

# Exhibit 6

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

HERITAGE FOUNDATION,

Plaintiff,

vs.

U.S. DEPARTMENT OF HOMELAND SECURITY,

Defendant.

Civil Action  
No. 1:23-1198

Washington, DC  
April 30, 2024

3:25 p.m.

**TRANSCRIPT OF EX PARTE STATUS CONFERENCE  
BEFORE THE HONORABLE CARL J. NICHOLS  
UNITED STATES DISTRICT JUDGE**

**APPEARANCES:**

**For the Defendant:**

**John Bardo**

**Peter Pfaffenroth**

DOJ-USAO

601 D Street NW

Washington, DC 20530

Email: john.bardo@usdoj.gov

**Reported By:**

**Lorraine T. Herman, RPR, CRC**

Official Court Reporter

U.S. District & Bankruptcy Courts

333 Constitution Avenue NW

Washington, DC 20001

lorraine\_herman@dcd.uscourts.gov

\*\*\* Proceedings recorded by stenotype shorthand.

\*\*\* Transcript produced by computer-aided transcription.

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1 public about how the government was dealing with the Duke.

2 I'm not saying that's the case. I'm just saying  
3 that, depending on what the true state of affairs was, that  
4 may or may not be true.

5 So my whole point in doing the ex parte discussion  
6 and submission was, rather than think about the set of  
7 hypothetical possibilities and whether each of them could  
8 possibly disclose some conduct by the government that one  
9 might want to know about or whatever, was to know with  
10 certainty what actually happened and then to think through  
11 what disclosing that set of facts would harm, by way of  
12 privacy interests, and what it would -- what, if any, public  
13 interest it would forward.

14 So while I have some of the "true set of facts"  
15 right now, I don't have all of them. And I well understand  
16 that some of this information that we've been talking about  
17 today is not at DHS.

18 **MR. BARDON:** That's correct.

19 **THE COURT:** I completely understand that.

20 Do I have authority, in your view, to require the  
21 executive branch to disclose that information to me by way  
22 of declaration or a brief or something like that, all of the  
23 relevant true set of facts, even if one of the executive  
24 branch agencies is not a defendant and even if one of the  
25 executive branch agencies that has relevant information at

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1 declarations that lay out all of the relevant facts even  
2 though that might require them to get information from a  
3 sister agency?

4 **MR. BARDO:** Could I confer with Mr. Pfaffenroth?

5 **THE COURT:** Yes, of course.

6 **MR. BARDO:** Thank you.

7 **THE COURT:** Of course.

8 (Discussion off the record.)

9 **MR. BARDO:** So, Your Honor, our position would be  
10 getting the State Department involved in this case would run  
11 far afield of what exactly plaintiff is seeking.

12 We believe that the issue in this case is whether  
13 the Department of Homeland Security is lawfully withholding  
14 these records under Exemption 6 and 7(C). It's about  
15 plaintiff's request for these specific records.

16 We would have to research whether the Court is  
17 able to get another agency that's not involved in this case  
18 into this case, and we would likely need to take it up the  
19 chain through various people at State and at Justice. But  
20 this case is really about whether the Heritage Foundation is  
21 entitled to these records.

22 **THE COURT:** No, I agree with that. Clearly, we're  
23 not talking about State Department FOIA production here  
24 but --

25 **MR. BARDO:** Can I mention something else,

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1       hived into two separate buckets. You have buckets over at  
2       DHS, which reference State Department materials and  
3       decisions, but the documents or at least the reasons for  
4       them are over at State and vice versa.

5               So you have a universe of documents that the  
6       documents are their own universe but the information isn't  
7       contained within that universe only; and that's what makes  
8       it complicated in my view. So I completely understand. And  
9       I'm open to your telling me, By the way, here's the true  
10      state of affairs -- this is hypothetical. Right?

11             This is a true state of affairs but the public's  
12      interest in knowing is reduced because if you -- if we had  
13      to produce the CBP materials or the DHS materials, that  
14      wouldn't tell the whole story. The public doesn't have an  
15      interest in knowing the full story.

16             So even if you think about this as the true state  
17      of affairs versus private interest, as you are, Judge  
18      Nichols, you may know that but the production of the  
19      materials at issue here wouldn't disclose that true state of  
20      affairs. It would disclose the DHS half of it. I totally  
21      get that and I'm open to that argument. I understand it  
22      completely.

23             It seems to me, though, that, thinking about even  
24      that argument, it's easier for me to think about the  
25      strength of it when I know the true state of affairs. So

1 I'm not rejecting the argument at all. It just seems to me  
2 that that, like many of the other arguments here, is more  
3 easily weighed when I know everything.

4 And so I'll leave it to the government to decide  
5 if it would like to do that. You have until May 10th to  
6 communicate however you would like to propose how you would  
7 like to proceed. Again, if you need a little bit more time  
8 past the 10th, just let me know that.

9 Yes, Counsel, please.

10 **MR. PFAFFENROTH:** I apologize, Your Honor.

11 **THE COURT:** No, please.

12 **MR. PFAFFENROTH:** Peter Pfaffenroth. We'll  
13 obviously run this up the chain.

14 The only points that I would just like to add are,  
15 you know, when we're talking about State records, as the  
16 Court just correctly summarized, we're talking about records  
17 that are, by statute, exempt.

18 And under the relevant precedence, you know,  
19 Congress has already done the balancing there and the  
20 weighing there. This case is unusual and, frankly, more  
21 interesting than almost all other FOIA cases because it's  
22 the interplay of immigration law and FOIA law.

23 But I know that, you know, various judges of this  
24 court have not always been particularly enamored of the  
25 consular non-reviewability arguments but the Court is

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1 in whether Prince Harry or Sting or anyone else you can  
2 think of who is prominent has a particular visa status.

3 Anyway, I don't want to belabor the point.

4 **THE COURT:** No, I get it.

5 **MR. PFAFFENROTH:** I know the Court is well aware  
6 of all these --

7 **THE COURT:** No, I know -- I mean, certainly my  
8 view is that I have ex parte discussions and ask for  
9 ex parte information only in particularly unique cases. I  
10 don't like to do it. I know the government has a strong  
11 interest in not having it happen.

12 It did seem to me that, in this case, given the  
13 parade of hypotheticals that Heritage had laid out, some of  
14 which, at least in theory, could suggest information the  
15 public would have an interest in seeing about the  
16 government, that the better path for me was to understand,  
17 again, the true set of facts.

18 And then that would be -- I mean, just again, I've  
19 said this a couple times but, if all of the relevant  
20 information was at DHS, if we didn't have State off to the  
21 side, and then I knew right now exactly what happened with  
22 all of these things, and that information, again, would be  
23 produced if -- because I have the defendant with all of the  
24 relevant records in front of me and I would know that  
25 production of those FOIA records would be 100 percent of the

1 relevant information, and I had all of that information,  
2 then I would be able to weigh the public's interest in  
3 knowing that against the privacy concerns.

4 What makes this unique is that we have the added  
5 complication -- really two things. Of course the thing that  
6 you've been talking about, which is the State status, but  
7 also that, even an order requiring production of every  
8 single document here doesn't disclose the true state of  
9 affairs.

10 But again, if you assume a counter-hypothetical  
11 where all of the information is here, then what I would know  
12 in an ex parte setting is an order of disclosure would tell  
13 the public what happened and I could say, Does the public  
14 have much of an interest in knowing that picture versus the  
15 privacy interest?

16 And I was trying to, sort of, get to that point,  
17 not because I thought the public had an interest in knowing.  
18 I mean, to be really clear, I know you just said this, but  
19 everything I've asked today is hypothetical.

20 I'm not suggesting that the public has one iota of  
21 interest in knowing any of this because I don't know what  
22 actually happened. And that's the question for you guys to  
23 consider is whether I should.

24 **MR. PFAFFENROTH:** The only other follow-up I have,  
25 Your Honor, is about timing --

1           **THE COURT:** Yeah.

2           **MR. PFAFFENROTH:** -- because, depending upon how  
3 far we have to run this, people may want to read a  
4 transcript of the Court's questions, and I don't know how  
5 quickly we can get that. So if -- but I don't want to put  
6 pressure on your court reporter if we have a -- we need to  
7 get back to you on May 10th.

8           **THE COURT:** How about we do this. You know I'd  
9 like to know an answer by May 10th, if possible.

10          **MR. PFAFFENROTH:** Right.

11          **THE COURT:** I have amazing staff. As I've said  
12 recently, I probably don't say it enough. I'm sure she will  
13 do her level best to get it to you as soon as possible, if  
14 that's the case.

15          **MR. PFAFFENROTH:** I appreciate that, yes.

16          **THE COURT:** And in the event that, for whatever  
17 reason you say, We need a little bit more time, just come  
18 back.

19          **MR. PFAFFENROTH:** Great.

20          **THE COURT:** I realize that, whereas my original  
21 request was for DHS information of course, this is asking  
22 for information from a non-party, at least, obviously in a  
23 sense. And that may be more complicated than the prior  
24 requests. So if you need more time, just let me know.  
25 Okay?

1                   **MR. PFAFFENROTH:** Thank you, Your Honor.

2                   **THE COURT:** All right.

3                   **MR. BARDO:** Your Honor --

4                   **THE COURT:** Yes.

5                   **MR. BARDO:** -- would you like me to communicate  
6 with Ms. Moore?

7                   **THE COURT:** Yes, unless you decide you need to  
8 file something. In other words, I'm envisioning -- I sort  
9 of leave it to you to decide how you'd like to come back on  
10 May 10th.

11                   But as I said before, if you say, We've had a  
12 chance to confer, we would like another discussion with you  
13 ex parte, Your Honor, then go to Ms. Moore and tell her that  
14 because she'll set that up.

15                   If you send an email that just says, Yes, we'd  
16 like to submit an ex parte filing, can we have 30 days, send  
17 that to her. If you want to submit something ex parte  
18 that's like a, We're not doing this and here's why,  
19 hypothetically, if it's a filing, then you don't need to do  
20 that.

21                   **MR. BARDO:** I understand, Your Honor.

22                   **THE COURT:** Well, actually maybe you have to  
23 anyway because it would be ex parte. So probably, in all  
24 circumstances, you're going through Ms. Moore. Okay?

25                   **MR. BARDO:** I understand, Your Honor.

1                   **THE COURT:** Okay. Thank you all for your time  
2 today.

3                   **MR. BARD:** Thank you, Your Honor.

4                   (Proceedings concluded at 4:30 p.m.)  
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**C E R T I F I C A T E**

I, **Lorraine T. Herman**, Official Court Reporter,  
certify that the foregoing is a true and correct transcript  
of the record of proceedings in the above-entitled matter.

May 8, 2024

**DATE**

/s/ Lorraine T. Herman

**Lorraine T. Herman**