UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

EHAB ELMAGHRABY and JAVAID IQBAL, Plaintiffs, vs. JOHN ASHCROFT, et al. Defendants.	04 CV 1809 (JG)(SMG)
IBRAHIM TURKMEN, et al., Plaintiffs, vs. JOHN ASHCROFT, et al., Defendants.	02 CV 2307 (JG)(SMG)

UNITED STATES' OBJECTIONS TO MAGISTRATE JUDGE GOLD'S ORDER ENTERED ON MAY 30, 2006

INTRODUCTION

Misunderstanding the United States's national security concerns and improperly crediting plaintiffs' speculation about a chilling effect, the Magistrate Judge erroneously ordered the public disclosure of highly sensitive, classified information on the Terrorist Surveillance Program ("TSP"). *See*, *infra*, at 4-5. Specifically, he required the government to state whether any member of the trial team, any supervisor, anyone else providing any guidance or advice, or any individual likely to be a witness is aware of any monitoring or surveillance of communications between any of the plaintiffs and their attorneys. Because this far-reaching order undermines our

national security without any plausible justification, and does so in a case in which the TSP is not even at issue, the United States respectfully requests that the Court vacate the order to the extent that it requires any additional disclosures beyond those already made.

The Magistrate's opinion rests on two equally faulty premises. First, the Magistrate concludes that, because the existence of the TSP "has received widespread publicity and has even been acknowledged by the President of the United States and other high-level government officials," the government's claim that sensitive secrets would be revealed by his required disclosures "is hard to fathom." (*See* Order, *Turkmen* Docket Entry 497 at 7-8.) In other words, the Magistrate mistakenly assumes that if the existence of a program is public information, the government has no national security interest in the details of that program. This assumption, however, is contrary established case law. *Halkin v. Helms* (*Halkin II*), 690 F.2d 977, 994 (D.C. Cir. 1982) ("We reject, as we have previously, the theory that 'because some information about the project ostensibly is now in the public domain, nothing about the project in which the appellants have expressed an interest can properly remain classified' or otherwise privileged from disclosure") (quoting *Military Audit Project v. Casey*, 656 F.2d 724, 752 (D.C. Cir. 1981); *Halkin v. Helms* (*Halkin I*), 598 F.2d 1 (D.C. Cir. 1978).

Second, the Magistrate asserts that the disclosure of the government's awareness of monitoring is necessary to avoid "the chilling specter of government eavesdropping" and to ensure that the government has not gained an unfair tactical advantage. (*See* Order, *Turkmen* Docket Entry 497 at 6.) In reaching this conclusion, however, the Magistrate overlooks the fact that the United States has already fully addressed any legitimate concerns the plaintiffs may have by confirming that the government trial team did not and would not receive any intercepts of

attorney-client communications and that no such intercepts would be used in the defense of this action. Further, the Magistrate ignores the narrowly defined and publicly disclosed limits of the TSP – namely, that it covers only certain international communications as to which there are reasonable grounds to believe that a party to the communication is a member of al Qaeda, a member of a group affiliated with al Qaeda, or an agent of al Qaeda or its affiliates. If plaintiffs have no such relationship to terrorist groups, such as al Qaeda, as they allege in their complaint,[1] then they have no basis for believing that their communications are being monitored under the TSP. In addition, even if plaintiffs have a relationship to a terrorist organization, they still cannot legitimately claim any added marginal chill or other disadvantage from the TSP, because persons associated with terrorist groups could alternatively be subject to surveillance pursuant to other means (such as under the Foreign Intelligence Surveillance Act or surveillance conducted overseas).

Because the Magistrate's decision rests on two erroneous premises and compromises national security, this Court should vacate the Magistrate's order requiring the additional disclosures. At most, the United States should be required to use the proposed witness statement initially crafted by the Magistrate. This statement was designed to balance the interests of both sides and provide a reasoned compromise, but in his Order, the Magistrate summarily rejected it. This Court should reverse the Magistrate's flawed decision.

In the alternative, the United States requests a stay of execution of the May 30, 2006, Order until final resolution of *Center for Constitutional Rights, et al. v. George W. Bush, et al.*,

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[1] *See Turkmen* Third Amended Complaint, ¶¶ 16-22, 149; *Elmaghraby* First Amended Complaint, ¶¶ 49, 51, 75.

Civil Action No. 06 CV 313 (S.D.N.Y.), which raises a broader disclosure issue and in which the United States has asserted the state secrets privilege. That case involves a challenge to the TSP, whereas the instant litigation does not. This Court should reject the plaintiffs' invitation to use this tort litigation as a backdoor means to attack the TSP.

BACKGROUND

1. The Terrorist Surveillance Program: With the attacks of September 11, al Qaeda demonstrated its ability to introduce agents into the United States undetected and to perpetrate devastating attacks. Since then, al Qaeda leaders have repeatedly promised to deliver another, even more devastating assault on America. For example, in October 2002, al Qaeda leader Ayman al-Zawahiri stated in a video addressing the "citizens of the United States": "I promise you that the Islamic youth are preparing for you what will fill your ears with horror." In October 2003, Osama bin Laden stated in a released videotape that "We, God willing, will continue to fight you and will continue martyrdom operations inside and outside the United States . . . ." And again in a videotape released on October 24, 2004, bin Laden warned U.S. citizens of further attacks and asserted that "your security is in your own hands."

In recent months, al Qaeda has reiterated its intent to inflict a catastrophic terrorist attack on the United States. On December 7, 2005, al-Zawahiri professed that al Qaeda "is spreading, growing, and becoming stronger," and that al Qaeda is "waging a great historic battle in Iraq, Afghanistan, Palestine, and even in the Crusaders' own homes." Finally, as is well known, since September 11, al Qaeda has staged several large-scale attacks around the world, including in Indonesia, Madrid, and London, killing hundreds of innocent people. As the President has made clear, "[t]he terrorists want to strike America again, and they hope to inflict even more damage

than they did on September the 11th." *See* Press Conference of President Bush (Dec. 19, 2005), available at http://www.white-house.gov//news/releases/2005/12/20051219-2.html.

For this reason, as the President has explained, finding al Qaeda sleeper agents in the United States remains one of the paramount national security concerns to this day. *See id.* One of the means for rooting out such agents is the TSP, a program that the President publicly acknowledged in December 2005. Under the TSP, the President authorized the National Security Agency to intercept certain communications as to which there are reasonable grounds to believe that (1) the communication originated or terminated outside the United States, and (2) a party to such communication is a member of al Qaeda, a member of a group affiliated with al Qaeda, or an agent of al Qaeda or its affiliates. *See* Press Conference of President Bush (Dec. 19, 2005). The purpose of the TSP is to protect the Nation from foreign attack by detecting and preventing plots by a declared enemy of the United States that has already killed thousands of innocent civilians in the single deadliest foreign attack on U.S. soil in the Nation's history.

2. *Procedural Background*: This litigation has nothing to do with the TSP, but rather the conditions of confinement that existed in two detention facilities over four years ago. However, on February 22, 2006, the *Turkmen* plaintiffs served "Plaintiffs' Second Set of Interrogatories and Request for Production of Documents to the United States," seeking discovery into the TSP. Because this discovery sought information irrelevant to plaintiffs' claims, was served more than fifteen months after the deadline for written discovery, and did not comply with the limitations set forth in this Court's discovery order, the United States objected. (Order, *Turkmen* Docket Entry 134, dated November 17, 2004; United States' letter, dated February 28, 2006, is attached

at Tab 1.) Specifically, the United States opposed Interrogatory No. 9,[2] which required the United States to:

> State whether any telephone, email or other communication between any plaintiff and his counsel was monitored or intercepted since the plaintiff's removal from the United States. If yes, state the date and time of the communication monitored, state the form of the communication monitored, identify the individuals involved, and identify each person who authorized such monitoring.

At a March 7, 2006 status conference, the Magistrate agreed with the United States that this interrogatory was inappropriate. As he noted, the interrogatory "has nothing to do really with the claims in this case." (Copies of the relevant pages of the Transcript of March 7, 2006, *Turkmen* Docket Entry 481, at 29, 33, are attached at Tab 2.) It did not relate to any of plaintiffs' claims or defenses. Nonetheless, without any advance warning to the United States, the Magistrate *sua sponte* crafted his own remedy:

> I want to know that no member of the trial team is aware of any of this activity. I want a representation that as far as the members of the litigation – [When] I say trial team, I mean the litigation team and support staff, et cetera – that as far as you know, no witness who might testify in this action is aware of any information culled through devices such as described in 9. . . . And I want a commitment that no information developed through such means will be used in the litigation of this case.

Id. at 33.

Because of the national security concerns arising from the Magistrate's discovery initiative, which seeks a window into the TSP, the United States promptly sought reconsideration. (*See* United States' letter, *Turkmen* Docket Entry 477.) In support, the United States explained that "it would be inappropriate to provide on the public record answers to these

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[2]Plaintiff Iqbal did not serve any discovery similar to Interrogatory No. 9, but has demanded that the United States respond to said interrogatory. (*See* Plaintiffs' letter, *Turkmen* Docket Entry 482 at 3.)

questions because no official or employee of the government, including trial counsel, can publicly confirm or deny whether any communications were intercepted by classified means." *Id.* at 1-2.

Plaintiffs opposed the motion and, attempting to justify their position, suggested that their concern regarding the alleged monitoring of privileged communications was very narrow. Specifically, plaintiffs stated that "attorneys representing the United States may have access to confidential communications between adverse parties and their counsel, and may use evidence gathered by such monitoring to prepare the government's case, or even in court." (*See* Plaintiffs' letter, *Turkmen* Docket Entry 478 at 4.) Plaintiffs further contended that the Court's questions were tailored specifically to address this concern. According to plaintiffs,"the Court has not directed the United States to certify that no such monitoring has taken place, nor even that no monitoring of privileged attorney-client communications has taken place, *but simply that no such intercepts have been or will be revealed to the United States' trial team or used in the defense of the action.*" *Id.* at 3 (emphasis added).

Interpreting the Court's questions in this fashion, and based on plaintiffs' representations of the scope of their concern, the United States provided a full and complete response on March 27, 2006. In the interest of moving forward, the United States informed plaintiffs and the Court: "First, no member of the trial team has received any intercepts of attorney-client communications. Second, no member of the trial team expects or intends to receive any intercepts of attorney-client communications. Third, no such intercepts will be used in the defense of the action." (*See* United States' letter, *Turkmen* Docket Entry 479.) Because this response addressed all the concerns identified by plaintiffs in their opposition to reconsideration,

it should have ended the discovery dispute.

But plaintiffs wanted more. Despite their previous representations, they demanded to know whether members of the trial team were aware of the fact that any alleged interception took place, whether any witnesses were aware of such fact, and whether witnesses will have access to the contents of any intercepted communications. (*See* Plaintiffs' letter, *Turkmen* Docket Entry 482 at 1.) Plaintiffs further demanded representations on behalf of "higher level decisionmakers, not considered members of the trial team, [who] may have access to those same communications, and may make critical decisions in this case based on those communications." *Id.* at 2. These disclosures, plaintiffs contended, were necessary to avoid an "overall chilling effect on attorney-client relations." *Id.* Plaintiffs never provided, however, any explanation of how or why their communications could have been chilled by the TSP in light of (1) the limits of the program acknowledged by the President and (2) plaintiffs' allegations that they have nothing to do with terrorist organizations, that they have been cleared of all terrorism charges, and that they "abhor terrorism." *See*, *supra*, p. 3, n. 1. Nor did plaintiffs explain why the government would be using the TSP – a critical tool designed to help prevent another al Qaeda attack on the United States– merely to win a tort suit challenging conditions of confinement that allegedly existed over four years ago.

On April 13, 2006, the United States filed a reply objecting to plaintiffs' evolving concerns and unsubstantiated speculation. The United States also pointed out that any reasonable concerns of the plaintiffs should have been satisfied by the government's previous representations on what the trial team knows and what it will use in defense of the action. As the United States pointed out, the representation that "no such intercept will be used in the defense of

the action" renders unnecessary any further inquiry into whether anyone (including witnesses) is aware of the mere existence or non-existence of any alleged interceptions. (*See* United States' letter, *Turkmen* Docket Entry 485 at 2.)

Recognizing the government's concerns, and "to resolve the apparent impasse," the Magistrate designed an alternative to plaintiffs' discovery requests. (*See* Order, *Turkmen* Docket Entry 497 at 4.) Specifically, he crafted a proposed witness statement that did not require the disclosure of potentially classified information, and he directed the parties at an April 21, 2006, status conference to explicate their positions regarding this statement in lieu of further discovery on the TSP. The proposed statement provided as follows:

> 1) I am not aware of any surveillance or interception of the substance of attorney-client communications by the government; OR
> 2) I have never been made aware of the substance of any attorney-client communications; OR
> 3) I do not have, and have not had since the first time I met with trial counsel in this case, any recollection of the substance of any attorney-client communications; OR
> 4) I have not communicated the substance of any attorney-client communications I recall to trial counsel and have not used the substance of any attorney-client communications to influence trial counsel's conduct of this case in any manner, I agree not to do so in the future, and I cannot anticipate any reason why truthfully answering questions relevant to the allegations plaintiffs make in this case would require me to communicate the substance of any attorney-client communications.
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> If any of the above four paragraphs are true, and you agree that, if you become aware of attorney-client communications in the future you may not reveal them to trial counsel, sign below:

Id.

On May 5, 2006, the United States notified the Magistrate that, in the interest of

compromise, it would accept the statement with only slight modifications.[3] Additionally, the United States proposed a protocol and reasonable conditions designed to clarify the terms under which signatures would be obtained.[4] (*See* United States' letter, *Turkmen* Docket Entry 489.) Plaintiffs, however, opposed the witnesses statement and claimed that only the discovery they sought would protect their asserted interests, allow for remedial action, and avoid the purported chill in communications. (*See* Plaintiffs' letter, *Turkmen* Docket Entry 488.)

3. Order of May 30, 2006: Notwithstanding the government's grave national security concerns, on May 30, 2006, the Magistrate entered another Order, abandoning his proposed witness statement without a reasoned explanation and broadening the discovery he ordered two months earlier. In this revised order, he required the United States to:

> (1) state whether any member of the trial team is aware of any monitoring or surveillance of communications between any of the plaintiffs and their attorneys in either of these related actions. The 'trial team' includes all attorneys and support staff who are participating in the defense of this case, as well as any supervisors or other individuals who are providing guidance or advice or exercising decision-making authority in connection with the defense of the United States in these cases;
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> (2) state whether any individual who has been identified as a likely witness in either of these cases is aware of any monitoring or

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[3]A copy of the proposed modification to the Court's statement is attached at Tab 3.

[4]First, each witness who has relevant factual knowledge regarding the plaintiffs' allegations and is interviewed by the attorneys representing the United States would be asked to sign the statement. The statement would be disclosed only if the witness testifies by affidavit, at a deposition, or at trial. Second, the following conditions would apply: (1) only witnesses who have relevant factual knowledge regarding the plaintiffs' allegations and are interviewed by the attorneys representing the United States will be asked to sign the statement; (2) the United States is not precluded from interviewing any witness who declines to sign such statements; (3) no discovery may be taken concerning the matters set forth in and/or related to any statements; and (4) the statements cannot be used in any manner in these cases.

> surveillance of communications between any of the plaintiffs and their attorneys in either of these related actions; and
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> (3) state whether any information obtained from monitoring or surveillance of communications between any of the plaintiffs and their attorneys in either of these related actions will be used in any way by the United States in its defense of these cases and, if so, identify the information that will be so used.

Order, *Turkmen* Docket Entry 497 at 10.

In other words, he required the Untied States to disclose not just whether the trial team is aware of any monitoring, but also (by broadly defining "trial team") whether "any supervisors or other individuals who are providing guidance or advice or exercising decision-making authority" are aware and whether anyone "who has been identified as a likely witness" is aware. In the previous order, he did not cover supervisors or high-level officials who ever gave guidance; rather, he covered only "litigation team and support staff, et cetera." (Tab 2 at 33.) Nor did he previously require the United States to reveal the knowledge of potential witnesses (such as the former Attorney General or the current Director of the FBI); instead, he simply wanted a representation that "*as far as you [trial counsel] know*, no witness who might testify in this action is aware of any information culled through devices such as described in [the interrogatory]." *Id.* (emphasis supplied). Finally, in the May 30th Order, the Magistrate made clear that the government had to disclose not just individuals who have knowledge of the "substance" of intercepts, but also anyone who "merely know[s] that communications were intercepted." (*See* Order, *Turkmen* Docket Entry 497 at 9.) These disclosure obligations, the Magistrate determined, are "continuing one[s], and any responses must be supplemented as new witnesses are identified or additional responsive information comes to light." *Id.* at 11.

4. THE RELATED LITIGATION: *Center for Constitutional Rights, et al. v. George W. Bush, et al.*, Civil Action No. 06 CV 313 (S.D.N.Y.)

On January 17, 2006, the Center for Constitutional Rights ("*CCR*"), including four CCR attorneys and a CCR legal worker, filed an action against the President of the United States, as well as several government agencies, including the National Security Agency: *Center for Constitutional Rights, et al. v. George W. Bush, et al.*, Civil Action No. 06 CV 313 (S.D.N.Y.).[5] The *CCR* complaint alleges that the NSA is conducting unlawful surveillance of the communications between plaintiffs and their counsel. It further alleges that the plaintiffs represent individuals who were detained or investigated for terrorism-related matters and, therefore, communications with these individuals fall within the scope of the NSA's monitoring program. (*See CCR* Cmplt. ¶¶ 35-40.) Rachel Meeropol, a CCR attorney who represents the *Turkmen* plaintiffs, alleges that "[i]n the course of her work on the *Turkmen* case she communicates with the named plaintiffs and potential class members . . . [, and that some of these individuals] are likely to be viewed by the United States as fitting within the broad criteria for NSA surveillance outlined by Attorney General Gonzales." *Id.* at ¶40. Plaintiffs seek declaratory and injunctive relief, including enjoining further surveillance as well as an order requiring disclosure of all new unlawful surveillance of plaintiffs' communications carried out pursuant to the program.

On May 26, 2006, the United States formally asserted the state secrets privilege, which

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[5] Although this action was filed in the district court for the Southern District of New York, on June 19, 2006, the United States sought to have the *CCR* case transferred and consolidated with the other cases that are subject to a transfer and consolidation motion before the Judicial Panel on Multidistrict Litigation. *See In re National Security Agency Telecommunications Record Litigation*, MDL Docket No. 1791. A hearing of the MDL panel on the transfer and consolidation motion is presently scheduled for July 27, 2006.

was supported by public and *in camera, ex parte* declarations of John D. Negroponte, the Director of National Intelligence, and Major General Richard J. Quirk, the Signals Intelligence Director of the NSA. The state secrets privilege was asserted to "protect intelligence information, sources, and methods that are implicated by the allegations in this case" that pertain to the NSA's surveillance program. (*See* Negroponte Decl., Tab 4 at ¶ 11; *see also* Quirk Decl., Tab 5 at ¶ 7, filed in support of Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, *CCR* Docket Entry 28.) In particular, Director Negroponte made the following averments:

> Plaintiffs also make allegations regarding whether they have been subject to surveillance by the NSA. The United States can neither confirm nor deny allegations concerning intelligence activities, sources, methods, or targets. For example, disclosure of those who are targeted by such activities would compromise the collection of intelligence information just as disclosure of those who do are not targeted would reveal to adversaries that certain communications channels are secure or, more broadly, would tend to reveal the methods being used to conduct surveillance. The only recourse for the Intelligence Community and, in this case, for the NSA, is to neither confirm nor deny these sorts of allegations, regardless of whether they are true or false. To say otherwise when challenged in litigation would result in routine exposure of intelligence information, sources, and methods and would severely undermine surveillance activities in general.

(*See* Tab 4 at ¶ 12 (emphasis added); Tab 5 at ¶ 8.)[6] Accordingly, the state secrets privilege was formally invoked "to prevent the disclosure of: (1) information regarding the nature of the al Qaeda threat; (2) further information regarding the TSP; and (3) information that would confirm or deny whether individuals have been targeted for surveillance by the NSA." (Tab 4 at ¶ 13.)

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[6]These declarations were submitted as exhibits in support of the Defendants' Motion for Summary Judgment or, in the Alternative, for Summary Judgment in the *CCR* case and are provided here for the Court's convenience only.

ARGUMENT

Ignoring the serious implications of plaintiffs' escalating discovery demands and relying on unwarranted speculation about a chilling effect, the Magistrate expanded his *sua sponte* discovery order and improperly required the government to reveal classified information that is vital to our national security and our ongoing fight against al Qaeda. In so doing, the Magistrate enabled the plaintiffs to use this litigation – a tort action challenging detention conditions – as a backdoor channel to obtain sensitive national security information that plaintiffs' counsel are seeking in another case, *Center for Constitutional Rights, et al. v. George W. Bush, et al.*, Civil Action No. 06 CV 313 (S.D.N.Y.). This Court should reject plaintiffs' efforts and vacate the portion of the Magistrate's order requiring the additional disclosures.

The Magistrate's decision rests on two equally unsupportable premises. First, the Magistrate concludes that, because the mere existence of the TSP is public, all the details of that program should be public as well, and the government has no continued interest in withholding the disclosure of those details. Second, the Magistrate asserts that such disclosure is necessary to avoid "the chilling specter of government eavesdropping" on plaintiffs' attorney-client communications, *see* Order, *Turkmen* Docket Entry 497 at 6, even though the United States has already confirmed that its trial team is not receiving any intercepts of attorney-client communications and that no such intercepts would be used in the defense of this action.

Moreover, the Magistrate's order should be vacated because it rejects the proposed witness statement without a reasoned explanation. The Magistrate himself crafted this witness statement – presumably to strike some balance between the government's national security concerns and plaintiffs' unsubstantiated interest in uncovering national security secrets – but in

his latest order, he summarily rejects it. Although the Magistrate explains why he declined to adopt the modifications proposed by the government, he does not explain why he discarded the entire proposal altogether.

Finally, in the alternative, the United States requests a stay of the execution of the Magistrate's Order until *Center for Constitutional Rights, et al. v. George W. Bush, et al.*, Civil Action No. 06 CV 313 (S.D.N.Y.), is resolved. Granting a stay on this limited issue would not prejudice the plaintiffs, would avoid an unnecessary burden on the defendants, and would conserve judicial resources.

I. THE MAGISTRATE MISUNDERSTOOD THE NATIONAL SECURITY ISSUE IN THIS CASE AND IMPROPERLY ORDERED THE DISCLOSURE OF SENSITIVE CLASSIFIED INFORMATION.

The primary infirmity with the Magistrate's decision is that it rests on the erroneous premise that complying with the Order would not reveal any sensitive classified information. According to the Magistrate, "it is difficult to imagine what relevant facts remain secret but would be revealed if the information at issue were provided." (Order, *Turkmen* Docket Entry 497 at 7.) The reason for this assertion, the Magistrate says, is that the existence of the TSP is already public information. Because the program "has received widespread publicity and has even been acknowledged by the President of the United States and other high-level officials," *id.*, "any claim that sensitive secrets would be revealed . . . is hard to fathom," *id.* at 8.

The flaw in this analysis is that the Magistrate improperly equates disclosure of the existence of the TSP with disclosure of the details of the TSP. The two are not synonymous, as the district court in *El Masri* recently recognized. *See El Masri v. Tenet*, 2006 WL 1391390, at *6 (E.D. Va. May 12, 2006). Dismissing claims challenging an alleged unlawful "rendition"

program, the *El Masri* court squarely held that there is a "critical distinction" between an admission that a program exists and the admission or denial of the specific fact at issue. *Id.* "A general admission provides no details as to the means and methods" involved in the program, and such "operational details" are "validly claimed as state secrets." *Id.*

The D.C. Circuit recognized the same distinction in *Halkin v. Helms* (*Halkin I*), 598 F.2d 1 (D.C. Cir. 1978). In that case, plaintiffs challenged the legality of NSA programs involving the interception and copying of all international telegrams leaving or entering the United States between 1945 and 1975, and the use of "watchlists" to specifically monitor and report on the communications of U.S. persons intercepted either through the telegram program or other foreign signals intelligence activities. *See id.* at 4. A great deal of information about these programs had been publicly acknowledged during the course of congressional hearings, including the number of U.S. persons monitored through watchlists (about 1,200 from 1967 to 1973), the number of intelligence reports issued by the NSA with regard to watchlisted individuals (about 1,900 from 1967 to 1973), the specific telecommunications companies that assisted the NSA with these activities (RCA Global, ITT World Communications, and Western Union International), and the number of telegrams per month reviewed by NSA analysts (about 150,000 from 1969-1972).[7] In light of this publicly available information, the district court had ruled that the government was required to disclose whether the plaintiffs had been monitored under these programs. But the D.C. Circuit reversed, denying disclosure of the requested information. *See id.* at 5, 9-10 ("There

[7] *See Halkin I*, 598 F.2d at 4, 10; Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, S. Rep. No. 94-755, 94th Cong., 2d Sess., Book III at 765 (Apr. 23, 1976); Hearings Before the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, 94th Cong., 1st Sess., Vol. 5 at 12 (Oct. 29, 1975) (testimony of Lt. Gen. Lew Allen, Jr., Director, National Security Agency).

is a 'reasonable danger' that confirmation or denial that a particular plaintiff's communications have been acquired would disclose NSA capabilities and other valuable intelligence information to a sophisticated intelligence analyst.") (citation omitted). As the court concluded in a related case: "We reject, as we have previously, the theory that 'because some information about the project ostensibly is now in the public domain, nothing about the project in which the appellants have expressed an interest can properly remain classified' or otherwise privileged from disclosure." *Halkin v. Helms* (*Halkin II*), 690 F.2d 977, 994 (D.C. Cir. 1982) (quoting *Military Audit Project v. Casey*, 656 F.2d 724, 752 (D.C. Cir. 1981)).

The same result is required here, where far less detailed information about the alleged NSA activities has been officially confirmed or denied. Indeed, an affirmative response to the Magistrate's Order would reveal information that is assuredly not public, such as whether the plaintiffs are targets of monitoring and the types of communications being monitored (calls with attorneys or otherwise). An affirmative response would also disclose the government officials who are involved in the surveillance, which is itself classified information. Indeed, it is because all this information is still highly classified that plaintiffs are seeking discovery into it. If the information were public, they wouldn't need discovery.

More importantly, such information is not only non-public, but highly sensitive and critical to national security. As the D.C. Circuit has recognized, the "identification of the individuals or organizations whose communications have or have not been acquired presents a reasonable danger that state secrets would be revealed" and "can be useful information to a sophisticated intelligence analyst." *Halkin I*, 598 F.2d at 9. If an individual knows that he is a target of intelligence activities, he can alter his behavior by taking new precautions against

surveillance, thereby compromising valuable intelligence collection. Also, disclosure of whether someone is subject to surveillance would tend to reveal intelligence methods that are at issue in the surveillance, thus compromising those methods and severely undermining surveillance activities in general. For example, our adversaries might be able to figure out what types of people and communications we are targeting, and change strategies accordingly. *See id.* at 8 (recognizing that "[a] number of inferences flow from the confirmation or denial of acquisition of a particular individual's international communications"; targets can be alerted, "methods of acquisition" can be revealed, and "foreign governments or organizations [can] extrapolate the focus and concerns of our nation's intelligence agencies").

Recognizing the importance of not disclosing communication-intelligence activities, Congress has rendered such disclosure punishable by a fine and up to ten years imprisonment. *See* 18 U.S.C. § 798. In addition, Section 6 of the National Security Agency Act of 1959 provides that "nothing in this Act or any other law . . . shall be construed to require the disclosure of the organization or any function of the National Security Agency, of any information with respect to the activities thereof, or of the names, titles, salaries, or number of persons employed by such agency." Pub. L. No. 86-36, § 6, 73 Stat. 63, 64, codified at 50 U.S.C. § 402 note. Consistent with these statutes, Executive Orders prohibit the disclosure and receipt of such information except in narrow circumstances. *See, e.g.*, Exec. Order 12958, 60 Fed. Reg. 19825 (Apr. 17, 1995), as amended by Exec. Order 13292, 68 Fed. Reg. 15315 (Mar. 25, 2003) (classified information cannot be disclosed to those who do not have proper clearance and a need to know). Likewise, Department of Justice regulations prevent the disclosure of classified information – even to persons who have the appropriate clearance – absent an actual need to

know that classified information. *See* 28 C.F.R. §17.45. Nonetheless, because he found it "difficult to imagine" what information might still be classifed, the Magistrate ordered the government to provide discovery responses that could reveal such information.

It is no defense that the government might be able to answer the Magistrate's questions in the negative, denying any awareness of monitoring of plaintiffs' attorney-client communications. Indeed, even a negative response would tend to reveal sensitive classified information. *See Halkin*, 598 F.2d at 8 (concluding that "[a] number of inferences flow from the confirmation or denial of acquisition of a particular individual's international communications") (emphasis added). First, a negative response could provide insight into the scope of government surveillance and apprise the enemy of which individuals have avoided surveillance, thereby revealing critical intelligence methods, informing adversaries which agents may communicate freely, and providing al Qaeda with a roadmap on how to plan future communications. As Director Negroponte explained in asserting the state-secrets privilege in *CCR*, "disclosure of those who are not targeted would reveal to adversaries that certain communications channels are secure or, more broadly, would tend to reveal the methods being used to conduct surveillance." (Tab 4 at ¶ 12.)

Second, if the United States were to state in this case that specific individuals are not targets of surveillance, but later refuse to comment (as it would have to) in a case involving an actual target, someone could easily deduce by comparing such responses that the person in the latter case is a target. It is critical to remember that any discovery requests in this case could also be made in other cases, and at a certain point (perhaps this case, perhaps another one) the government might be unable to deny awareness of monitoring. Accordingly, as Director

Negroponte concluded: "The United States can neither confirm nor deny allegations concerning intelligence activities, sources, methods, or targets. . . . The only recourse for the Intelligence Community and, in this case, for the NSA, is to neither confirm nor deny these sorts of allegations, regardless of whether they are true or false. To say otherwise when challenged in litigation would result in routine exposure of intelligence information, sources, and methods and would severely undermine surveillance activities in general."[8] *Id.*

The United States made the same argument to the Magistrate.[9] (United States' letter, *Turkmen* Docket Entry 477 at 2.) The United States explained that if an official or employee "did not know about such intercepts and so indicated in one case, any refusal to confirm or deny such intercepts in another case could itself tend to reveal classified information." *Id.* The Magistrate mislabeled this analysis as "conclusory" and lacking "specific facts or information," Order, *Turkmen* Docket Entry 497 at 7, but that is simply because he misunderstood what information is public and what is not. As discussed, the Magistrate erroneously believed that because the existence of the TSP is public, all the details are public as well. That premise is wrong, and the Magistrate's Order should be reversed.

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[8] The information so-far disclosed by the United States in an attempt to assuage plaintiffs' concerns does not compromise national security because the United States simply represented that it would not use any intercepted communication in the defense of this action and that no member of the trial team has received any intercepts or expects or intends to receive any intercepts. (*See* United States' letter, *Turkmen* Docket Entry 479.) In light of the statutes, Executive Orders, and DOJ regulations limiting the sharing of classified information, no one could reasonably expect that the trial attorneys in these tort actions would be aware of the contents of classified intercepts, let alone use them in the defense of the action. Accordingly, the United States did not reveal anything that the plaintiffs should not already have known.

[9] The United States did not cite the Negroponte declaration from the *CCR* case because it was not filed until May 26, 2006, when the United States asserted the state-secret privilege in that case.

Moreover, the Magistrate's other points are even less defensible. The Magistrate asserts that it is difficult to imagine what facts remain secret because "the detention of individuals suspected of involvement in terrorist activities at the MDC [Metropolitan Detention Center] after September 11, 2001, has also been documented." *Id.* at 8. But this simply shows a fundamental misapprehension of the government's position. The government has never argued that it has an interest in keeping secret the fact that it detained terrorism suspects at the MDC. That information is manfiestly public, and it has nothing to do with the government's concerns regarding the Magistrate's discovery order. The government is concerned with revealing details of the TSP, not with confirming that it detained terror suspects after September 11.

Likewise, the Magistrate misses the mark when he posits that the government's discovery objection is undercut by the fact that the "plaintiffs have been 'cleared' by the FBI of having links to terrorism." *Id.* Perhaps the Magistrate is suggesting that, because plaintiffs have been cleared of terrorism by the FBI, they are unlikely to be subject to monitoring under the TSP. But the United States has never publicly stated that individuals cleared by the FBI are automatically and forever excluded from the TSP. To confirm such a proposition regarding the scope of the TSP (assuming it is correct) would reveal highly sensitive information. As discussed above, any statement that someone is not subject to monitoring would provide our adversary with insight into the scope of government surveillance and a roadmap on how to plan future communications. To be sure, the fact that plaintiffs were cleared by the FBI might give plaintiffs some comfort and reduce any alleged "chill," *see infra* at 22-25, but United States officials cannot confirm or deny any awareness of monitoring without jeopardizing national security. Accordingly, this Court should vacate the Magistrate's Order to the extent that it requires any additional disclosures.

II. THE MAGISTRATE IMPROPERLY CREDITED PLAINTIFFS' UNSUBSTANTIATED CONCERNS ABOUT A CHILLING EFFECT AND THE GOVERNMENT GAINING A TACTICAL ADVANTAGE.

The Magistrate compounded his error by improperly assuming that disclosure is necessary to avoid "the chilling specter of government eavesdropping" and to ensure that the United States has not gained a tactical advantage in this litigation. This assumption is fallacious for two separate reasons.

First, plaintiffs have already received all the information that they previously said they needed to assuage their concerns. In opposing reconsideration of the Magistrate's original *sua sponte* order, plaintiffs contended that they were worried only that "attorneys representing the United States may have access to confidential communications between adverse parties and their counsel, and may use evidence gathered by such monitoring to prepare the government's case, or even in court." (*See* Plaintiffs' letter, *Turkmen* Docket Entry 478 at 4 (emphasis added).) Plaintiffs likewise argued that, to comply with the Court's order, the United States need only state "that no such intercepts have been or will be revealed to the United States' trial team or used in the defense of the action." *Id.* at 3 (emphasis added).

The United States has already fully responded to these concerns. In the interests of being cooperative, the United States informed plaintiffs and the Court that "no member of the trial team has received any intercepts of attorney-client communications," that "no member of the trial team expects or intends to receive any intercepts of attorney-client communications, and that "no such intercepts will be used in the defense of the action." (*See* United States' letter, *Turkmen* Docket Entry 479.) Because these representations fully responded to the plaintiffs' concerns and the Magistrate's original three questions, no further representations were warranted, and this Court

should reject plaintiffs' *post hoc* attempt to obtain additional information.

Second, given the narrowly defined limits of the TSP, which have been publicly disclosed, plaintiffs cannot suffer any reasonable chill or other tactical disadvantage when communicating with their attorneys. In the TSP, the President authorized the NSA to intercept only certain communications as to which there are reasonable grounds to believe that (1) the communication originated or terminated outside the United States, and (2) a party to such communication is a member of al Qaeda, a member of a group affiliated with al Qaeda, or an agent of al Qaeda or its affiliates. *See* Press Conference of President Bush (Dec. 19, 2005). Thus, if plaintiffs are not associated with al Qaeda, they have no reasonable concern of being subject to monitoring under the TSP.

Overlooking this fact, the Magistrate suggests that plaintiffs have a cause for concern simply because staff at the MDC recorded some attorney-client communications while plaintiffs were held in that facility over four years ago. (*See* Order, *Turkmen* Docket Entry 497 at 6-7.). But the Magistrate's suggestion is a *non-sequitur*. No one, not even the plaintiffs, has ever suggested that the videotaping of communications at the MDC had anything to do with the TSP. Such videotaping was conducted by an entirely different agency (the Bureau of Prisons, not the NSA), and it concerned purely domestic communications, which are outside the scope of the TSP. Additionally, the videotaping was performed while plaintiffs were still under investigation, before they were removed from the country.[10] Accordingly, the videotaping at the MDC has no

[10]The issue of monitoring at the MDC has been raised in plaintiffs' complaints, *see* Memorandum and Order, *Turkmen* Docket Entry 507 at 41, n.18, (noting videotaping of detainees visits with attorneys as well as the federal regulations that prohibit it), and discovery is being conducted as to it. The videotapes relevant to this issue have been identified and are available for inspection and copying.

bearing on the issue at hand, and the Magistrate had no basis for suggesting that it lends any credence to plaintiffs' unsubstantiated concerns. If plaintiffs are not associated with al Qaeda, they have no reasonable concern that they are subject to the TSP.

Moreover, even if plaintiffs have al Qaeda connections, they cannot legitimately claim that their communications are chilled in any significant sense by the TSP or that they have suffered any other tactical disadvantage on account of the TSP. Instead, any al Qaeda associate must assume that his communications could be subject to surveillance by other means or entities – including an order of the Foreign Intelligence Surveillance Court, *see* 50 U.S.C. § 1801, a Title III law enforcement warrant, or by other governments or law enforcement authorities. As a result, even if the TSP did not exist, al Qaeda operatives would "always run the risk" that their communications would be monitored through these other means; thus, they should already be chilled with respect to engaging in such communications." *See, e.g.*, *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 357 (1985) (rejecting chilling effect claim where the challenged authority presented no greater risk than the plaintiff ordinarily faced).

Yet plaintiffs have never sought discovery on these alternative surveillance techniques prior to the public disclosure of the existence of the TSP, and that is because plaintiffs are not actually concerned by the prospect of monitoring. Rather, plaintiffs' counsel are simply trying to use this tort suit as a backdoor mechanism for peering into the TSP. If plaintiffs were genuinely concerned with monitoring, they would have sought discovery into all types of potential monitoring of their communications before the TSP hit the headlines, over a year after the discovery period in this case ended. Because plaintiffs have failed to express any legitimate concerns regarding a chilling effect or other tactical disadvantage, this Court should vacate the

Magistrate's order, which was erroneously premised on there being such a disadvantage.

III. THE MAGISTRATE IMPROPERLY REJECTED THE PROPOSED WITNESS STATEMENT WITHOUT A REASONED EXPLANATION

At most, the Court should require government witnesses to sign the witness statement that the Magistrate himself crafted, before he rejected it without a reasoned explanation. As noted, the proposed witness statement would require each witness to attest that either (1) he was "not aware" of any surveillance or interception of the substance of attorney-client communications, (2) he was "never made aware of the substance" of such communications, (3) he did not have "any recollection of the substance," or (4) he "has not communicated the substance" to trial counsel or used it to influence trial counsel and agrees not to do so in the future.

By design, the statement was meant to balance the interests of both parties. On the one hand, it would ensure plaintiffs that, even if a witness had access to attorney-client communications, he would not reveal those communications to trial counsel or otherwise use it to influence trial counsel. As a result, even if plaintiffs were subject to the TSP, even if their communications with counsel were being monitored, and even if a witness learned the substance of those communications, trial counsel would never know anything about it. The United States's trial strategy would not change, and the plaintiffs would have no cause for concern. Indeed, for the reasons discussed above, plaintiffs would have no cause for concern even without the statements, but the statement would provide added assurance that the TSP is not being used to give the United States a tactical advantage in these tort suits.

At the same time, the witness statement attempted to protect the United States's interests in preserving the confidentiality of the details concerning a sensitive government program and in

protecting national security. Because all witnesses would be asked to sign the statement, irrespective of what they knew, and because no witness would reveal whether he in fact has access to monitored communications, use of the statement would not lead to the release of classified information – as the Magistrate himself recognized. (*See* Order, *Turkmen* Docket Entry 497 at 4. ("[T]he specific information the government sought to protect would not be revealed.")

Yet the Magistrate abandoned the witness statement without any explanation. In his Order entered on May 30, 2006, the Magistrate asserts that "plaintiffs have persuaded [him], . . . that this proposal is not adequate for at least two reasons." *Id.* at 8. But neither of his reasons relates to the witness statement. Both are mere responses to additional conditions that the government had proposed (limiting discovery about the witness statements, allowing the government to interview witnesses who refuse to sign the statement, and precluding plaintiffs from using the witness statements in the litigation). *See id.* at 8-9. Thus, even if the Magistrate's reasoning is correct (and it is not),[11] that would simply justify rejecting the government's proposed conditions. It would not justify abandoning the witness statements altogether. Accordingly, this Court should not uphold the Magistrate's unreasoned decision.

IV. IN THE ALTERNATIVE, THE EXECUTION OF THE MAGISTRATE'S ORDER SHOULD BE STAYED UNTIL THE RESOLUTION OF THE *CCR* CASE

In the alternative, the Court should exercise its discretion and stay the Magistrate's Order

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[11] Indeed, permitting full discovery on the witness statements would defeat the entire purpose of the statements. If plaintiffs were permitted to "test" the witnesses's representations of what they know and what they have conveyed to trial counsel, *id.* at 8, then plaintiffs would be allowed to uncover the very information that the witness statements are designed to protect. Plaintiffs would be able learn both the identity of individuals who may have access to classified information and the substance of any such information.

until the resolution of the *CCR* case, which raises the issue of whether classified information on the TSP should be disclosed. Granting a stay would not prejudice the plaintiffs; would avoid unnecessary burden on the defendants; and would conserve judicial resources.

District courts have the authority to postpone civil discovery pending the outcome of a parallel case when the interests of justice so require. *See United States v. Kordel*, 397 U.S. 1, 12 n. 27 (1970); *Bridgeport Harbour Place I v. Ganim*, 269 F.Supp.2d 6, 8 (D. Conn. 2002) *Banks v. Yokemick*, 144 F.Supp.2d, 272, 275 (S.D.N.Y. 2001); *Morris v. American Federation of State*, 2001 WL 123886 *2 (S.D.N.Y. Feb. 9, 2001). For obvious reasons of efficient judicial administration, courts have long held that, with rare exceptions, two separate courts should not attempt to resolve similar claims between the same parties. The Supreme Court has counseled that in dealing with the "conduct of multiple litigation in the federal judicial system," courts should give "regard to conservation of judicial resources and comprehensive disposition of litigation." *Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183 (1952). As the Supreme Court recognized in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), "[a]s between federal district courts, . . . though no precise rule has evolved, the general principle is to avoid duplicative litigation." *Id.* at 817.

District courts in New York apply a balancing test in considering whether to grant a stay of discovery to await a decision in a related case. *Banks*, 144 F.Supp.2d, at 275; *Bridgeport Harbour Place I*, 269 F.Supp.2d at 8. Factors considered in this test include: "(1) the interests of the plaintiffs in an expeditious resolution and the prejudice to the plaintiff in not proceeding; (2) the interests of and burdens on the defendants. . . ; (3) the convenience to the court in the management of its docket and the efficient use of judicial resources; (4) the interests of other

persons not parties to the civil action; and (5) the interests of the public in the pending civil . . . actions."[12] *Banks*, 144 F.Supp.2d, at 275; *see also Brideport Harbour Place I*, 269 F.Supp.2d at 8; *Trustees of Plumbers & Pipefitters Nat'l Pension Fund v. Transworld Mech.*, 886 F.Supp. 1134, 1139 (S.D.N.Y. 1995).

Balancing these factors weighs in favor of stay because the United States only requests delay on a single limited discovery issue until the broader disclosure issue can be resolved in the *CCR* case. The plaintiffs' interests in an expeditious resolution will not be harmed because CCR represents the plaintiffs in both the *CCR* case and in the instant case. CCR will have an opportunity to present its arguments on the issue of whether the United States should be compelled to disclose classified information in the *CCR* case and, therefore, the plaintiffs will not be prejudiced by a short delay until that issue is resolved. The court in *Bridgeport Harbour Place I* did not consider it an excessive burden on the plaintiffs to delay up to a year the entire civil case until a criminal case could be resolved because issues in the two cases "clearly overlap" and the resolution of the criminal case could "streamline discovery in the civil case." *Bridgeport Harbour I*, 269 F.Supp.2d at 9.

Turning to the second factor, complying with the Order would severely harm the interests of the United States. As explained above, the information plaintiffs seek is highly classified, and its disclosure could jeopardize national security.

The third factor, the efficient use of judicial resources, clearly weighs in favor of granting a stay of the Order until the resolution of the *CCR* case. It would be very inefficient to burden multiple district courts with plaintiffs' counsels' attacks on the TSP. Furthermore, both parties

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[12]It appears that only factors 1, 2, and 3 are applicable.

have an interest in litigating the monitoring issue in the forum in which this matter is squarely presented and in the process of being briefed, rather than litigating this issue as a collateral matter and unrelated to the claims asserted in the instant cases.

Lardner v. United States Dep't of Justice, 2005 WL 758267 (D.D.C. March 31, 2005), is instructive. In that case, plaintiff filed a Freedom of Information Act request to obtain documents on presidential pardons that were in the custody of the Office of the Attorney General, but the United States withheld certain documents pursuant to the presidential communications and deliberative process privileges. *Id.* at *1. After the court granted plaintiff's motion to compel production of a new *Vaughn* index, the court stayed the entire case until a similar issue could be resolved in a related case, *Judicial Watch v. Department of Justice*, 356 F.3d 1108, in which the Department of Justice was withholding presidential pardon documents under the same privileges asserted in *Lardner*. Although the *Lardner* case was delayed for about two months, the court did not consider such a delay excessively burdensome or prejudicial to the plaintiff, despite the fact that the plaintiff was not involved in the *Judicial Watch* case. *Id.*

Here, like the *Lardner* case, the issue of whether the United States should be compelled to reveal classified information relating to the TSP is already the subject of litigation in the *CCR* case. Accordingly, the most efficient solution would be to stay the portion of the Magistrate's Order regarding the additional disclosures until the broader disclosure issue in the *CCR* case is resolved, especially considering that virtually the same parties are involved in both cases.

CONCLUSION

For the foregoing reasons, the United States requests that the Court vacate the May 30, 2006 Order to the extent it requires any additional disclosures beyond those already made. In the

alternative, the United States requests a stay of the execution of the order until the *CCR* case is resolved.

Dated: June 23, 2006

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General
Civil Division

JONATHAN F. COHN
Deputy Assistant Attorney General
Civil Division

PHYLLIS J. PYLES
Director, Torts Branch
Civil Division

STEPHEN E. HANDLER (SH 3521)
CLAY MAHAFFEY (CM 9862)
Trial Attorneys, Torts Branch
Civil Division
U.S. Department of Justice
P.O. Box 888
Benjamin Franklin Station
Washington, DC. 20044
(202) 616-4279
(202) 616-5200 (facsimile)

CERTIFICATE OF SERVICE

I hereby certify that copies of the United States' Objections to Magistrate Judge Gold's Order Entered on May 30, 2006, was sent to the plaintiffs' attorneys and the attached Counsel of Record via electronic mail and/or First Class Mail, on June 23, 2006.

Stephen E. Handler

Elmaghraby, et al. v. Ashcroft, et al., Civil Action No. 04CV1809; Counsel of Record:

Via Electronic and/or First Class Mail:

Plaintiffs' Counsel:

Alexander A. Reinert, Esq.
Koob & Magoolaghan
19 Fulton Street, Suite 408
New York, New York 10038
(212) 406-3095
(212) 349-4658 (fax)
aar@kmlaw-ny.com

Haeyoung Yoon, Esq.
Urban Justice Center
666 Broadway, 10th Foor
New York, New York 10012
(646) 459-3003
(212) 533-2241 (fax)
Hyoon@urbanjustice.org

John Ashcroft's Counsel:

Brian D. Miller, AUSA
Larry L. Gregg, AUSA
Richard W. Sponseller, AUSA
OFFICE OF THE U.S. ATTORNEY
2100 Jamieson Avenue
Alexandria, VA 22314
(703) 299-3809
(703) 299-3983 (fax)
brian.miller@usdoj.gov

Robert Mueller's Counsel

Craig Lawrence
Office of the U.S. Attorney
555 4th Street, NW
10th Floor
Room 10-435
Washington, DC 20001
(202) 514-7151
(202) 514-8780 (fax)
Craig.Lawrence@usdoj.gov

Michael Rolince's Counsel

Lauren J. Resnick
Fernando A. Bohorquez
Baker & Hostetler LLP
666 Fifth Avenue, 16th Floor
New York, NY 10103
(212) 589-4242
(212) 589-4201 (fax)
lresnick@bakerlaw.com

Kenneth Maxwell's Counsel

Leslie R. Cadwell
Deborah Prisinzano Mikkelsen
Morgan, Lewis & Bockius
101 Park Avenue
New York NY 10178
lcaldwell@morganlewis.com

Kathleen Hawk Sawyer's Counsel:

Mark Earl Nagle, Esq.
Troutman,Sanders
401 Ninth Street, N.W.
Suite 1000
Washington, DC 20004
(202) 274-2972
(202) 654-5666 (FAX)
mark.nagle@troutmansanders.com

David Rardin's Counsel

Raymond Granger
757 Third Avenue, 7th Floor
New York, NY 10007
(212) 688-1669
(212) 688-1929 (fax)
rgranger@rgranger.com

Michael Cooksey's Counsel:

William E. Lawler, III
Nashiba Boyd
Vinson & Elkins
1455 Pennsylvania Ave., NW
Washington, DC 20004

Elmaghraby, et al. v. Ashcroft, et al., Civil Action No. 04CV1809; Counsel of Record:

(202) 639-6676
(202) 639-6604 (fax)
wlawler@velaw.com

Dennis Hasty's Counsel:
Michael L. Martinez, Esq.
Frederick Ryan Keith, Esq.
CROWELL & MORING
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595
(202) 624-2945
(202) 628-5116 (fax)
mmartinez@crowell.com

Michael Zenk's Counsel:
Allan N. Taffet, Esq.
DUVAL & STACHENFELD
300 East 42nd Street, 3rd Floor
New York, NY 10017
(212) 883-1700
(212) 883-8883 (fax)
ataffet@dsllp.com

Linda Thomas's Counsel:
Linda M. Marino, Esq.
FLEMMING, ZULACK & WILLIAMSON
35th Floor, One Liberty Plaza
New York, NY 10006-1404
(212) 412-9520
(212) 964-9200 (fax)
lmarino@fzw.com

James Sherman's Counsel:
Debra L. Roth
Thomas Sullivan
Shaw, Bransford, Veileux & Roth, PC
1100 Connecticut Avenue, Suite 900
Washington, DC 20036
(202) 463-8400
(202) 833-8082 (fax)
droth@shawbransford.com

Steven Barrere's Counsel:
James G. Ryan, Esq.
CULLEN & DYKMAN
100 Quentin Roosevelt Boulevard
Garden City, NY 11530-4850
(516) 357-3700
(516) 296-9155 (fax)
jryan@cullenanddykman.com

Lindsey Bledsoe's Counsel:
Labe M. Richman
305 Broadway, Suite 100
New York, NY 10007
(212) 227-1914
(212) 267-2129 (fax)
labe@laberichman.com

Thomas Cush's Counsel:
Joseph J. Kazmierczuk
Kazmierczuk & McGrath
111-02 Jamaica Avenue
Richmond Hill, NY 11418
(718) 441-5460
(718) 441-5537 (fax)
lcmgkaz@aol.com

Howard Gussak's Counsel:
Kenneth C. Murphy
Brian Waller

Elmaghraby, et al. v. Ashcroft, et al., Civil Action No. 04CV1809; Counsel of Record:

Simon & Partners LLP
42nd Floor
30 Rockefeller Plaza
New York, NY 10112
(212) 332-8900
(212) 332-8909 (fax)
kcmurphy@simonlawyers.com

Marcial Mundo's Counsel:
James F. Matthews, Esq.
Law Offices of Matthews & Matthews
191 New York Avenue
Huntington, NY 11743
(631) 673-7555
(631) 425-7030 (fax)
JimMatthewsLaw@aol.com

Elizabeth Torres' Counsel:
Linda Cronin
Christina Leonard
Rocco G. Avallone
Cronin & Byczek, LLP
1981 Marcus Avenue, Suite 227
Lake Success, NY 11042-1016
(516) 358-1700
(516) 358-1730 (fax)
avallone@cblawyers.net

Counsel for Reynaldo Alamo, and Jai Jaikissoon, Dexter Moore:
B. McMillan Attorney at Law, PC
Bridgett McMillan
Attorney at Law
445 Park Avenue - Ninth Floor
New York, New York 10022
(212) 926-0231
(212) 926-6406 (fax)
mseq8@aol.com

Counsel for Sidney Chase, Michael DeFrancisco, Richard Diaz, Scott Rosebery, and Joseph Cuciti,

Alan E.Wolin
Wolin & Wolin
420 Jericho Turnpike, Suite 215
Jericho, NY 11753
(516) 938-1199
(516) 938-1178 (fax)
wolinlaw@aol.com

James Clardy's Counsel:
Ronald P. Hart
Suite 101
305 Broadway
New York, NY 10007
(212) 766-1443
(212) 766-0943 (fax)
rhart50481@aol.com

Raymond Cotton's Counsel:
Nicholas Gregory Kaizer, Esq.
Richard Ware Levitt, Esq.
Law Offices of Richard Ware Levitt
148 East 78th Street
New York, NY 10021
(212) 737-0400
(212) 396-4152 (fax)
nkaizer@richardlevitt.com

Counsel for Jon Osteen and Angel Perez:

Elmaghraby, et al. v. Ashcroft, et al., Civil Action No. 04CV1809; Counsel of Record:

David A. Koenigsberg
Melissa Driscoll
John Robert Menz
Patrick Bonner
Menz, Bonner & Komar LLP
Two Grand Central Tower
140 East 45th Street
20th Floor
New York, NY 10017
(212) 223-2100
(212) 223-2185 (fax)
dkoenigsberg@mbklawyers.com

Clemmet Shacks' Counsel:
Barry M. Lasky, Esq.
LASKY & STEINBERG
595 Stewart Avenue
Garden City, NY 11530
(516) 227-0808
(516) 745-0969 (fax)
bmlpc@aol.com

Nora Lorenzo's Counsel:
Cary Feldman
Grace Culley
Matt Freedus
Feldesman, Tucker, Leifer & Fidell
Suite 200
2001 L Street, NW
Washington, DC 20036
(202) 466-8960
(202) 293-8103 (fax)
CaryF@feldesmantucker.com

Via First Class Mail:

Lt. Daniel Ortiz Pro Se
745 Clarence Ave.
Bronx, NY 10465

Lt. Salvatore LoPresti
Bureau of Prisons
U.S. Customs House
7th Floor
2nd and Chestnut Streete
Philadelphia, PA 19106

William H. Beck
145 North Laurel Street
Hazleton, PA 18201
(570) 578-9145

Turkmen, et al. v. Ashcroft, et al., Civil Action No. 02CV2307 Counsel of Record:

Via Electronic and/or First Class Mail:

Plaintiffs' Counsel:
Rachel Anne Meeropol
Center for Constitutional Rights
666 Broadway 7th Floor
New York, NY 10012
(212) 614-6432
(212) 614-6499 (fax)
rachelm@ccr-ny.org

John Ashcroft's Counsel:
Brian D. Miller, AUSA
Larry L. Gregg, AUSA
Richard W. Sponseller, AUSA
OFFICE OF THE U.S. ATTORNEY
2100 Jamieson Avenue
Alexandria, VA 22314
(703) 299-3809
(703) 299-3983 (fax)
brian.miller@usdoj.gov

Robert Mueller's Counsel
Craig Lawrence
Office of the U.S. Attorney
555 4th Street, NW
10th Floor
Room 10-435
Washington, DC 20001
(202) 514-7151
(202) 514-8780 (fax)
Craig.Lawrence@usdoj.gov

James Ziglar's Counsel
William Alden McDaniel, Jr.
Bassel Bakhos
Law Office of William Alden McDaniel, Jr.
118 West Mulberry Street
Baltimore, MD 21201
(410) 685-3810
(410) 685-0203 (fax)
bb@wamcd.com

Dennis Hasty's Counsel:
Michael L. Martinez, Esq.
Frederick Ryan Keith, Esq.
CROWELL & MORING
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595
(202) 624-2945
(202) 628-5116 (fax)
mmartinez@crowell.com

Michael Zenk's Counsel:
Allan N. Taffet, Esq.
DUVAL & STACHENFELD
300 East 42nd Street, 3rd Floor
New York, NY 10017
(212) 883-1700
(212) 883-8883 (fax)
ataffet@dsllp.com

James Sherman's Counsel:
Debra L. Roth
Thomas Sullivan
Shaw, Bransford, Veileux & Roth, PC
1100 Connecticut Avenue, Suite 900
Washington, DC 20036
(202) 463-8400
(202) 833-8082 (fax)
droth@shawbransford.com

Steven Barrere's Counsel:
James G. Ryan, Esq.
CULLEN & DYKMAN
100 Quentin Roosevelt Boulevard
Garden City, NY 11530-4850
(516) 357-3700
(516) 296-9155 (fax)
jryan@cullenanddykman.com

Turkmen, et al. v. Ashcroft, et al., Civil Action No. 02CV2307 Counsel of Record:

Lindsey Bledsoe's Counsel:
Labe M. Richman
305 Broadway, Suite 100
New York, NY 10007
(212) 227-1914
(212) 267-2129 (fax)
labe@laberichman.com

Thomas Cush's Counsel:
Joseph J. Kazmierczuk
Kazmierczuk & McGrath
111-02 Jamaica Avenue
Richmond Hill, NY 11418
(718) 441-5460
(718) 441-5537 (fax)
lcmgkaz@aol.com

Howard Gussak's Counsel:
Kenneth C. Murphy
Brian Waller
Simon & Partners LLP
42nd Floor
30 Rockefeller Plaza
New York, NY 10112
(212) 332-8900
(212) 332-8909 (fax)
kcmurphy@simonlawyers.com

Marcial Mundo's Counsel:
James F. Matthews, Esq.
Law Offices of Matthews & Matthews
191 New York Avenue
Huntington, NY 11743
(631) 673-7555
(631) 425-7030 (fax)
JimMatthewsLaw@aol.com

Elizabeth Torres' Counsel:
Linda Cronin
Christina Leonard
Rocco G. Avallone
Cronin & Byczek, LLP
1981 Marcus Avenue, Suite 227
Lake Success, NY 11042-1016
(516) 358-1700
(516) 358-1730 (fax)
avallone@cblawyers.net

Counsel for Sidney Chase, Michael DeFrancisco, Mario Machado, Brian Rodriguez and Richard Diaz:

Alan E. Wolin
Wolin & Wolin
420 Jericho Turnpike, Suite 215
Jericho, NY 11753
(516) 938-1199
(516) 938-1178 (fax)
wolinlaw@aol.com

Raymond Cotton's Counsel:
Nicholas Gregory Kaizer, Esq.
Richard Ware Levitt, Esq.
Law Offices of Richard Ware Levitt
148 East 78th Street
New York, NY 10021
(212) 737-0400
(212) 396-4152 (fax)
nkaizer@richardlevitt.com

Counsel for Jon Osteen:
David A. Koenigsberg
Melissa Driscoll
John Robert Menz
Patrick Bonner
Menz, Bonner & Komar LLP
Two Grand Central Tower
140 East 45th Street
20th Floor
New York, NY 10017
(212) 223-2100
(212) 223-2185 (fax)
dkoenigsberg@mbklawyers.com

Turkmen, et al. v. Ashcroft, et al., Civil Action No. 02CV2307 Counsel of Record:

Clemmet Shacks' Counsel:
Barry M. Lasky, Esq.
LASKY & STEINBERG
595 Stewart Avenue
Garden City, NY 11530
(516) 227-0808
(516) 745-0969 (fax)
bmlpc@aol.com

Stuart Pray's Counsel:
Thomas G. Teresky
191 New York Ave.
Huntington, NY 11743
(631) 634-0025
(631) 425-7030 (fax)
tgtesq@aol.com

Richard P. Caro
55 Kimbark Road
Riverside, IL 60546-1968
(708) 447-0721
(708) 447-0757 (fax)
rpcjd@ameritech.net

Kevin Lopez's Counsel:
Raymond P. Cash
116-02 Queens Blvd.
Forest Hills, NY 11375
(718) 793-1331
(718) 793-4089 (fax)
crcash1@aol.com

Raymond Mickens' Counsel:
Michael Rosenstock
Law Offices of E. Michael
Rosenstock, P.C.
55 Maple Avenue
Suite 206
Rockville Centre, NY 11570
(516) 766-7600
(516) 766-6630 (fax)
emrosenstock@rosenstocklaw.com

Christopher Witschel's Counsel:
John B. Saville
Lewis, Johs, Avallone, Aviles &
Kaufman
425 Broadhollow Road
Suite 400
Melville, NY 11747
(631) 755-0101
(631) 755-0117 (fax)
jbsaville@lewisjohs.com

James Cuffee's Counsel:
Mehrdad Kohanim
Law Offices of Mehrdad Kohanim
595 Stewart Ave.
Suite 410
Garden City, NY 11530
(516) 745-1242
(516) 745-1244 (fax)
mehrdadkoh@aol.com

Via First Class Mail:

Lt. Daniel Ortiz Pro Se
745 Clarence Ave.
Bronx, NY 10465

Lt. Salvatore LoPresti Pro Se
Bureau of Prisons
U.S. Customs House
7th Floor
2nd and Chestnut Streete
Philadelphia, PA 19106

Phillip Barnes Pro Se
4 Kaufman Street
Somerset, NJ 08873
philliptrav@aol.com

Turkmen, et al. v. Ashcroft, et al., Civil Action No. 02CV2307 Counsel of Record:

Michael McCabe Pro Se
4225 Centurian Circle
Greenacres, FL 33463
(561) 433-6404

William H. Beck
145 North Laurel Street
Hazleton, PA 18201
(570) 578-9145