

EXHIBIT D

1 Plaintiffs' principal argument is that the court need not
2 address the state secrets issue nor review the classified documents
3 because plaintiffs can make their *prima facie* case based solely on
4 the public record, including government admissions regarding the
5 wiretapping program and non-classified documents provided by former
6 AT&T technician Mark Klein. Doc #134 (Pl Redact Br) at 5-8. Even
7 if plaintiffs are correct in this argument, it does not afford
8 sufficient reason to delay deciding the state secrets issue.

9 The government asserts that "the very subject matter of
10 Plaintiffs' allegations is a state secret and further litigation
11 would inevitably risk their disclosure." Doc #145-1 (Gov Br) at
12 14. If the government is correct, then "the court should dismiss
13 [plaintiffs'] action based solely on the invocation of the state
14 secrets privilege." Kasza v Browner, 133 F3d 1159, 1166 (9th Cir
15 1998). Moreover, until the applicability and reach of the
16 privilege is ascertained, AT&T might be prevented from using
17 certain crucial evidence, such as whether AT&T received a
18 certification from the government. See Gov Br at 16-17. See also
19 Kasza, 133 F3d at 1166 (noting that a defendant might be entitled
20 to summary judgment if "the privilege deprives the defendant of
21 information that would otherwise give the defendant a valid defense
22 to the claim" (quoting Bareford v General Dynamics Corp, 973 F2d
23 1138, 1141 (5th Cir 1992)) (emphasis and internal quotation marks
24 omitted)). The state secrets issue might resolve the case,
25 discovery or further motion practice might inadvertently cause
26 state secrets to be revealed and AT&T's defense might be hindered
27 until the scope of the privilege is clarified. Hence, the court
28 agrees with the government that the state secrets issue should be

1 addressed first.

2 To address this issue, the government claims that the
3 court should examine the classified documents, which apparently
4 "disclose the sources and methods, the intelligence activities,
5 etc, that could be brought into play by the allegations in
6 plaintiffs' complaint." Doc #138 (5/17/06 Transcript) at 34:15-17.
7 Because the government contends that "the primary reasons for
8 rejecting Plaintiffs' arguments are set forth in the Government's
9 *in camera, ex parte* materials," Gov Br at 13, the court would be
10 remiss not to consider those classified documents in determining
11 whether this action is barred by the privilege. And although the
12 court agrees with plaintiffs that it must determine the scope of
13 the privilege before ascertaining whether this case implicates
14 state secrets, Pl Redact Br at 13-14, review of the classified
15 documents is necessary to determine the privilege's scope.

16 Plaintiffs also contend that "the government must make a
17 more specific showing [in its public filings] than it has before
18 this Court may be required to review secret filings *ex parte*." Id
19 at 10. But the government, via Director of National Intelligence
20 John D Negroponete, has stated that "any further elaboration on the
21 public record concerning these matters would reveal information
22 that could cause the very harms my assertion of the state secrets
23 privilege is intended to prevent." Doc #124-2 (Negroponete Decl), ¶
24 12. See also Doc #124-3 (Alexander Decl), ¶ 8. Although the court
25 may later require the government to provide a more specific public
26 explanation why the state secrets privilege must be invoked,
27 Ellsberg v Mitchell, 709 F2d 51, 63-64 (DC Cir 1983), the court
28 cannot, without first examining the classified documents, determine

1 whether the government could provide a more detailed public
2 explanation without potentially "forc[ing] 'disclosure of the very
3 thing the privilege is designed to protect.'" Id at 63 (quoting
4 United States v Reynolds, 345 US 1, 8 (1953)).

5 Plaintiffs further assert that adjudicating whether AT&T
6 received any certification does not require the court to review the
7 classified documents. Specifically, plaintiffs rely on 18 USC §
8 2511(2)(a)(ii)(B), which states in relevant part (emphasis added):

9 No provider of wire or electronic communication service
10 * * * or other specified person shall disclose the
11 existence of any interception or surveillance or the
12 device used to accomplish the interception or
13 surveillance with respect to which the person has been
14 furnished an order or certification under this
15 subparagraph, except as may otherwise be required by
16 legal process and then only after prior notification to
17 the Attorney General or to the principal prosecuting
18 attorney of a State or any political subdivision of a
19 State, as may be appropriate.

20 Plaintiffs claim that the phrase "except as may otherwise be
21 required by legal process" means that "if the AT&T defendants are
22 claiming that they have a certification defense, then 'legal
23 process' would require the disclosure of the fact of that
24 certification in the ordinary course of litigation." Pl Redact Br
25 at 8-9.

26 This argument fails, however, because the government's
27 "state secrets assertion 'covers any information tending to confirm
28 or deny' whether 'AT&T was involved with any' of the 'alleged
intelligence activities.'" Gov Br at 17 (quoting Doc #124-1 (Gov
Mot Dis) at 17-18). Because the existence or non-existence of a
certification would tend to prove or disprove whether AT&T was
involved in the alleged intelligence activities, the privilege as
claimed prevents the disclosure of any certification. And because

1 the "legal process" could not require AT&T to disclose a
2 certification if the state secrets privilege prevented such
3 disclosure, discovery on the certification issue cannot proceed
4 unless the court determines that the privilege does not apply with
5 respect to that issue.

6 Finally, plaintiffs claim that they should be able to
7 review the classified documents alongside the court. Plaintiffs
8 note that due process disfavors deciding this case based on secret
9 evidence and they contend that "the Court should proceed
10 incrementally, examining only the least amount of *ex parte*
11 information when - and if - this becomes absolutely necessary." Pl
12 Redact Br at 3. Although *ex parte*, *in camera* review is
13 extraordinary, this form of review is the norm when state secrets
14 are at issue. See Kasza, 133 F3d at 1169 ("Elaborating the basis
15 for the claim of privilege through *in camera* submissions is
16 unexceptionable."). See also Black v United States, 62 F3d 1115,
17 1119 & n6 (8th Cir 1995); Ellsberg, 709 F2d at 60 ("It is well
18 settled that a trial judge called upon to assess the legitimacy of
19 a state secrets privilege claim should not permit the requester's
20 counsel to participate in an *in camera* examination of putatively
21 privileged material."). And for the reasons stated above, review
22 of the classified documents is necessary here to determine whether
23 the state secrets privilege applies.

24 Plaintiffs also contend that a statutory provision, 50
25 USC § 1806(f), entitles them to review the classified documents.
26 Pl Redact Br at 4. Section 1806(f) provides in relevant part:

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1 [W]henver any motion or request is made by an aggrieved
2 person * * * to discover or obtain applications or orders
3 or other materials relating to electronic surveillance
4 * * * the United States district court * * * shall,
5 notwithstanding any other law, if the Attorney General
6 files an affidavit under oath that disclosure or an
7 adversary hearing would harm the national security of the
8 United States, review *in camera* and *ex parte* the
9 application, order, and such other materials relating to
10 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.

11 Plaintiffs contend if the court determines that it must review the
12 classified documents, this provision indicates that the court
13 "should do so under conditions that provide for some form of
14 appropriate access by plaintiffs' counsel." Pl Redact Br at 4.

15 The government and AT&T contend that this provision is
16 inapplicable here because "[p]laintiffs' claims are based on their
17 contention that the alleged surveillance activities should have
18 occurred under FISA, but allegedly did not, whereas the review
19 available under section 1806(f) is available only when electronic
20 surveillance did, in fact, occur 'under this chapter.'" Gov Br at
21 11 (citation omitted); Doc #150 (AT&T Redact Br) at 10. Even if
22 this provision applies to the present case, it does not follow that
23 plaintiffs are entitled to view some or all of the classified
24 documents at this time. Section 1806(f) requires the court to
25 "review *in camera* and *ex parte* the application, order, and such
26 other materials relating to the surveillance" when determining
27 whether the surveillance was legal. Only after such review may the
28 court disclose the protected materials to the aggrieved person to

United States District Court
For the Northern District of California

1 the extent "necessary to make an accurate determination of the
2 legality of the surveillance." Hence, § 1806(f) does not provide
3 plaintiffs with a present right to view the classified documents.

4 The court is mindful of the extraordinary due process
5 consequences of applying the privilege the government here asserts.
6 The court is also mindful of the government's claim of
7 "exceptionally grave damage to the national security of the United
8 States" (Negroponte Decl, ¶ 3) that failure to apply the privilege
9 could cause. At this point, review of the classified documents
10 affords the only prudent way to balance these important interests.

11 Accordingly, because review of the classified documents
12 is necessary to determine whether and to what extent the state
13 secrets privilege applies, the court ORDERS the government
14 forthwith to provide *in camera* and no later than June 9, 2006, the
15 classified memorandum and classified declarations of John D
16 Negroponte and Keith B Alexander for review by the undersigned and
17 by any chambers personnel that he so authorizes.

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19 IT IS SO ORDERED.

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22 VAUGHN R WALKER
23 United States District Chief Judge
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