

JAMEEL JAFFER
DIRECTOR
NATIONAL SECURITY PROJECT



October 10, 2013

BY ECF

Honorable William H. Pauley III
United States District Court for the
Southern District of New York
500 Pearl Street, Room 2210
New York, NY 10007

**AMERICAN CIVIL LIBERTIES
UNION FOUNDATION**
NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500
WWW.ACLU.ORG

Re: *American Civil Liberties Union et al. v. Clapper et al.*
Case No. 13 Civ. 03994 (WHP)

Dear Judge Pauley:

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

RICHARD ZACKS
TREASURER

In light of ongoing irreparable harm being suffered by Plaintiffs as well as the significant public interest in the prompt adjudication of Plaintiffs' motion for a preliminary injunction in this case, Plaintiffs write to respectfully move the Court to (1) lift the stay imposed by Order of the Chief Judge of the Southern District of New York on October 1, 2013, and (2) re-set the filing dates for the parties' reply briefs and the date for oral argument on the parties' motions.¹

By letter dated July 2, 2013, Plaintiffs informed the Court of their intention to file a motion for preliminary injunction with respect to the government's mass call-tracking program and requested a pre-motion conference for that purpose. *See* ECF No. 12. Defendants likewise requested a pre-motion conference in anticipation of their filing of a motion to dismiss Plaintiffs' Complaint. *See* ECF No. 16.

On August 8, 2013, this Court issued an amended scheduling order setting submission dates for the parties' briefs on Plaintiffs' motion for a preliminary injunction and Defendants' motion to dismiss, as well as for oral

¹ Plaintiffs submit this letter under this Court's Individual Practice I(D), as a letter-motion concerning the alteration of scheduled dates. As required by the Court's Practice, Plaintiffs attach a proposed Revised Scheduling Order to this letter.

The Government has indicated to Plaintiffs that it opposes this motion and intends to file a letter with the Court explaining the reasons for its opposition.

argument on both motions. *See* ECF No. 22. Under that order, the parties' opening briefs were due on August 26, opposition briefs on September 26, and reply briefs on October 10. *See id.* The Court set oral argument for November 1. *See id.* The Court later amended the scheduling order to provide that opposition briefs would be due on October 1 (rather than September 26) and reply briefs on October 15 (rather than October 10). *See* ECF No. 58. The parties filed their respective opening and opposition briefs on August 26 and October 1. *See* ECF Nos. 25–26, 32–33, 60, 61.

On October 1, 2013, the Chief Judge of the Southern District of New York issued an order staying “all civil cases . . . in which the United States Attorney’s Office for the Southern District of New York has appeared as counsel of record for the United States, its agencies, and/or its employees” and tolling all such cases for the duration of the “government shutdown” and until Justice Department funding has been restored. *In re Stay of Certain Civil Cases Pending the Restoration of Department of Justice Funding*, 13 Misc. 0334 (S.D.N.Y. Oct. 1, 2013) (Preska, C.J.), ECF No. 59.

Plaintiffs had hoped the government’s funding dispute would be resolved in short order and the stay lifted quickly. As of the date of this filing, however, the government shutdown continues, with reports indicating that it could be prolonged. *See* David Espo, *Debt Limit Overtaking Shutdown as US Crisis Focus*, Associated Press, Oct. 7, 2013, <http://bit.ly/198dxKI>; Jonathan Weisman & Jackie Calmes, *Senate Leaders Mull Raising Debt Ceiling in Challenge to House*, N.Y. Times, Oct. 7, 2013, <http://nyti.ms/19wkRMv>.

It now seems likely that the open-ended stay of the proceedings in this case will, if left in place, significantly delay resolution of Plaintiffs’ motion and result in Plaintiffs’ suffering additional and unnecessary injuries. As Plaintiffs explained in their brief in support of their motion for a preliminary injunction, the government is collecting a record of every single phone call Plaintiffs make or receive. That surveillance intrudes upon Plaintiffs’ sensitive associations and communications. *See* Pls.’ PI Br. 36–38. It also compromises Plaintiffs’ advocacy, public-interest litigation, and legislative efforts. *See id.* at 38–39. The injuries inflicted by the surveillance are ongoing and irreparable.

A significant delay in the adjudication of Plaintiffs’ motion will also deprive the public and Congress of information relevant to the ongoing public debate about the program. The debate about the program continues despite the shutdown. *See, e.g.,* Brendan Sasso, *Sen. Wyden Vows to Battle ‘Skin Deep’ NSA Reforms*, The Hill’s Hillicon Valley Blog (Oct. 9, 2013 12:53 PM), <http://bit.ly/1bHxagl> (discussing surveillance conference at Cato Institute); Ali Watkins, *Congress Now Is Expected to Revise NSA, FISA Court Operations*, McClatchyDC, Oct. 7, 2013, <http://bit.ly/1e4BC6y> (discussing numerous legislative proposals concerning changes to NSA surveillance authorities). A significant delay in the adjudication of Plaintiffs’ preliminary-injunction

motion would deprive the public and Congress of information that is highly relevant to their ongoing consideration of the government's surveillance authorities.

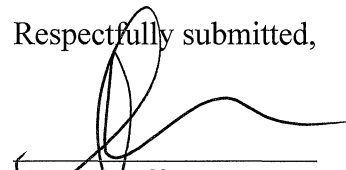
Plaintiffs are cognizant of the constraints that the government shutdown has placed upon the Department of Justice. However, given the nature of the challenged conduct, the significance of the injuries inflicted by it, and the considerable public interest in this Court's adjudication of Plaintiffs' preliminary injunction motion, Plaintiffs believe that relief from the stay is warranted and necessary. Notably, other courts addressing similarly urgent disputes have refused to grant stays of litigation, despite the government shutdown. *See, e.g.*, Order, *First Unitarian Church of L.A. v. Nat'l Sec. Agency*, No. 3:13-cv-03287 (N.D. Cal. Oct. 9, 2013) (denying government's motion for a stay in constitutional litigation concerning the government's mass call-tracking program); Order at 2, *Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 13-1261 (D.D.C. Oct. 2, 2013) ("In light of the irreparable harm alleged, the impending time sensitive mandate [in the Affordable Care Act], and defendants' refusal to delay enforcement of the mandate as to the plaintiffs in this case, the Court finds that an indefinite stay would be incompatible with the fair administration of justice."); *see also, e.g.*, Order, *Al Janko v. Gates*, No. 12-5017 (D.C. Cir. Oct. 9, 2013) (denying motion to postpone oral argument in light of lapse of Department of Justice appropriations); Order, *Aamer v. Obama*, No. 13-5223 (D.C. Cir. Oct. 8, 2013) (same).

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* * *

Plaintiffs respectfully request that the Court enter an order (1) lifting the stay in this matter, and (2) setting new dates for the submission of the parties' reply briefs and for oral argument. Plaintiffs respectfully request that the parties be required to file their reply briefs on Tuesday, October 29, 2013 (affording the parties two weeks in addition to the week already lapsed after the entry of the stay in this matter), and that, subject to the Court's availability, the Court hold oral argument one week later, on Tuesday, November 5, 2013 (affording the Court and the parties sufficient time to prepare for oral argument).

Respectfully submitted,



Jameel Jaffer

Alex Abdo

Patrick Toomey

Brett Max Kaufman

Catherine Crump

American Civil Liberties Union
Foundation

125 Broad Street—18th Floor

New York, NY 10004

Phone: 212.549.2500

Fax: 212.549.2654

jjaffer@aclu.org

Counsel for Plaintiffs

Chris Dunn
Arthur Eisenberg
New York Civil Liberties Union
Foundation
125 Broad Street—19th Floor
New York, NY 10004
Phone: 212.607.3300
Fax: 212.607.3318
cdunn@nyclu.org

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

cc: David Jones (david.jones6@usdoj.gov)
Tara La Morte (tara.lamorte2@usdoj.gov)
John Clopper (john.clopper@usdoj.gov)
Christopher Harwood (christopher.harwood@usdoj.gov)

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

AMERICAN CIVIL LIBERTIES UNION;
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION; NEW YORK CIVIL
LIBERTIES UNION; and NEW YORK CIVIL
LIBERTIES UNION FOUNDATION,

Plaintiffs,

v.

JAMES R. CLAPPER, in his official capacity as
Director of National Intelligence; KEITH B.
ALEXANDER, in his official capacity as
Director of the National Security Agency and
Chief of the Central Security Service;
CHARLES T. HAGEL, in his official capacity
as Secretary of Defense; ERIC H. HOLDER, in
his official capacity as Attorney General of the
United States; and ROBERT S. MUELLER III,
in his official capacity as Director of the
Federal Bureau of Investigation,

Defendants.

No. 13-cv-03994 (WHP)

ECF CASE

[PROPOSED] REVISED SCHEDULING ORDER

Upon consideration of Plaintiffs' Motion to Lift Stay Imposed Pending Restoration of Department of Justice Funding, and any opposition thereto, it is hereby ORDERED that the Motion is GRANTED. It is further ordered that (1) the parties' reply briefs on their respective motions for preliminary injunction and to dismiss are due on Tuesday, October 29, 2013, and (2) the Court will hear oral argument on both motions on Tuesday, November 1, 2013, at _____.

Dated: _____, 2013

IT IS SO ORDERED.

Honorable William H. Pauley III
United States District Judge