crime, no prosecution, throw the case out.

25 Now, have I accurately summarized the context in

1 which the motion was -- are you going to argue the motion,
2 Ms. Levine?

3 MS. LEVINE: Yes, your Honor.

4 THE COURT: Have I accurately characterized what your
5 briefs say?

6 MS. LEVINE: Yes.

7 THE COURT: Okay. Now, please be good enough to go
8 to the lectern, because I want to have you look over -- and
9 I'll give you ample time -- a one and a half page
10 hypothetical that I've prepared. And I'm giving copies to
11 the Courtroom Deputy for his analysis -- I mean, for his use
12 to circulate to the lawyers. I think there's enough for all
13 the lawyers, but if not, I have some more.

14 I ask you, Ms. Levine, to read the hypothetical, and
15 then we'll talk about it.

16 *(Pause in the proceedings.)*

17 THE COURT: Are you ready to proceed? Just tell me
18 if you're ready?

19 MS. LEVINE: I'm ready, your Honor.

20 I should, as a caveat, indicate that I never took
21 Friday afternoon classes in law school because I'm not always
22 my sharpest on questioning on Friday afternoon, but I'll do
23 my best.

24 THE COURT: Okay. Well, pretend it's Thursday then.

25 MS. LEVINE: I'm good at that.

1 THE COURT: I'm sure you'll do very, very well.

2 I first want to acknowledge this is a hypothetical
3 addressed to only one part of your motion, which is your
4 contention that the legislative history of the Federal
5 Corrupt Practices Act, beginning with the deliberations in
6 Congress before it was enacted, extending to the present day,
7 but very much including changes in amendments in '88 and '98,
8 show that Congress deliberately chose not to target bribes
9 intended to influence state-owned corporations.

10 MS. LEVINE: Yes, your Honor.

11 ~~THE COURT: That's your contention?~~

12 MS. LEVINE: That's --

13 THE COURT: And now --

14 MS. LEVINE: Well, there are two parts of our
15 contention. First, that that's what the legislative history
16 shows, but even if it didn't, the law is so vague on its
17 face --

18 THE COURT: I'm going to get to your challenges for
19 vagueness, your application of the rule of lenity.

20 I'm not going to go into the reliance on these
21 Latin-phrased constructions -- terms for construing statutes.
22 That will all be reflected. I will address all your
23 arguments in my ruling.

24 I just want to know now how you would answer this
25 hypothetical which, for the benefit of those who haven't seen

1 it, basically puts to Ms. Levine a hypothetical that Exxon
2 and Occidental were competing with each other to get a bid
3 from Pemex, the state-owned Mexican utility that owns and
4 exploits all of that nation's natural resources. There was a
5 public bidding. Occidental offered to pay Pemex more than
6 Exxon. At the televised public ceremony when the award was
7 going to be announced, the head of Exxon went up on the stage
8 and handed a \$10 million check to the CEO of Pemex, who
9 thanked him publicly for the gift being then provided to him,
10 and thereupon awarded the concession to Exxon.

11 Thereafter, Occidental asked the Department of
12 Justice to prosecute, and the Department of Justice asked the
13 members of Congress to say, did we think that the Foreign
14 Corrupt Practices Act precludes prosecuting Exxon because
15 Pemex is a corporation, not an instrumentality?

16 What's your answer?

17 MS. LEVINE: So, to go back and look at it, your
18 Honor, you do have to look back to the legislative history
19 and where they began. That means you have to go back to the
20 Watergate days and to the investigations that took place, and
21 to see that what Congress was looking at there was very
22 clear. It was not payments at all to state-owned
23 corporations.

24 And if you look at the world at that time, it makes a
25 big difference, because we were talking at a time --

1 THE COURT: Now you're already veering off into some
2 very elaborate, nicely argued by both sides -- briefs on both
3 sides were very good and very helpful. But, I'll grant you
4 that this is a fabricated example, because I'm asking you
5 what would happen, and the people who headed the appropriate
6 committees and the two bodies of Congress back in 1977 aren't
7 there.

8 MS. LEVINE: Right.

9 THE COURT: I just want you to tell me, with this
10 very strained hypothetical, with the whole notion of world
11 attention being devoted to this dramatic moment on the stage
12 in Mexico where the head of Exxon gives a \$10 million check
13 to the head of Pemex, do you think that any member of
14 congress would say it's outside the scope -- any member today
15 or in 1977 -- of the Foreign Corrupt Practices Act?

16 MS. LEVINE: I -- I don't think that that's a fair
17 question, your Honor. I will answer it, but I will tell you
18 it's not fair, because when you ask a Congressperson what
19 they would decide while the camera is on, you may get a
20 different answer than what they would decide if they were in
21 the midst of being lobbied by the chamber of commerce or
22 something to make a law differently.

23 So, when you --

24 THE COURT: Well, then let's bury my hypothetical,
25 and add to it the gloss that when the Department of Justice

1 asks the members of Congress whether they think this is
2 within the scope of the Foreign Corrupt Practices Act, it's
3 done in private. There aren't any cameras. The fact that
4 the Department of Justice wants the members of Congress to
5 provide them with an answer, isn't known to the public. So,
6 we don't have the difference with the chamber of commerce and
7 lobbying.

8 What would the members of Congress really say,
9 Ms. Levine?

10 MS. LEVINE: Well, in 1977 when they put that
11 language in --- because that's when they put it in, they
12 didn't change it -- they probably would have said yes and no,
13 different ones, because some members of Congress at that
14 point, did not want a law that covered criminality
15 whatsoever, and some members of Congress wanted a law that
16 expressly went to state-owned corporations. And so,
17 Congress-like, they reached a compromise, at a time when they
18 knew how to add state-owned corporations, because if you look
19 at the Foreign Sovereign Immunities Act, passed for different
20 reasons at about the same time, they used the terms
21 *state-owned corporations*, or right afterwards the Economic
22 Espionage Act. So, Congress knows how to put those terms in.

23 In this case, reaching a compromise, which is clear
24 from the legislative history, they did not put it in. So, if
25 you were to ask them in a truth serum way, as opposed to a

1 way where they're going to be quoted and run for office, I
2 think their answer would be, we meant what we said, which is
3 that we did not include state-owned corporations.

4 THE COURT: Okay. And do you think they would never
5 say, we meant what we said, something that's an
6 instrumentality can include, under certain facts and certain
7 circumstances, a state-owned corporation, they would never
8 say that?

9 MS. LEVINE: They couldn't say that because then it's
10 not a law that you can control criminal conduct to. You
11 couldn't say just in certain circumstances undefined, it's
12 going to include state-owned corporations.

13 THE COURT: Putting that aside, because of other
14 legal principles about what legislation can or cannot result
15 from or consist of, your argument is that under no
16 circumstances, no matter how egregious the facts, would
17 Congress have ever permitted, under the instrumentality prong
18 of the Foreign Corrupt Practices Act, Pemex to be prosecuted
19 or -- pardon me -- the head of Exxon and Exxon to be
20 prosecuted for the payment to Pemex, because it happens to be
21 a state-owned corporation. And if it's a state-owned
22 corporation, under no circumstances could it ever be an
23 instrumentality within the meaning of the Foreign Corrupt
24 Practices Act. That's your position, right?

25 MS. LEVINE: No. My argument isn't that they

1 wouldn't ever say that. My argument is, they didn't say
2 that.

3 And what's important is what they said, not what they
4 might say subsequently. Because subsequent legislative
5 history is just not how you interpret a statute. The Supreme
6 Court's clear on that.

7 THE COURT: You're relying a lot on subsequent
8 legislative history. You're relying especially heavily on
9 what Congress adopted from the OECD protocol and treaty that
10 was entered into in '98 and what it didn't adopt. So, let's
11 try to be at least consistent here.

12 MS. LEVINE: But with this set of words, your Honor,
13 if the Court were to go back to '77, because they don't
14 change, and look at what Congress said then, you couldn't
15 look at what Congress says in 1997, 1998 when they don't
16 change the words, to interpret what this Congress meant in
17 1977 from those words.

18 And what I'm suggesting to the Court is those words,
19 when they were passed, are what they meant. And just because
20 a crime takes place that's egregious down the line, doesn't
21 mean you can change the statute to meet that crime.

22 We often want to do that, we just can't.

23 THE COURT: They use the word *instrumentality*. Your
24 argument is that an instrumentality has to be the same thing
25 as an agency or department. It has to have the same

1 characteristics.

2 MS. LEVINE: Yes. That it has to -- I mean, because
3 it is Friday --

4 THE COURT: What characteristics?

5 What characteristics in my hypothetical that Pemex
6 has -- what are the characteristics of an agency or a
7 department in my hypothetical that Pemex lacks in order to be
8 an instrumentality?

9 MS. LEVINE: It's commercial, and it's not acting as
10 part of the state qua state. And so --

11 THE COURT: State qua state meaning what?

12 MS. LEVINE: Like the state doing stuff that state
13 does. Public entity things.

14 THE COURT: If a state has in its constitution that
15 it does the electricity, is that sufficiently public?

16 MS. LEVINE: I don't -- your Honor, I was in Cuba in
17 December, and they own the sandwich shops, the cigar
18 factories, the street cleaners, the cleaning, the people that
19 make the bread; and if you look in 1977, we were a different
20 world where there was half the world that was entirely
21 state-owned. And I do not believe that Congress meant when
22 it, in 1977 passed that, if something is state-owned and
23 they're selling bread, that -- and you bribe to go to the
24 head of the line so that the guy standing next to you happens
25 to be someone you want business with gets a good sandwich,

1 that that's a violation of the Foreign Corrupt Practices Act.

2 THE COURT: Of course that gets into the routine
3 conduct exception, and I'm not even going to allow this to
4 disintegrate into that side show. All right.

5 I understand your response. It's an able response by
6 an artful advocate. We are in 2011.

7 MS. LEVINE: Yes.

8 THE COURT: We are not in Cuba. And we have a
9 decision to make that doesn't preclude the application of
10 common sense. I'll just leave it at that.

11 So, thank you for your comments, and let me now tell
12 you what the decision will be on that motion.

13 The decision will be to deny the motion.

14 I will not dismiss this case. I will not throw it
15 out. I think it would be an improper, incorrect, and
16 unfounded legal conclusion to do so.

17 I say that because I've considered and I don't agree
18 with your arguments about legislative history. Both sides
19 have cited differing maxims of statutory construction to set
20 forth their position.

21 I think that the language itself, and the very
22 definition of instrumentality that you proposed in your
23 briefs, makes it unnecessary to even engage in a legislative
24 history or statutory analysis, because you defined -- you
25 defined instrumentality -- and I think it was on Page 6 of

1 your brief, as the quality -- you cited Webster's II New
2 College Dictionary. You gave an ordinary meaning of
3 instrumentality. In essence, it was serving as a means -- as
4 a means, or agency, or implemental of or relating to or done
5 with an instrument or tool.

6 You then went on to cite the American Heritage
7 Dictionary defining instrumentality as a means or an agency
8 of a branch of government by means of which functions or
9 policies are carried out.

10 You cited Black's Law Dictionary for defining
11 instrumentality as a thing used to achieve an end or purpose,
12 or a means or agency through which a function of another
13 entity is accomplished, such as a branch of a governing body.

14 This much I will preview about the ruling that I
15 intend to issue -- when I find time, which is another
16 issue -- and that is, I am going to adopt your definition of
17 instrumentality. It's plenty sufficient to establish,
18 without any real legitimate uncertainty or doubt, that CFE is
19 an instrumentality within the meaning of the Foreign Corrupt
20 Practices Act.

21 So, that will be just one part of the ruling. I
22 don't think we have time, I have a lot of other rulings to go
23 through. I've considered your arguments about the rule of
24 lenity. I've considered your arguments about vague for void
25 -- void for vagueness on its face, or vague as applied. I

1 don't think that those are compelling arguments either.

2 So, thank you for struggling -- ably struggling --
3 I'm not demeaning your responses -- but I think it's fair for
4 the lawyers to know that, as I tried to indicate before, I
5 don't think challenging -- well, I won't say *challenging* --
6 novel rulings like this, preclude someone from asking what
7 the application -- should preclude a Judge from asking what
8 the application of one side's very extreme, absolute rigid
9 argument could be. Judges do that all the time. Advocates
10 are forced to deal with hypotheticals like that all the time
11 at all levels of litigation.

12 So, I wasn't trying to spring a trap on you. I wrote
13 this this morning, so help me, but I find that it is
14 instructive to have had this colloquy.

15 So, let's move on to some of the other motions.
16 Please return the hypothetical, all of you who got it, at the
17 end of this proceeding.

18 We will now move to -- we might as well do 216.
19 Okay. The motion that I'm referring to is 216. It is a
20 motion that the Lindsey defendants filed. A motion in limine
21 to exclude reference to co-conspirator admissions before the
22 proof of preliminary facts.

23 Now, I alluded to this motion, I think, previously
24 when I was addressing you, Mr. Miller. Insofar as I pointed
25 out that the analysis that I think is appropriate and