

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LARRY E. KLAYMAN, ET AL.	:	Docket Nos. CA13-851
	:	CA13-881 (RJL)
Plaintiffs,	:	
	:	October 31, 2013
	:	
v.	:	3:45 p.m.
	:	
BARACK HUSSEIN OBAMA, ET AL.	:	
	:	
Defendants.	:	
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TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE RICHARD J. LEON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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P R O C E E D I N G S

COURTROOM DEPUTY: Your Honor, we have Civil Action 13-851 and Civil Action 13-881 Larry Klayman et al. versus Barack Hussein Obama, et al. For the record, counsel for the Plaintiff is not present.

I will ask the defense counsel and all counsel to please approach the lectern and identify yourself for the record.

MR. GILLIGAN: James Gilligan, your Honor, with the Department of Justice representing the Government Defendants as specified in our papers. With me at counsel table are Marcia Berman, Rodney Patton and Bryan Dearingier.

THE COURT: Welcome back, Mr. Gilligan. It has been a few years.

MR. GILLIGAN: It has been a few years.

THE COURT: Boumedian as I recall it.

MR. GILLIGAN: It was one of the Guantanamo cases, yes.

THE COURT: Welcome back.

MR. WHITMAN: About Jim Whitman with the Department of Justice. I represent the individual Federal Defendants who have not been served, but I am still appearing today.

THE COURT: Oh, you have an interest.

MR. WHITMAN: Yes.

THE COURT: Welcome back, Mr. Moss.

MR. MOSS: Randolph Moss on behalf of the Verizon

1 Defendants.

2 THE COURT: Welcome back.

3 MR. MOSS: Thank you.

4 THE COURT: Well, for reasons which I can't understand,
5 Mr. Klayman is neither here nor has made arrangements to have
6 anyone else here in his stead so I will make arrangements to
7 have a transcript of this hearing sent to him so he will have
8 the benefit of whatever is discussed today.

9 The purpose of today's hearing is obviously scheduling.
10 Under the local rules, the Court must have a hearing within
11 21 days of being filed which by my calculation would be
12 November 18th -- excuse me -- 19th. 19th.

13 The Defendants have seven days to respond to a
14 Preliminary Injunction Motion which seems a little much, I mean
15 a little penal, penal in this case, typed.

16 So I think some accommodations need to be made under
17 the circumstances. Now, I mean I don't -- the way this PI is
18 structured I do not believe it is directed at the private
19 companies or the individuals. So I don't see any reason why
20 they have to respond at all frankly and, if it should come to
21 pass that that becomes an issue, then I will give you an
22 opportunity at an appropriate time, Mr. Moss, to respond; but at
23 this point, these are directed at the Government of the United
24 States.

25 And so I think the Government should have more time

1 than seven days. That's for sure. I can't give you too much
2 more because I got to build in a little time for his reply.

3 So what I am thinking of is giving you until
4 November -- Monday, November 11th and then I will give Mr.
5 Klayman until -- I will give him three days, Thursday the 14th
6 and then we will have the oral argument on Monday, the 18th of
7 November at 11:30 in the morning. Hopefully he won't absent
8 himself for that hearing either, but he is getting a lot more
9 notice this time than he did before.

10 He did file Motions For Continuances which I denied.
11 He wanted to do it by telephone which it is not my practice to
12 permit that and, frankly, it is surprising to me that he thinks
13 he is going to litigate this alone without other counsel to help
14 him. So hopefully when he reviews this transcript, he will
15 start the process of reevaluating how he is going to do this
16 because obviously this is a case that has lots of parts to it
17 and where it is going, I don't know, all I know is there is a
18 lot of potential moving parts to this case.

19 Now, there is some other issues besides scheduling that
20 are -- that the Government is uniquely positioned. Mr. Gilligan
21 I will start with you since I assume you are kind of the leader
22 of the team here. I don't know to what extent the Government's
23 position is going to be based on classified information, I have
24 no idea, but obviously if it is going to be in whole or in part
25 based on classified information, then we got to start figuring

1 out people getting clearances. The Court has clearance, but I
2 have at least one law clerk working with me on this who I
3 believe has clearance up to a certain level, but I don't know
4 what level this is going to go up to.

5 If this is TSSCI, then I need to start immediately
6 taking steps to try to get my law clerk up to the TSSCI level
7 which gets us to the obvious question: What about Mr. Klayman?

8 Because if the Government's position is that its
9 defense turns on TSSCI information, and I might add in that
10 context, that might include opinions of the FISC that are
11 currently categorized as TSSCI or Mr. Klayman doesn't have
12 access -- can't have access to it as the lawyer for himself and
13 these other individuals, then we got another problem. It is a
14 pretty fundamental one.

15 So I am in the dark right now as to what the
16 Government's thinking is on this subject. Maybe the Government
17 is going to be able to respond to this PI without reference to
18 any classified information, but that may not be the case. Do
19 you have any sense?

20 MR. GILLIGAN: May I respond, your Honor?

21 THE COURT: Do you have any sense, Mr. Gilligan, where
22 you are likely to be headed in terms of your response to this
23 PI?

24 MR. GILLIGAN: Well, your Honor, as you say, this PI
25 has a lot of moving parts to it.

1 THE COURT: Potentially.

2 MR. GILLIGAN: There are a number of claims that we
3 have not addressed yet in other cases challenging the NSA
4 intelligence activities, and there are a number of alleged
5 activities that are challenged in this case that we have not had
6 to address before so we are starting from scratch here.

7 And while I appreciate the Court's efforts to provide
8 us with additional time to figure out how we are going to
9 address all the moving parts in these Motions, I would ask the
10 Court's -- if the Court would be willing to consider providing
11 us with some additional time beyond November 11th which I also
12 hasten to point out is Veterans Day.

13 THE COURT: We work 24/7 around this courthouse, my
14 friend. 24/7. I don't want to hear anything about vacations,
15 weddings, days off. Forget about it. This is a case at the
16 pinnacle of public national interest, pinnacle. All hands 24/7.
17 No excuses. You got a team of lawyers. Mr. Klayman is alone
18 apparently. You have litigated cases in this courthouse when
19 it is matters of this consequence and enormity. You know how
20 this Court operates.

21 MR. GILLIGAN: I understand the Court's willingness and
22 preparation to address this Court with all the speed necessary,
23 your Honor, but precisely because of its consequence, we feel
24 that informed decision-making on the part of this Court will
25 best be served if we have an opportunity to address the various

1 issues that are raised in appropriate depth.

2 THE COURT: Now, Mr. Gilligan, when was this lawsuit
3 filed?

4 MR. GILLIGAN: This lawsuit was filed over four months
5 ago, your Honor.

6 THE COURT: You have had, not you personally, the
7 Department of Justice, the NSA and the allied Government
8 agencies that have an interest in this have had four months to
9 think through its position. That's a lot of time, Mr. Gilligan.
10 I am sad to say I don't believe or assume that they worked seven
11 days a week for four months. I wish it were true, but I am sure
12 it isn't.

13 But I am not asking you to tell me, but the point is in
14 my judgment, you have got four months. That's a long time. I
15 might add you have got a case going on with Judge Pauly up in
16 the Southern District of New York. Now, it is a little bit
17 different in the sense that Klayman 2 deals with, you know, a
18 different aspect of the NSA's program than Klayman 1. Klayman 1
19 is telephonic. Klayman 2 is internet traffic as you well know.

20 MR. GILLIGAN: Yes.

21 THE COURT: The cases have not been joined yet which
22 kind of begs the next question: Have you had any discussions
23 with Mr. Klayman to join any of these or whether his intention
24 is to join them or not? I don't know. We have two separate
25 PI's.

1 For the purpose of briefing, you can do one set of
2 briefs. You don't need to do two sets of briefs, but we have
3 got two PIs here and I am giving you extra time. I am giving
4 you a week extra.

5 MR. GILLIGAN: Understood, your Honor. I would just
6 point out, the last word on this subject at least for me, that
7 regarding the four months, it says something that the Plaintiffs
8 waited four months to bring these Motions. It says something
9 about what level of urgency there is actually to immediate
10 consideration of these Preliminary Injunction Motions.

11 THE COURT: Your answer to the Complaint is not due --
12 you got an extension from the Court to the first week of
13 December, right?

14 MR. GILLIGAN: No, actually I believe -- the Verizon
15 Defendants got an extension, but December 2nd is in fact the
16 60th day of service of the Complaint on the Government by the
17 U.S. Attorney's Office.

18 THE COURT: Okay. So your answer is technically due the
19 first week of December?

20 MR. GILLIGAN: That's correct, your Honor. That's
21 three weeks, nearly a month following the November 11th date.

22 THE COURT: So Mr. Klayman is not here, unfortunately,
23 and he can't share with us why he believed circumstances exist
24 that required him, compelled him to feel like he needed to file
25 a PI. But whatever the reason is that they have done it, they

1 have done it; and the reality is I have the to deal with it.

2 And from where I am sitting at least, the Government
3 has had four months to figure out its position as to these
4 cases. So it is now time to get going.

5 MR. GILLIGAN: Very well, your Honor.

6 THE COURT: You get your briefs in on that Monday, the
7 11th and you can have until close of business on the 11th unless
8 you want to do it on Friday. I assume you wanted the weekend to
9 have the benefit of that extra time. I could make it that
10 preceding Friday at close of business, but I thought you would
11 want the extra time.

12 MR. GILLIGAN: No, your Honor. Harking back to your
13 point earlier, we work plenty of weekends.

14 THE COURT: Good. Keep your sleeves rolled up.

15 MR. GILLIGAN: November 11 by close of business did I
16 hear your Honor say?

17 THE COURT: Well, we won't be open for business
18 technically. I will be here. I would love to start reading
19 them that early, but if you don't have them ready until
20 midnight, you have got to midnight technically.

21 MR. GILLIGAN: Very well, your Honor. Thank you.
22 Regarding then your Honor's inquiry about reliance on classified
23 information --

24 THE COURT: Yes. How does that stand?

25 MR. GILLIGAN: We have, as your Honor may be aware in

1 the litigation in the Southern District of New York with Judge
2 Pauly, the ACLU case, we have thus far not found it necessary
3 to rely on classified information to present our arguments. We
4 believe that that will be the case here.

5 THE COURT: Good.

6 MR. GILLIGAN: If anything, it may be the Plaintiffs
7 ultimately who may have to rely on classified information in
8 order to make their case and that will raise issues that perhaps
9 we will need to grapple with at a later time.

10 THE COURT: Okay. That's encouraging to hear that
11 that's where you come out at the moment anyway because that
12 would add amazing complexities to things over the next 3,
13 4 weeks. That's for sure.

14 MR. GILLIGAN: A number of complexities, your Honor.
15 Speaking of complexities, there is the matter still of the
16 Plaintiff's Motion For Leave to Take a 30(b)(6) deposition. May
17 I assume based on the schedule your Honor has set that that
18 Motion will not be granted?

19 THE COURT: I haven't ruled on it yet, but I think you
20 have got some sense of how I am inclined. I will wait to issue
21 the ruling, but I don't think I would have set this kind of
22 schedule if I was inclined to grant it.

23 MR. GILLIGAN: Very well.

24 THE COURT: I think you should focus on the briefs.
25 Don't focus on depositions.

1 MR. GILLIGAN: Very well, your Honor. Thank you.

2 THE COURT: Very good. Mr. Moss, do you have anything
3 you need to add for the good of the order or are you okay?

4 MR. MOSS: I am okay, your Honor. I think from our
5 perspective this is something that we can deal with in our
6 Motion To Dismiss in a fairly straightforward manner. The
7 Plaintiff's allegations with respect to Verizon are simply that
8 it allegedly complied with a Court Order; and under the law,
9 that doesn't -- there is no cause of action or basis for
10 bringing the suit under those circumstances. That's our
11 principal intention to dispose of the case on that basis.

12 THE COURT: I am going to be very curious to hear the
13 arguments about the authority this Court has to review or
14 overrule a decision by another Court. I don't know what Mr.
15 Klayman's theory is going to be just yet, but we will see.

16 MR. MOSS: We will be interested as well, your Honor.
17 In addition, there are other defenses relating to personal
18 jurisdiction that we will raise, but I think they are all fairly
19 garden variety.

20 THE COURT: Anything else, counsel? All right. We will
21 have a copy of the transcript sent to Mr. Klayman's address as
22 it appears on the record. We will stand in recess.

23 (Whereupon, at 4:10 p.m., the proceedings were
24 concluded.)

25

CERTIFICATE OF REPORTER

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3 I, Patty A. Gels, certify that the foregoing is a
4 correct transcript from the record of proceedings in the
5 above-entitled matter.
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