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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VAUGHN R. WALKER, JUDGE

AL-HARAMAIN ISLAMIC )  
FOUNDATION, ET AL., )

PLAINTIFFS, )

VS. )

NO. C 07-109 VRW

GEORGE W. BUSH, ET AL., )

DEFENDANTS. )

SAN FRANCISCO, CALIFORNIA  
WEDNESDAY, SEPTEMBER 23, 2009

**TRANSCRIPT OF PROCEEDINGS**

**APPEARANCES :**

FOR PLAINTIFF: EISENBERG & HANCOCK  
1970 BROADWAY  
SUITE 1200  
OAKLAND, CA 94612

BY: **JON B. EISENBERG**  
**WILLIAM HANCOCK**  
**ATTORNEYS AT LAW**

STEVEN GOLDBERG  
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**(APPEARANCES CONTINUED ON FOLLOWING PAGE)**

REPORTED BY: JAMES YEOMANS, CSR #4039, RPR  
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1 **APPEARANCES:** (CONTINUED)

2 FOR PLAINTIFF: THOMAS HOWARD NELSON  
3 ATTORNEY AT LAW  
4 24525 E. WELCHES ROAD  
5 WELCHES, OREGON 97067

6 FOR DEFENDANT: U.S. DEPARTMENT OF JUSTICE  
7 CIVIL DIVISION  
8 20 MASSACHUSETTS AVENUE, N.W.  
9 ROOM 6102  
10 WASHINGTON, DC 20530  
11 BY: **ANTHONY JOSEPH COPPOLINO**  
12 **TIMOTHY STINSON**  
13 **ATTORNEYS AT LAW**

1 WEDNESDAY, SEPTEMBER 23, 2009 9:00 A.M.

2 **THE CLERK:** CALLING MDL NUMBER 06-1791, IN RE NATIONAL  
3 SECURITY AGENCY TELECOMMUNICATIONS RECORDS LITIGATION. AND  
4 THIS HEARING THIS MORNING RELATES TO THE CASE NUMBER 07-109, AL  
5 HERMAN ISLAMIC FOUNDATION VERSUS GEORGE BUSH.

6 APPEARANCES, COUNSEL.

7 **MR. EISENBERG:** JOHN EISENBERG FOR AL-HARAMAIN ISLAMIC  
8 FOUNDATION.

9 **THE COURT:** GOOD MORNING, MR. EISENBERG.

10 **MR. EISENBERG:** GOOD MORNING, YOUR HONOR.

11 **MR. GOLDBERG:** I'M STEVEN GOLDBERG AND THE OTHER  
12 MEMBERS OF OUR TEAM THOMAS NELSON AND WILLIAM HANCOCK.

13 **THE COURT:** VERY WELL. GOOD MORNING, MR. GOLDBERG,  
14 AND?

15 **MR. COPPOLINO:** GOOD MORNING, YOUR HONOR.

16 ANTHONY COPPOLINO DEPARTMENT OF JUSTICE CIVIL DIVISION  
17 OF THE GOVERNMENT, JOINED BY TIM STINSON OFFICE GENERAL COUNSEL  
18 NATIONAL SECURITY AGENCY.

19 **THE COURT:** GOOD MORNING, MR. COPPOLINO.

20 MR. EISENBERG, WHY DON'T YOU LEAD OFF. WE HAVE  
21 CROSS-MOTIONS, BUT I'D LIKE TO HAVE YOU LEAD OFF.

22 AND IN PARTICULAR YOU MIGHT ADDRESS WHETHER IN THE  
23 PUBLIC RECORD THERE IS INFORMATION WHICH NEGATES THE  
24 POSSIBILITY THAT THE INFORMATION WHICH WAS DEVELOPED ABOUT YOUR  
25 CLIENT WAS THE RESULT OF SOME SURVEILLANCE OR OTHER ACTIVITY

1 OTHER THAN ELECTRONIC SURVEILLANCE.

2 **MR. EISENBERG:** YES, YOUR HONOR.

3 **THE COURT:** AND ALSO NEGATES THE POSSIBILITY THAT  
4 THERE WAS A FISA WARRANT DIRECTED TO YOUR CLIENT. AND IS THERE  
5 ANYTHING IN THE PUBLIC RECORD THAT YOU POINTED TO THAT'S IN THE  
6 RECORD WHICH WOULD NEGATE EITHER OF THOSE, EITHER OR BOTH OF  
7 THOSE POSSIBILITIES?

8 **MR. EISENBERG:** YES, YOUR HONOR. I'LL SPEAK FIRST TO  
9 THE POSSIBILITY OF SOME SURVEILLANCE OTHER THAN ELECTRONIC  
10 SURVEILLANCE.

11 WE CAN START WITH ONE UNDISPUTED FACT AND MOVE FROM  
12 THERE. THAT IS, THE FACT THAT THE AL-HARAMAIN ISLAMIC  
13 FOUNDATION WAS SURVEILLED DURING THE 2003 INVESTIGATION.

14 THAT FACT IS UNDISPUTED BECAUSE IT'S POSTED ON THE  
15 FBI'S INTERNET WEBSITES. DEPUTY DIRECTOR JOHN PISTOLE SAID WE  
16 USED SURVEILLANCE IN THE 2004 INVESTIGATION OF AL-HARAMAIN.

17 FROM THERE LET ME MOVE TO THE NEXT UNDISPUTED FACT.  
18 WENDELL BELEW AND ASIM GHAFOOR SPEAK ON THE TELEPHONE WITH  
19 SOLIMAN AL-BUTHI DURING THE PERIOD OF THAT INVESTIGATION.

20 THEY TALK ABOUT THE REPRESENTATION OF AL-HARAMAIN AND  
21 A MAN NAMED MOHAMMAD JAMAL KHALIFA IN THE 911 LITIGATION, IN  
22 LITIGATION BY VICTIMS AND FAMILY OF THE 911 ATTACKS AGAINST  
23 MANY INDIVIDUALS AND ORGANIZATIONS. MR. KHALIFA WAS OSAMA  
24 BIN-LADEN'S BROTHER-IN-LAW.

25 AT THE END OF THE 2004 INVESTIGATION OFAC, THE OFFICE

1 OF FOREIGN ASSETS CONTROL, DECLARED DIRECT LINKS BETWEEN  
2 AL-HARAMAIN AND OSAMA BIN-LADEN. THE DIRECT LINKS EVIDENTLY  
3 BEING THE FACT AL-HARAMAIN AND OSAMA BIN-LADIN'S BROTHER-IN-LAW  
4 SHARED THE SAME LAWYER AS GHAFOR.

5 FROM THIS WE GET A REASONABLE INFERENCE AND, I  
6 BELIEVE, THE ONLY REASONABLE INFERENCE THAT OFAC RELIED ON  
7 SURVEILLANCE OF THOSE TELEPHONE CALLS DURING 2004 TO DECLARE  
8 DIRECT LINKS.

9 **THE COURT:** WERE THESE COMMUNICATIONS THE ONLY  
10 COMMUNICATIONS THAT THESE LAWYERS HAD WITH THE INDIVIDUALS YOU  
11 IDENTIFIED?

12 THAT IS TO SAY, CAN WE EXCLUDE THE POSSIBILITY THAT  
13 THERE WERE COMMUNICATIONS OTHER THAN WIRE AND  
14 TELE-COMMUNICATION COMMUNICATIONS?

15 **MR. EISENBERG:** PERSONAL CONVERSATIONS, PERHAPS?

16 **THE COURT:** PERSONAL CONVERSATIONS, FACE-TO-FACE  
17 MEETINGS?

18 **MR. EISENBERG:** I DON'T KNOW THE ANSWER TO THAT  
19 QUESTION, YOUR HONOR, I NEVER ASKED THEM.

20 IF YOU MEAN SOLIMAN AL-BUTHI PERSONALLY, I PRESUME  
21 NOT, BECAUSE THE LAWYERS WERE IN WASHINGTON D.C. AND  
22 MR. SOLIMAN AL-BUTHI IN SAUDI ARABIA. I GUESS, IF --

23 **THE COURT:** ASSUME IT WOULD BE RATHER EASY TO GET THAT  
24 INFORMATION, WOULD IT NOT?

25 **MR. EISENBERG:** IT WOULD BE, BUT I'VE HAD NO REASON

1 TO. AND THE REASON WHY I HAD NO REASON TO IS BECAUSE THE  
2 GOVERNMENT HAS PRESENTED NO OPPOSING EVIDENCE AT ALL, AND ON  
3 OUR MOTION FOR SUMMARY JUDGMENT THE IMPORT OF THIS REASONABLE  
4 INFERENCE IS THAT WE HAVE MADE A PRIMA FACIE CASE OF ELECTRONIC  
5 SURVEILLANCE.

6 IT'S REASONABLE TO INFER THAT THE SURVEILLANCE  
7 MR. PISTOLE ADMITTED WAS SURVEILLANCE OF THESE TELEPHONE CALLS.  
8 THAT'S A REASONABLE INFERENCE, IT CREATES A PRIMA FACIE CASE.

9 THE RESULT OF THAT IS THAT WE'VE SUSTAINED OUR BURDEN  
10 ON THE SUMMARY JUDGMENT MOTION. THE BURDEN SHIFTS TO THE  
11 GOVERNMENT TO SHOW A GENUINE ISSUE OF TRIABLE FACT. THEY HAVE  
12 NOT. THEY HAVE SUBMITTED NO EVIDENCE WHATSOEVER.

13 THIS COURT HAS GIVEN THEM AMPLE OPPORTUNITY TO SUBMIT  
14 CLASSIFIED EVIDENCE UNDER SECURE CONDITIONS. THEY HAVE NOT  
15 AVAILED THEMSELVES OF THAT OPPORTUNITY. THEY SUBMITTED NO  
16 PUBLIC EVIDENCE AT ALL.

17 SO WHAT WE END UP WITH IS A PRIMA FACIE CASE BEING  
18 UNDISPUTED FACTS, UNREBUTTED, NO TRIABLE ISSUE OF FACT AND I  
19 BELIEVE, THEREFORE, ENTITLEMENT TO SUMMARY JUDGMENT OF  
20 LIABILITY.

21 OF STANDING, EXCUSE ME, THIS GOES TO STANDING. I  
22 BELIEVE THE PROCEDURAL CONTEXT IN WHICH WE ARE NOW HERE IS  
23 CRITICAL. WE SUSTAINED OUR BURDEN, THE GOVERNMENT HAS NOT  
24 RESPONDED.

25 I SUPPOSE, IT'S POSSIBLE TO ENVISION VARIOUS

1 THEORETICAL SCENARIOS WHEREBY THE SURVEILLANCE MR. PISTOLE  
2 ADMITTED WAS NOT ELECTRONIC SURVEILLANCE OF THESE PHONE  
3 CONVERSATIONS, BUT WHERE WE STAND RIGHT NOW IS WITH UNREBUTTED  
4 INFERENCE AND THE INFERENCE, THERE IS NOTHING IN THE EVIDENCE  
5 THAT WE HAVE PRESENTED THAT RAISES AN INFERENCE THAT  
6 SURVEILLANCE WAS OF ANY OTHER SORT, NOTHING.

7 IF THEY WANT TO RAISE THAT COUNTER-INFERENCE THEY MUST  
8 PRESENT EVIDENCE. THEY HAVE NOT. I THINK THAT'S REALLY  
9 CRITICAL. NOW, WHY HAVEN'T THEY?

10 I CAN ONLY GUESS THEY GOT NOTHING TO PRESENT THAT  
11 WOULD REBUT THE INFERENCE.

12 SO NOW LET ME TURN TO THE ISSUE OF WHETHER OR NOT  
13 THERE WAS A FISA WARRANT. I BELIEVE, THAT THE MERE  
14 CIRCUMSTANCES OF THE CASE THAT ARE IN THE PUBLIC RECORD RAISE  
15 THE INFERENCE THAT THERE WAS NO FISA WARRANT. THE GOVERNMENT  
16 BELIEVES --

17 **THE COURT:** WHAT ARE THOSE CIRCUMSTANCES?

18 **MR. EISENBERG:** GOVERNMENT BELIEVES THAT AL-HARAMAIN  
19 HAS DIRECT LINKS WITH AL-QAEDA. AT THE TIME THE GOVERNMENT  
20 BELIEVED THAT THE GOVERNMENT HAD A PROGRAM FOR WARRANTLESS  
21 WIRETAPPING OF PERSONS BELIEVED TO HAVE LINKS WITH AL-QAEDA.

22 IT'S UNFATHOMABLE TO THINK IF THE GOVERNMENT HAD THIS  
23 PROGRAM AND THE GOVERNMENT BELIEVED THAT AL-HARAMAIN HAD LINKS  
24 WITH AL-QAEDA THAT THEY WEREN'T WIRETAPPING THE PLAINTIFFS  
25 WITHOUT A WARRANT.

1 FRANKLY, I MYSELF WOULD BE SHOCKED TO KNOW THAT THE  
2 GOVERNMENT THOUGHT THERE WERE TERRORISTS OUT THERE, HAD A  
3 PROGRAM FOR WIRETAPPING THEM AND WASN'T WIRETAPPING THEM. THAT  
4 WOULDN'T MAKE ANY SENSE AT ALL.

5 IT'S ALL IN THE PUBLIC RECORD. AGAIN, I BELIEVE THAT  
6 RAISES A REASONABLE INFERENCE THAT THERE WAS NO WIRE -- THERE  
7 WAS NO FISA WARRANT FOR THIS WIRETAPPING BECAUSE IT HAD TO HAVE  
8 BEEN DONE UNDER THIS PROGRAM.

9 THE PROGRAM WAS THERE, THE PROGRAM WAS IN PLACE IN  
10 ORDER TO EVADE FISA, THAT WAS THE REASON FOR ITS EXISTENCE.  
11 WHY ON EARTH WOULD THEY GET A FISA WARRANT TO PERFORM  
12 SURVEILLANCE THAT THEY BELIEVED THEY HAD NO NEED TO GET A FISA  
13 WARRANT FOR?

14 AGAIN, I BELIEVE, THAT SHIFTS THE BURDEN. WE'VE  
15 SUSTAINED OUR BURDEN UNDER RULE 56, OF PRESENTING A PRIMA FACIE  
16 CASE AND THAT SHIFTS THE BURDEN TO THEM TO SHOW EVIDENCE OF A  
17 WARRANT.

18 THERE IS A SEPARATE REASON WHY THEY HAVE THE BURDEN OF  
19 PRESENTING EVIDENCE OF A WARRANT, THAT WOULD HAVE, I BELIEVE,  
20 ARISEN IF WE HADN'T RAISED A REASONABLE INFERENCE, AND THAT IS  
21 THE FACT THAT THE EXISTENCE OR NOT OF A FISA WARRANT IS WITHIN  
22 THEIR EXCLUSIVE KNOWLEDGE.

23 AND I'VE SAID IT TO THE COURT IN MANY CASES IT'S  
24 ESTABLISHED, A VERY WELL ESTABLISHED AND LONG-STANDING RULE  
25 THAT SAYS, WHEN ONE OF THE PARTIES HAS PECULIAR KNOWLEDGE OF



1 THE FACTS TO THE EXCLUSION OF THE OTHER PARTY, THE OTHER PARTY  
2 IT IS REASONABLE TO SHIFT THE BURDEN.

3 **THE COURT:** WELL, COULD THE GOVERNMENT HAVE,  
4 CONSISTENT WITH FISA, DISCLOSED THE EXISTENCE OF A FISA  
5 WARRANT?

6 **MR. EISENBERG:** UNDER SECURE CONDITIONS, YES. I  
7 RECALL THREE YEARS AGO IN JUDGE KING'S COURTROOM IN OREGON  
8 TELLING JUDGE KING SOMETHING TO THIS EFFECT.

9 ALL MR. COPPOLINO NEEDS TO DO IS TELL ME, UNDER ANY  
10 CONDITIONS THAT HE WISHES, THAT HE HAD A FISA WARRANT AND I'LL  
11 BE GONE. THIS CASE WILL BE OVER.

12 I BELIEVE, I'VE MADE CLEAR SINCE THEN, THAT'S REALLY  
13 ALL WE NEED TO KNOW. IF THERE WAS A FISA WARRANT, I WISH I'D  
14 KNOWN THREE YEARS AGO. I WISH THIS COURT HAD KNOWN THREE YEARS  
15 AGO BECAUSE A TREMENDOUS AMOUNT OF WORK COULD HAVE BEEN SPARED.

16 THEY HAVE NOT PRODUCED EVIDENCE OF A FISA WARRANT  
17 BECAUSE THEY DID NOT HAVE A FISA WARRANT. THAT'S GOT TO BE  
18 VERY, VERY CLEAR.

19 THEY HAVE PRESENTED REPEATEDLY CLASSIFIED DECLARATIONS  
20 IN THIS CASE, I CANNOT BELIEVE THAT IN THOSE CLASSIFIED  
21 DECLARATIONS THEY SAID, OH, BY THE WAY, WE HAVE FISA WARRANT  
22 FOR THE SURVEILLANCE BECAUSE IF THAT WERE THE CASE I CANNOT  
23 BELIEVE I'D BE STANDING HERE TODAY.

24 AND I TRY TO GROUND MYSELF IN THE REAL WORLD IN THIS  
25 CASE. IN THE REAL WORLD IF THEY HAD A FISA WARRANT THE

1 JUDICIARY WOULD HAVE KNOWN IT LONG AGO AND I WOULD HAVE BEEN  
2 WORKING ON SOME OTHER CASES RIGHT NOW. PROBABLY SEVERAL OTHER  
3 CASES IN PLACE OF THIS ONE.

4 I'LL SAY IT AGAIN TODAY, 1806F IS THERE, THIS COURT  
5 HAS INDICATED TO THE DEFENDANTS THE PROVISIONS OF THIS STATUTE  
6 ARE AVAILABLE TO ASSURE YOU, THE GOVERNMENT, THAT YOU CAN  
7 PRESENT SENSITIVE INFORMATION TO THE COURT.

8 THAT TWO OF THE PLAINTIFF'S ATTORNEYS WHO HAVE  
9 OBTAINED SECURITY CLEARANCE, TOP SECRET SCI SECURITY CLEARANCE  
10 CAN SEE, AND YOU CAN BE ASSURED THAT IT WILL NOT BE DISCLOSED  
11 TO THE PUBLIC, AND THEY HAVE NOT DONE THAT.

12 THEY HAVE REFUSED WHICH IS WHY WE ARE HERE TODAY  
13 PROCEEDING ON NONCLASSIFIED EVIDENCE. THERE'S A REASON WHY  
14 THEY HAVE NOT DONE THAT, THEY DIDN'T HAVE A FISA WARRANT.

15 SO THAT'S HOW I WOULD ANSWER YOUR QUESTION, YOUR  
16 HONOR. WHERE SHALL I GO FROM HERE?

17 **THE COURT:** WHEREVER YOU WANT TO GO.

18 **MR. EISENBERG:** I'D LIKE TO GO TO THE MERITS, THAT'S  
19 WHAT I'M REALLY INTERESTED IN. THAT'S WHY WE FILED THIS  
20 LAWSUIT, TO ADJUDICATE THE MERITS AND, I THINK, IT'S TIME.

21 THE STATE SECRETS PRIVILEGE, AS I UNDERSTAND IT, IS  
22 NOT IN PLAY NOW, IT'S OUT OF THE PICTURE. WE'RE NOW PROCEEDING  
23 ON NONCLASSIFIED EVIDENCE. WE PRESENTED --

24 **THE COURT:** WELL, THAT ASSUMES, OF COURSE, THAT  
25 THERE'S VITALITY TO THE STATE SECRETS PRIVILEGE, BUT THAT

1 ASSUMPTION IMPLICATES THE SUBJECT THAT WE WERE JUST DISCUSSING,  
2 NAMELY, THAT THERE MIGHT BE SOURCES OTHER THAN ELECTRONIC  
3 SURVEILLANCE AND INTERCEPTIONS THAT GAVE RISE TO THE  
4 INFORMATION THAT WAS USED TO OBTAIN THE CLASSIFICATION OF YOUR  
5 CLIENT.

6 **MR. EISENBERG:** BUT THE GOVERNMENT HAS CHOSEN NOT TO  
7 PROCEED UNDER 1806F. THEY HAVE CHOSEN NOT TO PRESENT ANY  
8 NONCLASSIFIED EVIDENCE, EXCUSE ME, YOUR HONOR, ANY CLASSIFIED  
9 EVIDENCE. THAT IS A CHOICE THAT THEY HAVE MADE.

10 IN THE FACE OF THE COURT'S ASSURANCES THAT IT WILL NOT  
11 BE DISCLOSED TO THE PUBLIC, IT WON'T GO PAST YOUR HONOR,  
12 MR. GOLDBERG AND ME, MR. COPPOLINO AND MR. STINSON, THEY'VE  
13 CHOSEN NOT TO.

14 OKAY. SO MY TAKE ON THIS SITUATION RIGHT NOW IS THAT  
15 THE STATE SECRETS PRIVILEGE IS OUT OF THE CASE.

16 **THE COURT:** ONE OF THE SUGGESTIONS THAT YOU MADE,  
17 EXCUSE ME FOR INTERRUPTING YOU, YOUR ARGUMENTS ON THE MERITS  
18 WHICH I DO WANT TO HEAR.

19 **MR. EISENBERG:** WE'LL GET THERE.

20 **THE COURT:** ONE OF THE SUGGESTIONS YOU MAKE IN YOUR  
21 PAPERS IS THAT WHATEVER RULING I MAKE I SHOULD BASE IT BOTH ON  
22 THE PUBLIC RECORD AND ALSO ON THE CLASSIFIED INFORMATION THAT  
23 HAS BEEN SUBMITTED.

24 BUT ASSUME THAT I'M WRONG ABOUT THE FISA PREEMPTION,  
25 AND ASSUME FURTHER THAT THERE IS VITALITY TO THE NINTH CIRCUIT

1 STATEMENT IN THE CASE, WHAT WAS THAT NOVEMBER OF 2007, THAT THE  
2 PLAINTIFFS CANNOT PROCEED WITHOUT THE SEALED DOCUMENT, WHAT  
3 OBLIGATION AM I UNDER WITH RESPECT TO PRESERVING  
4 CONFIDENTIALITY OF THAT INFORMATION?

5 AND CAN I RELY UPON IT IN MAKING A DECISION, WHICH IS  
6 GOING TO BE A PUBLIC DECISION, THAT WOULD ALLOW A REASONABLE  
7 PERSON TO INFER THE CONTENT OF THE SEALED DOCUMENT?

8 **MR. EISENBERG:** WELL, AT THIS POINT IN THE LITIGATION,  
9 THE POSTURE WE'RE IN CURRENTLY, YOUR HONOR HAS RULED THAT FISA  
10 PREEMPTS THE PRIVILEGE.

11 **THE COURT:** BUT ASSUME I'M WRONG.

12 **MR. EISENBERG:** OKAY.

13 **THE COURT:** ASSUME THE COURT OF APPEALS SAYS THAT IS  
14 AN INCORRECT INTERPRETATION.

15 **MR. EISENBERG:** HERE'S WHY WE REQUESTED THE  
16 ALTERNATIVE RULING. ASSUME YOUR WRONG ON THAT, ASSUME THE  
17 COURT FINDS THE EVIDENCE WE'VE SUBMITTED, NEVER MIND FISA  
18 PREEMPTION, I BELIEVE RIGHT NOW FISA PREEMPTION DOESN'T MATTER,  
19 AND I BELIEVE THE REASON WHY IS THAT WE'RE PROCEEDING, AT  
20 LEAST, SAY FOR THE MOMENT ONLY ON PUBLIC EVIDENCE. THE NINTH  
21 CIRCUIT RULED THAT THE VERY SUBJECT MATTER OF THE TERRORIST  
22 SURVEILLANCE PROGRAM IS NOT A STATE SECRET.

23 THE IMPORT TO THAT RULING WITHIN THE CONTEXT OF THE  
24 STATE SECRETS PRIVILEGE IS THAT WE CAN GO FORWARD WITH  
25 NON-CLASSIFIED EVIDENCE TO TRY TO MAKE OUR CASE, AND IF WE CAN

1 MAKE OUR CASE WITHOUT USING THE DOCUMENT, WHICH IS SUBJECT TO  
2 THE PRIVILEGE IF IT APPLIES, IF WE CAN MAKE OUR CASE WITHOUT  
3 USING THE DOCUMENT WE GO FORWARD.

4 **THE COURT:** OKAY.

5 **MR. EISENBERG:** SO WHAT THAT MEANS IS THAT --

6 **THE COURT:** BUT THEN WHY SHOULD I EVEN CONSIDER THE  
7 DOCUMENT FOR PURPOSE OF THE DECISION?

8 **MR. EISENBERG:** BECAUSE I AM WORRIED ABOUT MY  
9 RETIREMENT. I AM WORRIED THAT WITHOUT A DECISION, AN  
10 ALTERNATIVE DECISION CONSIDERING THE DOCUMENT, WE'LL BE BACK  
11 HERE AGAIN IN A FEW YEARS FROM NOW. AND LET ME ELABORATE ON  
12 THAT, WITH THE COURT'S INDULGENCE.

13 WHAT I'M ASKING THE COURT TO DO, IS MAKE A COMPLETE  
14 RECORD FOR APPELLATE REVIEW. THIS CASE IS GOING TO THE NINTH  
15 CIRCUIT CERTAINLY AND PERHAPS BEYOND, IT'S GOING TO HAPPEN.

16 WHAT I VERY MUCH WOULD LIKE TO SEE IS FOR IT TO GO UP  
17 ON APPEAL ONLY ONCE MORE. THAT'S GENERALLY -- THAT'S THE  
18 GENERAL THEORY OF APPELLATE REVIEW ONCE. YOU DO IT ONCE,  
19 APPEAL FROM A FINAL JUDGMENT, NOT PIECEMEAL LITIGATION. OKAY.  
20 SO MY CONCERN IS THAT --

21 **THE COURT:** IT'S ALREADY BEEN THERE ONCE.

22 **MR. EISENBERG:** I WOULD LIKE THE COURT TO MAKE A  
23 COMPLETE RECORD THAT THE NINTH CIRCUIT CAN REFER TO IN THE  
24 EVENT THE COURT, THE NINTH CIRCUIT FINDS THAT THE  
25 NON-CLASSIFIED EVIDENCE, THE PUBLIC EVIDENCE ISN'T SUFFICIENT.

1 I BELIEVE THEY WILL, BUT BEING A VERY NERVOUS  
2 APPELLATE TYPE I WORRY ABOUT THAT. AND IF THEY DON'T FIND THE  
3 EVIDENCE SUFFICIENT, I WOULD LIKE THEM TO HAVE A RULING FROM  
4 THIS COURT, AN ALTERNATIVE RULING THAT THEY CAN REVIEW WITHOUT  
5 THE NEED FOR A REMAND, AND OUR ALTERNATIVE RULING AND THEN  
6 ANOTHER TRIP TO THE NINTH CIRCUIT.

7 NOW, I RECOGNIZE THAT FOR THIS COURT TO ISSUE THE  
8 RULING PRESENTS AN ODD PROBLEM FROM MY PERSPECTIVE, FROM THE  
9 PERSPECTIVE OF THE AL-HARAMAIN PLAINTIFFS AND THEIR COUNSEL.

10 I DON'T WANT US TO GET BACK INTO THE THICKET OF 1806F  
11 SIMPLY BECAUSE MR. COPPOLINO FOUGHT SO HARD DESPITE OUR  
12 SECURITY CLEARANCES, DESPITE THE COURT APPEARANCES, HE SAID  
13 WE'RE NOT GOING THERE, WE REFUSE TO GO THERE.

14 I DON'T THINK WE NEED TO GO THERE AND I UNDERSTAND THE  
15 COURT'S CONCERN. I APPRECIATE VERY MUCH THAT THE COURT DOES  
16 NOT FEEL COMFORTABLE WITH THE PLAINTIFFS LITIGATING WHAT I CALL  
17 BLIND, LITIGATING WITHOUT SEEING WHAT THEY'RE UP AGAINST.

18 BUT RECALLING THAT WE HAVE SEEN THE DOCUMENT, SOME OF  
19 US, WE DO FEEL COMFORTABLE PLACING IT, THE DECISION IN YOUR  
20 HONOR'S HANDS, WITHOUT US HAVING ANY NEED FOR FURTHER ACCESS TO  
21 THE DOCUMENT, WHICH MEANS WE DON'T NEED TO CRAWL BACK INTO THE  
22 1806F THICKET.

23 WE ARE COMFORTABLE WITH YOUR HONOR ISSUING THE  
24 ALTERNATIVE RULING BASED SOLELY ON YOUR HONOR'S REVIEW OF THE  
25 DOCUMENT, WITHOUT US HAVING ACCESS TO IT OR PRESENTING FURTHER

1 ARGUMENT ABOUT IT.

2 I WOULD MUCH RATHER PRESENT SOME ARGUMENT BECAUSE I  
3 BELIEVE THAT IT WOULD BE HELPFUL, I'LL LEAVE IT AT THAT. IT  
4 WOULD BE HELPFUL, BUT I ALSO BELIEVE A CAREFUL READING OF WHAT  
5 WE PRESENTED ALREADY WOULD ENABLE THE COURT TO UNDERSTAND HOW  
6 WE WOULD ARGUE CERTAIN ASPECTS OF THE DOCUMENT.

7 SO ULTIMATELY WHAT I AM LOOKING FOR, WHAT WE ARE  
8 LOOKING FOR IS A COMPLETE RECORD TO AVOID ENDLESS LITIGATION IN  
9 THIS CASE.

10 **THE COURT:** ALL RIGHT. YOUR MERITS ARGUMENT.

11 **MR. EISENBERG:** WE'RE THERE, FINALLY, AFTER THREE AND  
12 A HALF YEARS WE'RE FINALLY THERE. I NOW GET TO ARGUE THE POINT  
13 THAT WE FILED THIS LAWSUIT FOR, THREE AND A HALF YEARS AGO.

14 ISN'T THAT WONDERFUL, AND I VERY MUCH LOOK FORWARD TO  
15 MR. COPPOLINO'S RESPONSE ON THE MERITS. I'LL START WITH THE  
16 WORDS OF PRESIDENT OBAMA IN 2007.

17 "WARRANTLESS SURVEILLANCE OF AMERICAN CITIZENS IN  
18 DEFIANCE OF FISA IS UNLAWFUL AND UNCONSTITUTIONAL."

19 COULDN'T GET MORE CLEARER THAN THAT. AND THE  
20 PRESIDENT WAS RIGHT, EVEN THOUGH HE'S ONLY A SENATOR AT THE  
21 TIME, HE WAS STILL RIGHT, HE WAS RIGHT FOR TWO REASONS.

22 THE FIRST REASON IS PECULIAR TO FISA ITSELF. FISA  
23 MAKES IT UNDISPUTED IT'S UNLAWFUL TO CONDUCT ELECTRONIC  
24 SURVEILLANCE QUOTE "EXCEPT AS AUTHORIZED BY STATUTE."

25 NO STATUTE AUTHORIZED WHAT THE GOVERNMENT CALLS THE

1 TSP. NOW, THE BUSH DEPARTMENT OF JUSTICE ARGUED THAT THE TSP  
2 WAS AUTHORIZED BY THE 2001 AUTHORIZATION FOR USE OF MILITARY  
3 FORCE AGAINST TERRORISTS, THAT'S THE AUMF, A-U-M-F, BUT IN OUR  
4 MOTION FOR SUMMARY JUDGMENT WE'VE SHOWN MULTIPLE REASONS WHY  
5 THE BUSH DOJ WAS WRONG ABOUT THAT. AND I'LL SUMMARIZE THEM.

6 THE AUMF IS LIMITED TO INSTANCES OF WAR ON THE BATTLE  
7 FIELD. THAT DOESN'T COVER THE TSP.

8 THE AUMF DOES NOT ATTEMPT TO ALTER FISA'S WARRANT  
9 REQUIREMENT.

10 FISA'S EXCEPTION FOR ELECTRONIC SURVEILLANCE AS  
11 AUTHORIZED BY STATUTE WAS INTENDED TO REFER ONLY TO STATUTORY  
12 AUTHORIZATION BY FISA, I'M SORRY, BY FISA AND BY TITLE 7 OF THE  
13 OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968.

14 THE AUMF IS A RED HERRING. SOME MEMBERS OF THE  
15 CURRENT OBAMA ADMINISTRATION HAVE CALLED IT, THEY CALLED IT THE  
16 AUMF JIG, J-I-G.

17 THE MAIN EVENT HERE IS THE SECOND REASON WHY PRESIDENT  
18 OBAMA WAS RIGHT IN 2007. IT'S THE PRESIDENTIAL POWER ISSUE,  
19 IT'S THE HEART OF THIS CASE. THE QUESTION IS THIS:

20 MAY THE PRESIDENT OF THE UNITED STATES BREAK THE LAW  
21 IN THE NAME OF NATIONAL SECURITY?

22 THIS QUESTION IS NOT PECULIAR TO FISA, IT GOES TO THE  
23 HEART OF THE CONSTITUTIONAL SEPARATION OF POWERS. AND WE'RE  
24 ASKING THIS COURT TO SAY, NO, THE PRESIDENT OF THE UNITED  
25 STATES MAY NOT BREAK THE LAW IN THE NAME OF NATIONAL SECURITY.



1           THIS IS NOTHING NEW IN AMERICAN JURISPRUDENCE, IT'S  
2       BEEN SAID BEFORE. IT WAS SAID IN 1952 IN THE STEEL SEIZURE  
3       CASE, YOUNGSTOWN CASE, WHERE JUSTICE JACKSON SAID IN HIS FAMOUS  
4       CONCURRING OPINION THIS: IT'S THE THIRD PRONG FOR ASSESSING  
5       THE EXTENT OF PRESIDENTIAL POWER, HE SAID THIS.

6           "WHEN THE PRESIDENT TAKES MEASURES INCOMPATIBLE WITH  
7       THE EXPRESS OR IMPLIED WILL OF CONGRESS, HIS POWER IS AT ITS  
8       LOWEST EBB, WHERE HE CAN RELY ONLY UPON HIS OWN CONSTITUTIONAL  
9       POWERS MINUS ANY CONSTITUTIONAL POWERS OF CONGRESS OVER THE  
10      MATTER." ONE WOULD THINK THAT WOULD SETTLE THE QUESTION.

11          BUT EVIDENTLY THIS STATEMENT OF CONSTITUTIONALITY  
12      NEEDS TO BE SAID AGAIN IN THIS CASE AND WE ARE ASKING THIS  
13      COURT TO SAY IT.

14          30 YEARS AGO CONGRESS EXPRESSED ITS WILL IN FISA.  
15      CONGRESS SAID DOMESTIC ELECTRONIC SURVEILLANCE FOR FOREIGN  
16      INTELLIGENCE PURPOSES REQUIRES A COURT ORDER, A FISA WARRANT.

17          CONGRESS INTENDED FOR FISA TO PUT PRESIDENTIAL POWER  
18      AT ITS LOWEST EBB. IN THE WORDS OF JUSTICE JACKSON. IN HAMDAN  
19      VERSUS RUMSFELD A FEW YEARS AGO JUSTICE KENNEDY SAID IN HIS  
20      CONCURRING OPINION THIS. AND I'M QUOTING.

21          "CONGRESS IN THE PROPER EXERCISE OF ITS POWER AS AN  
22      INDEPENDENT BRANCH OF GOVERNMENT HAS SET LIMITS ON THE  
23      PRESIDENT'S AUTHORITY." IN THAT CASE INVOLVING THE UNIFORM  
24      CODE OF MILITARY JUSTICE.

25          THAT'S WHAT HAPPENED HERE. CONGRESS HAS SET LIMITS ON

1 THE PRESIDENT'S AUTHORITY TO CONDUCT DOMESTIC ELECTRONIC  
2 SURVEILLANCE FOR FOREIGN INTELLIGENCE PURPOSES. THESE LIMITS  
3 ARE BINDING ON THE PRESIDENT OF THE UNITED STATES.

4 IN THE WORDS OF ANOTHER JUSTICE OF THE U.S. SUPREME  
5 COURT BURGER IN THE UNITED STATES VERSUS NIXON:

6 THE PRESIDENT IS NOT "ABOVE THE LAW." THE PRESIDENT  
7 MUST FOLLOW NECESSARILY FROM CONGRESS."

8 AS LONG AS I'M QUOTING FAMOUS PEOPLE LET ME QUOTE THE  
9 FATHER OF OUR CONSTITUTION JAMES MADISON, FEDERALIST NUMBER 47,  
10 IF I MAY BE SO POMPOUS. JAMES MADISON SAID THIS.

11 "THE ACCUMULATION OF ALL POWERS IN THE SAME HANDS MAY  
12 JUSTLY BE PRONOUNCED THE VERY DEFINITION OF TYRANNY. THE VERY  
13 DEFINITION OF TYRANNY". END OF QUOTE.

14 THE THEORY OF PRESIDENTIAL POWER UNDERLYING THE  
15 TERRORIST SURVEILLANCE PROGRAM WOULD CONCENTRATE TOO MUCH POWER  
16 IN A SINGLE PERSON'S HANDS, THE POWER TO BREAK THE LAW.

17 I THINK, THAT'S REALLY DANGEROUS. IT'S ACTUALLY  
18 MONARCHICAL. IT'S WHAT THE AMERICAN REVOLUTION WAS ALL ABOUT  
19 AND IT'S WHAT OUR CONSTITUTIONAL SYSTEM OF CHECKS AND BALANCES  
20 IS INTENDED TO PREVENT, AN IMBALANCE OF GOVERNMENT POWER.

21 LET ME OFFER THE COURT ANOTHER QUOTE. THE INHERENT  
22 POWER THEORY IS HERE, THE QUOTE BEGINS, "PARTICULARLY DANGEROUS  
23 BECAUSE IT COMES AT THE EXPENSE OF BOTH CONGRESS' AND THE  
24 JUDICIARY'S POWER TO DEFEND THE INDIVIDUAL LIBERTIES OF  
25 AMERICANS." END OF QUOTE.

1            THAT'S ACTUALLY FROM THE DEPARTMENT OF JUSTICE. AT  
2 LEAST, ONE OF ITS MEMBERS, ASSOCIATE DEPUTY ATTORNEY GENERAL  
3 DONALD VERRILLI IN AN AMICUS BRIEF HE FILED IN THE ACLU VERSUS  
4 NSA LITIGATION.

5            LET ME QUOTE SOME MORE FROM THE BRIEF. HE SAID THIS  
6 ABOUT THE STEEL SEIZURE CASE. THE SUPREME COURT -- BEGINNING  
7 THE QUOTE "SUPREME COURT ESTABLISH THAT CONGRESS CAN, EVEN  
8 DURING TIME OF WAR, REGULATE THE INHERENT POWER OF THE  
9 PRESIDENT THROUGH DULY ENACTED LEGISLATION. THAT IS PRECISELY  
10 WHAT FISA DOES." END OF THE QUOTE.

11            AND, FINALLY, THIS FROM MR. VERRILLI, "THE NSA  
12 SURVEILLANCE PROGRAM UPENDS THE BALANCE ALONG THE THREE  
13 BRANCHES OF GOVERNMENT AND THEREBY THREATENS BEDROCK LIBERTIES  
14 THE CONSTITUTION AND THE BILL OF RIGHTS ARE DESIGNED TO  
15 PROTECT." END OF QUOTE. AND I CANNOT POSSIBLY SAY IT BETTER  
16 THAN THAT.

17            SO I'D LIKE TO MOVE AWAY FROM THE MERITS BACK TO ONE  
18 OF THE STANDING ISSUES. AND THAT'S REALLY THE ONLY NEW ISSUE,  
19 I BELIEVE, THE GOVERNMENT HAS PRESENTED IN THEIR OPPOSITION TO  
20 OUR MOTION AND IN THEIR CROSS-MOTION.

21            THAT'S THE QUESTION OF THE NINTH CIRCUIT MANDATE.  
22 THEY ARGUE THE NINTH CIRCUIT MANDATE FROM BACK IN 2007  
23 FORECLOSES AN ADJUDICATION OF STANDING IN THIS CASE.

24            THE CASE LAW SAYS OTHERWISE, ACTUALLY, AND RATHER THAN  
25 JUST MOUTHING OFF WHAT I'D LIKE THE LAW TO BE I'LL REPEAT WHAT

1 THE LAW ACTUALLY IS. NINTH CIRCUIT AUTHORITY.

2 NGUYEN VERSUS UNITED STATES, IT'S N-G-U-Y-E-N, SAYS,  
3 THAT UNLESS THE NINTH CIRCUIT AND THE COURT OF APPEALS SAYS  
4 THERE SHALL NOT BE AMENDMENT OF THE COMPLAINT ON REMAND, THERE  
5 MAY BE. THIS COURT HAS DISCRETION TO DISMISS WITH LEAVE TO  
6 AMEND, WHICH IS PRECISELY WHAT THIS COURT DID, UPON THE REMAND  
7 FROM THE COURT OF APPEALS.

8 SECOND CASE CASSETT VERSUS STEWART SAID THAT UNLESS  
9 THE APPELLATE COURT DIRECTS A FORM OF DISMISSAL IT NOT NEED BE,  
10 IT NEED NOT BE WITH PREJUDICE, AND THAT'S PRECISELY WHAT THE  
11 COURT DID HERE.

12 BACK IN JULY OF 2008 THE COURT SAID I AM DISMISSING,  
13 BUT NOT WITH PREJUDICE, I'M DISMISSING WITH LEAVE TO AMEND.  
14 NOTHING IN THE NINTH CIRCUIT MANDATE PRECLUDES THE PROCEEDINGS  
15 IN WHICH WE ARE NOW ENGAGED IN TODAY. WE CAN GO FORWARD AND WE  
16 SHOULD GO FORWARD.

17 **THE COURT:** I HOPE NOT.

18 **MR. EISENBERG:** ME, TOO, YOUR HONOR.

19 **THE COURT:** WE'VE BEEN SPENDING A LOT OF TIME  
20 NEEDLESSLY.

21 **MR. EISENBERG:** I FEEL REALLY CONFIDENT ABOUT THIS,  
22 ACTUALLY. IT'S NOT THERE, IT'S JUST SIMPLY NOT THERE. THESE  
23 PROCEEDINGS ARE CONSISTENT NOT ONLY WITH THE NINTH CIRCUIT  
24 MANDATE, BUT THE SPIRIT OF ITS MANDATE.

25 MR. COPPOLINO HAS ARGUED IN A PAST PREVIOUS HEARING

1 BEFORE THIS COURT THAT IT DOESN'T MATTER WHETHER YOU FIND  
2 LIABILITY, YOU STILL HAVE THE SAME SECRECY PROBLEMS WITH THE  
3 TRIAL OF DAMAGES WHICH, I BELIEVE, WOULD BE OUR NEXT STEP. AND  
4 I'M HERE TODAY TO TELL YOU, YOUR HONOR, THAT'S SIMPLY NOT TRUE.

5 WE CAN ESTABLISH DAMAGES JUST LIKE WE'VE ESTABLISHED  
6 STANDING, ON PURELY PUBLIC INFORMATION. THAT'S WHAT WE INTEND  
7 TO DO.

8 AND I WILL TELL YOU BRIEFLY, YOUR HONOR, HOW WE INTEND  
9 TO DO THAT AND GET INTO IT FURTHER, IF YOU WISH, BUT I DON'T  
10 THINK THERE'S A NEED FOR IT AT THIS POINT.

11 WHAT WE HAVE, IS WE KNOW THERE WAS SURVEILLANCE  
12 BETWEEN THE BEGINNING OF THE 2004 INVESTIGATION OF AL-HARAMAIN,  
13 FEBRUARY 2004, FEBRUARY 16TH, I BELIEVE, AND THE END OF IT,  
14 SEPTEMBER 9TH OF 2004 WHEN OFAC ISSUED ITS TERRORIST  
15 DESIGNATION AND DECLARED DIRECT LINKS.

16 THAT'S THE PERIOD AT THIS POINT IN THE LITIGATION  
17 THREE AND A HALF YEARS AFTER WE FILED OUR COMPLAINT THAT WE ARE  
18 FOCUSING ON FOR OUR DAMAGES PERIOD.

19 **THE COURT:** WHY ARE YOU FOCUSING ON THAT PERIOD?

20 **MR. EISENBERG:** WE KNOW FROM PUBLIC EVIDENCE THE  
21 REASON WHY IT'S MOST CONVENIENT AND HELPFUL, I BELIEVE, TO THIS  
22 COURT TO MOVE THE CASE FORWARD.

23 PERSONALLY I BELIEVE THEY SURVEILLED, I BELIEVE THAT  
24 THEY CONDUCTED WARRANTLESS ELECTRONIC SURVEILLANCE OF THESE  
25 PLAINTIFFS RIGHT THROUGH THE VERY END OF THE PROGRAM, BUT

1 PROBLEMS OF PROOF, TO THAT EXTENT, WOULD BE PRESENTED.

2 THERE ARE NO SUCH PROBLEMS OF PROOF IF WE USE A FINITE  
3 PERIOD, AND IN A MOMENT, I THINK, YOUR HONOR WILL UNDERSTAND  
4 WHY THAT'S ESPECIALLY TRUE, WE HAVE THIS FINITE PERIOD.

5 WE KNOW THEY RELIED OR WE INFER, AND THERE'S NO  
6 REBUTTAL OF THIS INFERENCE, THAT THEY RELIED ON SURVEILLANCE TO  
7 DECLARE DIRECT LINKS. ONCE THEY DECLARED DIRECT LINKS ON  
8 SEPTEMBER 9TH 2004, LET'S STOP THERE JUST FOR THE SAKE OF ALL  
9 OF US, FOR THE CONVENIENCE, FOR THE SIMPLICITY OF IT.

10 NOW, LET ME TURN TO THE INSPECTOR GENERAL'S REPORT  
11 WHICH PROVIDES A CRUCIAL PUBLIC LINK, THAT HELPS US NAIL DOWN  
12 THIS PERIOD AS OUR DAMAGES PERIOD. IT'S AT PAGE 30 OF THE  
13 REPORT AND THAT WOULD BE IN MY SUPPLEMENTAL DECLARATION EXHIBIT  
14 CC, PAGE 35.

15 THERE THE INSPECTORS GENERAL STATE PUBLICLY THAT THE  
16 TERRORIST SURVEILLANCE PROGRAM WAS TRANSITIONED, THAT'S THE  
17 WORD THEY USED, TRANSITIONED TO FISA OVER A TWO-YEAR PERIOD.  
18 THAT'S A QUOTE FROM THE REPORT, QUOTE "OVER A TWO-YEAR PERIOD"  
19 UNQUOTE, AFTER WHICH OR UPON WHICH THE TSP WAS DISCONTINUED ON  
20 FEBRUARY 1ST 2007.

21 THAT TELLS US SOMETHING REALLY IMPORTANT. THE  
22 TRANSITION DIDN'T OCCUR UNTIL EARLY 2005. BEFORE THEN NONE OF  
23 THE TSP SURVEILLANCE HAD BEEN TRANSITIONED TO THE FISA COURT,  
24 AND OUR DAMAGES PERIOD IS BEFORE THEN, IT IS FEBRUARY TO  
25 SEPTEMBER OF 2004, BEFORE THE TRANSITIONING BEGAN.

1            THAT IS A PERIOD FROM WHICH WE CAN STATE WITH GREAT  
2            ASSURANCE BASED SOLELY ON THE PUBLIC RECORD WHEN OUR CLIENT  
3            WERE SURVEILLED WITHOUT A WARRANT UNDER THE TSP.

4            **THE COURT:** YOU'RE RELYING, AT LEAST, IN PART OF ON  
5            MR. COMEY'S TESTIMONY BEFORE THE SENATE THAT YOU INCLUDE IN THE  
6            MATERIALS THAT YOU SUBMITTED?

7            **MR. EISENBERG:** HE KNEW -- WELL, YES, YES, THEY  
8            BELIEVED THE PROGRAM WAS ILLEGAL, NOW WE KNOW WHY THEY BELIEVED  
9            THE PROGRAM WAS ILLEGAL.

10           WE LEARN THAT FROM THE INSPECTOR GENERAL'S REPORT THE  
11           REASON WHY, ONE OF THE REASONS WHY THERE WAS THIS UPROAR IN  
12           MARCH 2004, ONLY ONE OF THE REASONS.

13           **THE COURT:** THERE WAS A WHAT?

14           **MR. EISENBERG:** ONE OF THE REASONS WHY -- UPROAR, THE  
15           UPROAR, THE BEDSIDE -- THE HOSPITAL BEDSIDE INCIDENT. A LOT OF  
16           IT REMAINS SHROUDED IN MYSTERY, BUT ONE THING WE KNOW FROM THE  
17           INSPECTOR GENERAL'S REPORT IS THAT MR. GOLDSMITH CAME IN  
18           REPLACING MR. YOO AS THE HEAD OF LEGAL COUNSEL, AND TOOK A LOOK  
19           AT YOO'S MEMO DECLARING THE LEGAL JUSTIFICATION FOR THE TSP,  
20           AND THAT LEGAL JUSTIFICATION WAS THE INHERENT POWER THEORY TO  
21           WHICH I JUST SPOKE, AND MR. GOLDSMITH DETERMINED THAT THE  
22           INHERENT POWER THEORY WAS FATALLY FLAWED, IT DID NOT SUPPORT  
23           THE PROGRAM.

24           MR. GOLDSMITH ALONG WITH THE ASSISTANCE OF MR. PHILBIN  
25           PUT TOGETHER A NEW THEORETICAL JUSTIFICATION FOR THE TERRORIST

1 SURVEILLANCE PROGRAM, IT WAS THE AUMF THEORY.

2 THIS IS ALL IN THE INSPECTOR GENERAL'S REPORT AND WHEN  
3 THE PROGRAM WAS RECERTIFIED, I BELIEVE, IT WAS MAY 6TH OF 2004  
4 BY THE DOJ, REMEMBER THEY REFUSED TO RECERTIFY IT IN MARCH,  
5 WHEN IT WAS RECERTIFIED IT WAS ON THE AUMF THEORY.

6 AND NOW I'VE FORGOTTEN WHY I'M MAKING THIS POINT, YOUR  
7 HONOR.

8 **THE COURT:** WELL, COINCIDE WITH YOUR DAMAGE PERIOD.

9 **MR. EISENBERG:** YES, YES, THAT'S RIGHT. THANK YOU  
10 VERY MUCH. SOMETIMES IT FRIGHTENS ME HOW I LOSE MYSELF IN  
11 THOUGHT.

12 COINCIDE WITH THE DAMAGE PERIOD. THEY KNEW DURING OUR  
13 DAMAGE PERIOD THAT THIS PROGRAM WAS UNLAWFUL, THAT THE SOLE  
14 JUSTIFICATION FOR IT CONCOCTED BY MR. YOO, THE INHERENT POWER  
15 THEORY WAS NO GOOD, IT WAS FLAWED.

16 NOW, THE THEORY THEY CAME UP WITH LATER WAS JUST AS  
17 BAD, MAYBE EVEN WORSE, THE AUMF THEORY. BUT DURING THIS PERIOD  
18 OF TIME THEY KNEW THAT THE LEGAL UNDISPUTED FACT UNDERPINNINGS  
19 FOR THIS CASE WERE BAD.

20 SO WE CAN DO THE NUMBERS. I COME UP WITH 202 DAYS OF  
21 SURVEILLANCE THE -- OF THREE PEOPLE. AL-HARAMAIN, ASIM GHAFOR  
22 AND WENDELL BELEW.

23 THE STATUTE 50 U.S. CODE SECTION 1810 PROVIDES FOR A  
24 HUNDRED DOLLARS A DAY, YOU CAN DO THE MATH, THAT'S 20,000, \$200  
25 PER PLAINTIFF. WE CAN TALK ABOUT PUNITIVE DAMAGES, I'M



1 MINDFUL, VERY MINDFUL OF THE GORE CASE, G-O-R-E, WHICH  
2 GENERALLY, THE CAP OF A RATIO OF 10 TO ONE GENERALLY, WILL KEEP  
3 THAT IN MIND.

4 WE HAVE A FAIRLY MODEST SUM OF DAMAGES IN THIS CASE  
5 AND A VERY FINITE SUM, EXCEPT FOR THE PUNITIVES WHICH, OF  
6 COURSE, CAN BE IN THIS COURT'S DISCRETION. AND ALL OF THAT'S  
7 ON -- ALL OF THAT IS ON UNCLASSIFIED INFORMATION.

8 I DON'T BELIEVE WE EVEN NEED CLASSIFIED INFORMATION ON  
9 PUNITIVE DAMAGES, ALTHOUGH, AGAIN, IT WOULD BE HELPFUL. IT  
10 WOULD BE NICE TO HAVE, BUT WE WOULD JUST PREFER NOT TO GO THERE  
11 FOR THE SAKE OF SIMPLICITY AND WRAPPING UP THIS LITIGATION AND  
12 SENDING IT UP ON APPEAL ON A FINAL JUDGMENT.

13 I DON'T BELIEVE WE EVEN NEED AN EVIDENTIARY HEARING ON  
14 DAMAGES. EVERYTHING CAN BE AND, I BELIEVE, SHOULD BE DONE ON  
15 DOCUMENTARY EVIDENCE, ON THE RECORD WE'VE ALREADY PRESENTED.

16 NO NEED FOR LIVE TESTIMONY UNLESS THE DEFENDANTS WISH  
17 TO PRESENT IT AND THAT I CANNOT IMAGINE. SO ONCE DAMAGES ARE  
18 ADJUDICATED THE CASE OVER, UP WE GO ON APPEAL.

19 **THE COURT:** LET ME --

20 **MR. EISENBERG:** HOPEFULLY ONLY ONCE. NOW, FINALLY LET  
21 ME MENTION DEFENDANT ROBERT MUELLER. HE'S STILL OUT THERE.

22 YOUR HONOR ALLOWED US TO SERVE HIM WITH, FILE OUR  
23 AMENDED COMPLAINT AND SERVE MR. MUELLER INDIVIDUALLY. WE  
24 AGREED TO PUT MR. MUELLER ON THE SHELF FOR THE TIME BEING.  
25 HE'S NOT BEEN SERVED. WE HAVE AGREED THERE WILL BE NO NEED TO

1 SERVE HIM UNTIL THERE'S AN ADJUDICATION OF STANDING.

2 IF THAT WERE TO OCCUR IN THE NEAR FUTURE, WHICH I  
3 FERVENTLY DESIRE, IT WILL COME TIME FOR MR. MULLER TO ANSWER.  
4 WE'RE IN NO HURRY FOR THAT TO HAPPEN. WE ARE PREPARED TO WAIT  
5 AND WE'LL HAVE TO DISCUSS THIS WITH MR. MUELLER'S ATTORNEYS.

6 I JUST WANTED THE COURT TO KNOW WE ARE PREPARED TO  
7 WAIT ON MR. MUELLER UNTIL THE FINAL ADJUDICATION IN THIS CASE,  
8 STRAIGHT THROUGH ON APPEAL BECAUSE REALLY AT THIS POINT WE  
9 BELIEVE MR. MUELLER IS A COROLLARY WE NEEDN'T GET TO.

10 MR. GOLDBERG REMINDS ME THAT MR. MUELLER HAS ACTUALLY  
11 ACCEPTED SERVICE, BUT HE HAS NOT ANSWERED. SO WE CAN DISCUSS  
12 MR. MUELLER FOR WHEN THE TIME COMES, BUT I THOUGHT THE COURT  
13 SHOULD BE AWARE THAT RIGHT NOW WE REALLY DON'T SEE ANY NEED TO  
14 PURSUE THAT AVENUE.

15 **THE COURT:** BEFORE YOU CONCLUDE LET ME ASK YOU TO TELL  
16 ME THE BACKGROUND AND WHAT OCCURRED, EITHER IN THE PROCEEDINGS  
17 IN OREGON OR THE ARGUMENTS BEFORE THE NINTH CIRCUIT, THAT LEAD  
18 IN THE NINTH CIRCUIT'S NOVEMBER 16, 2007 DECISION TO STATE THAT  
19 AL-HARAMAIN CANNOT ESTABLISH IT'S SUFFERED INJURY, IN FACT, A  
20 CONCRETE AND PARTICULARIZED INJURY BECAUSE THE SEALED DOCUMENT  
21 WHICH AL-HARAMAIN ALLEGES PROVES THAT ITS MEMBERS WERE  
22 UNLAWFULLY SURVEILLED IS PROTECTED BY THE STATES SECRET  
23 PRIVILEGE.

24 AT ORAL ARGUMENT COUNSEL FOR AL-HARAMAIN ESSENTIALLY  
25 CONCEDED THAT AL-HARAMAIN CANNOT ESTABLISH A STANDING WITHOUT

1 REFERENCE TO THE SEALED DOCUMENTS. WHAT'S THE BACKGROUND OF  
2 THAT?

3 AND WHAT IS THE EFFECT OF THAT STATEMENT FOR PURPOSE  
4 OF THE STANDING DETERMINATION HERE?

5 **MR. EISENBERG:** I MADE THAT STATEMENT A LONG TIME AGO.  
6 LET'S SEE, THAT WOULD BE OCTOBER OF 2007, THIS IS NOW -- EXCUSE  
7 ME, AUGUST OF 2007 THIS IS NOW SEPTEMBER OF 2009, THE ORAL  
8 ARGUMENT.

9 **THE COURT:** ARGUED ON AUGUST 15.

10 **MR. EISENBERG:** THANK YOU.

11 **THE COURT:** AND FILED ON NOVEMBER 16TH.

12 **MR. EISENBERG:** SO THE STATEMENT I MADE THAT WAS AT  
13 ORAL ARGUMENT, WHICH SEEMS TO ME ALMOST A DIFFERENT LIFE TIME,  
14 MORE THAN TWO YEARS AGO.

15 AT THAT TIME WE HAD THIS DOCUMENT, WE HAD A -- THE  
16 OREGON DISTRICT JUDGE SAYING WE CAN USE OUR MEMORIES OF THE  
17 DOCUMENT TO ESTABLISH STANDING, AND WE KNEW THAT IF WE COULD DO  
18 THAT THAT'S ALL WE NEEDED.

19 WE DIDN'T NEED TO MARSHAL PUBLIC EVIDENCE, WE DIDN'T  
20 NEED ANYTHING ELSE, AND THERE WASN'T THAT MUCH PUBLIC EVIDENCE  
21 THERE IN THE RECORD AT THE TIME.

22 I ACTUALLY HADN'T REALLY MADE THE EFFORT BECAUSE I SAW  
23 NO NEED AND I'LL TELL YOU, YOUR HONOR, IF I MADE THE EFFORT IN  
24 THE SUMMER OF 2007 I WOULD NOT HAVE COME UP WITH VERY MUCH.

25 SOME OF WHAT WE PRESENTED TO YOU I HAD COME UP WITH,

1 BUT THERE'S -- THERE ARE TWO CRITICAL THINGS WE KNEW NOTHING  
2 ABOUT IN THE SUMMER OF 2007.

3 **THE COURT:** LET'S SEE, YOU DIDN'T HAVE PISTOLE'S  
4 OCTOBER 22 SPEECH TO THE AMERICAN BANKERS ASSOCIATION AT ORAL  
5 ARGUMENT.

6 **MR. EISENBERG:** RIGHT, WE DID NOT HAVE THAT. THAT  
7 CAME OCTOBER 22ND AT ABOUT THREE WEEKS PLUS BEFORE THE NINTH  
8 CIRCUIT ISSUED ITS DECISION.

9 BUT I DIDN'T FIND IT UNTIL . . . AUGUST OF 2008 WHEN  
10 WE WERE PUTTING TOGETHER OUR AMENDED COMPLAINT, THAT'S WHEN I  
11 FOUND IT. I ACTUALLY DON'T KNOW WHEN THAT WENT UP ON THE  
12 WEBSITE. I SUSPECT IT WAS NOT OCTOBER 22ND.

13 IN ANY CASE, WE DIDN'T HAVE THAT AT THE TIME OF ORAL  
14 ARGUMENT. THAT IS CRUCIAL. THAT'S WHEN I SPOKE TO YOUR  
15 HONOR'S FIRST QUESTION AT THE BEGINNING OF THIS HEARING, I  
16 STARTED WITH MR. PISTOLE'S ADMISSION THAT THEY SURVEILLED  
17 AL-HARAMAIN, WE PROCEED FROM THAT TO OUR ULTIMATE INFERENCE.

18 THE SECOND THING WE DIDN'T HAVE, WE DIDN'T HAVE THE  
19 TESTIMONY BY MEMBERS OF THE BUSH ADMINISTRATION BEFORE CONGRESS  
20 THAT TOLD US HOW THEY INTERCEPT COMMUNICATIONS, WHICH IS THEY  
21 DO IT ON A WIRE FROM ROUTING STATIONS WITHIN THE UNITED STATES,  
22 WHICH MAKES IT ELECTRONIC SURVEILLANCE WITHIN THE MEANING OF  
23 THE FISA SECTION 1801 DEFINITION.

24 THAT WAS A REALLY CRITICAL PIECE OF INFORMATION FOR US  
25 BECAUSE THAT MADE OUR CASE, THAT THIS WAS ELECTRONIC

1 SURVEILLANCE, THAT THE WAY THEY INTERCEPT COMMUNICATIONS OF THE  
2 SORT BETWEEN MR. AL-BUTHI AND THE TWO LAWYERS IN WASHINGTON IS  
3 BY TAKING THEM OFF OF A WIRE IN THE UNITED STATES. WE DIDN'T  
4 HAVE THAT IN 2007 AND IT'S REALLY CRITICAL.

5 SO WHEN I WAS ASKED THAT QUESTION IN THE SUMMER 2007 I  
6 DID SOMETHING THAT COMES NATURAL TO ME AND THAT, I THINK, EVERY  
7 GOOD APPELLATE LAWYER SHOULD DO, BUT SOMETIMES WE LIVE TO  
8 REGRET, I WAS HONEST.

9 I TOLD THE COURT WITHOUT THIS DOCUMENT I DON'T HAVE  
10 STANDING BECAUSE AT THE TIME I DIDN'T HAVE THE TESTIMONY ABOUT  
11 HOW COMMUNICATIONS INTERCEPTED AND I DIDN'T HAVE MR. PISTOLE'S  
12 ADMISSION.

13 HAVING THOSE TWO THINGS MAKES AN IMMENSE DIFFERENCE.  
14 I DON'T BELIEVE THE COURT OF APPEALS COULD HAVE DREAMED THAT  
15 WOULD HAPPEN. WHO WOULD EXPECTED THE DEPUTY DIRECTOR OF THE  
16 FBI TO POST ON THE FBI'S WEBSITE AN ADMISSION LIKE THAT.

17 THIS MIND YOU AFTER MR. BONDY STOOD UP, THE  
18 GOVERNMENT'S APPELLATE ATTORNEY STOOD UP BEFORE THE NINTH  
19 CIRCUIT AND SAID IT'S A STATE SECRET WHETHER ANYBODY HAS BEEN  
20 SURVEILLED UNDER ANY PROGRAM, WE DON'T CONFIRM OR DENY  
21 SURVEILLANCE UNDER ANY PROGRAM.

22 THEN A FEW MONTHS LATER THEY DO IT FOR THE WHOLE WORLD  
23 TO SEE ON THE WEBSITE WHICH I FOUND THROUGH GOOGLE. PRETTY  
24 REMARKABLE, ONE OF THE MANY REMARKABLE THINGS ABOUT THIS CASE.

25 SO WHEN I SPOKE IN 2007 I WAS SPEAKING HONESTLY. AND

1 I WILL TELL THE COURT HONESTLY TODAY TWO YEARS LATER THINGS ARE  
2 VERY DIFFERENT.

3 AND, YOUR HONOR, THAT ABOUT WRAPS IT UP FOR ME, UNLESS  
4 YOU HAVE ANY QUESTIONS.

5 **THE COURT:** VERY WELL. THANK YOU, MR. EISENBERG.

6 MR. COPPOLINO, LET'S START WITH EXACTLY WHERE  
7 MR. EISENBERG LEFT OFF. THAT IS, THE EFFECT OF THE STATEMENT  
8 IN THE NINTH CIRCUIT DECISION IN NOVEMBER 2007, THAT  
9 AL-HARAMAIN CANNOT ESTABLISH STANDING WITHOUT REFERENCE TO THE  
10 SEALED DOCUMENT.

11 ISN'T THAT SIMPLY A CONCESSION FOR PURPOSE OF ARGUMENT  
12 THAT COUNSEL MADE AND NOT, IN FACT, A BINDING DETERMINATION BY  
13 THE CIRCUIT COURT?

14 **MR. COPPOLINO:** I DON'T AGREE IT IS JUST A MERE  
15 CONCESSION AND NOT A BINDING DETERMINATION.

16 **THE COURT:** DID THE NINTH CIRCUIT FORECLOSE THE  
17 POSSIBILITY OF THE PLAINTIFFS RELYING UPON PUBLIC INFORMATION?

18 **MR. COPPOLINO:** I BELIEVE THAT THEY DID, YOUR HONOR,  
19 FOR THE REASONS --

20 **THE COURT:** WHERE?

21 **MR. COPPOLINO:** I WAS ABOUT TO EXPLAIN THAT. I THINK,  
22 THE NINTH CIRCUIT ADDRESSED TWO ISSUES, TWO ISSUES AND  
23 DEFINITIVELY RESOLVED ONE.

24 THE VERY LANGUAGE THAT YOU JUST QUOTED OR, AT LEAST,  
25 THAT'S ONE OF THE THINGS THAT THEY SAID, THEY SAID, AL-HARAMAIN

1 CANNOT ESTABLISH ITS STANDING WITHOUT THE PRIVILEGED  
2 INFORMATION. AND THEY ALSO SAID THAT ITS CLAIMS MUST BE  
3 DISMISSED UNLESS THERE'S FISA PREEMPTION.

4 NOW, I DON'T SEE WHAT IS NOT CLEAR ABOUT THAT. THE  
5 NINTH CIRCUIT IS SAYING YOU LOSE, CASE OVER, UNLESS YOU HAVE  
6 THIS FISA PREEMPTION, AND WE'RE GOING TO REMAND THAT TO THE  
7 DISTRICT COURT.

8 THAT WAS THE ROAD THAT WAS AVAILABLE TO THEM BECAUSE  
9 OTHERWISE THE COURT RULED BASED IN PART ON WHAT MR. EISENBERG  
10 SAID AT THE ORAL ARGUMENT.

11 **THE COURT:** WHERE WAS THE CONSIDERATION OF PUBLIC  
12 INFORMATION BY THE NINTH CIRCUIT?

13 **MR. COPPOLINO:** I THINK, THE PRINCIPLE CONSIDERATION  
14 IS THE FACT THEY SPECIFICALLY INQUIRED OF MR.. EISENBERG  
15 WHETHER THERE WAS ANY OTHER EVIDENCE HE WOULD BRING FORWARD TO  
16 ADDRESS THE QUESTION OF WHETHER THAT WOULD IN ANY WAY SUPPORT  
17 HIS ARGUMENT.

18 **THE COURT:** HE'S SAYING HERE NOW THAT AT THAT TIME HE  
19 WOULD NOT, BUT A LOT OF INFORMATION HAS DEVELOPED IN THE  
20 MEANTIME WHICH HAS CHANGED HIS LITIGATION POSTURE. WHY ISN'T  
21 THAT A PERFECTLY LEGITIMATE POSITION FOR HIM TO TAKE?

22 **MR. COPPOLINO:** BECAUSE IT'S DISINGENUOUS.

23 **THE COURT:** DISINGENUOUS NECESSARILY IS NOT A GROUND  
24 FOR --

25 **MR. COPPOLINO:** LET ME POINT OUT --

1           **THE COURT:** IN OUR BUSINESS, MR. COPPOLINO,  
2 DISINGENUOUS IS ALL OVER THE PLACE.

3           **MR. COPPOLINO:** THIS IS HIS AFFIDAVIT. THIS IS DOCKET  
4 99-1. EVERY SINGLE ONE THESE EXHIBITS EXCEPT FOR THAT PISTOLE  
5 SPEECH -- AND I CAN TELL THERE'S ONE OTHER, OFAC GAVE THEM SOME  
6 MATERIAL IN FEBRUARY 2008 -- EVERY SINGLE ONE OF THESE ITEMS  
7 WAS AVAILABLE BEFORE AUGUST 2007.

8           THE ONLY THING THAT HE'S RELYING ON TODAY IS THE  
9 PISTOLE SPEECH, THIS IS THE DEPUTY FBI DIRECTOR, THAT'S THE  
10 ONLY THING THAT HE IS SAYING IS NEW, SO THAT'S POINT ONE. WE  
11 CAN TALK ABOUT PISTOLE'S SPEECH IN A SECOND.

12           **THE COURT:** THAT'S ISN'T QUITE ACCURATE, IS IT?

13           **MR. COPPOLINO:** THREE THINGS I CAN DETECT. PISTOLE'S  
14 SPEECH WAS OCTOBER 2007, THAT'S EXHIBIT S, EXHIBIT R WAS A  
15 LETTER TO MR. NELSON AND MS. BERNABEI OF BY FEBRUARY 6TH 2008,  
16 THAT'S EXHIBIT R AND EXHIBIT E.

17           EXHIBIT Z WAS A LETTER A MEMORANDUM FROM OFAC  
18 REGARDING THE REDESIGNATION OF AL-HARAMAIN FEBRUARY 6TH 2008,  
19 EVERYTHING ELSE PREDATES THE ORAL ARGUMENT.

20           **THE COURT:** LET'S LOOK AT THAT EXHIBIT Z, THE FEBRUARY  
21 2008 MEMORANDUM. BATES STAMP 139, I'M SORRY, 130. IT BEGINS  
22 INTERCEPTS, INTERCEPTS, INTERCEPTS DISCLOSED DURING AL-TIMINI'S  
23 TRIAL REVEALED A RELATIONSHIP BETWEEN AL-TIMINI AND AL-BUTHE.

24           AL-BUTHE WAS INTERCEPTED IN SOME FOUR CONVERSATIONS.  
25 AL-TIMINI IN AN INTERCEPT ON FEBRUARY 1, 2003, AT 1538,



1 AL-TIMINI SPOKE WITH FMULMU SUBSEQUENTLY DETERMINED TO BE  
2 SOLIMAN AL-BUTHI .

3 SKIPPING TWO LINES. DURING THE CONVERSATION FMULMU  
4 PROVIDED AL-TIMINI WITH THE FOLLOWING FAX NUMBER (966)  
5 120-6331. DURING THE SAME INTERCEPT FMULMU PASSED THE  
6 TELEPHONE TO AHMED MLNU. AFTER A BRIEF CONVERSATION AL-TIMINI  
7 TOLD AHMED MLNU TO ASK SOLIMAN AL-BUTHI TO CALL HIM, AL-TIMINI,  
8 THE NEXT DAY, AL-TIMINI COULD DICTATE SOMETHING TO SOLIMAN.

9 THAT SAME DAY AT 1620 AL-TIMINI AGAIN INTERCEPTED  
10 SPEAKING TO FMULMU SUBSEQUENTLY TO DETERMINED TO BE SOLIMAN  
11 AL-BUTHI. DURING THE CONVERSATION AL-TIMINI OR THE INDIVIDUAL  
12 FMULMU, PROVIDED AL-TIMINI WITH THE FOLLOWING SURVEILLANCE  
13 TELEPHONE, PROBABLE FAX NUMBER, (253) 981-9150.

14 AN INTERNET QUERY LINKS THE AFOREMENTIONED TELEPHONE  
15 NUMBERS WITH MORE LINK ON HERE, THE LATTER INTERNET ADDRESS FOR  
16 INTERNET SEARCH CORRESPONDENCE TO THE INTERNATIONAL COMMITTEE,  
17 SUPPORT OF THE FINAL PROJECT IN THE OFFICE OF THE CAMPAIGN TO  
18 DEFEND THE PROPHET. THAT'S ELECTRONIC SURVEILLANCE.

19 **MR. COPPOLINO:** THAT'S ELECTRONIC SURVEILLANCE OF  
20 AL-TIMINI. THAT WAS ACKNOWLEDGED BY THE GOVERNMENT AT HIS, I  
21 BELIEVE, HIS CRIMINAL PROCEEDING.

22 I ACTUALLY THINK THAT EVIDENCE CUTS AGAINST THEM  
23 BECAUSE WHAT IT DEMONSTRATES IS THAT THERE WAS AN INTERCEPT OF  
24 AN INDIVIDUAL ASSOCIATED WITH AL-HARAMAIN, MR. AL-BUTHI -- THAT  
25 WAS BASED ON A TARGET WHO WAS NOT A PLAINTIFF HERE, BY THE WAY,

1 WHO WAS BASED ON A TARGET OF SOMEONE ELSE.

2 THIS DEMONSTRATES THAT THE SURVEILLANCE THAT MAY HAVE  
3 BEEN AT ISSUE IN THIS CASE DID NOT, IN FACT, HAVE TO BE OF AN  
4 INDIVIDUAL ASSOCIATED WITH AL-HARAMAIN, COULD HAVE BEEN OF  
5 SOMEONE ELSE, COULD HAVE BEEN OTHER SOURCES.

6 AND SO, ACTUALLY, I THINK THAT PARTICULAR EXHIBIT  
7 DOESN'T DEMONSTRATE, FIRST OF ALL, THAT ANY OF THESE PLAINTIFFS  
8 WERE SUBJECT TO SURVEILLANCE, OR ELECTRONIC SURVEILLANCE, OR  
9 ELECTRONIC SURVEILLANCE THAT WAS NOT AUTHORIZED BY THE FISA.

10 THAT SURVEILLANCE, FIRST OF ALL, COULD WELL HAVE BEEN  
11 AUTHORIZED BY THE FISA. I ACTUALLY BELIEVE IT WAS. LET ME  
12 JUST SAY, IF THAT WAS ACKNOWLEDGED AT THE PUBLIC TRIAL, WHICH  
13 TYPICALLY IT WOULD BE IF THE GOVERNMENT IS GOING TO USE THE  
14 SURVEILLANCE EVIDENCE. SO I THINK THAT CUTS AGAINST THEM.

15 YOUR HONOR, YOU KNOW, TO ADDRESS YOUR FIRST QUESTION,  
16 IT SEEMS TO ME THAT, AS WE SET FORTH IN OUR PAPERS, THE NINTH  
17 CIRCUIT DID CHART TWO COURSES. YOU CAN EITHER TRY TO PROVE  
18 YOUR STANDING THROUGH PUBLIC EVIDENCE OR THERE'S FISA  
19 PREEMPTION.

20 AND IT SEEMS TO US THEY SQUARELY ADDRESSED THE  
21 PUBLIC -- THE EVIDENTIARY BASIS FOR WHETHER OR NOT THERE WAS  
22 STANDING. THEY CONCLUDED, I THINK, CORRECTLY, THAT PRIVILEGED  
23 INFORMATION THAT GOES TO WHETHER OR NOT AL-HARAMAIN WAS  
24 SURVEILLED WAS PROPERLY PROTECTED BY THE GOVERNMENT.

25 AND SO IN THE FIRST INSTANCE OUR ARGUMENT TO YOU IS,

1 THAT THE VERY ISSUE OF WHETHER OR NOT AL-HARAMAIN WAS SUBJECT  
2 TO SURVEILLANCE WAS RESOLVED BY THE NINTH CIRCUIT, AT LEAST,  
3 INSOFAR AS THE STATE SECRETS PRIVILEGE WAS CONCERNED.

4 AND I DON'T THINK YOU CAN HAVE ANY MORE DEFINITIVE  
5 STATEMENT THAN TO SAY YOUR CASE IS DISMISSED UNDER THE STATE  
6 SECRETS PRIVILEGE, UNLESS THERE'S FISA SECRETS PRIVILEGE  
7 PREEMPTION.

8 NOW, ASSUMING ARGUENDO YOU GO FORWARD TO A PUBLIC  
9 EVIDENCE OPTION, I HAVE A COUPLE JUST GENERAL POINTS TO MAKE  
10 ABOUT THAT.

11 WE CERTAINLY HAVE MADE THE POINT THAT THE EVIDENCE IS  
12 INSUFFICIENT, AND WE CAN DISCUSS SOME OF THE EVIDENCE, BECAUSE  
13 THE EVIDENCE IS FUNDAMENTALLY SPECULATIVE AND CONJECTURAL, IN  
14 OUR VIEW.

15 OBVIOUSLY, COURTS WILL EVALUATE THAT EVIDENCE AND MAKE  
16 THEIR OWN JUDGMENT, BUT I BELIEVE THAT THE PROPER CONCLUSION  
17 LOOKING AT ALL OF THIS EVIDENCE, IS THAT'S SPECULATIVE,  
18 CONJECTURAL AND DOES NOT SATISFY THE STANDING REQUIREMENTS OF  
19 ARTICLE III.

20 **THE COURT:** WELL, BUT DOESN'T IT ESSENTIALLY PUT THE  
21 BALL IN YOUR COURT, TO COME BACK WITH A RESPONSE THAT REBUTS  
22 THE INFERENCE THAT IS LIKELY TO BE DRAWN FROM THIS EVIDENCE?

23 **MR. COPPOLINO:** I DISAGREE WITH THAT, YOUR HONOR. IN  
24 A NORMAL CASE, ON A NORMAL CASE INVOLVING SUMMARY JUDGMENT, IN  
25 RESPONSE TO A SUMMARY JUDGMENT MOTION I RECOGNIZE THAT THE

1 PARTY OPPOSING THE MOTION WOULD EITHER HAVE TO ESTABLISH A  
2 GENUINE ISSUE OF FACT OR DEMONSTRATE SOMEHOW IT'S ENTITLED TO  
3 JUDGMENT, EVEN IF THERE IS NO ISSUE OF UNDISPUTED FACT. THIS  
4 IS OBVIOUSLY NOT A NORMAL CASE.

5 WHAT YOU HAVE IN A STATE SECRETS PRIVILEGE CONTEXT ARE  
6 NUMEROUS CASES, AND I'LL TICK SOME OF THEM OFF, HOLDING THAT IF  
7 THE EVIDENCE ESSENTIAL TO PROVE OR DISPROVE A CLAIM IS NOT  
8 AVAILABLE, IS PROPERLY WITHHELD, AND IF IT IS NECESSARY FOR  
9 PLAINTIFFS TO ESTABLISH THEIR STANDING, OR PRIMA FACIE CASE, OR  
10 RELEVANT TO THE DEFENDANT'S DEFENSE AGAINST THEIR ALLEGATION OF  
11 STANDING, THEN THE ANSWER IS NOT THAT THE BURDEN SHIFTS TO THE  
12 GOVERNMENT TO PRODUCE PRIVILEGED INFORMATION OR LOSE THE CASE.  
13 JUST THE OPPOSITE. THAT IF THE INFORMATION IS NECESSARY TO  
14 LITIGATE THE CASE, THE CASE HAS TO BE DISMISSED.

15 THAT'S, OF COURSE, WHAT AL-HARAMAIN HELD LEAVING ASIDE  
16 THE PREEMPTION ISSUE FOR THE MOMENT. THAT'S WHAT CAZA HELD IN  
17 THE NINTH CIRCUIT. BOTH CASES SAID IF YOU CANNOT PROVE YOUR  
18 STANDING OR IF -- AND THE OTHER PART OF THE STATE SECRETS  
19 DOCTRINE, IF THE GOVERNMENT CAN'T DEFEND, THE CASE GETS  
20 DISMISSED.

21 NUMEROUS OTHER CASES HAVE FOLLOWED. THERE'S ACLU CASE  
22 VERSUS NSA IN THE SIXTH CIRCUIT. AGAIN, THE COURT RECOGNIZED  
23 DISMISSAL IS REQUIRED WHERE THE STATE SECRETS PRIVILEGE  
24 PREVENTS THE PLAINTIFF FROM ESTABLISHING WHETHER THEY WERE  
25 SUBJECT TO SURVEILLANCE, OR THE GOVERNMENT FROM GETTING

1 EVIDENCE TO REFUTE THAT ALLEGATION.

2 THE TERKEL CASE JUDGE KENNELLY IN CHICAGO DISMISSED  
3 ALLEGATIONS REGARDING ALLEGED COMMUNICATION RECORDS COLLECTION  
4 BECAUSE HE SAID STATE SECRETS PRIVILEGE FORECLOSED PLAINTIFFS  
5 FROM ESTABLISHING THEIR STANDING.

6 **THE COURT:** I'M QUITE FAMILIAR WITH THAT DECISION, YOU  
7 KNOW THE REGARD I HAVE FOR JUDGE KENNELLY, HOW I INTERPRET THE  
8 LAW IN A DIFFERENT FASHION.

9 **MR. COPPOLINO:** ELSBERG VERSUS MITCHELL, HALKIN VERSUS  
10 HELMS 1 AND 2 BOTH, ALL THREE OF THOSE CASES UPHELD DISMISSAL  
11 BECAUSE THE EVIDENCE NECESSARY TO ESTABLISH STANDING OR TO  
12 ADDRESS THE ISSUE WAS NOT AVAILABLE.

13 SO MY POINT TO YOU SIMPLY IS, THAT EVEN IF THERE IS  
14 BURDEN SHIFTING IN THE NORMAL CONTEXT, I HAVE YET TO SEE A CASE  
15 WHERE THE BURDEN EVER SHIFTED TO THE DEFENDANT TO ESTABLISHING  
16 STANDING.

17 AND CERTAINLY THE WEAST CASE THAT THEY CITED,  
18 W-E-A-S-T, WHICH CONCERNING THE BURDEN OF PERSUASION DOES NOT  
19 HOLD THAT IN SOME INSTANCES THE BURDEN TO DISPROVE STANDING  
20 FALLS TO A DEFENDANT. IT'S CERTAINLY NOT SOMETHING THAT OCCURS  
21 UNDER THE STATE SECRETS PRIVILEGE. THE LAW IS JUST TO THE  
22 CONTRARY.

23 YOUR HONOR, I THOUGHT, I GUESS, I'D LIKE TO STEP BACK  
24 JUST FOR A MINUTE AND GIVE YOU KIND OF A THEMATIC POINT. I  
25 RECOGNIZE THAT THROUGHOUT THIS LITIGATION THE GOVERNMENT HAS

1 TAKEN A FAIRLY FIRM POSITION IN THIS CASE, BOTH UNDER THE PRIOR  
2 ADMINISTRATION AND UNDER THE CURRENT ADMINISTRATION.

3 WE ARGUED OVER AND AGAIN, I THINK, TO THE ANNOYANCE OF  
4 THE COURT, THE PRIVILEGE ASSERTION STILL HOLDS. WE ARGUED THAT  
5 STANDING CAN'T BE RE-LITIGATED PURSUANT TO THE MANDATE IN THE  
6 NINTH CIRCUIT.

7 WE ARGUED IT'S NOT PREEMPTED BY THE STATE, BY FISA,  
8 AND WE ARGUED THEIR EVIDENCE IS INSUFFICIENT TO ESTABLISH  
9 STANDING AND THAT THE BURDEN DOESN'T SHIFT TO US.

10 I RECOGNIZE THAT THAT MAY STRIKE THE COURT AS A VERY  
11 HARD LINE, BUT THERE'S A REASON FOR THAT. AND I ASK THE COURT  
12 TO CONSIDER IT CAREFULLY IN ITS NEXT DECISION AND TO, PERHAPS,  
13 REORIENT YOUR THINKING ABOUT THE CASE.

14 THE REASON WE'VE DONE THAT, NOT ONLY UNDER THE PRIOR  
15 ADMINISTRATION, BUT UNDER THIS ADMINISTRATION, IS THAT WHAT IS  
16 AT STAKE ARE CORE INTELLIGENCE SOURCES AND METHODS, WHICH IS  
17 WHAT IS AT ISSUE WHEN THE QUESTION IS WHETHER OR NOT YOU  
18 SURVEILLED SOMEONE WHO, WHAT, WHERE, HOW, BY WHAT METHOD AND SO  
19 ON.

20 ALL OF THAT REVEALS, I THINK, THE HAIKIN CASE  
21 DESCRIBED MOST COGENTLY CORE INTELLIGENCE SOURCES, METHODS THE  
22 GOVERNMENT HAS CONSISTENTLY PROTECTED GOING BACK YEARS.

23 THESE CASES GO BACK TO THE 70'S AND UNDOUBTEDLY BEFORE  
24 THAT, AND THE REASON FOR THAT IS FOREIGN INTELLIGENCE  
25 SURVEILLANCE IS OF SUCH VITAL IMPORTANCE TO NATIONAL SECURITY.

1 IT'S CRITICAL THE GOVERNMENT BE ABLE TO MAINTAIN SECRECY IN  
2 THAT AREA.

3 NOW, THAT'S ESPECIALLY SO IN A CASE SUCH AS THIS WHERE  
4 ONE OF THE PLAINTIFFS IS DESIGNATED TERRORIST ORGANIZATION WITH  
5 LINKS TO AL-QAEDA. AND CONTRARY TO WHAT MR. EISENBERG SAID HIS  
6 OWN RECORD DEMONSTRATES THOSE LINKS TO AL-QAEDA WERE DOCUMENTED  
7 YEARS BEFORE 2004.

8 AND IT'S VERY VITAL TO THE GOVERNMENT THAT IN  
9 PARTICULAR, GIVEN THE CONTINUING THREATS OF TERRORISM, WE NEED  
10 TO PROTECT INFORMATION CONCERNING SOURCES AND METHODS BY WHICH  
11 WE SEEK TO DETECT AND PREVENT FURTHER TERRORIST ATTACK.

12 AND COURTS HAVE RECOGNIZED AND ACKNOWLEDGED THAT VERY  
13 MUCH OVER THE YEARS. THIS IS, THEREFORE, A CASE WHERE THE  
14 PUBLIC INTEREST AND THE NATIONAL SECURITY INTEREST OUTWEIGHS  
15 WHATEVER PRIVATE INTEREST THE PLAINTIFFS HAVE IN PURSUING THEIR  
16 CLAIMS.

17 **THE COURT:** WELL, RECOGNIZING THAT, AND IN NO WAY,  
18 AGAIN, SAYING THE IMPORTANCE OF PROTECTING NATIONAL SECURITY  
19 AND PROTECTING SOURCES OF INTELLIGENCE INFORMATION, NO QUESTION  
20 OF THAT AT ALL.

21 WHAT IS CURIOUS IS THE COURSE THAT THIS LITIGATION HAS  
22 TAKEN. IF THE SOURCES OF INFORMATION ABOUT AL-HARAMAIN WERE  
23 OTHER THAN ELECTRONIC SURVEILLANCE THAT WOULD HAVE BEEN QUITE  
24 AN EASY PIECE OF INFORMATION TO HAVE DISCLOSED BEFORE.

25 SIMILARLY IF THERE WERE A FISA WARRANT THAT, AS

1 MR. EISENBERG PUTS IT, COULD EASILY HAVE BEEN DISCLOSED AND THE  
2 CASE WOULD HAVE BEEN OVER AND DONE WITH. AND YOU AND I WOULD  
3 NOT HAVE GOTTEN TO KNOW ONE ANOTHER AS WELL AS WE HAVE,  
4 MR. COPPOLINO.

5 AND YOUR PRINCIPALS WOULD BE ONGOING ONTO THE VERY  
6 IMPORTANT WORK OF PROTECTING NATIONAL SECURITY AND THAT YOU  
7 JUST DESCRIBED.

8 **MR. COPPOLINO:** IF I CAN JUST RECOUNT SOME OF THE  
9 HISTORY OF THE LAWSUIT WHICH, AGAIN, IS SET FORTH IN OUR  
10 PAPERS. WE SPECIFICALLY PROTECTED NOT ONLY WHETHER THEY WERE  
11 SUBJECT TO SURVEILLANCE UNDER THE TERRORIST SURVEILLANCE  
12 PROGRAM, BUT UNDER ANY AUTHORITY, INCLUDING IN PARTICULAR THE  
13 FISA, IN OUR STATE SECRETS PRIVILEGE.

14 BECAUSE AT THE BEGINNING OF THIS CASE WHEN IT WAS  
15 STILL IN OREGON BEFORE JUDGE KING THEY SERVED INTERROGATORIES  
16 THAT SPECIFICALLY ASKED US WHETHER OR NOT THEY WERE SUBJECT TO  
17 FISA SURVEILLANCE.

18 IN THE RECORD IN CONNECTION WITH MY FOURTH MOTION THE  
19 DNI SPECIFICALLY ASSERTED PRIVILEGE OVER WHETHER THERE WAS ANY  
20 FISA SURVEILLANCE, BECAUSE AS YOU OBSERVED FISA SURVEILLANCE  
21 WOULD BE JUST AS MUCH A SECRET AS ANY OTHER TYPE OF  
22 SURVEILLANCE.

23 THAT, A, WAS COVERED BY OUR PRIVILEGE ASSERTION AND,  
24 B, THEREFORE, WOULD BE JUST AS REVEALING OF INTELLIGENCE  
25 SOURCES AND METHODS IF WE WERE TO DISCLOSE THAT IN THE PUBLIC



1 RECORD.

2 AND THE PLAINTIFFS ARE SIMPLY SPECULATING AS TO  
3 WHETHER, IN FACT, WE HAVEN'T PROVIDED THAT INFORMATION TO THE  
4 COURT IN THE EX PARTE MATERIALS.

5 BUT EVEN IF WE HAD, EVEN IF THERE WAS A FISA WARRANT  
6 AND WE HAD TOLD THE COURT, WE CANNOT DEFEND ON THE MERITS BY  
7 PUBLICLY DISCLOSING THE EXISTENCE OF A STATE SECRET IN ORDER TO  
8 PREVAIL IN THE CASE BECAUSE THAT, OF COURSE, WOULD BE -- WOULD  
9 RESULT IN THE VERY HARM THAT WE'RE SEEKING TO PREVENT TO  
10 NATIONAL SECURITY AND WHICH THE PRIVILEGE REQUIRES BE  
11 PREVENTED, SO I THINK --

12 **THE COURT:** WOULD THAT HAVE REQUIRED A PUBLIC  
13 DISCLOSURE?

14 **MR. COPPOLINO:** I THINK -- WELL, I THINK, WHAT COULD  
15 HAPPEN, WHAT SHOULD HAPPEN, IS THAT THE COURT SHOULD LOOK AT --

16 **THE COURT:** ISN'T THE ANSWER TO THAT NO?

17 **MR. COPPOLINO:** THAT DEPENDS. HERE'S THE ANSWER TO  
18 THE QUESTION. YOU COULD LOOK AT THE STATE SECRET PRIVILEGE  
19 ASSERTION AS THE NINTH CIRCUIT AND FIND THE DNI ESTABLISHED ITS  
20 BURDEN, REASONABLE HARM TO NATIONAL SECURITY WOULD RESULT AND,  
21 THEREFORE, THE CASE SHOULD BE DISMISSED FOR THAT REASON.

22 I CAN -- YOU DON'T HAVE TO SAY WHY THE CASE IS  
23 DISMISSED. UPON REVIEW OF THE STATE SECRETS PRIVILEGE, IN THE  
24 COURT'S MIND IT COULD BE THERE WAS A FISA WARRANT, IN THE  
25 COURT'S MIND THERE COULD ALSO BE OTHER HARM TO NATIONAL

1 SECURITY IF INFORMATION UNDERLYING THESE ALLEGATIONS IS  
2 DISCLOSED.

3 SO, YEAH, YOU DON'T HAVE TO IDENTIFY THE BASIS FOR THE  
4 PRIVILEGE ASSERTION, BUT NEITHER CAN I, IN ARGUING THIS CASE ON  
5 THE PUBLIC RECORD, INDICATE THAT WE HAVE A DEAD BANG DEFENSE  
6 FISA WARRANT BECAUSE THAT WOULD, OBVIOUSLY, DISCLOSE  
7 INFORMATION WE HAVE SUCCESSFULLY PROTECTED PURSUANT TO THE  
8 PRIVILEGE ASSERTION.

9 YOUR HONOR, I'LL GO IN WHATEVER DIRECTION YOU WANT  
10 WITH THIS, BUT I THINK YOU CAN TELL FROM OUR PAPERS, FIRST OF  
11 ALL, WE THINK THAT THE NINTH CIRCUIT'S DECISION GOVERNS AND  
12 THAT WE REALLY CANNOT WALK BACK FROM THAT BECAUSE IT'S SO VITAL  
13 TO OUR NATIONAL SECURITY INTEREST, NOT ONLY IN THIS CASE BUT IN  
14 ANY OTHER CASE.

15 HAVING TAKEN THE PRIVILEGED INFORMATION AND SEALED  
16 DOCUMENT OUT OF THESE MOTIONS THESE PLAINTIFFS ARE EFFECTIVELY,  
17 IN A SITUATION THAT ANY PLAINTIFF WHO COMES INTO COURT AND SAYS  
18 I'M A PERSON OF INTEREST, PERHAPS, ANOTHER DESIGNATED TERRORIST  
19 ORGANIZATION OR AN ENTITY THAT MAY WELL HAVE BEEN UNDER  
20 INVESTIGATION FOR ALLEGED LINKS TO TERRORISM, AND SAYS I KNOW  
21 I'M OF INTEREST TO THE GOVERNMENT REGARDING TERRORISM, I KNOW  
22 THE GOVERNMENT SURVEILS PEOPLE, I KNOW THE GOVERNMENT, PERHAPS,  
23 UNDERTOOK SURVEILLANCE IN MY INVESTIGATION AT A CERTAIN TIME,  
24 BUT I DON'T KNOW IF IT WAS OF ME, AND I DON'T KNOW IF IT WAS  
25 ELECTRONIC SURVEILLANCE, I DON'T KNOW IF IT WAS WARRANTLESS

1 SURVEILLANCE OR UNDER THE FISA, I ESTABLISHED ENOUGH OF A PRIMA  
2 FACIE CASE, SO I'M GOING TO MOVE FOR SUMMARY JUDGMENT IN  
3 FEDERAL DISTRICT COURT, THEN THE BURDEN SHIFTS TO THE  
4 GOVERNMENT TO EITHER DISPROVE MY ALLEGATIONS WITH CLASSIFIED  
5 EVIDENCE OR LOSE.

6 THAT'S NOT THE LAW AND IF IT WERE THE LAW IT WOULD  
7 EVISCERATE THE GOVERNMENT'S ABILITY TO PROTECT INTELLIGENCE  
8 SOURCES AND METHODS BECAUSE THIS SCENARIO COULD EASILY BE  
9 REPLICATED.

10 SO BEYOND THAT YOU, AS I INDICATED A MOMENT AGO, I  
11 DON'T BELIEVE THAT WE'RE PROCEEDING UNDER FISA'S SECTION 1806F  
12 AT THE MOMENT.

13 SO WE ARE ESSENTIALLY BACK TO WHERE THE CASE WAS  
14 BEFORE THE NINTH CIRCUIT AND I THINK DISMISSAL IS REQUIRED.  
15 BUT IF YOU GO FORWARD AND LOOK AT THIS PUBLIC EVIDENCE AND TRY  
16 TO EVALUATE WHETHER IT ESTABLISHES ARTICLE III STANDING, I  
17 THINK, IT CLEARLY DOES NOT.

18 AND WE'VE GONE THROUGH IT LINE BY LINE, INCLUDING JUST  
19 THIS MORNING'S AL-HARAMAIN MEMO. BUT BEYOND THAT, I THINK, YOU  
20 KNOW, YOU'RE VERY FAMILIAR WITH THE CIRCUMSTANCES OF ARTICLE  
21 III STANDING, IT CANNOT BE BASED ON SPECULATION AND CONJECTURE,  
22 AND I THINK THE PLAINTIFFS ESSENTIALLY CONCEDE THEY HAVEN'T  
23 ACTUALLY PROVED THEIR STANDING.

24 THEY'RE RELYING ON A PROCEDURAL MECHANISM TO PUT THE  
25 BURDEN ON US. THEY UNDERSTAND, AND MR. EISENBERG IN TALKING

1 THIS MORNING HE SAID APPARENTLY THIS MEANS THIS, AND IT HAD TO  
2 BE THAT, AND WHY ON EARTH WOULDN'T IT BE THAT.

3 OBVIOUSLY, HE DOESN'T KNOW THE ACTUAL FACTS AND WHAT  
4 HE'S TRYING TO DO IS TO PUT THE BURDEN ON US TO SET THE RECORD  
5 STRAIGHT TO SOMEHOW PREVAIL ON SUMMARY JUDGMENT. THAT'S NOT  
6 HOW THE PRIVILEGE WORKS.

7 I THINK UNDER THE LAW OF ARTICLE III STANDING THEY  
8 HAVE THE BURDEN. IF THEY CAN'T ESTABLISH THE BURDEN, AND I  
9 CONCEDE THEY CAN'T ESTABLISH THEIR BURDEN BECAUSE IT IS  
10 INFORMATION UNIQUELY HELD BY THE GOVERNMENT AND PROPERLY  
11 PROTECTED AND HAS BEEN PROPERLY PROTECTED IN THE CASE, THE CASE  
12 WOULD HAVE TO BE DISMISSED.

13 MR. EISENBERG WAS ACTUALLY RIGHT IN HIS ORAL ARGUMENT  
14 IN 2007. HE SAID IF HE DOESN'T HAVE PRIVILEGED INFORMATION I  
15 CAN'T ESTABLISH MY STANDING, I DON'T THINK IT WAS A BAD DAY, I  
16 THINK, HE WAS BEING HONEST.

17 HE WAS ALSO CORRECT ABOUT THAT BECAUSE ULTIMATELY TO  
18 PROVE WHETHER OR NOT SOMEONE IS SUBJECT TO SURVEILLANCE HAS TO  
19 COME DOWN TO A CONFIRMATION OR DENIAL BY THE GOVERNMENT. THEY  
20 ARE THE ONES THAT POSSESS THAT EVIDENCE AND WE HAVE VALID  
21 REASONS FOR PROTECTING THAT WHICH HAVE BEEN RECOGNIZED IN THE  
22 CASE.

23 AND SO ABSENT FISA PROCEEDINGS, WHICH WE ARE CERTAINLY  
24 NOT INVITING, WE OBJECTED TO THOSE AND HAVE CONCERNS ABOUT  
25 THOSE. AS MR. EISENBERG NOTED, ABSENT THAT, I THINK, YOUR BACK

1 TO ESSENTIALLY WHERE THE NINTH CIRCUIT BROUGHT US, EVEN IF YOU  
2 CONSIDER THEIR PUBLIC EVIDENCE.

3 SO I ADDRESSED THAT POINT, I ADDRESSED WHETHER THE  
4 BURDEN SHIFTS, IF YOU'D LIKE I CAN DISCUSS SOME OF THE  
5 SUFFICIENCY OF THEIR EVIDENCE, BUT I THINK I LAID THAT WELL  
6 OUT. I THINK, IF YOU LOOK AT ALL OF IT IT COMES DOWN TO SIMPLY  
7 AN ARGUMENT BECAUSE THE TERRORIST SURVEILLANCE PROGRAM EXISTED  
8 AND TARGETED AL-QAEDA, AL-HARAMAIN WAS DESIGNATED ASSOCIATED  
9 WITH AL-QAEDA, AND BECAUSE PLAINTIFFS HAD A PHONE CALL THAT  
10 MENTIONED BIN LADEN ASSOCIATE, THEN LATER THE SEPTEMBER 2004  
11 DESIGNATION REFERRED TO LINKS WITH BIN LADEN.

12 THAT SOMEHOW THESE PLAINTIFFS WERE NOT ONLY SUBJECT TO  
13 SURVEILLANCE, BUT ELECTRONIC SURVEILLANCE UNDER THE DEFINITION  
14 OF THE FISA STATE SECRETS PRIVILEGE, WARRANTLESS SURVEILLANCE,  
15 THAT SIMPLY DOESN'T HOLD.

16 **THE COURT:** MR. EISENBERG AND HIS COLLEAGUE HAVE  
17 RECEIVED SECURITY CLEARANCES, WHAT IS THE GOVERNMENT'S  
18 OBJECTION TO DISCLOSURE FOR PURPOSES OF THIS LITIGATION AND  
19 PRESUMABLY ANY LITIGATION OF A SEALED DOCUMENT AND ANY OTHER  
20 CLASSIFIED INFORMATION?

21 **MR. COPPOLINO:** WELL, YOUR HONOR, YOU KNOW, WE HAD A  
22 LONG BACK AND FORTH ABOUT THAT EARLIER IN THE YEAR.

23 **THE COURT:** YES, WE DID.

24 **MR. COPPOLINO:** THERE IS NO MORE DIRECT ABROGATION OF  
25 THE STATE SECRETS PRIVILEGE THAN TO PROVIDE THE VERY

1 INFORMATION SUBJECT TO THE PRIVILEGE TO COUNSEL FOR THE PARTY  
2 THAT IS SEEKING IT.

3 OUR VIEW, WHICH WE SET FORTH IN OUR PRIOR PAPERS, IS  
4 THAT THERE IS NO NEED TO KNOW, WHERE YOU'RE SEEKING TO SERVE  
5 YOUR PRIVATE INTEREST AS A LITIGANT. OTHERWISE IN ANY CASE  
6 INVOLVING NATIONAL SECURITY INFORMATION THAT THE GOVERNMENT  
7 SEEKS TO PROTECT, A LITIGANT COMES IN AND SAYS I WANT TO FIND  
8 OUT WHAT YOU'VE DONE TO ME, WHETHER IT WAS LAWFUL, AND I HAVE A  
9 NEED TO KNOW.

10 **THE COURT:** YOU HAVE TO CONCEDE THAT MR. EISENBERG HAS  
11 DONE A LOT MORE THAN SIMPLY SAY I WANT THIS INFORMATION. HE  
12 HAS PRESENTED A SUBSTANTIAL ARRAY OF EVIDENCE, PUBLIC EVIDENCE  
13 THAT APPEARS TO INDICATE THAT HIS CLIENT WAS, INDEED, THE  
14 SUBJECT OF SURVEILLANCE, AND ELECTRONIC SURVEILLANCE.

15 **MR. COPPOLINO:** BUT I QUESTION, FIRST OF ALL, I  
16 QUESTION THE SUFFICIENCY OF THEIR EVIDENCE.

17 BUT, SECONDLY, THERE IS NO LAW THAT I AM AWARE OF IN  
18 THIS AREA WHICH SAYS THAT A PARTY IS ENTITLED TO THE ULTIMATE  
19 FACTS AT ISSUE IN A STATES SECRET PRIVILEGE IN ORDER TO PROVE  
20 OR DISPROVE THEY HAVE STANDING OR WHETHER THEY HAVE A CLAIM ON  
21 THE MERITS. AND SO --

22 **THE COURT:** WE'RE NOT DEALING WITH STATE SECRETS  
23 PRIVILEGE FOR PURPOSE OF THIS PROCEEDING, AT LEAST, AS FAR AS  
24 ELECTRONIC SURVEILLANCE IS CONCERNED, THIS IS ALL UNDER FISA.

25 **MR. COPPOLINO:** WELL, IF -- LET'S TALK A LITTLE BIT

1 WHETHER WE SHOULD REVERT BACK TO FISA AND THEN I WOULD JUST  
2 REITERATE ARGUMENTS WE HAVE MADE PREVIOUSLY.

3 FIRST OF ALL, WE DO NOT BELIEVE FISA PREEMPTS THE  
4 PRIVILEGE, WE HAVE A DISAGREEMENT ON THAT.

5 SECONDLY, AND MORE IMPORTANTLY, THERE ARE TWO, AT  
6 LEAST, TWO ALTERNATIVES IN WHICH YOU CAN PROCEED UNDER FISA  
7 ITSELF. EITHER ONE, IN OUR VIEW, EITHER RISKS OR REQUIRES  
8 DISCLOSURE OF THE VERY PRIVILEGED INFORMATION AS YOU OBSERVED  
9 IN YOUR COLLOQUY WITH MR. EISENBERG.

10 HOW COULD YOU RULE ON THE ISSUE OF STANDING BASED ON  
11 CLASSIFIED INFORMATION WITHOUT ULTIMATELY DISCLOSING, EITHER  
12 DIRECTLY OR INDIRECTLY TO THEM OR ON THE PUBLIC RECORD WHAT THE  
13 FACTS ARE IN THIS CASE.

14 BECAUSE, FIRST OF ALL, IF YOU DISCLOSE IT TO THEM THAT  
15 IS DIRECT DISCLOSURE. IT'S ONE TO WHICH THE GOVERNMENT WOULD  
16 OBJECT AND, I THINK, ONE TO WHICH WE HAVE AN APPELLATE RIGHT.

17 BUT, SECONDLY, EVEN IF YOU WERE TO PROCEED EX PARTE OR  
18 ATTEMPT PROCEED EX PARTE, THE FUNDAMENTAL ISSUE IN THE CASE  
19 CONCERNS THE EXISTENCE OF JURISDICTION, THE EXISTENCE OF  
20 STANDING, THE EXISTENCE OF AN ALLEGED ACTIVITY IN THIS CASE,  
21 ALLEGED SURVEILLANCE OF THE PLAINTIFFS.

22 NOW, IF YOU GO FORWARD EVEN EX PARTE THE MERE EXERCISE  
23 OF JURISDICTION WOULD INDICATE YOU HAVE FOUND FACTS SUBJECT TO  
24 THE PRIVILEGE ASSERTION.

25 IF YOU WERE TO REACH A JUDGMENT ON THE MERITS THAT

1 WOULD INDICATE THAT, IT COULD EVEN BE A JUDGMENT FOR THE  
2 GOVERNMENT, IT WOULD INDICATE YOU FOUND THERE WAS JURISDICTION.  
3 IF YOU FOUND THAT THE MERITS OF THE CLAIM COULD BE REACHED AND  
4 THAT ALONE, EVEN IF YOU DON'T DISCUSS THE DETAILS, WOULD REVEAL  
5 THE EXISTENCE OF INFORMATION SUBJECT TO PRIVILEGE.

6 IF YOU RULED FOR THE GOVERNMENT HOW DOES THAT, HOW  
7 DOES THE PLAINTIFF KNOW THE BASIS OF THAT RULING AND APPEAL?

8 MY VIEW IS YOU CAN'T HIDE LITIGATION BEHIND THE VEIL  
9 OF EX PARTE REVIEW, WHERE THE BASIC FUNDAMENTAL FACTS AS TO  
10 WHETHER OR NOT THE CASE COULD EVEN PROCEED ARE ITSELF SUBJECT  
11 TO THE PRIVILEGE ASSERTION.

12 AS THE NINTH CIRCUIT INDICATED, AS THE SIXTH CIRCUIT  
13 INDICATED IN ACLU, IF YOU CANNOT ESTABLISH WHETHER YOU HAVE  
14 STANDING WITHOUT THE DISCLOSURE OF INFORMATION THAT THE  
15 GOVERNMENT HAS SHOWN WOULD HARM NATIONAL SECURITY, HOW DOES A  
16 CASE PROCEED?

17 SO AS A RESULT OUR VIEW IS THAT ANY ATTEMPT TO PROCEED  
18 UNDER 1806F IS INHERENTLY RISKY AND IN OUR VIEW WOULD DIRECTLY  
19 VIOLATE 1806F, IF YOU WERE TO GIVE THEM THE INFORMATION IN  
20 ORDER TO PROCEED.

21 WHAT WE HAVE ARGUED ALL ALONG IS THAT YOU SHOULD  
22 CERTIFY THAT QUESTION BECAUSE IF YOU ARE WRONG ABOUT THE 1806F  
23 ISSUE THE CASE WOULD BE OVER AND THERE WOULD BE NO FURTHER  
24 PROCEEDINGS, THERE WOULD BE NO BASIS TO ESTABLISH STANDING, IT  
25 WOULD BE DISMISSED JUST AS THE NINTH CIRCUIT HAD SAID.



1           SO I DON'T THINK REVERTING BACK IS THE PROPER COURSE,  
2           FOR THOSE REASONS, I THINK, THE BETTER COURSE, IF YOU WERE  
3           INCLINED TO, WOULD BE TO CERTIFY IT BECAUSE THEN WE WOULD GET A  
4           RULING DIRECTLY ON THE ISSUE.

5           I CERTAINLY DON'T THINK IT WOULD BE PROPER FOR YOU TO  
6           RULE IN THE ALTERNATIVE ON WHETHER THEY HAVE STANDING BASED ON  
7           CLASSIFIED EVIDENCE. THAT IS EFFECTIVELY ASKING YOU AS THE  
8           DISTRICT JUDGE TO DIRECTLY OR INDIRECTLY REVEAL INFORMATION  
9           THAT'S BEEN SUBJECT TO A SUCCESSFUL PRIVILEGE ASSERTION PRIOR  
10          TO APPELLATE REVIEW.

11          THAT IS THE KEY ON THAT BECAUSE AS YOU SUGGESTED, AND  
12          I THINK YOU ARE QUITE KEENLY AWARE OF THIS ISSUE, IF YOU'RE NOT  
13          CORRECT ON THE FISA PREEMPTIONN ISSUE, THEN PROCEEDING IN ANY  
14          WAY WHICH ABROGATES THE PRIVILEGE IN A LIMITED WAY -- BY  
15          DISCLOSURE TO THE PLAINTIFFS, OR IN A BROADER WAY BY RULING  
16          THAT THERE IS JURISDICTION, OR, IN FACT, THAT THERE ISN'T  
17          JURISDICTION BECAUSE WE HAVE, IN FACT, ARGUED YOU CAN'T CONFIRM  
18          OR DENY THE EXISTENCE OF STANDING IS NOT SOMETHING THAT  
19          DISTRICT COURT OUGHT TO DO AND WOULD WANT TO BE IN A POSITION  
20          OF DOING BEFORE ANY APPELLATE REVIEW.

21          SO, YOUR HONOR, I THINK, I HAVE ADDRESSED THE CRUX OF  
22          THE ISSUES THAT MR. EISENBERG HAS RAISED. NOW, I UNDERSTAND  
23          THAT HE WANTS TO REACH THE MERITS OF THIS CASE, BUT WE HAVE SET  
24          FORTH, I THINK, NUMEROUS REASONS, AND RECOGNIZING THE COURT  
25          DISAGREES WITH SOME OF THESE REASONS, BUT NUMEROUS REASONS WHY

1 WE THINK THAT IS SIMPLY INAPPROPRIATE AND WOULD LEAD TO AN  
2 ADVISORY OPINION. AND AS A RESULT WE URGE THE COURT NOT TO GO  
3 DOWN THAT ROAD.

4 YOU KNOW, JUDGE TAYLOR IN MICHIGAN WHO I ADMIRE  
5 GREATLY, I LITIGATED THAT CASE BEFORE HER IN DISTRICT COURT,  
6 SHE OPTED TO GO THAT ROUTE AND YOU SAW WHAT HAPPENED. IT WAS  
7 REVERSED FOR LACK OF STANDING, CERT WAS DENIED, AND I THINK  
8 QUITE PROPERLY SO, BECAUSE THERE AS HERE IF YOU CANNOT  
9 ULTIMATELY ESTABLISH STANDING, YOU REALLY HAVE NO BUSINESS  
10 REACHING THE MERITS.

11 THE FISA PREEMPTION ISSUE IS ANOTHER THRESHOLD PROBLEM  
12 THAT WOULD FORECLOSE THE COURT FROM REACHING THE MERITS. WE  
13 DON'T THINK THEIR EVIDENCE ESTABLISHES A RIGHT TO HAVE THE  
14 MERITS REVIEWED ON ITS OWN.

15 WE DON'T THINK THE BURDEN SHIFTS TO US OR THAT AS A  
16 RESULT OF SOME PROCEDURAL CONCLUSION THAT BECAUSE WE HAVEN'T  
17 REBUTTED THEIR EVIDENCE ON STATE SECRET GROUND, THEY GET TO  
18 HAVE THE MERITS ADJUDICATION.

19 YOU KNOW, I WOULD ADD A COUPLE OF OLD ARGUMENTS IN  
20 THERE THAT WE RAISED A YEAR AGO, WHICH WAS THAT TERRORIST  
21 SURVEILLANCE PROGRAM HAS LAPSED, IT'S DONE, IT'S BEEN  
22 SUPPLANTED BY FISA ACT AMENDMENTS OF 2008, AS A RESULT THEY  
23 COULDN'T POSSIBLY ESTABLISH STANDING FOR PROSPECTIVE  
24 PERSPECTIVE RELIEF AT THIS POINT.

25 OUR VIEW, AGAIN, THERE IS NO BASIS FOR DAMAGES UNDER

1 SECTION 1810, WHICH WE DON'T THINK WAIVED SOVEREIGN IMMUNITY.  
2 IF WE'RE RIGHT ON THAT ONE ISSUE ON SECTION 1810, THE CASE IS  
3 OVER.

4 SO IN THE FACE OF ALL THIS ARRAY OF JURISDICTIONAL  
5 ISSUE AND PROBLEMS AND THRESHOLD JUDICIBILITY PROBLEMS, I DON'T  
6 THINK IT WOULD BE APPROPRIATE FOR THE COURT TO REACH THE MERITS  
7 OF THE CASE.

8 UNLESS THE COURT HAS FURTHER QUESTIONS, I THINK, I  
9 ADDRESSED ALL OF THE ISSUES THAT YOU RAISED AND THAT  
10 MR. EISENBERG RAISED.

11 **THE COURT:** VERY WELL. THANK YOU, MR. COPPOLINO.  
12 VERY, VERY BRIEFLY, MR. EISENBERG, REBUTTAL.

13 **MR. EISENBERG:** YES, YOUR HONOR. JUST A FEW MINUTES.  
14 YOUR INDULGENCE.

15 **THE COURT:** I ASSUME, MR. STINSON HAS NOTHING TO  
16 OFFER?

17 **MR. COPPOLINO:** NO, HE'S JUST MY AGENCY COUNSEL. NOT  
18 JUST, BUT HE'S NOT GOING TO BE MAKING ARGUMENT.

19 **THE COURT:** ALL RIGHT.

20 **MR. EISENBERG:** I SUPPOSE, I COULD BE DISINGENUOUS AND  
21 SAY I CAN'T UNDERSTAND WHY THEY WON'T ADDRESS THE MERITS. THEY  
22 DID IN THEIR WHITE PAPER, THERE'S NO FACTUAL ISSUES.

23 YEAH, I COULD BE DISINGENUOUS. I WON'T BE. WE KNOW  
24 WHY THEY WON'T ADDRESS THE MERITS.

25 **THE COURT:** WHAT'S THE FUN OF EVER BEING A LAWYER IF

1 YOU CAN'T BE DISINGENUOUS ONCE IN A WHILE.

2 **MR. EISENBERG:** I DO TRY TO AVOID IT, YOUR HONOR, I  
3 TAKE THIS LITIGATION VERY SERIOUSLY.

4 **THE COURT:** IT IS SERIOUS, ALL KIDDING ASIDE. THE  
5 ISSUES HERE ARE QUITE SERIOUS AND I APPRECIATE THE VERY ABLE  
6 GUIDANCE OF COUNSEL ON BOTH SIDES.

7 **MR. EISENBERG:** THANK YOU, YOUR HONOR. WE KNOW WHY  
8 THEY WON'T ADDRESS THE MERITS BECAUSE THERE'S NOTHING THEY CAN  
9 SAY TO JUSTIFY THIS PROGRAM.

10 BRIEFLY, MR. COPPOLINO REFERRED TO THE NINTH CIRCUIT'S  
11 DECISION ASSERTING ITS MANDATE FORECLOSES THESE PROCEEDINGS.  
12 LET ME READ A QUOTATION FROM THE NINTH CIRCUIT'S DECISION, 507  
13 FED 3D AT 1204.

14 "LITIGATION CAN PROCEED IF PLAINTIFFS CAN PROVE THE  
15 ESSENTIAL FACTS OF THEIR CLAIM WITHOUT RESORT TO MATERIAL  
16 TOUCHING UPON MILITARY SECRETS."

17 THAT'S OUR CASE. THAT'S THE SPIRIT OF THE NINTH  
18 CIRCUIT'S MANDATE, HOW WE'RE PROCEEDING NOW.

19 MR. COPPOLINO ARGUES THAT, WELL, THE SHIFTING OF THE  
20 BURDEN OF PROOF THAT'S BEEN -- SOME HUNDRED PLUS YEARS DOESN'T  
21 APPLY TO STATE SECRETS CASES, THAT DOESN'T HAPPEN IN STATE  
22 SECRETS CASES, THERE'S NO CASE THAT SAYS THAT CERTAINLY.

23 BUT I WOULD ALSO SAY THIS. FISA PREEMPTION AND THE  
24 APPLICATION OF 1806F IS THE VEHICLE FOR THEM TO SUSTAIN THEIR  
25 SHIFTED BURDEN OF PROOF. IT'S THERE, THEY CAN DO IT.

1 UNDER SECURE CONDITIONS. MR. COPPOLINO ARGUES WE HAVE  
2 TO TAKE THIS HARD LINE POSITION, WE, THE GOVERNMENT, BECAUSE  
3 INTELLIGENCE SOURCES AND METHODS ARE AT RISK OF PUBLIC  
4 DISCLOSURE HERE.

5 THAT'S NONSENSE. UNDER 1806F THE DOCUMENT CAN BE  
6 REDACTED TO PREVENT SUCH DISCLOSURE, AND BESIDES THE DOCUMENT'S  
7 NOT EVEN AN ISSUE IN THIS CASE RIGHT NOW, ALL WE'RE ASKING FOR  
8 IS ADJUDICATION OF THE FACT OF OUR CLIENTS' WARRANTLESS  
9 ELECTRONIC SURVEILLANCE.

10 I HAVE NO INTEREST WHATSOEVER IN THIS COURT OR ANY OF  
11 THE ATTORNEYS IN THIS CASE REVEALING TO THE PUBLIC INTELLIGENCE  
12 SOURCES AND METHODS. AND THIS CASE CAN BE LITIGATED UNDER  
13 1806F IN A MANNER THAT DOES EXACTLY WHAT MR. COPPOLINO WANTS TO  
14 DO, HE WANTS TO PROTECT THAT INFORMATION.

15 IT CAN BE DONE. HE SAYS HE CANNOT DISCLOSE ANY DEAD  
16 BANG DEFENSE THAT HE HAS LIKE THE EXISTENCE OF A FISA WARRANT,  
17 BUT OF COURSE HE CAN UNDER THE PROTECTIONS OF 1806F.

18 MR. COPPOLINO SAID, WELL, IF THEY CAN PROCEED IN THIS  
19 CASE THEN ANYBODY CAN DO IT. THIS IS A QUOTE FROM  
20 MR. COPPOLINO. "THIS SCENARIO COULD EASILY BE REPLICATED."  
21 UNQUOTE.

22 WELL, HE CAN'T BE SERIOUS. THERE WILL NEVER BE  
23 ANOTHER CASE LIKE THIS ONE, I ASSURE YOU, WITH THE GAFFS AND  
24 PUBLIC ADMISSIONS IN THIS CASE. THIS CASE IS UNIQUE, IT WILL  
25 NOT BE REPLICATED AGAIN, AND FOR US TO GO FORWARD UPON A

1 SHOWING OF STANDING TO LITIGATE THE MERITS WILL NOT OPEN THE  
2 FLOODGATES.

3 FINALLY, THE REFERENCE TO THEY'RE ONLY SEEKING TO  
4 PROMOTE THEIR PRIVATE INTERESTS, AS MR. COPPOLINO PUT IT. THAT  
5 IS NOT TRUE, WE ARE NOT SEEKING TO PROMOTE OUR PRIVATE  
6 INTERESTS IN THIS CASE, WE ARE SEEKING TO CHALLENGE THE  
7 LEGALITY OF A PROGRAM OF SURVEILLANCE THAT GOES TO THE HEART OF  
8 THE CONSTITUTIONAL SEPARATION OF POWERS.

9 AND WE ARE SEEKING TO VINDICATE WHAT JUSTICE ROBERTS  
10 SAID IN 1952 AND THAT I THOUGHT I LEARNED WAS THE LAW WHEN I  
11 WENT TO LAW SCHOOL AT HASTINGS DOWN THE STREET, THAT THE  
12 CONSTITUTION SETS FORTH A DELICATE AND CAREFULLY CRAFTED  
13 BALANCE OF POWERS THAT SHOULD NOT BE UPENDED.

14 THAT'S WHY WE FILED THIS LITIGATION, NOT OUT OF OUR  
15 OWN PRIVATE INTEREST, BUT TO VINDICATE THE CONSTITUTIONAL  
16 SEPARATION OF POWERS.

17 **THE COURT:** REFERRING TO JUSTICE JACKSON.

18 **MR. EISENBERG:** ROBERT, ROBERT JACKSON. THREE PART  
19 TEST.

20 **THE COURT:** I THOUGHT YOU SAID JUSTICE ROBERTS.

21 **MR. EISENBERG:** I PROBABLY DID. I'VE BEEN MAKING THAT  
22 MISTAKE A LOT LATELY. I APOLOGIZE. YES, THANK YOU, JUSTICE  
23 JACKSON, NOT ROBERTS. ALTHOUGH, I WOULD LIKE VERY MUCH FOR  
24 JUSTICE ROBERTS, TO SAY IT, TOO, SOMEWHERE DOWN THE LINE.

25 **MR. COPPOLINO:** JUDGE WALKER, I JUST WANTED TO ADDRESS

1 PROCEDURAL TYPE ARGUMENT. YOUR JUNE 5TH ORDER, AS I READ IT,  
2 EFFECTIVELY FORECLOSES US FROM SUBMITTING ANYTHING TO YOU EX  
3 PARTE, IN CAMERA OR OTHERWISE IT WOULD TRIGGER A PROTECTIVE  
4 ORDER UNDER WHICH THE PLAINTIFFS WOULD OBTAIN ACCESS AND  
5 THAT'S, OBVIOUSLY, SOMETHING THAT WE CANNOT AGREE TO AND DO NOT  
6 AGREE TO.

7 AND IN GENERAL THE PROBLEM WITH THAT IS THAT IF WE  
8 WANT TO PROVIDE THIS COURT INFORMATION, ADDITIONAL INFORMATION  
9 ABOUT ANY OF THE ALLEGATIONS IN THIS CASE, WE ARE INHIBITED  
10 FROM DOING SO, EVEN IF WE WOULD LIKE THE COURT TO BE AWARE OF  
11 IT AND TO REVIEW IT.

12 I WOULD NOTE AS A PRACTICAL EXAMPLE, THEY RAISED AN  
13 ISSUE REGARDING AN INACCURACY THAT HAD BEEN SUBMITTED IN A  
14 PRIOR SUBMISSION EARLIER IN THE CASE. AS YOU MAY RECALL IN  
15 FEBRUARY I SUBMITTED SEVERAL DECLARATIONS ON THAT ISSUE. THE  
16 DNI IN OUR REPLY BRIEF ADDRESSED THE ISSUE, BUT ONLY IN AN  
17 UNCLASSIFIED DECLARATION.

18 AND WE WOULD LIKE TO, AT LEAST, HAVE THE OPPORTUNITY  
19 TO PRESENT ADDITIONAL INFORMATION ON THAT, BUT WE CANNOT AGREE  
20 TO DO THAT UNLESS THEY WERE SUBMITTED FOR EX PARTE REVIEW,  
21 WHICH I ASK THE COURT TO CONSIDER. AND WHICH I WOULD ALSO JUST  
22 POINT OUT, I WANT THE COURT TO BE AWARE THIS, IS INFORMATION  
23 THAT WE THINK WE MAY ADVISE THE COURT OF APPEALS OF AS WELL.

24 SO WE WOULD NOT WANT TO HAVE THE SITUATION WHERE YOU  
25 WERE NOT AWARE OF INFORMATION THAT THEY MIGHT BE AWARE OF. SO

1 I WOULD JUST ASK THE COURT TO RECONSIDER THAT.

2 I DON'T THINK THIS IS -- WE'RE NOT GOING TO BE  
3 SUBMITTING TO ANYTHING TO WIN ON THE MERITS, WE'RE NOT  
4 SUBMITTING IT TO WIN BASED ON THE STATE SECRETS PRIVILEGE  
5 ASSERTION, BUT TO ADDRESS THIS ISSUE, AND I WOULD ASK THE COURT  
6 TO CONSIDER THAT BECAUSE WE CANNOT SUBMIT IT JUST TO YOU,  
7 THAT'S THE PROBLEM FOR US.

8 **THE COURT:** WHAT'S YOUR POSITION, MR. EISENBERG, ON  
9 THIS?

10 **MR. EISENBERG:** YOUR HONOR, THE QUESTION WHETHER OR  
11 NOT THERE'S BEEN A MISREPRESENTATION, I DON'T KNOW WHAT  
12 INACCURACY MEANS. IT SOUNDS TO ME A BIT LIKE  
13 MISREPRESENTATION.

14 JUSTICE LAMBERTH FORMER JUSTICE WITH THE FISA COURT  
15 SITTING IN D.C. DISTRICT COURT RULED RECENTLY IN HORN VERSUS  
16 HUDDLE THAT'S A BASIS FOR DECLINING TO GIVE A HIGH DEGREE OF  
17 DEFERENCE TO THE GOVERNMENT'S ASSERTION OF THE STATE SECRETS  
18 PRIVILEGE, IF THE GOVERNMENT HAS ASSERTED A MISREPRESENTATION  
19 TO THE COURT.

20 WE DON'T KNOW WHAT THE INACCURACY IS, WE HAVEN'T SEEN  
21 THESE CLASSIFIED DECLARATIONS. IF MR. COPPOLINO WISHES TO  
22 LITIGATE THE POINT, WE WOULD LIKE THE OPPORTUNITY TO LITIGATE  
23 IT AS WELL.

24 AGAIN, IT'S NOT FAIR AS A MATTER OF DUE PROCESS TO  
25 REQUIRE US TO LITIGATE BLIND. ON OCCASION WE MAY CHOSE TO DO



1 SO BECAUSE WE FEEL CONFIDENT WE'LL BE OKAY. IN THIS SITUATION  
2 I DON'T FEEL ANY SUCH CONFIDENCE AT ALL.

3 I DO NOT FEEL IT WOULD BE FAIR TO US, FOR THIS COURT  
4 TO DETERMINE WHETHER THERE'S BEEN A MISREPRESENTATION TO THE  
5 COURT, WITHOUT US BEING PRIVY TO THE CLASSIFIED INFORMATION  
6 THAT THEY SUBMIT TO YOU TO TRY TO CONVINCING YOU THERE'S BEEN NO  
7 MISREPRESENTATION.

8 MR. GOLDBERG AND I HAVE TOP SECRET SCI SECURITY  
9 CLEARANCE. I ASSURE YOU, NOT JUST THE FBI BELIEVES WE CAN BE  
10 TRUSTED, WE OURSELVES BELIEVE WE CAN BE TRUSTED WITH THIS  
11 INFORMATION.

12 IT WOULD BE FAIR TO US, FOR THIS COURT TO MAKE SUCH AN  
13 IMPORTANT DETERMINATION, HAS THE GOVERNMENT PERPETRATED A FRAUD  
14 ON THIS COURT, A MISREPRESENTATION THAT AMOUNTS TO A FORFEITURE  
15 OF THE STATE SECRETS PRIVILEGE.

16 I DO NOT THINK IT WOULD BE FAIR FOR US, FOR THIS COURT  
17 TO LITIGATE THIS QUESTION WITHOUT OUR INFORMED INVOLVEMENT.

18 **THE COURT:** VERY WELL. I'LL TAKE THAT MATTER UNDER  
19 CONSIDERATION AND I APPRECIATE COUNSEL DRAWING THAT TO MY  
20 ATTENTION.

21 I MUST SAY, I NOTED THE SUBJECT THAT MR. COPPOLINO  
22 RAISED, I APPRECIATE HIM DRAWING ATTENTION TO THAT IN ARGUMENT.

23 ALL RIGHT, COUNSEL, THANK YOU VERY MUCH FOR YOUR VERY  
24 ABLE AND HELPFUL ARGUMENTS.

25

( PROCEEDINGS ADJOURNED . )

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CERTIFICATE OF REPORTER

I, THE UNDERSIGNED, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS 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.

I FURTHER CERTIFY THAT I AM NOT OF COUNSEL OR ATTORNEY FOR EITHER OR ANY OF THE PARTIES IN THE FOREGOING PROCEEDINGS AND CAPTION NAMED, OR IN ANY WAY INTERESTED IN THE OUTCOME OF THE CAUSE NAMED IN SAID CAPTION.

THE FEE CHARGED AND THE PAGE FORMAT FOR THE TRANSCRIPT CONFORM TO THE REGULATIONS OF THE JUDICIAL CONFERENCE.

FURTHERMORE, I CERTIFY THE INVOICE DOES NOT CONTAIN CHARGES FOR THE SALARIED COURT REPORTER'S CERTIFICATION PAGE.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND THIS 30TH DAY OF SEPTEMBER, 2009.

/S/ JAMES YEOMANS

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JAMES YEOMANS, CSR, RPR