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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VAUGHN R. WALKER

CAROLYN JEWEL, TASH HEPTING, GREGORY HICKS, ERIK KNUTZEN, and JOICE WALTON, Plaintiffs, vs. NATIONAL SECURITY AGENCY ("NSA"); KEITH B. ALEXANDER, Director of the NSA; UNITED STATES OF AMERICA; BARACK OBAMA, President of the United States; UNITED STATES DEPARTMENT OF JUSTICE; ERIC HOLDER, Attorney General of the United States; DENNIS C. BLAIR, Director of National Intelligence, *Government Defendants Sued in their Official Capacity.*	NO. C 08-4373-VRW San Francisco, California Wednesday July 15, 2009 11:35 a.m.

TRANSCRIPT OF PROCEEDINGS

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THE CLERK: Calling Civil Case 08-4373, Carolyn Jewel Alvarez versus National Security Agency, et al.

Counsel, appearances.

MR. COPPOLINO: Anthony Coppolino, Department of Justice, for the United States. And I'm joined at the end of the table, your Honor, by Scott Chutka, Office of General Counsel, National Security Agency; Tricia Wellman, Office of General Counsel of the Office of Director of National Intelligence.

THE COURT: Very well. Good morning.

MR. WHITMAN: Good morning, your Honor. James Whitman, for the Department of Justice, on behalf of the individual-capacity defendants.

THE COURT: Good morning.

MR. BANKSTON: Kevin Bankston, on behalf of the Jewel plaintiffs.

THE COURT: Good morning, Mr. Bankston.

MR. WIEBE: Richard Wiebe, on behalf of the Jewel plaintiffs.

THE COURT: Yes, Mr. Wiebe.

MR. OPSAHL: Good morning, your Honor. Kurt Opsahl, on behalf the Jewel plaintiffs.

THE COURT: Mr. Opsahl.

MR. TYRE: Good morning, your Honor. James Tyre, also for the Jewel plaintiffs.

MS. BLIZZARD: Good morning, your Honor. Paula Blizzard, for the Jewel plaintiffs.

THE COURT: Ms. Blizzard.

MS. COHN: Good morning, your Honor. Cindy Cohn, on behalf of the Jewel plaintiffs.

THE COURT: Very well. Well, let's see. Mr. Coppolino, I suppose you want to start. It's your motion. And, in any event, I'd like to talk to you about this.

MR. COPPOLINO: Thank you, your Honor.

THE COURT: Now, let's talk about sovereign immunity. I know you have other things to say as well, but sovereign immunity is what's on my mind. One of the prerogatives of being the Judge is you get to talk about what's on the Judge's mind, at least, first; so let's chat about that.

MR. COPPOLINO: Well, your Honor --

THE COURT: Let's take a look at 18 U.S.C. Section 2712. It might be helpful if you have that in front of you.

MR. COPPOLINO: I do, your Honor.

THE COURT: All right. We've, of course, looked at this before. 2712(a) provides any person who's aggrieved by any willful violation of this chapter --

Now, what's this chapter? That's Chapter 121, isn't it?

MR. COPPOLINO: Correct.

THE COURT: And what is Chapter 121?

MR. COPPOLINO: I believe it's -- Chapter 121 is the Stored Communications Act.

THE COURT: Chapter 121 is the Stored Wire and Electronic Communications Act?

MR. COPPOLINO: Right.

THE COURT: Okay. And it goes on -- or of Chapter 119. Well, what's Chapter 119?

MR. COPPOLINO: Wiretap Act.

THE COURT: And that would include the Electronic Communications Privacy Act?

MR. COPPOLINO: I believe so, your Honor, or --

THE COURT: I beg your pardon?

MR. COPPOLINO: I think it might be in 121, but it covers them all.

THE COURT: Okay -- or of Sections 106(a), 305(a), or 405(a) of the Foreign Intelligence Surveillance Act of 1978. Now, that seems to be pretty specific. It would embrace the Stored Communications Act, the Electronic Communications Privacy Act, the so-called "Wire Act," I gather, in their totality, and then specific identified provisions of F.I.S.A..

Now, how is it that this provision is not a waiver of sovereign immunity?

MR. COPPOLINO: It is a waiver of sovereign immunity, your Honor. The difference of opinion is over precisely the

scope of it. And I acknowledge that this is our most -- of our four jurisdictional arguments, this is clearly the most challenging one.

And, if I could just give you a brief moment of context for why we have raised it, I think it's important that we preserve as many issues as possible in the District Court on jurisdiction, in particular, where cases involve the assertion of a State Secrets Privilege, because, as you know, it's a privilege assertion that's not to be lightly invoked. And in this case, as in any case, we would like to give the District Court and reviewing courts alternative grounds to eliminate or narrow claims so that they can focus precisely on what the State Secrets Privilege assertion applies to. And so that's the context and the spirit in which these arguments have been raised.

And in particular, we think they really only have, construing all their claims, a constitutional claim for prospective relief.

With respect to this particular provision in Section 2712, our argument is -- and I think it's a colorable one; and I actually think it's correct, but I acknowledge there is a tension there with this particular language. Our argument is that you shouldn't evaluate the waiver of sovereign immunity in 2712 based solely on this one sentence. What you should look at is the Supreme Court has, over and over, stressed the

structure, the object, the purpose of the statute.

And in particular, the statute here is Section 223 of the Patriot Act, which, as we've detailed in our brief -- and we have actually attached a copy in our appendix -- actually enacted several provisions at the same time. And in those provisions, it did several things to the Wiretap Act, the Stored Communications Act, before implementing this waiver of sovereign immunity.

And what it did in particular was, in Section 223(a) of the Patriot Act, it actually eliminated a cause of action against the United States under the Wiretap Act. And it inserted a particular cause of action for a willful violation by government employees of the disclosure of information collected pursuant to electronic surveillance or pen register trap and trace.

In the second section of the Patriot Act -- I believe it's Section 223(b) -- again, the Congress eliminated a cause of action against the United States, but also inserted a cause of action in general in that provision to -- for liability against government employees for unauthorized, willful disclosures.

And then, with that as the preceding sections, Congress then added Section 2712, which you have just quoted. And our view is that that cause of action should be read in context of the prior two provisions.

THE COURT: Well, when was 2712 enacted?

MR. COPPOLINO: I believe it was enacted with the Patriot Act, in Section 223 of the Patriot Act, which would have been in October of 2001. All of this was done at the same time.

And when you look at the statutory provisions, the reference to the willful violations --

THE COURT: So you're saying that this provision came into effect at the same time as the Patriot Act provisions that you're also relying upon?

MR. COPPOLINO: Yes. I'm saying that Section 223 of the Patriot Act is what created Section 2712. And it also went back and it amended the Wiretap Act and the Stored Communications Act. And those first two amendments eliminated causes of action against the United States; specifically excluded the United States.

THE COURT: How does that help? Admittedly, it helps you with respect to those omitted claims, but you have a situation where Congress omitted particular claims and it expressly included others, and not just included whole statutes in a wholesale fashion, although it did that, but also particularized the provisions in F.I.S.A. as to which this provision applies and constitutes a waiver. So Congress appears to have known how to give a broad waiver and a narrow waiver.

MR. COPPOLINO: This -- again, I think if you look at it from the standpoint of what did Congress do at the same time on the same day in the same statutory provision, we think reading the entire statute in harmony, all of its provisions, suggests that what they were seeking to do was add the unauthorized disclosure violation, which is the very title of Section 223 of the Patriot Act: Civil Liability for Certain Unauthorized Disclosures.

Add that cause of action to the Wiretap Act, the Stored Communications Act, and then a cause of action to sue the government for that violation, having expressly excluded the government from the other violations, from -- more broadly, from causes of action under those statutes separately.

The phrase "willful violation" that you quoted when you came out is a phrase that we think gathers meaning from the use of the term "willful" in the surrounding provisions.

Another specific thing which we think gives this context is the --

THE COURT: Isn't that what the plaintiffs have alleged here?

MR. COPPOLINO: Your Honor, they've alleged a different type of disclosure violation. The cause of action that Congress enacted is a cause of action that's -- it's an anti-leak provision. It originated in a proposal from Representative Frank in the House of Representatives. And the

provision is much like a Privacy Act provision, which says that if the government collects information pursuant to surveillance or a pen register trap and trace, and then leaks it or discloses or misuses it, then there's a cause of action against the government.

Their allegation here is different. Their allegation is that the government, in conjunction with the telecommunications carriers, allegedly induced the carriers to disclose information to the government. The cause of action concerns information disclosed by the government to the public, or a misuse of information about an individual collected. It is, in effect, an embodiment of a Privacy Act-type provision in the Criminal Code.

So, as I say, I think if you look at the object and policy of all of Section 223, we think certainly a colorable argument could be made that Congress intended to adjust this unauthorized disclosure and provision.

THE COURT: Well, take me through the other provisions that you think shed light upon what appears to be the very clear language of 2712.

MR. COPPOLINO: If you look at -- and when submitted this as an exhibit, your Honor -- it's Exhibit 2 to our motion for summary judgment, which is Section 223 of the Patriot Act.

And, as I said --

THE COURT: That's been codified where?

MR. COPPOLINO: Well, they're codified in different spots in the U.S. Code, but Section --

THE COURT: All right. Well, let's --

MR. COPPOLINO: Pardon me?

THE COURT: Okay. Let me -- where are they codified?

MR. COPPOLINO: Section 223 first amends a cause of action that is available under the Wiretap Act, which is Title 18, 18 U.S.C., 2520.

THE COURT: Okay. Okay.

MR. COPPOLINO: And that's a provision which authorizes a cause of action for violations of the Wiretap Act; but what Congress did in the Patriot Act is it expressly excluded the United States from that cause of action. And it also inserted the unauthorized improper disclosure violation that I've been preferring to in -- in the Wiretap Act. So it added the unauthorized disclosure violation, but said, "You can't sue the government under 18 U.S.C. 2520."

And the second provision of the Patriot Act amended Title 18 Section 2707, the cause of action available for claims brought under the Stored Communications Act. And it again said you can't sue the government under this provision. You're -- we've added an unauthorized disclosure violation, but you can't sue the government under the general cause of action for Stored Communications Act violations.

Then it adds 2712. And in 2712, it makes clear you

can sue the government for something. And what we're disagreeing about is what that something is.

Does it include everything under the Wiretap Act or Stored Communications Act, or does it include just that narrow unauthorized disclosure violation?

Now, the backdrop of this for us is it's a waiver of sovereign immunity.

It's got to be clear. It can't be ambiguous. And if there's a plausible interpretation otherwise, it has to be interpreted in the favor of the sovereign. And our view is that we have a colorable argument that what Congress intended to do was to create a cause of action against the government solely for the unauthorized disclosure violation.

I recognize that it's a tough argument in the context of the specific language you quoted. My argument is if you look at the entirety of what Congress did in an Act enacting Section 223 of the Patriot Act, it appears that willful violation -- any willful violation -- is an attempt to refer back to the willful unauthorized disclosure violation.

And I support that argument by citing the fact that in 2712, the specific provisions of the F.I.S.A. which they've authorized a cause of action under are provisions which concern the use of and the disclosure of information.

And I further support it with legislative history which entirely supports our argument, and which -- there is no

support for the plaintiffs' argument that, in the aftermath of 9/11, Congress sought to make it easier to sue the government on all claims; but rather, the legislative history of Congressman Frank's amendment made clear that it was solely focused on creating a cause of action against government officials for unauthorized leaks. Mr. Frank said that. Two House Reports say that. Senator Leahy said that on the Senate floor. There are two summaries in the Congressional Record of the Patriot Act Section 223 which describe the provision in that manner.

THE COURT: Well, first of all, Section 2520 is part of Chapter 119, which is expressly referred to in Section 2712.

MR. COPPOLINO: That's correct.

THE COURT: Okay.

MR. COPPOLINO: And there's a bit of -- and that, I think, leads to some of the ambiguity, because 2520 is a part of Chapter 119; but in the cause of action for that, it says you can sue a person for intercepting disclosure or intentionally using information intercepted. You can sue a person or entity other than the United States. That's what was added in the Patriot Act, along with 2520(g), the improper disclosure violation. So that was added on the same day that they created the cause of action under 2712.

Likewise, in the Stored Communications Act it says -- in 2707 it creates a cause of action for violations of

Chapter 121 other than violations against the United States.

THE COURT: All right. Well, let me finish.

MR. COPPOLINO: Mm-hm.

THE COURT: 2520 is part of Chapter 119. That's expressly referred to in Section 2712.

And the provision that you're referring to in 2512, Subsection G, simply provides any willful disclosure or use by an investigative or law enforcement officer or government entity of information beyond the extent permitted by Section 2517 is a violation of this chapter for purposes of 2520(a). That is, it's sweeping into the coverage of 25(a) a willful disclosure.

MR. COPPOLINO: But since it's --

THE COURT: But --

MR. COPPOLINO: Mm-hm.

THE COURT: Section 2712, which, of course, includes Chapter 119, refers to any willful violation.

MR. COPPOLINO: Right.

THE COURT: Any willful violation. That is, it could be an unlawful disclosure or any other violation.

MR. COPPOLINO: Right. And I think, read literally, that phrase is -- it suggests that they could -- they could sue for any violation of 2520.

My point to you is simply that they did it all in the same day.

Sentence one: you can't sue the government.

Sentence two: you can sue the government.

So what does that mean? How are we supposed to figure this out?

Well, they took out the causes of action under 2520 and 2707, but they added them back in a third section.

What does that mean? Did they mean to negate what they did in the first two sections, or did they mean to limit the cause of action solely to the unauthorized disclosure violation?

Our argument simply, your Honor, is that, viewed in full context, we think we have a plausible argument that Congress intended to solely focus on unauthorized disclosure by the government. Legislative history firmly supports that in the context of sovereign immunity, where waivers need to be clear. We wanted to preserve the argument.

THE COURT: Where is the legislative history?

MR. COPPOLINO: I've attached --

THE COURT: Oh, I know.

MR. COPPOLINO: -- virtually all of it.

THE COURT: Well, but you know, you're having kind of a tough sledding. So take me through your argument. Point out what you have.

MR. COPPOLINO: All right. Well, first of all, the first bit of legislative history would be a hearing where this

originated, where Congressman Frank actually introduced the legislation out of the House Judiciary Committee mark up. This is Exhibit 3 that we provided on summary judgment, Docket Number 18-2. And it begins at page 11 of that docket number. It's a draft. It's an excerpt from the Committee hearing where Attorney General Ashcrof was testifying. And Congressman Frank first raised the topic of whether there should be included in the Patriot Act a cause of action to sue the government if it leaks information obtained through surveillance or pen register trap and trace.

THE COURT: Well, that's what I'm looking at now. Point out specifically these comments that you think cabin the cause of action created under 2712.

MR. COPPOLINO: There wasn't any draft language at this point, so it's not there. Okay. It's simply the origination of Mr. Frank's proposal that ended up being in 2712. And the purpose of it so this simply shows that what Congress -- that the beginning of the change in the legislative process was a proposal by Mr. Frank to create an unauthorized disclosure violation. And that turned into what became Section 223 of the Patriot Act, which is the statutory provisions that we have been talking about; the ones that simultaneously exclude and include a waiver of sovereign immunity against the government.

So that's all. I cited that. Exhibit 4. We have

cited two House Reports; one from 2001. And this would be Exhibit 4 to our summary-judgment motion, Docket 18-2 -- it starts at page 17 -- a House Report which refers to an amendment offered by Mr. Frank to provide increased civil liability for unlawful disclosures of information obtained by wire or electronic interception. And that -- and so that describes the purpose of Mr. Frank's amendment.

There was actually a similar House Report four years later when the Patriot Act was reauthorized, which we attached as Exhibit 5. Again, Docket 18-2 starts at page 20, which again describes Mr. Frank's amendment in similar terms.

In fact, there is nothing in the legislative history that suggests that Congress was intending to broadly encompass all claims under the Wiretap Act and Stored Communications Act against the government.

Now you might say, well, that's what that language does. Isn't it -- even though there's nothing in the legislative history. The concern we have with that argument, though, is that, where Congress simultaneously did all of the various things that I pointed out, that it's ambiguous, at best. Authorized suit under the government -- all claims under that provision where it expressly included a provision that there was to be no suit against the government for those provisions.

THE COURT: Aren't we in a situation where the

legislative history is ambiguous, but the statutory language is clear?

MR. COPPOLINO: I would say, actually --

THE COURT: And in that situation, it's pretty clear what a judge should do, isn't it?

MR. COPPOLINO: I would argue, your Honor, that perhaps the opposite is the case; that the legislative history is clear that --

THE COURT: Well, the legislative history that's ambiguous in the face of a clear statute?

MR. COPPOLINO: Let me just say two things. I think the legislative --

THE COURT: I trust you're not advising Judge Sotomayor on her testimony; that kind of advice.

MR. COPPOLINO: The legislative history is clear, and the statute is ambiguous. Read as a whole, all three provisions, and trying to read them in harmony, and, you know, again, recognizing that there is some tension in that language, we felt that we needed to preserve this argument in the context of both the need for waivers of sovereign immunity to be clear, and to provide this Court and reviewing courts alternative grounds for narrowing the State Secrets Privilege assertion. So that's why we raise the argument, your Honor.

I was not going to spend a great deal of time on the other jurisdictional arguments, unless you wanted to. I think

you've seen these before, and I think they're much more straightforward than the 2712 argument.

We've argued, again, that there's no waiver of sovereign immunity under Section 1810 of the F.I.S.A.

You've ruled on that in the *Al-Haramain* case, we're just preserving our position.

The other jurisdictional arguments we've made have simply are whether the plaintiffs can have a claim for injunctive relief under the A.P.A. and under the Larson Doctrine. And, for the reasons we've set forth in our brief, we don't believe there is any cause of action for injunctive relief.

THE COURT: Spell that argument out a little more fully. You know, it's always helpful to hear the argument articulated orally as well as to read it. And --

MR. COPPOLINO: Okay. So --

THE COURT: Take me through this matter.

MR. COPPOLINO: In addition to making various claims, they seek damages under Sections 1810 of the F.I.S.A., 50 U.S.C. 1810 and 18 U.S.C. 2712. That's their damages claims.

They also seek injunctive relief, and they seek that under at least three different theories. One is that they seek it for an alleged constitutional violation. The other is that they seek it under the Administrative Procedures Act. And the third theory is that they seek it under the doctrine of the

Larson case, on the theory that the alleged actions are *ultra vires*; that they exceeded the statutory authority of the officer of the government.

The A.P.A. argument, I think, is clearly wrong. Under Section 702 of the A.P.A., sovereign immunity is waived as to -- for challenges to agency actions against the government; but Section 702 makes clear that it is not waiver of sovereign immunity where there are other limitations on judicial review that either expressly or impliedly forbid the relief sought.

And Ninth Circuit, actually, and the Supreme Court have construed this provision at some length. And the bottom line is the A.P.A. doesn't waive sovereign immunity where some other statute controls. That's the principle.

Now, their argument -- our argument is that if there are other statutes that control here, they would be Section 2712, whatever its scope -- and we disagree about that -- and Section 1810; and that those provisions, for example, both foreclose injunctive relief against the government. They -- or impliedly foreclose.

They make a rather interesting argument. They say that because Section 2520 and 2707 expressly forbid injunctive relief against the government, you can get it under the A.P.A.

That's clearly wrong.

Section 702 says that when injunctive relief is

expressly forbidden against the government in another statute, you can't it get it under the A.P.A.

Then they go on to say under Section 2707 for their damages claim, "You can only get damages. You can't get injunctive relief. And so therefore, we ought to be able to get injunctive relief under the A.P.A."

That's clearly wrong. And the reason it's clearly wrong is that what the law is in this area is that when Congress enacts a specific statutory remedy, that's what governs over the A.P.A. So that's why they don't have a separate A.P.A. claim for injunctive relief. A lot of it -- we simply are not going to allow a jurisdictional argument to go unmentioned, because the fact of the matter is they're simply misapplying the A.P.A. to seek injunctive relief under statutory provisions.

And the very statutory provisions that expressly exclude injunctive relief against the United States, 2520 and 2707, the Larson Doctrine, to the extent it still has any viability -- and I think that's questionable in the Ninth Circuit, but the Larson Doctrine purports to allow you to sue officers of the United States for injunctive relief without regard to sovereign immunity if they have acted in excess of statutory or other authority, Constitutional authority; but the Ninth Circuit and the Supreme Court made clear that that rule applies. The rule is this; that it's a suit against the

government -- the sovereign -- if judgments sought would expend itself on the public treasury or domain, or interfere with the public administration, or the effect of the judgment would be to restrain the government from acting or compelling it to act. That's the *Dugan versus Rank* case, 372 U.S. 609.

And the Ninth Circuit has said the same thing in a case called *"Palomar Pomerado Health System*" -- I can spell that for you later, which -- it says that relief nominally sought against an officer is sought against the sovereign if it would operate against the government.

Now, all I'm saying on the *Larson* argument is it can't seriously be disputed that they're seeking injunctive relief against the government. And if you're seeking injunctive relief against the government, you don't have a *Larson* argument.

So that, I think, really sums up all of the jurisdictional arguments, your Honor. Unless you have questions, I would like to just turn to the State Secrets issues, but I'll do whatever you --

THE COURT: No. Go ahead. Complete your argument, Mr. Coppolino.

MR. COPPOLINO: Well, your Honor, just to briefly set the stage, as you're probably very familiar with this case, this is the same group of plaintiffs, I think, with the exception of one, that filed a *Hepting* action in 2006. And the

substance of their allegations is the same. The difference is that they're suing the government, and not AT&T. And, as in *Hepting*, if you recall, going back to the summer of 2006, the government asserted the State Secrets Privilege to protect the intelligence sources and methods that are at issue in this case. Now, the *Hepting* action was just dismissed by the Court under Section 802 of the F.I.S.A. That is the action against AT&T.

So we're here dealing with the identical allegations and claims against the government. And our view is that you ought to do what we think is the standard, two-step process in the State Secrets Privilege, which is: at first, review the privilege and determine whether the D.N.I. has properly supported his conclusion that harm would result to national security through the disclosure of the information that he seeks to protect; and then -- once you've reviewed the privilege assertion, then, to determine what consequences the exclusion of that information would have on the litigation. So there is the two-step process.

And our view is that the information that's necessary to litigate the case is subject to the privilege assertion, and has been properly excluded by the D.N.I.

THE COURT: Well, let me ask you this. What -- obviously, we've discussed this three years ago in the *Hepting* case. And I certified -- essentially certified that decision

for interlocutory appeal. What has changed between now and 2006 that suggests that I should take a different view of this argument in this case than I took in the *Hepting* case?

MR. COPPOLINO: Well --

THE COURT: Have we received guidance from the Ninth Circuit that suggests that the *Hepting* view was incorrect?

MR. COPPOLINO: Since 2006 the Ninth Circuit has issued two rulings on the State Secrets Privilege -- I believe just two: one in *Al-Haramain*, and one just recently in a case called, *"Mohamed versus Jeppesen*." That's the case that they presently relied on.

THE COURT: Yeah.

MR. COPPOLINO: Now, *Mohamed versus Jeppesen* and *Al-Haramain* are inconsistent, in our view. And *Jeppesen* is also inconsistent with *Kasza*, in our view.

And the government has filed a rehearing petition in *Jeppesen*, which is still pending. And I obviously don't know when that will decided. I suggested in our papers that the Court ought to consider at least waiting some time, to see if *Jeppesen* will, in fact, remain Circuit precedent. Erroneous decision conflicts with *Reynolds* and other Supreme Court authority. And if it doesn't hold, it would be the wrong road to go down, because *Jeppesen* suggests that the privilege can only be asserted at the discovery phase, not at the pleading stage, and only on an item-by-item basis.

Now, of course, *Al-Haramain*, which came down in 2007 and was not overruled and cannot be overruled by -- *Jeppesen* ruled just the opposite. *Al-Haramain* actually reviewed and upheld the State Secrets Privilege at the pleading stage, and held that the privilege foreclosed the information necessary for plaintiffs to establish their standing, and said the case would have to be dismissed under the State Secrets Privilege.

Now we have this issue of statutory preëmption hanging out there.

THE COURT: But there's the preëmption part.

MR. COPPOLINO: That's not the State Secrets issue, though *Jeppesen* doesn't talk about preëmption. I recognize the preëmption issue is still there to be dealt with in terms of the law of the states.

THE COURT: I don't think there's any preëmption issue in *Jeppesen*, is there?

MR. COPPOLINO: No, there is not simply a case about what does the State Secrets Privilege mean, and how is it to be interpreted so as --

My real pitch to you, your Honor, is first not only wait before -- to see what happens in *Jeppesen*, because it -- if you're going to go down that road, the road may get pulled out from under us before this litigation is over, and we would have proceeded down a path that is simply not Circuit precedent.

Second argument I would make is that there is other Circuit precedent. And I think you have to try to construe *Jeppesen* consistently with that. Not only did *Al-Haramain* consider the privilege at the pleading stage, *Kasza* itself is directly inconsistent, suggesting that the agency at issue does not have to personally review every particular piece of evidence before asserting a privilege.

I also have, though, an additional argument I would make about *Jeppesen*. And that is that I think you can rule and grant in favor of the government's motion and grant the government's motion consistent with *Jeppesen* because there are several points on which I think *Jeppesen* can be distinguished.

First, *Jeppesen* considered the assertion of State Secrets Privilege under a Rule 12(b)(6) motion. And it made clear on that appeal that the question was whether a motion to dismiss under Rule 12(b)(6) should have been granted. And it said that the plaintiffs had stated their claim.

Our motion in this case does not rely on Rule 12(b)(6). We do not rest solely on a *Totten* argument. We don't rest solely on a very subject matter of the pleadings argument. Rather, we follow the language of the Ninth Circuit set forth in *Al-Haramain*, which says -- I'll quote it. This is the Ninth Circuit in *Al-Haramain*.

> The suit itself may not be barred because of its subject matter, yet

ultimately the State Secrets Privilege may nonetheless preclude the case from proceeding to the merits.

That's the case in *Al-Haramain*. That's our view of the case here. And that's how *Kasza* went off, because the Court found that if the plaintiff couldn't establish standing or a *prima facie* case or the government couldn't present the information necessary to defend or the private party, then summary judgment was required.

Now, *Jeppesen* says -- first of all, *Jeppesen* doesn't even address summary judgment, but what it does say is this. In deciding a State Secrets Privilege, you need three things: an actual request for discovery, plaintiff's explanation of the need for the information, and a formal assertion of privilege.

Our view, your Honor, is that you have all of that before you now. In substance, the plaintiffs are going to say, "Well, wait, wait. We haven't submitted any discovery requests."

What they have submitted is a Rule 56(f) affidavit, which is a roadmap to their discovery; a detailed roadmap that the discovery they seek will be evidenced protected by the State Secrets Privilege assertion. You don't need to look further than that to know that, even consistent with *Jeppesen* and *Al-Haramain* and *Kasza* -- that you can look at the substance of the issue and determine now that the information subject to

the privilege assertion not only is relevant, but it's exactly what they seek. Paragraph 13 of their 56(f) affidavit -- and this is a quote.

> Plaintiffs would seek discovery regarding the fact of the carriers' interception and disclosure of the communications and communications records of telecommunications companies' customers, including plaintiffs.

That's what they want to seek discovery on. And that's what the D.N.I. has asserted privilege over: information necessary to confirm or deny those allegations.

They also say they would seek discovery of telecom companies, including AT&T, regarding their dealings with N.S.A that's subject to the privilege assertion. They want discovery of the facility at Folsom Street in San Francisco as to whether there was an N.S.A. secure room there; whether there is certain equipment in that room; what goes on in that room. Are there other secure rooms around the country?

That's all subject to the privilege assertion.

They want to depose numerous government officials and former government officials about -- quote, "about communications carriers' involvement in the N.S.A. warrantless surveillance." That's paragraph seven.

And in paragraph 20 they say all of the topics of

discovery that they have identified in their 56(f) affidavit, quote, "would lead to evidence regarding the nature and scope of the government's surveillance program."

That's what the privilege assertion is about: the nature and scope of the government's surveillance activities, and if they exist.

So I don't think you need any more for purposes of *Jeppesen* to see that the discovery they seek is -- in fact, goes right to the heart of the State Secrets Privilege. And you don't need to wait for a particular request.

And the reason I urge you not to do that, your Honor, is that not only would that elevate form over substance, and it -- and bring us right back to where we are if they were to seek that kind of discovery, but the very process of going through the -- of discovery like that would put at risk the disclosure of the information subject to the D.N.I. privilege assertion. Indeed, that, I think, is the point of the discovery sought. And that's why it's something that, obviously, we would have to put a very large circle around.

But one thing that I think the plaintiffs concede in their 56(f) affidavit is that the mass of information that they have put in the record in their so-called "summary of evidence" from media reports, books, and some limited government statements, they recognize would have to be reduced to actual sworn facts concerning whether or not these allegations are

true.

That's the discover -- that's the litigation process. It's a very exacting process, which turns speculation and conjecture and limited information into actual fact.

And that's the concern that the D.N.I. has in the State Secrets Privilege; that to establish whether or not particular facts are true would risk exceptional harm to national security. And, as I think you pointed out in *Hepting*, it would be a process whereby uncertainty is brought to certainty either that the allegations exist or don't exist, or at least that there is more certainty about that.

In fact, if I may, I would quote a very fine District Judge, Walker, of the Northern District of California, who said in *Hepting*,

> Simply because statements have been publicly made does not mean that the truth of those statements is a matter of public knowledge, and that verification of the statements is harmless.

And so the plaintiffs' argument is, "Look. We want to go down the road of trying to find out what is privileged and what is not privileged." And that's what's going to risk the very disclosures that are at stake here.

Even *Jeppesen* says, by the way, that the case can proceed, quote, "so long as the underlying facts could be

proven without resort to the privileged information"; but that's impossible here, because you know now that they seek disclosure of the privileged information.

Now they're going to get up and say that what they seek, they believe, is not privileged.

Well, first of all, that's going to be disputed; but secondly, as I just quoted to you from the 56(f) affidavit, they're seeking information that goes to the core of the privilege.

You know, your Honor, I'm not just trying to make an argument here. I'm actually trying to point out to you that if you look at what's at issue in this case, they want to know what is behind the D.N.I.'s privilege assertion. They want to know: is the government engaged in a content dragnet? Is it engaged in a communications dragnet that includes both content and noncontent? And I would like to focus your attention on those specific allegations as a last point that I make here.

First of all, the communications-records allegation -- this is the allegation, as you may be familiar with, that the N.S.A. collected in bulk from carriers particular records of people's communications.

You address this issue in *Hepting*. You did not uphold the State Secrets Privilege at that time, but you deferred discovery. And I believe the reasons you deferred discovery are still valid, and haven't changed. And more,

upholding the privilege, you said at that time the government has neither confirmed nor denied whether it monitors communications records, and has never publicly disclosed whether such a program actually exists. That hasn't changed in three years.

You said that revealing that a communications-records program exists might encourage terrorists to switch to less efficient but less detectable forms of communications. That hasn't changed.

You said revealing that such a program does not exist might encourage a terrorist to use AT&T services when it would not have done so.

You said that terrorists who operate with full information are able to communicate more securely and efficiently than a terrorist that operates in an atmosphere of uncertainty. I think that's exactly right, and nothing has changed to alter the conclusion.

And Judge Kennelly, in the *Terkel* case, upheld the State Secrets Privilege with respect to the communications records, and dismissed that case.

THE COURT: You say nothing has changed. What do you make of this Inspector General report?

MR. COPPOLINO: The Inspector General report, in our view, your Honor, doesn't warrant any different conclusion for a couple of reasons. And the Inspector General, first of all,

made clear that the only -- the only intelligence activity that's been publicly acknowledged was the terrorist surveillance program, which was described as a content one: international Al Qaeda-related communications.

Now he said that there are other activities that the government authorized to detect and prevent Al Qaeda and terrorist attacks, but he stresses that those remain highly classified. On pages five and six of his report he says, and the I.G. does nothing to -- doesn't say anything that would remotely confirm or even address whether there was a dragnet on communications, or communications records inclusion program.

And the plaintiffs' argument just simply boils down to: we should be able to use this as a jumping-off pad to try to find out what are those other highly classified activities that the O.I.G. report referred to?

So my first response is: the O.I.G. report continues to protect undisclosed intelligence sources and methods that may or may not even be at issue in this lawsuit, but in any event, haven't been disclosed.

Second point I'd make about this I.G. report -- and this is a bit of phenomenon we see a lot of in Washington, where information that was revealed years ago gets recycled, revealed, and disclosed again, and it's suddenly news; but in 2007 the government advised Congress of the very information that was in this report. That's in the post 9/11

authorizations by the President to N.S.A. Terrorist Surveillance Program was just one of the activities that was authorized, but that -- there were other activities. In fact, the D.N.I.'s letter to Senator Specter is in the record of this case filed in 2007. It's Docket Number 356 in M.D.L. 1791 filed on August 20th, 2007. And that's where the government indicated; that there -- there was more than one activity authorized to detect and prevent Al Qaeda attacks. And the T.S.P. was one of them. So that's not news, but what is, I think, significant is that since 2006 the government has not changed its view that the particulars about what those other activities are continues to need to be protected.

And the last point I would make -- and I'll sit down, your Honor -- is this. The State Secrets Privilege assertion, as you know, has been reaffirmed by new the President, new presidential administration, and a new D.N.I. And President Obama inherited a number of surveillance activities from the prior administration. And the President has made clear that he doesn't intend to use the State Secrets Privilege to cover up alleged illegal activities or to frustrate oversight by Congress, but that there remain rare occasions where the privilege has to be invoked in order protect harms to national security. This case concerns intelligence sources and methods for detecting terrorist attacks. That is the crown jewel of U.S. National Security Administration. And I think it

should speak volumes that the administration, after very close and careful review, has continued to seek to protect this information.

Last point. I would just urge your Honor to actually read the *ex parte* materials, if you haven't had a chance to, before proceeding down any road, because once you read them, I think you will see what the concerns are; and, in particular, the concerns with allowing the plaintiffs to take discovery in this particular area, and what is at stake, and what the harms might be. And certainly you shouldn't embark on a course without having that base of information. Typically, most courts actually uphold the privilege even before allowing discovery, so that it's known what the ground rules are as to what could be gone into; but I submit that if you look at that material, you will see the precise concerns that we're talking about, and recognize that, even consistent with *Jeppesen*, you could dismiss the case.

Thank you, your Honor.

THE COURT: Very well. Thank you, Mr. Coppolino.

And let me -- Mr. Bankston --

Mr. Whitman, do you have anything to say on behalf of the individual defendants?

MR. WHITMAN: Your Honor, we're prepared if you want to discuss the individual-capacity defendants' motion that we filed last Friday, but I didn't know if you wanted to wait

until after argument on the government's motion, or not.

THE COURT: I see. All right. You don't have anything to add at this juncture?

MR. WHITMAN: Not as to Mr. Coppolino's argument, your Honor.

THE COURT: Who's going to be arguing on the other side?

MR. BANKSTON: Kevin Bankston. Would you like to ask specific questions at the outset?

THE COURT: As a matter of fact, I would --

MR. BANKSTON: Certainly.

THE COURT: -- pick up on the last few points Mr. Coppolino was making.

We have been through this State Secrets Privilege business in *Hepting* and *Al-Haramain* and so forth.

MR. BANKSTON: We have, indeed.

THE COURT: Now, why is the State Secrets Privilege applicable to all of the claims that the plaintiffs have asserted, except the F.I.S.A. claim?

MR. BANKSTON: Well, first, your Honor, I'd point out, of course, that, as this Court has held, 1806(f) preëmpts the State Secrets Privilege regarding material.

THE COURT: For F.I.S.A.?

MR. BANKSTON: No, your Honor; in any civil or criminal case regarding materials for electronic surveillance.

On its plain language it applies in any case where an aggrieved party -- i.e., someone subjected to electronic surveillance -- has made any motion to or request for discovery or to obtain electronic surveillance materials.

THE COURT: You mean you read the decision as saying the State Secrets Privilege is dead; is just plain dead?

MR. BANKSTON: I --

THE COURT: Not applicable to anything?

MR. BANKSTON: To materials relating to electronic surveillance, your Honor.

This conclusion is bolstered by, as you were discussing earlier, 18 U.S.C. 2712. The cause of action for Wiretap- and Stored Communications Act are direct violations against the government, which specifically calls out 1806(f).

THE COURT: Well, but that doesn't waive the State Secrets Privilege. 2712 doesn't waive the State Secrets Privilege.

MR. BANKSTON: 1806(f) in those cases is the exclusive means, notwithstanding any other law by which such materials shall be reviewed. And so our position is, as laid out fully in our brief -- is that 1806(f) is not limited to F.I.S.A. causes of action, which, in -- would be contrary, indeed, to the plain language of 2712, which speaks of 1806(f) as well; but instead 1806(f)'s plain language applies to any request or motion to obtain material or discover materials

related to electronic surveillance.

THE COURT: All right. Spin that out for me. What -- why -- why is it that you think the preëmption of the State Secrets Privilege under F.I.S.A. extends far beyond the reach of the F.I.S.A. statute itself?

MR. BANKSTON: Congress passed a number of statutes to comprehensively regulate the government's electronic surveillance act; not only F.I.S.A., but the Wiretap Act and the Electronic Communications Privacy Act. 1806(f) is located in F.I.S.A, but on 18 U.S.C. 2712's own terms specifically applies in cases against the United States for violations of the Wiretap Act.

THE COURT: There's nothing in 2712 about State Secrets, is there?

MR. BANKSTON: Your Honor, I direct you to 2712(b).

THE COURT: State of proceedings.

MR. BANKSTON: (b)(4).

THE COURT: (b)(4)?

MR. BANKSTON: Yes, your Honor. We did cite to this in our brief. Notwithstanding any other provision of law, the procedures set forth in section 106(f), skipping over a few, 106(f), which is 50 --

> Notwithstanding any other provision of law, the procedures set forth in Section 106(f) of the F.I.S.A., which is 50

U.S.C. 1806(f), shall be the exclusive means by which materials governed by those sections may be reviewed.

1806(f) governs the disclosure and review of applications, orders, or other materials related to electronic surveillance, and in no way cabins itself to cases brought directly under F.I.S.A..

It may be instructive to look at the plain language of 1806(f) itself. Let me just pull that, up, your Honor. Whenever a court or other authority -- and I'm going to skip over the nonpertinent parts. Whenever a court or other authority -- I'm sorry. Whenever any motion or request is made by an aggrieved person --

So, of course, the party must be an aggrieved person.

-- under F.I.S.A. -- i.e., subject to electronic surveillance, which we have alleged.

THE COURT: You're looking at 1806(f)?

MR. BANKSTON: When any motion or request made any aggrieved person pursuant to any other statute or rule of the United States before any any court or authority of the United States to discover or obtain applications, orders, or other materials relating to electronic surveillance, the U.S. District Court shall, notwithstanding any other law, if the Attorney General files the appropriate affidavit, review those materials *in camera*.

There is nothing in this language that cabins this provision to claims brought under F.I.S.A. And indeed, Congress specified in 2001, when it created 18 U.S.C. 2712, that in civil actions against the United States, 1806(f) is the inclusive means for the review of such materials.

Does that address your question, your Honor?

THE COURT: Well, I'm not -- I'm not letting that cat out of the bag at the moment.

MR. BANKSTON: Certainly.

THE COURT: Next point.

MR. BANKSTON: But to address your question, assuming that 1806(f) does not preëmpt as to all our claims, which we do argue here and in our briefing, we do think several things have changed in regard to records since you first heard this -- the *Hepting* case in 2006.

Mr. Coppolino highlights that the I.G. reports confirmation that there were activities authorized by the President's program order beyond the so-called "Terrorist Surveillance Program" Isn't news, but it is news since we last hit this issue in *Hepting*.

At the point of *Hepting*, the government had not admitted to any conduct beyond the T.S.P. It hadn't submitted that there was other intelligence activities beyond the Terrorist Surveillance Program that were authorized by the President's program order. And although the Executive Branch

has so far not indicated what those activities were, numerous Senators and Congresspersons who were briefed on the program have confirmed that it involved the government's acquisition of records. And I'll direct you to a few examples which are in our summary of evidence appended to Ms. Cohn's 56(f) Declaration.

Senator Kit Bond, when questioned about the records program, and after being briefed on the other aspects of the program, said the President's program uses information collected from phone companies. The phone companies keep their records. They have a record, and it shows what telephone number called what other telephone number.

Senator Pat Roberts similarly stated that the N.S.A. was looking at the phone calls collected during the surveillance; not at the content, just at the pattern of the phone calls; i.e., a reference to calling patterns reflected in records.

Representative Jane Harman noted that there is a program that involved the collection of some phone records.

And, keeping in mind that the statements of AT&T that you considered important in *Hepting*, Edward Whitacre, the CEO of AT&T, responded to a question about the records program by saying, "If it's legal, we do it." And then later, AT&T opined in a letter to Congress that it would be legal for it to provide -- excuse me -- it would be legal for the government to

request various forms of intelligence assistance from the private sector pursuant to the President's Article II powers.

And so, in addition to the numerous news reports, in addition to the books that have dealt with this program, there have also been confirmations from previous members of Congress that the records program does, indeed, exist, and is no longer a secret, regardless of the government's claim.

If you have any other questions on that matter, your Honor -- or shall I proceed?

THE COURT: (Indicating)

MR. BANKSTON: To expand on my comments about 50 U.S.C. 1806, your Honor, I think that it has on its face one clear purpose, and that's to allow you to reach the legality of the surveillance, despite the government's claims of secrecy. And, as noted, on its plain language, it is not limited to F.I.S.A. causes of action; a conclusion bolstered by reference to it in 18 U.S.C. 2712.

We also note that, although the government continues to claim a danger of risk of disclosure if we proceed under 1806(f), 1806(f) is more than adequately protective. So long as the government files its required affidavit, electronics surveillance materials cannot be disclosed by the Court, except to the plaintiffs under a appropriate security procedures and protective orders, and only if that disclosure is necessary to determine the legality of the surveillance.

So we think Congress has struck an appropriate balance between the needs of litigants and the needs of national security, a balance which, notably, has not changed since 1978, despite numerous amendment to F.I.S.A. since then.

Although F.I.S.A. 1806(f) does preëmpt the State Secrets Privilege as to all of our claims, we don't believe that the State Secrets Privilege requires dismissal at this stage.

Even if that were not the case, we think that *Mohamed v. Jeppesen* deals with that issue. We do not think that there is any need for this Court to wait to see whether that is taken *en banc*. First of all, of course, you can rely on its reasoning even if you cannot cite it; but also, its holding and a decision not to dismiss based on state secrets would be consistent with *Al-Haramain v. Bush*, the decision from the Ninth Circuit, and your ruling in *Hepting*, which both make clear that the entire subject matter of the program is not a state secret.

Al-Haramain also makes clear that before considering the impact of the State Secrets Privilege on standing, the Court must independently evaluate the purportedly privileged evidence, as the Ninth Circuit did in *Al-Haramain*. To do otherwise would put the cart before the horse, in the words of *Mohamed*; something that this Court refused to do in *Hepting*, recognizing that reaching the standing and *prima facie* case

issues would be premature, considering we are entitled at least to discovery of unprivileged evidence to support our claims.

As this Court has previously recognized, and as discussed by Mr. Coppolino, F.I.S.A.'s 18 U.S.C -- 50 U.S.C. 1810 waives -- I'm sorry. 50 U.S.C. 1810 does waive sovereign immunity for damages, as this Court found in *Al-Haramain*. And the government offers no new argument on this point.

We have provided in our briefs some additional support for that holding, and have also, to the extent you care to use it, provided an alternative basis for finding that waiver.

As this court has noted, the waiver regarding sovereign immunity in terms of damages is also concretely clear from the plain language of 18 U.S.C. 2712, where, insofar as our Wiretap Act claims -- and actually, just a terminology clarification, Chapter 121 is, as Mr. Coppolino noted, the Stored Communications Act portion of the E.C.P.A., which also updated the Wiretap Act, which is at Chapter 119.

As far as equitable relief, under *Larson*, when an officer acts in excess of his statutory authority, those *ultra vires* actions are not considered -- those of the sovereign -- and therefore, sovereign immunity does not apply to equitable claims seeking to confine officers to their statutory authority.

Application of the Larson Doctrine is especially

proper here, where the defendants' dragnet surveillance goes far beyond the narrow, restrictive, and exclusive authority of the comprehensive surveillance statutes: F.I.S.A., the E.C.P.A. and the Wiretap Act.

I'd like to point out that, in regard to Mr. Coppolino's pointing to *Dugan* in the Ninth Circuit, certainly *Dugan* does state the general rule that actions that would restrain the sovereign are against the sovereign. However, it also specifically notes *Larson* as an exception to that rule. And, notably, the Ninth Circuit has broadly construed that exception, such that an action against for *ultra vires* conduct will not be considered against the sovereign unless it would impose an intolerable burden on governmental functions that outweighs any other private interest. So to stay that *Dugan* does not support our *Larson* claim is simply incorrect. Indeed, the Larson Doctrine is sometimes referred to in cases as "the *Larson/Dugan* exception."

So considering that *Larson* does apply to our claims against the federal officers, the Court does not need to reach the Administrative Procedures Act issue; but if it does, we think that the government is approaching that issue from the wrong perspective, as if there is a presumption against sovereign immunity as to equitable relief post Administrative Procedures Act. The default, the presumption, the baseline is that plaintiffs can obtain equitable relief against the

sovereign under the A.P.A.

And the question then becomes: did Congress do anything specifically to eliminate that A.P.A. relief?

There is nothing in the statutes that does so, either expressly or impliedly. And this makes sense, considering that the notion that Congress would take away the A.P.A.'s equitable relief is inconsistent with the clear purpose of the statutes to regulate comprehensively the government's electronic surveillance activities. To take away an equitable remedy for plaintiffs would make those statutes a dead letter, as the Court would have no way to enforce its restrictions.

So I believe I've covered all of the bases covered by the government. If -- unless your Honor has other specific questions, I shall take my seat.

THE COURT: Very well. Thank you, Mr. Bankston.

Anybody else want to be heard before we submit the matter?

MR. COPPOLINO: Your Honor, unless you had questions in response to his presentation, I have nothing to add; but Mr. Whitman and Ms. Cohn may want to discuss the individual capacity. They may want to discuss the individual-capacity claims.

THE COURT: All right. Who's going to take the laboring oar on that, Ms. Cohn?

MS. COHN: I will, your Honor. I wanted to address

that if we could, but this is not on the government's motion that was just argued, so I don't know that it needs to stop you from submitting that issue; but there was a motion brought by the individual-capacity defendants on last Friday which we maintain is an improper attempt to move for reconsideration of your decision of April 8th. And so we brought an administrative motion.

Since they -- they set a hearing date for September, if we waited until then, they would have unilaterally given themselves a two-month extension of the deadline to respond to the complaint that your Honor set in April. And, rather than let that happen, I was hoping we could use today to raise that, and try to head that off, because we believe it is -- today is the deadline for the individual-capacity defendants to respond, as set in your Order. And we don't think that their kind of belated attempt to try to give themselves a two-month extension is proper.

And I talked with Mr. Whitman before today. Since he was going to be here today, I thought we could most efficiently address this now, if your Honor is willing to.

THE COURT: Okay.

MS. COHN: Effectively, they are still trying to get the same thing they asked for in April that you denied, which is essentially an indefinite stay until whatever arguments the government wishes to make about the state secrets are fully and

finally resolved, which, to me, means many, many years.

THE COURT: Well, wouldn't establishing the government's State Secrets Privilege require a dismissal of the individual claims?

MS. COHN: It would, your Honor, but in order to get a stay --

THE COURT: So why not just go ahead and address this state secrets issue? And there really isn't any need for the individual defendants to respond until we sort through that, is there?

MS. COHN: Well, your Honor, I think that the standard for a stay, to begin with, is that they have to have a probable -- probability of success on the merits, and the possibility of irreparable harm. It's the preliminary-injunction standard, is what courts look at. So you have to find that they have a probability of success on the merits of their state-secrets claim before, I think, you can reasonably entertain a stay of any kind, much less an indefinite stay. I mean, they've almost had a year now.

THE COURT: I can stay it under Rule 16 case management. It doesn't make sense to force parties, who may very well prevail derivatively, because the government may prevail on the State Secrets Privilege, may -- it may completely obviate the need for the individual defendants to enter their appearances here.

MS. COHN: Your Honor, I just worry about --

THE COURT: Why doesn't it just make sense to simplify the litigation, rather than to complicate it?

MS. COHN: I think that's unfair to the plaintiffs. You know, they have a set of --

THE COURT: What do you gain with the individual claims?

MS. COHN: We gain -- we know they're going to raise qualified-immunity claims on behalf of the individuals. They've got -- they've said so quite plainly; that they're going to raise qualified immunity. I would like to get that done.

THE COURT: Judging by what's going on -- the Inspector General report and everything else -- might not that illuminate the issue of whether the law is clearly established in this area, and whether an officer -- federal officer had reason to know that what he or she was doing was wrong? Those are certainly standards that you take into account in determining qualified immunity.

MS. COHN: Well, that's right, your Honor; but I would like to get over the motion to dismiss hurdle on this, because I'm worried that essentially what -- if -- if we don't go ahead with what they can argue now on a motion to dismiss standard, then they're going to want to bring that motion to dismiss in five years, when we're done with the state-secrets

issue at the Supreme Court. And it's still going to be trailing very far behind the case against the government in a way that I don't think is reasonable.

The motion to dismiss doesn't require -- I mean, that's -- you know the statute. The part that you're talking about is kind of the merits decision. If they want to waive their right to bring a motion to dismiss on qualified immunity and only --

THE COURT: I think it was.

MS. COHN: -- only bring a summary-judgment motion, then they might be reasonable, but I don't expect that that's --

THE COURT: You're going to be knocked over with a feather if qualified immunity --

MS. COHN: Also, if they don't want to raise it on a motion to dismiss standard, and instead want to raise it as summary judgment, we can do that now. And I think we should, in order to try to bring these two pieces of the cases --

THE COURT: Aren't we going to resolve that with a lot less information now than we'll have further down the road?

MS. COHN: They're going to argue that even if everything we've alleged is true, they still are protected; that what they have to argue is on the motion to dismiss standard.

And so, again, if they want to forgo that argument

and only argue on summary judgment and have it based on, you know, actual evidence and the merits-based decision, then I probably need to talk to my colleagues. I'm less concerned about the time issues, but that's not -- I don't think I would submit what they want to do. And in that instance, I'd like to get going on that now, because it is a motion to dismiss. And I worry that we're going to end up in a situation.

You know, my client's no -- granted, we only filed *Jewel* in September; but as you know, we brought this case in early 2006. It's now 2009. We've had a change in administration. There has been no change in the Government's position. I'd like to try to get to the merits of this case before --

THE COURT: Well, all right. Since you raise that, then let me pursue something with you. You and I had many interesting discussions about preëmption --

MS. COHN: Yes.

THE COURT: -- on the State Secrets Privilege under F.I.S.A.

Isn't Mr. Coppolino on solid ground that, notwithstanding the fact that at least I believe and I think there's substantial support that F.I.S.A. preëmpts the State Secrets Privilege as far as F.I.S.A. claims are concerned, it does not do so with respect to these other claims?

MS. COHN: I'm afraid I --

THE COURT: And the State Secrets Privilege is still a live issue vis-a-vis the non-F.I.S.A. claims?

MS. COHN: I must say I disagree, your Honor.

THE COURT: Okay. Tell me why.

MS. COHN: I read 1806. My colleague mentioned 1806(f). I think what Congress tried to do with F.I.S.A. was to not create a situation where the Court was faced with differing rules for secret evidence in electronic surveillance cases. They wanted to set one set of rules for your Honor in electronic surveillance cases, and that set of rules is 1806(f). It is expressly about the Government's claims of national security around electronic surveillance. And I think it would be strange --

THE COURT: But the Wire Act and the Stored Communications Act cover more than simply intelligence surveillance.

MS. COHN: Yes, your Honor.

THE COURT: Covers a lot of other things.

MS. COHN: Yes.

THE COURT: And are you telling me that the State Secrets Privilege might not be alive with respect to those other claims?

MS. COHN: I think with regard to those other claims in this case, where it is about national security, it's clear that 1806(f) applies. I understand I'm not answering your

specific question.

THE COURT: Well, State Secrets Privilege might come up in a different context from simply intelligence activities, might it not?

MS. COHN: Yes, your Honor.

THE COURT: So?

MS. COHN: We don't think it -- in the -- in the case where a State Secrets Privilege is alleged, and concerning electronic surveillance materials, we think 1806(f) applies.

I think that's what Congress did. Congress wanted to -- there had been, you know -- as your Honor's well aware, there had been rampant electronic surveillance in a way that Congress was deeply concerned about in the Church Commission reports. That's the backdrop to F.I.S.A.

And I think it's very clear that all of the exclusive-means language of F.I.S.A., not only about the surveillance itself, but about the process by which the Court determines whether there -- the surveillance was legal, was intended to avoid a situation where part of a case was handled under 1806(f), and part of it was handled under the state-secrets issue. Artful pleading or artful ways for the Government to try to get around this comprehensive process that it had created in order to deal with electronic surveillance. And that's what I think. That's how I think the statute needs to be interpreted.

Otherwise, you're in a somewhat strange position, where you might have to apply the State Secrets Privilege, and it leads you in one direction, and 1806(f) would lead you in another with regard to the exact same surveillance, because one claim was background under Wiretap, and other under F.I.S.A..

THE COURT: Foreign intelligence? It could be in connection with a lot of other things.

MS. COHN: Right.

THE COURT: To me, that seems to be what was on the mind of the Congresspeople that Mr. Coppolino pointed out in the reference to the legislative materials.

MS. COHN: Well, I think --

THE COURT: Talking about J. Edgar Hoover and Congressional representatives and staff being surveilled in some fashion or other, and a state secret could certainly arise in that context.

MS. COHN: Mm-hm. I think that when a State Secrets Privilege is being alleged for electronic surveillance -- obviously, alleged for lots of other things, as it is in *Jeppesen* that -- that 8106 applies. You know, your Honor, we actually briefed this. And I'd be happy to do additional briefing on this, because I understand that this is of concern to you.

And we actually talked about this in the *amicus* brief under 1806(f) that we filed in *Al-Haramain*. And I'm happy to

submit that.

I'm also happy to submit additional briefing on this issue if you think it would help; but I understand what you're trying to get at, but I think we're right about the scope of 1806(f).

THE COURT: I'm suggesting that you don't think --

MS. COHN: I wouldn't stand up here and say something I didn't think we were right about, but I think that it makes sense in the -- in the -- in the sense of what Congress was trying to do with --

THE COURT: What do you think Congress was trying to do?

MS. COHN: I think Congress was trying to create one rule for electronic surveillance -- one rule about how it can be -- how it can be engaged in, and one rule about how claims that it has been -- that those rules have been violated were supposed to be handled.

And I think the most important part of that in 1806(f) is that the determination -- that the determination of whether the surveillance is legal or not needs to be made by the Court, and not by the Executive Branch.

THE COURT: What do you do about a state secret that has no bearing whatsoever on foreign intelligence: the Cosgrove situation. That was a plan or engineering of a fighter aircraft, I believe.

MS. COHN: Yes, it was.

THE COURT: That doesn't relate to foreign intelligence.

MS. COHN: I still think 1806(f) is the process. And remember the process is not -- there's nothing foreign intelligent about it. All it says is -- in fact, it's got some differences from the State Secrets Privileges, which we think are interesting and important. Fundamentally, all it says is that an aggrieved person -- that you need to make the decision about whether the surveillance was legal or not. That's the core of 1806(f), and that the -- that if the Government says that you should not show it to the other party, you shouldn't show it to the other party, except as you believe necessary in order to determine the legality.

So 1806(f) envisions a procedure that's completely *ex parte* and *in camera*, or, if your Honor believes that the parties need to know, then the parties can be informed, and you can take proper procedural protections around that.

It's not -- it's not such a rabid departure from the State Secrets Privilege as to be something to be concerned that it might apply outside of foreign-intelligence situations. I don't think that's a concern.

I think 1806(f) should apply in electronic surveillance across the board. It's a simple process. It's got some differences from the State Secret Privilege, but

they're not radical.

THE COURT: It would apply to surveillance of telephone communications between you and me?

MS. COHN: I believe that surveillance of telecommunications between you and me is part of what we're talking about in this case, your Honor.

THE COURT: Oh. I see.

MS. COHN: Well, I mean, if our dragnet theory would include, unfortunately, your communications with me over the phone as well as any others, because they're all being swept in.

THE COURT: I'm glad we haven't had those communications, then.

MS. COHN: No, we have not. Luckily, we're safe for the moment; but yes, I do think that 1806(f) would be the process by which one would bring domestic, you know -- if there was a claim of domestic surveillance, and if the Government alleged that national security -- remember, the Government has to allege that national security is at stake, so it's not going to happen in garden-variety cases, because I don't believe they would allege the State Secrets Privilege willy-nilly in garden-variety cases. It's a very high standard. I take them at their word at that.

THE COURT: It might be an activity that is completely different from intelligence activities.

MS. COHN: Yes. And I think 1806(f) needs to apply. Otherwise, you run into this strange situation where, in this instance, we are alleging violations of a range of statutes. And -- and honestly, I think that is what the statute says. I think it's pretty straightforward on this. And -- and I don't think there's an ambiguity in the statute that would lead you to look beyond it for the reasons that Mr. Bankston laid out; but again, I'm happy to offer, you know, additional briefing. I'd have all the benefit of all these wise people standing behind me on that issue, if it would help your Honor.

Again, I think we went into it in some detail in the *Al-Haramain amicus*, but I'm happy to present it kind of squarely as the issue to be addressed, if it would help.

THE COURT: Well, that may be helpful.

MS. COHN: Okay.

THE COURT: Anything further, Mr. Coppolino?

MR. COPPOLINO: On this F.I.S.A. preëmption issue, we not only do not agree that F.I.S.A. preëmpts the State Secrets Privilege out of F.I.S.A. claims; we don't think inside F.I.S.A. claims.

THE COURT: Well, I know that, but what about the outside F.I.S.A.?

MR. COPPOLINO: One thing I would point out to you is that if you look at 1806, the F.I.S.A., 50 U.S.C. 1806, which is the provision in which 1806(f) resides, you will see that

Congress repeatedly referred to electronic information acquired from an electronic surveillance conducted pursuant to this subchapter or this chapter.

THE COURT: That's what I'm going on.

MR. COPPOLINO: That's really what it seems to me limits 1806(f) to F.I.S.A. claims. It doesn't say, hey, any old intelligence claim, any old intelligence sources and methods, you can raise it under 1806(f) with F.I.S.A.

Now, of course, you're familiar, I think, with our argument that we don't think it preëmpts the F.I.S.A. claim; but rather than reiterate all that and re-brief it, I think that really we ought to consider, as you considered in *Al-Haramain*: where does preëmption lead us? Where do we actually go with it?

I mean, our position on disclosure to the plaintiffs' counsel is certainly not going to change.

And Ms. Cohn's suggestion that the Court could litigate the merits *ex parte*, I think, is, A, wrong, and B, risky, where the very existence of standing or alleged activities is even at stake, because you can't hide a lawsuit. Even if you try to proceed *ex parte*, you're going to eventually get to a point where you're either exercising jurisdiction and confirming standing, or you're declining to exercise jurisdiction.

If you reach the merits, that tends to suggest that

there's an activity there that actually exists when that's subject to the privilege assertion.

So I don't think *ex parte* litigation, even if it works, where what's at issue is the very existence of the alleged surveillance activity -- the reason it works under 1806(f) is that that provision applies, in our view, where the Government has given notice of the alleged surveillance.

Your Honor, I think I want to defer to Mr. Whitman for a few minutes.

THE COURT: Oh, he does want to say something after all.

MR. WHITMAN: Not if your Honor wants to rule in our favor at the moment. Then I won't.

THE COURT: I assume you want to respond to what Ms. Cohn said.

MR. WHITMAN: I do, your Honor, just very briefly.

As your Honor suggested to Ms. Cohn, I think that ruling on the United States' motion to dismiss or for summary judgment before requiring the individual-capacity defendants to answer or respond is really the only option that makes sense in this case as a matter of judicial efficiency, as a matter of law, and as a matter of logic.

THE COURT: Why not just get this show on the road and get all of the defendants in, and whatever motions they want to make, made, ruled upon, so that I just proceed with the

litigation?

MR. WHITMAN: Well, I think that's extremely problematic. And it would be very prejudicial.

No. The individual-capacity defendants -- first of all, as your Honor mentioned, the Government has indicated in its briefing that its privilege assertions preclude from litigation the very information necessary for the personal-capacity defendants to defend themselves.

And so it would make sense, just as a matter of logic and judicial efficiency, to address the United States' motion before requiring the individual-capacity defendants to respond.

And, in fact, that is the procedure being followed in other cases, in related cases before this Court; albeit, by stipulation of the parties, I understand, but it's also been a procedure that has been followed in other cases arising in similar circumstances. And we've cited some of those in our papers, where a plaintiff has brought a *Bivens* claim against an individual federal officer, and the Government has intervened in the case, asserted state secrets, and sought to dismiss the action essentially on behalf of the individual-capacity defendant.

And that is very -- and that -- the reason for that is because the state-secrets assertion is the Government's to assert. The individual-capacity defendants are powerless to control whether that privilege is asserted or waived, so they

have no means of raising issues that they otherwise would raise, were it not for the Government asserting the State Secrets Privilege.

And that really goes to the fundamental issue here, which is -- and I don't think it's one of the wrongs that the plaintiffs' counsel have fully recognized, which is: in responding to a complaint -- in initially responding to a complaint, the individual-capacity defendants are not limited to just filing an answer or a motion to dismiss. It is well within their right to seek dismissal under Rule 12(b)(6) or, alternatively, under Rule 56 and a motion for summary judgment. That happens all the time. And normally, there would be no problem with the individual-capacity defendants raising such a motion.

Here, however, the Government has asserted state secrets and related statutory privileges over the information that the individual-capacity defendants would otherwise use to support a motion for summary judgment when initially responding to the complaint. And because they have done so, that effectively is instructing the individual-capacity defendants that they are not allowed to use that evidence to defend themselves.

And the whole purpose of the qualified-immunity doctrine is to avoid, to the maximum extent possible, the burdens of litigation on federal officers when they're sued in

their individual capacity. And requiring them to answer or respond to a complaint when they do not have access to information that would allow them to assert a complete personal defense to the claims alleged against them is effectively denying them their qualified immunity.

And, for all those reasons, it makes -- really, the only option that makes sense in this case is to rule on the United States' motion before requiring the individual-capacity defendants to respond to the complaint.

THE COURT: Very well. Thank you.

Mr. Whitman, the matter's submitted.

MS. COHN: Your Honor, just a couple of things. I'm sorry to belabor this.

The first thing pointed out: I didn't hear Mr. Whitman; that they wanted to forgo their right to a motion to dismiss and go straight to summary judgment. I think we're still facing two motions, even after all of this is done. The first would -- you know, would be straight on the pleadings, which we could do now, so that, you know, I still remain concerned.

In any event, I'd -- you know, I'd like to know whether we should go ahead and oppose this motion and have a hearing again on September 17th on this request. I hope we can leave here with at least clarity about --

THE COURT: I'll try to give you guidance on that.

Let's see. It's set for September 15th?

MS. COHN: Seventeenth, I think.

MR. WHITMAN: Seventeenth, your Honor.

MS. COHN: Yeah. So we will need to respond and -- of course, by about late August.

THE COURT: Okay.

MS. COHN: The other thing on 1806(f): my learned colleagues did point out two more things I wanted to raise with you in terms of interpreting it. First, 1806(f) actually says that it applies to orders or other materials relating to electronic surveillance, or to discover information derived from electronic surveillance under this chapter.

THE COURT: Under this chapter?

MS. COHN: Right. That's only the "or clause." That's one of the ways, if you read the statute.

THE COURT: How does that help you?

MS. COHN: I think the fact that "under this chapter" isn't in the first part of clause; means that it is to be read more broadly, to electronic surveillance generally.

And then the second one is "to discover suppressed evidence derived under this chapter." So "under this chapter" is only in one of the two clauses of the statute, which, again, I think supports our plain-language reading of it.

THE COURT: Okay.

MS. COHN: And the second thing I would like to point

out is that electronic surveillance is actually defined in a way that does not limit it to foreign surveillance, electronic surveillance; that the definition in 1801(f)(2) of electronic surveillance is a broad definition. It doesn't limit itself to electronic surveillance in national-security cases or in foreign-intelligence cases. It's electronic surveillance, period.

So again, I think if you look at the statute, the plain reading of it is that it's all electronic surveillance; not just foreign intelligence electronic surveillance. And I think that leaves us in a strange position. Otherwise, it would leave us in a strange position, where the State Secrets Privilege arguments would apply to some of our causes of action, and 1806(f) would apply to others.

THE COURT: What's so strange about that?

MS. COHN: When you're dealing with the same underlying evidence, I think it can be very complicated.

THE COURT: Unless you've got causes of action. Sometimes different evidentiary rules apply to some claims and some causes of action, but not others. That's -- I'm sure you've faced that situation before.

MS. COHN: I do, your Honor; but I guess I would go back to the point -- and I won't belabor it further -- I don't think that's what Congress was trying to do here.

I think Congress was trying to create one process

and, frankly, ensure the stability of the justiciability of these requests. That's what this whole fight is about.

The Government's position is that the courts can't look whether they violated the law and the rights of millions of Americans.

And we think that Congress very clearly in F.I.S.A. wants the Court -- and provided that the Court should be the people who make the decision about whether the surveillance conducted by the Executive Branch is legal or not. It was a placement of the decision-making power. And 1806(f) is how that decision-making power gets placed firmly with the courts in this instance.

And I think to undermine that, to say that the statute undermines that and took that away, I think, is to misunderstand what Congress was doing in creating this set of statutes to begin with. They wanted to create the exclusive means. And they wanted a determination of whether what the Government was dealing was legal to be made by the Judicial Branch, as opposed to being made unilaterally by the Executive Branch; but what the Government here is arguing is that the President gets to decide what's legal, and that the courts can't look. And I think that that's wrong.

THE COURT: Okay. Thank you very much, Counsel.

Matters will be submitted.

(At 12:55 p.m. the proceedings were adjourned.)

CERTIFICATE OF REPORTER

I, LYDIA ZINN, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in C. 08-4373-VRW, Carolyn Jewel, Tash Hepting, Gregory Hicks, Erik Knutzen, and Joice Walton, v. National Security Agency ("NSA"); Keith B. Alexander, Director of the NSA; United States of America; Barack Obama, President of the United States; United States Department of Justice; Eric Holder, Attorney General of the United States; Dennis C. Blair, Director of National Intelligence, 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

Friday, July 31, 2009