

Volume 1

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VAUGHN R. WALKER

In Re National Security Agency)	MDL 06-1791-VRW
Telecommunications Records)	
Litigation)	
<u>Al-Haramain Islamic Foundation,</u>)	
Inc., et al.,)	
)	
Plaintiffs,)	
)	
vs.)	NO. C 07-0109-VRW
)	
George W. Bush, et al.,)	
)	San Francisco, California
Defendants.)	Friday
)	January 23, 2009
)	10:30 a.m.

TRANSCRIPT OF PROCEEDINGS

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(Appearances Continued On Next Page)

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1 **THE CLERK:** Calling Civil Case 06-1791, In re:
2 National Security Agency Telecommunications Records Litigation.
3 And this matter is in reference to 07-109, Al-Haramain Islamic
4 Foundation versus -- it's now Obama, et al.

5 **MR. EISENBERG:** Jon Eisenberg, for the plaintiffs.

6 **THE COURT:** Good morning, Mr. Eisenberg.

7 **MR. EISENBERG:** Good morning, Judge. With me today I
8 have Steven Goldberg, and William Hancock also.

9 **THE COURT:** Good morning.

10 **MR. GOLDBERG:** Good morning.

11 **MR. COPPOLINO:** Anthony Coppolino, with the United
12 States Department of Justice, Civil Division. With me is
13 Alex Haas, also of the Justice Department, Civil Division, and
14 Tim Stinson, of the Office of General Counsel of the National
15 Security Agency.

16 **THE COURT:** Very well. Good morning, Mr. Coppolino.

17 Well, the first matter that we have to discuss is the
18 status of these proceedings in view of the Government's notice
19 of appeal. How do you intend to proceed, both of you, in
20 connection with the notice of appeal that's been filed?

21 **MR. EISENBERG:** Mr. Coppolino.

22 **MR. COPPOLINO:** Your Honor, I think, as we had
23 indicated in our papers, we would request that the Court enter
24 a stay of proceedings, pending appeal. We have filed that
25 motion. And I'm certainly prepared to address that today.

1 I would also ask if the Court would consider
2 shortening time, so that if you'd like further briefing on that
3 particular motion, that we could do so in an expeditious
4 fashion, but that's, I guess, my first most direct response to
5 your question.

6 **THE COURT:** Mr. Eisenberg.

7 **MR. EISENBERG:** Judge Walker, the threshold question
8 this morning is the effect of the notice of appeal that was
9 filed on Friday. It has no effect whatsoever for purposes of
10 proceedings before this Court, unless your Honor's Order of
11 January 5th, 2009, was appealable. A notice of appeal taken
12 from a nonappealable order does not divest this Court of
13 jurisdiction.

14 So the question today we, I think, must address is:
15 was the Order of January 5th appealable -- directly appealable?

16 **THE COURT:** And how are we going to address that?

17 **MR. EISENBERG:** We have addressed it in our case
18 management conference statement. And I can briefly summarize
19 what the arguments are. There are three theories of
20 appealability that the Government has suggested.

21 One is a collateral order theory of appealable, which
22 is an exception to the final judgment rule.

23 The second is mandamus.

24 The third is something that only appeared in the case
25 management conference statement they filed yesterday, which I

1 have not yet had a chance to address to the Court, which is 28
2 U.S. Code Section 1292(a)(1), an injunction order which will be
3 appealable. So I guess I'll start with collateral final order.

4 Plenty of case law says that the portion of your
5 Honor's Order of January 5th denying the motion to dismiss is
6 not appealable as a collateral final order, because the issue
7 can be reviewed on appeal from a final judgment. Let's go to
8 the portion of your Order of July -- January 5th, which
9 addressed the 1806(f) motion.

10 There are two reasons why the ruling on the 1806(f)
11 motion is not appealable. The second -- the first is that the
12 Order is enmeshed with the merits of the case. It's not
13 collateral.

14 One of the merits issues in this case is whether or
15 not our clients were unlawfully surveilled. That is an issue
16 that will be decided on the 1806(f) motion, or at least, that's
17 how we propose it be decided. The order's not collateral to
18 that in that respect.

19 The second reason is that it's not final. And by
20 that, I mean it's not what the case law calls "conclusive." It
21 doesn't conclusively resolve the issue that the Government is
22 concerned about: disclosure of the document.

23 The reason why it doesn't conclusively resolve that
24 issue is because this Court has not yet ordered disclosure of
25 the document.

1 This Court has ordered the Government to consider
2 declassifying some or all of the sealed document, some or all
3 of the Government's submission -- sealed submissions, and then
4 report back to the Court in 45 days.

5 Pardon me.

6 If the Government decides to declassify, say, certain
7 portions of the sealed document, redact portions that might
8 implicate national security, and only declassify portions that
9 would enable -- would assist in our showing of standing,
10 without compromising national security, there will be no order
11 of disclosure by this Court -- of involuntary disclosure.
12 There will be nothing to appeal under the collateral order
13 rule.

14 Our suggestion, which I'll get to in a moment, is
15 that we should wait those 45 days, and see what the new -- the
16 new president and the new president's Department of Justice do
17 about the matter of declassification.

18 So that is why the order is not appealable under the
19 collateral order doctrine.

20 Mandamus is our second argument. It's appealable
21 under the mandamus doctrine. Mandamus is not an appeal.
22 Mandamus is a writ petition to the Ninth Circuit. They have
23 not filed a petition for a writ of mandamus. Until and unless
24 they do, that doesn't get them an appeal in the Ninth Circuit
25 and a stay of further proceedings in this court.

1 And then, finally, it's the matter of the injunction,
2 which, as I say, unfortunately, I haven't had a chance to
3 address, because it was only brought up yesterday afternoon as
4 the theory of appealability in the Government's case management
5 conference statement.

6 So what's the law on the appealability of an order as
7 an injunction? This is -- 1292(a)(2) authorizes a direct
8 appeal from interlocutory orders, quote, "granting, continuing,
9 modifying, refusing, or dissolving injunctions, or refusing to
10 dissolve or modify injunctions."

11 Your Honor's order of January 5th does not purport to
12 issue an injunction of any sort, but that's not the end of the
13 story. The question is whether or not it has the practical
14 effect of granting an injunction. There are three factors that
15 must be present to have that practical effect.

16 The order must be directed to a party. It must be
17 enforceable by contempt. And it must be designed to accord or
18 protect some or all of these substantive reliefs sought by the
19 complaint in more than a preliminary fashion. And I'll just
20 briefly for the record give you quotes to the primary case that
21 says that. It's *United States versus Cal Almond, Inc.*, 102 F.
22 3d. 999 at page 1009, Ninth Circuit, 1996.

23 In contrast, an order is not appealable as an
24 injunction if it merely regulates the conduct of the
25 litigation. For example, discovery orders which do not grant

1 or withhold substantive relief.

2 Begging your Honor's pardon, a couple more citations
3 for that proposition. *Gon versus First State Insurance*
4 *Company*, 871 F. 2d. 863 at 865-866, Ninth Circuit, 1989. And
5 *Tenkku versus Normandy Bank*, 218 F. 3d. 926 at page 928, Eighth
6 Circuit, 2000.

7 So let's look at the third of those elements
8 designed to accord or protect some or all of the substantive
9 relief sought by a complaint in more than a preliminary
10 fashion. Your Honor's January 5th order does not accord
11 plaintiffs any substantive relief at all, nor does it protect
12 the substantive relief they seek. It merely assists the
13 plaintiff in making their showing of Article III standing, by
14 enabling the plaintiffs to use a sealed document to make that
15 standing.

16 It regulates the conduct of the litigation by
17 prescribing procedures to facilitate the showing of standing.
18 It is like a discovery order. It is not appealable as an
19 injunction order.

20 Also, it's not directed to a party, which is one of
21 the other elements in an appealable injunction order. The
22 only -- well, it is directed to a party.

23 **THE COURT:** You're saying it's not directed to the
24 plaintiffs, so it's got to be -- (indicating).

25 **MR. EISENBERG:** Your Honor, that's only half the

1 story.

2 **THE COURT:** I see. All right. Well, tell me the
3 other half.

4 **MR. EISENBERG:** Here's how it's directed to the
5 defendants. It tells them to, number one, arrange for the
6 foreign security officer to make the sealed document available
7 to the Court.

8 I presume that's already been done, because the
9 deadline for that was two days ago -- January -- three days
10 ago: January 20th, I believe. It's done. No complaints from
11 the Government about that.

12 Secondly, it orders the Government to arrange for
13 three of plaintiffs' attorneys to apply for Top Secret SCI
14 security clearances. That's in process. We have all submit --
15 three of us -- myself, Jon Eisenberg, Steven Goldberg, and
16 Ashlee Albies -- have submitted applications. We have been
17 interviewed by the FBI. The FBI has been interviewing our
18 neighbors, our friends, or co-workers, our employers going back
19 to the past ten years. The best I can tell, those
20 investigations are well on their way. No complaint from the
21 Government there.

22 Finally, the third thing: the orders for the
23 Government to determine whether or not any or all of any of
24 these documents should be declassified. The Government informs
25 us they are doing that. No complaint there.

1 The only thing the Government is complaining about is
2 action by this Court deciding the case. That's what they're
3 complaining about. Their argument is an argument we have heard
4 before. You may not decide this case unless we acknowledge the
5 surveillance in this case.

6 That is not action -- an order of action directed to
7 a party. That is action by this Court. So whatever they have
8 complained about -- the Government -- in this Order is not an
9 Order directed to the party. Whatever is directed to their
10 party -- to them, the Government -- they are complying with.
11 So I can't imagine how it could possibly be appealable as an
12 injunction order. A very long-winded explanation, for which I
13 apologize, of a very critical issue.

14 Is your Honor's January 5th Order directly
15 appealable?

16 The answer is no. And the cases say -- and I've said
17 it in our case management conference statement -- that an
18 appeal from a nonappealable order does not divest the District
19 Court of jurisdiction.

20 **THE COURT:** Very well. Mr. Coppolino.

21 **MR. COPPOLINO:** Good morning, your Honor.
22 Your Honor, I guess first, if you just permit me this
23 observation, because we've had some contentious arguments over
24 the past year -- you and I. And I just wanted to first make a
25 couple of points.

1 One is I'm not here to reargue my case that you ruled
2 upon -- the issues that you've ruled upon. I'm not here to
3 argue that the Court was wrong. I'm not here to annoy the
4 Court. I have great respect for your Honor. I hope you
5 understand that. And you need not find this --

6 **THE COURT:** Well, I hope I don't annoy you, either.

7 **MR. COPPOLINO:** You do not. You do not.

8 It is a high honor and distinct privilege to practice
9 in front of you. I just wanted to make a point; that we feel
10 at this stage we are at -- at irreconcilable loggerheads, and
11 that the proper approach for the Court would be to certify the
12 case for review; or to at least grant stay pending appeal while
13 we seek review.

14 We've set our arguments forth at some length in our
15 stay papers. And I don't intend on really reiterating all of
16 those arguments, unless you would like me to; but from our
17 standpoint, the issue is a fairly straightforward one.

18 We believe that we have a successful privilege
19 assertion in this case that has been upheld by the Ninth
20 Circuit, and that the Court should not proceed to use
21 procedures held to preëempt it where the disclosure of
22 privileged information would be at risk or required, as we
23 believe it would be in further proceedings, and, under those
24 circumstances, that the prudent course for the Court and for
25 all concerned would be to ask the Ninth Circuit to consider the

1 matter before we go down a process that could quickly spin out
2 of control, and lead to things that I don't think the Court --
3 and certainly not the Government -- would like.

4 We think there are serious and novel questions
5 presented. I think the Court itself has recognized that. And
6 we do believe that there's a very serious potential for risk of
7 destruction of our privilege, if not an outright abrogation of
8 the privilege, if you were to grant access to information to
9 the plaintiffs' counsel.

10 Now, Mr. Eisenberg specifically addressed a few
11 moments ago the issue of whether or not the Order is
12 appealable, and whether there is jurisdiction in the court of
13 appeals.

14 And my first argument in response to that,
15 Judge Walker, is that we are not here today raising or
16 addressing the argument of the jurisdiction of the court of
17 appeals, nor arguing that you have been divested of
18 jurisdiction.

19 We are here simply seeking a stay of proceedings in
20 the District Court, pursuant to the standards set forth under
21 Ninth Circuit case law for injunctive relief. As we put forth
22 in our papers, we think that the proper place in the first
23 instance for the jurisdiction of the court of appeals to be
24 addressed is in the court of appeals. And we assume, in light
25 of the plaintiffs' comments, that they intend to challenge the

1 jurisdiction of -- the court of appeals' jurisdiction as soon
2 as they -- as soon as possible, and argue to the court of
3 appeals that this is not an appealable order.

4 It's -- that's, I think, the proper forum to address
5 these issues. And, of course, if they're to be addressed in
6 District Court, we could also seek to address them further in
7 our -- in the stay motion that we had presented in response to
8 that.

9 **THE COURT:** Of course, you could do the same thing.

10 **MR. COPPOLINO:** I'm sorry, your Honor.

11 **THE COURT:** Obviously, it would be a different
12 procedure or posture, but you could ask the court of appeals
13 for a writ of mandamus to direct this Court to stay its
14 proceedings.

15 **MR. COPPOLINO:** We could seek a stay, pending appeal.
16 We could seek a writ of mandamus and a stay, pending appeal.

17 **THE COURT:** Right.

18 **MR. COPPOLINO:** I think I'm correct; the rules
19 require we seek a stay from the District Court, and, if denied,
20 we ask the court of appeals for a stay.

21 The mandamus issue would go to, I think, the ultimate
22 relief we would seek on appeal. And that is a determination
23 that the Solicitor General would make as to whether he wanted
24 to press that particular grounds for reversing the Court's
25 Order. And I have to leave that to the Solicitor General to

1 make that determination.

2 I can address the arguments that Mr. Eisenberg has
3 made with respect to collateral order, and the issue of
4 injunction, but I -- I am happy to do that if you'd like to
5 hear me; but I don't really think they're relevant to simply
6 this question if the matter is on appeal. In order to preserve
7 the status quo and the jurisdiction of the court of appeals, it
8 seems to me that you should either certify or grant a stay so
9 that the court of appeals could consider this issue of
10 jurisdiction.

11 If we lose, it will be back.

12 If we prevail, then the issue of divestiture of this
13 Court's jurisdiction to proceed will be ripe for you to
14 consider, and the appeal will go forward.

15 And so, however you wish to proceed. I can -- I can
16 address collateral order. I can address our views on the
17 injunction issue if you would like, but I don't think it's
18 relevant to the question of a stay.

19 **THE COURT:** Well, it does seem to me that
20 Mr. Eisenberg has made a compelling presentation that the
21 notice of appeal is a nullity, and that it is a nullity because
22 it's been taken from a nonappealable order.

23 Now, what he has not addressed -- and what I think,
24 in fairness both to the Government and to the plaintiffs, I
25 should consider -- is whether or not the Government's effort to

1 obtain an interlocutory appeal under Section 1292(b) is
2 appropriate; and secondly, if 1299(b) interlocutory appeal is
3 appropriate, whether, in the meantime, the Government should --
4 or the Court should stay these proceedings; but it does seem to
5 me that the notice of appeal that you have filed is from a
6 nonappealable order. And that would not divest this Court of
7 jurisdiction.

8 **MR. COPPOLINO:** And again, your Honor, I'm not here
9 arguing that, as a legal matter, you have been divested. That
10 is not the issue that I've raised for -- in our stay motion.
11 And that is ultimately a question, I think, for the Court.

12 **THE COURT:** I suppose if you haven't raised that
13 issue, then I shouldn't even tarry on it. I shouldn't even
14 consider the possibility that there's -- that jurisdiction of
15 this Court had been divested.

16 **MR. COPPOLINO:** Well, I am asking the Court to stay
17 its hand, assuming it has jurisdiction. And if the court of
18 appeals were to determine that the Court's jurisdiction has not
19 been divested, I mean, my assumption is --

20 **THE COURT:** Well, wait a minute. Hold on a second.

21 **MR. COPPOLINO:** Mm-hm.

22 **THE COURT:** You're asking for a stay without a
23 consideration whether or not there is a viable appeal.

24 **MR. COPPOLINO:** What I'm saying, Judge Walker, is
25 that the existence of whether or not a --

1 **THE COURT:** Shouldn't --

2 Let me finish.

3 **MR. COPPOLINO:** Okay.

4 **THE COURT:** Shouldn't we proceed under 1292(b), if
5 that's your position?

6 **MR. COPPOLINO:** First of all, I do agree that we
7 should discuss the 1292(b) issue. And I've separately moved
8 for that; but before I get to that, I guess the way I look at
9 it is that the -- we certainly could argue today that you're
10 divested of jurisdiction, because there is proper grounds for
11 an appeal under 1291 or 1292(a)(1); but I think in the first
12 instance, the question of the appellate court's jurisdiction
13 needs to be decided by the appellate court. And they're going
14 to challenge that. And so once that issue is resolved, we will
15 then know whether you have been divested of jurisdiction or
16 not.

17 We're certainly here -- we're not here agreeing with
18 their argument that this appeal is -- this notice of appeal is
19 a nullity. On the contrary, we are confident that it is
20 appealable; that your order is appealable. And I could discuss
21 the issues. I could discuss the reasons why, if you want to
22 evaluate our position on that in connection with whether the
23 matter should be stayed.

24 **THE COURT:** It would be helpful. It would be
25 helpful --

1 **MR. COPPOLINO:** Right.

2 **THE COURT:** -- if you joined those issues if you want
3 me to take a position; but it does appear to me, based upon the
4 presentation that Mr. Eisenberg has made and my own reading of
5 the law, that the appeal as a right is not appropriate here,
6 because we do not have a final judgment or other appealable
7 order.

8 **MR. COPPOLINO:** And again, I want to emphasize that
9 I'm not saying to you "Reargue my case," but I just want to
10 answer -- I think I will have to make my positions known on the
11 fundamental issues you decided in order to address this
12 question.

13 And I also need to say, of course, that I cannot
14 foreclose any argument that the Solicitor General will choose
15 to make or not make in the court of appeals, but I think I can
16 certainly indicate to the Court that we believe there are
17 several grounds for appeal of this Order, well founded in law.

18 Let's talk about collateral order first under
19 28 U.S.C. 1291. I disagree with Mr. Eisenberg's argument that
20 your Order has not conclusively determined anything that's
21 appealable. I think it's quite clear that your Order has
22 conclusively determined that Section 1806 of the FISA preëmpts
23 the state-secrets privilege. And we would proceed --

24 **THE COURT:** All right. Now, that Order was issued in
25 June.

1 **MR. COPPOLINO:** Well, your Honor, your --

2 **THE COURT:** June or July.

3 **MR. COPPOLINO:** July 2nd.

4 **THE COURT:** Last summer.

5 **MR. COPPOLINO:** Well, your Honor, your July 2nd
6 Order, in your July 2nd Order, your discussion of the
7 preemption issue was -- shall we say -- dicta, because you
8 dismissed the case without prejudice, and, in effect, at that
9 moment in time, the Government won. The case had gone away.
10 And if they failed to amend or failed to amend successfully,
11 the case was over.

12 Your Order on January 5, however, we think, is
13 reasonably and clearly read to incorporate the Court's holding
14 of the July 2nd Order that FISA preempts the privilege. In
15 fact, you specifically refer to it, and went so far as to put
16 the whole big block quote of 1806(f) back in there, and explain
17 why it's now applicable.

18 And, more importantly, you are now applying
19 Section 1806(f) to further proceedings. And that's why we
20 think that the 1806(f) preemption issue has now been
21 conclusively determined.

22 Second point I would make is that the second ground
23 for a collateral order would be satisfied because that question
24 is separate from the merits.

25 There are two separate things to consider here. The

1 merits claim is whether or not the plaintiffs' rights have been
2 violated if, in fact, they could establish that they had been
3 surveilled.

4 The Section 1806(f) preemption issue goes simply to
5 whether or not our privilege assertion has been preempted. And
6 Section 1806(f) establishes the procedures under which you
7 would now proceed. Now, in our judgment, that's separate from
8 the merits question. And, indeed, if you were incorrect about
9 that, the case would be over. And that's why we think it is a
10 fundamental legal question that should be reviewed now.

11 The third standard is whether your Order would be
12 effectively unreviewable should you proceed under 1806(f). And
13 this standard gets into the arguments that we had made in our
14 stayed motion with respect to irreparable harm.

15 We view your Order as imposing serious risk of
16 irreparable harm in the Government in a number of ways, as I've
17 set forth, both through a direct or implied disclosure by the
18 Court that -- as to whether or not standing exists to proceed
19 under Section 1806(f), which you've indicated you would decide
20 now upon *ex parte* review of the sealed document that the Ninth
21 Circuit, of course, excluded from the case to decide an issue
22 that was specifically subject to our state-secrets privilege
23 assertion as to whether or not the plaintiffs had been subject
24 to the alleged surveillance.

25 You've also said that you would decide that issue and

1 issue an order on that, and that, thirdly, you had indicated
2 that due process requires that the plaintiffs have access to
3 classified information in that process. You've indicated that
4 the process would not be purely *ex parte*, because that would
5 not be consistent with due process. And so that aspect of the
6 Order provides for a direct abrogation of the privilege, by
7 disclosing information to the plaintiffs.

8 And so we think for those three reasons, the
9 collateral order doctrine would be satisfied.

10 With respect to injunctive relief, your Honor, we
11 also think that strong and certainly reasonable and sound
12 arguments exist that the Order has an injunctive effect.

13 You have directed the United States to now process
14 these plaintiffs' counsel for a security clearance under
15 penalty of contempt. And you have directed that we do so in
16 order to enable them to prosecute these actions. And so
17 certainly I think that the standards, as Mr. Eisenberg has
18 identified, as to whether the Order is directed at the
19 Government under penalty of contempt have been met; but I want
20 to hasten to add, though, that it's in a particular context of
21 the rest of the Order that we think this this Order for
22 clearances imposes injunctive relief.

23 Again, as I pointed out a minute ago, you have not
24 simply ordered that we process a clearance. You have ordered
25 that due process requires that, in order for them to prosecute

1 their case, they need to obtain clearances.

2 And you further, your Honor -- in our view, you have
3 rejected our argument quite clearly, under *Department of Navy*
4 *versus Egan*, that the President, in the Executive branch,
5 control access to classified information under Article II of
6 the Constitution.

7 You pointed out that there is some language in *Egan*
8 which you have held suggests that Congress could clearly
9 supersede that. And I assume you -- you further concluded that
10 the FISA is such a provision by which Congress has determined
11 that this Court has the authority to grant access.

12 We have a fundamental disagreement about whether
13 Section 1806(f) does that, but the combination of ordering that
14 they obtain clearances, that due process requires procedure in
15 which they have access to classified, and where you have taken,
16 effectively, the need-to-know determination from the Executive
17 branch, in our view, operates as an injunction to compel the
18 disclosure of the classified information to the plaintiffs.

19 Now, I recognize these issues will be addressed
20 further, most likely in the court of appeals; but again, the
21 bottom line for now is that, where there is a threat of
22 irreparable harm, the proper course would be to stay.

23 You can characterize the grounds for an appeal
24 differently. The court of appeals might say "collateral
25 order." It might say "injunction." They might consider a

1 mandamus petition, if one is filed; but the bottom line, as a
2 practical effect, is that we think the case should be reviewed
3 now, before proceeding further.

4 Now, you asked me about 1292(b). And I do want to
5 emphasize that we are seeking certification under 1292(b) in
6 the alternative not because we don't think we have firm grounds
7 for an appeal, but because, recognizing that Mr. Eisenberg is
8 going to challenge jurisdiction, we think it would be
9 appropriate for this Court to certify the case to avoid any
10 question about the propriety of appellate review, because this
11 case, I think, certainly satisfies the standards for 1292(b),
12 as you recognized in *Hepting* a couple of years ago.

13 Now, I believe that the issue of FISA preemption is a
14 controlling question of law. If we are right about that, the
15 case gets dismissed.

16 I believe there are substantial grounds for a
17 difference of opinion on that. With due respect to the Court,
18 I think you recognize that these are novel questions. We think
19 they're certainly novel and serious questions of first
20 impression. And I do think that an appeal would materially
21 advance -- I just want to double-check here -- an immediate
22 appeal would materially advance the ultimate determination of
23 the litigation.

24 **THE COURT:** When can you file that?

25 **MR. COPPOLINO:** We have filed a motion to ask you to

1 certify. This is part of the motion I filed on Monday.

2 **THE COURT:** Oh. So you consider that to be your
3 1292(b) motion?

4 **MR. COPPOLINO:** It is a separate -- I moved to stay
5 or, in addition, that you certify under 1292(b).

6 **THE COURT:** Thank you. So you don't contemplate any
7 further briefing with respect to the 1292(b) issue?

8 **MR. COPPOLINO:** No. It's really up to you,
9 your Honor. I'm perfectly happy to rest on the papers and my
10 argument. I think Mr. Eisenberg may prefer to respond. If you
11 need to have us out here again, I'm happy to come out --

12 **THE COURT:** All right.

13 **MR. COPPOLINO:** -- but I think we could certainly
14 urge the Court. I think the arguments we've made are clear.

15 If you have any questions, I'm happy to come back. I
16 think the matter is appropriate for certification.

17 **THE COURT:** All right. Then let me ask
18 Mr. Eisenberg. How long do you think you need to reply or to
19 oppose what the Government deems to be its motion under
20 Section 1292(b), Court interlocutory --

21 **MR. EISENBERG:** I'd like to make a suggestion. I
22 think it should be timed in synch with -- in synch -- I'm
23 sorry. S-Y-N-C. Excuse me, your Honor. I have a cold. So
24 I'm doing my best to be comprehensible.

25 I think it would be most appropriate to time the

1 briefing of the 1292(b) motion in synch with what this Court
2 has already ordered in its January 5th order. And this is why.
3 The most critical question right now is: what is the
4 Government going to do next?

5 We have heard from the existing Department of Justice
6 officials as of 64 minutes before midnight last Monday night --
7 we have not yet heard from the incoming leadership of the
8 Department of Justice. And none of us knows whether or not
9 they might take a different approach to this case.

10 I think that the new Department of Justice officials
11 need and deserve time to look at the case and decide what to do
12 next. The first decision they have on their plate is what to
13 do about this Court's order to consider declassification. If
14 the new administration declassifies, for example, a redacted
15 portion of the sealed document, that may resolve a lot of what
16 we're arguing about today.

17 The threat that the Government claims of irreparable
18 harm -- the threat of disclosure of this document will not be a
19 threat if the Government -- the new Government -- redacts and
20 declassifies it.

21 **THE COURT:** Well, before we get too far away from my
22 question --

23 **MR. EISENBERG:** Okay.

24 **THE COURT:** -- when would you like to respond on the
25 1292(b) issue?

1 **MR. EISENBERG:** Well, what we proposed in our --
2 thank you, your Honor. What we proposed in our case management
3 statement was to begin briefing on the -- on the question of
4 Article III standing on -- March 19th, I believe, was the date.

5 **THE COURT:** March 19?

6 **MR. EISENBERG:** March 19. This would be our case
7 management conference statement -- bear with me a moment,
8 your Honor -- page 8, where we propose a schedule for briefing
9 on the issue of Article III standing. I have chosen March 19th
10 because that was one month after the due date for the
11 Government's decision on declassification. What I envisioned
12 was by that time, we will have had a month to review the
13 declassified documents, review any documents that might remain
14 classified, and write a brief on our standing.

15 **THE COURT:** Let's go back. Let's just --

16 **MR. EISENBERG:** I am getting there, but yes,
17 your Honor.

18 **THE COURT:** Well, then, get there a little quicker.

19 **MR. EISENBERG:** I'm here right now. March 19th
20 happens to be the due date under this Court's local rules for
21 our opposition to their 1292(b) motion.

22 **THE COURT:** I see. That's how you got there.

23 **MR. EISENBERG:** That's how I get it. It's a
24 coincidence. And, in my view, it's a fortunate coincidence.

25 What I propose is that we file our opposition to

1 their 1292(b) motion when it's due: March 19th.

2 **THE COURT:** Is it that far out?

3 **MR. EISENBERG:** Yes, because I noticed it's for
4 April 9th, I believe.

5 **THE COURT:** Oh, I see. I see.

6 **MR. EISENBERG:** They noticed this hearing for the --
7 the hearing on their stay motion for April 9th.

8 **THE COURT:** And -- let's accelerate that.

9 **MR. EISENBERG:** Okay.

10 **MR. COPPOLINO:** Your Honor, if I could just
11 address -- I noticed it for April 9 because the local rules.
12 That was your first available hearing date. I had asked for
13 expedition, and that's what we're discussing.

14 **THE COURT:** I appreciate that. We can give you some
15 relief. Ordinarily, Mr. Eisenberg, you'd have two weeks.

16 **MR. EISENBERG:** Counting back? Two weeks from -- is
17 that correct? I read the local rules, and I read it as
18 being -- I believe it was 20 days before the due date was the
19 hearing date. Oh, I wish I had it with me.

20 **MR. COPPOLINO:** It's 21 days.

21 **THE COURT:** It's usually a 35-day notice. And then
22 the opposition is due in two weeks; and a reply two weeks
23 before hearing.

24 **MR. EISENBERG:** Is that correct, Mr. Coppolino?
25 You're familiar more than I. I looked up the local rules.

1 Never mind.

2 **THE COURT:** We can blow by the local rules right here
3 and now -- the three of us.

4 **MR. EISENBERG:** Mr. Coppolino has proposed that we
5 file opposition this coming Tuesday.

6 **THE COURT:** Can you do that?

7 **MR. EISENBERG:** Can you imagine what my last weekend
8 was like, your Honor, being hit with a notice of appeal on
9 Friday night, and then a motion for a stay on Monday night? I
10 am tired and weary, and I have a cold.

11 **THE COURT:** All right.

12 **MR. COPPOLINO:** Take until Wednesday.

13 **MR. EISENBERG:** Until Wednesday. How generous,
14 Mr. Coppolino.

15 **THE COURT:** I'm here to give you some relief.

16 **MR. EISENBERG:** I appreciate that, your Honor.

17 **MR. COPPOLINO:** Can I just address on the timing
18 issue, your Honor? In light of the deadlines that are coming
19 up, the -- we need to be mindful of those, and the clearance
20 process you've ordered to be completed by February the 13th.
21 And so we would request that the briefing on 1292(b)
22 certification be completed and argued, if necessary, in advance
23 of that, so that if you don't certify, and we feel that we need
24 to seek a stay in the court of appeals, that we do it certainly
25 before that 13th deadline comes in.

1 So I don't -- these are not complicated issues. The
2 1292(b) standards are simple. Why don't we just give them a
3 week? I can have a few days to reply. I can waive my reply.
4 If you want to have a hearing, I'll come back. I can reply and
5 won't come back. Whatever you prefer.

6 **THE COURT:** There are really two issues here.

7 Even if I were to agree with you that an
8 interlocutory appeal is appropriate, that doesn't necessarily
9 stay the proceedings.

10 **MR. COPPOLINO:** Exactly. I would request that --

11 **THE COURT:** The stay is a completely separate issue,
12 or it's -- it's an issue that's joined with the 1292(b)
13 question.

14 There have been circumstances in which I and other
15 judges have granted an interlocutory appeal, and yet proceeded
16 with the action. And so the stay is a separate issue.

17 **MR. COPPOLINO:** And there would be an issue,
18 your Honor, if you certified, and the Ninth Circuit granted the
19 petition. Then there would be an issue of jurisdiction on the
20 subject matter of the appeal which could affect consideration
21 of a stay.

22 My point, simply in terms of timing this motion
23 that --

24 **THE COURT:** An interlocutory appeal can proceed while
25 proceedings go forward in the District Court.

1 **MR. COPPOLINO:** Yes, as long as the Court -- I
2 believe the core law is: as long as the Court doesn't exercise
3 jurisdiction over the matter that's subject to appeal.

4 **THE COURT:** That's correct.

5 **MR. COPPOLINO:** And all I'm saying is that I think,
6 in light of the deadlines in the Orders, and our concern with
7 respect to irreparable harm, that certainly if there are no
8 proceedings in this litigation pending your consideration of
9 our motion to stay and motion under 1292(b) that would -- that
10 would assist, but in any event, I think we could complete this
11 process well before February 13th.

12 **MR. EISENBERG:** Your Honor, I might have a word on
13 the issue of delay.

14 I have been perturbed for three years by the delay in
15 the proceedings in this case. And I have opposed the delay as
16 best as I could.

17 Suddenly, on Monday, I learned that there is a
18 tremendous rush in the Department of Justice to get a stay
19 motion on file that day. Suddenly they're in a big hurry.

20 There is an unknown factor here, and that is: what
21 are the new people in charge at the DOJ going to do?

22 And I think, out of courtesy to them and out of the
23 interest of avoiding unnecessary proceedings in this Court, we
24 need to slow this procedure down just a bit. I am prepared to
25 make the arguments that I would like to make against

1 certification for an interlocutory appeal, but I think there's
2 a third group of people who are not present here today who
3 deserve the opportunity to weigh in themselves, and we have not
4 heard from them yet.

5 **THE COURT:** All right. Well, I think you've made
6 that point --

7 **MR. EISENBERG:** Thank you.

8 **THE COURT:** -- but let's come back.

9 **MR. EISENBERG:** Okay.

10 **THE COURT:** Consistent with your health and good
11 humor, when can we get a brief from you on 1292(b) issue?

12 **MR. GOLDBERG:** (Indicating)

13 **MR. EISENBERG:** One moment, your Honor.

14 **THE COURT:** Want to confer with your colleagues?
15 (Pause in proceedings)

16 **MR. EISENBERG:** Your Honor, I have a court appearance
17 scheduled in the State Supreme Court on February 3rd. I would
18 like to be able to prepare somewhat for that.

19 Let me suggest we file on February 6th.

20 **THE COURT:** February 5th?

21 **MR. EISENBERG:** Sixth. Friday, February 6th. Is
22 that -- do I have that right?

23 **THE COURT:** That is.

24 **MR. EISENBERG:** Yes, yes.

25 **THE COURT:** That is correct.

1 **MR. EISENBERG:** Friday, February 6.

2 **THE COURT:** That will be fine.

3 **MR. EISENBERG:** Thank you.

4 **THE COURT:** All right. And Mr. Coppolino's willing
5 to waive a reply, he said?

6 **MR. COPPOLINO:** Would you like to have us back out
7 for a hearing on the question, your Honor?

8 **THE COURT:** Not necessarily.

9 **MR. COPPOLINO:** Because if you don't want to have a
10 hearing, then I guess I would take a week to reply.

11 **THE COURT:** All right, then. February 13th.

12 **MR. COPPOLINO:** Thank you, your Honor; but could I
13 just clarify, your Honor, that since that's the date we have
14 sought a stay of the suitability determination, and that's the
15 deadline for it, I'm not suggesting that --

16 **THE COURT:** The deadline for?

17 **MR. COPPOLINO:** The deadline you've ordered for the
18 clearance process to be completed is also February 13th. Could
19 we at least have a stay, pending resolution of your decision on
20 our motion to stay and 1292(b) of the issue of a clearance
21 determination and adjudication?

22 I'm not suggesting the -- the background checks don't
23 proceed; but the actual determination by the Department of
24 Justice security officers -- and in addition, could we -- do we
25 have an understanding that there would be no, for example,

1 order issued by the Court with respect to whether or not the
2 case would proceed, and no disclosures, obviously, to the
3 plaintiffs, so that I have some certainty?

4 In the meantime, that -- I don't need to go to the --
5 to the court of appeals to get a stay?

6 In other words, if we're just going to push this
7 forward a couple of weeks, I'm fine with that, as long as
8 there's no prejudice to the Government in the process.

9 **MR. EISENBERG:** Your Honor, may I respond?

10 **THE COURT:** Very well.

11 **MR. EISENBERG:** The Government has made it clear in
12 their motion for a stay that the suitability determination is
13 really quite irrelevant, because even if we were determined to
14 be suitable for security clearances, the Government believes we
15 have no need to know the contents of document, so they are not
16 going to grant us access anyway.

17 I don't know how to deal with that; I truly don't;
18 but I do know this. If the Government's position that the
19 suitability determination will not grant us access to the
20 document, then there's no reason to stay it.

21 **THE COURT:** I'm inclined to think, Mr. Coppolino,
22 that we ought to leave the February 13 date in place, so that
23 we get as much clarity on the situation as we possibly can.
24 And, obviously, what follows after the suitability
25 determinations are made on the 13th may depend upon the outcome

1 of the stay motion.

2 **MR. COPPOLINO:** Well, that's --

3 **THE COURT:** 1292(b) stay motion.

4 **MR. COPPOLINO:** Yes, I do agree with that,
5 your Honor. And I do agree that's your right that the outcome
6 would depend on your ruling on the stay motion and 1292(b); but
7 I don't want to belabor the point. It's just that if that's
8 adjudicated favorably, it is at that point, in our view, that
9 the potential among -- the potential harms that we've
10 identified would then be clearly ripe, because they would have
11 a clearance. And our fear is --

12 **THE COURT:** Well, the existence of a clearance is not
13 the harm that you're concerned about.

14 The harm you're concerned about is that disclosure of
15 the sealed document.

16 And that's a step to be taken after we make -- after
17 we have a finding of suitability or nonsuitability, we can
18 evaluate what to do in the next step.

19 And what I'm afraid of is postponing the steps and
20 postponing one after the other, and pretty soon, a tremendous
21 amount of time has passed.

22 **MR. COPPOLINO:** I understand, your Honor.

23 And then the only point I would make, then, is to say
24 that, assuming a favorable adjudication, the very issue of
25 access, we're arguing, is that -- it's an issue we've lost

1 control of -- over, because you appear to have projected our
2 argument under *Egan* that we get to determine the question of
3 access -- the Government -- the United States Government.

4 And so if we at least had some understanding that,
5 assuming, *arguendo*, their suitability determinations are
6 favorable, there would be no disclosure by the Court of any
7 information to the plaintiffs that is at issue -- any
8 classified information that is relevant, and no disclosure by
9 the Court of whether it feels it has jurisdiction to proceed
10 under 1806(f) --

11 **THE COURT:** I have not reviewed the sealed document.
12 I have no intention of reviewing the sealed document until we
13 get all of these pieces in place so that we can proceed in a
14 judicial fashion; and by that I mean a fashion in which both
15 parties have access to the material upon which the Court makes
16 a decision.

17 **MR. COPPOLINO:** And that would seem to be -- as I
18 hear your Honor's response, there's no risk of that prior to
19 February 13th.

20 **THE COURT:** There's no risk that the sealed document
21 is going to be reviewed by Mr. Eisenberg or by me prior to the
22 13th of February.

23 **MR. COPPOLINO:** I appreciate, your Honor, that
24 clarification. So the February 13th date, we will send our
25 reply in. And again, if you'd like us out, that would be fine.

1 **THE COURT:** I specifically declined to review the
2 sealed document until we get a process in place that is an
3 orderly process, so that we can have a judicial determination
4 with all of the -- well, perhaps not all, but at a least the
5 basic, fundamental aspects of a judicial proceeding.

6 **MR. COPPOLINO:** I am happy to come back if you'd like
7 to hear argument again.

8 **THE COURT:** Maybe I'll want to hear argument. I
9 always like to hear argument; but in any event, I don't think
10 we need to schedule one.

11 All right. So we're going to have the briefing by
12 the plaintiffs on the 6th of February, with a response by the
13 Government on the 13th of February.

14 Now, that's the first of the three matters that I
15 wanted to get in place with you this morning.

16 Second is: can we not proceed to resolve some of the
17 non-FISA-related issues in the case?

18 Mr. Coppolino.

19 **MR. COPPOLINO:** Your Honor, I'm afraid I have to say
20 I think not, because, well, first of all, I would like -- I
21 don't think that the non-FISA-related issues would actually
22 necessarily be -- even be in place anymore, because the
23 Ninth Circuit upheld the state-secrets privilege and rejected
24 standing, except for the issue of FISA preemption. And the
25 only claim that FISA preemption would apply to is one that's

1 pending: a claim for damages under Section 1810 based on an
2 alleged Fourth Amendment violation.

3 Assuming, *arguendo*, there are other live claims in
4 the complaint --

5 **THE COURT:** Can I get you to proceed on the basis of
6 a hypothetical?

7 **MR. COPPOLINO:** Oh, no. I don't think so,
8 your Honor. I don't. The fundamental question --

9 **THE COURT:** You know, lawyers make hypothetical
10 arguments all the time.

11 **MR. COPPOLINO:** Not as to Article III jurisdiction.

12 **THE COURT:** Assuming *arguendo* that FISA, in fact,
13 preëmpts the state-secrets privilege, what do we do about these
14 other claims; these non-FISA claims?

15 **MR. COPPOLINO:** I think the most direct answer to
16 your question is that every claim requires a determination of
17 Article III jurisdiction, which I had understood that you would
18 now be making pursuant to the procedures set forth in FISA,
19 since the very question of whether they're subject to the
20 alleged surveillance is the threshold question before you can
21 consider any claim, whether it's Fourth Amendment,
22 International Conventions, statutory separation of powers.
23 They have to have Article III standing. That's an issue we've
24 asserted privilege over. That's the question we're disputing,
25 as to whether our privilege is preëmpted under FISA. And you

1 can make the determination under 1806(f).

2 So I'm afraid that I have to say that our position is
3 there's no claim to proceed without that threshold issue being
4 decided. I don't think there's any claim that could be
5 resolved based on unclassified information. If there was a
6 Rule 12(b)(6) motion that they failed to state a claim, I think
7 that day has since passed. So I think the jurisdiction has to
8 be established; and it can't be unless this FISA preemption
9 issue is worked out.

10 **THE COURT:** Mr. Eisenberg.

11 **MR. EISENBERG:** Other than to say I would prefer to
12 go forward as expeditiously as possible on every aspect of this
13 case, I don't know what else to say. I think we can. I'm
14 prepared to. It's your Honor's call.

15 I would like to clarify one point. Our understanding
16 is that the Government will be going forward with its
17 determination of whether to declassify documents and adhere to
18 that 45-day deadline. Is that a correct understanding?

19 **THE COURT:** That's correct.

20 **MR. EISENBERG:** Thank you.

21 **THE COURT:** All right. Well, it does seem to me that
22 we could be over some of these non-FISA-related issues, but if
23 the Government is unwilling to join the battle on those issues,
24 then that may affect the outcome; but the ball, I think, is
25 probably in your court, Mr. Eisenberg.

1 All right. Let's see. We have a hearing scheduled,
2 you said, in April. What date was that again in April?

3 **MR. COPPOLINO:** Your Honor, on April 1st, I believe
4 there's a hearing scheduled in the cases involving the state
5 government investigations, if your clerk may confirm that. And
6 that is involving whether the state investigations have been
7 preëmpted by Section 803 of the Foreign Intelligence
8 Surveillance Act Amendments of 2008.

9 Now, the state, I believe, filed a motion to stay
10 that hearing. And we opposed, just the other day. And so
11 that's the first issue: are you going to force -- are you
12 going to, you know, direct them, as we think you should, to
13 reply to our motion for summary judgment?

14 And if you do, then that's the hearing date for that.

15 There is also another hearing date. I believe it's
16 March 28. It can't be the 28th. That's a Saturday; but
17 there's a hearing date in March in the *Joll* case.

18 My understanding, through e-mail traffic, is that
19 we've reached agreement or are close to reaching agreement with
20 the plaintiffs represented by Ms. Cohn that we would seek
21 additional time to respond to the complaint in that case.

22 And so that hearing date -- I don't think it is
23 likely to be established; but if we could just file that
24 motion -- so the only hearing date that I think is pretty firm
25 is April 1, unless you grant the State's request to put that

1 date off.

2 **THE COURT:** Is that your understanding,
3 Mr. Eisenberg?

4 **MR. EISENBERG:** On those cases, I have no
5 understanding.

6 **THE COURT:** I see. All right.

7 Ms. Cohn.

8 **MS. COHN:** I have a bit, if you'd like to --

9 **THE COURT:** I'm sorry. This is Cindy Cohn, who's
10 representing the plaintiffs in --

11 **MS. COHN:** Well, I'm co-lead counsel of the
12 multidistrict litigation. So I guess in that capacity, I'd
13 like to at least comment on or clarify a couple of things. I'm
14 also representing the plaintiffs in *Joll*.

15 So I think Mr. Coppolino is right that the state
16 government officials have asked for a stay of the hearing on
17 the summary-judgment motion that the Government brought late at
18 the end of the year about Section 803 of the new FISA
19 Amendments Act.

20 Their argument is that the Court would -- it would be
21 useful for the Court to decide the question of the immunity
22 under 802, which is currently pending in front of you, before
23 turning to the question of 803, since some of the underlying
24 issues are the same. And so they have asked to basically wait,
25 and come second, because they think it would be helpful to see

1 what you -- for everyone, including the Court, to address the
2 first issue first about 802, before you ask the question --
3 address the question of preemption under 803, which is what
4 affects them directly. So that's the basis on which they've
5 asked for a stay.

6 They're not here today, so I may be a little
7 imprecise, but that's my understanding with regard to *Joll*.

8 The Government has asked us to agree for more time
9 before they file the various motions to dismiss. We have not
10 agreed to allow them more time, but we won't oppose their
11 motion. Again, they have argued that, due to the transition
12 and some of the individual defendants leaving office, that they
13 need a little more time to get ready. We know your Honor is
14 anxious to go, but it did seem like a fairly reasonable
15 request. That's why we're not opposing it.

16 **THE COURT:** All right. Well, why don't we just let
17 the dust settle on that issue?

18 All right. I don't think we have anything further
19 that we need to do in *Al-Haramain* this morning. Is that your
20 view as well, Mr. Eisenberg?

21 **MR. EISENBERG:** Yes, I believe that's correct.

22 **THE COURT:** And Mr. Coppolino?

23 **MR. COPPOLINO:** Yes, your Honor. Thank you.

24 **THE COURT:** I just want the record to be clear.

25 We're going to proceed with briefing on the 1292(b)

1 interlocutory appeal request of the Government, and the
2 Government's request to stay these proceedings pending an
3 interlocutory appeal.

4 I want, to the extent it's helpful to the parties,
5 the record to be clear. I am in agreement with the plaintiffs'
6 position that the notice of appeal that the Government has
7 filed is a nullity, because it is not an appeal from an
8 appealable order under any of the theories that the Government
9 has articulated: collateral order doctrine, 1292 -- 1291,
10 1291(a) --

11 **MR. EISENBERG:** Your Honor, if I may, it's
12 1292(a)(1).

13 **THE COURT:** -- 1292(a)(1) --

14 **MR. EISENBERG:** Yes, your Honor.

15 **THE COURT:** -- or any other ground of appeal, because
16 it does not appear to be a final judgment or a final order
17 appealable to the court of appeals.

18 To the extent the Government wants to seek relief
19 based upon the present record in the court of appeals on that
20 determination, you may do so, Mr. Coppelino, although I suspect
21 probably that it would make sense to wait until the outcome of
22 the 1292(b) motion; but that's entirely a matter for you to
23 decide.

24 And, in the meantime, Mr. Eisenberg, if you want to
25 proceed in the court of appeals to seek any relief, you may do

CERTIFICATE OF REPORTER

I, LYDIA ZINN, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in MDL 06-1791-VRW and C. 07-0109-VRW, In re: National Security Agency Telecommunications Records Litigation; and Al-Haramain Islamic Foundation, Inc., et al, v. George W. Bush, et al., were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing.

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/s/ Lydia Zinn, CSR 9223, RPR

Monday, January 26, 2009