BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE NATIONAL SECURITY AGENCY LITIGATION	**MDL Docket No. 1791**

MEMORANDUM OF THE PLAINTIFFS IN *CCR v. BUSH*, No. 06-313 (S.D.N.Y.) (CENTER FOR CONSTITUTIONAL RIGHTS, TINA M. FOSTER, GITANJALI S. GUTIERREZ, SEEMA AHMAD, MARIA LAHOOD, AND RACHEL MEEROPOL) IN OPPOSITION TO THE UNITED STATES' MOTION FOR TRANSFER AND COORDINATION PURSUANT TO 28 U.S.C. § 1407

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes and Legislative Materials

INTRODUCTION

On January 17, 2006, the Center for Constitutional Rights ("CCR") and members of its legal staff (Tina M. Foster, Gitanjali S. Gutierrez, Seema Ahmad, Maria LaHood, and Rachel Meeropol) filed an action against President George W. Bush and other government officials, seeking injunctive relief against an illegal warrantless surveillance program carried out by the National Security Agency (the "NSA Program"), *CCR v. Bush*, No. 06-313 (S.D.N.Y.) (Lynch, J.). On June 19 and 21, 2006, the United States submitted a motion and a subsequent letter to this Court, seeking to have CCR's action transferred and coordinated as a "tag-along" action with a number of pending class actions against private telecommunications companies, as well as three other actions brought against the federal government officials as defendants. Plaintiffs in *CCR v. Bush* oppose transfer and coordination of the case with any other pending actions.

BACKGROUND

On December 17, 2005, following revelations in the news media, the President admitted to the nation that he had authorized the NSA "to intercept the international communications of people with known links to al Qaeda and related terrorist organizations." *CCR v. Bush* was filed in New York a month later, on January 17, 2006, the same date as the *ACLU v. NSA* case in Detroit. The two cases were the first challenges filed against the NSA Program.

In the course of defending the NSA Program against a firestorm of public criticism, high-level administration officials have spoken in great detail about the manner in which the program operates. Under the Program, the NSA intercepts both phone calls and emails without obtaining a warrant or any other type of judicial authorization. Attorney General Gonzales has admitted that the Program intercepts communications that are subject to the requirements of the Foreign Intelligence Surveillance Act (FISA). These factual admissions were sufficient to establish

numerous violations of law. Accordingly, plaintiffs sought summary judgment on their claims that the NSA Program violates the requirements of FISA, the separation of powers, and the First and Fourth Amendments on March 9, 2006, prior to the filing of any answer to the complaint.

The government defendants subsequently requested and received from the Court a lengthy extension of more than seven weeks to respond to the complaint and summary judgment motion. (During this long extension period, defendants failed to move before this Court for transfer and consolidation of our case with *Al Haramain*, *Guzzi*, or the *ACLU* cases, despite the fact all those cases were pending at the time.) On May 26, in lieu of an answer to the complaint or a response to our motion for summary judgment, the government filed a motion to dismiss based on the state secrets privilege, challenging *inter alia* plaintiffs' standing to sue.

The government's motion to dismiss asks Judge Lynch to "exclude from this case the information identified in the classified declarations of" Director of National Intelligence John Negroponte and NSA Signals Intelligence Director Richard Quirk. (Defs. Mem. In Support of Motion to Dismiss at 52.) From this exclusion of specified information the government asserts that dismissal must automatically follow, but the factual dispute at issue is whether specific information generally identified (but not disclosed) in declarations should be excluded from our case. The declarations themselves establish that they are tailored to our case: In formally asserting the state secrets privilege, Director Negroponte claims to have undertaken personal consideration of "the allegations at issue in this case," as caselaw says he must in asserting the privilege. (Negroponte Decl. ¶2.) His (unclassified) declaration states that facts in three areas constitute state secrets: "the nature of the al Qaeda threat," further detail about the NSA Program, and whether plaintiffs have been subject to surveillance. However, because these facts constitute the very secrets that the executive seeks to shield from judicial review, they obviously

cannot be contained in the classified versions of the declarations of Directors Negroponte and Quirk. Instead, both classified declarations contain "a more detailed *explanation of* the information at issue and the harms to national security that would result from its disclosure." Negroponte Decl. ¶11; Quirk Decl. ¶7. According to the government's briefs, these declarations, standing alone, contain all the facts necessary to conclude that our case must be dismissed. The court may not look beyond the declarations "'by insisting on an examination of the evidence'"—the privileged state secret matter itself—"'even by the judge alone, in chambers.'" Gov't MTD Reply at 44 (quoting *United States v. Reynolds*, 345 U.S. 1, 10 (1953)). Thus, the government's motion to dismiss on the basis of state secrets privilege relies on a fixed body of fact contained in two discrete declarations which are tailored to the unique circumstances of our case.

The government's motion to dismiss also challenges plaintiffs standing to sue, claiming primarily that because plaintiffs cannot show that they have been actual targets of surveillance (absent discovery that would be blocked by the state secrets privilege), they cannot assert injury. However, plaintiffs' assertion of standing is based on the fact that the program makes it more difficult to communicate with our clients and thus more difficult to carry on our mission as civil rights lawyers. CCR and the named plaintiffs (CCR lawyers and legal staff) are involved in litigating many cases challenging post-9/11 detention and interrogation practices in the "war on terror." In the course of that litigation and related work, the plaintiffs communicate regularly by phone and email with persons located outside the United States who defendants have asserted are associated with al Qaeda or associated groups, and thus fit the publicly-announced target categories of the NSA Program.[1] Our professional and ethical responsibilities as attorneys mandate that we take measures to safeguard the confidentiality of these conversations, which

[1] These include clients, witnesses and other litigation participants in cases on behalf of hundreds of our clients detained as "enemy combatants" at Guantanamo, a case on behalf of a Canadian man (Maher Arar) wrongly accused of being an Al Qaeda member and rendered from JFK Airport to Syria for months of torture, and others.

contain client confidences and work product. Often this means delaying conversations until an in-person visit can be made overseas, or the use of alternative means of communication that are inadequate substitutes for the use of the telephone and email. All of this inhibits our ability to litigate cases challenging other illegal conduct of this administration, and does irreparable harm to our ability to communicate with persons essential to our litigation and to advocate vigorously on our clients' behalves.

Our obligation to take such countermeasures diverts time and resources from our core mission and reduces the efficiency of our litigation efforts. That is the injury that underlies our standing, and it is completely independent from the fact of whether or not we were subject to any actual interception, as we have made clear in our filings and in oral argument[2] before the district court. (The same theory of standing was upheld by the district court as to the many attorney plaintiffs in the ACLU case.) On our theory of standing, the only facts relevant to standing are already in the record before Judge Lynch: that based on who we represent, we are injured by measures we have been forced to implement as reasonable safeguards against the surveillance program that government officials have announced exists.

Because plaintiffs need not prove actual surveillance to manifest actionable injury and maintain standing on our theory, and our motion for summary judgment (obviously) does not require additional facts beyond those in the public record and our declarations, we have not sought any factual discovery in our case.

On July 7, 2006, Judge Lynch issued an order that "the merits of all pending motions ... be heard simultaneously," ordered that the government respond to plaintiffs' summary judgment motion, and issued a tentative hearing date for oral argument. Although defendants sought an indefinite adjournment of the oral argument and remaining briefing pending a hearing and

[2] *See, e.g*, Oral Arg. Tr. at 11, 18-20.

decision before this Panel, Judge Lynch refused their request. The last of some 640 pages of briefs and declarations (as detailed in Part C, below) relating to the two motions was filed on August 29, 2006, and an extensive oral argument lasting nearly three hours was held on September 5, 2006. (Meanwhile, the *ACLU* case progressed through two oral arguments and was decided in favor of plaintiffs by the district court. *See ACLU v. NSA/CSS*, 438 F. Supp. 2d 754 (E.D. Mich. Aug. 17, 2006). That decision is now pending appeal to the Sixth Circuit.)

ARGUMENT

Under 28 U.S.C. § 1407, the Panel may transfer actions if it determines that: (1) "one or more common questions of fact are pending in different districts;" (2) transfer would serve "the convenience of the parties and witnesses;" and (3) transfer "will promote the just and efficient conduct of such actions." 28 U.S.C. § 1407(a). The transfer and coordination sought by the government defendants would not fulfill these criteria.

A. No Common Complex Questions of Fact Are Pending in Different Districts

Transfer is "inappropriate where Movant fails to demonstrate that the common questions of fact are sufficiently complex, or that the accompanying discovery will be so time consuming as to justify" transfer. *In re The Boeing Company Employment Practices Litigation (No. II)*, 293 F. Supp. 2d 1382, 1383 (J.P.M.L. 2003) (*citing In re Scotch Whiskey Antitrust Litigation*, 299 F. Supp. 543, 544 (J.P.M.L. 1969)).

The motions currently under submission before Judge Lynch in our case do not require judgment on complex questions of fact; indeed, both parties currently claim that the essential facts necessary to resolve the case are undisputed. Plaintiffs' motion for summary judgment relies entirely on the affirmations of individual staffers at the Center, setting forth the basis for plaintiffs' standing, and on facts available in the public record; we believe it is not necessary to

review any purported state secrets to decide our motion. Conversely, the Government argues that the only facts relevant to its motion to dismiss pursuant to its assertion of the state secrets privilege are set forth in the classified declarations of Director of National Intelligence Negroponte and NSA Signals Intelligence Director Quirk. As discussed above (p.3, *supra*), the Government has stressed that the Court may not look beyond the facts provided in those declarations in making its determination. Review of the public record and/or the declarations is not so "complex" or "time consuming" as to justify transfer and consolidation at such a late stage in the proceedings. *See In re Boeing*, 294 F. Supp. 2d at 1383.

Further, when unique questions of fact predominate over common questions of fact, centralization under § 1407 is not warranted. *In re Pharmacy Benefit Plan Administrators Pricing Litigation*, 206 F.Supp.2d 1362, 1363 (J.P.M.L. 2002). This is true even if actions share common legal questions and some factual questions. *Id.* Where any efficiencies that might result from transfer are "outweighed by the need for separate treatment of the major portion" of cases, transfer is not justified. *In re Penn Cent. Sec. Litigation*, 325 F. Supp. 309, 311 (J.P.M.L. 1971) ("[F]ull development of these cases may require investigation of factual areas covered in [the others]. Whatever efficiencies might result in ... limited areas from transfer, however, would be outweighed by the need for separate treatment of the major portions of these cases."). *See also In re Diamond Mortgage Corporation, et al., Securities Litigation*, 1989 U.S. Dist. LEXIS 13672 (J.P.M.L. 1989) (denying motion to transfer five actions as transfer would not serve the goal of efficiency "given the difference in type of plaintiff in each district, the difference in scope in each district, and the difference in purpose in each district as reflected in the legal theories underlying the actions"). The cases the government seeks to coordinate with ours have many unique questions of fact not present in ours, and vice versa.

1. Cases with Telecommunications Company Defendants

The core factual issues in the telecommunications company cases are completely different than those in *CCR v. Bush*. *CCR v. Bush* arises primarily under the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. § 1801-62, and the factual foundation of our case is the President's admission that the NSA carried out warrantless electronic surveillance of the *content* of communications. In the telecommunications company cases, arising primarily under the Electronic Communications Privacy Act, 18 U.S.C. § 2701-12, the primary factual issue is whether the companies unlawfully gave the NSA telephone calling records or their internet/email equivalents—"metadata" that did not include the content of the communications.[3] Those issues regarding communications "metadata" are not present in our case.

Moreover, neither the government nor the telecommunication companies have admitted whether the companies participated in the surveillance of the content of calls and emails, or the disclosure of calling records. Another major unresolved factual issue in all the telecommunications company cases is whether the companies received an appropriate certification authorizing the surveillance from the federal government. The government asserts state secrets privilege with regard to both issues. Such factual issues may be capable of more efficient resolution by the single transferee court. None of them are relevant to the claims in our case.

The telecommunications company cases also entail various factual questions regarding class action status, while our case does not. Ensuring that class determinations are consistent with each other (and avoiding overlap of classes in multiple suits) is a central concern underlying

[3] These might be generally described as dialing, routing, addressing and/or signaling information regarding electronic communications.

the passage of section 1407,[4] but one entirely absent from our case. Moreover, the telecommunications company cases entail resolution of individual questions of damages, where our case seeks only injunctive relief. The two sets of actions at their core involve completely different types of conduct by completely different classes of actors, seeking completely different remedies; there is no factual commonality of either deed or doer.

2. Cases with Only Government Officials as Defendants

The factual determinations at issue in the three other government-defendant cases are also distinct from those arising in *CCR v. Bush*, as set forth below. Given the small number of cases currently involved (as the ACLU case is now on appeal), the burden on the government to prove a common core of complex question of fact between these cases is especially high. *In re Scotch Whiskey Antitrust Litigation*, 299 F. Supp. 543, 544 (J.P.M.L. 1969) ("where, as here, there are a minimal number of cases involved in the litigation the moving party bears a strong burden to show that the common questions of fact are so complex and the accompanying common discovery so time-consuming as to overcome the inconvenience to the party whose action is being transferred").

***Al Haramain v. Bush*, No. 06-cv-274 (D. Or.)**

In *Al Haramain v. Bush*, plaintiffs, a domestic charitable group based in Oregon and their attorneys in Washington, D.C., allege that a government document, classified but accidentally disclosed to them by the government, proves that their attorney-client communications were subject to warrantless surveillance by the NSA. It is not clear from the public filings whether this interception was of a domestic call or an international call; the complaint specifies that one or

[4] *See In re Pension Fund Litigation*, 360 F. Supp. 1400 (J.P.M.L. 1973); *In re 7-Eleven Franchise Antitrust Litigation*, 358 F. Supp. 286 (J.P.M.L. 1973) ("We have frequently held that the possibility for conflicting class action determinations is an important factor favoring transfer of an action under Section 1407").

more communications between one or more directors or officers of Al Haramain and the Washington attorneys were intercepted, and the directors and officers of the organization include both domestic and overseas persons. The government asserted state secrets privilege and demanded the return of the document, which had been filed with the court under seal and is currently housed in a secure government facility for handling classified information in Oregon.

The Court in *Al Haramain* has already rendered a decision regarding these assertions, rejecting the claim of privilege on the grounds that the accidental disclosure to plaintiffs rendered the contents of the document no longer secret to the plaintiffs. *See* Opinion and Order, 2006 U.S. Dist. LEXIS 64102 (Sep. 7, 2006). The issue has been certified for appeal, *id*. at *49, and the government has petitioned the Ninth Circuit to accept the appeal. Factual issues relating to state secrets privilege are essentially no longer before the *Al Haramain* Court, and cannot form the basis for transfer and coordination with our case.

In any event, factual issues regarding state secrets privilege are invariably case-specific. See pp. 2-3, *supra*, and 15-16, *infra*. (That is obviously so where the facts of the cases are as different as they are here—the public record in *Al Haramain* indicates the NSA was spying on what may have been domestic calls; our case asserts the NSA is spying on international calls.) Indeed, the government's assertion of the privilege relies on declarations from different parties in the two cases: DNI Negroponte and NSA Director Alexander in *Al Haramain*, Negroponte and NSA Signals Intelligence Director Quirk in our case.

In *Al Haramain*, the Court has allowed plaintiffs to make reference to the classified document in order to attempt to establish standing by showing the document proves that their communications were <u>actually</u> intercepted. In our case, standing is not based on a claim of actual interception, but rather on the costs and hardships imposed on our activities as civil rights

attorneys by the defensive measures we must take in response to the threat of interception under the NSA Program. The facts relevant to standing in *Al Haramain* are presumably all contained in the classified document; in our case they are contained in a handful of affirmations from CCR staff, discussing our communications practices and detailing why we believe some of the people we communicate with fit within the groups the NSA Program targets (according to admissions of government officials). All the factual issues relevant to standing in *CCR v. Bush*[5] are absent from *Al Haramain*, and vice-versa.

In contrast to *CCR v. Bush*, the factual nature of the NSA Program *generally* is not at issue in *Al Haramain*. The classified document allegedly discloses *specific* surveillance of attorney-client conversations by NSA. (According to Congressional testimony of Attorney General Gonzales, the NSA runs many surveillance programs; for all we know the program of international surveillance admitted to by the President and challenged in our case may be entirely different from whatever program[6] intercepted the possibly-domestic communications in *Al Haramain*.) The *Al Haramain* plaintiffs have not relied on admissions by government officials to show they were harmed; those admissions, in contrast, are the factual foundation of the claims and the summary judgment motion in *CCR v. Bush*.

In contrast to *CCR v. Bush*, which seeks only equitable relief, the relief claimed in *Al Haramain* is primarily monetary damages. (Although the *Al Haramain* plaintiffs seek declaratory and injunctive relief, that equitable relief is limited to declaring the surveillance *of the specific plaintiffs* illegal, and ordering its termination.[7] Again, factually, it is quite possible that the

---

[5] Of course, we claim there is no material dispute as to all facts relevant to our plaintiffs' standing.

[6] The government implies the program at issue in *Al Haramain* may be different. *See* Opinion and Order, 2006 U.S. Dist. LEXIS 64102 at *14 (government claims as state secret any "information that would confirm or deny whether plaintiffs have been subject to surveillance under the Surveillance Program *or under any other government program*").

[7] *See* Complaint, Prayer for Relief ¶ 1 (seeking declaration that "defendants' warrantless surveillance of plaintiffs is unlawful and unconstitutional, and enjoin any such warrantless surveillance"); *id*. ¶ 2 ("Order

surveillance program those plaintiffs were victims of and the program challenged in *CCR v. Bush* are entirely different programs.) The damages claims arising in *Al Haramain* under FISA, 50 U.S.C. § 1810, create a number of issues amenable to discovery. For example, plaintiffs might seek to discover the duration of the unlawful surveillance as it is germane to the statutory liquidated damages; defendants will presumably seek discovery of plaintiffs to establish the scope of other damages—actual damages and punitives as allowed by § 1810. No similar facts need be explored at any stage of the case in *CCR v. Bush*.

Finally, like *CCR v. Bush*, the *Al Haramain* case has progressed a great distance since the complaint was filed on February 28, with the Court already having decided four pretrial motions. The case is already at the discovery conference stage; in contrast, the CCR plaintiffs have requested no discovery, and have filed for summary judgment. If our case ever required discovery, it would be vastly different from that the *Al Haramain* plaintiffs would seek, given the nature of the claims and relief sought in the respective cases.

***Shubert v. Bush*, No. 06-cv-2282 (E.D.N.Y.)**

Shubert v. Bush was filed shortly after news media revelations that the NSA had gathered phone records in apparent violation of the Electronic Communications Privacy Act (ECPA). The complaint focuses on data mining and call records collection—issues absent from *CCR v. Bush* and not the subject of detailed admissions by administration officials, unlike the content-interception program challenged in *CCR v. Bush*—although the *Shubert* case includes content interception claims as well. Because those data mining and phone records claims will require

---

defendants to disclose to plaintiffs all unlawful surveillance of plaintiffs' communications carried out pursuant to the illegal program").

factual discovery, the *Shubert* case presents a variety of pretrial factual issues not present in *CCR v. Bush*.[8]

Factual matters relevant to standing and class action status may arise before trial in *Schubert*, but will not be relevant to our case. Like *Al Haramain*, *Shubert* seeks damages, not just under FISA (as in *Al Haramain*) but also under ECPA and *Bivens* (for their Fourth Amendment claims) as well. Again, pretrial discovery will presumably be required to establish the nature and scope of such damages in those cases. These pretrial factual issues are also absent from our case.

***Guzzi v. Bush*, No. 06-cv-136 (D. Ga.)**

Guzzi is a pro se case brought by a citizen who claims to have conversed with persons overseas, discussing issues such as terrorism and criticism of President Bush. He is not an attorney and does not make standing claims rooted in the special problems posed to attorneys by a program of warrantless surveillance lacking any judicially-supervised minimization requirements to protect legally-privileged conversations. As the government itself states: "Plaintiff Guzzi makes no comparable allegation here of communicating with terrorist suspects nor demonstrates any injury to professional responsibilities comparable to those alleged in" the ACLU case (Defs. Reply Mem. In Support of Motion to Dismiss (Dkt. 13) at 6 n.3), or ours. Thus the core factual issues relating to standing in our case and *Guzzi* are entirely different.[9] The

[8] Examples of allegations in *Shubert* that reach facts not relevant to our claims, and which are not the subject of overt admissions by administration officials, include: the claim that the NSA accesses communications in "electronic storage" under ECPA (¶53); that the NSA monitors call data (¶56); that the NSA monitored purely domestic calls (¶59); that there is no authorization for specific intercepts from the Attorney General or the President (¶63); that the NSA makes interceptions within the United States by monitoring satellite signals from inside the U.S. and accessing telephone company switching stations inside the U.S. (¶¶ 65-68), and that it engages in data mining (¶ 70), including of internet usage (¶¶ 75-78). We allege none of this; none of it is relevant to our claims. In order to establish these facts, the *Shubert* plaintiffs will presumably require pretrial factual discovery, since at least some of these facts have not been the subject of admissions by government officials.

[9] Guzzi's claims are also different from ours. Although he seeks only equitable relief, he makes only constitutional claims against the NSA Program; his complaint includes no APA-based claim that the Program violates the FISA statute.

government has moved to dismiss *Guzzi* based entirely on plaintiff's lack of standing. (The motion has been fully briefed since August 23d.) The government has not asserted the state secrets privilege nor has it made any classified submissions.[10]

3. The Factual Issues Relevant to Standing in *CCR V. Bush* Are Unique As against All the Other Pending Cases

The government has claimed in our case that we must demonstrate that plaintiffs have been actually subject to surveillance under the NSA Program in order to maintain standing. However, we have consistently maintained that the fact *vel non* of surveillance is utterly irrelevant to our standing, and we have accordingly not sought any discovery as to whether we were targets of actual surveillance by the NSA.[11] Instead, the standing of the CCR plaintiffs is based on the their status as attorneys and legal staff at the Center, and the undisputed fact that they represent many individuals accused of involvement in terrorism—including alleged Al Qaeda members at the heart of the admitted target group of the NSA Program. Our plaintiffs are forced to institute protective measures to reduce the potential impact of such surveillance on their representation of their clients, including not communicating with certain individuals at all by phone or email, and avoiding subjects central to the attorney-client relationship and work product in electronic communications with others. Such protective measures are mandated by our professional responsibilities as attorneys. The expense, delay and inefficiency they create are

[10] Thus, to the extent the government claims the ease of handling such materials or deciding such issues militates in favor of transfer to a single venue, those issues are absent from *Guzzi.* As a general matter, however, the government's argument is specious for reasons set forth in Part B, below.

[11] As part of our requested relief, we seek disclosure of whether any of our communications were surveilled, but that is a matter of post-trial relief, not pretrial factual discovery. In another matter, *Turkmen v. Ashcroft*, No. 02-CV-2307 (E.D.N.Y.), attorneys and staff for CCR (including one named plaintiff in *CCR v. Bush*) and co-counsel firms have sought and received from the Magistrate Judge an order mandating government disclosure as to whether attorney-client communications in that case were subject to surveillance. (The government has sought review before the District Judge.) However, that case is not before this panel.

harm sufficient to ground standing—indeed, plaintiffs continue to experience irreparable harm to their ability to advocate vigorously on their clients' behalf.

The government argued that plaintiffs' injuries are not causally related to the NSA Program because plaintiffs should have taken these defensive measures in response to the threat of judicially ordered wiretaps under Title III or FISA. However, because they are attorneys, plaintiffs communications would be protected by judicially imposed and supervised minimization procedures had their phone lines or email been subject to surveillance under warrants. In other words, plaintiffs' status as attorneys is crucial to establishing the causation element of their injury (i.e. that it is causally related to the NSA Program) and thus is crucial to their standing. In other cases where the plaintiffs are not attorneys (and thus not (a) subject to special protection under the wiretapping statutes' minimization procedures and (b) especially vulnerable to injury from surveillance, given their need to protect the confidence of their privileged conversations), other factual matters relevant to standing may be at issue, including whether those plaintiffs have a reasonable fear of surveillance under the program because they routinely communicate with people the government believes are associated with terrorism, and a reasonable fear of concrete harm as a consequence. But they are not at issue in our case.

In sum, our claims are factually simpler to resolve because our case was designed to be as streamlined as possible in order expeditiously to reach the legal issues, and achieve relief for the continuing irreparable harm our attorneys (and our clients) are suffering as a result of the NSA Program. By design, our case involves no need to show actual surveillance of our plaintiffs, and no need for discovery as to additional details concerning the NSA Program to prove either injury or a legal right to relief.

B. Neither Convenience Nor a Common Legal Claim—the Government's Assertion of the State Secrets Privilege—May by Itself Provide a Basis for Transfer

The government's papers fail to identify *any* complex common questions of fact meriting transfer. Instead, their focus is exclusively the notion that transfer will supposedly be convenient in a variety of ways for the government. That would be legally insufficient to support transfer, but as a factual matter the government's specific arguments for convenience are dubious as well.

The government asserts that it must submit classified declarations in support of its assertions of state secrets privilege, and "there is an increased risk of disclosure of such information, which would be harmful to the national security, if the United States is required to present state secrets in multiple fora." Gov't Br. at 15. But the very point of the state secrets privilege, according to the government, is that judges may not be allowed to review any such exceptionally sensitive information; instead, they must rely on the judgment of the executive declarants that the truly "state secret" information is sensitive enough that its disclosure *even to the judge* would present an unacceptable risk of its being made public and that such disclosure would cause grave harm to the national security. (See pp. 2-3, *supra*.) Therefore it defies all logic that the government would place such sensitive matter even in the classified versions of the declarations it submits *ex parte* and *in camera*, when in fact the whole point of the invocation of the privilege is to avoid judicial scrutiny of the sensitive matter.[12] While the declarations may be "classified" because they contain lesser secrets, the "state secrets" themselves would never be contained in such documents.

---

[12] *See United States v. Reynolds*, 345 U.S. 1, 8-10 (1953) ("The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect. ... we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.").

Moreover, the classified declarations the government claims it would rather not file in various courts around the country have already been made available to Judge Lynch in our case,[13] and have been reviewed by the judges in several of the cases initially identified as tag-along actions by the government, including the *Al Haramain* and *ACLU* cases. *See Al Haramain*, 2006 U.S. Dist. LEXIS 64102 at *8; *ACLU v. NSA*, 438 F. Supp. 2d at 765-66 ("the court has reviewed the classified information and is of the opinion that this information is not necessary to any viable defense to the TSP").

Director Negroponte will still be required by law[14] to "give personal consideration" to the assertion of privilege "separately in each action" (Gov't Br. at 16-17), regardless of whether they are transferred to a single court for coordinated pretrial procedures; coordination is not consolidation, and the matters will remain separate actions requiring separate assertions of privilege tailored to the distinct facts of each case. The notion that transfer will make Director Negroponte's job easier, and thus serve the "convenience of the parties" and the "efficient conduct" of these actions, is therefore utterly spurious.

After close scrutiny, what is left of the government's argument for transfer is that there is "a clear commonality of legal theory and purported statutory violations claimed across all the cases." Averment in Support of Gov't Motion, ¶ 1; *see also* Gov't Br. at 18 ("many of the asserted statutory challenges to the Government in the added actions are related to the causes of action against the telecommunication companies."). But common questions of *law* are not sufficient to justify transfer. Section 1407 provides that transfer is appropriate *only* where "one

---

[13] Judge Lynch chose not to review the government's classified submissions in our case prior to the public oral argument on the government's Motion to Dismiss and our Motion for Summary Judgment September 5, 2006, in order not "to risk either inadvertent disclosure or even the appearance of such disclosure" during the proceedings in open court. Oral Arg. Tr. at 5 lines 15-16. However, he stated that he would "most assuredly read them before" ruling on the pending motions. Id. at 5 line 13.

[14] *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953) ("There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer.").

or more common questions of *fact* are pending in different districts." 28 U.S.C. § 1407(a) (emphasis added). Where the "primary common thread in ... litigation pertains to *legal* questions," transfer under § 1407 is not warranted; where questions of law preponderate over questions of fact, this panel has refused to transfer cases. *In re National Ass'n of Attorneys Gen. Air Travel*, Docket No. 813, 1989 U.S. Dist. LEXIS 19091, *2 (J.P.M.L. 1989) (*citing In re Environmental Protection Agency Pesticide Listing Confidentiality Litigation*, 434 F. Supp. 1235, 1236 (J.P.M.L. 1977) (denying EPA defendant's motion to transfer on grounds that common question is primarily a question of law)); *see also In re U.S. Navy Variable Reenlistment Bonus Litigation*, 407 F. Supp. 1405 (J.P.M.L. 1976). The reasons for such a policy are obvious: the federal system is predicated on allowing consideration of complex legal issues by multiple district and appeals courts in order to ultimately present the Supreme Court with a variety of approaches and opinions on important questions.[15]

C. Transfer of *CCR v. Bush* Would Be Inefficient

Efficiency is a hallmark of section 1407. Where transfer would serve to disrupt the progress made in an action or delay the termination of an action, consolidation is inappropriate. *In re Chiropractic Antitrust Litigation*, 483 F. Supp. 811, 813 (1980); *see also In re Qwest Communicational International, Inc., Securities and "ERISA" Litigation*, 395 F. Supp. 2d 1360, 1361 (J.P.M.L. 2005) (denying motion to transfer where "centralization would not necessarily … further the just and efficient conduct" of the litigation given the advanced stage of proceedings and the limited number of districts involved); *In re Ecuadorian Oil Concession Litigation*, 487

[15] The government also argues that the district and appellate judges in D.C. have some "particular expertise with cases involving classified national security information," but that is of course completely irrelevant to the matter at hand, and no pending matters already before the district court in D.C. are subject to this Court's Conditional Transfer Order. The related argument that "[d]ue to the manner in which classified information is maintained, [the D.C. District] would also be the most secure forum for the Government" is unsupported by legal citation or fact and, for the reasons discussed in the text, irrelevant.

F. Supp. 1364 (J.P.M.L. 1980) (denying motion to transfer where centralization "could delay the termination of [one] action without producing any overriding benefits"). This practice is consistent with the legislative history of § 1407, which indicates that "transfer is to be ordered only where *significant* economy and efficiency in judicial administration may be obtained" thereby. H. Rep. 1130, 90th Cong., 1st Sess. (Feb. 28, 1968), *reprinted in* 1968 U.S.C.C.A.N. 1898, 1900 (emphasis added).

In our case, both Judge Lynch and the parties have already expended considerable time and effort on advancing the case to its current stage. Plaintiffs filed a motion for summary judgment on March 9, 2006, asserting that public admissions by administration officials provided all the necessary facts to resolve the case in our favor. On May 26, in lieu of an answer to the complaint or a response to our motion for summary judgment, the government filed a motion to dismiss based on the state secrets privilege, challenging *inter alia* plaintiffs' standing to sue. Neither side believes discovery is necessary to resolve the case in its favor: our summary judgment motion is based on the affirmations of plaintiffs and public admissions by administration officials; the government's motion is based on classified submissions from Director Negroponte and General Alexander. Each party has filed three major briefs; the six briefs reach approximately 220 pages in total. In addition, eight amicus briefs (totaling over 170 pages) have been filed in the district court from parties supporting both sides. The court has reviewed 7 public declarations totaling over 250 pages. An extensive oral argument lasting for nearly three hours and addressing both parties' dispositive motions was held on September 5, 2006.

Given that Judge Lynch is in a position to rule on pending dispositive motions from both parties, and decision on the motions can be reached without resolution of disputed issues of fact,

it would be unjust and inefficient to transfer our case and to consolidate it with any of the other potential tag-along actions. Centralization is inappropriate where the actions subject to the motion are "procedurally so far advanced that discovery is complete or nearly completed, and a substantial number of … motions have been fully briefed and decided or are pending." *In re Telecommunication Providers' Fiber Optic Cable Installation Litigation*, 199 F. Supp. 2d 1377, 1378 (J.P.M.L. 2002).[16]

Entertaining motions for transfer of cases where there are fully briefed and argued dispositive motions pending quite obviously creates a moral hazard,[17] as it opens up opportunities for parties to feel out the attitudes of judges before deciding whether to seek transfer. In such circumstances, it is appropriate and wise for this Court to defer its decision on transfer until the pending motions are decided. *Cf. In re Resource Exploration, Inc., Securities Litigation*, 483 F. Supp. 817, 822 (J.P.M.L. 1980) (transferring eight actions but deferring decision to transfer ninth pending district court's decision on fully-submitted motion for summary judgment); *In re Exxon Corp. Hawkins Field Unit Recoupment Litigation*, 1988 U.S. Dist. LEXIS 17012 (J.P.M.L. 1988) (excluding one of twenty two actions where a "potentially dispositive motion is pending").

It would also be highly inefficient to transfer and coordinate our case with the already-transferred cases seeking money damages against telecommunications companies. Indeed, given the complexity of that litigation, such consolidation would likely slow the progress of our case,

---

[16] *See also In re Nortel Networks Corp. Securities & "ERISA" Litigation*, 269 F. Supp. 2d 1367, 1369 (J.P.M.L. 2003) (granting motion to transfer three actions, but denying motion to transfer action to which the judge "has already devoted significant time and effort"); *In re Multidistrict Private Civ. Treble Damage Litig.*, 298 F. Supp. 484, 496 (J.P.M.L. 1968) (Citing "principles of comity" as leading Panel to operate "in a manner which will permit the transferor courts…to reach timely decisions on particular issues without abrupt, disconcerting, untimely or inappropriate orders of transfer by the Panel.").

[17] *See In Re "East of the Rockies" Concrete Pipe Antitrust Cases*, 302 F. Supp. 244, 256 (J.P.M.L. 1969) (Weigel, J., concurring) (asking: "Will transfer serve an ulterior motive of any party or parties, such as forum shopping?").

defeating the purpose of the multidistrict litigation statute—to promote the "just and efficient conduct" of cases.[18] Concerns for efficiency are especially significant in considering the transfer of a case, such as ours, where plaintiffs are alleging irreparable harm to fundamental First Amendment interests—their ability to communicate freely with their clients, and their ability to engage in civil and human rights litigation in the public interest[19]—and seeking solely injunctive relief, not money damages, to remedy such harm.[20] Transfer would inevitably engender delays that would perpetuate the irreparable harm that results from the impact of this surveillance program on Plaintiffs' ability to function as public interest attorneys.

CONCLUSION

For the foregoing reasons, the Panel should: (1) deny the Government's Motion to transfer and coordinate *CCR v. Bush* with any other cases; or (2) in the alternative, defer a decision on transfer and coordination of *CCR v. Bush* until the dispositive motions already argued before the district court are decided.

---

[18] *See In Re "East of the Rockies" Concrete Pipe Antitrust Cases*, 302 F. Supp. at 256 (Weigel, J., concurring) (asking: "Will transfer hasten or delay progress in the cases?") (citing *In re Air Crash Disaster*, 298 F. Supp. 1323, 1324 (J.P.M.L. 1969) ("to effect a transfer at this time of the New York actions would serve to delay the trial of those litigants who have been diligent in prosecuting their claims and would not promote the 'just and efficient conduct' of those actions")); *In re McDonnell Douglas "Wild Weasel AN/APR-38" Contract Litigation*, 415 F. Supp. 387, 389 (J.P.M.L. 1976) ("*Loral* has been pending for close to two and one-half years ... while *Itek* was only recently filed. And it is possible that a transfer at this time might delay the trial of *Loral*. We are not convinced that such a delay would be justified by a concomitant increase in the expeditiousness with which *Itek* could be resolved.").

[19] Such public interest litigation is both a form of redress for grievances protected by the First Amendment, and a form of political expression, *see NAACP v. Button*, 371 U.S. 415, 429 (1963).

[20] An instructive parallel may be made with § 1407(g), whereby Congress specifically exempted antitrust actions brought by the government from coordination with actions for damages brought by private plaintiffs "merely to ride along on the Government's cases." Congress was concerned that the "Government suits would then almost certainly be delayed," often to the injury of the public. H. Rep. 1130, 90th Cong., 1st Sess. (1968), *reprinted at* 1968 U.S.C.C.A.N. at 1902. "To treat the government differently is not arbitrary, for the purpose of the governmental suit is [to] protect the public... while private parties are primarily interested in recovering damages for injuries already suffered." *Id*. at 1905 (quoting letter of Att'y Gen. Clark); *see also* S. Rep. 454, 90th Cong., 1st Sess. (Jul. 27, 1968) at 6, 10. Here, the streamlined injunctive case brought by CCR in the public interest may be delayed by transfer and coordination with private damages suits of far greater factual complexity.

Respectfully submitted,

Shayana Kadidal
William Goodman
Michael Ratner
Mateo Taussig-Rubbo
Meg Gardiner (law student)
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012-2317
(212) 614-6438

David Cole
(CCR Cooperating Counsel)
c/o Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, DC 20001
(202) 662-9078

Michael Avery
NATIONAL LAWYERS GUILD
c/o Suffolk Law School
120 Tremont Street
Boston, MA 02108
(617) 573-8551

counsel for Plaintiffs

September 30, 2006

Certificate of Service

I, Shayana Kadidal, certify that on September 30, 2006, I caused the foregoing Motion to Vacate, Memorandum in Support (together with its Exhibits), Corporate Disclosure Statement and Notice of Appearance to be served on the parties listed on the attached Panel Service List.

Dated: September 30, 2006

Shayana Kadidal
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012-2317