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2 THE COURT: Ms. Gowan, do you have a report from this
3 morning's argument in the Second Circuit?

4 MS. GOWAN: Yes, your Honor, the government does. I
5 would like Ms. Wolstein to so advise the Court.

6 THE COURT: Fine. Ms. Willstein.

7 MS. WOLSTEIN: Thank you, your Honor. Good afternoon.
8 What happened this morning was the Court of Appeals dismissed
9 the hospital's petition for lack of jurisdiction, and that was
10 in order for the hospital to be able to go into contempt in
11 order for the Court of Appeals to have before it an appealable
12 order, namely, the contempt order. The court stated that it
13 would be issuing an order this afternoon reflecting its ruling.

14 At the hearing this morning the hospital's lawyer Mr.
15 Frank represented to the Court of Appeals that the hospital did
16 in fact, does in fact, intend to go into contempt in order to
17 come up with an appealable order.

18 We over the lunch break called the hospital and again
19 confirmed. We were informed by the hospital counsel that
20 indeed they did intend to go into contempt. They stated that
21 they were not intending to be present here at 2 o'clock but
22 that they are available by phone or are available to come if
23 the Court so desires.

24 The Court of Appeals also stated this morning that as
25 soon as its order issues reflecting its ruling, that the

1 hospital will be in contempt of this Court's order of March
2 26th directing the hospital to produce documents by noon on
3 March 29th, and that as a result of that statement by the Court
4 of Appeals being and the government's understanding, the
5 government therefore moves simultaneously with the issuance of
6 the Court of Appeals order to hold the hospital in contempt of
7 the Court's March 26th order directing production by noon on
8 March 29th.

9 As I stated earlier, the Court of Appeals made clear
10 that once there is an order of this Court holding the hospital
11 in contempt --

12 THE COURT: This Court being the district court?

13 MS. WOLSTEIN: This court, the district court. Once
14 the Court holds the hospital in contempt, there is an
15 appealable order and that the Court of Appeals fully expects
16 the hospital to immediately, immediately appeal to bring the
17 matter back before the circuit in a manner that the court has
18 jurisdiction over.

19 In light of that ruling, the government's position is
20 and our application is for the Court of course to rule as
21 promptly as it sees fit on the contempt motion and that if the
22 hospital does not bring the matter back to the Court of Appeals
23 within four business hours, therefore requiring the government
24 to be put to the task of bringing the matter back to the Court
25 of Appeals, the government requests that the hospital be fined

1 \$500 for its contempt, and we will thereafter be ourselves
2 bringing the matter back to the Court of Appeals in the case of
3 a failure by the hospital to do so in timely fashion. In fact,
4 my colleague reminds me that Judge Sack in fact invited the
5 government to bring the matter back before the Court of Appeals
6 if Presbyterian Hospital's actions are not taken in a timely,
7 immediate fashion.

8 That is what the government intends to do and asks
9 this Court to do.

10 THE COURT: Keep your voice up, please.

11 MS. WOLSTEIN: Yes. Sorry, your Honor.

12 THE COURT: I am sure you are very weary, as everyone
13 in this courtroom is, but try and keep it up.

14 Is it the government's position that this Court has
15 the power to hold the hospital in contempt prior to the Court
16 of Appeals issuing its order this afternoon or? I assume we
17 have to await that, do we not?

18 MS. WOLSTEIN: Yes, your Honor. We believe the
19 jurisdiction vests with the district court once the Court of
20 Appeals issues its order.

21 THE COURT: But only then?

22 MS. WOLSTEIN: Yes, your Honor.

23 THE COURT: Do we have any indication as to when they
24 may do that?

25 MS. WOLSTEIN: Yes. They said before the sun sets,

1 some memorable phrase like that.

2 The hospital's view, based on some discussion in the
3 Court of Appeals, is that this Court, the district court,
4 doesn't have jurisdiction until the mandate issues. We
5 understood Judge Sack to be extremely clear, after a little bit
6 of back and forth, that jurisdiction does not await issuance of
7 the mandate but that jurisdiction returns to the district court
8 upon issuance of the Court of Appeals' order. That is, when
9 the Court of Appeals' order is docketed.

10 THE COURT: Did you leave with some understanding with
11 the Court of Appeals that they will telephonically notify you
12 as soon as the order is issued, and will they do so with my
13 chambers?

14 MS. WOLSTEIN: They didn't expressly say so. They
15 have proceeded by fax in the past. They have also, they did
16 actually I am reminded again, that we were telephoned when we
17 were proceeding for reconsideration was in the Court of Appeals
18 earlier, a couple of weeks ago [> the proceeding<]

19 There is something I wanted to add.

20 THE COURT: Go right ahead.

21 MS. WOLSTEIN: Thank you. Based on some questions
22 from the panel this morning. As your Honor knows, the
23 government has always believed that the medical records that we
24 have subpoenaed are relevant and certainly central to the
25 litigation and to the proper adjudication of the plaintiffs'

1 claims. We think the Court has expressed the same view many
2 times, and we understand the Court to think the records were
3 relevant as well.

4 The Court of Appeals asked some questions on the other
5 side of the undue burden question, namely, what steps have been
6 taken to protect the privacy interests of the patients so that
7 in the equation as between weighing the relevance and the need
8 for the records against the intrusion on the patients' privacy
9 interest, what consideration of the privacy interests have been
10 taken.

11 We pointed out to the Court of Appeals this Court's,
12 the district court's, very strong statement in its March 18th
13 order basically setting out that the issue to be decided pitted
14 two very important interests against each other: The need for
15 fair adjudication based on all the facts and the very
16 STAEUPBGT, I think the Court used, of the doctor-patient
17 relationship and the need to protect the sanctity of the
18 privacy interests there. We certainly pointed that out to the
19 Court of Appeals and we pointed to this Court's statement at
20 the February 5th conference where it expressed the view that
21 patient privacy was also a central concern in resolving the
22 matter.

23 We pointed out also the extraordinary steps that the
24 government and the Court have taken to ensure that all
25 identifying information would be redacted from the records and

1 the extraordinarily protective order with its multiple layers
2 of protection that the Court signed on January 23rd.

3 So we think that, in light of all this, the government
4 and the Court have taken extraordinary steps to protect the
5 privacy interests of the patients. But if your Honor were
6 inclined to amplify his prior statements on the importance in
7 the balancing equation of the patient privacy rights against
8 the relevance and the need for the documents, the government
9 would respectfully request that the Court do so.

10 THE COURT: This would be for something when you again
11 meet with the Court of Appeals? Is that what you are
12 suggesting? You don't need this at this moment, I take it? I
13 assume you had all the statements. I thought the government
14 and the Court had gone to great lengths to ensure the privacy
15 of all the patients. We were not unmindful of that, but we
16 felt, as you expressed -- I cannot quote myself, but we drove
17 mightily to balance the competing interests, but that at all
18 times we did everything, I thought, that we could think of to
19 protect the privacy of women, the patients, and the hospital,
20 and would continue to do so.

21 Perhaps we could even get a look at the transcript of
22 the argument this morning. I assume what you are looking for
23 is something after the next proceeding I guess in this court of
24 our position on that question. Is that correct?

25 MS. WOLSTEIN: Yes, your Honor, if the Court so

1 desired. That is exactly right.

2 THE COURT: I think also -- I have great fears about
3 justice being achieved here. I think the best thing to do to
4 make sure that this all works smoothly, I am not quite sure --
5 did Judge Sack preside today?

6 MS. WOLSTEIN: Yes, your Honor.

7 THE COURT: He was the one who said before the sun
8 sets? The ohm trouble is we have daylight SAEUFPLGTS were this
9 WEURPT time, we would be better served.

10 You might inform them that I will stand at the ready
11 and I will consider whether it is necessary to issue a
12 statement such as you suggest now, but that can be done later
13 today or just when. I assure you that the Court takes
14 seriously the concerns of all parties. The Court also is very
15 mindful and very concerned, as I think I expressed more than
16 once for sure, that the Court is concerned that there be a
17 level playing field, that all parties' rights be preserved, and
18 that I felt and it became increasingly evident as this trial
19 went on that significant concerns that were relevant to this
20 case were in those hospital records or at least the right of
21 the government to examine them to make sure that they knew all
22 the facts. In that effort I hope that production would happen
23 in order to make that a level playing field.

24 In any event, what I do think would be important so
25 that there be no further delay, I would ask, Ms. Wolstein, if

1 you would assume the burden of informing Mr. Frank that he is
2 being ordered to come to court immediately.

3 MS. WOLSTEIN: Yes, your Honor. Conditional and that
4 he should make himself available to this Court in my courtroom
5 for the balance of the day until we hear from the Court of
6 Appeals. I don't want any question of delay because he is in
7 his office and then he makes some request to be heard. He
8 knows what happened this morning, correct?

9 MS. WOLSTEIN: Yes, your Honor.

10 THE COURT: Fully aware of that, and he chose not to
11 be here but to go to his office. You inform him that I have
12 ordered him to appear so that he is available to this Court so
13 that the moment the Second Circuit issues its order, we can
14 act.

15 MS. WOLSTEIN: Yes, your Honor. I will step outside
16 if that is all right with the Court, and call him right now.

17 THE COURT: I am going to recess the court. I will be
18 in my chambers. I have ordered him and you can take that on
19 your shoulders if you would be so kind.

20 Is there anything else that any counsel wishes to be
21 heard on?

22 MS. GOWAN: No, your Honor, for the government.

23 MR. HUT: Nothing from the plaintiffs, your Honor.

24 THE COURT: Thank you all. Stay tuned.

25 (Recess) 4/20/04 Judge Casey take 2 of NAF versus Ashcroft.

1 THE FOREPERSON: And Roth, RFRPBLGTS
2 Roth, frank, Frank,.
3 THE COURT: Good evening, please be seated.
4 THE DEPUTY CLERK: National abortion federal etal
5 against John Ashcroftet all.
6 All counsel please side TPAOEU themselves for the
7 record.
8 MS. CHAITEN: Lorie Chaiten from the Roger bald win
9 foundation of the ACLU object behalf of the plaintiffs,.
10 MS. PARKER: Park park park from will PHER cut letter
11 and plaintiffs on.
12 MR. FRANK: James frank, TP*EUP EUPZizeer on behalf of
13 New York Presbyterian Hospital.
14 MS. ROTH: Judy Roth, TP*EUP EUZizeer on behalf of New
15 York Presbyterian Hospital.
16 MS. GOWAN: Assistant United States attorney Gowan ow
17 ban PWAOF of the.
18 MR. LANE: Lane lane lane on behalf of the defendant.
19 MS. WOLSTEIN: Assistant United States attorney
20 Elizabeth Wolstein on behalf of defendant.
21 MR. PANTOJA: Assistant United States attorney Joseph
22 Pantoja on behalf of the defendant.
23 THE COURT: All right, well has everyone received a
24 copy of the order from the Second Circuit Court of Appeals?
25 MR. FRANK: No, we have not, your Honor.

1 THE COURT: All right, Mr. coffer, would you please
2 give a copy?
3 THE COURT: You have not, Mr. frank.
4 MS. GOWAN: Neither has the government, your Honor.
5 MS. CHAITEN: Nor has the plaintiff.
6 THE COURT: It is relatively short.
7 MS. GOWAN: Thank you, Mr. coffer.
8 Your Honor, we have been in contact with Mr. bolden
9 the supervising managing clerk up until two minutes before 5:00
10 and he told us that an order had not yet issued.
11 THE COURT: We were told at about 4:40 that no order
12 would issue and I had dispatched a law clerk to inform
13 Mr. Frank that despite what we have been told earlier in the
14 day he could depart when the phone rang saying disregard the
15 first order, an order would be forgecoming, which is what you
16 now have.
17 MS. GOWAN: Thank you, your Honor.
18 MR. FRANK: Thank you, your Honor.
19 THE COURT: We were told to stand by, which is what we
20 did, and then when we couldn't reach anyone we finally called
21 the clerk's office of the Second Circuit and we are told that
22 no order would come, that's what I was mentioning a moment ago
23 and then it was countered shortly thereafter.
24 But, I hope that you, Mr. flank was here with
25 Ms. Gowan. Would you please, as the story unfold leave us a

1 number where you can be reached we tried all afternoon to reach
2 you and all of your assistant, both here in the office, at the
3 U.S. Attorney's office maintains in this court house and at
4 your home offices as well. We couldn't reach anybody trying to
5 find out what was going on.
6 MS. GOWAN: Your Honor, we were here in our fifth
7 floor office all afternoon and we were also checking our
8 phones, were you leaving messages on our office phones?
9 THE COURT: I believe that plaintiff coffee will
10 discuss with you.
11 MS. GOWAN: Cough cough name no message.
12 MS. GOWAN: Every 10 minutes Ms. Wolstein and I to see
13 if there was a message from the Second Circuit.
14 THE COURT: We may not rank quite as high with those
15 folks but I hope you work out with Mr. coffer some KHO means of
16 communication that we can maintain STKWRAO most certainly, your
17 Honor.
18 MS. GOWAN: Your Honor, the government has had an
19 opportunity to review the order.
20 THE COURT: And Mr. frank you have had an opportunity
21 to read it?
22 MR. FRANK: Yes, your Honor.
23 THE COURT: And the plaintiffs who will be taking the
24 lead there today?
25 MS. CHAITEN: Your Honor, this is Ms. Chaiten, yes, we

1 have had a chance to read this.
2 THE COURT: I'm not sure you are a party to it but you
3 have had a chance to read it in any event?
4 MS. CHAITEN: We V. your Honor.
5 THE COURT: Mr. frank, I think consistent with the
6 order of the Court of Appeals do you, on behalf of your client,
7 and again, is it the New York Presbyterian Hospital that is the
8 correct title?
9 MR. FRANK: Your Honor, the correct name of the
10 hospital is the New York and Presbyterian Hospital.
11 THE COURT: New York and Presbyterian Hospital.
12 Do you, on behalf of your client, 3ER sift in refusal
13 to comply with this subpoena and the order of this Court to
14 produce the records requested in that order and subpoena?
15 MR. FRANK: Yes, your Honor.
16 THE COURT: All right, fine.
17 Does the government wish to be heard, otherwise we
18 will take just a very short break and I want to just make sure
19 that I have drafted an order that covers all of this.
20 MS. WOLSTEIN: No, your Honor.
21 THE COURT: I mean of course Mr. frank do you wish any
22 further argument? I think consistent with the order of the
23 Court that's all that is needed and required, is your statement
24 that you persist refusal to comply, correct? Unless you wish
25 to be heard on something.

1 MR. FRANK: Your Honor, as we advised the Court this
2 morning, we believe that an appeal of this issue is important
3 and that since this is the vehicle for obtaining that appeal,
4 we have respectfully declined to produce the records so we can
5 comply with the appeal procedures that the Court of Appeals has
6 outlined for us.
7 THE COURT: Ms. Gowan do you wish to add anything.
8 MS. GOWAN: No, other than consistent with the
9 government's position all along, we seek expeditious decision
10 on this issue so that the proceedings before your Honor may
11 proceed to an appropriate conclusion.
12 THE COURT: I think all parties to this litigation are
13 desirous of of the ability of this toward, to bring this case
14 to a conclusion in a speedy and just fashion and we will
15 attempt to achieve those ends.
16 Now, if you will all bear with us just a few moments
17 the Court will take a brief recess and I will read our order
18 and issue copies to all of you.
19 The Court will stand in recess.
20 THE COURT: Whereas in a written decision dated March
21 18th, 2004, the Court granted defendant's motion to enforce a
22 subpoena seeking production of certain medical records in the
23 possession of non-party New York and Presbyterian Hospital.
24 Whereas N. a memo endorsement dated March 26, 2004,
25 the Court ordered that the records be produced no later than

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1 March 29th, 2004 at 12:00 p.m.
2 Whereas, the Court held a hearing on April 20th, 2004,
3 at which counsel for the hospital indicated that the hospital
4 would not produce the records.
5 Whereas, the hospital has failed to comply with the
6 Court's orders it is therefore ordered that, one, the hospital
7 is in contempt of this Court's orders of March 18th and 26th,
8 2004.; (2) the hospital is fined \$500 for failure to produce
9 the records.
10 All right, that concludes the contempt citation.
11 Is there anything further that any counsel wishes to
12 be heard on?
13 MS. GOWAN: Not from the government, your Honor.
14 THE COURT: I do note, I believe correct me if I am
15 wrong, that the Court of Appeals order says that it is
16 incumbent upon the hospital to file immediately if they intend
17 to do so. Is that correct I believe it is in I TALics, is it
18 not? TP-FRPBLT yes, your Honor, and may I ask.
19 THE COURT: I believe there is night filing, is there
20 not? Ms. Gowan, I assume you would know.
21 MS. GOWAN: Yes, your Honor, there is night filing, up
22 until midnight.
23 THE COURT: So I guess immediately is immediately. As
24 one of the great judges of this Court once against late Thomas
25 Murphy, I believe they phone them in now.

1 So, there you have T.
2 One other thing for the parties who are here, I guess
3 with have no choice but to await the decision of the Court of
4 Appeals. It is pretty hard to schedule closing arguments or
5 filing of brief with findings of facts and conclusions of law
6 until we know that we have a completed trial, unless anybody
7 has any further thoughts on that I suspect the only thing we
8 can do is adjourn see anyway dea.
9 MR. FRANK: Your Honor, may I ask two questions?
10 THE COURT: You may.
11 MR. FRANK: Is your order now considered entered for
12 purposes of the appellate Court?
13 THE COURT: Yes.
14 MR. FRANK: And secondly, may I request a stay of the
15 Court's order pending decision on appeal?
16 THE COURT: No, sir. Your application is denied.
17 This has been a long journey and that has been denied by this
18 Court before, it was denied by the Court of Appeals today and
19 this Court will likewise deny it now.
20 MR. FRANK: Thank you.
21 THE COURT: Might I ask what the purpose of your
22 request to stay this time for is?
23 MR. FRANK: I believe that the Court of Appeals
24 invited a motion to stay pending appeal and I was asking the
25 District Court to stay the order before we made that

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1 application to the Court of Appeals with our appeal papers,
2 which we will file shortly.
3 THE COURT: You need that -- I don't know that you do
4 but if you need that your application is denied.
5 MR. FRANK: Thank you, your Honor.
6 THE COURT: One thing. I don't know -- I would
7 appreciate it to be done by letter of the parties. Since this
8 has been tried along with other cases in at least for this
9 Court in an unusual fashion, I would like a letter from both
10 parties as to, it's almost as if you are going up to the
11 stadium and you need a program. But I would like a statement
12 of the witnesses who appeared in this trial who testified in
13 either the case in Nebraska or the case in San Francisco.
14 And I would also like to know whether or not they
15 testified before Congress. All right? If both sides would
16 take the burden on themselves for their own witness. And if
17 they testified in the other cases and did not testify here, I
18 would like to know who they are.
19 Might I ask, Ms. Gowan, perhaps you know or maybe you
20 don't know or maybe you all know, have the cases in Nebraska
21 and California concluded?
22 MS. GOWAN: Yes, your Honor. There was closing
23 arguments in the San Francisco case this past Friday and then
24 a, the prior Friday before the proceedings were concluded in
25 Nebraska. There were not closings in Nebraska, however, the

1 Judge there has ordered briefing and I believe closing in -- I
2 want to say June, your Honor, but I could put those facts in
3 the government's letter foot Court.
4 THE COURT: I would appreciate that.
5 MS. GOWAN: And then the judge in San Francisco has
6 also ordered some post-trial briefing but on a more expeditious
7 schedule than that that has been ordered by the judge in
8 Nebraska.
9 But we will set all of those facts out for the Court.
10 THE COURT: I would appreciate knowing what has
11 happened and what is happening in those cases. Thank you.
12 Is there anything else that any counsel would like to
13 be heard on?
14 MS. CHAITEN: Your Honor, this is Ms. Chaiten for the
15 plaintiffs. Just again a housekeeping matter.
16 THE COURT: Surely.
17 MS. CHAITEN: When would you like those letters
18 submitted to the Court?
19 THE COURT: When?
20 MS. CHAITEN: When, yes.
21 THE COURT: Oh, by -- can you do it in the next day or
22 two?
23 MS. CHAITEN: Absolutely. Thank you.
24 THE COURT: There is not a rush or anything like that.
25 I just THAUL while it came to me I would ask for it. You know

1 how old folks are, we occasionally forget so I thought I would
2 ask for it while I thought about it.
3 And short of that, I hope we haven't driven Mr. Hut
4 away, I hope he is still checking out the draft possibilities
5 for Saturday and getting a step ahead of me because I'm
6 precluded from doing that because I have to attend these
7 gatherings with you.
8 MS. CHAITEN: Your Honor Mr. Hut apologizes for not
9 being here. He had another commitment and needed to leave.
10 THE COURT: No problem, I am only jesting. I am sure
11 you understand.
12 All right F. there is nothing further then we will,
13 this time, recess or adjourn sine dea at the pleasure of the
14 Court of Appeals.
15 Thank you all very much and I hope you have a lovely
16 evening.