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14 UNITED STATES DISTRICT COURT
15 FOR THE CENTRAL DISTRICT OF CALIFORNIA
16 WESTERN DIVISION

17 Robert M. Nelson, William)
Bruce Banerdt, Julia Bell,)
18 Josette Bellan, Dennis V.)
Byrnes, George Carlisle, Kent)
19 Robert Crossin, Larry R.)
D'Addario, Riley M. Duren,)
20 Peter R. Eisenhardt, Susan)
D.J. Foster, Matthew P.)
21 Golombek, Faroujan Gorjian,)
Zareh Gorjian, Robert J. Haw,)
22 James Kulleck, Sharon L.)
Laubach, Christian A.)
23 Lindensmith, Amanda Mainzer,)
Scott Maxwell, Timothy P.)
24 McElrath, Susan Paradise,)
Konstantin Penanen, Celeste)
25 M. Satter, Peter M.B. Shames,)
Amy Snyder Hale, William John)
26 Walker and Paul R. Weissman,)

Case No. CV-07-05669 ODW(VBKx)
**FEDERAL DEFENDANTS'
DECLARATIONS AND EXHIBITS
IN SUPPORT OF THEIR
MOTION FOR CLARIFICATION**

DATE: March 10, 2008
TIME: 1:30 p.m.
COURTROOM: 11

Honorable Otis D. Wright II

27 Plaintiffs,

28 v.

1 National Aeronautics and)
Space Administration, an)
2 Agency of the United States;)
Michael Griffin, Director of)
3 NASA, in his official)
capacity only; Department of)
4 Commerce; Carlos M.)
Gutierrez, Secretary of)
5 Commerce, in his official)
capacity only;)
6 and Does 1-100,)
7 Defendants.)

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1 **DECLARATION OF CLINTON G. HERBERT IN SUPPORT OF**
2 **FEDERAL DEFENDANTS' MOTION FOR CLARIFICATION**

3 I, Clinton G. Herbert, declare as follows:

4 1. My name is Clinton G. Herbert. My current position with the National
5 Aeronautics and Space Administration ("NASA") is Deputy Assistant
6 Administrator for Security and Program Protection. In this position, I am the
7 second most senior individual responsible for security, law enforcement, counter-
8 intelligence/counter-terrorism, and emergency preparedness at NASA. I have
9 served in this position since April 2004.

10 2. I have been with NASA for eleven years, and my prior assignments
11 include duty as Manager, Special Projects, Office of Security Program Protection,
12 NASA Headquarters and as Chief of Protective Services at NASA's Ames
13 Research Center in Northern California.

14 3. I am a 1988 graduate of Columbia College and have attended numerous
15 professional training courses and educational forums throughout my career.

16 4. As part of my duties as Deputy Assistant Administrator, it was my
17 responsibility to oversee the agency's implementation of all aspects of Homeland
18 Security Presidential Directive ("HSPD")-12, including ensuring compliance with
19 NASA Procedural Requirements ("NPR") 1600.1. I developed NASA's policies
20 and plans to reduce security vulnerability, including overseeing the process of risk
21 designation throughout NASA. In my duties, I am in constant communication
22 with security personnel at NASA Headquarters, all NASA Centers, and other
23 Federal agencies. I make the following statements based upon my personal
24 knowledge and the information made available to me in my official capacity.

25 5. Prior to entry of the October 5, 2007 Order, Caltech employees working
26 at JPL had been submitting their investigation documentation in order to initiate
27 the background investigation process, so that they could receive the HSPD-12
28 badges credentials that would allow them access to JPL, as well as to other NASA
 facilities. When I use the term "investigation documentation," I mean electronic
 documentation and information provided by the individual to initiate the

1 background investigation process, and which contains the same information as the
2 paper OPM Standard Form 85. The electronic submission system is termed
3 “electronic Questionnaires for Investigation Processing” or “eQIP.”

4 6. Following the Ninth Circuit’s October 5, and subsequent October 12
5 Orders, NASA took several steps to comply. On October 5, 2007, NASA, through
6 the Director of the NASA Management Office,¹ contacted the JPL Deputy
7 Director, who sent out an email to all Caltech employees at JPL informing them
8 that any employee who had not submitted a questionnaire for a low-risk position,
9 including the authorization forms for release of information, was no longer
10 required to do so. Several of the named plaintiffs had submitted all required items
11 for HSPD-12 compliant badges prior to Oct. 5, 2007.

12 7. Although the Ninth Circuit’s order extended only to the named Plaintiffs,
13 NASA suspended requesting SF 85s pursuant to HSPD-12 from any Caltech
14 employees working at JPL, and so suspended NASA’s processing of all SF 85s
15 from Caltech direct-hire employees, subcontractor employees at any tier, grantees,
16 and any Caltech direct-hire or subcontractor new hires and/or job-applicants
17 received by NASA on or after October 5, 2007, excepting those persons who may
18 have been filling medium and high risk positions. As a result, no further forms
19 were requested from Caltech employees and subcontractor employees at JPL, and
20 any form submitted on or after October 5, 2007, was held but not processed.

21 When I state “held but not processed,” I mean that forms electronically submitted
22 by the individual in eQIP to NASA were not electronically forwarded by NASA to
23 OPM. In addition, NASA directed Caltech to suspend the processing of forms
24 from the named Plaintiffs

25 8. For new hires of Caltech and its subcontractors at any tier, NASA issued
26 contract guidance to Caltech to ensure that new hires understood that although the

27 _____
28 ¹ The NASA Management Office is responsible for overseeing the
Caltech/JPL contract with NASA and providing management support to NASA
program offices and Centers for NASA work performed at JPL.

1 requirement to complete form SF 85 and submit to the resulting background
2 investigation in compliance with HSPD-12 was currently suspended, it could be
3 required in the future.

4 9. The Ninth Circuit's Order enjoined Defendants only from requiring the
5 appellants to submit their questionnaires, and did not enjoin Defendants from
6 processing forms that had already been received. Forms that were received by
7 NASA prior to October 5, 2007 were electronically forwarded to OPM for
8 investigative action. To that end, NASA transmitted all of the submissions
9 received to OPM, which conducted the investigatory process itself pursuant to
10 interagency operating agreement and its own internal procedures. NASA
11 understood that OPM would then proceed with the investigations with respect to
12 the information or forms submitted. Forms that were received by NASA on or
13 after October 5, 2007 have been held without further action.

14 10. NASA understands that as a result of this Court's January 11, 2008
15 Order, OPM intended to suspend all processing with respect to Caltech employees
16 who work at JPL.

17 11. NASA's records reflect that there are approximately 8,000 total JPL
18 employees who require HSPD-12 compliant badges. This number includes civil
19 servants, Caltech employees, subcontractors at all tiers, grantees, and individuals
20 detailed to Caltech or JPL from other organizations. Of this number,
21 approximately 5,800 are Caltech employees working at JPL.

22 12. Of the 8,000 total JPL employees requiring HSPD-12 badges, just over
23 5,600 submitted SF 85 forms and releases to the NASA management office prior
24 to October 5, 2007. These forms were in turn transmitted to OPM for processing
25 and completion of the background investigations. Over 2,600 of these
26 investigations have been returned by OPM with no need for follow-up, and badges
27 may be issued for these individuals immediately. NASA is also holding forms
28 from 394 individuals who submitted them on or after October 5, 2007.

1 13. All of NASA is currently under a two-badge system, with some
2 individuals (primarily in other facilities) holding HSPD-12 compliant badges, and
3 others holding the OneNASA badge. NASA plans to phase out usage of the
4 OneNASA badge as soon as practicable, and move to requiring the use of HSPD-
5 12 compliant badges. In order to help to facilitate this move, and to comply with
6 the enhanced security requirements of HSPD-12, NASA would like to issue
7 badges for those individuals who have been determined to be eligible.

8 I declare under penalty of perjury that the foregoing is true and correct.
9 Executed on February 13th, 2008.


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11 _____
12 Clinton G. Herbert
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EXHIBIT A

FILED

OCT 05 2007

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT M. NELSON; et al.,

Plaintiffs - Appellants,

v.

NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION, an Agency
of the United States; et al.,

Defendants - Appellees.

No. 07-56424

D.C. No. CV-07-05669-ODW
Central District of California,
Los Angeles

ORDER

Before: B. FLETCHER, REINHARDT, and BERZON, Circuit Judges.

This is a preliminary injunction appeal. Accordingly, Ninth Circuit Rule 3-3 shall apply.

Appellants' emergency motion for a temporary injunction is granted to the extent set forth below. Appellees are enjoined, through October 12, 2007, or until further order of the court, whichever is earlier, from requiring appellants to submit the questionnaires for non-sensitive positions, including the authorization forms for release of information. In the meantime, the court will consider whether to extend the temporary injunction until the appeal of the denial of the preliminary injunction is resolved.

07-56424

The complaint in this case and the motion for a preliminary injunction were filed on August 30, 2007. Plaintiffs advised the district court from the outset that relief was needed by October 5, 2007. The district court decided the motion on October 3, 2007. The motion for an emergency injunction pending appeal was filed in this court the next day, on the afternoon of October 4, 2007. The motion, responses and exhibits consist of 984 pages. Appellants allege that they can be terminated from employment if they do not comply with appellees' requirement that they submit the completed authorization forms and the questionnaires for non-sensitive positions by the close of business today, October 5, 2007.

The court has not had the opportunity to consider fully the voluminous material filed in connection with the emergency motion. As far as we can determine in the short time available, appellants likely raise serious legal and constitutional questions, and show the probability of irreparable harm. What is quite clear is that the balance of hardships tips strongly in their favor. Most of the appellants have worked for Jet Propulsion Laboratories for many years, and the government has been considering and planning the implementation of the new requirements for well over a year. We, therefore, grant a temporary injunction through October 12, 2007. *See Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113,

07-56424

1120 (9th Cir. 2005); *see also Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983), *rev'd in part on other grounds*, 463 U.S. 1328, 464 U.S. 879 (1983). The court will consider whether to issue an injunction pending appeal on or before at that date.

Appellants' motion to expedite this appeal is granted.

If they have not already done so, within 5 calendar days of the filing date of this order, the parties shall make arrangements to obtain from the court reporter an official transcript of proceedings in the district court that shall be included in the record on appeal.

The briefing schedule is set as follows: the opening brief is due not later than October 25, 2007; the answering brief is due November 8, 2007 or 14 days after service of the opening brief, whichever is earlier; and the optional reply brief is due within 7 days of service of the answering brief. *See* 9th Cir. R. 3-3(b).

EXHIBIT B

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APPEARANCES OF COUNSEL:

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1 **LOS ANGELES, CALIFORNIA; FRIDAY, JANUARY 11, 2008; P.M. SESSION**

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3

4 THE CLERK: Item No. 3, CV 07-5669-ODW, Robert
5 Nelson, et al. v. National Aeronautical and Space Agency, et
6 al.

7 Counsel, please state your appearances.

8 MR. STORMER: Good afternoon, Your Honor. Dan
9 Stormer and Virginia Keeny of Hadsell and Stormer for the
10 plaintiffs.

11 THE COURT: Good afternoon, Mr. Stormer, Ms. Keeny.

12 MS. KEENY: Good afternoon.

13 MS. MEI: Good afternoon, Your Honor. Vesper Mei
14 from the United States Department of Justice on behalf of the
15 federal defendants.

16 THE COURT: Good afternoon, Counsel.

17 All right. We've been in trial here, so I'm still
18 reading the Ninth Circuit's opinion, but it looks like this is
19 going to go the distance. My question is with respect to
20 timing.

21 I would imagine that the parties would like this
22 thing to proceed as quickly as possible; is that right,
23 Mr. Stormer?

24 MR. STORMER: That would be correct.

25 THE COURT: Is there a great deal of discovery that

1 must be done, or is this really a case about principle?

2 MR. STORMER: Well, one -- principle is a part of it,
3 but I think the discovery would go to the issue which I think
4 is somewhat of a conundrum that we're faced with here, which is
5 the issue of the position of Caltech.

6 Your Honor made a ruling, and the Ninth Circuit has
7 made a ruling, and those rulings are directly contradictory;
8 and that's one of issues, I think, before we begin the
9 discovery process of which we believe there is some discovery
10 to conduct, and I believe that Caltech probably would want some
11 discovery, as well.

12 But the issue is that Your Honor issued an order
13 dismissing Caltech, and that order was issued while there was
14 an appeal on that very issue pending, and there's -- most of
15 the case law -- and I don't know any that really contradicts
16 it -- which say that such an order would be both premature and
17 in excess of the trial court's jurisdiction and therefore would
18 probably be a nullity.

19 And I can cite Your Honor some case law to that
20 effect.

21 THE COURT: Well, my view is no one was put to death.
22 Anything that we do, we can undo. So don't fret over that.

23 MR. STORMER: Okay. Then addressing directly the
24 issue of discovery. I think there is some discovery that
25 relates specifically to issues concerning Caltech as to its

1 decision-making process and its determination as to why people
2 would be excluded if they refused to sign and the impact of
3 their refusal to sign.

4 THE COURT: Wait, wait, wait, wait.

5 Right now we've got an injunction in place, right?
6 And there's going to have to be a determination as to whether
7 or not it's going to become permanent, whether or not NASA is
8 going to be permanently enjoined from, I suppose, requiring the
9 employees to submit to background investigations prior to
10 issuance of I.D. cards.

11 I have a question, by the way. Could I, for example,
12 today, without any identification at all, walk onto JPL?

13 MR. STORMER: You would have to be escorted. You
14 certainly wouldn't have to go through the background check.

15 THE COURT: Well, I just want to know whether I have
16 access to JPL without any identification.

17 MR. STORMER: I don't know the answer if you don't
18 have any identification. If somebody identifies you, you
19 probably go could on. Whether you would have to present
20 identification, I think Mr. Holscher is here --

21 THE COURT: Anyone here from Caltech that can answer
22 that, or NASA, JPL, that can answer that? Look at all these
23 people in here. I just want to know -- Sir?

24 MR. NELSON: Robert Nelson, the lead plaintiff in the
25 case.

1 THE COURT: Called on the right person.

2 MR. NELSON: This is the badge that we show at the
3 door to the laboratory.

4 THE COURT: And that identifies you as what?

5 MR. NELSON: That badge is a photograph of myself and
6 it's an indication that I've had a national agency check.

7 MR. STORMER: But, Mr. Nelson, the question is --

8 MR. NELSON: Could I bring Judge Wright.

9 THE COURT: No, no. Without escort, can I walk onto
10 JPL's property?

11 MR. NELSON: No, sir.

12 UNIDENTIFIED SPEAKER: You must show a photo I.D.

13 THE COURT: Okay. Kind of like walking into here.

14 UNIDENTIFIED SPEAKER: Yes.

15 THE COURT: All right. Thank you.

16 MR. STORMER: I think the -- where we stand is once
17 the case comes back to court, the first thing that the -- NASA
18 would have to do is they would have to -- even before
19 initiating this process again, they would have to go through
20 the Administrative Procedures Act; and I think the Ninth
21 Circuit was quite clear on that.

22 So there couldn't be -- until that process was
23 completed, there couldn't be the types of checks that they have
24 that the court found inappropriate, that the Ninth Circuit
25 found inappropriate.

1 So the first step would be to go through the APA and
2 set the standards under which they could create such a
3 background check and the extent to which it could extend. So I
4 think that's the first step.

5 And the second step would be for the injunction to
6 remain in place to determine whether what came from that
7 process was constitutionally appropriate.

8 THE COURT: All right. As I started thinking about
9 this, I've been wondering what is it that we're going to try?
10 What is it that we're going to have a jury determine? And at
11 first blush, I don't know.

12 MR. STORMER: Well, I don't think there would be a
13 jury issue, Your Honor. I think this would be an equitable
14 issue and tried to the court.

15 THE COURT: Okay.

16 MR. STORMER: The issue would be -- it may well be
17 resolvable completely on the paper -- the issue may -- it
18 probably can be resolved on paper after some limited discovery.

19 THE COURT: And I would imagine -- and I just throw
20 this out -- this may be resolvable outside of the process. I
21 would imagine if both sides come to some sort of an agreement
22 with respect to a mutually agreeable course of action in terms
23 of properly being able to identify and authenticate the
24 identity of the employees, et cetera, and in a way that is
25 minimally intrusive, that is no more than absolutely necessary

1 to accomplish its purpose, we may be able to put this all to
2 rest; and I hope that that's the direction that we can go.

3 MR. STORMER: We're certainly amenable to sitting
4 down and talking this over with the defendants.

5 THE COURT: Okay. Because that's what I would really
6 like. I would really like for this to get negotiated. All
7 right.

8 Timelines?

9 MR. STORMER: I'd like to -- if we could have just a
10 moment to discuss something --

11 THE COURT: Absolutely.

12 Let me hear from the government. Same kinds of
13 questions.

14 MR. HOLSCHER: Your Honor?

15 THE COURT: Yes.

16 MR. HOLSCHER: Is it possible for Caltech to address
17 briefly what was just raised regarding the case against
18 Caltech?

19 THE COURT: Yes.

20 MR. HOLSCHER: Mark Holscher on behalf of Caltech.

21 Counsel for the plaintiffs just made reference to
22 wanting to seek discovery against Caltech. You dismissed us
23 with prejudice in an order earlier this week, and I think the
24 record is quite clear that on October 11th, 2007, the Ninth
25 Circuit explicitly denied the plaintiffs' request to stay this

1 action.

2 So contrary to Mr. Stormer's statement to you that
3 your order this week was somehow improper, you absolutely had
4 jurisdiction and the right, pursuant to an established briefing
5 schedule, to issue the order dismissing with prejudice the
6 claims against Caltech.

7 If the plaintiffs -- they have two choices, Your
8 Honor: They can ask that you certify the order for appeal, or
9 they can move for reconsideration. I submit, Your Honor, there
10 are no bases for a reconsideration under the local Rule 7.18;
11 there have been no new facts and there's no new law. The
12 Ninth Circuit cited *Sutton* case, which is the exact case that
13 Your Honor relied on. There is no new Ninth Circuit case law.
14 And, in fact, if you look at the Ninth Circuit's order, it
15 explicitly notes that that decision does not necessarily render
16 Caltech liable as a government actor. I'm reading from page
17 24. You could have issued your same ruling on our motion to
18 dismiss with prejudice tomorrow or next week, after the Ninth
19 Circuit had ruled.

20 The Ninth Circuit disagreed with some of Your Honor's
21 determinations regarding the government's scope of permissible
22 investigation --

23 THE COURT: They did?

24 MR. HOLSCHER: -- but, Your Honor, I actually like
25 what you did.

1 But setting aside that as a matter of law they may
2 have disagreed with you as to legal issues as it related to
3 arguments the government had made in opposition to both the
4 motion -- in an opposition to the question for the preliminary
5 injunction there, all also in the motion to dismiss, there is
6 no new law in the Ninth Circuit order as respects to us.

7 So I would respectfully submit that at this point,
8 Your Honor, absent the plaintiffs' complying with the federal
9 rules and the local rule, they're entitled to third-party
10 discovery from Caltech and we'll cooperate; but we're not a
11 defendant. You've dismissed us with prejudice.

12 And, frankly, Your Honor the issue that is a bit
13 perplexing is that under federal law, the Ninth Circuit did not
14 have jurisdiction to enjoin us after we dismissed with
15 prejudice. We're prepared to stipulate -- if this court on
16 remand needs to sort out the scope of the injunction, we're
17 prepared to stipulate that we're going to comply with the order
18 as it relates to the government.

19 We've made it very clear, Your Honor, before the
20 government had this investigation process in this badging
21 program, we were not -- we wanted all the plaintiffs to stay
22 and work. So we're going to comply with the injunction against
23 the government.

24 But I want to make sure Your Honor is aware of that,
25 which is you have correctly followed federal law and procedure;

1 your case was not stayed when this went up to the Ninth
2 Circuit.

3 THE COURT: I see here what -- the Ninth Circuit felt
4 that Caltech went further than it had to go to implement NASA's
5 policy by indicating that if you failed to complete the
6 background investigation and have an identification badge
7 issued, you wouldn't have access to the premises and would be
8 deemed to have voluntarily resigned your position.

9 However, looking at page three, that an
10 identification badge is necessary to gain access to the
11 facilities, which is part of the reason I asked the question
12 whether or not an identification badge is necessary. This was
13 already a pre-existing requirement. So this isn't something
14 that Caltech has engineered on its own.

15 MR. HOLSCHER: Correct, Your Honor.

16 THE COURT: You've always had to have identification
17 to be on JPL's premises; now it's going to be different
18 identification, but I don't see that the action by Caltech is
19 over and above, one, what is necessary to implement the
20 directive; and, two, is anything new.

21 So we'll take a look at it. If, one, we have acted
22 in excess of our jurisdiction, it's null, and there will be a
23 mulligan. We'll do it again. We'll take another close look at
24 this.

25 MR. STORMER: Might I, Your Honor?

1 THE COURT: Sure.

2 MR. HOLSCHER: Before you do, just to finish up, we'd
3 like to brief -- no doubt, Your Honor. There's dozens of cases
4 which say where the Ninth Circuit declines to stay a district
5 court proceeding when they're looking at injunctive relief, you
6 retain jurisdiction. Cases go on forever.

7 There's also no doubt that the local rules here
8 require that if they want you to reconsider the motion, they've
9 got to comply with it. We would just like the opportunity to
10 brief whatever questions you might have.

11 As we sit here today, we are not a defendant, and we
12 may have disagreements with the plaintiffs' counsel as to the
13 scope of the Ninth Circuit's decision; but Your Honor
14 explicitly considered, and we addressed the fact, that -- the
15 fact is, Your Honor, as alleged in the plaintiffs' complaint --
16 and they have all sorts of judicial admissions that Your Honor
17 considered in ruling on our motion to dismiss -- that if the
18 plaintiffs don't have the badge, if the government's program
19 goes forward, they can't access the property, the computer they
20 need for work. That's nothing to do with us. That's just what
21 it is. It's not an action by Caltech.

22 We'd be delighted to brief it down the road. I just
23 didn't want you to think that somehow we are back in this case
24 as a result of the other order because that's not true.

25 THE COURT: You're not back in the case yet, if at

1 all, if ever.

2 MR. STORMER: Your Honor --

3 THE COURT: I thought this was going to be short and
4 sweet.

5 MR. STORMER: So did I. I thought so, as well.

6 But the case law is absolutely clear. The issue of
7 whether a court, while there's an appeal pending, can take any
8 action has to only address things which would maintain the
9 status quo. And if the issue is an issue which was raised on
10 appeal, the court is divested of its jurisdiction to address
11 those issues.

12 In this case, if you look at pages 23 and 24 of the
13 decision, this is the very issue raised by Caltech on appeal
14 and rejected by the court. And Mr. Holscher is absolutely
15 correct. The cases are legion that say that the trial court
16 has no jurisdiction in those instances where the issue is
17 addressed on appeal. And in this case, it couldn't be clearer
18 that it was addressed, it was ruled on. In fact, I have not
19 received a notice that the judgment has been entered in this
20 case.

21 So as I understand it there, that -- there's no need
22 for motion for reconsideration, and there wouldn't be a need
23 for reconsideration if there was no jurisdiction to issue such
24 an order.

25 THE COURT: Okay. I understand your point.

1 MR. STORMER: And we'll be happy to brief the issue,
2 and I can provide Your Honor numbers of cases from U.S. on down
3 on the issue.

4 THE COURT: The proposition you advanced initially is
5 absolutely correct. Okay? Absolutely. So let's talk about
6 what is alive and well that we do have to deal with, okay?

7 Again, I'd still like to hear from the government.
8 Discovery?

9 MS. MEI: Well, I think the first thing, Your Honor,
10 is as both Mr. Stormer and Mr. Holscher pointed out, is there's
11 no mandate yet from the court of appeals. So at this point,
12 the motion to dismiss is still alive before the district court.
13 And even if you look at the Ninth Circuit opinion, there's no
14 impediment at this to point to dismissing first the California
15 constitutional claim, which plaintiffs haven't disputed is --
16 should be dismissed. There's no impediment to dismissing their
17 Fourth Amendment claim, and there's no impediment to
18 dismissing -- or to addressing the Fifth Amendment
19 self-incrimination claim, which the Ninth Circuit didn't
20 address at all.

21 THE COURT: Does this Ninth Circuit opinion deal with
22 the California Constitution issues?

23 MS. MEI: No, I don't think it does.

24 THE COURT: Okay.

25 MS. MEI: As for the rest, we, like Your Honor,

1 received the opinion just hours before this hearing, and we
2 would really like an opportunity to study it more carefully.
3 We haven't had time to confer with the clients or within the
4 department; and the government at this point is including en
5 banc -- moving for en banc rehearing.

6 And at this point, I think we'd also like the
7 opportunity to do some supplemental briefing to address the
8 issues that the Ninth Circuit raised, as well.

9 THE COURT: All right. My only concern was this --
10 and I probably shouldn't have been concerned about it because I
11 did notice that the Ninth Circuit pointed out the fact that
12 time doesn't appear to be of the essence. We've been fooling
13 with this for some years now -- but my only concern was to
14 bring some closer to this as quickly as possible so it isn't
15 languishing in the court system.

16 So if I'm the only one who is worried about that,
17 I'll get over it, fine. If you guys want to push this thing
18 along, we'll make it happen. That's why I want to know about
19 discovery. Is that really an issue, or is this a
20 constitutional philosophical debate?

21 MS. MEI: Again, I think we'd like the opportunity to
22 consider the opinion more closely at this point and see what we
23 think needs to be addressed. I don't think --

24 THE COURT: Lawyer speak for you'd like a month to
25 mull this over? Just tell me what you want.

1 MS. MEI: I think that would -- yeah, that would --

2 THE COURT: I'll give you what you want.

3 MS. MEI: A month.

4 THE COURT: All right.

5 Mr. Stormer?

6 MR. STORMER: At the end of -- a month sounds fine,
7 but it's to do what? I'm not quite certain.

8 THE COURT: I don't know. I want to set a trial date
9 for day after tomorrow. I want to get this thing done. That
10 is why I asked about discovery.

11 Is that really necessary?

12 MR. STORMER: There isn't a lot, but there is some.
13 There are the question, for instance, that were addressed by
14 the trial court as -- excuse me -- by the appellate court as to
15 the investigative process and certain things are used, but it's
16 limited. It is discovery that we could do in two, three months
17 at the maximum.

18 THE COURT: I did see that -- let's take as true what
19 the Ninth Circuit has said about, All right, this is what, I
20 guess, the FBI is going to do, you know. They're going to take
21 these releases, and they're going to do what the FBI does, and
22 they're going to ask every open-ended question there is. Let's
23 assume that all that's true, all right?

24 What we don't know is then what? How is that
25 information utilized, if at all? And how am I supposed to make

1 a determination on that?

2 MR. STORMER: Well, the defendants have said it is
3 utilized; they haven't said exactly how it's utilized.

4 THE COURT: That's the point. If it utilized by
5 okeydokey, then it's a big deal, but --

6 MR. STORMER: But there would be a big deal with
7 that. Then that -- those requests and those investigation and
8 stuff that they don't use would be needless. There would be no
9 basis for those questions. It would be an investigation that
10 would not be the least intrusive form of investigation.

11 THE COURT: Good point.

12 MR. STORMER: So that's the issue. Those are some of
13 the areas that we need limited, not a lot, but we need to know
14 who's doing what and what they're doing with it. If they're
15 throwing it away, that's one thing. If they're using it in a
16 certain way, that's another. We just need to know those
17 things.

18 And, for instance, against Caltech, who we believe
19 the Ninth Circuit will say is a member of this process, we need
20 to know why people are being voluntarily resigned. Why is that
21 the necessary step? And there's not a lot. We don't need to
22 do a tremendous amount, but there's some very limited, very
23 focused discovery. Perhaps what we should do is sit down with
24 the defendants -- and I include Caltech in that -- and work out
25 a discovery plan that addresses the types of discovery that we

1 might need.

2 THE COURT: Let's do that, then. Let's pretend this
3 is a piece of normal litigation and let's have counsel sit
4 down, meet, and then put together and submit a joint report
5 which primarily includes a discovery plan.

6 And I'd really be interested in knowing the issues
7 you honestly think are going to have to be litigated, things
8 that are going to have to be decided in this case because,
9 quite frankly, I haven't given it a whole lot of thought; but
10 right now, I don't like the idea that these claims are going to
11 be litigated. I want these claims negotiated. I really do. I
12 want there to be some sort of a mechanism in place that has
13 been designed by the parties and that everyone has signed off
14 on. That's what I'd like. I want a new bicycle for Christmas,
15 too.

16 MR. STORMER: I do have a proposal.

17 THE COURT: Okay.

18 MR. STORMER: I would propose that that's what we do
19 in the next month.

20 THE COURT: That's a good idea. That's time well
21 spent. Let's all get together again on February 15th.

22 MR. STORMER: And I have a second portion of the
23 proposal.

24 THE COURT: Uh-huh.

25 MR. STORMER: It addresses the jurisdictional issue.

1 I would propose that we submit a brief -- since there has, as I
2 understand it, been no judgment entered, no -- I could be
3 wrong. There's been a ruling, but I don't know if it's been
4 entered -- perhaps -- well, that we could -- so I don't think
5 there's a motion for reconsideration necessary if it hasn't
6 been entered.

7 THE COURT: What are we talking about?

8 MR. STORMER: On the jurisdictional issue on
9 whether --

10 THE COURT: Are you talking about the Caltech's
11 motion to dismiss?

12 MR. STORMER: Right.

13 THE COURT: Okay.

14 MR. STORMER: We could either submit simultaneous
15 briefs in ten days, and then simultaneous responses addressing
16 the issues.

17 THE COURT: I don't want to put you to unnecessary
18 work. I have a better proposal. We'll withdraw it. We may
19 reissue it tomorrow, but that eliminates --

20 MR. STORMER: I'm fine with that.

21 THE COURT: I got your attention. Okay.

22 MR. STORMER: It was like a ninja thing. No mask,
23 though. Okay.

24 MR. HOLSCHER: Your Honor, I do believe it would be
25 appropriate, and we're prepared to give you a brief tomorrow,

1 next week or in ten days, whatever you need, Your Honor.

2 The Local Rule 7.18 doesn't apply to reconsideration
3 of orders that are final judgments, it's to all decisions of
4 the court, whether it's from the smallest of order to a case
5 dispositive order. You've issued an order dismissing the case
6 with prejudice. There are very good reasons why -- I'm sorry,
7 Your Honor.

8 THE COURT: The point being I guess until a few hours
9 ago, this matter was still being viewed Pasadena.

10 MR. HOLSCHER: With all due respect to plaintiffs'
11 counsel, Your Honor, I believe they've not correctly stated the
12 law. You have absolute jurisdiction. There are -- give you
13 cases now where you're before the trial court, there's an
14 appeal pending on injunctive relief. You're allowed to decide
15 every substantive issue in the case and to resolve the case. I
16 respectfully disagree with plaintiffs' counsel. Their
17 statement of law is not correct, which I fear is the reason why
18 you are moving so expeditiously here.

19 I can assure Your Honor you are on solid ground with
20 respect to you had jurisdiction to decide the motion to
21 dismiss; you decided it. If they want to file a motion for
22 reconsideration, there is an interesting legal issue, which is
23 I believe, Your Honor, with the Ninth Circuit's opinion in
24 hand, you could have issued the very same decision, the motion
25 to dismiss.

1 So what I request that you do is to keep the order in
2 place that you had in place which dismissed Caltech and allow
3 the parties to brief very quickly for you the,
4 simultaneously -- and I feel quite confident, Your Honor, that
5 when you look at the brief, you'll see that there are all sorts
6 of Ninth Circuit cases which say just because the Ninth Circuit
7 has a case up on appeal for injunctive relief, you can still
8 decide the motion to dismiss. It's just black letter law.

9 THE COURT: I was trying to save the parties that
10 work by simply eliminating the need. We withdraw it and refile
11 it Monday. But --

12 MR. HOLSCHER: I think at the end of the day Monday
13 you'd be in the same spot.

14 THE COURT: Then it would be a motion for
15 reconsideration. I would like to avoid all that. I would
16 really like the lawyers to spend their time in sort of
17 advancing the ball.

18 I understand your position. You're out, you'd like
19 to stay out. That's fine. I don't see Caltech as an
20 independent actor in this. That is why unless someone brings
21 something to me to really make me change my mind, Caltech is
22 out of this case, all right?

23 And I don't want the lawyers spending their weekends,
24 you know, just churning paper needlessly. I really want us to
25 come together and see about resolving this case as quickly as

1 possible. That isn't going to be your concern.

2 MR. HOLSCHER: Right. And we're happy to cooperate
3 with discovery as an interested third party. I commit that to
4 plaintiffs' counsel. But to the extent that they wanted to
5 have us reinstated, we'd like to brief it.

6 And I would just point out, Your Honor, that we are
7 one facility that is part of nationwide government program. In
8 terms of input on how the government is going to resolve this
9 for the plaintiffs, I can tell you that this would be, if there
10 are any negotiations -- because it's a national policy. I have
11 no idea what the government's consideration is going to be --
12 it's not going to involve Caltech, whether we're a third party,
13 where they were to succeed on a motion for reconsideration.

14 We'll cooperate with both sides, but -- and if they
15 need help to get access to Caltech documents and witnesses,
16 we'll be cooperative as a third party and to expedite it as
17 much as the parties want to, Your Honor.

18 THE COURT: All right. And if a letter brief shows
19 up on jurisdiction, we'd be grateful.

20 Okay. Is this date all right with your side,
21 Mr. Stormer? February 15, '07[sic], two o'clock?

22 MR. STORMER: Yes.

23 THE COURT: All right. And I'd like to have a joint
24 report outlining where we're going to go, certainly with
25 respect to the discovery you contemplate and the issues you

1 contemplate -- uh-oh.

2 MR. STORMER: And should we put --

3 (Discussion held off the record between counsel)

4 MR. STORMER: We will have in ten days our brief, and
5 they will have their brief.

6 THE COURT: That is fine. Thank you. Appreciate it.
7 Yes, from the United States of America.

8 MS. MEI: Your Honor, I guess I'd still like to
9 clarify what is pending before the court because we did have
10 the motion to dismiss --

11 THE COURT: Check your mail.

12 MS. MEI: Okay.

13 And then there's also a pending motion for class
14 certification, and to us it makes sense to figure out what is
15 live in the case and what the plaintiffs -- what the parties
16 agree is live in the case before we go ahead and complete
17 briefing with that.

18 THE COURT: As long as this case is limited to these
19 low risk employees, I don't believe that class action is
20 appropriate for this case. So if there's a motion to certify
21 the class, that will probably be denied.

22 Now what's pending is a joint report following an
23 early meeting of counsel, and we're going to let this proceed
24 like normal litigation, but I would like to expedite it.

25 With respect to that motion set for hearing on

1 February 25th, the court is going to being dark on
2 February 25th, but we will probably issue an order and they'll
3 be no oral argument on that.

4 Does anyone have any questions?

5 MS. KEENY: I have a questions, Your Honor. Virginia
6 Keeny on behalf of plaintiffs.

7 THE COURT: Ms. Keeny.

8 MS. KEENY: The motion on February 25th, was that the
9 motion for class certification?

10 THE COURT: Yes.

11 MS. KEENY: I think that the defendants have not yet
12 filed their opposing briefs in that -- with respect to that
13 motion, and the class certification we were seeking was with
14 respect to injunctive relief only.

15 So I think that the court should consider our moving
16 papers and the opposing papers prior to ruling on that, though
17 it doesn't have to be heard on February 25th; it can be pushed
18 off.

19 THE COURT: Do you seek to redefine the class beyond
20 that -- all right.

21 MS. KEENY: No -- it is -- say it's a technicality,
22 but one can seek class certification on an injunctive relief
23 class, and that's what we were seeking to do, just to be
24 certain that if a preliminary injunction was ordered -- there
25 is one in place now -- that it was clear that it applied to all

1 of the low risk employees at JPL --

2 THE COURT: Okay. Are all of the low risk employees
3 at JPL included as plaintiffs in this case?

4 MS. KEENY: No, only 28 of 5000, approximately. So
5 the case is pled as a class action seeking injunctive relief on
6 behalf of all low risk employees of whom we have 28
7 representatives.

8 THE COURT: All right. That's different. All right.
9 Take a look that the --

10 MS. MEI: Your Honor, I think what we were seeking
11 was to put off -- I'm sorry. I wasn't clear -- to put off our
12 opposition to our -- briefing our opposition to the class
13 certification motion until it was clearer what was in -- what
14 claims were still alive in the case.

15 THE COURT: Yes, don't put it off.

16 MR. STORMER: Okay.

17 THE COURT: As a matter of fact, we probably should
18 have -- well, we want to make sure that the entire process has
19 been enjoined. There should be no going forward whatsoever
20 with respect to seeking submissions of these questionnaires,
21 applications and beginning the background checks and any other
22 punitive actions against these employees.

23 MS. MEI: Right --

24 THE COURT: None of them, right?

25 MS. MEI: And at this point, NASA has not gone

1 forward with any of them. But it's not certified as a class at
2 this point, and the briefing hasn't been completed on that
3 issue; and we would like the opportunity to complete the
4 briefing.

5 THE COURT: That's fine. That's fine. But I was
6 just thinking in the interim, Ms. Keeny is right. We do have
7 an order from the Ninth Circuit and, technically, that order
8 applies to, you know, these two dozen people or so, but that
9 order should apply -- well, actually, it should apply to NASA.

10 MS. MEI: Right.

11 THE COURT: And I don't think it's really
12 necessary -- wait a minute. I should read this. Maybe we
13 should all just read this.

14 All right. So the Ninth Circuit has left it up to
15 the district court to fashion preliminary injunctive relief
16 consistent with this opinion.

17 We can do that without the need of certifying the
18 class. NASA is simply enjoined from moving forward with the
19 Homeland Security Presidential Directive 12 as it pertains to
20 the JPL property and the Caltech employees until we have a
21 trial on the merits on this case. That will be the order.

22 Anything else we have to deal with?

23 MR. STORMER: I don't --

24 THE COURT: Never give a lawyer a blank check to
25 talk.

1 MR. STORMER: How soon before the hearing do you want
2 our consolidated submission?

3 THE COURT: How much consideration do you wish me to
4 give it?

5 MR. STORMER: As much as you can.

6 THE COURT: Early as you can.

7 MR. STORMER: Okay. Fair enough. Thank you.

8 THE COURT: Anything else? Everyone have a good
9 weekend.

10 (Proceedings concluded at 2:35 p.m.)

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14 C E R T I F I C A T E

15

16 I hereby certify that the foregoing is a true and
17 correct transcript from the stenographic record of
18 the proceedings in the foregoing matter.

19

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January 12, 2008

21

Deborah K. Gackle
Official Court Reporter
CSR No. 7106

Date

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