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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

TASH HEPTING, GREGORY HICKS CAROLYN JEWEL and ERIK KNUTZEN on Behalf of Themselves and All Others Similarly Situated,

Plaintiffs,

v.

AT&T CORP., AT&T INC. and DOES 1-20, inclusive,

Defendants.

Case No. C-06-0672-VRW

UNITED STATES' RESPONSE TO PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN RESPONSE TO COURT'S MAY 17, 2006 MINUTE ORDER

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INTRODUCTION

In this case, the United States has invoked the military and state secrets privilege (hereinafter "state secrets privilege") to protect information which two of the nation's highest ranking intelligence officials have determined cannot be disclosed without causing harm to the national security interests of the United States. On the basis of determinations made by the Director of National Intelligence and the Director of the National Security Agency, the United States has explained in public filings and, in more detail, in filings submitted for the Court's *in camera, ex parte* review, why no aspect of this case can be litigated without disclosing state secrets. The United States has not lightly invoked the state secrets privilege, and the weighty reasons for asserting the privilege are apparent from the classified material submitted in support of its assertion. The need to protect against the harm to national security that would arise from the disclosure of classified information, however, makes it impossible for the United States to explain on the public record more precisely what those reasons are. Although the Court could dismiss this action based on the public filings already made, in light of the grave national security implications at issue in this case, it would be perilous to proceed instead to litigate any of Plaintiffs' claims here without full consideration of the details of the Government's state secrets privilege assertion, including the material that the United States has submitted for this Court's *in camera, ex parte* review.

Plaintiffs argue that consideration by the Court of the *in camera, ex parte* evidence submitted by the United States can deprive them of due process; that the Foreign Intelligence Surveillance Act ("FISA") requires them to be provided with access to the underlying materials; and that the Court should not review the *in camera, ex parte* materials submitted by the United States, but should instead allow Plaintiffs certain discovery and address Plaintiffs' legal claims based on the information available on the public record. Each of these arguments is misguided. It is well established that where classified materials are at issue, a court may review such material *in camera, ex parte* without infringing a litigant's due process rights in order to avoid the harms

that would result from unauthorized disclosure. Moreover, neither FISA nor any other provision of law can be construed to provide Plaintiffs with access either to classified material subject to the state secrets privilege or to material subject to the statutory privileges invoked by the United States.

Finally, Plaintiffs' belief that the Court should defer review of the United States' *in camera, ex parte* submissions because Plaintiffs can prove their *prima facie* case based on materials available in the public record, and that they are entitled to certain discovery in their effort to do so, reflects a fundamental misconception of the scope, nature and effect of the Government's invocation of the state secrets privilege. As described in the United States' public filing and in the supporting classified materials, state secrets are central to the Plaintiffs' allegations and any attempt to proceed with the litigation will threaten the disclosure of privileged matters. Because, for the reasons explained in the Government's earlier submissions, including in the public Memorandum of the United States in Support of the Military and State Secrets Privilege and Motion to Dismiss or, in the Alternative, for Summary Judgment, Docket No. 124 ("U.S. Mem."), Plaintiffs cannot prove their *prima facie* case without resort to classified material, the Court should consider the dispositive motions of the United States and AT&T before taking any further action in this case.

ARGUMENT

I. *IN CAMERA, EX PARTE* REVIEW OF THE UNITED STATES' SUBMISSIONS DOES NOT VIOLATE DUE PROCESS.

Plaintiffs' initial argument is that due process disfavors the Court's consideration of materials provided *in camera* and *ex parte*. Although *ex parte* submissions are not the norm, courts have repeatedly recognized that such submissions are necessary in a variety of contexts. *See, e.g., Meridian Int'l Logistics, Inc. v. United States*, 939 F.2d 740, 745 (9th Cir. 1991) ("We find that the procedure [declarations sealed and subject to *in camera, ex parte* review] used by the court in the instant case was proper; it adequately balanced the rights of the Government and [plaintiff]. . . . [A]lthough [plaintiff] did not have the opportunity to conduct discovery and

cross-examine the Government's witness, its interests as a litigant are satisfied by the ex parte/in camera decision of an impartial district judge."); *In re Grand Jury Proceedings*, 867 F.2d 539, 540-41 (9th Cir. 1988) (rejecting due process challenge to *in camera* submission supporting enforcement of grand jury subpoena); *United States v. Ott*, 827 F.2d 473, 476-77 (9th Cir. 1987) (rejecting due process challenge to *in camera, ex parte* review of materials under the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801 *et seq.*); *Pollard v. Fed. Bureau of Investigation*, 705 F.2d 1151, 1153-54 (9th Cir. 1983) ("the practice of in camera, ex parte review remains appropriate in certain [Freedom of Information Act ("FOIA")] cases").

More specifically, as the Court of Appeals squarely recognized in the very case upon which Plaintiffs predominately rely, *in camera, ex parte* submissions are appropriate when there is "some 'compelling justification.'" *Guenther v. Comm'r of Internal Revenue*, 889 F.2d 882, 884 (9th Cir. 1989) ("*Guenther I*"), *appeal decided after remand by*, 939 F.2d 758 (9th Cir. 1991) ("*Guenther II*") (quoting *United States v. Thompson*, 827 F.2d 1254, 1258-59 (9th Cir. 1986)). "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981) (citation omitted); *see also Wayte v. United States*, 470 U.S. 598, 612 (1985) ("Unless a society has the capability and will to defend itself from the aggressions of others, constitutional protections of any sort will have little meaning"); *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) ("The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service.").

Thus, numerous courts have considered *in camera, ex parte* submissions containing information that is classified or that relates to ongoing counter-terrorism efforts of the federal government, and have rejected due process challenges to such a course. *See, e.g., Jifry v. Fed. Aviation Admin.*, 370 F.3d 1174, 1182 (D.C. Cir. 2004) (court has "inherent authority to review classified material *ex parte, in camera* as part of its judicial review function") (citing cases), *cert.*

denied, 543 U.S. 1146 (2005); *Patterson v. Fed. Bureau of Investigation*, 893 F.2d 595, 600 n.9, 604-05 (3d Cir. 1990) (noting that "notwithstanding this imbalance between the parties, the D.C. Circuit, as well as other circuits, have allowed the use of *in camera* affidavits in national security cases"); *see also Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003) (rejecting plaintiff's "claim that the use of classified information disclosed only to the court *ex parte* and *in camera* in the designation of a foreign terrorist organization . . . was violative of due process"), *cert. denied*, 540 U.S. 1218 (2004); *People's Mojahedin Org. of Iran v. Dept. of State*, 327 F.3d 1238, 1242 (D.C. Cir. 2003) (same); *Global Relief Found. v. O'Neill*, 315 F.3d 748, 754 (7th Cir. 2002) (rejecting constitutional challenge to federal statute which authorizes the district court's *ex parte* and *in camera* consideration of classified evidence in connection with a judicial challenge to an Executive decision to freeze the assets of entity that assisted or sponsored terrorism), *cert. denied*, 540 U.S. 1003 (2003); *Torbet v. United Airlines*, 298 F.3d 1087, 1089 (9th Cir. 2002) (affirming district court's dismissal of complaint challenging airline search based, in part, on *in camera* review of sensitive security information); *Doe v. Browner*, 902 F. Supp. 1240, 1250 n.7 (D. Nev. 1995) (dismissing environmental challenge as moot based on *in camera* inspection of classified documents), *aff'd in part and dismissed in part sub nom., Kasza v. Browner*, 133 F.3d 1159 (9th Cir. 1988).

Similarly, in cases where, as here, the Government has asserted the state secrets privilege, courts routinely examine classified information on an *in camera, ex parte* basis, and on the basis of that examination, make determinations that affect or even dictate the outcome of a case. *See, e.g., Sterling v. Tenet,* 416 F.3d 338, 342 (4th Cir. 2005) (upholding dismissal based on determination, after reviewing *in camera* affidavits, that any attempt by plaintiffs to make out a prima facie case at trial would entail the revelation of state secrets), *cert. denied*, 126 S. Ct. 1052 (2006); *accord Kasza v. Browner*, 133 F.3d 1159, 1170 (9th Cir. 1998); *Edmonds v. U.S. Dept. of Justice*, 323 F. Supp. 2d 65, 74 (D.D.C. 2004), *aff'd*, 161 Fed. Appx. 6 (D.C. Cir.), *cert. denied*,

126 S. Ct. 734 (2005); *Salisbury v. United States*, 690 F.2d 966, 974-77 (D.C. Cir. 1982); *El Masri v. Tenet*, Civil Action No. 05-1417 (E.D. Va.), Order, May 12, 2006, attached as Ex. A.[1]

In cases such as this one, where the national security of the United States is implicated, it is well established that the Executive Branch is best positioned to judge the potential effects of disclosure of sensitive information on the nation's security. *See Dept. of Navy v. Egan*, 484 U.S. 518, 529 (1988) ("Predictive judgment [about whether someone might 'compromise sensitive information'] must be made by those with the necessary expertise in protecting classified information."); *Central Intelligence Agency v. Sims*, 471 U.S. 159, 170 (1985) ("Congress intended to give the Director of Central Intelligence broad power to protect the secrecy and integrity of the intelligence process. The reasons are too obvious to call for enlarged discussion; without such protections the Agency would be virtually impotent."). Indeed, the Supreme Court has repeatedly recognized that courts are ill-equipped as an institution to judge harm to national security. *See Egan*, 484 U.S. at 529 ("The Court also has recognized 'the generally accepted view that foreign policy was the province and responsibility of the Executive.'") (quoting *Haig*, 453 U.S. at 293-94)); *see also Sims*, 471 U.S. at 180 ("weigh[ing] the variety of subtle and complex factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the [nation's] intelligence-gathering process" is a task best left to the Executive Branch and not attempted by the judiciary).

Thus, where, as here, the Executive Branch, through the Director of National Intelligence and the Director of the National Security Agency, has determined that the needs of national security demands that certain information be reviewed only by the Court *in camera* and *ex parte*, Plaintiffs' due process concerns must be viewed in light of that determination. The "strong

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[1] *See also American-Arab Anti-Discrim. Comm. v. Reno*, 70 F.3d 1045, 1070 (9th Cir. 1995) (explaining that the effect of a successful invocation of the state secrets privilege is that "the evidence is unavailable, as though a witness had died" and that even when the privilege operates "as a complete shield to the government and results in the dismissal of a plaintiff's suit, the information is simply unavailable and may not be used by either side") (internal quotation marks and citations omitted).

interest of the government [in protecting against the disclosure of classified information] clearly affects the nature . . . of the due process which must be afforded petitioners." *Nat'l Council of Resistance of Iran v. Dept. of State*, 251 F.3d 192, 208-09 (D.C. Cir. 2001); *see also Gilbert v. Homar*, 520 U.S. 924, 930 (1997) ("it is by now well established that due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances") (internal quotation marks and citation omitted); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("due process is flexible and calls for such procedural protections as the particular situation demands"). In this situation, as the Court of Appeals has plainly held, *ex parte* consideration is proper and Plaintiffs' interests "as a litigant are satisfied by the ex parte/in camera decision of an impartial district judge." *Meridian Int'l Logistics, Inc.*, 939 F.2d at 745; *see also In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1075 (D.C. Cir. 1998) ("We recognize that appellants cannot make factual arguments about materials they have not seen and to that degree they are hampered in presenting their case. The alternatives, however, are sacrificing the secrecy of the [materials] or leaving the issue unresolved at this critical juncture.") (quoting *In re John Doe Corp.*, 675 F.2d 482, 490 (2d Cir. 1982)).

The consequences that sometimes must flow from the United States' compelling need to protect national security information was demonstrated earlier this month by the decision of the United States District Court for the Eastern District of Virginia in *El-Masri v. Tenet*, Civil Action No. 05-1417 (E.D. Va.), attached as Ex. A. In *El-Masri*, in response to Plaintiff's Complaint making constitutional tort allegations against former CIA Director George Tenet, other CIA employees, and private individuals concerning an "extraordinary rendition" program, the United States moved to intervene and filed a formal claim of the state secrets privilege, supported by both an unclassified and a classified *ex parte* declaration from the Director of the CIA. The United States also sought dismissal or summary judgment on the ground that maintenance of the suit would invariably lead to disclosure of its state secrets.

In its May 12, 2006, opinion, the District Court agreed. Finding that courts must "bear in mind the Executive Branch's preeminent authority over military and diplomatic matters and its greater expertise relative to the judicial branch in predicting the effect of a particular disclosure on national security," Slip Op. at 9, the Court concluded that "there is no doubt that the state secrets privilege is validly asserted here." *Id.* at 10. Specifically, the Court found that Plaintiff's "publicly available complaint alleges a clandestine intelligence program, and the means and methods the foreign intelligence services of this and other countries used to carry out the program" and that "any admission or denial of these allegations . . . would reveal the means and methods employed pursuant to this clandestine program and . . . would present a grave risk to national security." *Id.* Moreover, the Court found that state secrets in the form of details about the classified rendition program were the "very subject of litigation," *see id.* at 12-13, and concluded that dismissal of Plaintiffs' claims was the only appropriate disposition: "while dismissal of the complaint deprives El-Masri of an American judicial forum for vindicating his claims, well-established and controlling legal principles require that . . . El-Masri's private interests must give way to the national interests in preserving state secrets." *Id.* at 14.

For the same reasons, dismissal is also the appropriate disposition of this case, and none of the authority cited by Plaintiffs demands a different result. The cases upon which Plaintiffs rely do not involve the *ex parte* submission of classified information. *Lynn v. Regents of Univ. of Calif.*, 656 F.2d 1337 (9th Cir. 1981), involved a claim of gender discrimination brought by an assistant professor who alleged she was denied merit salary increases and tenure. The Ninth Circuit held that the district court's *in camera, ex parte* review of the plaintiff's tenure file violated the plaintiff's due process. *Id.* at 1345-46. And, in *Guenther II*, an appeal by taxpayers of the Internal Revenue Commissioner's finding of deficiency, the court found that the district court's review of an *ex parte* trial memorandum violated the plaintiffs' due process. 939 F.2d 758. Indeed, the *Guenther* cases upon which Plaintiffs rely support the Government's position that classified information is properly considered by the Court *in camera* and *ex parte*. *See, e.g.*,

Guenther I, 889 F.2d at 884 ("And recently, we made clear that absent some 'compelling justification,' ex parte communications will not be tolerated."); *Guenther II*, 939 F.2d at 760 (affirming "compelling justification" principle); *see also United States v. Thompson*, 827 F.2d 1254, 1259 (9th Cir. 1987) ("situations where the court acts with the benefit of only one side's presentation are uneasy compromises with some overriding necessity, such as the need to act quickly or to keep sensitive information from the opposing party"). Other cases in this circuit further demonstrate the lack of merit to Plaintiffs' position. *See United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1261 (9th Cir. 1998) ("In a case involving classified documents, . . . *ex parte, in camera* hearings in which government counsel participates to the exclusion of defense counsel are part of the process that the district court may use in order to decide the relevancy of the information."); *Kasza*, 133 F.3d at 1165 (affirming dismissal where district court "properly considered classified declarations and documents in camera" in ruling on government's invocation of the state secrets privilege).

In sum, the Court has the inherent authority to consider classified information *in camera* and *ex parte* without violating Plaintiffs' right to due process and, thus, before proceeding with the litigation of Plaintiffs' claims on the merits, the Court should consider the materials submitted by the United States in support of its assertion of the state secrets privilege in order to fully understand and avoid the dangers that would result from any such litigation.

II. PLAINTIFFS ARE NOT ENTITLED TO ACCESS TO THE CLASSIFIED MATERIALS SUBMITTED *IN CAMERA, EX PARTE*.

Plaintiffs claim that the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. § 1801 *et seq.*, creates a statutory mechanism that allows them access to the classified material that forms the basis of the Government's assertion of the state secrets privilege. In particular, they rely on section 1806(f) of the FISA, which provides a basis for "an aggrieved person" to seek judicial review of the legality of the FISA electronic surveillance. They claim that if the Court intends to review the Government's classified material, it should also provide Plaintiffs with

access to that material under the review procedures set forth in section 1806(f).[2] Plaintiffs, however, are not entitled to review classified material under the FISA or any other mechanism.

It is well-established that, under the separation of powers established by the Constitution, the Executive is exclusively responsible for the protection and control of national security information, and the decision to grant or deny access to such information rests exclusively within the discretion of the Executive. *See Egan*, 484 U.S. at 527-28 (noting that the Executive supremacy on such decisions arises from President's role as Commander in Chief under Art. II, § 2 of Constitution); *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990) ("a clearance may be granted or retained only if 'clearly consistent with the interests of the national security'; "the decision to grant or revoke a security clearance is committed to the discretion of the President by law") (quoting *Egan*, 484 U.S. at 527).

As a corollary to this principle, a federal district court may not order the Executive to grant opposing counsel or any other person access to classified information, and in keeping with this rule, the Ninth Circuit and other courts repeatedly have rejected demands that opposing counsel or parties be permitted access to classified material presented to the court *in camera* and *ex parte*. *See Pollard,* 705 F.2d at 1153 (rejecting plaintiff's claim that counsel should have been allowed access to materials reviewed *in camera* "where the claimed [FOIA] exemption involved

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[2] The following is the pertinent language of section 1806(f), on which Plaintiffs rely:

> [W]henever a motion or request is made by an aggrieved person . . . to discover or obtain applications or orders or other materials relating to electronic surveillance . . . the United States district court . . . shall, notwithstanding any other law, if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States, review in camera and *ex parte* the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted. In making this determination, the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance.

50 U.S.C. § 1806(f). Plaintiffs also rely on a similar provision in 50 U.S.C. § 1845(f).

is the national defense or foreign policy secrecy exemption"); *see also People's Mojahedin Org. of Iran*, 327 F.3d at 1242-43; *In re United States*, 1 F.3d 1251, WL 262658, *6 (Fed. Cir. 1993) (fact that certain of the defense contractor plaintiff's employees already had access to the classified material "does not divest the [Air Force Secretary] of his exclusive authority to control access to other persons or limit his right to assert the privilege to prevent any disclosure in a pending lawsuit"); *Salisbury v. United States*, 690 F.2d 966, 973-74 & n.3 (D.C. Cir. 1982) ("It is well settled that a trial judge called upon to assess the legitimacy of a state secrets privilege claim should not permit the requester's counsel to participate in an in camera examination of putatively privileged material"); *Weberman v. Nat'l Security Agency*, 668 F.2d 676, 678 (2d Cir. 1982) ("The risk presented by participation of counsel . . outweighs the utility of counsel, or adversary process . . . . Given these circumstances, [the district judge] was correct in . . . excluding counsel from the in camera viewing"); *Hayden v. Nat'l Security Agency*, 608 F.2d 1381, 1385-86 (D.C. Cir. 1979) ("it is not appropriate, and not possible without grave risk, to allow access to classified defense-related material to counsel who lack security clearance"); *El-Masri*, Slip Op. at 13-14 (finding that clearing counsel for access to classified information is "plainly ineffective where, as here, the entire aim of the suit is to prove the existence of state secrets").

Thus, Plaintiffs' suggestion that the Court can establish "safeguards" for Plaintiffs to review the classified material subject to the Government's assertion of the state secrets privilege is incorrect. *See* Pltfs' Br. at 4. Indeed, Plaintiffs fail to cite a single case in support of their assertion.[3] Such "safeguards" merely present the opportunity for further disclosure of classified

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[3] Plaintiffs' reliance on *DTM Research, L.L.C. v. AT&T Corp.*, 245 F.3d 327, 334 (4th Cir. 2001), for their claim that this Court may grant them access to the relevant classified information is misplaced. In that case, the Fourth Circuit upheld the Government's assertion of the state secrets privilege and excluded the use of any of the material covered by the privilege, but further determined that the exclusion of that material did not necessitate dismissal. *Id.* In making this determination, the court did not grant the Plaintiffs access to the classified material, as Plaintiffs request here. Moreover, as explained in the Government's assertion of the state secrets privilege, state secrets are so central to the allegations in Plaintiffs' Amended Complaint that any attempt to proceed will threaten disclosure of the privileged matters. *See* U.S. Mem. at 14-29.

information. *See, e.g., Sterling v. Tenet*, 416 F.3d 338, 348 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1052 (2006) ("Such procedures, whatever they might be, still entail considerable risk. . . . At best, special accommodations give rise to added opportunity for leaked information. At worst, that information would become public, placing covert agents and intelligence sources alike at grave personal risk."); *Halkin v. Helms*, 598 F.2d 1, 7 (D.C. Cir. 1978) ("*Halkin I*") ("However helpful to the court the informed advocacy of the Plaintiffs' counsel may be, we must be especially careful not to order any dissemination of information asserted to be privileged state secrets"; "[p]rotective orders cannot prevent inadvertent disclosure nor reduce the damage to national security of the nation which may result.").

Plaintiffs attempt to avoid the well-established rule that their counsel do not get access to classified material by relying on the judicial review mechanism set forth in section 1806(f) of the FISA. Their reliance on FISA, however, is mistaken. Significantly, Plaintiffs' claims are based on their contention that the alleged surveillance activities should have occurred under FISA, but allegedly did not, *see, e.g.,* Am. Compl. ¶¶ 90-99, whereas the review available under section 1806(f) is available only when electronic surveillance did, in fact, occur "under this chapter." 50 U.S.C. § 1806(f); *see id.* (authorizes court to review *in camera* and *ex parte* "the application, order and such other materials relating to the surveillance. . . ."). Thus, by their own allegations, section 1806(f) is inapplicable to Plaintiffs.

In any event, even if Plaintiffs claim that alleged surveillance occurred under the FISA, only "an aggrieved person" can utilize the statutory mechanism for seeking judicial review of the legality of FISA surveillance.[4] *See* 50 U.S.C. § 1806(f). But Plaintiffs cannot demonstrate that they are aggrieved persons under the FISA because the Government's privilege assertion covers any information tending to confirm or deny (a) the alleged intelligence activities, (b) whether AT&T was involved with any such activity, and (c) whether a particular individual's

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[4] FISA defines an "aggrieved person" as "a person who is the target of an electronic surveillance or any other person whose communications or activities were subject to electronic surveillance." 50 U.S.C. § 1801(k).

communications were intercepted as a result of any such activity. *See* U.S. Mem. at 17-18. Thus, because Plaintiffs lack the information necessary for them to demonstrate that they are aggrieved persons under the FISA, they lack standing to invoke that statute's judicial review provisions. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Moreover, in order to initiate judicial review under section 1806(f), Plaintiffs would have to show that electronic surveillance as defined by FISA, 50 U.S.C. § 1801(f), actually occurred. The Government's assertion of the state secrets privilege precludes any such showing as well.

Finally, even if section 1806(f) was applicable to Plaintiffs' allegations and arguably could be interpreted to require disclosure of information to uncleared counsel,[5] it should not be interpreted in that manner because doing so would be inconsistent with the President's powers to control access to classified information and with the power to assert the state secrets privilege.[6] *See Nadarajah v. Gonzales*, 443 F.3d 1069,1076 (9th Cir. 2006) ("[I]f an otherwise acceptable

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[5] Plaintiffs are incorrect that FISA allows them immediate access to the classified material submitted to the Court. Rather, the FISA review process requires the Court first to review (upon an assertion of privilege by the Attorney General) the relevant material *in camera, ex parte* "as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted." 50 U.S.C. § 1806(f). The FISA allows very limited disclosure of the relevant FISA material only where the Court – after conducting this *in camera, ex parte* review – determines that "such disclosure is necessary to make an accurate determination of the legality of the surveillance." *Id.* Indeed, since the enactment of FISA, every court to review the legality of a FISA electronic surveillance or physical search pursuant to *in camera, ex parte* review has upheld the Government's actions, and no court has disclosed the underlying materials to the moving party. *See, e.g.,United States v. Hamide*, 914 F.2d 1147 (9th Cir. 1990); *United States v. Squillacote*, 221 F.3d 542 (4th Cir. 2000); *United States v. Johnson*, 952 F.2d 565 (1st Cir. 1991); *United States v. Isa*, 923 F.2d 1300 (8th Cir. 1991); *United States v. Badia*, 827 F.2d 1458 (11th Cir. 1987); *United States v. Ott*, 827 F.2d 473 (9th Cir. 1987); *United States v. Duggan*, 743 F.2d 59 (2d Cir. 1984); *United States v. Belfield*, 692 F.2d 141 (D.C. Cir. 1982).

[6] Such an interpretation would also be inconsistent with, and could not override, the statutory privilege that the United States has asserted concerning the activities and information of the NSA. *See* Declaration of Keith B. Alexander, Director of the National Security Agency, U.S. Mem., Attachment 2, ¶ 6 (quoting section 6 of the National Security Agency Act of 1959, Public Law No. 86-36, codified as a note to 50 U.S.C. § 402: "[n]othing in this Act or any other law . . . shall be construed to require the disclosure of the organization or any function of the National Security Agency [or] any information with respect to the activities thereof. . . .") (emphasis added); *see also* Declaration of John D. Negroponte, Director of National Intelligence, U.S. Mem., Attachment 1(quoting 50 U.S.C. § 403-1(i)(1): "The Director of National Intelligence shall protect intelligence sources and methods from disclosure").

construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems.") (quoting *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001)) (citation omitted). In addition, when Congress intentionally seeks to restrict or regulate presidential action through legislation, it must make that intention clear. *See Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991) ("[l]egislation regulating presidential action . . . raises 'serious' practical, political, and constitutional questions that warrant careful congressional and presidential consideration") (citing *United States v. Bass*, 404 U.S. 336, 350 (1971)). Section 1806(f) does not set forth a clear intention to restrict the President's constitutionally-imposed authority to protect and control national security information in the context of this case. *See Egan*, 484 U.S. at 527.

III. PLAINTIFFS HAVE OFFERED NO VALID REASON FOR THE COURT TO FOREGO REVIEW OF THE *IN CAMERA, EX PARTE* MATERIALS.

Plaintiffs' remaining arguments – that the Court need not review the *in camera, ex parte* materials because Plaintiffs can prove their *prima facie* case based on the public record, *see* Pltfs' Br. at 5-9, that the Court's review of the *in camera, ex parte* materials is premature, *see id.* at 10-14, and that it would be appropriate to permit discovery into any certifications AT&T may have received from the United States, *see id.* at 14 – all reflect a fundamental misconception of the scope, nature and effect of the Government's invocation of the state secrets privilege.

Although the primary reasons for rejecting Plaintiffs' arguments are set forth in the Government's *in camera, ex parte* materials, several arguments that can be made on the public record demonstrate that Plaintiffs' position is without merit. Plaintiffs' primary argument for deferring review of the *in camera, ex parte* materials is that they "can sustain their *prima facie* case without resort to the classified materials." Pltfs' Br. at 5. But this argument ignores the well-established rule that if "the 'very subject matter of the action' is a state secret, then the court should dismiss the plaintiff's action based solely on the invocation of the state secrets privilege." *Kasza*, 133 F.3d at 1166 (citing *United States v. Reynolds*, 345 U.S. 1, 11 n.26 (1953)); *see also*

Totten v. United States, 92 U.S. 105, 107 (1875) ("[P]ublic policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated."); *see also Tenet v. Doe*, 544 U.S. 1, 8 (2005) (applying *Totten* to bar a suit brought by former Soviet double agents seeking to enforce their alleged employment agreements with the CIA and making clear that the *Totten* bar applies whenever a party's "success depends upon the existence of [a] secret espionage relationship with the government"). In such cases, the state secrets are "so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters." *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1241-42 (4th Cir. 1985). For the reasons discussed in the Government's *in camera, ex parte* filing, the very subject matter of Plaintiffs' allegations is a state secret and further litigation would inevitably risk their disclosure.

Even if the very subject matter of Plaintiffs' allegations were not state secrets, Plaintiffs are wrong to claim that they can make out a *prima facie* claim absent the excluded state secrets. As noted above, in order to prevail on any of their claims, Plaintiffs bear the burden of establishing standing and must, at an "irreducible constitutional minimum," demonstrate (1) an injury-in-fact, (2) a causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision. *Lujan,* 504 U.S. at 560-61. In meeting that burden, the named Plaintiffs must demonstrate an actual or imminent – not speculative or hypothetical – injury that is particularized as to them; they cannot rely on alleged injuries to unnamed members of a purported class. And to obtain prospective relief, Plaintiffs must show that they are "immediately in danger of sustaining some direct injury" as the result of the challenged conduct. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983); *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974).

As demonstrated in the Government's public briefs and declarations, Plaintiffs cannot prove these jurisdictional elements without information covered by the state secrets assertion.

The Government's privilege assertion covers any information that tends to confirm or deny (a) the alleged intelligence activities, (b) whether AT&T was involved with any such activity, and (c) whether a particular individual's communications were intercepted as a result of any such activity. *See* Declaration of John D. Negroponte, Director of National Intelligence, U.S. Mem., Attachment 1 ("Negroponte Decl."), ¶¶ 11-12. Without these facts – which must be removed from the case as a result of the state secrets assertion – Plaintiffs cannot establish any alleged injury that is fairly traceable to AT&T.[7] Thus, regardless of whether they adequately allege such facts, Plaintiffs ultimately will not be able to prove injury-in-fact or causation—and thus cannot establish this Court's jurisdiction, let alone sustain a *prima facie* case, without information subject to the state secrets privilege.[8]

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[7] Because jurisdictional issues must be examined as a threshold question, *see, e.g., Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998), if the Court were to determine on the basis of the public record that Plaintiffs failed to establish their standing because, for example, Plaintiffs have failed to meet their burden to do so as a matter of law, or because it is clear from the public record that, in light of United States' inability to confirm or deny whether any individual Plaintiff is the subject of surveillance, the Court may find it unnecessary to review the United States' *in camera, ex parte* submissions, and may dismiss this case on that ground alone. Otherwise, however, review of the materials submitted *in camera* and *ex parte* is necessary to adjudicate the state secrets issues posed by this case. As a result, the Court could dismiss this case on the basis of the Government's public assertion of the state secrets privilege.

[8] As the United States noted in its public brief, to the extent Plaintiffs challenge the Terrorist Surveillance Program ("TSP"), *see, e.g.,* Am. Compl. 32-37, the allegations in the Complaint are insufficient on their face to establish standing even apart from the state secrets issue because Plaintiffs fail to demonstrate that they fall anywhere near the scope of that program. Plaintiffs do not claim to be, or to communicate with, members or affiliates of al Qaeda – indeed, Plaintiffs expressly *exclude* from their purported class any foreign powers or agents of foreign powers, "including without limitation anyone who knowingly engages in sabotage or international terrorism, or activities that are in preparation therefore." Am. Compl. ¶ 70. The named Plaintiffs thus are in no different position from any other citizen or AT&T subscriber who falls *outside* the narrow scope of the TSP but nonetheless disagrees with the program. Such a generalized grievance is clearly insufficient to support either constitutional or prudential standing to challenge the TSP. *See Halkin v. Helms*, 690 F.2d 977, 1001-03 (D.C. Cir. 1982) ("*Halkin II*") (holding that individuals and organizations opposed to the Vietnam War lacked standing to challenge intelligence activities because they did not adequately allege that they were (or immediately would be) subject to such activities; thus, their claims were "nothing more than a generalized grievance against the intelligence-gathering methods sanctioned by the President") (internal quotation marks and citation omitted); *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375, 1380 (D.C. Cir. 1984) (rejecting generalized challenge to alleged unlawful surveillance). To the extent Plaintiffs allege classified intelligence activities

Plaintiffs' inability to sustain a *prima facie* case is not limited to their inability to prove their standing. More generally, as the Government explained in its public brief, adjudicating each claim in the Amended Complaint would require confirmation or denial of the existence, scope, and potential targets of alleged intelligence activities, as well as AT&T's alleged involvement in such activities.[9] Because such information cannot be confirmed or denied without causing exceptionally grave damage to the national security, Plaintiffs' attempt to make out a *prima facie* case would run into privileged information. Where, as here, a plaintiff cannot make out a *prima facie* case in support of its claims absent the excluded state secrets, the case must be dismissed. *See Kasza*, 133 F.3d at 1166; *Halkin II*, 690 F.2d at 998-99; *Fitzgerald*, 776 F.2d at 1240-41.

Plaintiffs' argument also fails to recognize that litigation is not limited to determining whether a plaintiff can establish a *prima facie* case. For that very reason, courts have recognized that if the state secrets privilege "'deprives the *defendant* of information that would otherwise give the defendant a valid defense to the claim, then the court may grant summary judgment to the defendant.'" *Kasza*, 133 F.3d at 1166 (quoting *Bareford v. General Dynamics Corp.*, 973 F.2d 1138, 1141 (5th Cir. 1992)); *see also Molerio v. Fed. Bureau of Investigation,* 749 F.2d 815, 825 (D.C. Cir. 1984) (granting summary judgment where state secrets privilege precluded

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beyond the TSP, Plaintiffs could not prove such allegations in light of the state secrets assertion.

[9] As the United States demonstrated in its public brief, to prove their FISA claim (as alleged in Count I), Plaintiffs would have to show that AT&T intentionally acquired, under color of law and by means of a surveillance device within the United States, the contents of one or more wire communications to or from Plaintiffs. *See* Am Compl. ¶¶ 93–94; 50 U.S.C. §§ 1801(f), 1809, 1810. Likewise, to prove their claim under 18 U.S.C. § 2511 (as alleged in Count III), Plaintiffs would have to demonstrate that AT&T intentionally intercepted, disclosed, used, and/or divulged the contents of Plaintiffs' wire or electronic communications. *See* Am. Compl. ¶¶ 102–07. Plaintiffs' claims under 47 U.S.C. § 605, 18 U.S.C. § 2702, and Cal. Bus. & Prof. Code §§ 17200, *et seq*, all require similar proof: the acquisition and/or disclosure of Plaintiffs' communications and related information. And Plaintiffs must also prove, for each of their statutory claims, that any alleged interception or disclosure was not authorized by the Government. Despite Plaintiffs' unsupported assumption that they could demonstrate some or all of these necessary facts on the basis of the public record, the Government's submissions make clear that any information tending to confirm or deny the alleged activities, or any alleged AT&T involvement, is subject to the state secrets privilege. *See* Negroponte Decl. ¶¶ 11-12.

the Government from using a valid defense). In this case – as noted in the United States' public brief and as demonstrated in the *in camera, ex parte* materials – neither AT&T nor the Government could defend this action on the grounds that, among other things, the activities alleged by the Complaint (i) were authorized by the Government; (ii) did not require a warrant under the Fourth Amendment; (iii) were reasonable under the Fourth Amendment; or (iv) were otherwise authorized by law. *See* U.S. Mem. at 14-29.

Plaintiffs suggest that the Court could adjudicate whether AT&T received any certification or authorization from the Government relating to the alleged surveillance activity. They are mistaken. The United States has explained that the state secrets assertion "covers any information tending to confirm or deny" whether "AT&T was involved with any" of the "alleged intelligence activities." *See* U.S. Mem. at 17-18. Clearly, the existence or non-existence of any certification or authorization by the Government relating to any AT&T activity would be information tending to confirm or deny AT&T's involvement in any alleged intelligence activity. Thus, any such activity would fall within the Government's state secrets assertion, and the Court could not adjudicate, or allow discovery regarding, whether any Government certification or authorization exists without considering the Government's assertion of the state secrets privilege. *See id.* at 23.[10]

Finally, Plaintiffs argue that before the Court can review the *in camera, ex parte* materials, the Government must make a more specific – *i.e.*, public – showing about the information subject to the state secrets privilege. But requiring such a showing would be improper where, as here, it would "force 'disclosure of the very thing the privilege is designed to protect.'" *Ellsberg v. Mitchell*, 709 F.2d 51, 63 (D.C. Cir. 1983) (quoting *United States v. Reynolds*, 345 U.S. 1, 8 (1953)); *see also* 709 F.2d at 63 (noting the Court's "[f]ear" that "an

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[10] Plaintiffs argue that 47 U.S.C. § 2511(2)(a)(ii) actually requires discovery of any certifications. That is simply wrong. That provision precludes any entity that has received such a certification from disclosing that certification "except as may otherwise be required by legal process." *Id.* Moreover, any "legal process" includes the determination of whether any privilege, including the state secrets privilege or any statutory privilege, prohibits such disclosure.

insufficient public justification result in denial of the privilege entirely might induce the government's representatives to reveal some material that, in the interest of national security, ought not to be uncovered"; further noting the "considerable variety in the situations in which a state secrets privilege may be fairly asserted"). As DNI Negroponte states in his Public Declaration, "any further elaboration on the public record concerning these matters [covered by his Declaration] would reveal information that could cause the very harms my assertion of the state secrets privilege is intended to prevent." *See* Negroponte Decl. ¶¶ 11-12. In light of this determination by the nation's highest-ranking intelligence official, the Government cannot say more publicly, and should not – and cannot – be penalized in this litigation because it has done nothing other than take the steps necessary to protect the national security of the United States.[11]

Not surprisingly, Plaintiffs are unable to point to any state secrets case in which the court has refused to review *in camera, ex parte* materials on the ground that the Government had insufficiently described the state secrets on the public record. Instead, *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973) (*en banc*), on which Plaintiffs rely for the proposition that a more particularized public showing must be made before a court conducts an *in camera* review of privileged materials, is a case that involving the assertion of *executive privilege,* not the state secrets privilege.[12] *Id.* at 715-16.

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[11] *See, e.g., In re United States*, 872 F.2d 472, 476 (D.C. Cir. 1989) ("Notions of sovereign immunity preclude any further adverse consequence to the government, such as alteration of procedural or substantive rules."); *Salisbury*, 690 F.2d at 975 ("when the government is defendant . . . an adverse finding cannot be rendered against it as the price of asserting an evidentiary privilege"); *Halkin I,* 598 F.2d at 10 (rejecting as "faulty" the premise "that the defendants should not be permitted to avoid liability for unconstitutional acts by asserting a privilege which would prevent plaintiffs from proving their case").

[12] The executive privilege, like the state secrets privilege, is constitutionally grounded. The executive privilege, however, protects the President's generalized interest in the confidentiality of his communications, and, as *Nixon* establishes, is a qualified privilege (at least in criminal cases). *See* 487 F.2d at 716. The state secrets privilege, on the other hand, is a privilege that directly derives from the President's constitutional responsibility to determine, based on his particular expertise, which disclosures will result in harm to the national security. Once properly invoked, the state secrets privilege is absolute. *In re Under Seal*, 945 F.2d 1285, 1288 (4th Cir. 1991); *see also Halkin II*, 690 F.2d at 980 ("[S]ecrets of state – matters the revelation of which reasonably could be seen as a threat to the military or diplomatic interest of

Instead, Plaintiffs try to contrast the Government's public filings in this case with the materials filed on the public record in *Kasza v. Browner*, 133 F.3d 1159 (9th Cir. 1998). Although there is no indication in *Kasza* (and no basis in law or logic) to suggest that the Court was creating a minimum requirement for public descriptions of state secrets assertions, in this case the Government has made a similar public showing to that made in *Kasza.* In *Kasza,* the declarant identified categories of information that were validly classified, describing those categories in general terms, such as, for example, "program names"; "missions"; "capabilities"; "intelligence sources and methods"; "security sensitive environmental data"; and "military plans, weapons or operations." *Id.* at 1168-69; *see also Edmonds*, 323 F. Supp. 2d at 74 (upholding assertion of state secrets privilege and granting defendant's motion to dismiss where the Attorney General concluded that "further disclosure of the information underlying this case, including the nature of the duties of plaintiff or the other contract translators at issue in this case reasonably could be expected to cause serious damage to the national security interests of the United States" and finding this assertion "similar to the one submitted to the court in *Kasza*").

The United States' public filings in this case are no less specific than the public submissions made in *Kasza* and *Edmonds.* For example, DNI Negroponte states in his Public Declaration that to disclose additional details regarding the Terrorist Surveillance Program beyond the facts already disclosed by the President would disclose "classified intelligence information" and reveal "intelligence sources and methods," as a result of which adversaries of the United States would be able "to avoid detection by the U.S. Intelligence Community and/or take measures to defeat or neutralize U.S. intelligence collection, posing a serious threat of damage to the United States' national security interests." Negroponte Decl. ¶ 11; *see also El-Masri*, Slip Op. at 10-11 (finding that even where Government had made "a general admission that rendition exists," the Government "validly claimed as state secrets" the "operational details of the extraordinary rendition program"). With respect to Plaintiffs' allegations regarding other

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the nation – are absolutely privileged from disclosure in the courts.").

purported activities of the NSA, including allegations about NSA's purported involvement with AT&T, DNI Negroponte further states that the United States can neither confirm nor deny allegations concerning "intelligence activities," "sources," "methods," "relationships," or "targets." Negroponte Decl. ¶ 12. And DNI Negroponte goes on to note that "disclosure of those who are targeted by such activities would compromise the collection of intelligence information just as disclosure of those who do are not targeted would reveal to adversaries that certain communications channels are secure or, more broadly, would tend to reveal the methods being used to conduct surveillance." *Id.*

In sum, where (as here) requiring further public descriptions of the state secrets assertion would "force 'disclosure of the very thing the privilege is designed to protect,'" *Ellsberg*, 709 F.2d at 63 (citing *Reynolds*, 345 U.S. at 8), and where (as here) the Government has made a public showing similar to that in *Kasza*, 133 F.3d at 1168-69, there is no reason for the Court to require further public disclosures before reviewing the *in camera, ex parte* materials.

CONCLUSION

For the reasons stated herein, the Court should consider the United States' *in camera, ex parte* submissions and rule on the Government's assertion of the state secrets privilege and its Motion to Dismiss or, in the Alternative, for Summary Judgment before taking any further action in this case.

Respectfully submitted,

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Attorneys for Intervenor Defendant United States

DATED: May 24, 2006

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **UNITED STATES' RESPONSE TO PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN RESPONSE TO THE COURT'S MAY 17, 2006 MINUTE ORDER** will be served by means of the Court's CM/ECF system, which will send notifications of such filing to the following:

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

KHALED EL-MASRI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 1:05cv1417**
	)	
GEORGE TENET, et al.,	)	
	)	
Defendants.	)	

ORDER

Plaintiff in this civil suit claims to be an innocent victim of the United States' "extraordinary rendition" program[1] and seeks redress from the former Director of the Central Intelligence Agency (CIA), private corporations allegedly involved in the program, and unknown employees of both the CIA and the private corporations. At issue is whether the assertion of the state secrets privilege by the United States is valid, and, if so, whether this privilege prevents this case from proceeding.

I.

A. Facts[2]

Plaintiff Khaled El-Masri is a German citizen of Lebanese descent. His allegations begin

[1]The complaint alleges that since the early 1990s the CIA has been operating interrogation centers in countries where the United States believes legal safeguards do not constrain efforts to interrogate suspected terrorists. This practice is commonly known as "extraordinary rendition."

[2]As appropriate when considering a motion to dismiss pursuant to Rule 12(b)(6), Fed.R.Civ.P., the facts recited here are derived from the complaint and assumed true. *Randall v. United States*, 30 F.3d 518, 522 (4th Cir.1994) (plaintiff's version of facts accepted as true at threshold dismissal stage).

on New Years Eve 2003 when he claims he was seized by Macedonian authorities while attempting to cross the border between Serbia and Macedonian. Following his abduction, El-Masri alleges the Macedonian authorities imprisoned him in a Skopje hotel room for 23 days, refusing to let him contact a lawyer, a German consular officer, a translator or his wife, and interrogating him continuously about his alleged association with Al Qaeda, an association he consistently denied. After thirteen days of this treatment, El-Masri alleges he commenced a hunger strike to protest his detention, and he did not eat again in Macedonia.

On January 23, 2004, El-Masri claims several men in civilian clothes entered his hotel prison room. They forced El-Masri to make a statement that he had not been mistreated by his captors, and would shortly be flown back to Germany. After his captors videotaped this statement, El-Masri states he was blindfolded and driven to what sounded like an airstrip approximately one hour from Skopje. Still blindfolded, he alleges he was led to a building where he was beaten, stripped of his clothing, and sodomized with a foreign object. He further alleges he was dragged naked to a corner of the room where his captors removed his blindfold only for him to be blinded again by a camera's flash. When he regained his sight, he claims he saw seven or eight men dressed in black and wearing black ski masks. El-Masri contends that these men were members of a CIA "black renditions" team, operating pursuant to unlawful CIA policies at the direction of defendant Tenet. These men, he alleges, dressed him in a diaper, a tracksuit and earmuffs. He claims he was then blindfolded, shackled and dragged to an airplane where his captors injected him with a sedative that rendered him nearly unconscious. In this drugged state, he states he was secured inside the aircraft and thereafter only dimly remembers the airplane landing once and taking off again before finally depositing him in a place that El-Masri knew from the air temperature was not Germany. Indeed, El-Masri was to discover later that he had

been flown to Kabul, Afghanistan.[3]

Upon reaching Kabul, El-Masri claims he was again beaten and then placed in a small, cold cell. He contends this prison was a CIA-run facility known as the "Salt Pit," an abandoned brick factory north of the Kabul business district. El-Masri alleges he was detained in the "Salt Pit" for the next four months, during which time he was repeatedly interrogated about his alleged association with terrorists, including September 11 conspirators Mohammed Atta and Ramzi Binalshibh. He points out that although the prison facility was nominally run by Afghans, two of his interrogators identified themselves as Americans. He claims he repeatedly beseeched his captors to contact the German government on his behalf, but these requests were denied.

In March, El-Masri contends he and several other inmates commenced another hunger strike to protest their continued confinement. After 27 days without food, El-Masri states he was brought before two unmasked persons he believes were CIA agents in charge of the "Salt Pit." These men refused to accede to El-Masri's demands to release him, to charge him with a crime, or to allow him to contact a German official. Although the American official denied these requests, El-Masri contends the official conceded to El-Masri that El-Masri's detention was a mistake, but that he could not agree to El-Masri's release without permission from Washington. At this point, El-Masri states he was returned to his cell where he continued his hunger strike. After ten more days without nourishment, El-Masri asserts his captors fed him forcibly by

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[3]In his complaint, El-Masri alleges that documentary evidence supports his recollection. He claims aviation documents show that late on the evening of January 23, 2004 a Boeing business jet owned by defendant Premier Executive Transport Services, Inc. (PETS) and operated by defendant Aero Contractors Limited (ACL) flew from Skopje, Macedonia to Kabul, Afghanistan with a brief stop in Baghdad, Iraq. This documentary evidence is attached to the plaintiff's memorandum of points and authorities in opposition to the United States' motion to dismiss.

inserting tubes into his nose and his mouth through which they pumped liquid sustenance. Soon thereafter, El-Masri states he was given canned food and books to read. El-Masri alleges that his hunger strike had a deleterious effect on his health; he lost sixty pounds over the course of his detention.

El-Masri contends that the CIA had determined soon after his arrival in Afghanistan that they were detaining an innocent man. Further, he contends that Tenet knew this fact by April 2004 and that Secretary of State Condoleeza Rice knew by early May that El-Masri was the victim of mistaken identity.[4] Nonetheless, El-Masri says he remained imprisoned in Kabul until May 28, 2004, after which he was flown in a private jet, again blindfolded, from Kabul to Albania, where he was deposited by his captors on the side of an abandoned road. With the assistance of Albanian authorities, El-Masri eventually made his way back to his home in Germany only to find that his wife and four children, believing he had abandoned them, had left Germany to live in Lebanon. El-Masri asserts that he remains deeply traumatized by his abduction and treatment during his detention.

B. Proceedings

The complaint in this case was filed on December 6, 2005, naming the following defendants: (1) former Director of the CIA George Tenet, (2) certain unknown agents of the CIA (John Does 1-10) (3) PETS, (4) ACL, (5) Keeler and Tate Management (KTM),[5] (6) and certain

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[4]El-Masri also intimates that the German government was aware of his captivity. In addition to his American interrogators, El-Masri describes meeting a German speaker who identified himself only as "Sam." "Sam" asked El-Masri many of the same questions as his American interrogators, but ultimately informed him that he would be released only if he agreed never to discuss what had happened over the last five months.

[5]According to El-Masri, the aircraft used in his transfer from Macedonia to Afghanistan was sold by PETS to KTM on or about November 14, 2004, shortly after reports of the aircraft's

unknown employees of the defendant corporations (John Does 11-20). Tenet is sued in his individual capacity for authorizing the unknown CIA agents' actions with actual or constructive knowledge that such actions were illegal, and John Does 1-10 are sued for their actual participation in El-Masri's treatment. El-Masri sues the American corporations PETS, ACL and KTM, as well as their employees, for their participation in the CIA's "extraordinary rendition" that victimized El-Masri. El-Masri contends that these corporate defendants are liable for authorizing the use of aircraft they owned or operated for the transfer of suspected terrorists to detention facilities despite the corporate defendants' knowledge that the suspected terrorists, including El-Masri, would be detained incommunicado, tortured and subjected to other cruel treatment.

El-Masri asserts three separate causes of action. The first claim is brought against Tenet and the unknown CIA agents pursuant to the cause of action recognized by the Supreme Court in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for violations of El-Masri's Fifth Amendment right to due process. Specifically, El-Masri contends that Tenet and John Does 1-10 violated the Due Process Clause's prohibition against anyone acting under color of U.S. law (1) to subject any person held in U.S. custody to treatment that "shocks the conscience," or (2) to deprive any person of liberty in the absence of legal process. El-Masri's second cause of action is brought against all defendants pursuant to the Alien Tort Statute (ATS) for violations of international legal norms prohibiting prolonged

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involvement in the "extraordinary rendition" program. El-Masri contends that this transfer was fraudulent because it was done to avoid potential liability for PETS' acts. El-Masri contends that KTM is the successor to PETS, carrying on the same business and operations and utilizing the same personnel and assets as PETS.

arbitrary detention.[6] Likewise, El-Masri's final cause of action is brought pursuant to the ATS for each defendant's violation of international legal norms prohibiting cruel, inhuman, or degrading treatment.

On March 8, 2006, the United States filed a statement of interest and a formal claim of the state secrets privilege. In support of its formal claim of privilege the United States submitted both an unclassified and a classified *ex parte* declaration of the Director of the CIA (DCI). Thereafter, on March 13, 2006, the United States moved to intervene in the suit pursuant to Rule 24(a), Fed.R.Civ.P. in order to protect its interests in preserving its state secrets. The motion was granted on March 21, 2006. *El-Masri v. Tenet*, Case No. 1:05cv1417 (E.D.Va. March 21, 2006). Concurrent with the motion to intervene, the United States moved for dismissal or for summary judgment on the ground that maintenance of the suit would invariably lead to disclosure of its state secrets. The parties presented oral argument on this motion on May 12, 2006.

II.

The United States' dismissal motion and the plaintiff's opposition raise important threshold issues, the resolution of which requires a two step analysis. First, it is necessary to determine whether the United States' assertion of the state secrets privilege is valid in this case. If not, the inquiry is over and the United States' dismissal motion must be denied. On the other hand, if the assertion of the privilege is valid, then the second step in the analysis requires

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[6]Codified at 28 U.S.C. § 1350, the ATS provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The Supreme Court in *Sosa v. Alvarez Machain*, 542 U.S. 692 (2004), has interpreted this statute as providing district courts jurisdiction over civil suits brought by aliens for violations of a limited set of well-recognized norms of international law. *Id.* at 724. The Supreme Court did not identify precisely which well-recognized norms of international law are actionable under the ATS.

determining whether dismissal is required or whether the case may nonetheless proceed in some fashion that adequately safeguards any state secrets.

A.

Determining whether the state secrets privilege has been validly asserted requires an understanding of the nature and purpose of the privilege and of who may assert it. The state secrets privilege is an evidentiary privilege derived from the President's constitutional authority over the conduct of this country's diplomatic and military affairs and therefore belongs exclusively to the Executive Branch. *See United States v. Reynolds*, 345 U.S. 1., 7-8 (1953). As such, it must be formally asserted by the head of the Executive Branch agency with control over the state secrets at issue, and then only after that person has personally considered the matter. *See id.* If validly asserted the state secrets privilege permits the government to "block discovery in a lawsuit of any information that, if disclosed, would adversely affect national security." *Ellsberg v. Mitchell*, 709 F.2d 51, 56 (D.C.Cir. 1983). More particularly, "the various harms, against which protection is sought by invocation of the privilege, include impairment of the nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments." *In re Under Seal*, 945 F.2d 1285, 1287 n.2 (4th Cir. 1991) (quoting *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C.Cir.1983)); *see also Sterling v. Tenet*, 416 F.3d 338, 346 (4th Cir. 2005). Given the vitally important purposes it serves, it is clear that while the state secrets privilege is commonly referred to as "evidentiary" in nature, it is in fact a privilege of the highest dignity and significance.

As noted, the privilege belongs solely to the Executive Branch and must be formally asserted by the head of the Executive Branch agency with responsibility for, and control over, the state secrets involved. Once it is determined that the appropriate officer has invoked the

privilege, the next step in the judicial inquiry into the validity of the assertion is to determine whether the information for which the privilege is claimed qualifies as a state secret. Importantly, courts must not blindly accept the Executive Branch's assertion to this effect, but must instead independently and carefully determine whether, in the circumstances, the claimed secrets deserve the protection of the privilege. *Reynolds*, 345 U.S. at 10. This determination requires a court to consider whether "a responsive answer . . . or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Sterling*, 416 F.3d at 343 (quoting *Reynolds*, 345 U.S. at 9). In other words, this part of the inquiry focuses on whether the United States has made an adequate showing that disclosure of claimed privileged material would injure national security.

How searching the judicial inquiry must be depends on the particular circumstances of the case, for it is well-settled that the depth of a court's inquiry increases relative to the adverse party's need for the information the government seeks to protect. *Reynolds*, 345 U.S. at 11; *Sterling*, 416 F.3d at 343. If the information is peripheral to the adverse party's claims, the court's inquiry need not be as searching as it must be in cases where the claimed state secrets are at the core of the suit. In those cases where the claimed state secrets are at the core of the suit and the operation of the privilege may defeat valid claims, courts must carefully scrutinize the assertion of the privilege lest it be used by the government to shield "material not strictly necessary to prevent injury to national security." *Ellsberg*, 709 F.2d at 58. But, in undertaking this inquiry, courts must also bear in mind the Executive Branch's preeminent authority over military and diplomatic matters and its greater expertise relative to the judicial branch in

predicting the effect of a particular disclosure on national security.[7] Accordingly, the judiciary must accept the executive branch's assertion of the privilege whenever its independent inquiry discloses a "*reasonable danger* that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." *Reynolds*, 345 U.S. at 10 (emphasis added). Importantly, once the court is satisfied that any disclosure of the putative secrets "might have a deleterious effect on national security, 'the claim of the privilege will be accepted without requiring further disclosure.'" *Id.* (quoting *Reynolds*, 345 U.S. at 9).

Finally, it is important to note that, unlike other privileges, the state secrets privilege is absolute and therefore once a court is satisfied that the claim is validly asserted, the privilege is not subject to a judicial balancing of the various interests at stake.[8] Thus, the adverse party's need for privileged information affects only the depth of the judicial inquiry into the validity of the assertion and not the strength of the privilege itself, for "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." *Reynolds*, 345 U.S. at 11.

Given these governing principles, there is no doubt that the state secrets privilege is validly asserted here. To begin with, the privilege has been formally asserted by the appropriate

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[7]*See United States v. Nixon*, 418 U.S. 683, 710 (1974) (claims of privilege for military or diplomatic secrets "traditionally shown the utmost deference."); *see also C. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.").

[8]*See In re Under Seal*, 945 F2d 1285, 1288 (4th Cir. 1991) ("the privilege is absolute when properly invoked"); *United States v. Halkin*, 690 F.2d 977, 990 (D.C.Cir. 1982) ("[S]ecrets of state—matters the revelation of which reasonably could be seen as a threat to the military or diplomatic interests of the nation—are absolutely privileged from disclosure in the courts.").

Executive Branch official, the DCI, who has done so by submitting an *ex parte* classified declaration labeled "JUDGE'S EYES ONLY," and also an unclassified declaration for the public record. The latter document states in general terms that damage to the national security could result if the defendants in this case were required to admit or deny El-Masri's allegations. The former is a detailed explanation of the facts and reasons underlying the assertion of the privilege. It is, of course, inappropriate to reveal here the substance of the DCI's classified *ex parte* declaration, for to do so would compromise "the very thing the privilege is designed to protect." *Reynolds*, 345 U.S. at 8. It is enough to note here that the substance of El-Masri's publicly available complaint alleges a clandestine intelligence program, and the means and methods the foreign intelligence services of this and other countries used to carry out the program. And, as the public declaration makes pellucidly clear, any admission or denial of these allegations by defendants in this case would reveal the means and methods employed pursuant to this clandestine program and such a revelation would present a grave risk of injury to national security. This conclusion finds firm support in the details disclosed in the DCI's classified *ex parte* declaration.

Plaintiff's argument that government officials' public affirmation of the existence of a rendition program[9] undercuts the claim of privilege misses the critical distinction between a general admission that a rendition program exists, and the admission or denial of the specific facts at issue in this case. A general admission provides no details as to the means and methods

[9]*See* Declaration of Stephen Macpherson Watt in Support of Plaintiff's Opposition to the United States' Motion to Dismiss or, in the Alternative, for Summary Judgment ("Watt Decl.") Exh. A.

employed in these renditions, or the persons, companies or governments involved.[10] Nor is the government's assertion of the privilege here intended to protect from disclosure this general information. Instead, the government seeks to protect from disclosure the operational details of the extraordinary rendition program, and these details are validly claimed as state secrets. Accordingly, El-Masri's argument that generalized public admissions somehow undercut the government's right to protect the specific details of the "extraordinary rendition" program are unavailing.

Nor is the strength of the government's privilege somehow diminished by either El-Masri's complaint or the numerous media, government or other reports discussing renditions, often relying largely on El-Masri's allegations.[11] It is self-evident that a private party's allegations purporting to reveal the conduct of the United States' intelligence services overseas are entirely different from the official admission or denial of those allegations. Furthermore, neither the United States' claim of privilege, nor a judicial acceptance of that claim is tantamount to an admission that El-Masri's factual allegations are true. The applicability of the state secrets privilege is wholly independent of the truth or falsity of the complaint's allegations. While a public admission of the alleged facts would obviously reveal sensitive means and methods of the country's intelligence operations, a denial of the alleged facts would also be damaging, as it may raise an inference of veracity in those cases where the government does not deny similarly

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[10]This distinction between the general and the particular is exemplified by Secretary of State Rice's public comments concerning El-Masri's claims in which she affirmed the existence of the program but declined to comment on the specific facts alleged by El-Masri. *See* Watt Decl. Exh. B. Although not revealing any details about the program, she did say in response to a question about El-Masri's allegations that "when and if mistakes are made, we work very hard to rectify them." *Id.*

[11]*See generally id.*

sensitive allegations but asserts the state secrets privilege instead. For this reason, the CIA has appropriately adopted the policy of neither admitting nor denying allegations regarding the means, methods, persons, entities or countries used in its foreign intelligence operations. In light of this sensible policy, and on the basis of the DCI's public and classified *ex parte* declarations, the Court finds the United States' privilege is validly asserted in this case.

B.

If a court finds that the state secrets privilege has been validly asserted, it must then determine whether the case must be dismissed to prevent public disclosure of those secrets, or whether special procedural mechanisms may be adequate to prevent disclosure of the state secrets. Resolution of this issue will depend on the centrality of the privileged material to the claims or defenses asserted by either party. As the Fourth Circuit has recently put it, "when the very subject of the litigation is itself a state secret," and where there is "no way [the] case could be tried without compromising sensitive military secrets, a district court may properly dismiss the plaintiff's case." *Sterling*, 416 F.3d at 347-48 (quoting *Fitzgerald v. Penthouse Int'l., Ltd.*, 776 F.2d 1236, 1243 (4th Cir. 1985)) (internal quotations omitted). Thus, while it is well-settled that "dismissal is appropriate only when no amount of effort and care on the part of the court and the parties will safeguard privileged material," it is equally well-settled that "where the very question on which a case turns is itself a state secret, or the circumstances make clear that sensitive military secrets will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters, dismissal is the appropriate remedy." *Id.* at 348 (internal quotations and citations omitted). In sum, the question is whether El-Masri's claims could be fairly litigated without disclosure of the state secrets absolutely protected by the United States' privilege.

In the instant case, this question is easily answered in the negative. To succeed on his claims, El-Masri would have to prove that he was abducted, detained, and subjected to cruel and degrading treatment, all as part of the United States' extraordinary rendition program.[12] As noted above, any answer to the complaint by the defendants risks the disclosure of specific details about the rendition argument. *See* Rule 8(b), Fed.R.Civ.P. ("A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies."). These threshold answers alone would reveal considerable detail about the CIA's highly classified overseas programs and operations.

Finally, the fact that any answer to the complaint would potentially disclose information protected by the privilege refutes El-Masri's argument that special procedures short of dismissal would be adequate to protect the government's validly asserted privilege. To be sure, special procedures, such as clearing defense counsel for access to classified information and the application of the Classified Information Procedures Act (CIPA), 18 U.S.C. App. 3, could be, and indeed have been, used effectively in appropriate circumstances in other cases. These are not appropriate circumstances. Such procedures are plainly ineffective where, as here, the entire aim of the suit is to prove the existence of state secrets. As the Fourth Circuit recognized in *Sterling*, where "the whole object of the suit and of the discovery is to establish a fact that is a state secret" special procedures are inadequate. 416 F.3d at 348. Precisely this is the case here. Further, even

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[12]For purposes of the present analysis it is appropriate to assume that El-Masri has stated a cognizable claim; the strength or weakness of his legal claims is immaterial to the resolution of the state secrets privilege dismissal motion. It is nonetheless worth noting that El-Masri's legal claims are novel and might well be vulnerable to dismissal pursuant to Rule 12(b)(6), Fed.R.Civ.P., quite apart from the application of the state secrets privilege. *See generally* Scott J. Borrowman, *Sosa v. Alvarez-Machain and Abu Ghraib – Civil Remedies for Victims of Extraterritorial Torts by U.S. Military Personnel and Civilian Contractors*, 2005 B.Y.U.L.Rev. 371 (2005).

assuming some mechanism might be used to avoid disclosure of state secrets in the answer, it is clear that the use of special procedures during discovery and trial would be wholly inadequate to preserve the United States' privilege. The Fourth Circuit also addressed this point in *Sterling* where it noted that:

> Such procedures, whatever they might be, still entail considerable risk. Inadvertent disclosure during the course of a trial – or even *in camera* – is precisely the sort of risk that *Reynolds* attempts to avoid. At best, special accommodations give rise to added opportunity for leaked information. At worst, that information would become public, placing covert agents and intelligence sources alike at grave personal risk.

Sterling, 416 F.3d 338. Thus, while dismissal of the complaint deprives El-Masri of an American judicial forum for vindicating his claims, well-established and controlling legal principles require that in the present circumstances, El-Masri's private interests must give way to the national interest in preserving state secrets. The United States' motion to dismiss must therefore be granted.

C.

The United States' dismissal motion also argues that the recently reaffirmed so-called *Totten* bar renders this case non-justiciable. *See Tenet v. Doe*, 125 S.Ct. 1230, 1237 (2005). This argument is problematic in certain respects, but in the end need not be reached.

The *Totten* bar is quite distinct from the state secrets privilege; it is not a privilege or a rule of evidence; it is instead a rule of non-justiciability that deprives courts of their ability to hear "suits against the Government based on covert espionage agreements" even in the absence of a formal claim of privilege. *Id.* at 1233. It is properly invoked only in those cases "where success depends upon the existence of [a] secret espionage relationship with the government," or where the government cannot openly "admit or deny [a] fact that [is] central to the suit." *Id.* at 1236-37.

In *Totten*, the Supreme Court forbade the suit of a self-proclaimed Civil War secret agent attempting to enforce the secret espionage agreement he claimed he had negotiated with President Lincoln on the ground that "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential." *See Totten v. United States*, 92 U.S. 105, 107 (1876). *See also Weinberger v. Catholic Action of Ha./Peace Ed. Project*, 454 U.S. 139, 146-47 (1981) (holding that whether the Navy had complied with the National Environmental Policy Act (NEPA) with respect to its storage of nuclear materials was "beyond judicial scrutiny"). In *Tenet*, the Supreme Court applied the *Totten* bar to a suit brought by former Soviet double agents seeking to enforce their agreement with the CIA, but made clear that the bar was not limited to contract actions, but applies whenever a party's "success depends upon the existence of [a] secret espionage relationship with the government." *Tenet*, 125 S.Ct. at 1236.

It is debatable whether the *Totten* bar would apply to the present case. It is true that El-Masri's allegations here concern the existence of several "secret espionage relationships" between the United States and both certain foreign governments and the corporate defendants, but it is also true that El-Masri himself was not a party to any of these secret espionage agreements or relationships. There is, therefore, some doubt whether *Totten* speaks to the circumstances at bar. In any event, because the valid assertion of the state secrets privilege presents an adequate and independent ground for dismissal of this case, it is unnecessary to reach and decide the applicability of the *Totten* bar to the facts of this case.

D.

It is important to emphasize that the result reached here is required by settled, controlling law. It is in no way an adjudication of, or comment on, the merit or lack of merit of El-Masri's complaint. Nor does this ruling comment or rule in any way on the truth or falsity of his factual allegations; they may be true or false, in whole or in part. Further, it is also important that nothing in this ruling should be taken as a sign of judicial approval or disapproval of rendition programs; it is not intended to do either. In times of war, our country, chiefly through the Executive Branch, must often take exceptional steps to thwart the enemy. Of course, reasonable and patriotic Americans are still free to disagree about the propriety and efficacy of those exceptional steps. But what this decision holds is that these steps are not proper grist for the judicial mill where, as here, state secrets are at the center of the suit and the privilege is validly invoked.

Finally, it is worth noting that putting aside all the legal issues, if El-Masri's allegations are true or essentially true, then all fair-minded people, including those who believe that state secrets must be protected, that this lawsuit cannot proceed, and that renditions are a necessary step to take in this war, must also agree that El-Masri has suffered injuries as a result of our country's mistake and deserves a remedy. Yet, it is also clear from the result reached here that the only sources of that remedy must be the Executive Branch or the Legislative Branch, not the Judicial Branch.

Accordingly, and for the reasons stated from the bench,

It is hereby **ORDERED** that the United States' claim of the state secrets privilege is **VALID**.

It is further **ORDERED** that given the application of the privilege to this case, the United

States' motion to dismiss must be, and hereby is, **GRANTED**.

The Clerk is directed to send a copy of this Order to all counsel of record and to place this matter among the ended causes.

/s/
T.S. Ellis, III
United States District Judge

Alexandria, Virginia
May 12, 2006

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

TASH HEPTING, GREGORY HICKS, CAROLYN JEWEL and ERIK KNUTZEN on Behalf of Themselves and All Others Similarly Situated, Plaintiffs, vs. AT&T CORP., AT&T INC. and DOES 1-20, inclusive, Defendants.	No. C-06-0672-VRW **REPLY MEMORANDUM OF DEFENDANT AT&T CORP. IN RESPONSE TO COURT'S MAY 17, 2006 MINUTE ORDER**

[REDACTED]

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FEDERAL CASES

FEDERAL STATUTES

Defendants AT&T Inc. and AT&T Corp. (collectively "AT&T") respectfully submit this reply memorandum addressing the two issues raised in the Court's Minute Order of May 17, 2006 ("Minute Order," Dkt. 130): (1) whether this case can be litigated without deciding the state secrets issue, thus obviating any need for the Court to review the government's classified submissions and (2) whether plaintiffs are entitled to discovery of any authorizations the government may have provided to AT&T notwithstanding the government's invocation of the state secrets privilege.

I. INTRODUCTION.

In their Memorandum in Response to the Minute Order, plaintiffs maintain that this case can proceed without the Court deciding the state secrets issue and that, accordingly, the Court should not even *look at* the government's classified submissions in support of its assertion of the military and state secrets privilege in this case. Plaintiffs ignore that the classified portions of the government's Motion to Dismiss ("Government's Motion," Dkts. 124 – 125) are, as the Court recognized at the hearing on May 17, 2006, "the heart of [the government's] argument" in support of its Motion. Tr. of May 17th Hearing, at 33:11-12.

Plaintiffs advance a number of arguments in support of their claim that the Court should not review the government's classified submissions. First, they contend that due process "disfavors" the consideration of evidence in *ex parte, in camera* proceedings. Plaintiffs do not argue that such proceedings actually *violate* due process, and for good reason. Decades of decisions establish that *ex parte, in camera* review of classified submission is the standard and appropriate means of evaluating state secrets assertions and that the only course of action that would deny due process would be allowing plaintiffs to impose massive liabilities on AT&T when AT&T is barred by the government's assertion of the state secrets privilege from rebutting plaintiff's allegations.

Plaintiffs also contend that if the Court is going to review the government's *ex parte, in camera* submissions, two sections of the Foreign Intelligence Surveillance Act ("FISA") give plaintiffs the right to review them, too. This contention ignores that the provisions of FISA they cite – 50 U.S.C. § 1806(f); 50 U.S.C. § 1845(f) – are intended to

apply mainly when the government seeks to use evidence obtained through FISA warrants against individuals whose communications were intercepted pursuant to FISA. Because plaintiffs have specifically alleged that the purported surveillance they are challenging did not occur pursuant to FISA, *see* First Amended Complaint ("FAC") ¶¶ 2, 35, they cannot and have not alleged that they were subjected to government surveillance (pursuant to FISA or otherwise). As such, the FISA provisions they cite offer no support to their claim to review the government's classified submissions. Notably, however, those provisions provide that, even in an FISA case, courts may perform the sort of *ex parte* and *in camera* review of classified information that plaintiffs resist here.

Plaintiffs next assert that the Court can adjudicate plaintiffs' claims without resort to the classified information the government has submitted in support of its Motion to Dismiss. In its public filings, the United States explained in detail that no aspect of plaintiffs' cause of action – from plaintiffs' standing, to the elements of its statutory causes of action, to the elements of its Fourth Amendment claims – can be proven by plaintiffs or defended against by AT&T without invading the domain protected by the constitutionally-grounded state secrets doctrine.[1] *See* Gov't Mem. at 16 ("every step in this case . . . runs into privileged information"). Yet plaintiffs maintain that the Court need take no account of the underlying basis for this explanation before rejecting it. Plaintiffs, of course, cannot discern the specific relevance or significance of this information, and so they cannot say whether the information would in fact bear on the litigation of their claims. Only the Court can make that determination. It should go without saying that the Court can only do so after it has actually reviewed the information. If the information is in fact relevant to plaintiffs' claims, the Court cannot permit the case to proceed against AT&T. Because of

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[1] Gov't Mem. at 16-23 (plaintiffs standing); at 21 (whether AT&T has intentionally intercepted or disclosed the contents of plaintiffs communications or calling record or related information); at 21-23, 28 (whether any interceptions or related activities were in accord with certifications of the Attorney General or other authorizations that confer immunity on carriers from *any* cause of action); at 23-28 (plaintiffs' Fourth Amendment claims).

the government's assertion of the state secrets privilege, AT&T cannot defend itself against plaintiffs' claims. Plaintiffs' argument that the Court could decide this case without examining the foundation for the government's state secrets assertion defies common sense.

Finally, plaintiffs argue that the statute that would provide AT&T with immunity from plaintiffs' suit (18 U.S.C. § 2511(2)(a)(ii)) somehow mandates discovery of any authorization AT&T may have received from the government for assisting it with alleged surveillance activities. Section 2511(2)(a)(ii) says nothing of the sort. To the contrary, it prevents telecommunications providers such as AT&T from disclosing any such certifications "except as may otherwise be required by legal process." 47 U.S.C. § 2511(2)(a)(ii). Because there is no such "otherwise required" legal process at issue here, plaintiffs' claim to discovery of government certifications – the mere existence of which section 2511(2)(a)(ii) prevents AT&T from either confirming or denying – falls flat.

II. ARGUMENT.

A. The Government's State Secrets Motion Cannot Properly Be Resolved Without Reviewing The Classified Submissions.

Ensuring proper application of the state secrets doctrine is primarily the province and concern of the United States. AT&T offers its views on this subject in response to the Court's invitation in the Minute Order of May 17 to the extent that such views may be of assistance to the Court.

Contrary to plaintiffs' arguments, AT&T does not believe that an assertion of state secrets by the United States may blithely be dismissed without even considering the basis for it. Assertions of state secrets must be made personally by the nation's most senior intelligence officials, as they were here. To the extent courts can ever rule on state secrets assertions without examining the government's supporting submissions, it is only to accept such assertions where the potential for compromising state secrets is obvious. Where there is any doubt, *ex parte* and *in camera* review of classified submissions is the standard and accepted method for adjudicating state secrets issues. To render the rulings plaintiffs seek

without even reviewing the evidence tendered personally to this Court by the Director of National Intelligence and Director of the National Security Agency would be unprecedented and wrong. Regardless of what the government's classified submissions contain – something we do not know – the better course is to review those submissions before deciding whether this case may proceed.

1. Deciding A State Secrets Motion Routinely Entails Ex Parte Review Of Classified Submissions.

The state secrets privilege allows the government to prevent the unauthorized disclosure of information during litigation that might harm national security interests. *See, e.g., United States v. Reynolds*, 345 U.S. 1, 7-8 (1953); *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998); *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983) ("the various harms against which protection is sought by invocation of the privilege, include[e] impairment of the nation's defense capabilities [and] disclosure of intelligence-gathering methods or capabilities"). The invocation of state secrets must be made formally through an affidavit by "the head of the department which has control over the matter, after actual personal consideration by the officer." *Reynolds*, 345 U.S. at 7-8. The judgment of such officers, who are constitutionally entrusted and empowered to protect the nation's security, is due the "utmost deference" by the courts, and the scope of a reviewing court's discretion to reject them is exceedingly narrow. *Id.* at 10; *see also Kasza*, 133 F.3d at 1166. A court that does not review the government's filing cannot be giving proper consideration or deference to the government's position. "Once the privilege is properly invoked and the court is satisfied as to the danger of divulging state secrets, the privilege is absolute," and "even the most compelling necessity cannot overcome the claim of privilege." *Kasza*, 133 F.3d at 1166-7 (quoting *Reynolds*, 345 U.S. at 11 n.26).

Where, as here, the government contends that "the 'very subject matter of the action' is a state secret," the Court must "dismiss the plaintiff's action based solely on the invocation of the state secrets privilege" as long as "'the court is ultimately satisfied that

there are military secrets at stake.'" *Kasza*, 133 F.3d at 1166 (quoting *Reynolds*, 345 U.S. at 11 n.26); *see also Black v. United States*, 62 F.3d 1115 (8th Cir. 1995); *Fitzgerald v. Penthouse Internat'l, Ltd.*, 776 F.2d 1236, 1239, 1241-42 (4th Cir. 1985); *Halkin v. Helms*, 690 F.2d 977, 999 (D.C. Cir. 1982). "While dismissal of an action based on the state secrets privilege is harsh, the results are harsh in either direction and the state secrets doctrine finds the greater public good – ultimately the less harsh remedy – to be dismissal." *Kasza.* at 1167 (*quoting Bareford v. General Dynamics Corp.*, 973 F.2d 1138, 1144 (5th Cir. 1992)).

In limited circumstances, state secrets assertions may be adjudicated without reviewing the underlying state secrets information – but only where the government's assertion is accepted. In *United States v. Reynolds*, 345 U.S. 1 (1953), the Supreme Court indicated that:

> It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.

Id. at 10; *see also Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544 (2d Cir. 1991) (accepting privilege assertion without *in camera* review). Short of such a situation, however, a reviewing court is obliged to satisfy itself that the threshold for proper invocation of the privilege has been met – *i.e.,* "that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." *Kasza*, 133 F.3d at 1166 (internal quotations omitted). Once such a determination is made, the court's job is at an end; the privilege is absolute and cannot be overcome by any countervailing considerations. *See id.*

The standard and accepted means for a court to satisfy itself that the threshold has been met is through *ex parte* and *in camera* review of privileged and/or classified submissions by the government. *See, e.g., Kasza*, 133 F.3d at 1169; *Black v. United States*, 62 F.3d 1115, 1119 (8th Cir. 1995); *Fitzgerald v. Penthouse Internat'l, Ltd.*, 776 F.2d 1236 (4th Cir. 1985); *Halkin v. Helms*, 598 F.2d 1, 3 (D.C. Cir. 1978) ("It is settled that in camera proceedings are an appropriate means to resolve disputed issues of privilege"). As a practical matter, how else can the Court determine whether the privilege has been properly invoked? The clear is answer is the Court cannot. Neither plaintiff nor defendant is empowered or entrusted to review or comment on the privileged submission; both are equally disabled from having access to national security secrets that, by definition, they are not authorized to possess. *C.f., e.g., Dorfmont v. Brown*, 913 F.2d 1399 (9th Cir. 1990) (courts lack jurisdiction to interfere in security clearance determinations). Instead, only the court is constitutionally entrusted with the responsibility to verify the bona fides of the executive's assertion of state secrets. Such verification necessarily entails review of the government's *ex parte, in camera* submission. Not surprisingly, plaintiffs are unable to cite even a single case in which a reviewing court has rejected a state secrets submission without reviewing it.

Nor is plaintiffs' effort to convince this Court that review of the classified submission is a last resort—to be undertaken only if the government makes a "particularized showing" of state secrets and the court determines "what information properly falls within and without the state secrets privilege"—any more availing. The whole purpose of the classified submission is to make the "particularized showing" plaintiffs seek, such that the court can make the determination they request. To ask that the government make public more of the information it is trying to keep secret or that the court evaluate privilege claims and resolve discovery requests without access to the privileged information is unreasonable and incorrect.

Ellsberg v. Mitchell, 709 F.2d 51 (D.C. Cir. 1983), and *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973) (en banc), mandate no such result. *Ellsberg* rejected "a strict rule that the trial judge must compel the government to defend its claim publicly before submitting materials *in camera*," *id.* at 63, holding only that "the trial judge should insist (1) that the formal claim of privilege be made on the public record and (2) that the government either (a) publicly explain in detail the kinds of injury to national security it seeks to avoid and the reason those harms would result from revelation of the requested information or (b) indicate why such an explanation would itself endanger national security," *id.* at 63-64. The government's extensive submissions in this case easily satisfy this standard.

The *Ellsberg* court went out of its way "to make clear the limitations of our ruling: The government's public statement need be no more (and no less) specific than is practicable under the circumstances." *Id.* at 64. And even this rule only applied in a limited class of cases, totally unlike this one, where "the surrounding circumstances did not make apparent the likelihood that disclosure would lead to serious injury," *id.* at 61 – there, because the surveillance at issue had admittedly stopped more than five years earlier. And *Nixon* involved the wholly different context of a criminal prosecution of executive branch officials, in which, in effect, the executive branch was on both sides of the case. The court there rejected the notion that any public explanation had to be given regarding materials that "relate[] to national defense or foreign relations." 487 F.2d at 721.

If the state secrets assertion in this case could be decided without recourse to the government's classified submission, it could only be decided in favor of the government: the threat to national security is obvious from permitting litigation of claims that, on their face, place in issue the details of a highly classified intelligence program and almost nothing else. But, unless this Court grants AT&T's motion to dismiss on non-state secrets grounds, thereby avoiding the need to confront this issue at all, the better course of action is for this Court to review the classified information the government has made available to it for *ex parte* and *in camera* review.

2. Due Process Is Not Violated By Such Review.

Although plaintiffs do not directly contend that due process would be violated by *in camera, ex parte* review of the government's classified submissions in this case, they nevertheless attempt to bolster their arguments by vague allusions to due process: its general requirements, its "very spirit," and its "disfavor" for "secret evidence [and] arguments." Plaintiffs' Memorandum ("Pltfs. Mem.") at 2-3. Plaintiffs' due process concerns are misplaced in the context of this case. As detailed above, numerous courts, including the Ninth Circuit, have found that review of *in camera, ex parte* classified submissions is an appropriate procedure for determining whether a case can proceed after invocation of the state secrets privilege. *See supra* Section II.A.1. Moreover, due process claims have been consistently rejected in analogous contexts involving *in camera, ex parte* review of classified submissions, including cases reviewing blocking orders issued under the International Emergency Economic Powers Act ("IEEPA"),[2] designations of "foreign terrorist organizations" under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"),[3] and immigration deportation proceedings.[4]

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[2] *See, e.g., Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003), cert. denied 540 U.S. 1218 (2004); *Global Relief Found. v. O'Neill*, 315 F.3d 748, 754 (7th Cir. 2002).

[3] *See, e.g., National Council of Resistance of Iran v. Dep't of State*, 373 F.3d 152, 158 (D.C. Cir. 2004); *People's Mojahedin Organization of Iran v. Dep't of State*, 327 F.3d 1238, 1242 (D.C. Cir. 2003); *National Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 208 (D.C. Cir. 2001); *see also Jifry v. Fed. Aviation Admin.*, 370 F.3d 1174, 1184 (D.C. Cir. 2004) (holding that the same due process protections that apply to terrorism listing cases under AEDPA also apply to FAA revocation of airmen certificates based on finding that pilots posed a security risk and rejecting argument that pilots' due process rights were violated because they did not have access to the specific, classified evidence on which the agency relied in making its determination), cert. denied 543 U.s. 1146 (2005).

[4] *See, e.g., Suciu v. Immig. and Naturalization Servs.*, 755 F.2d 127, 128 (8th Cir. 1985); *United States ex rel. Barbour v. District Director of the INS*, 491 F.2d 573, 578 (5th Cir. 1974); *see also Jay v. Boyd*, 351 U.S. 345 (1956) (government may rely on classified information to deny discretionary immigration relief); *Shaughnessy v. United States ex rel. Mezel*, 345 U.S. 206 (1953) (government may rely on confidential information to exclude an alien from the United States); *United States v. Shaughnessy*, 338 U.S. 537 (1950) (same); *Azzouka v. Meese*, 820 F.2d 585, 587 (2d Cir. 1987) (same); *Azzouka v.* (continued...)

Plaintiffs make no attempt to come to grips with any of this law. Instead, they rely on several due process cases from unrelated and inapposite contexts. In *Lynn v. Regents of Univ. Calif.*, 656 F.2d 1337 (9th Cir. 1981), for example, a garden-variety gender discrimination case, the court held that the district court's *in camera, ex parte* review of the tenure file of the plaintiff professor violated due process. Similarly, in *Guenther v. Comm'r of Internal Rev.(Guenther II)*, 939 F.2d 758 (9th Cir. 1991), an appeal by taxpayers of an IRS finding of tax deficiency, the court held that the district court's *ex parte* consideration of the agency's trial memorandum violated due process.[5] It should come as no surprise that neither *Lynn* nor *Guenther II* involved an assertion of the state secrets privilege or any analogous national security consideration of the kind that has consistently led courts, including the Ninth Circuit,[6] to approve *ex parte, in camera* review of classified information.[7]

(...continued)
Sava, 777 F.2d 68, 72 (2d Cir. 1985) (same).

[5] Plaintiffs also cite *Guenther v. Comm'r of Internal Rev. (Guenther I)*, 889 F.2d 882 (9th Cir. 1989), a prior ruling in the same case in which the Ninth Circuit remanded the case for an evidentiary hearing on the issue of the *ex parte* communication.

[6] *See, e.g., Meridian Internat'l Logistics, Inc. v. United States*, 939 F.2d 740, 745 (9th Cir. 1991) (holding that ex parte review of declaration concerning whether employee was acting within the scope of his employment was proper and adequately balanced the rights of the interested parties); *In re Grand Jury Proceedings*, 867 F.2d 539, 541 (9th Cir. 1988) (holding that party was not denied due process by district court's *in camera* inspection of the materials upon which the government based its showing of the crime-fraud exception); *United States v. Sarkissan*, 841 F.2d 959, 965 (9th Cir. 1988) (stating that Classified Information Procedures Act permits *ex parte* submissions); *United States v. Ott*, 827 F.2d 473, 476-77 (9th Cir. 1987) (holding that due process was not violated by *ex parte, in camera* proceeding under Foreign Intelligence Surveillance Act); *Pollard v. Fed. Bureau of Investigation*, 705 F.2d 1151, 1153-54 (9th Cir. 1983) (stating that practice of *in camera, ex parte* review is appropriate in certain cases under the Freedom of Information Act).

[7] Plaintiffs' reference to the principle articulated by Justice Frankfurter in his concurring opinion in *Joint Anti-Fascist Refugee Comm'n v. McGrath*, 341 U.S. 123, 170 (1951), is just generalized flag-waving; it provides no more concrete support than *Lynn* or *Guenther II* for the proposition that due process concerns somehow alter the well-established procedure for evaluating state secrets assertions by the United States in national security-related litigation such as this.

3. The Provisions Of FISA Governing Disclosure Of FISA Materials Have No Application Here.

Plaintiffs point to two sections of FISA – 50 U.S.C. §§ 1806(f), 1845(f) – in arguing that if the Court is going to review the government's *ex parte, in camera* submissions, plaintiffs should also be able to do so. Pltfs. Mem.. at 4 ("[T]he Court should do so under conditions that provide for some form of appropriate access by plaintiffs' counsel."). These provisions of FISA are designed to apply primarily in circumstances in which the government seeks to use evidence obtained through FISA warrants against individuals whose communications were intercepted. Plaintiffs have specifically alleged that the purported surveillance they are challenging did not occur pursuant to FISA, *see* FAC ¶¶ 2, 35; they cannot and have not alleged that they themselves were subjected to government surveillance, pursuant to FISA or otherwise; and the government is not, in any event, attempting to use information derived from surveillance of plaintiffs against them in this or any other proceedings. *See* 50 U.S.C. § 1806(c) (1806(f) procedures apply, *inter alia*, "[w]henever the Government intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding . . . against an aggrieved person, any information obtained or derived from an electronic surveillance of that aggrieved person"). Absent a broad expansion of the traditional understanding of the purpose of these provisions, they lend no support to plaintiffs' position.

Moreover, these FISA provisions specifically mandate the very thing plaintiffs are attempting to resist: *ex parte* and *in camera* review. At most, Sections 1806(f) and 1845(f) provide a court with some discretion to disclose to litigants certain evidence gathered pursuant to FISA, but only after it first reviews the purported evidence *in camera* and *ex parte*. *See* 50 U.S.C. § 1806(f) (District Court "*shall ... review in camera and ex parte the application, order, and such other materials* relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted") (emphasis added); 50 U.S.C. § 1845. Thus, plaintiffs'

threshold argument that the Court should not be able to review the government's submissions flies in the face of the very statutes they cite.

Further, even if these provisions were applicable – which they are not – sections 1806(f) and 1845(f) provide only that a court *may* disclose the secret material. *See* 50 U.S.C. § 1806(f); 50 U.S.C. § 1845(f). Such disclosure is not mandatory, and plaintiffs cite no case in which those provisions have been held to permit or require disclosure of state secrets. Indeed, the great weight of authority interpreting the FISA sections plaintiffs cite mandates that even ordinary FISA surveillance information over which no formal state secrets claim has been asserted should not be disclosed. *See ACLU Foundation of Southern California v. Barr*, 952 F.2d 457, 469 (D.C. Cir. 1991) (noting that 50 U.S.C. § 1806(f) "is designed to prevent disclosure of information relating to FISA surveillance in adversary proceedings"); *United States v. Belfield*, 692 F.2d 141, 147 (D.C. Cir. 1982) (rejecting argument that disclosure was necessary and holding that under 1806(f) "[d]isclosure and an adversary hearing are the exception, occurring *only* when necessary") (emphasis in original); *United States v. Thomson*, 752 F. Supp. 75, 79 (W.D.N.Y. 1990) ("No court that has been required to determine the legality of a FISA surveillance has found disclosure or an adversary hearing necessary"); *United States v. Spanjol*, 720 F. Supp. 55, 59 (E.D. Pa. 1989) (refusing to disclose information where "discovery would reveal the targets of electronic surveillance, thereby compromising intelligence sources and methods"); *United States v. Ott*, 637 F. Supp. 62, 65-66 (E.D. Cal. 1986) (noting that "[i]n the sensitive area of foreign intelligence gathering, the need for extreme caution and sometimes even secrecy may not be overemphasized" and holding that "there is no need for disclosure to protect the respondent's legitimate interests"), aff'd 827 F.2d 473 (9th Cir. 1987).

In support of the argument that they should be able to review the government's submissions, plaintiffs cite a case where the Court declined to disclose the state secrets at issue. Pltfs. Mem. at 4 (citing *DTM Research, L.L.C. v. AT&T Corp.*, 245 F.3d 327 (4th Cir. 2001)). In *DTM Research*, the government invoked the state secrets privilege in

support of its motion to quash third-party subpoenas. The district court granted the motion to quash, and the Court of Appeals affirmed. Despite having protected the state secrets information, the *DTM Research* court declined to dismiss the case because, unlike here, that case was not one in which "the very question upon which the case turns is itself a state secret, or the circumstances make clear that sensitive military secrets will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters." 245 F.3d at 334 (internal quotations omitted). Instead, the state secrets in that case were "not central" to the question of liability and could be excluded from trial without fundamentally impairing the litigation. *Id.* Here, plaintiffs have alleged in their complaint that AT&T has been authorized by the government to assist it with a secret surveillance program. *Ipso facto*, then, "the very question upon which the case turns is itself a state secret," *id.*, and the government has accordingly sought dismissal of the entire action. *DTM Research* is irrelevant.

B. The Court Cannot Adjudicate Plaintiffs' Prima Facie Claims Until It Reviews The Classified Submissions.

Plaintiffs claim that their *prima facie* case can be fully presented and litigated based solely on their existing evidence and that, therefore, this Court need not review any classified materials to assess those claims. This argument fundamentally misconstrues the state secrets doctrine, the significance of the Klein evidence, the law that would govern any litigation of the merits of plaintiffs' claims, and, most importantly, the effect the government's assertion of the state secrets privilege has on AT&T's ability to defend itself in this action.

Plaintiffs contend that the Klein Declaration is itself sufficient to make out a prima facie case on their statutory claims. But even if one focused only on the two claims as to which plaintiffs make any argument, the Court could not determine the validity of those claims without first evaluating information covered by the government's state secrets assertion. [redacted]

[redacted]

AT&T cannot confirm or deny any of the facts on which plaintiffs' complaint is based. But it is certain that the Klein Declaration and its associated exhibits are insufficient to demonstrate any illegal conduct by AT&T. [redacted] Plaintiff's purported expert, of course, has no knowledge whether this is true or not.

Even accepting their allegations as true, plaintiffs' declarations fail to establish their claims. Key factual issues that bear directly on the viability of their legal claims and AT&T's defenses are subject to the Government's state secrets assertion and are unavailable. Without either confirming or denying the plaintiffs' assertions, [redacted]

[redacted]

Accordingly, without admitting or denying any factual assertions by the plaintiffs, it is clear they lack even prima facie evidence of any governmental interception or electronic surveillance of any communications – much less any illegal activity. No such evidence could possibly be developed without delving deeply into matters covered by the government's existing state secrets assertion.

Plaintiffs' request that this Court nonetheless proceed based on their "evidence" – and only their evidence – is essentially a request that the Court presume guilt on the part of AT&T. This is precisely the approach attempted in and rejected by *Halkin v. Helms*, 598 F.2d 1 (D.C. Cir. 1978), in which the Court refused to assume from the mere fact that warrantless acquisitions of communications occurred that individuals on NSA watch lists were actually being surveilled by the government. *Id.* at 10. There, as here, plaintiffs attempted to circumvent the assertion of a state secrets privilege by asking the court to draw unsupported inferences against private defendants, but the Court of Appeals recognized that:

> The underlying premise of the argument is that the defendants should not be permitted to avoid liability for unconstitutional acts by asserting a privilege which would prevent plaintiffs

> from proving their case. The premise is faulty. The defendants are not asserting the privilege to shield allegedly unlawful actions; the state secrets privilege asserted here belongs to the United States and is asserted by the United States which is not a party to the action. It would be manifestly unfair to permit a presumption of acquisition of the watchlisted plaintiffs' international communications to run against these defendants.

598 F.2d. at 10. As that court concluded, "[n]ot only would such a presumption be unfair to the individual defendants who would have no way to rebut it, but it cannot be said that the conclusion reasonably follows from its premise." *Id.* Plaintiffs' suggestion that they have established a prima facie case requests exactly such a presumption and asks this Court to draw unsupported factual and legal inferences AT&T would have no fair opportunity to rebut in light the government's state secrets assertion.

C. Plaintiffs Cannot Obtain Any Discovery Or Litigate Any Facts Relating To AT&T's Immunity Before This Court Has Resolved The Government's State Secrets Motion.

As Plaintiffs recognize, section 2511(2)(a)(ii) provides absolute statutory immunity "[n]otwithstanding any other law" to any provider of wire or electronic communications that provides the government with "information, facilities, or technical assistance" if such provider has been provided with appropriate governmental authorizations. 18 U.S.C. § 2511(2)(a)(ii) ("No cause of action shall lie in any court against any provider or wire or electronic communications . . . for providing information, facilities or assistance in accordance with the terms of a . . . certification under this chapter"). And, as AT&T Corp. has explained in its motion to dismiss, a provider of wire or electronic communications also enjoys both absolute and qualified common-law immunity for alleged assistance to the government that the government has assured the provider is lawful. *See* AT&T Motion at 13-19.

Plaintiffs are wrong in suggesting that the Court could adjudicate as a factual matter the question whether AT&T has immunity from suit or allow discovery of any government

authorizations or assurances AT&T may have received without reviewing the government's classified state secrets showing.[8] As the government explained in its motion to dismiss, its state secrets assertion "covers *any* information tending to confirm or deny" whether "AT&T was involved with any" of the "alleged intelligence activities." Motion to Dismiss of the United States at 17-18.

The existence or non-existence of any such government authorizations or assurances is quite obviously information that would tend to confirm or deny AT&T's involvement with the alleged government intelligence activities and is thus squarely within the government's state secrets assertion. Accordingly, the Court could not adjudicate, or allow discovery on, the alleged existence of any such authorizations or assurances without first considering and rejecting the government's state secrets assertion. *See* Motion to Dismiss of the United States at 23 ("even if Plaintiffs speculated and alleged the absence of section 2511(2)(a)(ii) authorization, they could not meet their burden of proof on the issue because information confirming or denying AT&T's involvement in the alleged intelligence activities is covered by the state secrets assertion"). And, as explained above, the Court could not do that without first considering and rejecting the government's classified state secrets submission.

Plaintiffs nonetheless contend that the existence of any such certifications "cannot be immunized from disclosure on the ground of the 'state secrets privilege.'" Pltfs. Mem. at 8. That is so, they claim, because "[d]iscovery of such certifications . . . is *required* by" section 2511(2)(a)(ii). *Id.* at 14 (emphasis added). Both the premise and the conclusion are wrong. Section 2511(2)(a)(ii) does not require discovery of anything. To the contrary, it *forbids* providers from disclosing any such certifications "except as may otherwise be required by legal process." 18 U.S.C. § 2511(2)(a)(ii).

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[8] The Court is, however, free to resolve these issues based on the fatal defects in plaintiffs' pleadings, as we have contended it should in our motion to dismiss.

But even if § 2511(2)(a)(ii) did generally require or authorize discovery of certifications, that could not overcome the Executive's constitutionally-based privilege to protect from disclosure information about the existence or non-existence of *particular* certifications where it is necessary to protect military or state secrets – as the Ninth Circuit squarely held in *Kasza v. Browner*, 133 F.3d 1159, 1167-68 (9th Cir. 1998). In *Kasza*, the plaintiffs contended that a federal statute narrowly codified the scope of the President's privilege to exempt federal facilities from environmental information disclosure requirements and that no broader exemption could be asserted under the state secrets privilege. The Court rejected that argument, equating it to an assertion that Congress had "preempted" the President's federal common law state secrets privilege. *Id.* at 1167. The Court explained that any such argument must necessarily fail unless "the statute speaks directly to the question otherwise answered by the common law," *id.* (*quoting County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 236-37 (1985)), and it cautioned that statutes "are to be read with a presumption favoring the retention of long-established and familiar principles, except when a contrary statutory purpose to the contrary is evident." *Id.* at 1167 (*quoting United States v. Texas*, 507 U.S. 529, 434 (1993)). The Court then rejected the preemption claim, finding "no Congressional intent to replace the government's evidentiary privilege to withhold sensitive information in litigation by providing" a statutory exemption. *Id.* at 1168 ("At times the purposes of the privilege and the exemption may overlap, but that does not mean that [the statute] 'speaks directly' to the existence, or exercise, of the privilege in every RCRA action"; "if a facility hasn't been exempted . . . it might still be the case that disclosure of discrete items of relevant information would affect the national interest").

The same conclusion is compelled here. Nothing in section 2511(2)(a)(ii) remotely suggests that Congress intended to deprive the Executive Branch of the ability to assert its privilege to deny discovery that would risk harm to national security – even assuming that Congress could do so consistent with core constitutional separation of powers principles.

See, e.g., Frost v. Perry, 161 F.R.D. 434, 439 (D. Nev. 1995) ("the Court finds it implausible that Congress, without 'more explicit statutory language and legislative comment,' intended to preempt or supersede a common law privilege with constitutional underpinnings) (*quoting Fogerty v. Fantasy, Inc.*, 510 U.s. 517, 534 (1994)). Indeed, § 2511 evinces precisely the opposite intent: its principal thrust is to *forbid* any disclosure of a certification until after the Attorney General has been notified and thereby given an opportunity to interpose the kinds of privileges or objections he has asserted in this case. In other words, the statute is, on its face, designed to *preserve* the very privilege the plaintiffs claim it overrides. *See* H.R. Rep. No. 95-1283, at 99 n.53 (1978) ("The notice provision is intended to provide sufficient time for the Government to intervene to quash a subpoena or otherwise take legal action to prevent disclosure if it so desires.").

Here, of course, the government already has exercised its discretion to invoke the state secrets privilege to deny discovery of any information that would confirm or deny AT&T's participation in the alleged government intelligence activities or any certifications or other authorizations that AT&T may or may not have received. The Court accordingly cannot adjudicate the question whether AT&T has section 2511(2)(a)(ii) immunity from plaintiffs' claims or allow discovery of the existence or non-existence of any certifications AT&T may have received without reviewing the government's classified state secrets showing. Because plaintiffs acknowledge that the existence of a certification could provide AT&T with complete immunity from suit or, alternatively, a good-faith defense to all their claims, it is apparent that, for this reason alone, plaintiffs' claim that they "can make their case based on the public record," Pltfs. Mem. at 5, is flat wrong.

In all events, AT&T has numerous other legal and factual defenses that would be implicated by litigation of this case, regardless of whether or not certifications exist. To take just one example already cited in AT&T's motion to dismiss, even if one assumes that AT&T participated in the terrorist surveillance program as alleged and that it did not enjoy statutory immunity, AT&T would still be entitled to assert the common law immunities

from suit that are available to telecommunications carriers who are alleged to be cooperating with surveillance activities that the government has assured the carrier are lawful. *See, e.g., Smith v. Nixon*, 606 F.2d 1183, 1191 (D.C. Cir. 1979); *Halperin v. Kissinger*, 424 F. Supp. 838, 846 (D.D.C. 1976), *rev'd on other grounds*, 606 F.2d 1192 (D.C. Cir. 1979). Consideration of absolute or qualified common law immunity, to the extent they did not provide a basis for dismissal on the pleadings, would entail detailed consideration of the facts and circumstances of the carrier's cooperation, including the representations made to the carrier, what specific actions were taken by the carrier's employees, what role the carrier had in the surveillance, and what, if any, use was made of any data. All of this is within the scope of the United States' existing claim of privilege, and evaluation of these issues could not possibly occur without first confronting that claim.

* * * *

The appropriate way to resolve the state secrets issue in this case is the normal and accepted way: this Court should review the classified submission of the United States, decide whether it satisfies the legal criteria for invoking the state secrets privilege and supports the government's request for dismissal of this case, and rule accordingly. There is no reason to deviate from this established procedure or to accept plaintiffs' invitation to engage in legal contortions in an attempt to avoid confronting the threshold question on which most other questions in this case depend. Until that question is resolved, no discovery of information covered by the government's assertion of privilege, including the existence *vel non* of certifications, should be ordered.

III. CONCLUSION.

For the foregoing reasons, the Court should adhere to its current plan and review the government's classified submissions prior to argument on the pending motions to dismiss on June 23, 2006. No discovery should be ordered unless and until those motions are denied.

Dated: May 24, 2006.

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