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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

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WIKIMEDIA FOUNDATION      :
                             :
           Plaintiff       :
versus                      : Civil Action Number
                             :
NATIONAL SECURITY AGENCY, et al: 15-CV-662
                             :
           Defendants.    :
-----x

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September 22, 2017

The above-entitled Status Conference was continued before the Honorable T.S. Ellis, III, United States District Judge.

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A P P E A R A N C E S

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P R O C E E D I N G S

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THE DEPUTY CLERK: Wikimedia Foundation.net versus  
NSA. Civil Case Number 1:15-CV-662.

Counsel, please note your appearance for the record.

THE COURT: Who is here for the plaintiff?

MR. ABDO: Good morning or good afternoon, Your  
Honor. Alex Abdo for the Knight First Amendment Institute on  
behalf of the plaintiff.

THE COURT: Would you spell your name for the  
reporter, please?

MR. ABDO: Yes, Your Honor. Alex spelled, A-L-E-X.  
Abdo spelled, A-B-D-O.

THE COURT: All right. And you'll argue on behalf  
of the plaintiff?

MR. ABDO: I will, Your Honor. And I'm joined by my  
colleague, Patrick Toomey from the ACLU.

THE COURT: All right. And who is here on behalf of  
the defendant?

MR. GILLIGAN: James Gilligan, Your Honor, with the  
Department of Justice. Gilligan is spelled just like the  
island. With me here at counsel table are Rodney Patton,  
Caroline Anderson, and Timothy Johnson also with the  
Department of Justice.

THE COURT: "Just like the island." I never saw the

1 program. I actually am older than the program, but I escaped  
2 it, for which I think I should be eternally grateful.

3 MR. GILLIGAN: Yes, Your Honor, because I have never  
4 escaped it and you should be very grateful.

5 THE COURT: All right. This matter is before the  
6 Court on remand from the Fourth Circuit, which concluded that  
7 the complaint correctly failed to state jurisdictional facts  
8 against some defendants but stated enough in the complaint for  
9 Wikimedia. I think that's essentially -- and then it went on  
10 to say that if the defendant wished to dispute those facts  
11 then it could do so. And the Court could proceed in a variety  
12 of ways. One of which is, I think, the most common is to  
13 allow some discovery and have an evidentiary hearing and rule.  
14 The other is simply to conclude that in three or four months  
15 we'll have summary judgment. And that's really what we're  
16 here today for me to decide: To aid me in reaching an  
17 appropriate decision.

18 I have your briefs, which were helpful. But, I need  
19 to focus sharply on what it is that is in dispute about  
20 injury-in-fact for Wikimedia, because that's what Wikimedia  
21 contends and wants to show, and why NSA thinks it doesn't  
22 exist.

23 I don't have much doubt, by the way, that there  
24 are -- there is some interrelation between facts and  
25 jurisdiction, but that doesn't dispose of how I should

1 proceed.

2 Let me ask, to begin with -- let me confirm with Mr.  
3 Abdo, your contention, as I understand it, is that NSA copies,  
4 using surveillance devices along the internet backbone, it  
5 intercepts and copies text-base communications of Wikimedia.  
6 Am I correct?

7 MR. ABDO: That's correct, Your Honor.

8 THE COURT: But you go on and say in addition, they  
9 attempt to filter that data, foreign and domestic, and -- but  
10 some domestic is copied and within that domestic is Wikimedia  
11 material?

12 MR. ABDO: That -- slight modification. There are  
13 two types of filtering that go on that we understand. The  
14 NSA, as we understand, attempts to filter out purely domestic  
15 communications from the set of communications that it scans.  
16 And by the Government's own descriptions, in publically  
17 available documents that have been officially acknowledged,  
18 that filtering is incomplete. And those that -- those that  
19 pass that first filter include communications that are purely  
20 foreign as well as ones that have --

21 THE COURT: I thought that's what I said. And that  
22 some of those --

23 MR. ABDO: Right.

24 THE COURT: That don't get filtered out that are  
25 domestic are Wikimedia.

1 MR. ABDO: That's right. I was just qualifying  
2 domestic -- there are purely domestic ones that the NSA  
3 intends to filter out entirely because its authority does not  
4 allow it to collect those. But its authority does allow to  
5 collect one end domestic and one end foreign communications.

6 THE COURT: All right. Now, then I think you also  
7 allege that they review those domestic communications of  
8 Wikimedia?

9 MR. ABDO: That's right.

10 THE COURT: What do you mean by -- you -- they  
11 actually read them?

12 MR. ABDO: Well, they have surveillance equipment  
13 that scans the full text of text-based international  
14 communications to determine whether anywhere in the content of  
15 those communications. So, for example, including inside the  
16 envelope. Whether they mention specific selectors, is the  
17 term that the NSA uses, that the NSA is targeting. And if so,  
18 if the body of the message mentions one of those selectors,  
19 then that communication is shunted off for retention and --

20 THE COURT: But does anybody -- nobody reads it.  
21 It's just a computer search by a selector?

22 MR. ABDO: At -- at that point, that's correct.

23 THE COURT: And if the message is not selected,  
24 there's no selector in there, then that particular message,  
25 although it was copied, and it wasn't filtered as it should

1 have been, it made it, but it's not got a selector. Nobody  
2 reads that. Nobody looks at it. It's -- that's not the  
3 injury-in-fact that you're claiming.

4 MR. ABDO: Well, we do claim that a computerized  
5 scan of the message is an injury-in-fact and that it is a  
6 search for a seizure within the meaning of the Fourth  
7 Amendment. In the same way that if the Government used robots  
8 to search the interiors of homes for contraband, that would be  
9 a search of whether or not contraband was detected. And I  
10 understand that we have a disagreement with the Government on  
11 the merits about that position. And I think that's an  
12 important question -- that's an important question that goes  
13 to the vitality of the Fourth Amendment in the digital age.  
14 But that's a dispute on the merits.

15 THE COURT: All right. Yes, I think, you're right.  
16 It is a dispute on the merits.

17 All right. Thank you. Let me -- now Mr. Gilligan,  
18 I think we have clearly the allegation or the contention by  
19 the Government that the NSA copies text-based communications  
20 of Wikimedia that passed through this backbone. And they  
21 use -- they filter out or try to filter out purely foreign and  
22 that's a little -- that's not entirely successful. Some  
23 domestic matters are copied. And some of those, they contend,  
24 are Wikimedia.

25 Is that your understanding too?

1 MR. GILLIGAN: That is -- yes, that is my  
2 understanding of the allegations. Yes, Your Honor.

3 THE COURT: Now, is it the NSA's contention  
4 factually that there aren't any domestic Wikimedia messages  
5 that are copied?

6 MR. GILLIGAN: I think, Your Honor, if the question  
7 is put as a matter of fact, it's a question that we can --  
8 cannot respond to. We could not confirm or deny that because  
9 that would get into classified operational details --

10 THE COURT: All right.

11 MR. GILLIGAN: -- of the NSA's upstream collection  
12 --

13 THE COURT: But what about -- the reason I ask  
14 that -- I take your point that it's classified, but we  
15 could -- and we'll have CIPA hearings if we need to. But if  
16 the Government were to say we don't copy, we intercept, but  
17 don't copy any Wikimedia. Because as a matter of fact, even  
18 though our filtering of domestic from foreign is imperfect,  
19 what's left in the domestic is not Wikimedia. That could be a  
20 fact, couldn't it?

21 MR. GILLIGAN: Yes, that -- that could be a fact.  
22 Yes.

23 THE COURT: And if that were a fact, the case could  
24 be over?

25 MR. GILLIGAN: If that were a fact that could be



1 disclosed on the public record, Your Honor, yes, the  
2 case would be over.

3 THE COURT: Well, even if it couldn't be disclosed  
4 on the public record, if it were through a CIPA hearing and I  
5 ruled that, it's over.

6 MR. GILLIGAN: Two points on that, Your Honor. The  
7 first is that CIPA applies only in criminal matters.

8 THE COURT: Oh, you're correct.

9 THE DEFENDER: It does not apply in civil --

10 THE COURT: I've written that it should be applied  
11 civilly.

12 MR. GILLIGAN: A debate for another forum, Your  
13 Honor.

14 THE COURT: Yes.

15 MR. GILLIGAN: And second of all, if the Court were  
16 to announce on the public record that -- that the NSA does not  
17 intercept any of Wikimedia's communications or scan them, that  
18 in itself would tend to reveal classified information.

19 THE COURT: Well, how do we proceed in this case  
20 factually?

21 MR. GILLIGAN: Well, there are -- it seems to us,  
22 Your Honor, the plaintiff, of course, has the burden of  
23 establishing that it has standing to bring the claims that it  
24 has, purported to state in its Amended Complaint. And that's  
25 predicated at the stage of proceeding on the allegation that

1 its communications are so numerous and so widely, globally  
2 distributed that the NSA must be somewhere on the internet  
3 backbone intercepting, copying, and scanning for selectors.  
4 It's communications, which I underscore, are what they call  
5 communications, are the transmissions of data between its  
6 public websites and individual internet users.

7           It -- it seems to us it's -- it's their burden to  
8 establish those --

9           THE COURT: How can they meet that burden without  
10 discovery that gets into what you call "classified  
11 information"?

12           MR. GILLIGAN: Well, Your Honor, I can reserve  
13 judgment on that until I see what discovery requests they  
14 pose. But, yes, it may well be that -- that -- that --

15           THE COURT: Well, I can guarantee you one of the  
16 discovery questions is going to be, do you capture and copy  
17 messages that include Wikimedia messages?

18           And you would answer that under oath yes or no.

19           MR. GILLIGAN: Or we would potentially assert --  
20 it's not my decision, of course -- but that kind of a question  
21 would raise a possibility that we -- the Government would  
22 assert The States Secrets Privilege or The NSA's Statutory  
23 Privilege against disclosure, compelled disclosure.

24           THE COURT: Well, then how could this case ever be  
25 resolved?

1           MR. GILLIGAN: Well, Your Honor, if -- if -- this is  
2 a point, Your Honor that I had intended to make here on my  
3 own. Which is that one of the reasons that this case should  
4 be bifurcated between the jurisdictional standing question and  
5 the merits, is that the plaintiff's efforts to carry its  
6 burden on establishing its standing, may run into the State's  
7 Secret Privilege and The NSA Statutory Privilege. And that  
8 would bring the matter, it seems to the Government, to a close  
9 right there, which is why it doesn't make sense to start  
10 jumping into a bunch of merits proceedings until we see  
11 whether the plaintiff can possibly carry its burden of  
12 establishing its standing.

13           THE COURT: Well, then what in the world do you see  
14 is a difference between merits and jurisdiction if they have  
15 to show injury-in-fact to establish a Fourth Amendment  
16 violation. They have to show it for merits and they have to  
17 show it for jurisdiction. Am I correct?

18           MR. GILLIGAN: Well, yes, Your Honor. Any litigant  
19 in the Federal Court carries the burden or must carry the  
20 burden of establishing that it has standing.

21           THE COURT: And it also has the burden of  
22 establishing the violation.

23           MR. GILLIGAN: Correct.

24           THE COURT: And how can it do that without answering  
25 the question that you say is going to provoke a State Secret

1 invocation -- or privilege invocation because the question,  
2 very simply is, do you capture and filter or do you fail to  
3 filter out Wikimedia messages that are domestic? And you say  
4 we can't answer that because it's a state secret.

5 How can they possibly -- how could Wikimedia  
6 possibly know the answer to that? They can't know.

7 MR. GILLIGAN: Indeed, Your Honor and that is --  
8 that is the consequence of The State Secrets Privilege as it  
9 was in El-Masri.

10 THE COURT: Well, yes, but I don't see any point  
11 then in going on. Assert it and see if I accept it. You've  
12 got to go through all the procedures. You've got to get the  
13 Attorney General and everyone else to sign on. Am I correct?

14 MR. GILLIGAN: Yes, Your Honor, there are plenty of  
15 procedures and many hoops we would have to jump through to  
16 make that happen.

17 THE COURT: Well, I don't see why we don't go to  
18 that. Because clearly both jurisdiction and merits in this  
19 case involve the central question: "Do you, NSA, copy and  
20 filter and maybe content review Wikimedia domestic messages?"

21 The answer is either yes or no. If it's yes, then  
22 the plaintiff says, "you've violated the Fourth Amendment."  
23 If the answer is no, the case goes away on both grounds.  
24 No -- the merits and jurisdiction. Although technically, it  
25 would just be jurisdiction because there wouldn't be any power

1 to reach the merits. But I didn't realize that -- I thought  
2 you were going to say, "No, we don't copy those messages."

3 But instead what you've said is, "I'm not authorized  
4 to tell you whether we copy those messages or not."

5 MR. GILLIGAN: That's correct, Your Honor.

6 THE COURT: And I appreciate that. I've been in  
7 enough classified cases over the last 30 years in this  
8 courthouse, not this courthouse, but the previous courthouse I  
9 sat in. So that I know that they're not that simple.

10 MR. ABDO: Your Honor, if I might address directly  
11 your question of how we would intend to show that Wikimedia  
12 had suffered an injury-in-fact, even assuming the Government  
13 offers and the Court accepts The State's Secrets Privilege  
14 invocation to that particular question, I'd be happy to -- I  
15 think that question might be, you know, one we'd answer, I  
16 think, ultimately.

17 THE COURT: All right. I'll let you answer that.

18 MR. ABDO: Carry our burden. I'll be happy to come  
19 and do that.

20 THE COURT: Mr. Gilligan will listen with interest.

21 MR. GILLIGAN: I will indeed, Your Honor.

22 MR. ABDO: All right. Thank you, Your Honor. So  
23 there is a substantial public record about how upstream  
24 surveillance operates. And that record comes directly from  
25 the Government in most circumstances from disclosures the

1 Government has affirmatively made to statements that it's made  
2 to the privacy and Civil Liberties Oversight Board or in  
3 Congress in defending this authority.

4           And we believe that on the basis of that public  
5 record, we can demonstrate, as a matter of fact that  
6 Wikimedia's communications are being copied and reviewed by  
7 the NSA under upstream surveillance.

8           THE COURT: How do you do that?

9           MR. ABDO: We do it in part --

10          THE COURT: I'm not intimately familiar with all  
11 aspects of that review. I think it was -- it came up during  
12 the first hearing in this case, as I recall. I don't think it  
13 specifically says anything about Wikimedia.

14          MR. ABDO: Well, we -- we -- the complaint -- and we  
15 would anticipate supporting, obviously, with declarations,  
16 including expert declarations, would explain, I think, three  
17 key facts that are essential to our injury-in-fact  
18 demonstration.

19          And I would -- I should say at the outset that we  
20 anticipate also seeking limited discovery. But we don't think  
21 that that discovery -- we don't think our ability to show  
22 injury-in-fact hinges on the discovery. Although, we would  
23 seek it nonetheless.

24          The first critical fact we would establish through  
25 our own declarations and expert declarations is that

1 Wikimedia -- the volume of Wikimedia's communications and the  
2 global distribution of its communications is such that that  
3 some Wikimedia communications traverse every one of the major  
4 international cables entering the United States.

5           The second key fact that we would show is that, as a  
6 matter of how the internet operates and how packets traverse  
7 the internet, for the NSA to acquire even a single  
8 communication going along one of the paths -- for example, if  
9 it wants to collect an e-mail, it needs to collect all e-mails  
10 traversing that path and reconstruct them because they're all  
11 broken up into packets. And to even read one of them in the  
12 way upstream works, the way that it has been publicly  
13 described to work. It needs to intercept all of them. That  
14 is something that is based on basic internet technology and we  
15 would be able to show that through an expert declaration.

16           And the final key fact is that the NSA is, in fact,  
17 conducting upstream surveillance at one of these internet  
18 backbone trip points, which we think the public record  
19 demonstrates by the NSA's own admissions.

20           Now, we may also ask the NSA the particular question  
21 Your Honor eluded to, but we don't think an answer to that  
22 question is necessary for us to show, to carry our burden of  
23 showing, by a preponderance of the evidence that the NSA, is  
24 in fact, copying and reviewing the --

25           THE COURT: All right. Let me review to see if I

1 understand your argument. You're saying that on the basis of  
2 what's in the public record now, Wikimedia can show  
3 injury-in-fact because through expert declarations, or a  
4 hearing with experts, it can show that -- I think you said  
5 that it's publicly known that they use a particular backbone  
6 or?

7 MR. ABDO: Well, I'm not sure how much of that is  
8 already in the public versus would be within Wikimedia's own  
9 knowledge so that they could provide that information through  
10 an expert declaration. But it would be information either in  
11 Wikimedia's own possession or publicly available about the  
12 distribution and the volume of its international internet  
13 communication traffic.

14 THE COURT: Well, I thought what you were saying is  
15 that you're able to show that on one of these backbones that  
16 they do take messages, and by virtue of the way in which the  
17 internet disseminates messages, in bits and pieces, it would  
18 have to be reconstructed when they arrive separately in  
19 various destinations, that they get them all. And that there  
20 would be -- maybe you would show them mathematically, that  
21 there's a high probability that Wikimedia messages are  
22 included in that backbone. Is that what you're saying?

23 MR. ABDO: Yes, Your Honor.

24 THE COURT: And --

25 MR. GILLIGAN: It alluded to that --



1 THE COURT: Well, suppose I -- we proceed there to  
2 get to that point -- I'll let you, since you have the burden,  
3 as you correctly know, and you get to that point -- and I  
4 conclude that you have shown by a preponderance of the  
5 evidence adequate injury-in-fact to Wikimedia; where do we go  
6 from there?

7 MR. ABDO: Well, before getting there I think --

8 THE COURT: No, I'm there. So if you want to come  
9 back, come back.

10 MR. GILLIGAN: Sure. Sure.

11 THE COURT: But when I'm there, you're there.

12 MR. ABDO: Of course, Your Honor. Sorry about that.

13 THE COURT: Where do we go from there?

14 MR. ABDO: We would proceed to the merits. But I --

15 THE COURT: What would be different about the merits  
16 that wouldn't trigger The State Secret thing?

17 MR. ABDO: Well, that is -- so that question,  
18 whether we can show by preponderance of the evidence, which is  
19 our burden on the merits, that Wikimedia's communications are  
20 being copied or reviewed, that's a question that is essential  
21 both to jurisdiction and to the merits. And if we make that  
22 showing, we don't think --

23 THE COURT: Do you have to do anything else?

24 MR. ABDO: At least to establish the first element  
25 of all of our claims. Now, we would have to then have a legal

1 fight over the legal consequences of that showing. Is that a  
2 search or a seizure. And if so, is it a reasonable one? Now,  
3 setting aside the Fourth Amendment claim on our statutory  
4 claims, for instance, that would show that upstream  
5 surveillance has been applied to us. And we believe upstream  
6 surveillance is not consistent with the statute. So we would  
7 have to have a legal fight over whether upstream surveillance  
8 is consistent with the statute. And we think all of that  
9 is -- all of those questions are merits ones. And for that  
10 reason, we think they cannot be appropriately resolved in a  
11 Rule 12(b)(1) proceeding. Even after a period of discovery,  
12 we think they have to be resolved on a 12(b)(6) proceeding or  
13 an actual trial so that the Court could resolve any disputed  
14 facts.

15 THE COURT: It seems to me hard for you all to  
16 dispute facts since you don't have them.

17 MR. ABDON: Well, my understanding is the Government  
18 intends to dispute our characterization or our factual showing  
19 of how the internet works, and the consequences of the  
20 distribution of Wikimedia's communications.

21 THE COURT: Yes, I can see that possibility of  
22 dispute. For example, I'm going to ask Mr. Gilligan in a few  
23 minutes here about this point, this point you've just -- point  
24 you've made about we would show with experts that the  
25 Government copies all this on the backbone and by -- and that

1 Wikimedia messages go on that backbone, and that by virtue of  
2 the way the internet disseminates information, in various bits  
3 and pieces, it'd have to be reassembled at the destination,  
4 that it captures Wikimedia bits and pieces.

5 MR. ABDO: That's right.

6 THE COURT: And you think they're going to dispute  
7 that?

8 MR. ABDO: I think they -- they said so in their  
9 opposition brief or their brief in this proceeding. But I  
10 would like to point out that we don't think it's appropriate  
11 to address that question before we've had an opportunity to  
12 seek whatever discovery we like going to, you know, going to  
13 that question. And we think controlling Fourth Circuit law  
14 says --

15 THE COURT: I have a hard time -- I don't quarrel,  
16 by the way, I think you're perfectly on sound ground saying  
17 you need some discovery. I'm not sure I see any discovery  
18 that isn't going to run into what Mr. Gilligan said: The  
19 State Secret Privilege.

20 MR. ABDO: Well, as I said before, Your Honor, there  
21 is a substantial public record of --

22 THE COURT: Well, then you don't need discovery if  
23 there's a public record.

24 MR. ABDO: I agree that we don't need it in a  
25 technical sense, but we would still seek it because it would

1 bolster our claims and make some -- make it harder for some of  
2 the Government's arguments to be accepted.

3 THE COURT: It would be a waste of my time. If it's  
4 in the public record by the Government, it's in the public  
5 record.

6 MR. GILLIGAN: The --

7 THE COURT: Now, if what you're saying is in the  
8 public record is Professor Numbskull from MIT says "X" and  
9 they don't agree with that, then you're going to have to get  
10 Numbskull here and testify. And I'd have to hear him  
11 cross-examined by Professor from Hard -- Hardskull from  
12 Caltech or Princeton or from wherever.

13 But it's a factual question. You know, it either is  
14 or it isn't. And it doesn't seem to me, although I confess to  
15 an imperfect understanding of the internet operation, it  
16 doesn't seem to me that one can plausibly say that there isn't  
17 a clear factual answer to whether NSA captures, copies  
18 Wikimedia messages. It either does or it doesn't.

19 Now, there may be -- they may invoke The State  
20 Secret. I want to see whether we can do anything at all of  
21 any significance before they do that. Otherwise, it's a waste  
22 of my time, because, as I recall, the invocation of The State  
23 Secret -- when is the last time I had to deal with it? I  
24 guess it was also El-Masri. In the El-Masri case. I think  
25 once the -- once the Government went through that, I don't

1 even remember who was president or who was -- who was  
2 Department of Justice then. Who was it, Mr. Gilligan?

3 MR. GILLIGAN: I believe that was still President  
4 Bush, George W. Bush administration.

5 THE COURT: But I think the Courts are disabled from  
6 doing anything once that occurs.

7 MR. ABDO: Well, I think it would have the  
8 consequence of keeping certain evidence out of the  
9 proceedings. But I should point out, Your Honor, that there's  
10 a substantial public record, but not every detail about  
11 upstream surveillance that would be relevant to these  
12 proceedings has been disclosed. And it may be that some  
13 details need to remain secret as a matter of state secrets.

14 THE COURT: But you think the other is sufficient to  
15 make your case?

16 MR. ABDO: But we don't -- we also -- we think that,  
17 and we also think that there's some questions we could ask  
18 that wouldn't trigger an appropriately invoked State Secret  
19 Privilege.

20 THE COURT: All right. Well, that seems to me the  
21 way -- the way in which we ought to proceed. I don't think  
22 you can predict with any confidence what will or will not  
23 invoke the state secrets because it's a secret what will  
24 invoke it. And they will -- the Government will invoke it  
25 when it deems it appropriate to do so. So it seems to me that

1 we ought to proceed with you showing the Court by affidavit  
2 and memorandum factually why you think that's all you need to  
3 show injury-in-fact.

4 MR. ABDO: Well, if I -- if I may dispute that, Your  
5 Honor. I don't think we can appropriately be put to that  
6 obligation until we've had an opportunity to seek discovery.

7 THE COURT: Well, what is the discovery? I'm trying  
8 to ask you that. And I don't think you have framed any  
9 question that you would ask the Government other than the one  
10 I put that doesn't call for invoking the state secret. You  
11 say everything is in the public record. So I'm saying show  
12 me.

13 MR. ABDO: Respectfully, Your Honor, I'm not saying  
14 everything is in the public record. I'm saying there's a  
15 substantial public record that we think is adequate, but as  
16 any plaintiff would want to seek discovery.

17 THE COURT: What else do you want to know?

18 MR. ABDO: I think there are probably three -- three  
19 buckets of general discovery. We haven't set all of these  
20 out.

21 THE COURT: What questions would you ask?

22 MR. ABDO: We'd ask questions relating to the  
23 operation of the internet that might be ones phrased as part  
24 of the expert discovery we would anticipate seeking. The  
25 Government has an expert that it attempted to put on in the

1 prior proceedings, who put forth one version of how he thinks  
2 the internet works. And we'd want to depose that expert, most  
3 likely, to get a better understanding of where he's deriving  
4 his understanding of how the internet works.

5 THE COURT: All right. Number one is you'd want to  
6 depose the Government's expert on how the internet works.  
7 What else?

8 MR. ABDO: We'd seek -- we'd seek certain admissions  
9 relating to how the internet worked -- internet works. We'd  
10 seek certain information relating to whether certain  
11 types of --

12 THE COURT: What admissions would you seek?

13 MR. ABDO: Relating to what we think of as  
14 indisputable propositions about how they --

15 THE COURT: What are they?

16 MR. ABDO: Well, there are specifics, Your Honor.  
17 For example, the facts --

18 THE COURT: I'm asking for specifics. Am I not  
19 clear?

20 MR. ABDO: You are clear, Your Honor. But I'm not  
21 sure I can reproduce them all right now. But, for example,  
22 the way that packets are divided on the internet when they  
23 travel across cables, the fact that communications sent to a  
24 destination may take a very different path than communications  
25 sent back in the opposite path, the basic routing principles

1 that apply at the routers that cause that phenomenon. The  
2 fact that you cannot understand an entire communication  
3 intelligibly without intercepting each of its component parts  
4 and reassembling it.

5           There's detail there that we think would narrow the  
6 scope of dispute if we were able to engage in a period of  
7 appropriately limited discovery. And we think, moreover, that  
8 we're legally entitled to that before --

9           THE COURT: All right. You've mentioned two things  
10 so far. You want to depose their expert on how the internet  
11 works and you want to ask for certain requests to admit  
12 relating to how packets traverse the internet in messages.

13           MR. ABDO: We would -- we would also seek certain  
14 clarifying questions from the government about the operation  
15 of upstream itself. As I said, there's a substantial public  
16 record of how upstream surveillance works, but the government  
17 hasn't answered every question. And we don't think that the  
18 answer to every question is a matter of state secret. And so  
19 we would have questions that we would ask.

20           And the final -- that's bucket two. And the final  
21 bucket would be questions specifically relating to Wikimedia.  
22 And based on Your Honor's earlier exchange with Mr. Gilligan,  
23 it appears that the government may invoke the state secrets  
24 privilege with respect to some of that information. We will  
25 take that fact back internally and discuss whether -- whether



1 we want to ask those questions or not so as to avoid having to  
2 go through State Secrets proceedings.

3 But I think --

4 THE COURT: What do you think are State Secret  
5 proceedings?

6 MR. ABDO: Well, the Government would have to take  
7 the time and deliberation necessary to --

8 THE COURT: Right. And then they file something?

9 MR. ABDO: They file something.

10 THE COURT: And it's over.

11 MR. ABDO: That -- it's not quite right it's over.  
12 The consequence would be that certain evidence is off the  
13 table. But --

14 THE COURT: Yes, that's correct.

15 MR. ABDO: But -- but --

16 THE COURT: But it's as far as whether the State  
17 Secret is invoked, the Court doesn't have the power to  
18 question whether it should have invoked it.

19 MR. ABDO: I'm not sure that's correct, Your Honor.  
20 I think there are -- there's a legal standard that applies --  
21 if I may consult for a moment, Your Honor --

22 THE COURT: Yes, by all means you may because I'm  
23 interested in that.

24 MR. ABDO: Right. And there's a separate  
25 question -- sorry -- that I should have mentioned earlier,

1 which is Your Honor mentioned CIPA proceedings earlier. And  
2 it is correct that those apply solely to criminal cases.

3 THE COURT: That's correct.

4 MR. ABDO: FISA itself has an analog for how to deal  
5 with classified information when you are dealing with claims  
6 relating to electronic surveillance under FISA. And we think  
7 that procedure, under 1806, 50 U.S.C. Section 1806, applies in  
8 this case and allows the Court to review information ex parte.  
9 And in some circumstances where appropriate, allow us to  
10 participate, and avoid the State Secrets Privilege.

11 The Government, I think, probably vehemently,  
12 disagrees with whether FISA provides that. A Court in  
13 California has held that it does. And --

14 THE COURT: As soon as you said, "in California,"  
15 you impaired its --

16 MR. ABDO: Well, I hope, Your Honor, yeah --

17 THE COURT: That's all right. I like --

18 MR. ABDO: Members of the cloth, I think, all act in  
19 good faith.

20 So in view of our point, Your Honor, though is, the  
21 Fourth Circuit case law is clear that where facts that go to  
22 jurisdiction are intertwined with facts that go to the merits,  
23 it's not a matter of discretion whether the Court can proceed  
24 under 12(b)(1). It is in error to proceed under 12(b)(1) in  
25 that circumstance. The appropriate course is to allow -- is

1 to proceed to the merits.

2 THE COURT: No. No. That's not right. The proper  
3 procedure could include proceeding to an evidentiary hearing  
4 on injury-in-fact. I don't have to go all the way to the  
5 merits.

6 MR. ABDO: Well, it could include --

7 THE COURT: I'm sorry. Are you -- are you --  
8 respond to what I said. Is that correct what you say?

9 MR. ABDO: I don't think it is. I think that -- I  
10 think you could proceed to a proceeding on injury-in-fact.  
11 But I think --

12 THE COURT: That's exactly what I said.

13 MR. ABDO: But I think that would be, in effect, a  
14 bifurcated proceeding on the merits of injury-in-fact. In  
15 which we would first be entitled to discovery.

16 THE COURT: All right.

17 MR. ABDO: And then could proceed to --

18 THE COURT: Well, I'm perfectly happy with you  
19 having appropriate discovery if, as you've already done,  
20 identified with some specificity the discovery that you would  
21 think appropriate. You've mentioned three buckets. You've  
22 described them a bit. And I'm amenable to that. I'm not sure  
23 I see -- since you keep telling me that the public record has  
24 enough to take you all the way. I'm not sure that that really  
25 carries the day.

1 MR. ABDO: Well, Your Honor, in many cases the  
2 plaintiff will have virtually everything they need to prevail,  
3 but they still seek discovery to bolster certain claims. And  
4 we would anticipate that same model.

5 THE COURT: All right. Thank you.

6 MR. ABDO: Thank you, Your Honor.

7 THE COURT: What's your view? He's made clear what  
8 he thinks he needs by way of discovery. He's also said that  
9 the public record contains information, which will enable the  
10 plaintiff to carry its burden of a preponderance to show that  
11 there's injury-in-fact. And he says that he is entitled to  
12 and needs discovery. What's your view?

13 MR. GILLIGAN: Well, we -- I'll cut right to the  
14 chase. And then, if I may, elaborate after that, Your Honor,  
15 because I know you like attorneys who cut to the chase.

16 So we are perfectly, as we said in our brief, filed  
17 in anticipation of this matter -- we are perfectly amenable to  
18 a period of appropriate discovery both for the plaintiff and  
19 for us. And I'll come back to that.

20 Also, I want to, if I can just --

21 THE COURT: Well, you would want to depose their  
22 expert on how the internet operates?

23 MR. GILLIGAN: Yes. And we'd want to get other  
24 discovery from them regarding their claim. We're -- we're not  
25 going to be content, I think, just to rely on their affidavits

1 about the volume and the global distribution of their  
2 communications. We're going to want to probe that ourselves  
3 through discovery.

4 THE COURT: Because their claim on injury-in-fact  
5 was going to rest at some point and in some degree on numbers,  
6 probabilities, and the number of messages and that sort of  
7 thing.

8 MR. GILLIGAN: Precisely, Your Honor. And in -- and  
9 in laying all of that out, Mr. Abdo ably answered the question  
10 you had posed to me, which I thank him for. Which is, the  
11 question why we haven't come in here talking about asserting  
12 the State Secrets Privilege immediately. It is because we had  
13 anticipated more or less what Mr. Abdo had said, that they  
14 would seek to make a case that regardless of any classified  
15 information, that we would say is subject to the State Secrets  
16 Privilege, they can still make their case with -- on standing  
17 on the basis of publicly available information and information  
18 that they would provide through their own declarations and  
19 expert testimony. We want the opportunity to test that. And  
20 so we are in agreement there for that a period of discovery on  
21 the jurisdictional question is in order.

22 THE COURT: Why would that take -- well, let me ask  
23 Mr. Abdo because its his -- he's chiefly the person who wants  
24 discovery.

25 Why would you need any longer than, at most, 60

1 days?

2 MR. ABDO: Well, it might be helpful, Your Honor, if  
3 we had a period of time to consult with the Government about  
4 the exact --

5 THE COURT: I agree with you.

6 MR. ABDO: But if I can address, I think, an  
7 important question though in deciding the length necessary.

8 THE COURT: Yes.

9 MR. ABDO: Is the scope of that discovery. Our  
10 view, as we laid out in our papers, is that it shouldn't be  
11 limited to jurisdiction. It should cover the merits. And  
12 there are a couple of important reasons why that --

13 THE COURT: All right. Let me hear first from Mr.  
14 Abdo on that. And then I'll come back to you, Mr. Gilligan.

15 MR. GILLIGAN: Thank you, Your Honor.

16 MR. ABDO: So, a couple of reasons why I think  
17 that's appropriate, Your Honor. First is that, the bulk of  
18 the discovery that we would anticipate seeking relates to  
19 jurisdiction and not to a category that you might think of as  
20 merits without overlapping with this intertwine jurisdictional  
21 question. So the totality of discovery is not going to be  
22 much more if you don't artificially limit it to jurisdiction.

23 And second, if the Court were to limit it to  
24 jurisdiction at this point, it might have to engage in  
25 satellite litigation over what the line is between

1 jurisdictional discovery and merits discovery. And we think  
2 that line is very hazy precisely because the jurisdictional  
3 fact --

4 THE COURT: I deal with hazy lines all the time. I  
5 don't have a problem.

6 MR. ABDO: Well, it's -- it's not a question of  
7 whether it's difficult. It'll just cause more litigation and  
8 delay things further.

9 THE COURT: I don't think you all want to come see  
10 me very often.

11 MR. ABDO: I appreciate that, Your Honor. We're  
12 just -- our goal is to streamline the litigation as much as  
13 possible given the delay we've already --

14 THE COURT: That's why I don't want to engage in any  
15 unnecessary litigation and unnecessary discovery.

16 MR. ABDO: Well, Your Honor --

17 THE COURT: You know the problem with this case is  
18 this: I take your point that merits and jurisdiction are  
19 somewhat interrelated. But after that, I get this  
20 qualitative, the bulk of discovery will be jurisdictional and  
21 then there will be less in merits -- is meaningless. I don't  
22 know what you mean by the "bulk" of litigation. I don't know  
23 how many interrogatories, how many depositions, how many  
24 requests to admit go in this pile and go in this pile. It's  
25 not a meaningful discussion for someone who wants to manage

1 this litigation sensibly, efficiently, and expeditiously. It  
2 doesn't give me any information.

3 MR. ABDO: Well, part of my point, Your Honor, is  
4 that -- that it may be virtually possible to distinguish. So,  
5 for example, a concrete example, if we wanted to depose  
6 somebody within the Government about certain of the public  
7 disclosures they've made about how upstream surveillance  
8 works, the line between a question that relates to how  
9 upstream works as relevant to our theory that it must work in  
10 a way that captures some Wikimedia communications. And the  
11 question that goes exclusively to some question not dealing  
12 with this, that would -- that -- with that overlapping  
13 jurisdictional merits question is an illusory one. And we  
14 think it's a waste of the Court's resources and ours to  
15 litigate those questions.

16 And -- and further, it's true that -- that with  
17 respect to these proceedings alone, if the Court ultimately  
18 were to agree with the Government, that Wikimedia does not  
19 have standing, that would streamline communications in this  
20 Court, but that's not the end of proceedings. And if we go up  
21 to the Fourth Circuit and the Fourth Circuit respectfully  
22 disagrees, we'll be back here without having any -- having  
23 gone through merits discovery --

24 THE COURT: That's true in every case I have.  
25 People can appeal what I do and if the Fourth Circuit



1 disagrees with me, then it's back here.

2 MR. ABDO: Although it's extremely rare, Your Honor,  
3 to bifurcate injury-in-fact litigation from merits litigation  
4 precisely because that piecemeal litigation tends to be  
5 inefficient. And the --

6 THE COURT: I don't know of any empirical study to  
7 that effect so. I have my own experience to go by and it  
8 doesn't confirm what you've just said.

9 MR. ABDO: I -- I suppose I can't --

10 THE COURT: That's right. You can't refute that.  
11 But anyway, I take your point that -- I think its irrefutable  
12 that some merits and some jurisdictional are intertwined.  
13 It's the same question. Does the Government intercept, copy  
14 Wiki -- Wiki --

15 MR. ABDO: Media.

16 THE COURT: Wikimedia messages or information.  
17 That's both for merits and for jurisdiction. And as you have  
18 correctly pointed out, there are other questions on merits  
19 that are separate from that, but there are other questions on  
20 merits that are also a part of that bigger question.

21 MR. ABDO: Yes, Your Honor.

22 THE COURT: Let me -- this has been helpful because  
23 obviously, I don't understand the technicalities as well as  
24 you gentlemen do.

25 MR. GILLIGAN: May I be heard briefly, Your Honor?

1 THE COURT: Yes, I told you I would, but give me a  
2 moment.

3 MR. GILLIGAN: Okay.

4 THE COURT: Yes. Go ahead, Mr. Gilligan.

5 MR. GILLIGAN: First of all, a housekeeping matter  
6 at this point, Your Honor. I want to be clear.

7 On this dispute that the parties have discussed in  
8 their papers, whether we proceed under 12(b)(1) or a 56(f),  
9 the Government, at this point, has come to recognize that  
10 as -- well, a disputed form over substance. Whether we call  
11 it a proceeding under rule 12(b)(1) or whether we call it a  
12 proceeding under Rule 56, the parties are in agreement that  
13 there's an appropriate period of discovery that should take  
14 place. And I take it that perhaps the Court is as well.  
15 Before we --

16 THE COURT: That's why I asked. Do you think 60  
17 days would be enough?

18 MR. GILLIGAN: I think, Your Honor --

19 THE COURT: But I'm going to let you all discuss  
20 that.

21 MR. GILLIGAN: Right. It's -- it's hard to asses  
22 that especially not knowing the degree to which precisely the  
23 plaintiffs are seeking discovery. And it's still a matter to  
24 which we are giving thought on our end. But -- but I don't  
25 think there's any -- any need to resolve an issue over

1 12(b)(1) versus Rule 56. We'll -- we'll call our motion on  
2 jurisdiction or to dismiss because of the State Secrets  
3 Privilege, or what have you, or a Rule 56 motion if that's  
4 satisfactory to the plaintiffs. That -- that makes no  
5 difference to us.

6 It seems to us the important point is -- is to --  
7 for both parties to have an opportunity for a discovery to get  
8 it --

9 THE COURT: Well, I think the main point is this.

10 MR. GILLIGAN: -- to get it standing issue.

11 THE COURT: Just a moment.

12 The main point is: Should discovery, at this stage,  
13 be limited to discovery that focuses on injury-in-fact or  
14 should it go beyond that? Well, I don't have any clear  
15 picture of what discovery is appropriate beyond that. Mr.  
16 Abdo discussed a pile here and a pile here, but I haven't --  
17 and I have some sense of what's in the pile for jurisdiction,  
18 because he's gone through that. I have no idea what's over  
19 here. And it seems to me that there is some merit in both not  
20 bifurcating and bifurcating.

21 MR. GILLIGAN: Well, let me -- let me address the --  
22 the bifurcation side of the discussion, Your Honor. Because  
23 there is a substantial amount of discovery. I take your  
24 point, it can't be quantified with precision as we all stand  
25 or sit here today. But I can say that there is substantial

1 discovery that -- that will have to take place at the merits  
2 phase of the case. As the --

3 THE COURT: You mean once jurisdiction  
4 is established.

5 MR. GILLIGAN: Assuming hypothetically that  
6 jurisdiction were established.

7 THE COURT: What would that be?

8 MR. GILLIGAN: Well, for example, to -- it is  
9 insufficient, we maintain, under the Fourth Amendment simply  
10 to say, "you intercepted or you copied one of our  
11 communications." That's a seizure.

12 The Supreme Court has said that -- that a seizure  
13 requires a significant interference with a possessory  
14 interest. And so we would want discovery from Wikimedia, for  
15 example, to have them identify what possessory interest they  
16 claim in communications that are based on information that  
17 comes from third parties and that is made available on their  
18 public websites to everyone in the world.

19 Similarly, with respect to the claim that the  
20 electronic scanning is a search. A search under the Fourth  
21 Amendment is an invasion of a Fourth Amendment protected  
22 privacy interest. What privacy can Wikimedia claim in  
23 communications that are carrying, again, publicly -- publicly  
24 available information from their website. So we're going to  
25 want discovery to see what they have to say about that.

1           Their First Amendment claim is predicated on the  
2 notion that the copying and scanning that allegedly occurs  
3 undermines confidence and the confidentiality of their  
4 communications. And therefore that -- that people are less  
5 willing to communicate with them, that they have to take  
6 burdensome and costly measures to protect the confidentiality  
7 of their communications. We're entitled to discovery on those  
8 issues as well, Your Honor.

9           So, it seems to me we -- we are going down a road  
10 and a lot of --

11           THE COURT: Well, you certainly --

12           MR. GILLIGAN: Prominent effort by the parties --

13           THE COURT: You have -- you have certainly helped to  
14 put some flesh on the bones of what, I would say, goes into  
15 that second pile of non-jurisdictional discovery. That helps  
16 me. I hadn't thought of those.

17           I'm going to have to take a recess in a few minutes.  
18 Let me tell you what I'm thinking as of this time.

19           As I said, I concur with your joint view that there  
20 is some interrelationship between merits and jurisdictional --  
21 some interrelation. I also concur with both of you that for  
22 me to determine jurisdiction, it is appropriate for there to  
23 be discovery on that issue as well as other issues on merits.

24           I also think that your -- well, Mr. Abdo makes the  
25 point that -- and it's a sound point. It doesn't frighten me,

1 but it's a sound point. That litigation over the indistinct  
2 boundaries between merits and jurisdictional discovery is  
3 wasteful. I take that point as a good observation, but I  
4 don't -- it doesn't deter me from picking the best way to  
5 manage this -- this litigation because I think you all are  
6 very good lawyers. You're not going to waste my time. If you  
7 do, you will only do it once. I promise you. And so it seems  
8 to me that there should be a period of time -- I'm not  
9 bifurcating anything -- but there should be a period of time  
10 in which you engage in discovery -- I was thinking 60 days --  
11 in which you do as much discovery as you want cooperating, and  
12 answer as many questions as need to be answered, focussing on  
13 injury-in-fact. And then at the end of that, you can -- Mr.  
14 Gilligan would have to tell me whether, you know, we've done  
15 this discovery and I now have to concede that there is  
16 injury-in-fact. Or I staunchly contend that there isn't. I  
17 don't know whether this discovery would prompt a state secret,  
18 but it might -- invocation.

19           And then it would be clearer to me, once we pass  
20 that milestone, if I found there was jurisdiction, it would be  
21 clearer to me what the appropriate range and scope of  
22 additional discovery would be needed to resolve the many  
23 claims of the plaintiff. And we would do that. And then have  
24 an appropriate hearing.

25           Now, the one thing I've left out is that there might

1 also be -- it might also be useful, because there -- I can  
2 anticipate now that there will be disputes between experts.  
3 Not because there are real disputes but because experts never  
4 agree.

5 I remember a long patent case in which I had experts  
6 on transistor circuitry. And very good experts. They  
7 disagreed. I was concerned that I, of course, did not  
8 understand the matters as well as they. And I was worried  
9 these experts would blow things past me. So I said I was  
10 going to appoint a third expert to testify. And then there  
11 were 23 patents. We did one patent at a time. No jury. And  
12 to my amazement, the third expert who was appointed by the two  
13 experts as a -- and these were first class people from MIT and  
14 Princeton and everywhere else. I ultimately found the  
15 original experts on one side or the other, because there were  
16 23 patents, to be on the mark. And I -- and I did six patents  
17 out of the 23 before they settled the whole thing. And I  
18 never found persuasive the third expert.

19 But anyway, I anticipate there could be an issue of  
20 fact. And I would want to hear the parties examination of  
21 that expert or experts and their cross examination. I don't  
22 have a -- I'm not a Ph.D. in any science and I don't purport  
23 to be a scientist. And I can tell you now, because I think it  
24 might be useful for you to know, I don't use a computer. I'm  
25 not a computer person. I'm not on -- my wife gave me a

1 T-shirt that says, "I am not on Facebook." That's a true  
2 fact.

3 MR. GILLIGAN: I would like that T-shirt, Your  
4 Honor.

5 THE COURT: I am stunned by the world we now live  
6 in. It's so different from the world I grew up in. But let  
7 me hasten to add, it's a lot better today than it was 50 years  
8 ago. Everything is better today than it was 50 years ago. I  
9 wouldn't want to go back.

10 But computer use is quite another matter. I don't  
11 know that I would ever use Facebook. I have a small computer  
12 that my wife gave me and it opens up into three sites by  
13 punching just a couple of buttons. Weather is one. The other  
14 one is a news thing, and it tells me what that newspaper has  
15 each day. The newspaper need not be identified. And the  
16 third one is the sports page of one of my universities. And  
17 that's it. That's all I look at.

18 So, I really don't -- I'm not an expert in the way  
19 the internet operates. But I'm prepared to listen carefully.  
20 I have some technical background. And I have some ability to  
21 understand it. But I think I can anticipate that.

22 So what I'm thinking of, because I have another  
23 hearing I have to go to here. And then I'll meet back with  
24 you all at about 2:30. I'm thinking about this, and you all  
25 can address and tell me why you think it's not a good idea.



1 But I'm thinking that we go ahead. I don't call it  
2 bifurcation, necessarily, because I think a lot of the  
3 discovery you're going to be doing will go to the merits if we  
4 get to the merits as well as the jurisdiction.

5           There will be -- and I understand fully, there will  
6 be more discovery necessary if we get to the merits. One  
7 thing we haven't even discussed that I don't know the answer  
8 to is, we've talked about standing under the Fourth Amendment.  
9 Does standing come into play for any of the other causes of  
10 actions? And I don't know the answer to that. And I think I  
11 would want you to address that. But I have in mind, getting  
12 back to what I was going to propose, because we can talk about  
13 this endlessly.

14           I would think maybe 60 to 90 days at the most for  
15 this first round of discovery. That would focus, I think,  
16 chiefly on injury-in-fact. And I would hope it could be done  
17 sooner than that. And at the end of that, Mr. Gilligan, you  
18 would have to tell me whether there -- you continue to contest  
19 jurisdictional facts or not. Mr. Abdo has made it pretty  
20 clear that he thinks the matters in the public record by  
21 themselves might be sufficient or are sufficient.

22           Well, I would want something provided to me, Mr.  
23 Abdo, in the next weeks or so, telling me what that is,  
24 educating me. What is this material? How does it show that  
25 there is injury-in-fact? And maybe we can move on from this

1 jurisdictional issue, and lessen the pain, and go to the  
2 merits. I don't know when executive -- the executive secrets  
3 privilege might be invoked. That's up to the Government.  
4 And -- but we'll find out, because I'm sure some of your  
5 questions -- well, I asked one and it almost got invoked  
6 today. I asked the central question: Do you copy and inspect  
7 Wikimedia? And that's a disputed issue, I suppose, because I  
8 can see why state secrets are involved in how NSA does certain  
9 things. I don't think there can be a lot of dispute about  
10 that. We don't want to spread out in the public record  
11 exactly what NSA does and how they do it or anything else.

12           NSA is us. Now, that doesn't mean we shouldn't  
13 watch carefully to see what it does and we ought not to hold  
14 it to the law. We should. But we can't forget, it's not them  
15 and us. They are us. And they are trying to protect us from  
16 another 9/11 and other things. And -- but that doesn't mean,  
17 Mr. Abdo, that we shouldn't look carefully over their  
18 shoulders and make sure they don't violate the constitution in  
19 doing so. We should. But as with always in these sorts of  
20 things, those who are -- who have that duty, have to go  
21 straight to the line, because that's what it takes.

22           All right. I remember being appalled by my uncle  
23 who was in the 82nd Airborne landing in Normandy. And I  
24 remember how appalled people were when he told them that at  
25 one point he and his group were pinned down. They needed to

1 know where the Nazis were. The Germans had their people. And  
2 they captured an officer and they were trying to make him  
3 talk. And my uncle related that he was, sort of, in command.  
4 So he pulled out his .45, he put it at the guys skull, and he  
5 gave him until ten to reveal the information. And told him  
6 that if the information was false, he'd come back later and  
7 pull the trigger. And I won't say everything he said. But it  
8 was appalling to people listening, because they thought it was  
9 bestial.

10 Over the years I've come to respect his position.  
11 Yes, they did get the information. Yes, it was accurate.  
12 And, no, nobody was shot. That's what he said. I don't know  
13 if that's true. He might have shot the guy. I don't know.

14 But anyway, let's convene again at 2:30. And maybe  
15 you can help me, because it should be a joint venture of all  
16 of us to try to -- try to manage this litigation in a way that  
17 is efficient, expeditious, and fair. And to that end, I think  
18 we've already agreed on a number of things. There should be  
19 some discovery, at least, for jurisdiction. And we already  
20 know that the issues are somewhat intertwined, and that this  
21 discovery is going to be a bit broad in this category. And we  
22 already know there's a lot of other discovery that we may not  
23 have to reach, but we may have to reach it if there is  
24 jurisdiction.

25 Remember, Mr. Abdo, I do want to hear from you about

1 whether standing has any relevance to the other claims.

2 MR. ABDO: Yes, Your Honor.

3 THE COURT: Because maybe it doesn't.

4 MR. GILLIGAN: I can answer that now, Your Honor --  
5 that question now, Your Honor. Yes, it does.

6 THE COURT: Okay. Well, we'll hear more about that.  
7 I'm going to take a recess now and hear the next case.

8 MR. GILLIGAN: Thank you, Your Honor.

9 THE COURT: At 2:30 we will reconvene. And I have a  
10 ceremony to attend at 3:00 so we need to get this done. I'm  
11 perfectly open to other suggestions, Mr. Abdo and Mr.  
12 Gilligan, but not let us just do discovery for a year and then  
13 we'll get back to you. That won't fly with me.

14 MR. ABDO: Of course. Thank you, Your Honor.

15 MR. GILLIGAN: Thank you, Your Honor.

16 THE COURT: All right. I thank counsel for your  
17 cooperation. I'll see you at 2:30 and you -- I'm going to  
18 take a brief recess.

19 (Recess.)

20 PROCEEDINGS

21 (Continued)

22 THE COURT: All right. Let me ask -- counsel, you  
23 all don't need to move for a moment. Counsel in the Wikimedia  
24 case and for NSA, are -- have you all had a constructive  
25 opportunity to discuss how you might suggest to me we

1 structure the rest of this case?

2 MR. ABDO: We have, Your Honor, although I think  
3 we're both in agreement that we could use a few more days to  
4 set down in writing and consider it more carefully how long a  
5 period would be necessary. And then propose to you next week  
6 in writing a very concrete schedule.

7 THE COURT: I think that's a reasonable request. So  
8 we'll do it that way.

9 MR. ABDO: Thank you, Your Honor.

10 THE COURT: I will be here Friday if we need to  
11 convene, but I'd rather -- I'm likely to smile and agree with  
12 any joint recommendation you make. But I think I've explained  
13 to you that I agree with some basic propositions you both have  
14 expressed.

15 And what I -- and I know that there's merits  
16 discovery and there's jurisdictional discovery. My sense of  
17 it is that the biggest pot is the jurisdictional discovery,  
18 but I don't know that for sure. And I'm not sure you all do,  
19 but I think so. So my sense is that we ought to proceed with  
20 that and we ought to proceed with a hearing or anything that's  
21 necessary to resolve that issue, and be prepared to go on and  
22 do the rest if that's what it takes.

23 And would you put, Mr. Abdo, both of you, address  
24 the standing issue as it might relate to the causes of action  
25 other than the Fourth Amendment cause of action?

1 MR. ABDO: Yes, Your Honor.

2 THE COURT: Because I don't know what the issues are  
3 there. And we've focussed only on the Fourth Amendment.

4 MR. ABDO: If I could just say one final thing, Your  
5 Honor. You had referenced a filing that we might make in the  
6 next few weeks setting out our public case for having  
7 injury-in-fact --

8 THE COURT: That would be helpful.

9 MR. ABDO: Our hope is that we could pull that in at  
10 the end of discovery. We think it might be --

11 THE COURT: Yes. Yes, I'll permit that.

12 MR. ABDO: Thank you, Your Honor.

13 THE COURT: It just -- there's no need not to do it  
14 that way. Because what I anticipate is after this discovery  
15 and that you -- we're going -- you should anticipate it that  
16 at the end of that period, the parties are going to file,  
17 first the plaintiff, then the defendant, briefs that -- I  
18 don't care whether you call it 12(b)(1) or Rule 56. It  
19 doesn't matter. If it's Rule 56 -- it doesn't matter.

20 And I will determine whether there are issues of  
21 fact and -- of course, if there are issues of fact, it would  
22 go to the jury on merits, but if there are issues of fact on  
23 jurisdiction, you're stuck with me .

24 MR. ABDO: With respect to, Your Honor, to the  
25 extent that those issues of fact are intertwined with the

1 merits, we think that the Fourth Circuit case law clearly says  
2 the trier of fact has to resolve any disputes.

3 THE COURT: All right. Well, you're probably  
4 correct in that regard.

5 MR. GILLIGAN: If I may address that point, Your  
6 Honor. In a case like this against the United States, you  
7 would be the trier of facts on the merits as well. As well as  
8 the jurisdictional issues, sir.

9 THE COURT: All right. Well, address that in your  
10 briefs at the end of this period, however long you recommend  
11 that it should be.

12 MR. ABDO: Yes, Your Honor.

13 MR. GILLIGAN: Your Honor --

14 THE COURT: What I -- I know that there's discovery  
15 to be done on the merits after -- if the plaintiff prevails on  
16 standing. I think it's inefficient to do it all. I think  
17 it's more efficient for me to decide whether standing goes or  
18 not. I take your point. I have to go back and look at the  
19 cases. It seems odd to me that under 12(b)(1) the judge  
20 decides -- decides the jurisdictional matters. And somehow it  
21 morphs into an issue for the jury if its Rule 56. But I'll  
22 look at it. I'll look at it.

23 MR. ABDO: Thank you, Your Honor.

24 MR. GILLIGAN: Your Honor, very quickly, because I  
25 know your time is short. There is an evidence preservation

1 issue about which the parties are currently conferring. I  
2 would simply say at this point, I hope we're able to work it  
3 out, but if not, we may be filing a motion for the Court's  
4 consideration on that issue or some time --

5 THE COURT: On the issue of preservation?

6 MR. GILLIGAN: On a very particular evidence  
7 preservation issue.

8 THE COURT: All right.

9 MR. GILLIGAN: But I don't want to bog the Court  
10 down with the details of that.

11 THE COURT: Is there any need for me to know what  
12 that might entail?

13 MR. GILLIGAN: I don't -- I don't believe so at this  
14 time. It concerns certain classified information.

15 THE COURT: All right. Well, do this: Give me your  
16 joint feelings about how we should proceed by the close of  
17 business next Thursday. Is that enough time?

18 MR. GILLIGAN: I believe so, Your Honor.

19 MR. ABDO: Yes, Your Honor. Yes.

20 THE COURT: All right. By five o'clock on Thursday.  
21 And if a hearing -- a further hearing is necessary, otherwise,  
22 I'll just enter an order and we'll proceed in that regard.  
23 But if a further hearing is necessary, I will promptly advise  
24 you and we'll convene and have that hearing.

25 MR. ABDO: Thank you, Your Honor.



1 THE COURT: And if this other issue arises, Mr.  
2 Gilligan, I'll hear it promptly.

3 MR. GILLIGAN: Very well, Your Honor.

4 MR. ABDO: Just one quick note, Your Honor. We're  
5 in New York so to the extent that you can give us the time  
6 necessary to make sure we can appear here --

7 THE COURT: Yes, I'll keep that in mind.

8 MR. ABDO: Thank you, Your Honor.

9 THE COURT: And that will also mean that to the  
10 extent we need, I don't foreclose telephone conferences  
11 either.

12 MR. ABDO: Thank you, Your Honor.

13 MR. GILLIGAN: Thank you, Your Honor.

14 THE COURT: All right. I thank counsel.

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16 (Proceedings adjourned at 2:55 p.m.)

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CERTIFICATE OF REPORTER

I, Tonia Harris, an Official Court Reporter for the Eastern District of Virginia, do hereby certify that I reported by machine shorthand, in my official capacity, the proceedings had and testimony adduced upon the Status Conference in the case of the **WIKIMEDIA FOUNDATION versus NATIONAL SECURITY AGENCY, et al**, Civil Action Number 15-CV-662, in said court on the 22nd day of September, 2017.

I further certify that the foregoing 50 pages constitute the official transcript of said proceedings, as taken from my machine shorthand notes, my computer realtime display, together with the backup tape recording of said proceedings to the best of my ability.

In witness whereof, I have hereto subscribed my name, this the December 20, 2017.

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Tonia M. Harris, RPR  
Official Court Reporter