STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DIVISION OF PUBLIC UTILITIES AND CARRIERS

In Re: Rhode Island Affiliate, American Civil Liberties Union – Informal Complaint Against Verizon and AT&T	Case No. D-06-45

AT&T COMMUNICATIONS OF NEW ENGLAND, INC.'S MOTION TO DISMISS

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AT&T Communications of New England, Inc. ("AT&T"), by its undersigned counsel, files this Motion to Dismiss the Complaint of the Rhode Island Affiliate, American Civil Liberties Union ("ACLU"). For the reasons stated below, the Division of Public Utilities and Carriers ("Division") lacks jurisdiction over the subject matter of the Complaint.

Introduction

The Complaint filed by the ACLU[1] is part of a coordinated, nationwide effort by the ACLU to stimulate investigations by state public service commissions of one aspect of the alleged cooperation of telecommunications carriers with the post-9/11 counterterrorism intelligence activities of agencies of the United States government, principally including the National Security Agency ("NSA"), an agency of the Department of Defense. Its goal is to bring pressure to bear on the United States intelligence community to cease certain counterterrorism surveillance activities that the ACLU believes to be unlawful. The Complaint thus asks that the Division, pursuant to state law, "investigate this complaint and the allegations of improper phone record sharing, and determine whether AT&T and/or Verizon have violated any rules of the

[1] *See* Letter from Steven Brown, Executive Director, Rhode Island Affiliate, American Civil Liberties Union, to Thomas F. Ahern, Administrator, Division of Public Utilities and Carriers, dated May 24, 2006 ("Complaint").

Division or Rhode Island law. . . ." Complaint at 3. These are matters that are already the subject of several dozen lawsuits in federal courts around the country and which have been subjected to extensive oversight in the Intelligence Committees of the United States Congress.

At the core of the ACLU's Complaint are significant legal issues regarding the scope of the authority of the Executive Branch of the United States Government to conduct intelligence-gathering activities in furtherance of national security and the ability of the United States to protect classified information. These significant legal issues are governed exclusively by federal law, and responsibilities in this area are assigned exclusively to the federal government under the Constitution, which wholly divests the states of any power to act with respect to matters of national security, national defense, and the gathering of foreign or military intelligence. In this regard, express provisions of federal law prohibit the disclosure of information to the Division that would be necessary to act on this Complaint. Accordingly, the Federal Communications Commission and a number of other state commissions have already concluded that they do not have the ability or the authority to investigate the same allegations that the ACLU has made here. In the rare instances where state authorities have insisted on the right to compel disclosure of information relating to the alleged NSA calling records program, the United States has sued state officials and carriers in federal court for violations of the Constitution. Thus, if the Division were to attempt to conduct such an investigation here, the sole consequence would be to place AT&T in the middle of a confrontation between federal and state officials that federal officials are certain to win under the Supremacy Clause of the Federal Constitution.

Indeed, the United States has asserted that the question of whether or not AT&T and other telecommunications carriers are disclosing calling records to the National Security Agency is a "state secret" and that information relating to these allegations cannot be revealed even in

actions pending in federal district courts. Three different federal district courts have now accepted these claims. In *Terkel, et al. v. AT&T Corp., et al.,* Case No. 06 C 28a (N.D. Ill.), as here, the only allegation was that AT&T had unlawfully provided calling records to the NSA, and the district court held that this claim involves state secrets that cannot be revealed without increasing the risk of future terrorist attacks in the United States, and it dismissed the entire case in an order entered on July 25, 2006.[2] Similarly, while other claims have been permitted to proceed in *Hepting, et al. v. AT&T Corp., et al.*, Case No. C 06-0672-VRW (N.D.Ca.), the court there likewise concluded that disclosure of information relating to the alleged calling record program could increase the risk of future terrorist attacks and that "for present purposes AT&T should not be required to disclose what relationship, if any, it has with this alleged program."[3] Most recently, in *ACLU, et al. v. NSA, et al.* – even while holding the government's program of acquiring the contents of certain one-end foreign communications unlawful – the United States District Court for the Eastern District of Michigan nonetheless ruled, just as *Hepting* and *Terkel* had done, that claims as to call records are foreclosed by the state secrets doctrine. On that basis, the court granted partial summary judgment to the government defendants.[4]

Accordingly, AT&T respectfully submits that the subject matter of the ACLU's Complaint is beyond the jurisdiction of the Division and in support of its motion, AT&T represents the following:

Background

The ACLU's complaint. On May 24, 2006, the ACLU filed its Complaint, which alleges that according to recent media reports, AT&T and Verizon have provided "personal calling

[2] *See* July 25 Order, *Terkel et al., v. AT&T Corp., et al.,* Case No. 06 C 28a (N.D. Ill.), at 16-39 (Exh. 1).

[3] *See* July 20 Order, *Hepting, et al. v. AT&T Corp., et al.*, Case No. C 06-0672-VRW, N.D.Ca, at 40-42 (July 20, 2006) (Exh. 2).

[4] *See* August 17 Order, *ACLU, et al. v. NSA, et al.*, Case No. 06-cv-10204, E.D. Mich., at 14 (Exhibit 3).

details" of their customers to the National Security Agency, including "telephone numbers called, time, date, and direction of calls." Complaint at 1. The ACLU further alleges that these disclosures were made without the consent of their customers and "without the compulsion of a warrant, court order, or other legal process from the government." *Id.* Thus, the ACLU asserts that it has a well-founded belief that AT&T has violated its own privacy policy and that these actions constitute violations of a number of Rhode Island statutes. *See id.* at 3.

The Complaint is part of a coordinated campaign by the ACLU to cause state public utilities commissions to investigate carriers that are believed to have participated in NSA counterterrorism surveillance programs reported in the popular press, and thereby to bring pressure to end the supposed programs. *See* Press Release, *ACLU Launches Nationwide Action Against NSA Snooping on Americans' Phone Calls* (May 24, 2006), *at* http://www.aclu.org/safefree /nsaspying/25647prs20060524.html. The Complaint requests that the Division conduct an investigation into the alleged conduct and if it is found that AT&T "committed any violations, . . . take all appropriate action within its jurisdiction to ensure that such violations cease." Complaint at 3.

The press reports of NSA activities. As noted, the ACLU's Complaint arises from press reports concerning certain alleged intelligence-gathering and counterterrorism activities of the federal government. On December 19, 2005, in response to a report in the *New York Times*, President Bush acknowledged the existence of a counterterrorism program involving the interception of international telephone calls made or received by suspected al Qaeda agents. *See* Press Conference of President Bush (Dec. 19, 2005), available at http://www.whitehouse.gov/news/ releases/2005/12/20051219-2.html. The United States Department of Justice subsequently published a written explanation of the legal authority for the

program acknowledged by the President and defended by the Attorney General. *See* Press Conference of Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005), available at http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html.

On May 11, 2006, *USA Today* published a story suggesting that the NSA's intelligence-gathering activities may also have included some form of access to domestic call records databases. *See* Leslie Cauley, *NSA Has Massive Database of Americans' Phone Calls*, USA Today, May 11, 2006, at A1; Complaint at 1. The Administration has neither confirmed nor denied these more recent reports and the separate "calling records" program they alleged.

AT&T has consistently declined to either confirm or deny any participation in either of the alleged programs. As a matter of policy, AT&T declines comment on matters related to national security. AT&T has, however, affirmed that any cooperation it affords the law enforcement or intelligence communities occurs in accordance with law.

The other proceedings and litigation. In addition to the ACLU's Complaint here, there are similar complaints pending in other state public utility commissions around the country, as well as in state and federal courts. The first of these complaints was the *Hepting* matter discussed above. This case was filed on January 31, 2006, following publication of the original *New York Times* story, and is a nationwide class action lawsuit against AT&T pending in the United States District Court for the Northern District of California. *See Hepting, et al. v. AT&T, et al.,* No. C-06-0672-VRW. That lawsuit alleges that AT&T cooperated with various NSA national security surveillance activities and, in so doing, violated the First and Fourth Amendments of the U.S. Constitution and various provisions of the Foreign Intelligence

Surveillance Act (FISA), the Electronic Communications Privacy Act (ECPA), and California state law.

Following publication of the *USA Today* story on May 11, a series of additional class actions were filed, in both state and federal courts, making similar allegations. To date more than 30 such actions have been filed. On May 24, 2006, a petition was filed with the Judicial Panel on Multidistrict Litigation seeking to consolidate these actions before a single federal district court for pretrial proceedings. *See* Defendants Verizon Communications Inc., Verizon Global Networks Inc., and Verizon Northwest Inc.'s Motion for Transfer and Coordination Pursuant to 28 U.S.C. § 1407, *In re National Security Agency Litigation,* Judicial Panel on Multidistrict Litigation ("MDL") (May 24, 2006) (Exh. 4). Among other reasons, the MDL petition cited the national security concerns involved in these cases and the possible need to share highly classified information with federal judges as justifications for consolidating all the pending actions in a single federal judicial district for joint consideration. The United States also filed a motion with the Judicial Panel on Multidistrict Litigation to transfer these cases and in doing so made clear that "The United States Intends to Assert the State Secrets Privilege in All of the Pending Actions Brought and Seek their Dismissal." *See* The United States' Motion for Transfer and Coordination Pursuant to 28 U.S.C. 1407 To Add Actions To MDL 1791 And Response to Verizon's Motion For Transfer and Coordination, at 12, *In re National Security Agency Litigation*, Judicial Panel on Multidistrict Litigation (June 19, 2006) (Exh. 5).

On August 9, 2006, the MDL Panel granted the motions and ordered these cases to be transferred to the United States District Court for the Northern District of California. The Panel found that consolidation of the various cases was necessary, *inter alia*, in order to "prevent

inconsistent trial rulings (particularly with respect to matters involving national security)."[5] Recognizing the importance of the Government's assertion of the state secrets privilege, the Panel concluded that the Northern District of California was an appropriate transferee forum because it "has already established and utilized a procedure for reviewing classified information that the Government deems necessary to decide its state secret claim."[6]

The Hepting, Terkel, and ACLU v. NSA decisions. Almost all of the foregoing lawsuits were stayed pending a decision by the MDL Panel, and there are only three lawsuits in which any proceedings of substance occurred beyond the initial filing of the plaintiffs' complaints: *Hepting, Terkel,* and *ACLU v. NSA.*[7] In all three cases, the federal courts concluded that the matters the ACLU seeks to put at issue could not be adjudicated.

First, in the original *Hepting* case, AT&T moved to dismiss the suit on the grounds that the plaintiffs lack standing and that they had failed to allege facts essential to override the well-established statutory and common-law immunities enjoyed by telecommunications carriers who, at the direction of the government, provide facilities, assistance or information to the government in connection with authorized national security-related surveillance intelligence activities. *See* Motion of Defendant AT&T Corp. to Dismiss Plaintiffs' Amended Complaint; Supporting Memorandum, *Hepting, et al. v. AT&T Corp., et al.*, Case No. C 06-0672-VRW (N.D. Cal.) (April 28, 2006) (Exh. 7). Shortly after AT&T filed its motion, the United States intervened in the *Hepting* case and sought dismissal of the action in its entirety "because adjudication of

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[5] *See* MDL Docket No. 1791, *In re National Security Agency Telecommunications Records Litigation*, Transfer Order issued August 9, 2006, at 2 (Exh. 6).

[6] *Id.* at 2-3.

[7] In addition, the court in *Harrington, et al. v. AT&T, et al.*, Case No. 06 cv 374-LY (W.D. Tex), denied AT&T's motion for a stay pending decision on the MDL, and on July 10, 2006, AT&T filed a motion to dismiss on grounds of, *inter alia,* lack of standing and failure to allege the absence of immunity and other essential elements of plaintiffs' claim. Briefing on this motion is not yet complete.

Plaintiffs' claims risks or requires the disclosure of protected state secrets and would thereby risk or cause exceptionally grave harm to the national security of the United States." *See* Notice of Motion and Motion to Dismiss or, in the Alternative, for Summary Judgment by the United States of America, at 29, *Hepting, et al. v. AT&T Corp., et al.*, Case No. C 06-0672-VRW (N.D. Cal.) (May 12, 2006) (Exh. 8). In seeking dismissal of the *Hepting* lawsuit, the United States indicated that "no aspect of this case can be litigated without disclosing state secrets." *See* United States' Response to Plaintiffs' Memorandum of Points and Authorities in Response to Court's May 17, 2006 Minute Order, *Hepting, et al. v. AT&T Corp., et al.*, Case No. C 06-0672-VRW, at 1 (N.D. Cal.) (May 24, 2006) (Exh. 9).

In particular, the United States asserted the state secrets privilege with respect to the "existence, scope, and potential targets of alleged intelligence activities, as well as AT&T's alleged involvement in such activities." *See* Notice of Motion and Motion to Dismiss or, in the Alternative, for Summary Judgment by the United States of America, *supra* at 16. In support of this assertion, the United States submitted a classified declaration from Director of National Intelligence ("DNI") John D. Negroponte, in which Ambassador Negroponte, "who bears statutory authority as head of the United States Intelligence Community to protect intelligence sources and methods, . . . formally asserted the state secrets privilege after personal consideration of the matter." *See id.* at 12 (Citing Declaration of John D. Negroponte (Exh. 10)). Supported by a classified declaration from Director of National Security Agency Lieutenant General Keith B. Alexander, Ambassador Negroponte "demonstrated the exceptional harm that would be caused to U.S. national security interests by disclosure" of information pertaining to the alleged surveillance activities and AT&T's claimed participation in those activities. *See id.* at 13 (citing Declaration of Lieutenant General Keith B. Alexander (Exh. 11)).

On July 20, 2006, the court in the *Hepting* case issued an order denying both AT&T's and the United States' motions to dismiss. A copy of the order is attached hereto as Exhibit 2. In its Order, the court explained that the case involved allegations with respect to at least two types of NSA surveillance programs. *See* Exh. 2 at 19. First, the "terrorist surveillance program" involves the interception of communications of people with known links to al Qaeda and its affiliated organizations. *See id.* The existence of this program has been acknowledged by the United States. *See id.* Second, the communications records program allegedly involves the disclosure of calling records to the NSA. *See id.* at 21-23. The existence of this program has not been confirmed or denied by the United States. *See id.* at 23.

With respect to the "terrorist surveillance program" relating to the interception of communications not at issue here, the court concluded that "significant amounts of information about the government's monitoring of communication content and AT&T's intelligence relationship with the government are already non-classified or in the public record." *Id.* at 34. Accordingly, the court held that the very subject matter of the lawsuit is not a secret and it would be premature to decide whether the United States' assertion of the state secrets privilege will bar evidence necessary for plaintiffs' prima facie case or AT&T's defenses with respect to these allegations. *See id.* at 34-35.

However, with respect to the "calling records" allegations raised in this Division proceeding, the *Hepting* court treated these allegations as a state secret and barred discovery of any information relating to these claims, at least unless absent public confirmation of such a program by the government. *Id.* at 40-42. The court found that disclosure of these facts now could increase the risk of future terrorist attacks in the United States and concluded that "for

present purposes, the court does not require AT&T to disclose what relationship, if any it has with this alleged program." *Id.*[8]

On July 25, 2006, the United States District Court for the Northern District of Illinois reached this same conclusion in *Terkel, et al. v. AT&T Corp., et al., supra.* A copy of the *Terkel* court's July 25, 2006 Memorandum Opinion and Order ("July 25 Order") is attached hereto as Exhibit 1. In *Terkel*, as here, the action was based solely on the allegation that AT&T unlawfully provided calling records to the NSA. Because the *Terkel* plaintiffs had alleged that AT&T had acted without the certifications or other authorizations that confer immunity on carriers, AT&T moved to dismiss the action on the ground of lack of standing. The United States intervened and moved to dismiss the case on the ground of state secrets, relying (as it had in *Hepting*) on declarations of Director of National Intelligence John D. Negroponte and Director of National Intelligence Keith B. Alexander. Here, too, the public versions of these affidavits explained that confirming or denying these alleged activities would compromise intelligence sources and enable terrorists to avoid detection,[9] and as in *Hepting,* the points were explained in detail in classified versions of the affidavits that the court reviewed *in camera.*

In its July 25 Order, the *Terkel* court granted the motion to dismiss of the United States. In an exhaustive analysis, the *Terkel* court concluded that the state secrets privilege has been properly invoked by the United States, that the privilege bars disclosures of whether AT&T has participated in the alleged calling records program, and that because plaintiffs cannot prove their

[8] The court in *Hepting* held that it was irrelevant that allegations about the calling record program have appeared in newspaper articles and other media reports. It concluded that the reliability of these media reports is unclear and cannot be the basis for a conclusion that this program is public knowledge. *See* Exh. 2 at 24-27.

[9] The public version of these affidavits made showings that were largely identical to those made in the prior filings in *Hepting* except that the showings in *Terkel* were directed solely at the information relating to the allegations that calling records have been divulged to the United States.

claims without access to that information, the case must be dismissed without any further discovery or investigation of the underlying facts. *See* July 25 Order at 16-39.[10]

The *Terkel* court found that "neither AT&T nor the government has made any statements confirming or denying AT&T's participation in the particular program alleged in this case," and therefore "the existence of the activities at issue has not become public knowledge based on any statements by those entities that are most likely to have personal knowledge about the matters at issue." *Id.* at 26. After reviewing the public versions of the declarations of Ambassador Negroponte and General Alexander, the court concluded that "requiring AT&T to confirm or deny whether it has disclosed large quantities of telephone records to the federal government could give adversaries of this country valuable insight into the government's intelligence activities. Because requiring such disclosures would therefore adversely affect our national security, such disclosures are barred by the state secret privilege." *Id.* at 32. *See also, e.g., id.* at 30, 36. The court stated that the confidential versions of the affidavits reinforced these findings. The court therefore concluded that the case could not proceed, because the information that the plaintiffs would need to prove their claims – and even to prove standing – was protected from discovery by the state secrets privilege. *Id.* at 33-39.

On August 17, the court in *ACLU, et al. v. NSA, et al.* likewise concluded that all information pertaining to an alleged "data-mining" or call-records program of the NSA was covered by a valid assertion of the state secrets privilege and could not lawfully be divulged. As an initial matter, it held that the state secrets privilege does not foreclose litigation regarding the terrorist surveillance program because, the court concluded, the United States had admitted facts

[10] As in *Hepting*, the court found that media reports regarding the alleged program were irrelevant to the issue of whether AT&T's relationship (if any) with the alleged calling records program was a state secret. *See* Exh. 1 at 26-29. The court found that statements by other carriers regarding the alleged program were also irrelevant, because the plaintiffs' case "concerns AT&T, not any telephone companies." *Id.* at 30.

sufficient to allow the plaintiffs to establish a *prima facie* case with respect to those claims.[11] Indeed, the court went on to hold that that program violates the Constitution and various federal statutes.[12] But, notwithstanding those rulings regarding the terrorist surveillance program, the court concluded that the plaintiffs' claims regarding call records were barred by the state secrets doctrine: "The court, however, is convinced that Plaintiffs cannot establish a *prima facie* case to support their data-mining claims without the use of privileged information and further litigation of this issue would force the disclosure of the very thing the privilege is designed to protect."[13] For that reason, the court granted summary judgment to the United States government entities with respect to all such claims.[14]

In short, all three of these courts have made clear that the questions raised by the Complaint here regarding the alleged calling records program cannot be answered without confirming or denying facts that not only are classified, but also that may not, as a matter of federal law, be publicly disclosed even in a federal court proceeding because disclosure would risk harm to the United States' efforts to protect the nation against further terrorist attack.

FCC and other state regulatory proceedings. In parallel with the federal court litigation in *Terkel, Hepting, ACLU v. NSA,* and the other pending class action lawsuits, certain members of Congress urged the Federal Communications Commission ("FCC") to investigate the reports that AT&T and other telecommunications carriers had shared call record data with the NSA or otherwise violated the privacy protections in the Communications Act. After reviewing the matter, including the submissions of the United States in *Hepting*, the FCC concluded that "it

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[11] August 17, 2006 Order, *ACLU, et al. v. NSA, et al.*, at 13 (Exh. 3).

[12] *Id.* at 28-43. The United States has appealed that decision.

[13] *Id.* at 14.

[14] *Id.*

would not be possible for us to investigate the activities addressed in your letter without examining highly sensitive classified information." *See* Letter from Kevin J. Martin, Chairman, Federal Communications Commission to the Honorable Edward J. Markey, at 2 (May 22, 2006) (Exh. 12). Accordingly, the FCC declined to open an investigation. *See id.* at 2. Likewise, five state public utility regulatory authorities have also declined to investigate these matters and two have held proceedings in abeyance until it is determined by the courts whether necessary information will be available to the Division.[15]

Lawsuits by the United States against states and state officials. The few states that have continued to maintain they have regulatory or investigatory jurisdiction with respect to the NSA's alleged counterterrorism programs have been met with lawsuits by the federal government under the Supremacy Clause. On May 17, 2006, the New Jersey Attorney General served AT&T and other carriers with a subpoena that sought documents and other information relating to AT&T's alleged activities under the NSA program. On June 14, 2006, the United States filed suit in the United States District Court for the District of New Jersey against the New Jersey Attorney General, AT&T Corp., and other carriers, seeking a declaratory judgment that federal law prohibits New Jersey from enforcing the subpoenas and prohibits AT&T from providing the requested information to state officials. *See* Complaint, *United States of America v. Zulima V. Farber, et al.,* Civil Action No. 3:06 cv 02683, Prayer for Relief, (D.N.J.) (June 14,

[15] See Letter from David Lynch, General Counsel, Iowa Utilities Board to Mr. Frank Burdette (May 25, 2006) (Exh. 13); Letter from William H. Chambliss, General Counsel, Virginia State Corporation Commission, to ACLU of Virginia (June 22, 2006) (Exh. 14); Letter from William M. Flynn, Chairman, New York Public Service Commission to Donna Lieberman, Executive Director, New York Civil Liberties Union (June 14, 2006) (Exh. 15); Letter from Richard Hinckley, General Counsel, Public Utilities Commission of Nevada to Gary Peck, American Civil Liberties Union of Nevada (July 18, 2006) (Exh. 16); Letter from Doug Dean, Director, Colorado Public Utilities Commission, to Taylor Pendergrass, Counsel for ACLU of Colorado (August 23, 2006) (Exh. 17); On July 11, 2006, the Delaware Commission issued an Order stating that it will not make any decision on whether to initiate an investigation for a period of six months. (Exh. 18); On September 27, 2006, the Washington Utilities and Transportation Commission likewise issued an Order deferring further action pending resolution of the federal issues. (Exh. 19).

2006) (Exh. 20) ("New Jersey Action"). In this lawsuit, the United States maintains that state attempts to force carriers to disclose information about their activities, if any, under the NSA Program relate to exclusively federal functions and are preempted by a number of different provisions of federal law.

The United States explained its legal position in greater detail in a letter that was simultaneously sent to the New Jersey Attorney General. *See* Letter from Peter D. Keisler to the Honorable Zulima V. Farber (June 14, 2006) (Exh. 21). There, the United States stated that state subpoenas seeking information relating to the NSA Program "intrude upon a field that is reserved exclusively to the Federal Government and in a manner that interferes with federal prerogatives" and that "[r]esponding to the subpoenas," and even merely "disclosing whether or to what extent any responsive materials exist, would violate various federal statutes and Executive Orders," including statutes that carry felony criminal sanctions. *Id.* at 2-3. The United States also explained that the subpoenas "seek the disclosure of matters with respect to which the D[irector of] N[ational] I[intelligence] already has determined that disclosure, including confirming or denying whether or to what extent such materials exist, would improperly reveal intelligence sources and methods" in contravention of the United States' state secrets privilege. *Id.* at 5.

At the same time, the United States sent a letter to AT&T Corp. that specifically warned AT&T Corp. that "[r]esponding to the subpoenas - including by disclosing whether or to what extent any responsive materials exist - would violate federal laws and Executive Orders." Letter from Peter D. Keisler to Bradford A. Berenson, Esq., et al., at 1 (June 14, 2006) (Exh. 22). Accordingly, AT&T Corp. advised the New Jersey Attorney General that it could not disclose any of the requested information regarding AT&T activities, if any, under the NSA program,

pending the final resolution of these issues in the federal judicial system. The Attorney General has since agreed not to seek to enforce these subpoenas pending resolution of the federal litigation.

Subpoenas were also issued to AT&T entities by two Missouri Public Service Commissioners in June 2006 seeking similar information. The General Counsel for the Office of the Director of National Intelligence sent a letter to counsel for AT&T Corp. and certain of its affiliates, stating that "[c]ompliance with the subpoenas by these entities would place them in a position of having to confirm or deny the existence of information that cannot be confirmed or denied without harming national security. Further enforcement of the subpoenas would be inconsistent with, and preempted by, federal law." *See* Letter from Benjamin A. Powell, General Counsel, Office for the Director of National Intelligence to Edward R. McNicholas (July 11, 2006) (Exh. 23). The letter further states that "the Director of National Security recently asserted the state secrets privilege with respect to the very same topics and types of information sought by the subpoenas. This underscores that any such information cannot be disclosed." *See id.* On July 12, 2006, after the carriers advised the Missouri PSC commissioners that they could not respond to the subpoenas in light of the letter from the General Counsel for the Office of the Director of National Intelligence, PSC officials initiated an action in Missouri state court to compel the carriers to comply.

On July 25, 2006, the United States responded by filing a suit against the Missouri commissioners similar to the one filed in New Jersey. To assure that carriers would *not* provide information requested by the subpoenas, the United States filed an action for a declaratory judgment and other appropriate relief in federal district court against the relevant Missouri state officials and the carriers. *See* Complaint filed July 25, 2006, in *United States v. Gaw, et al.* (E.D.

Mo.) (Exh. 24). The United States sought a declaratory judgment "that the Subpoenas issued by the State Defendants may not be enforced by the State Defendants or responded to by the Carrier Defendants because any attempt to obtain or disclose the information that is the subject of these Subpoenas would be invalid under, preempted by, and inconsistent with the Supremacy Clause of the United States Constitution, Art. VI, Cl. 2, federal law, and the Federal Government's exclusive control over foreign intelligence gathering activities, national security, the conduct of foreign affairs, and the conduct of military affairs." *Id.* at 11-12. The United States argued, *inter alia*, that the state secrets privilege "covers the precise subject matter sought from the Carrier Defendants here" and that compliance with the subpoenas "could not be accomplished without harming national security." *Id.* ¶¶ 31, 33.

The United States has also filed similar suits against state officials and telecommunications carriers in three other states in which public utility regulators have sought to investigate these issues by ordering carriers to provide the same information that is at issue in the ACLU's Complaint. On August 21, 2006, the United States filed suit against the Maine Public Utilities Commission ("MPUC") and Verizon to prevent Verizon from complying with an August 9th order of the MPUC, which had required Verizon to provide by August 21 a sworn affirmation from one of its officers affirming the veracity of certain statements in Verizon's press releases, including Verizon's representation that it was not asked to provide – and did not provide -- customers' calling records to the NSA. *See* Complaint filed August 21, 2006, in *United States v. Adams, et al.* (D. Me.) (Exh. 25). Asserting that "the state secrets privilege covers precisely the same types of information that the State Defendants seek from Verizon," the United States argued that the MPUC's attempts to obtain such information "are invalid under the Supremacy Clause of the United States Constitution and are preempted by the United States

Constitution and various federal statutes." *Id.* at 2, 7. The United States further asserted that complying with the MPUC's order would "place Verizon in a position of having to confirm or deny the existence of information that cannot be confirmed or denied without causing exceptionally grave harm to national security." *Id.* at 1.

Similarly, on September 6, 2006, the United States filed suit against the commissioners of the Connecticut Department of Public Utility Control ("DPUC"), AT&T and Verizon after the DPUC issued an order requiring the carriers to respond to interrogatories asking, *inter alia,* whether the carriers had disclosed calling records to government entities including the NSA and if so, under what circumstances. *See* Complaint, ¶¶ 35, 36, in *United States v. Palermino, et al.* (D. Ct.) (Exh. 26). There the United States is seeking a declaratory judgment "that the Order issued by the State Defendants, or other similar order, may not be enforced by the State Defendants or responded to by the Carrier Defendants because any attempt to obtain or disclose the information that is the subject of this Order would be invalid under, preempted by, and inconsistent with the Supremacy Clause of the United States Constitution, Art. VI, Cl. 2, federal law, and the Federal Government's exclusive control over foreign intelligence gathering activities, national security, the conduct of foreign affairs, and the conduct of military affairs." *Id.*, Prayer for Relief.

Finally, on October 2, 2006, the United States filed suit against several Vermont state officials and telecommunications carriers. This lawsuit was filed after the Vermont Public Service Board ("VPSB") denied motions to dismiss a petition by the Vermont Department of Public Service ("VDPS") and ordered the carriers to respond to an information request from the VDPS. *See* Complaint, ¶¶ 36, 37, in *United States v. Volz, et al.* (D. Vt.) (Exh. 27). In a previous letter to the VPSB, sent on July 28, 2006, the Department of Justice explained that "[i]t

is the position of the United States that compliance with the DPS Document Requests, and any similar discovery propounded in the VPSB proceeding, would place the carriers in a position of having to confirm or deny the existence of information that cannot be confirmed or denied without harming national security, and that enforcing compliance with such requests for information would be inconsistent with, and preempted by, federal law." *See* Letter from Peter D. Keisler to Chairman James Volz, at 1-2 (July 28, 2006) (Exh. 28). As in New Jersey, Missouri, Maine and Connecticut, the United States has asserted that the Vermont officials are without jurisdiction to investigate these issues and is seeking a declaratory judgment that this investigation is preempted by federal law. *See* Complaint in *United States v. Volz,* Prayer for Relief.[16]

ARGUMENT

I. FEDERAL LAW PROHIBITS THE DISCLOSURE OF INFORMATION THAT IS NECESSARY TO RESOLVE THIS COMPLAINT.

This Complaint seeks to use Rhode Island state law to gain information regarding AT&T's alleged participation in the alleged activities of the NSA in gathering foreign intelligence in support of ongoing counterterrorism efforts. Doing so would involve the state directly in functions that are exclusively federal: the defense of the nation against foreign attack. Under such circumstances, the state is without power to act, as these matters are regulated and controlled exclusively by federal law. Moreover, as set forth above, the courts in *Hepting* and *Terkel* have made clear that the questions that the Complaint raises regarding the NSA Program cannot be answered without confirming or denying facts that are not publicly disclosed and

[16] The Department of Justice has also sent letters to the Michigan and Nebraska Public Service Commissions, urging the dismissal of complaints pending before those Commissions for the same reasons. *See* Letter from Peter D. Keisler, Assistant Attorney General, to Michigan Public Service Commission, dated September 19, 2006 (Exh. 29); *See* Letter from Peter D. Keisler, Assistant Attorney General, to Nebraska Public Service Commission, dated October 13, 2006 (Exh. 30).

doing so would risk harm to the United States' efforts to protect the nation against further terrorist attack. Such an inquiry clearly cannot be undertaken and is beyond the jurisdiction of the Division.

The United States Constitution provides that federal law "shall be the supreme Law of the Land. . . ." Art. VI, cl. 2. Accordingly, it as long been settled "that state law that conflicts with federal law is 'without effect.'" *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (citations omitted). Federal preemption of state law may be either express or implied. *See id.* State law is implicitly preempted when federal law so thoroughly occupies a field that there is no room left for the states to regulate, or when there is a conflict between federal and state law. *See id.; see also Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 372 (2000) (citations omitted) ("state law is preempted to the extent that it conflicts with federal law").

This is true whether the state law conflicts with federal statutory law or federal common law. *See, e.g., Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988) (there are some fields of activity that involve "'uniquely federal interests,' [and] are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts – so-called 'federal common law.'") (citations omitted). Thus where there are "uniquely federal interests," state law is preempted to the extent that there is a conflict between the two. *See id.* at 504-05, 507-08. Moreover, when unique federal interests are involved, "[t]he conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption when Congress legislates in a field which the States have traditionally occupied." *Id.* at 507. Finally, "the states have no power . . . to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into

execution the powers vested in the general government." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819). This proceeding is preempted under all of these different aspects of the Supremacy Clause.

A. FEDERAL STATUTES PREEMPT APPLICATION OF STATE LAW UNDER THESE CIRCUMSTANCES.

As an initial matter, this proceeding cannot go forward, because two specific federal statutes directly prohibit disclosure of the very information this proceeding would require. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (noting that "the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements"). This position was clearly stated by the United States in its June 14, 2006 letter to New Jersey Attorney General in connection with the New Jersey Action. In that letter, the United States asserted that "[r]esponding to the subpoenas" issued by New Jersey, which sought national security information of the precise type that this Division would necessarily have to seek if it proceeded in this matter, "including merely disclosing whether or to what extent any responsive materials exist, would violate various federal statutes and Executive Orders." (Exh. 21 at 3). In addition to the two statutes discussed below, the June 14 letter of the United States details other binding provisions of federal law with which any state investigation of NSA intelligence activities would conflict.

First, 18 U.S.C. § 798 makes it a felony to "knowingly and willfully communicate[], furnish[], transmit[], or otherwise make[] available to an unauthorized person, or publish[], or use[] in any manner prejudicial to the safety or interest of the United States, . . . any classified information . . . concerning the communication intelligence activities of the United States." *Id.* The United States has repeatedly emphasized that the NSA program and all of its operational details, including the existence or non-existence of participation by particular telecommunication

carriers, is highly classified. In his declaration filed in *Hepting*, Director Negroponte has sworn that "[t]o discuss [the Terrorist Surveillance Program] in any greater detail . . . would disclose classified intelligence information." Negroponte Decl. ¶11; *see also id.* ¶13 ("proceedings in this case risk disclosure of privileged and classified intelligence-related information") (Exh. 9); Alexander Decl. ¶ 9 (same) (Exh. 10).

Similarly, when Attorney General Gonzales made a limited public acknowledgement of an NSA program concerning "intercepts of contents of communications" involving al-Qaeda, he stressed that the program is not only "highly classified," but indeed "probably the most classified program that exists in the United States government." *See* Press Conference of Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005), available at http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html. Moreover, as the court in *Hepting* strongly indicated that with respect to the alleged communications records program at issue here, the United States' assertion of the state secrets privilege could be defeated only if the United States made public disclosures about the program, either deliberately or inadvertently (or if the telecommunications carriers did so). *See* July 20 Order, *Hepting, et al. v. AT&T Corp., et al.*, at 41-42 (July 20, 2006) (Exh 2). Because the United States has asserted the state secrets privilege with respect to this information and has vigorously protected it from disclosure, it can be presumed that allowing state actions pertaining to the alleged NSA program to proceed could result in the disclosure of classified materials. *See Halkin v. Helms ("Halkin II")*, 690 F.2d 977, 996 n.69 (D.C. Cir. 1982) (noting that "matter qualifying as a secret of state will presumably always qualify for classified status."). Because compliance with any state investigation of this matter would require AT&T to disclose, at a minimum, whether it was in possession of relevant

information, AT&T could not participate in a proceeding on the investigation without violating this criminal statute.

Second, this investigation is also preempted by § 6 of the National Security Agency Act of 1959, Pub. L. No. 83-36, § 6, 73 Stat. 63, 64 (codified at 50 U.S.C. § 402 note), which prohibits the disclosure of any information regarding the activities of the NSA. Specifically, the Act provides that "nothing 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, of any information with respect to the activities thereof, or of the names, titles, salaries, or number of persons employed by such agency." 50 U.S.C. § 402 note.

In enacting Section 6, Congress was "fully aware of the 'unique and sensitive activities of the [NSA] which require 'extreme security measures." *Hayden v. National Security Agency,* 608 F.2d 1381, 1390 (D.C. Cir. 1979). This statute "reflects . . . a congressional judgment that, in order to preserve national security, information elucidating the subjects specified ought to be safe from forced exposure." *Founding Church of Scientology v. National Security Agency*, 610 F.2d 824, 828 (D.C. Cir. 1979); *Hayden*, 608 F.2d at 1389 (interpreting section 6; "release of the documents would disclose a function of the NSA, since signals intelligence is one of the Agency's primary functions; and would disclose information with respect to Agency activities, since any information about an intercepted communication concerns an NSA activity"). Thus, "[t]he protection afforded by section 6 is, by its very terms, absolute. If a document is covered by section 6, NSA is entitled to withhold it. . . ." *Linder v. Nat'l Security Agency,* 94 F.3d 693, 698 (D.C. Cir. 1996).

Requiring disclosure of the information called for by this investigation would clearly be in conflict with the Section 6. Indeed, the FCC has already recognized that because "[t]he

Commission has no power to order the production of classified information," and because section 6 of the National Security Act of 1959 independently prohibits disclosure of information relating to NSA activities, the FCC lacks the authority and the ability to compel the production of the information necessary to undertake an investigation. (Exh. 12 at 2). The FCC therefore declined to do so. The same is true of this Division, and this Division should reach the same conclusion.

B. THE UNITED STATES' ASSERTION OF ITS STATE SECRETS PRIVILEGE IS FURTHER CONFIRMATION THAT THE REQUESTED INVESTIGATION CANNOT PROCEED.

In addition, the investigation requested in the Complaint would call for the disclosure of information regarding the alleged calling records program which the United States has asserted is covered by its state and military secrets privilege, and the courts in *Terkel*, *Hepting*, and *ACLU v. NSA* have recognized that this information cannot be disclosed even in federal court proceedings. *See* July 25 Order, *Terkel, et al. v. AT&T Corp., et al.,* at 16-39 (Exh. 1); July 20 Order, *Hepting, et al. v. AT&T Corp., et al.*, at 41-42 (Exh. 2); August 17 Order, *ACLU, et al. v. NSA, et al.* at 14 (Exh. 3). These facts vividly confirm that the information necessary to evaluate the Complaint is beyond the reach of the Division and that the investigation requested by the ACLU cannot proceed.

The state secrets privilege is a constitutionally-based privilege belonging exclusively to the federal government that protects any information whose disclosure would result in "impairment of the nation's defense capabilities" or "disclosure of intelligence-gathering methods or capabilities." *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983). 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." *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953). When the entire subject matter of a controversy is a state

secret, then the matter must be dismissed outright, and no balancing of competing considerations are allowed or sufficient to override the privilege. *See, e.g., Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998). Moreover, the state secrets privilege cannot be waived by a private party such as AT&T. *See United States v. Reynolds*, 345 U.S. at 7.

The state secrets assertion in *Terkel, Hepting, ACLU v. NSA*, and other cases covers all details of the alleged NSA calling records program at issue here, including the identities of any carriers participating in it and their roles and responsibilities, if any. This position was reiterated by the United States in its June 14, 2006 letter to the New Jersey Attorney General in connection with the New Jersey Action. In that letter, the United States asserted that "[i]n seeking information bearing upon NSA's purported involvement with various telecommunications carriers," New Jersey sought "the disclosure of matters with respect to which the DNI has already determined that disclosure, including confirming or denying whether or to what extent such materials exist, would improperly reveal intelligence sources and methods." (Exh. 21 at 5). The Justice Department then made clear that, as a legal matter, the state's effort to investigate matters covered by the privilege "conflicts with the assertion of the state secrets privilege by the Director of National Intelligence" and, as such, "would contravene the DNI's authority and the Act of Congress conferring that authority." *Id.* at 5-6.

Because the United States has asserted the state secrets privilege with regard to even the mere existence or non-existence of any relationship between the federal government and AT&T Corp. in connection with the program underlying the Complaint, and the courts in *Terkel, Hepting,* and *ACLU v. NSA* have recognized the legal validity of that assertion and warned that any disclosure will increase the risk of future terrorist attacks, any action by the Division would be in clear conflict with a controlling principle of federal law and cannot go forward.

Finally, it is irrelevant that the United States has not formally invoked the state secrets privilege in this state administrative proceeding. It has not done so because it is the position of the United States, as it is the position of AT&T, that state utility commissions lack jurisdiction over allegations concerning these issues. Thus, while the United States has not formally asserted this privilege in state commission proceedings, it has referred to the privilege in each of the lawsuits that it has brought to obtain equitable relief against the attempts that a handful of state utility commissions have made to investigate these issues, and federal courts can and will consider the state secrets privilege in determining whether the state commission proceedings are preempted. The Division therefore cannot rationally attempt to investigate the ACLU's allegation if it believes that the investigation is barred by the state secrets privilege.

In this regard, the Division has the facts before it that establish that the state secrets privilege has been properly invoked and that federal courts have properly held that this privilege bars any investigation into the factual allegations that the ACLU has made here. The public versions of the affidavits of the Director of National Intelligence (Ambassador Negroponte) and of the head of the NSA (General Alexander) have been filed before the Department, and both Judge Walker in the *Hepting* case and Judge Kennelly in the *Terkel* case concluded that this public information is itself sufficient to establish that the state secrets privilege applies here. For example, Judge Kennelly expressly reached his conclusion "based on the government's public submission," concluding that it established that "requiring AT&T to confirm or deny whether it has disclosed large quantities of telephone records to the federal government could give adversaries of this country valuable insight into government's intelligence activities [and that] requiring such disclosures could adversely affect our national security." *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899, 917 (N.D. Ill. 2006). Similarly, Judge Walker's analysis relied entirely on

the same publicly available materials, reasoning that disclosures of whether or not AT&T provided calling records to NSA would provide terrorists with valuable information that would enable them to operate more efficiently and with reduced risks of detection. *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 990-91, 997 (N.D. Cal. 2006). Because this same information is before the Division, it has before it the facts that establish that any attempt by it to investigate these matters violates the state secrets privilege and is thus contrary to federal law and preempted for this reason.

Further, even if the Division did not consider the state secrets privilege, the Department's invocation of the state secrets privilege vividly confirms that carriers cannot confirm or deny whether they have provided calling records to NSA without disclosing classified information in violation of the executive orders and two federal statutes discussed above. Thus, while the United States did not assert the state secrets privilege in the earlier proceedings before the FCC, the FCC determined that it had no ability or authority to conduct an investigation because these federal statutes prohibited the carriers from providing the relevant information. In this regard, even if the state secrets privilege somehow could not be considered by the Division, the fact that the United States has asserted the state secrets privilege in the federal court class action proceedings with respect to the very program allegedly placed at issue by the Complaint is dramatic confirmation that the information at issue is highly classified national security information and that federal law prohibits any attempt by this Division to compel disclosure of this information. These facts also establish that the United States will act vigorously – as it has acted vigorously – to prevent state officials from attempting to investigate this matter and that the only consequence of any attempt by the Division to investigate these issues will be to

provoke a federal-state confrontation that federal authorities are certain to win – with AT&T and other telecommunications carriers unfairly placed in the middle.

II. STATE LAW IS PREEMPTED WITH REGARD TO MATTERS OF NATIONAL SECURITY.

As set forth above, when state action involves "uniquely federal interests" state law is preempted to the extent that there is a conflict between the two. *See Boyle*, 487 U.S. at 504-05, 507-08. Moreover, when unique federal interests are involved, "[t]he conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption when Congress legislates in a field which the States have traditionally occupied." *Id.* at 507. There can be no doubt that the entire area of national security and foreign intelligence gathering are uniquely and exclusively federal interests and as such any state law, regulation, or state governmental activity that would have a tendency to impact these activities is wholly preempted. *See, e.g., American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (invalidating subpoenas seeking information concerning insurance policies sold in Europe in the inter-war period). In addition, any state action is preempted which seeks the adjudication of matters concerning the espionage relationships of the United States within the meaning of the *Totten* rule.

A. STATE AUTHORITIES LACK CONSTITUTIONAL POWER IN THE REALM OF MILITARY AND INTELLIGENCE AFFAIRS, AND DIVISION PROCEEDINGS IN THIS FIELD ARE ENTIRELY PREEMPTED.

This proceeding should be dismissed because state officials lack any authority to intrude into the foreign intelligence or military activities of the United States, and particularly to investigate or interfere with the operations of federal government entities entrusted with those constitutional responsibilities. The Constitution vests exclusive power over these subjects in the federal government. Congress is granted the power "to ... provide for the common Defense," to "regulate Commerce with foreign Nations" and to "declare War," among other powers related to

national security and foreign affairs. *See* U.S. Const. art. I, § 8, cls. 1, 3, 4, 10, 11; *id.* § 9 cl. 8. The President is the Commander in Chief, among other related powers. *Id.* art. II, § 2, cls. 1, 2; *id.* § 3. States, by contrast, are constitutionally forbidden from "enter[ing] into any Treaty, Alliance, or Confederation"; and cannot "without the Consent of Congress ... enter into any Agreement or Compact with ... a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." *Id.* art. I, § 10, cls. 1-3. The structural decision to vest sole responsibility for defending the nation against foreign attack in the federal government was critical to the enactment of the Constitution: The experience of the Articles of Confederation convinced the Framers that certain subjects required a unified national response—specifically, relations with the outside world, whether in the form of national defense, national security, war making or diplomacy. *See, e.g.*, The Federalist No. 42 (James Madison) (The power to "regulate the intercourse with foreign nations .... forms an obvious and essential branch of the federal administration. If we are to be one nation in any respect, it clearly ought to be in respect to other nations."); 1 The Records of the Federal Convention of 1787, at 17 (Edmund Randolph) (Max Farrand ed., rev. ed. 1937) ("[T]he confederation produced no security against foreign invasion...."); *see also Hines v. Davidowitz*, 312 U.S. 52, 63 n.9 (1941) ("The importance of national power in all matters relating to foreign affairs and the inherent danger of state action in this field are clearly developed in Federalist papers No. 3, 4, 5, 42 and 80.").

Accordingly, it long has been recognized that "as a matter of 'purely legal principle ... the Constitution ... allotted to the federal government jurisdiction over foreign commerce, foreign affairs and national defense.'" *United States v. Maine*, 420 U.S. 515, 522 (1975). "Power over external affairs is not shared by the States; it is vested in the national government exclusively." *United States v. Pink*, 315 U.S. 203, 233-34 (1942); *Nat'l Foreign Trade Council v. Natsios*, 181

F.3d 38, 49-50 (1st Cir. 1999), *aff'd on other grounds*, 530 U.S. 363 (2000); *see also Zschernig v. Miller*, 389 U.S. 429, 432 (1968) ("'Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.'"); *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) ("If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action."); *Stehney v. Perry*, 907 F. Supp. 806, 824 (D.N.J. 1995) ("State regulation in the area of national security is expressly preempted by Article I, § 8 and Article II, § 2 of the Constitution."), *aff'd*, 101 F.3d 925 (3d Cir. 1996); Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. Pa. L. Rev. 1245, 1295-96 (1996) ("By simultaneously granting authority to the political branches and denying power to the states, the Constitution appears to vest exclusive and plenary control over foreign relations in the federal government.").

To be sure, not every state action that merely touches upon national security or foreign affairs is foreclosed. *See Garamendi*, 539 U.S. at 418 ("state action with *more than incidental effect* on foreign affairs is preempted" (emphasis added)). But this is hardly a case in which the effect sought is merely incidental: The very purpose of the Complaint is to inquire into the classified intelligence-gathering activities of an agency of the Department of Defense.[17] And for that reason, even if this Division had incidental authority with respect to matters touching indirectly upon national security and foreign affairs (notwithstanding Articles I and II of the Constitution), they would be further disabled here by virtue of the Supremacy Clause. The

[17] It is true but irrelevant that the States have a role in regulating telecommunications carriers. The relevant question is whether that role extends into the sphere of carriers' alleged cooperation with foreign intelligence or defense activities. In *Zschernig*, the Supreme Court invalidated an Oregon probate statute despite the fact that "[t]he several States ... have traditionally regulated the descent and distribution of estates," because such "regulations must give way" when they interfere with powers that belong exclusively to the national government. 389 U.S. at 440.

ACLU's Complaint, in its effect and purpose, seeks to "interfere with the implementation of [an alleged] federal program by a federal agency." *Forest Park II v. Hadley*, 336 F.3d 724, 732 (8th Cir. 2003). It does not matter that the ACLU has attempted an end-run around sovereign immunity by using this Division to seek information from AT&T rather than the federal government: state officials cannot "regulate[] the conduct of [private] citizen[s]" in an effort to "regulate[] or restrict[] the actions of the federal government." *Id.*; *see also id* ("This situation presents the quintessential case of the Supremacy Clause in action. Simply, state statutes may not interfere with the implementation of a federal program by a federal agency."). This conclusion follows directly from the foundational holding in *M'Culloch v. Maryland* that "the states have no power, by taxation *or otherwise*, to retard, impede, burden, *or in any manner control*, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government." 17 U.S. (4 Wheat.) at 436 (emphases added)); *see also United States v. Belmont*, 301 U.S. 324, 332 (1937) ("[C]omplete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states.... [I]n respect of our foreign relations generally, state lines disappear."). As the United States made clear in its June 14, 2006 letter to the New Jersey Attorney General in connection with the New Jersey Action, by seeking to investigate matters pertaining to the NSA's intelligence-gathering activities, a state "intrude[s] upon a field that is reserved exclusively to the Federal Government and in a manner that interferes with federal prerogatives." (Exh. 21 at 2-3).

B. THIS COMPLAINT IS PREEMPTED BY THE TOTTEN RULE.

Well established federal law also prohibits any adjudication of claims (state or federal) that relate to the existence of alleged espionage relationships with the United States. The so-called *Totten* rule provides that "the existence of a contract for secret services with the

government is itself a fact not to be disclosed." *Totten v. United States*, 92 U.S. 105, 107 (1875). Just last year, the Supreme Court unanimously reaffirmed *Totten*, holding that "lawsuits premised on alleged espionage agreements are altogether forbidden." *Tenet v. Doe*, 544 U.S. 1, 9 (2005). The Court described the "core concern" of *Totten* as "preventing the existence of [the alleged espionage agent's] relationship with the Government from being revealed." *Id.* at 10.

Where this concern is present, an "absolute protection" is required, because "[t]he possibility that a suit may proceed and an espionage relationship may be revealed ... is unacceptable." *Id.* Indeed, the Supreme Court has observed that the applicability of the *Totten* rule may be decided before jurisdictional questions are resolved, and when the existence of a secret espionage agreement is at issue, the suit should be dismissed on the pleadings. *See Tenet*, 544 U.S. at 6 (describing the applicability of the *Totten* rule as a "'threshold question'"); *see id.* at 9 (noting that cases such as *Totten* in which "'the very subject matter of the action, a contract to perform espionage, was a matter of state secret" should be "'dismissed *on the pleadings without ever reaching the question of evidence*, since it [is] so obvious that the action should never prevail over the privilege'") (quoting *United States v. Reynolds*, 345 U.S. 1, 11 n.26 (1953)) (emphasis in *Tenet*).

The concerns that are addressed by the *Totten* rule are squarely implicated by the ACLU's Complaint. The Complaint presents precisely the sort of claim that cannot be examined or adjudicated without attempting to establish the existence or non-existence of a secret espionage relationship between the United States and private parties.

While the court in *Hepting* concluded that the *Totten* bar did not preclude the plaintiffs from proceeding with their claims, it did so largely because it believed (incorrectly) that a relationship between AT&T and the federal government in connection with the "terrorist

surveillance program" had been disclosed in at least general terms. *See* July 20 Order, *Hepting, et al. v. AT&T Corp., et al.*, at 31 (July 20, 2006) (Exh. 2). The same is not true with respect to the alleged communication records disclosure program at issue here. Indeed, the court in *Hepting* recognized that the existence of this program has not been confirmed or denied, and that AT&T Corp.'s relationship, if any, to the program is a fact that it should not be forced to disclose. *See id.* at 40-42.[18] Accordingly, this federal rule of law preempts state law under these circumstances and, for this reason as well, this proceeding cannot go forward.

III. FEDERAL STATUTORY LAW LIKEWISE ENTIRELY PREEMPTS STATE AUTHORITY IN THESE CIRCUMSTANCES.

The subject matter of the ACLU's Complaint is entirely preempted for another reason as well: even were the states not categorically disabled under the Constitution from acting in this area, Congress has regulated the field of telecommunications carriers' assistance to the federal government in conducting foreign intelligence surveillance activities. *See Hillsborough County v. Automated Med. Labs.*, 471 U.S. 707, 713 (1985) (federal law preempts an entire field of state law when "the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation") (internal quotation marks and citation omitted). This pervasive regulation leaves no room for state involvement.

Under the doctrine of "field preemption," "state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990). "Such an intent may be inferred from a 'scheme of federal regulation ... so pervasive as to make reasonable the inference that Congress

[18] To the extent that the court also concluded that the *Totten* bar applies only to preclude a plaintiff who was a party to a clandestine relationship from bringing a claim arising out of that relationship, AT&T disagrees with this conclusion. It is the exposure of the relationship that is at issue and there is nothing to suggest that the concern is somehow non-existent if it is raised by a plaintiff who was not a party to the alleged relationship. *See Tenet v. Doe*, 544 U.S. 1, 9 (2005).

left no room for the States to supplement it,' or where an Act of Congress 'touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

Here, both of these tests are satisfied. For all of the reasons set forth above, the federal interest is manifestly "dominant." *United States v. Isa*, 923 F.2d 1300, 1307 (8th Cir. 1991) ("The governmental interests in gathering foreign intelligence are of paramount importance to national security." (internal quotation marks omitted)); *see Murphy v. Waterfront Comm'n*, 378 U.S. 52, 76 n.16 (1964) ("the paramount federal 'authority in safe-guarding national security' justifies 'the restriction it has placed on the exercise of state power'"); *Pennsylvania v. Nelson*, 350 U.S. 497, 504-05 (1956) (preempting state-law claim involving national security).[19] Under such circumstances, preemption is not merely available—it is "presumed." *Heart of Am. Grain Inspection Serv., Inc. v. Missouri Dep't of Agric.*, 123 F.3d 1098, 1103 (8th Cir. 1997).

Even were that not the case, the ACLU's Complaint, and any investigation of the Complaint by this Division, are preempted because Congress has enacted a series of detailed and interlocking statutes that regulate the obligations of telecommunications carriers to assist the federal government with foreign intelligence surveillance activities. These statutes impose technical requirements on telecommunications carriers; specify the circumstances under which carriers may (or must) provide designated types of customer information to the federal government; and include civil and criminal enforcement mechanisms for the statutory

[19] *See also New SD v. Rockwell Int'l Corp.*, 79 F.3d 953, 955 (9th Cir. 1996) (with respect to "government contractor matters having to do with national security, state law is totally displaced by federal common law"); *MITE Corp. v. Dixon*, 633 F.2d 486, 491 (7th Cir. 1980) ("In the realms of national security and foreign affairs, state legislation has been held impliedly preempted because both areas are of unquestionably vital significance to the nation as a whole."), *aff'd on other grounds sub nom. Edgar v. MITE Corp.*, 457 U.S. 624 (1982); *AMCA Int'l Corp. v. Krouse*, 482 F. Supp. 929, 934 (S.D. Ohio 1979) ("The Supreme Court has also found preemption when the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. There is an overriding federal interest in the spheres of foreign affairs and national security.")

requirements, as well as special litigation immunities for cooperating carriers. In enacting these comprehensive regulations, Congress simply has "'left no room' for supplementary state regulation," and thereby has preempted the field. *Hillsborough County*, 471 U.S. at 713 (quoting *Rice*, 331 U.S. at 230).

First, the Communications Assistance to Law Enforcement Act ("CALEA"), 47 U.S.C. § 1001 *et seq.* enumerates the technical capabilities that telecommunications carriers must possess so that they can assist in government surveillance activities. In addition to detailed technical requirements, *see id.* § 1002, this statute contains security requirements, *id.* § 1004, a provision requiring various forms of technical cooperation, *id.* § 1005, and an enforcement provision that is carefully limited, *see* 18 U.S.C. § 2522; H.R. Rep. No. 103-827, pt. 1, at 28 ("[i]n order to avoid disparate enforcement actions throughout the country which could be burdensome for telecommunications carriers, this authority is vested in the Attorney General of the United States").

Second, layered on top of these technical requirements are a series of statutes that regulate when and under what circumstances telecommunications carriers may or must assist the federal government in its surveillance activities. The Stored Communications Act ("SCA"), 18 U.S.C. § 2701 *et seq.*, regulates in detail the circumstances in which telecommunications carriers may (and sometimes must) disclose stored communications such as customer calling records to the federal government. *Id.* §§ 2702, 2703. Likewise, the Wiretap Act, 18 U.S.C. § 2510 *et seq.*, regulates the circumstances in which telecommunications may intercept communications on behalf of the federal government and disclose the contents of such communications to government agents. *Id.* § 2511(2); *see also United States v. Carrazana*, 921 F.2d 1557, 1562 (11th Cir. 1991) ("[i]n 1968, Congress preempted the field of interception of wire and oral

communications by enacting Title III of the Omnibus Crime Control and Safe Streets Act [*i.e.*, the Wiretap Act]"). And, in the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. § 1801 *et seq.*, Congress authorized the federal government to direct telecommunications carriers to assist in foreign intelligence surveillance activities.[20] *See, e.g.*, 50 U.S.C. § 1804(a)(4)[21]; 50 U.S.C. § 1805(c)(2).[22] In this regard, FISA regulates numerous aspects of foreign intelligence surveillance, including electronic surveillance, *id.* §§ 1801-11, physical searches, *id.* §§ 1821-29, pen registers and trap and trace devices, and access to business records, *id.* §§ 1861-62. Notable here, both the Wiretap Act and FISA already regulate the disclosure of the information the ACLU seeks through its Complaint, and both provide that this information is to be disclosed to, and these activities overseen by, committees of the Congress and other exclusively federal instrumentalities. *See* 18 U.S.C. § 2519; 50 U.S.C. §§ 1807, 1808, 1826, 1846, 1862 (requiring reports to Congress and the Administrative Office of the U.S. Courts).

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[20] The special and exclusively federal nature of foreign intelligence surveillance is emphasized by the fact that applications to conduct FISA surveillance must be submitted by a federal officer to a special federal court, must be approved by the Attorney General of the United States, and must include a certification by an Executive Branch official. *See* 50 U.S.C. § 1804(a). Moreover, government officials must notify the Attorney General before disclosing in a law enforcement proceeding information derived from foreign intelligence surveillance. *See id.* § 1806.

[21] "With respect to electronic surveillance authorized by this subsection [i.e., without a court order], the Attorney General may direct a specified communication common carrier to--(A) furnish all information, facilities, or technical assistance necessary to accomplish the electronic surveillance in such a manner as will protect its secrecy and produce a minimum of interference with the services that such carrier is providing its customers; and (B) maintain under security procedures approved by the Attorney General and the Director of National Intelligence any records concerning the surveillance or the aid furnished which such carrier wishes to retain. The Government shall compensate, at the prevailing rate, such carrier for furnishing such aid." *Id.*

[22] "An order approving an electronic surveillance under this section shall direct--. . . (B) that, upon the request of the applicant, a specified communication or other common carrier . . . furnish the applicant forthwith all information, facilities, or technical assistance necessary to accomplish the electronic surveillance in such a manner as will protect its secrecy and produce a minimum of interference with the services that such carrier . . . is providing that target of electronic surveillance; (C) that such carrier . . . maintain under security procedures approved by the Attorney General and the Director of National Intelligence any records concerning the surveillance or the aid furnished that such person wishes to retain; and (D) that the applicant compensate, at the prevailing rate, such carrier . . . for furnishing such aid." *Id.*

Finally, Congress has enacted complex regimes of liability for violations of each of these statutes. Liability-imposing provisions include 18 U.S.C. §§ 2520, 2707, and 50 U.S.C. §§ 1809, 1810, 1827, and 1828; and immunizing provisions appear in 18 U.S.C. §§ 2511, 2520(d) and 2707(e). *See Muskovich v. Crowell*, No. 3-95-CV-80007, 1995 WL 905403 (S.D. Iowa Mar. 21, 1995) ("In section 2708, Congress unequivocally expressed an intent to occupy the field and provide the exclusive remedies for conduct regulated by" the Electronic Communications Privacy Act of 1986, of which the SCA is a part).[23] In light of the pervasive scheme of federal regulation concerning the cooperation of telecommunications carriers with federal intelligence activities, there is no room for state legislation or regulation in this field.

For similar reasons, any attempts by States to require the production of information regarding any relationship of AT&T and Verizon with the NSA are preempted because they would "stand as an obstacle to the accomplishment and execution of the full purposes of Congress." *Hines*, 312 U.S. at 67. Through these federal statutes, Congress has carefully sought to balance customers' privacy interests and the federal government's need to protect the public from foreign threats. *United States v. Phillips*, 540 F.2d 319, 324 (8th Cir. 1976) ("This legislation attempts to strike a delicate balance between the need to protect citizens from unwarranted electronic surveillance and the preservation of law enforcement tools needed to fight organized crime."); H.R. Rep. No. 103-827, pt. 1, at 11 (1994) ("the legislation 'has as its dual purpose (1) protecting the privacy of wire and oral communications and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized.'"). When Congress has struck a balance in this fashion, any state action that seeks to upset, impact, or modify that balance is preempted. *E.g.*, *Bonito Boats,*

[23] These enforcement provisions vividly illustrate the interlocking nature of the complementary federal statutes. *See, e.g.*, 18 U.S.C. § 2511(2)(f) (Wiretap Act provision cross-referencing FISA); *id.* § 2522 (CALEA enforcement provision cross-referencing FISA); *id.* § 2702(b)(2) (SCA provision cross-referencing Wiretap Act).

Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 152 (1989). This is true even when state laws purport to further the same privacy-protection goals as the federal statutes. *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 379-80 (2000) ("The conflicts are not rendered irrelevant by the State's argument that there is no real conflict between the statutes because they share the same goals ... The fact of a common end hardly neutralizes conflicting means ...."); *In re Operation of the Missouri River Sys. Litig.*, 418 F.3d 915, 919 (8th Cir. 2005).[24] Because, at best, this proceeding would be a "conflicting means" to the common end of protecting subscriber privacy in the context of foreign intelligence gathering activities, it is preempted by federal law and may not proceed.

[24] *See also Commonwealth of Pennsylvania v. Nelson*, 350 U.S. 497, 478-79 (1956) ("The precise holding of the court, and all that is before us for review, is that the Smith Act of 1940 . . . which prohibits the knowing advocacy of the overthrow of the Government of the United States by force and violence, supersedes the enforceability of the Pennsylvania Sedition Act which proscribes the same conduct."). In *Nelson*, the Court noted that once Congress determines that a particular area of law is a "matter of vital national concern, it is in no sense a local enforcement problem." *Id.* at 482.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, AT&T respectfully requests that the Division issue an Order which:

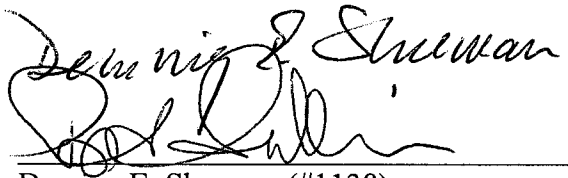
1. Dismisses the above captioned Complaint with prejudice; and

2. Grants any additional relief that is just and reasonable under the circumstances.

Respectfully submitted,

AT&T COMMUNICATIONS OF
NEW ENGLAND, INC.

By its Attorneys,



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November 15, 2006

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of November, 2006, I caused a copy of the within Motion to Dismiss to be mailed to:

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EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STUDS TERKEL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	**Case No. 06 C 2837**
	)	
AT&T CORP., et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

This case is one of a number of suits filed in federal courts around the country in which the plaintiffs contend that AT&T Corp. and affiliated entities have illegally provided information about customer telephone calls and Internet communications to the National Security Agency. Some of the cases have been stayed; a few, including this one, have not. The government has intervened in the cases that are being litigated and has sought dismissal pursuant to the "state secrets" privilege, contending that allowing the cases to be litigated would damage national security. In the one case that has reached decision thus far, *Hepting v. AT&T Corp.*, Case No. C-06-672 (N.D. Cal. July 21, 2006), the Honorable Vaughn Walker concluded that the state secrets privilege did not require dismissal of the case, largely because of public disclosures by the government about a program in which it intercepts the contents of communications in certain circumstances and public admissions by AT&T about its willingness to assist the government.

This case differs from *Hepting* in two significant respects. First, the plaintiffs in this case do not challenge the interception of the *contents* of communications; their challenge is limited to the alleged disclosure of *records* regarding customer communications. The governmental disclosures that Judge Walker relied on in *Hepting* concern the former, not the latter. Second, the plaintiffs in this case seek (thus far, at least) only prospective relief – an injunction and a declaratory judgment – in contrast to the *Hepting* plaintiffs, who also seek damages for claimed past disclosures. In view of constitutionally-imposed limits on the standing of a plaintiff to sue for prospective relief, disclosures about past activities (of the type relied upon by Judge Walker in *Hepting*) are of limited value to the plaintiffs in the present case, as we will discuss.[1]

The plaintiffs in this case, six individuals and the American Civil Liberties Union of Illinois, seek to represent a class consisting of all of AT&T's Illinois customers. They allege that AT&T has released and continues to release records regarding "massive numbers of domestic telephone calls" involving its Illinois customers to the NSA, in violation of 18 U.S.C. § 2702(a)(3), and that the NSA uses this data to search for patterns that might warrant further investigation. *See* Amend. Compl. ¶ 2.

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1 The Court has two other similar cases pending. In one of them, *Joll v. AT&T Corp.*, Case No. 06 C 2680 (N.D. Ill.), the plaintiffs, as in *Hepting,* challenge the alleged interception of contents of communications as well as the alleged disclosure of records, and they seek damages for past alleged wrongs as well as prospective relief. *See, e.g.,* Second Am. Compl. (Case No. 06 C 2680, docket no. 31) ¶¶ 2, 35, 57-62. In the other case, *Waxman v. AT&T Corp.,* Case No. 06 C 2900 (N.D. Ill.), the plaintiffs challenge only the alleged disclosure of records, but they seek damages for past alleged violations in addition to injunctive relief. *See, e.g.,* Compl. (Case No. 06 C 2900, docket no. 1) ¶¶ 1, 9-11, 18, 25, 27, 31, 37. The Court temporarily deferred consideration of those cases in order to focus on the present case, in which the plaintiffs had moved for entry of a preliminary injunction. Because of the differences between those cases and this one, our ruling in this case is not necessarily dispositive of the other cases.

AT&T has moved to dismiss the complaint, contending that the plaintiffs have inadequately alleged their standing to sue. The government, to which the Court granted leave to intervene, has moved to dismiss or for summary judgment, arguing that the state secrets privilege and various other legal doctrines bar the litigation of the case in its entirety, or at a minimum prevent the plaintiffs from seeking to establish their standing to sue.

For the reasons stated below, the Court denies AT&T's motion to dismiss, concluding that the complaint adequately alleges the plaintiffs' standing. We grant, however, the government's motion to dismiss. The Court concludes that in contrast to the alleged content monitoring that is a key focus of the *Hepting* case, there have been no public disclosures of the existence or non-existence of AT&T's claimed record turnover – the sole focus of the current complaint in the present case – that are sufficient to overcome the government's assertion of the state secrets privilege. The Court further concludes that due to the operation of that privilege, the plaintiffs (to whom we will refer as the "*Terkel* plaintiffs") cannot obtain the information they would need to prove their standing to sue for prospective relief and thus cannot maintain that type of claim. We therefore dismiss the *Terkel* plaintiffs' complaint, allowing them to seek leave to amend their claims if they wish to do so.

Facts

As noted above, the *Terkel* plaintiffs are six Illinois residents and an organization, the ACLU of Illinois. They have filed this action seeking to represent all present and future Illinois residents who are or will become AT&T customers. The ACLU of Illinois, an organization dedicated to the protection of civil liberties and civil rights, seeks to serve as the representative of its members who are Illinois residents and AT&T customers. Am. Compl. ¶¶ 3-4, 14, 16.

AT&T Corp. is the largest telecommunications company in the United States. Directly and through its affiliates and subsidiaries, including Illinois Bell Telephone Co., AT&T provides telephone and Internet services to millions of customers across the country. *Id.* ¶ 15.

The *Terkel* plaintiffs allege that in the aftermath of the September 11, 2001 terrorist attacks, AT&T began providing to the National Security agency records concerning the telephone calls of its customers. These records, the plaintiffs claim, include the originating and receiving telephone numbers for calls, as well as the date, time and duration of calls. Plaintiffs allege that AT&T has provided and continues to provide these records to the NSA without legal authorization or adequate justification. Based on these allegations, the plaintiffs seek a declaratory judgment that AT&T's actions violate the Electronic Communications Privacy Act, 18 U.S.C. § 2702(a)(3), and an injunction barring such violations in the future. Am. Compl. ¶¶ 21-25 & Part VII.

Together with their amended complaint, the *Terkel* plaintiffs filed a motion for a preliminary injunction, a motion for class certification, and a motion for leave to take expedited discovery in anticipation of a hearing on their preliminary injunction motion. Specifically, the *Terkel* plaintiffs sought permission to serve AT&T with a set of interrogatories in which they requested (in summary) the following information: whether AT&T has provided or continues to provide customer telephone records to the government, either pursuant to specific laws or without statutory authorization; identification of any governmental entities to which AT&T has provided or will provide such records; and how many AT&T customers' records have been disclosed. *See generally*, Pl. Mot. to Permit Ltd. Disc., Ex. 1.

The government sought leave to intervene in the case, arguing that the plaintiffs' allegations implicated matters vital to national security. The Court granted the government's motion. Both AT&T and the government filed motions to dismiss; the government's motion also includes a request for summary judgment. The Court deferred consideration of the *Terkel* plaintiffs' preliminary injunction and class certification motions pending determination of the motions to dismiss.

AT&T's motion to dismiss, as noted earlier, concerned the alleged inadequacy of the allegations in the plaintiffs' complaint. The government's motion included publicly-filed affidavits from Director of National Intelligence John Negroponte and National Security Agency Director and Lieutenant General Keith Alexander, setting forth facts supporting the government's contention that the state secrets privilege and other legal doctrines required dismissal of the case. In its motion, the government also gave notice that it was filing for the Court's *ex parte, in camera* review additional declarations by Mr. Negroponte and Lt. Gen. Alexander containing classified material. The Court thoroughly reviewed the classified materials in chambers under carefully controlled security.[2] This publicly-issued decision is not premised in any way, shape, or form on the classified materials or their contents. We are issuing

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2 Only one copy of the materials was provided, and following our review, the materials were removed to a secure location outside the Court's control (we reviewed the materials again on later occasions under similar conditions). The Court was not permitted to discuss the materials with other members of our staff, and notes that we took were removed and kept in a secure location outside the Court's control. We advised the parties that we needed to ask the government's counsel questions about the material; this was done in an *in camera, ex parte* session on July 13, 2006 that was tape recorded so that a transcript could later be made by personnel with appropriate security clearance (we have reviewed the transcript of the July 13 session and believe it to be accurate). The Court asked the government to provide further information about certain matters in the classified materials; this information was thereafter produced for *in camera, ex parte* inspection as well.

on this date a separate Memorandum discussing various points arising from the classified materials; because that Memorandum discusses certain of the contents of those materials, it, too, is classified and will be unavailable for inspection by the public or any of the parties or counsel in this case other than counsel for the government. The Court directs counsel for the government to cause the classified Memorandum be placed in a secure location and to ensure its availability in the event of appellate review.

Discussion

A. Plaintiff's claim under 18 U.S.C. § 2702(a)(3)

Under section 2702(a)(3),

> a provider of remote computing service or electronic communication service to the public shall not knowingly divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by paragraph (1) or (2)) to any governmental entity.

The *Terkel* plaintiffs contend that AT&T has violated this statute by providing large quantities of customer telephone records to the federal government without legal authorization or adequate justification. Specifically, plaintiffs allege that AT&T knowingly and intentionally provides the federal government with telephone records that document the telephone numbers from which calls are made, the telephone numbers at which the calls are received, and the dates and times at which the calls begin and end. Amend. Compl. ¶¶ 21-22. Plaintiffs allege that AT&T disclosed their records without statutory authorization, without prior consent from its customers, and without any other legal justification. *Id.* ¶¶ 23-25.

This provision of the Electronic Communications Privacy Act (ECPA), 18 U.S.C. § 2701 *et seq.*, was added as part of the USA PATRIOT Act of 2001, Pub. L. No. 107-86, 115 Stat. 272 (2001), reauthorized by the USA PATRIOT Improvement and Reauthorization Act of 2005, Pub.

L. No. 109-177, 120 Stat. 192 (2005). Unfortunately, there is no legislative history regarding the adoption of this specific provision of the ECPA. There is, however, a House Judiciary Committee report regarding the initial version of the ECPA which provides insight into the purposes behind regulating telecommunications companies' ability to share customer records with third parties. H.R. REP. NO. 99-647, at 64-73 (1986).

The original version of the ECPA dealt primarily with the disclosure of the contents of electronic communications, rather than records of communications. In its report, the House Judiciary Committee commented on the need to protect privacy interests to ensure that advances in technology do not lead to erosions of personal privacy. *Id.* at 19. The Committee stated that

> subscribers and customers of remote computing services should be afforded a level of confidence that the contents of records maintained on their behalf for the purpose of providing remote computing services will not be disclosed or obtained by the government, unless certain exceptions apply or if the government has use appropriate legal process with the subscribers or customers being given an opportunity to protect their rights.

Id. at 73.[3] The Committee therefore proposed that "individuals have enforceable rights to limit the disclosure of [communications] records maintained about them for third parties," just as they would have the right to limit disclosures of bank or cable records. *Id.* The Court finds that section 2702(a)(3), by prohibiting the disclosures of records to governmental entities, furthers the original purposes of the ECPA.

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3 The quoted reference to nondisclosure of the "contents of records," in context, concerns records *of the contents* of electronic communications kept in storage by communications providers, not the type of records at issue in this case.

B. AT&T's motion to dismiss

AT&T contends that the *Terkel* plaintiffs have inadequately alleged their standing to sue because they have sufficiently pleaded that their records will be turned over to the government and that AT&T has violated section 2702(a)(3). The plaintiffs respond that they have adequately alleged the facts necessary to establish standing.

First, AT&T argues that the plaintiffs have not adequately alleged that AT&T is disclosing their telephone records to the government. The Seventh Circuit has stated that "'[w]here pleadings concern matters peculiarly within the knowledge of the defendants, conclusory matters peculiarly within the knowledge of the defendants, conclusory pleading on 'information and belief' should be liberally viewed.'" *Brown v. Budz*, 398 F.3d 904, 914 (7th Cir. 2005) (quoting *Tankersley v. Albright*, 514 F.2d 956, 964 n. 16 (7th Cir. 1975)). Because the matters at issue in this case are entirely within the knowledge of AT&T and the government, the *Terkel* plaintiffs have made all of their allegations based upon "information and belief." In their complaint, they have stated the factual bases for their allegations, namely media reports indicating that the government intends to collect and analyze all domestic telephone records, that AT&T has already released large quantities of records, and that federal intelligence gathering agencies have focused on their efforts on large metropolitan areas like Chicago. Am. Compl. ¶¶ 19-25. The Court concludes that under the circumstances, the plaintiffs have sufficiently alleged that they are suffering a particularized injury for which they can seek relief.

Second, AT&T claims that the plaintiffs have not adequately alleged that AT&T's actions have caused them any injury. Plaintiffs correctly point out, however, that they have claimed an ongoing violation of their statutory rights under section 2702(a)(3), an alleged injury

that in itself is sufficient to establish standing. *See Kyles v. J.K. Guardian Sec. Servs., Inc.*, 222 F.3d 289, 298 (7th Cir. 2000) (an individual may establish Article III standing for a statutory violation if she suffers an injury in a form that "the statute was intended to guard against" even though "she has not been harmed apart from the statutory violation"). In addition, unlike the plaintiff in *Kyles*, who alleged only a bare statutory violation, the plaintiffs in this case have gone beyond Article III standing requirements, alleging that AT&T's actions have interfered with their professional relationships. Am. Compl. ¶ 4. The Court concludes that the plaintiffs have adequately alleged that they have suffered a violation of section 2702(a)(3) that is actionable under section 2707.

C. The government's motion to dismiss

The government argues that the Court should dismiss this case or grant summary judgment in AT&T's favor. It contends that the NSA has properly asserted two statutory privileges that bar disclosure of any information about its activities; that prosecution of the litigation would require the government to admit or deny the existence of a secret relationship with AT&T; and that prosecution of the lawsuit would contravene the state secrets privilege, which the government has asserted in its public and *in camera* filings.

The *Terkel* plaintiffs contend that the information needed to prosecute their case does not implicate any of these concerns. Plaintiffs ask the Court to declare that the alleged record disclosure program violates section 2702(a)(3) and to enjoin AT&T from providing customer telephone records to any government agency, absent authorization under Chapter 121 of Title 18 of the United States Code. *Id.* at Part VII. Pending trial on the merits, the *Terkel* plaintiffs have requested a preliminary injunction to this same effect. In aid of their motion for preliminary

injunction, the *Terkel* plaintiffs have filed proposed interrogatories in which they ask AT&T to state whether it has provided or continues to provide customer telephone records to the government; the legal basis, if any, for such disclosures; the number of such disclosures; and the governmental entities to which such disclosures have been made. *See generally*, Pl. Mot. to Permit Ltd. Disc., Ex. 1.

1. Statutory privileges

The government has asserted two statutory privileges in this case: section 6 of the National Security Agency Act of 1959, 50 U.S.C. § 402 note, §6, and section 102A(i)(1) of the Intelligence Reform and Terrorism Prevention Act of 2004, 50 U.S.C. § 403-1(i)(1). The plaintiffs maintain that neither of these privileges are applicable.

a. Section 6 of the National Security Agency Act

Section 6 provides that:

> [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, of any information with respect to the activities thereof, or of the names, titles, salaries or number of persons employed by such agency.

50 U.S.C. § 402 note, § 6. According to the government, because the plaintiffs contend that AT&T has provided customer call information to the NSA, litigating the case would require AT&T to affirm or deny information regarding the activities of the NSA. The government therefore claims that it is entitled to assert the privilege purportedly created by section 6.

The Court has located three decisions, all from the United States Court of Appeals for the D.C. Circuit, discussing the scope of section 6. Each case involved a request for the NSA to release information pursuant to the Freedom of Information Act (FOIA). *See Linder v. Nat'l Sec. Agency*, 94 F.3d 693 (D.C. Cir. 1996); *Founding Church of Scientology of Washington*

D.C., Inc. v. Nat'l Sec. Agency, 610 F.2d 828 (D.C. Cir. 1979); *Hayden v. Nat'l Sec. Agency*, 608 F.2d 1381 (D.C. Cir. 1979). These decisions hold that section 6 gives the NSA the absolute right to withhold from disclosure under FOIA any information covered by section 6. *See Linder*, 94 F.3d at 698; *Hayden*, 608 F.2d at 1389-90; *Founding Church*, 610 F.2d at 828.

In *Hayden*, however, the court reserved deciding whether the NSA could use section 6 to withhold information regarding unauthorized or illegal activities, stating that "where the function or activity is *authorized by statute* and *not otherwise unlawful*, NSA materials integrally related to that function or activity fall within [section 6] and Exemption 3 [of FOIA]." 608 F.2d at 1389 (emphasis added). *Id.* The Court has been unable to locate any later cases discussing this point. We are, however, concerned that if, as the court in *Hayden* anticipated, section 6 is taken to its to its logical conclusion, it would allow the federal government to conceal information regarding blatantly illegal or unconstitutional activities simply by assigning these activities to the NSA or claiming they implicated information about the NSA's functions.

In short, the Court is hard-pressed to read section 6 as essentially trumping every other Congressional enactment and Constitutional provision. Indeed, at oral argument, the government agreed that there is likely a limit to its ability to invoke section 6, though it balked at defining where the line would be drawn, insisting that wherever the line is, this case falls squarely inside it. The Court is skeptical that section 6 is properly read as broadly as the government urges. But because the matters alleged by the plaintiffs are, as we will discuss, subject to the state secrets privilege, we need not definitively determine the thorny issue of the proper scope of section 6.

b. Section 102A(i)(1) of the Intelligence Reform and Terrorism Prevention Act of 2004

Section 102A(i)(1) states that "[t]he Director of National Intelligence shall protect intelligence sources and methods from disclosure." 50 U.S.C. § 403-1(i)(1). Plaintiffs concede this statute allows the Director of National Intelligence to withhold information covered by the statute when it is requested of him or agencies under his control. *See, e.g., CIA v. Sims*, 471 U.S. 159 (1985) (holding that precursor to § 102A(i)(1) could shield against FOIA request); *Fitzgibbon v. CIA*, 911 F.2d 755 (D.C. Cir. 1990) (same). In this case, however, the plaintiffs have sued only AT&T and are seeking discovery only from that entity, not the Director of National Intelligence, the NSA, or any governmental agency. Under these circumstances, section 102A(i)(1) does not by itself bar prosecution of this case. Indeed, the statute, by its terms, applies to this case only in that it instructs the Director of National Intelligence to take measures that are available to prevent disclosure regarding intelligence sources and methods – for example, by asserting the state secrets privilege, as Mr. Negroponte has done.

2. Applicability of *Totten/Tenet*

The government also contends that plaintiffs' claims are not justiciable because the very subject matter of their lawsuit is a state secret. Initially, the government argues that plaintiffs' lawsuit concerns an alleged espionage relationship between the government and AT&T. As a result, the government claims that the suit is categorically barred. *See Tenet v. Doe*, 544 U.S. 1 (2005); *Totten v. United States*, 92 U.S. 105 (1876).

The seminal case regarding the justiciability of lawsuits concerning secret espionage contracts is *Totten*, a post-Civil War case in which the estate of a self-identified Union spy sued the government for breach of contract. 92 U.S. at 105. Under the purported contract, the

plaintiff was to obtain intelligence about the Confederacy's troop deployments and fortification efforts in exchange for a two hundred dollar monthly salary; the parties also agreed that the contract's existence and terms would remain a secret. *Id.*. The Supreme Court held that the president undoubtedly had the legal authority to make the alleged contract but that the plaintiff could not pursue a lawsuit to enforce the contract. *Id.* at 106. The Court explained that because acknowledgment of such an agreement or its terms could threaten national security, the estate's claim was not justiciable. *Id.*

The Court recently explained the broad scope of *Totten* in *Tenet*, a case in which two former spies sued the government for constitutional violations based on the government's alleged breach of an espionage agreement they had made with the Central Intelligence Agency. 544 U.S. at 7. The Court cited its statement in *Totten* 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." *Id.* at 8 (quoting *Totten*, 92 U.S. at 107)(emphasis in original)). The Court found that *Totten* applied broadly and therefore concluded that courts could not adjudicate any claims – not just breach of contract actions – by alleged spies based on secret espionage agreements. *Id.* at 7.

According to the government, this case must be dismissed because it would require an inquiry into whether AT&T entered a secret espionage relationship with the government. We assume for the purposes of discussion that the alleged relationship between AT&T and the government, if it exists, constitutes the type of espionage relationship governed by *Totten* and *Tenet*. It is unclear, however, whether those decisions govern this case. The plaintiffs in *Totten* and *Tenet* had entered contracts that they knew were a secret, but they nonetheless attempted to

bring lawsuits to obtain the benefit of their bargain. In contrast, the plaintiffs in this case were not parties to the alleged contract nor did they agree to its terms; rather, they claim that the performance of an alleged contract entered into by others would violate their statutory rights. In addition, while there is no question that the executive branch had the legal authority to enter the contracts in *Totten* and *Tenet*, the plaintiffs have raised a legitimate question as to whether, assuming the alleged agreement with AT&T exists, the President can legally enter into an agreement that would require circumventing the laws of the United States.

At oral argument, the government argued that *Totten* stands for a broader proposition that courts cannot maintain lawsuits that would result in "the disclosure of matters which the law itself regards at confidential." *Id.* at 146-47 (quoting *Totten*, 92 U.S. at 107). In support of its argument, the government cites *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139 (1981). In *Weinberger*, the plaintiff sued the Navy for failure to prepare and publish an environmental impact statement (EIS) regarding the use of a storage facility in Hawaii. The plaintiff claimed that the Navy planned to store nuclear weapons at the facility, a use that could have a significant environmental impact on the surrounding community. Pursuant to regulations adopted to protect national security, the Navy maintained that it could not disclose the planned use for the facility and that it consequently was not required to file an EIS or release one to the public. *Id.* at 140-42.

Having concluded that Navy regulations prohibited disclosure about whether it planned to store nuclear weapons at the facility in question, the Court held the Navy was not required to publish an EIS and that it could not adjudicate the question of whether the Navy had filed an adequate EIS for internal use only. In finding that it could not adjudicate the adequacy of the

internal EIS drafted by the Navy, the Court cited *Totten* for the proposition that courts cannot maintain lawsuits that would result in "the disclosure of matters which the law itself regards at confidential." *Id.* at 146-47 (quoting *Totten*, 92 U.S. at 107).

The government contends that based on *Weinberger*, *Totten* is applicable to any lawsuit in which the subject matter of the case itself is a state secret. This may be true. *But see Tenet*, 544 U.S. at 8-10 (noting that *Weinberger* recognized the continuing validity of *Totten*'s sweeping holding but later describing *Totten* as establishing a categorical bar on "the distinct class of cases that depend upon clandestine spy relationships"). On its face, however, the very subject matter of this lawsuit is not necessarily a state secret. It is obvious that acknowledging the mere existence of a secret espionage relationship or the location of nuclear weapons can jeopardize national security. *See Tenet*, 544 U.S. at 7 (espionage agreements); *Weinberger*, 454 U.S. 146-47 (nuclear weapons storage sites); *Totten*, 92 U.S. at 108 (espionage agreements). Disclosing the mere fact that a telecommunications provider is providing its customer records to the government, however, is not a state secret without some explanation about why disclosures regarding such a relationship would harm national security. Put another way, the Court cannot think of a situation in which publicly acknowledging a covert espionage contract or a secret nuclear weapons facility would not threaten national security. In contrast, the Court can hypothesize numerous situations in which confirming or denying the disclosure of telephone records to the government would not threaten national security and would clearly reveal wholesale violations of the plaintiffs' statutory rights.[4]

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[4]To use a completely unrelated example, adjudicating this case would not threaten national security if the government were obtaining all customer telephone records from AT&T for the sole purpose of determining the identity of individuals who call psychics. The government could

The Court finds that it would be particularly inappropriate to apply *Totten* to this case. The Supreme Court recently stated that when a case is governed by *Totten*, that decision creates a categorical bar to judicial review. *Tenet*, 544 U.S. at 8. Though the Court ultimately concludes, as discussed below, that this case implicates the state secrets privilege, it has done so only after carefully evaluating the government's claimed justifications. If *Totten* applied to this case, by contrast, it would require outright dismissal without any real judicial review of whether this case in fact implicates state secrets.

3. The state secrets privilege

The government's primary argument is that assertion of the state secrets privilege bars the making of responses to the *Terkel* plaintiffs' proposed interrogatories and, indeed, precludes the *Terkel* plaintiffs from establishing their standing to sue or from establishing a right to relief against AT&T. The state secrets privilege is a common law evidentiary privilege that allows the government to "block discovery of any information that, if disclosed, would adversely affect national security." Because the privilege, if applicable, is absolute, its successful assertion may be fatal to the underlying case. *Ellsberg v. Mitchell*, 709 F.2d 51, 56 (D.C. Cir. 1983). Proper assertion of the privilege makes the information at issue unavailable, often rendering a plaintiff unable to establish a *prima facie* case and without a remedy for the violation of her rights. *Id.* For these reasons, courts have warned that "'[the privilege] is not to be lightly invoked.'" *Id.* (quoting *United States v. Reynolds*, 345 U.S. 1, 7 (1953)).

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not claim that affirming or denying such a program would threaten national security because it would enable psychics to avoid detection by the government.

The leading Supreme Court case addressing the state secrets privilege is *Reynolds*, which involved the crash of an Air Force bomber. Three of the four civilians aboard the bomber died in the accident, and their widows sued the United States under the Federal Tort Claims Act. The plaintiffs sought discovery of an Air Force investigation report regarding the crash. The government asserted the state secrets privilege, claiming that release of the report would threaten national security interests. Specifically, the government stated that the bomber was testing secret electronic equipment and that the report contained classified information about the equipment. *Reynolds*, 345 U.S. at 2-5.

The Court in *Reynolds* explained that the state secrets privilege traced its origins to English common law. *Id.* at 7. The Court noted that it was first invoked in the United States during the treason trial of Aaron Burr but that the privilege had been discussed by few courts since then. *Id.* Drawing on these cases, the Court enumerated the formal requirements for asserting the privilege, concluding that only the government, and not private parties, may assert or waive the state secrets privilege. More specifically, the head of the department that oversees the information in question must assert the privilege formally after personally considering the matter. *Id.* at 7-8.

The Court also explained the judiciary's role in evaluating an executive official's assertion of the privilege. The Court made it clear that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *Id.* at 9-10. Courts must determine "whether the circumstances are appropriate for the claim of privilege" but must do so "without forcing the disclosure of the very thing the privilege is designed to protect." *Id.* at 8.

The depth of a court's inquiry into the propriety of the invocation of the state secrets privilege depends on the circumstances of the case. "Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted...[but] where necessity is dubious, a formal claim of privilege, made under the circumstances of this case, will have to prevail." *Id.* at 11. However, "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake."[5] *Id.* The Court ultimately concluded that the Air Force had properly asserted the privilege with regard to the investigation report. It declined, however, to dismiss the plaintiffs' case as they had alternate means of establishing the cause of the crash. *Id.* at 12.

In this case, it is undisputed that the government has complied with the formal requirements for invoking the privilege. *See Reynolds*, 345 U.S. at 7-8. Mr. Negroponte has filed in the public record a declaration formally asserting the privilege on behalf of the government. Negroponte Decl. ¶ 3. Specifically, Mr. Negroponte has, in his public declaration, invoked the privilege as to:

> any information tending to confirm or deny (a) alleged intelligence activities, such as the alleged collection by the NSA of records pertaining to a large number of telephone calls, (b) an alleged relationship between the NSA and AT&T (either in general or with respect to specific alleged intelligence activities), and (c) whether particular individuals or organizations have had records of their telephone calls disclosed to the NSA.

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5 The D.C. Circuit has held, and this Court agrees, that the privilege covers not just "military secrets" as such, but information whose release could lead to "the impairment of the nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments." *Ellsberg*, 709 F.2d at 57.

Negroponte Decl. ¶ 11. Lieutenant General Keith Alexander, the Director of the NSA, has also filed a public declaration supporting Mr. Negroponte's assertion of the privilege. Alexander Decl. ¶ 2.

For their part, the *Terkel* plaintiffs have made a strong showing of necessity for the information over which the government claims the privilege. The necessity requirement articulated in *Reynolds* incorporates two related but distinct concepts: whether the information at issue is essential to the case, and whether it is available through alternate means. *See Reynolds*, 345 U.S. at 11; *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 399 & 401 n. 7 (D.C. Cir. 1984). In this case, the plaintiffs have established both types of necessity: they need the information as to which the privilege is claimed to establish their standing and a *prima facie* case, and they have been unable to point to any other available sources for the information they need. For these reasons, "the claim of privilege cannot be lightly accepted." *Id.* at 11.

The question before the Court, therefore, is whether the government has shown that based on the circumstances of the case and the interrogatories posed by the plaintiffs, "'responsive answer[s] to the question[s] or [] explanation[s] of why [they] cannot be answered might be dangerous because injurious disclosure could result.'" *Id.* at 9 (quoting *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951) (identifying circumstances under which to allow invocation of Fifth Amendment privilege against self-incrimination)).

The *Terkel* plaintiffs claim that AT&T violated section 2702(a)(3) by unlawfully disclosing their telephone records to the government. They have posed seven interrogatories to AT&T in an attempt to develop the factual basis for their claims. As discussed above, the

plaintiffs ask AT&T to disclose whether it has knowingly and/or intentionally provided customer telephone records to the federal government and to identify the federal government entities to which these disclosures have been made, the quantity of records disclosed, the legal basis, if any, for the disclosures, and whether AT&T is disclosing such records at present.

Plaintiffs contend that the answers to these questions do not implicate state secrets. Rather, they maintain that they only need information about "very general intelligence techniques" that are already public knowledge, the disclosure of which will not reveal to enemies of the United States "the fact that surveillance of [their] activities has occurred, the targets and extent of such surveillance, or the means by which it was accomplished." *See ACLU v. Brown*, 619 F.2d 1170, 1174 (7th Cir. 1980) ("*ACLU II*"). Plaintiffs further maintain that the answers to the limited questions they have posed would be sufficient to allow them to prosecute their case. Pl. Resp. at 9-10.

The government disagrees. In his publicly filed declaration, Mr. Negroponte maintains that the government cannot confirm or deny information regarding its intelligence activities because any disclosure would threaten national security. Negroponte Decl. ¶ 12. He states that confirming any activities would compromise intelligence sources and enable adversaries, including members of Al Qaeda, to avoid detection. *Id.* He further states that:

> [e]ven confirming that a certain intelligence activity or relationship does *not* exist, either in general or with respect to specific targets or channels, would cause harm to the national security because alerting our adversaries to channels or individuals that are not under surveillance could likewise help them avoid detection.

Id. Finally, Mr. Negroponte maintains that "denying false allegations is an untenable practice" as adversaries could deduce important information about American intelligence practices based

on the government's denial of certain claims and failure to respond to others. Negroponte Decl. ¶ 12.

The government has also filed additional materials *in camera* and *ex parte* further justifying its invocation of the state secrets privilege. Specifically, the government's public submissions disclose that it has filed additional declarations from Lt. Gen. Alexander and Mr. Negroponte that contain classified information. The government has also filed an *in camera, ex parte* version of its brief that discusses the *in camera* declarations and additional reasons why the Court should uphold the assertion of the state secrets privilege. The Court has reviewed these submissions thoroughly. After doing so, we questioned government counsel, *in camera* and *ex parte*, about certain aspects of the submissions and requested further information, which the government later provided. The Court cannot disclose the contents of the *in camera* submissions, as we cannot divulge "the very thing the privilege is designed to protect." *See Reynolds*, 345 U.S. at 8. As noted earlier, we have issued a separate Memorandum addressing the *in camera* submissions. The present, publicly issued Memorandum Opinion does not take the *in camera* submissions into account but rather is based entirely on the public record.

Because the government's *in camera* submissions were made, and were required to be made, *ex parte*, the plaintiffs have been unable to examine some of the information supporting the government's assertion of the state secrets privilege. They argue, however, that the information they need to prosecute their case is already in the public domain and therefore is not subject to the state secrets privilege. In support of their argument, the *Terkel* plaintiffs cite several newspaper articles asserting that AT&T has provided large quantities of telephone records to the federal government, specifically the NSA, without statutory authorization. Susan

Page, *Lawmakers: NSA Database Incomplete*, U.S.A. Today, June 30, 2006, at 2A (hereinafter, "U.S.A. Today, June 30, 2006"); Jon Van and Michael O'Neal, *Phone Giants Raise Doubts on NSA Story*, Chic. Trib., May 17, 2006, at 1 (hereinafter, "Chic. Trib., May 17, 2006"); Eric Lichtblau, *Bush Is Pressed Over New Report On Surveillance*, N.Y. Times, May 12, 2006, at A1; Barton Gellman, *Data On Phone Calls Monitored*, Wash. Post, May 12, 2006, at A1; Lesley Cauley, *NSA Has Massive Database Of Americans' Phone Calls*, U.S.A. Today, May 11, 2006, at 1A (hereinafter, "U.S.A. Today, May 11, 2006"); Josh Meyer, *U.S. Spying is Much Wider, Some Suspect*, L.A. Times, Dec. 26, 2005, at 1; Eric Lichtblau, *Spy Agency Mined Vast Data Trove, Officials Report*, N.Y. Times, Dec. 24, 2005, at A1.

Plaintiffs also focus the court's attention on statements by other telephone companies, including Bell South, Qwest, and Verizon, denying that they provide large quantities of telephone records to the government. Specifically, Bell South and Verizon have indicated that they have not engaged in the wholesale disclosure of customer telephone records to the government. *See* BellSouth, *BellSouth Statement on Government Data Collection*, May 15, 2006, available at http://bellsouth.mediaroom.com/index.php?s=press_releases&item=2860&printable ("Based on our review to date, we have confirmed no such contract exists and we have not provided bulk customer calling records to the NSA."); Verizon, *Verizon Issues Statement on NSA and Privacy Protection*, May 12, 2006, available at http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=93446&PROACTIVE_ID=cecdc6c9c7cfcdc7c7c5cecfcfcfc5cecdcec9c7c6cccec7c9c5cf ("Verizon does not, and will not, provide any government agency unfettered access to our customer records or provide

information to the government under circumstances that would allow a fishing expedition.").[6] Qwest, another communications provider, has been even more specific in its disclosures. According to counsel for Qwest's former Chief Executive Officer Joseph Nacchio, the government approached Mr. Nacchio several times between fall of 2001 and summer of 2002 to request its customer telephone records, but because the government failed to cite any legal authorization in support of its demands, Mr. Nacchio refused the requests. *See* John O'Neil, *Qwest's Refusal of N.S.A. Query Is Explained*, N.Y. Times, May 12, 2006. AT&T, in contrast, has stated only that when it does release records to the government, it does so in accordance with all laws and regulations. AT&T, *AT&T Statement on NSA Issue*, June 27, 2006, available at http://att.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=22372 ("What we can say is AT&T is fully committed to protecting our customers' privacy and would not provide customer information to any government agency except as specifically authorized under the law.").

Plaintiffs also point to the government's official acknowledgment of a program to monitor the contents of telephone calls. *See, e.g.*, Department of Justice, *Legal Authorities Supporting the Activities of the NSA Described by the President* (Jan. 19, 2006) (admitting existence of content-monitoring program and explaining legal basis for the program). Specifically, President Bush and Attorney General Gonzales stated publicly that the government intercepts communications in which one party to the conversation is a suspected member of Al Qaeda, regardless of whether the communications involve parties in the United States. *See*

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6 Based on the wording of Verizon's press release, it is unclear whether the telephone company MCI engaged in such conduct prior to its acquisition by Verizon earlier this year. *See* Verizon Press Release.

Hepting, slip op. at 19-21 (collecting press releases). The *Terkel* plaintiffs concede, however, that no executive branch official has officially confirmed or denied the existence of any program to obtain large quantities of customer telephone records, the subject of the plaintiffs' lawsuit.

Based on these media reports and official admissions, the *Terkel* plaintiffs argue that the activities alleged in the complaint are not state secrets because they are publicly known and, further, that adversaries of the United States surely know about these activities and have already adjusted their behavior accordingly. The government strenuously denies the plaintiffs' contentions. It maintains that neither AT&T nor the executive branch of the government has confirmed or denied allegations that AT&T has disclosed large quantities of consumer telephone records. It also contends that requiring AT&T to affirm or deny these allegations would harm national security by arming adversaries of the United States with more concrete knowledge about how best to use communications channels to achieve their violent goals. In particular, the government argues, enemy groups could utilize a confirmation or a denial of the activities at issue in this case to assess the relative risks of using particular providers and to avoid detection of their communications. Specifically, if they learned that AT&T was disclosing telephone records, they might use another provider to avoid surveillance of their activities; if they learned that AT&T had withheld such records from the government, they might switch to AT&T.

The question the Court must determine is whether the information sought by the plaintiffs is truly a secret or whether it has become sufficiently public to defeat the government's privilege claim. Ascertaining whether alleged activities that have been discussed in the public

domain remain state secrets is a difficult task, particularly because few courts have thoroughly addressed the issue.[7]

It seems logical, however, that the focus should be on information that bears persuasive indication of reliability. In particular, public admissions by the government about the specific activity at issue ought to be sufficient to overcome a later assertion of the state secrets privilege. Judge Walker relied on such disclosures in *Hepting* when he concluded that the existence of a program of monitoring the contents of certain telephone communications was no longer a state secret as a result of the recent public statements by the President and the Attorney General. *Hepting*, slip op., at 19-21, 28.

Similarly, admissions or denials by private entities claimed to have participated in a purportedly secret activity may, under appropriate circumstances, constitute evidence supporting a contention that the state secrets privilege cannot be claimed as to that particular activity. As is the case with official governmental disclosures, such statements reasonably may be considered reliable because they come directly from persons in a position to know whether or not the

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7 We have been unable to locate any appellate decisions that squarely address the question of when press reports may be considered to have divulged what would otherwise constitute state secrets. The seminal appellate court cases on the state secrets privilege address the question of whether the government, once it has officially released some information about intelligence activities, must release additional information about those activities. *See Ellsberg*, 709 F.2d at 59-60 (concluding that government, having acknowledged conducting surveillance of certain plaintiffs, could nonetheless invoke the state secrets privilege as to whether other plaintiffs had been subjected to surveillance); *Halkin I*, 598 F.2d at 9 (concluding that the government, having acknowledged conducting surveillance of an individual in one case, could nonetheless assert state secrets privilege as to whether plaintiff in *Halkin I* had been subjected to surveillance). These cases are of limited assistance here, however, because they do not address the question of whether alleged intelligence activities are no longer secrets because the media has issued reports about them.

supposedly covert activity is taking place. Again, Judge Walker relied on disclosures of this type in his decision in *Hepting*. *See Hepting*, slip op. at 21-23, 29-32.

As the *Terkel* plaintiffs concede, however, neither AT&T nor the government has made any statements confirming or denying AT&T's participation in the particular program alleged in this case.[8] As a result, the existence of the activities at issue has not become public knowledge based on any statements by those entities that are most likely to have personal knowledge about the matters at issue.

The *Terkel* plaintiffs insist that the press reports discussed earlier are sufficient to render their allegations matters of public knowledge. The Court disagrees. The plaintiffs initially argue that this case is controlled by *Spock v. United States*, 464 F. Supp. 510, 520 (S.D.N.Y. 1978), in which the plaintiff alleged that government agents unlawfully intercepted his electronic communications. *See id.* at 512. The court concluded that the state secrets privilege did not apply because the press had widely reported that the plaintiff had been under government surveillance. *Id.* at 520. Plaintiffs cite *Spock* for the proposition that media reports about intelligence activities make those activities public knowledge, rendering the state secrets privilege inapplicable. *See id.*

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8 In *Hepting*, the plaintiffs cited an equivocal statement by AT&T which arguably suggested that it may be assisting the government with surveillance. *Id.* at 30-31 (citing News Release, *AT&T Statement on Privacy and Legal/Security Issues* (May 11, 2006), available at http://www.sbc.com/gen/press-room?pid=4800&cdvn+news&newsarticleid=22285 ("If and when AT&T is asked to help, we do so strictly within the law and under the most stringent conditions.")). This statement offers no indication, however, that the means of any such assistance by AT&T consists of the wholesale disclosure of customer telephone records.

The Court disagrees with the analysis in *Spock* and therefore declines to apply it to this case. Indeed, as the government pointed out at oral argument, it would undermine the important public policy underlying the state secrets privilege if the government's hand could be forced by unconfirmed allegations in the press or by anonymous leakers whose disclosures have not been confirmed. Neither the media reports cited here, nor those in *Spock*, are the result of official disclosures, nor is there any way for the Court to say that they are based on information from persons who would have reliable knowledge about the existence or non-existence of the activity alleged. Rather, on the present record at least, these reports amount to nothing more than unconfirmed speculation about the particular activity alleged in this case. *Accord, Hepting*, slip op. at 25. As a result, the Court cannot treat them as making the alleged activities at issue in this case matters of public knowledge.

The *Terkel* plaintiffs have also cited one press report indicating that executive officials briefed members of Congressional Intelligence Committees in closed-door sessions about the activities at issue here. *See* U.S.A. Today, June 30, 2006. The article states that five unnamed members of the committees stated that "they were told by senior intelligence officials that AT&T participated in the NSA domestic calls program." *Id.* Based on this article, plaintiffs argue that the Court should follow *Jabara v. Kelley*, 75 F.R.D. 475, 493 (E.D. Mich. 1977), a case in which the plaintiff claimed that multiple government agencies had conducted unconstitutional surveillance of his activities. The plaintiff sought to discover the identities of those agencies. The court held that the identity of one unnamed agency had ceased to be a state secret once the agency had been named in a Congressional report. *Id.* Plaintiffs cite *Jabara* for

the notion that once executive officials have disclosed certain activities to members of Congress, those activities are no longer covered by the state secrets privilege.

It is unclear from the decision in *Jabara* whether executive officials disclosed the information in the Congressional report in a public or private setting. If it was the latter, the Court disagrees with *Jabara*. Treating confidential statements to Congressional representatives as public disclosures that make an otherwise secret activity a matter of public knowledge would undermine the state secrets privilege by forcing the executive branch to give up the privilege whenever it discusses classified activities with members of Congress. Just as importantly, it would also discourage executive officials from candidly discussing intelligence activities with Congress, further reducing the legislative branch's ability to hold executive officials accountable. If, on the other hand, the revelations by the executive officials in *Jabara* were made in a public setting, the case is inapposite; there is no indication of any such public disclosure relevant to the allegations in this case.

Our conclusion is supported by case law interpreting the Freedom of Information Act. *See ACLU v. Brown*, 609 F.2d 277, 280 (7th Cir. 1979) ("*ACLU I*") (finding FOIA case law instructive in ascertaining the applicability of the state secrets privilege).[9] FOIA allows individuals to obtain documents held by the government, 5 U.S.C. § 552(a)(2), but it creates an exemption for documents that are shielded from disclosure by statute. 5 U.S.C. § 552(b)(3). A

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9 The plaintiffs discourage us from invoking FOIA case law to ascertain what constitutes information in the public domain. They argue that determining whether the government is entitled to an exemption from disclosure is a much narrower inquiry than whether the government is entitled to invoke the state secrets privilege as to matters that arise in litigation. That may be so. The Court nonetheless finds the policy considerations expressed in the FOIA jurisprudence helpful to the extent they deal with the general question of how to determine whether a matter claimed to implicate national security interests is publicly known.

petitioner under FOIA may nonetheless overcome this exemption by showing that the agency invoking it has officially and publicly acknowledged the requested information. *See Fitzgibbon*, 911 F.2d at 765.

FOIA case law is clear, however, that unconfirmed media reports about an alleged governmental activity are insufficient to render information public knowledge. *See Fitzgibbon*, 911 F.2d at 765 ("'It is one thing for a reporter or author to speculate or guess that a thing may be so or even, quoting undisclosed sources, to say that it is so; it is quite another thing for one in a position to know of it officially to say that it is so.'") (quoting *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1370 (4th Cir. 1975)). As the court stated in *Afshar v. Dep't of State*, 702 F.2d 1125, 1130, 33-34 (D.C. Cir. 1983), "[e]ven if a fact...is the subject of widespread media and public speculation, its official acknowledgment by an authoritative source might well be new information that could cause damage to the national security." A disclosure must be both official and public for the fact at issue to be considered a matter of public knowledge for FOIA purposes. *See Fitzgibbon*, 911 F.2d at 765.

As noted earlier, the plaintiffs contend that the alleged program at issue in this case cannot be a state secret because of disclosures made by other telecommunications companies. Two such companies, Bell South and Verizon, have flatly denied making such disclosures. Judge Walker also considered these arguments in *Hepting*. *See Hepting*, slip op. at 21-23 (citing press releases from Bell South, Verizon, and Qwest). The plaintiffs also point to another news report quoting counsel for the former chief executive officer of Qwest, who (as discussed earlier) stated that the government approached the CEO about obtaining access to telephone records, but he refused after learning that the government lacked legal authority supporting its request. *See*

John Markoff, *Questions Raised for Phone Giants in Spy Data Furor*, N.Y. Times, at A1, May 13, 2006. The plaintiffs hypothesize that if Bell South's, Qwest's, and Verizon's denials did not reveal state secrets, confirmation or denial of AT&T's participation in the alleged program would not reveal state secrets either.

The Court disagrees. Initially, the Court fails to see how the statements by Bell South and Verizon, in which they simply deny the allegations without elaboration, can be considered to have disclosed the existence or non-existence of the program alleged by the *Terkel* plaintiffs. The statement by the former Qwest executive comes somewhat closer to the mark. But plaintiffs' reliance on that disclosure misses the point. Their case concerns AT&T, not any other telephone companies. Requiring AT&T to admit or deny the existence of a request by the government as to AT&T, or AT&T's response if a request was made, would disclose significant information that has not been made public by anything the Qwest executive reported. This is so even if one were to infer from that report that the government had some sort of program in place: admitting or denying an approach to AT&T, or its response if an approach was made, would reveal information about the scope of the claimed program that could impact national security. Specifically, such a disclosure or a denial could permit would-be terrorists to tailor their activities to avoid detection. In addition, as Judge Walker stated in *Hepting*:

> it may be that a terrorist is unable to avoid AT&T by choosing another provider or, for reasons outside his control, his communications might necessarily be routed through an AT&T facility. Revealing that a communication records program exists might encourage that terrorist to switch to less efficient but less detectable forms of communication. And revealing that such a program does not exist might encourage a terrorist to use AT&T services when he would not have done so otherwise.

Hepting, slip op. at 40-42.

The *Terkel* plaintiffs have brought to our attention Judge Walker's decision in *Hepting*, arguing that it supports denial of the government's privilege claim in this case. But the *Terkel* case (unlike, perhaps, the others assigned to this Court, *Joll* and *Waxman*) differs from *Hepting*. The differences are significant, and they lead this Court to a result different from the one Judge Walker reached. The plaintiffs in *Hepting* challenged, among other things, the alleged interception of the *contents* of communications by the NSA with AT&T's assistance – a challenge not made in *Terkel*. Judge Walker concluded that public disclosures by the government of a "terrorist surveillance program" involving interception of communications contents, along with other factors, made that particular alleged program, AT&T's possible participation in it, and the existence of any assurances of legality by the government no longer secrets that are protected by *Totten* or the state secrets privilege. *See Hepting*, slip op. at 29-31 (discussion of *Totten*), 35 & 39 (discussion of the state secrets privilege claim). The *Terkel* plaintiffs, however, currently advance no claim about content monitoring.

Hepting also includes claims based on AT&T's alleged disclosure to NSA of telephone call records – the same claims (indeed the only claims at this juncture) made by the *Terkel* plaintiffs. Judge Walker expressed some skepticism as to whether the existence or non-existence of such a program is a state secret, in light of the disclosures of the "terrorist surveillance program" and denials by other companies that they participated in a program of disclosure of call records. *See Hepting*, slip op. at 40-41. In the final analysis, however, Judge Walker concluded, as we do, that at present at least, the potential for risk from disclosure of the existence or non-existence of such a program, or AT&T's involvement or non-involvement, made it imprudent to

require such disclosures. As a result, he declined to permit discovery about those particular allegations. *See id.* at 41-42.

Where that conclusion leads this Court is affected by the differences between this case and *Hepting*. Judge Walker determined, in effect, that because the allegations regarding the publicly-revealed *content* monitoring activity could proceed, there was no basis to dismiss or otherwise terminate the claims about the alleged *record* monitoring activity. *See id.* at 42, 50. Specifically, Judge Walker indicated that as the claims about content monitoring proceeded, further disclosures might be made (in the case or otherwise) that would remove the allegations about record disclosure from the protection of the state secrets privilege. *See id.* Thus he saw no need to dismiss the latter allegations at present. This Court does not necessarily agree with that particular aspect of Judge Walker's decision, but even were we to agree, this would have no bearing on the *Terkel* case. In *Terkel*, the *only* claims in the plaintiffs' amended complaint are those arising from the alleged record disclosure activity. Thus our determination that discovery on those allegations cannot proceed – a point on which this Court and Judge Walker effectively agree – effectively brings to a halt all of the discovery requested by the *Terkel* plaintffs.

In sum, based on the government's public submission, the Court is persuaded that requiring AT&T to confirm or deny whether it has disclosed large quantities of telephone records to the federal government could give adversaries of this country valuable insight into the government's intelligence activities. Because requiring such disclosures would therefore adversely affect our national security, such disclosures are barred by the state secrets privilege. The Court reaches this conclusion based on the government's public submission, without reference to its classified *ex parte* submissions. We do not discuss in this decision any of the

material contained in the classified submissions. We can state, however, that we have rejected some of the claims made by the government in those submissions and have expressed skepticism about others. Those particular matters aside, however, the remainder of the classified submissions provide support for the conclusions the Court has reached based on the government's public submission. As noted earlier, the Court has prepared a classified Memorandum discussing the results of our review of the *in camera* material.

Having concluded that the government has properly invoked the state secrets privilege with regard to any information tending to confirm or negate the factual allegations presented in the *Terkel* plaintiffs' complaint, the final question is whether the Court should allow the case to proceed. The government argues that because the *Terkel* plaintiffs can neither establish standing nor a *prima facie* case without the information subject to the state secrets privilege, the Court should dismiss the case or grant summary judgment. Plaintiffs respond that dismissal or summary judgment at this stage would be an extreme remedy; they contend that we should modify ordinary rules of procedure and/or burdens of proof to enable them to prosecute their case. *See Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1238 n. 3 (4th Cir. 1985) (stating in dicta that "[o]ften, through creativity and care, [the] unfairness caused [by assertion of the state secrets privilege] can be minimized through the use of procedures which will protect the privilege and yet allow the merits of the controversy to be decided in some form," but ultimately declining to modify ordinary procedures because subject matter of lawsuit was a state secret).

Plaintiffs offer several proposals for how they might maintain this lawsuit while allowing protection of state secrets, such as applying a presumption arising from the loss of evidence, *see Halkin v. Helms*, 690 F.2d 977, 991 (D.C. Cir. 1982) ("*Halkin II*"); conducting an *in camera*

trial, *see Halpern v. United States*, 258 F.2d 36, 41 (2d Cir. 1958); entering strict protective orders, *see DTM Research, L.L.C. v. AT&T Corp.*, 245 F.3d 327, 333-35 (4th Cir. 2001); taking depositions in secure facilities; *see In re Under Seal*, 945 F.2d 1285, 1287 (4th Cir. 1991); adding an attorney to plaintiffs' legal team who has security clearance or granting security clearance to one of plaintiffs' current counsel, *cf. Al Odah v. United States*, 346 F. Supp. 2d 1, 14 (D.D.C. 2004); *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174, 179-80 (D.D.C. 2004); or appointing a special master. *Cf. Loral Corp. v. McDonnell Douglas Corp.*, 558 F.2d 1130, 1132 (2d Cir. 1977).

The problem with most of plaintiffs' proposals is that in those cases where the government has invoked the state secrets privilege and the court made modifications to the ordinary rules of procedure, it did so to allow for the introduction of classified information that *did not* constitute a "state secret" protected by the state secrets privilege. *See Halpern*, 258 F.2d at 43 (allowing *in camera* trial by inventor of secret invention against the government so long as state secrets not divulged); *DTM Research, L.L.C.*, 245 F.3d at 333-35 (entering protective order over state secrets but allowing case to proceed based on evidence that did not constitute a state secret); *In re Under Seal*, 945 F.2d at 1287 (allowing depositions at secured facilities with government officials present to ensure state secrets not revealed). In the instant case, by contrast, the Court has already concluded that the state secrets privilege covers any disclosures that affirm or deny the activities alleged in the complaint. As a result, the information at issue is unavailable in its entirety, as a result the alternative procedures used in these cases cannot be utilized here.

The *Terkel* plaintiffs alternatively propose altering the standard of proof for proving standing, as well as the existence of a *prima facie* case on the merits, by adopting presumptions favoring them due to their inability to obtain the evidence they need. The plaintiffs cite *Halkin II* in support of this approach. In *Halkin II*, the court suggested in *dicta* that changing procedural rules "could compensate the party 'deprived' of his evidence by, for example, altering the burden of persuasion upon particular issues, or by supplying otherwise lost proofs through the device of presumptions or presumptive inferences." *See Halkin II*, 690 F.2d at 991. The court declined to do so in that case, however, because it had declined to alter the parties' burdens in an earlier ruling in the same case. *Id.* (citing *Halkin I*, 598 F.2d at 11).

The Court has been unable to locate any cases in which courts have decided to alter burdens of proof to neutralize the effect of the successful invocation of the state secrets privilege. Indeed, in *Ellsberg,* the D.C. Circuit appears to have abandoned its *dicta* from *Halkin II*, concluding that "the result [of the government's successful invocation of the state secrets privilege] is simply that the evidence is unavailable, as though a witness has died, and the case will proceed accordingly, with no consequences save those resulting from the loss of the evidence.'" *Ellsberg*, 709 F.2d at 64 (quoting McCormick's Handbook of the Law of Evidence 235 (E. Cleary ed. 1972)). The Court is convinced that this rule is correct, particularly in cases where the government, a non-party, has intervened to assert the state secrets privilege over information requested from one of the parties to the case. "In such a case, sanctions against a party are inappropriate because neither party is responsible for the suppression of the evidence." *See Farnsworth Cannon, Inc. v. Grimes,* 635 F.2d 268, 271 (4th Cir. 1980) (quoting 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 509(10) (1979)). In this case, because the

government intervened to assert the privilege, it would be unfair to AT&T to ease the plaintiffs' burden of proof based on decisions beyond its control.

The plaintiffs point out that "[t]he privilege may not be used to shield material not strictly necessary to prevent injury to national security; and whenever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter." *Ellsberg*, 709 F.2d at 57. Thus, when the government asserts the state secrets privilege as to a wide range of requested disclosures, "the District Court's inquiry must look at each item or logically related group of items individually in order to assure full consideration of the government's claims." *ACLU I*, 609 F.2d at 280. The Court is satisfied, having carefully reviewed the government's public submission, that at the very least, requiring AT&T to admit or deny the core allegations necessary for the plaintiffs to prove standing – whether *their* information is being disclosed – implicates matters whose public discussion, be it an admission or a denial, could impair national security.

The Court has also considered, as an alternative, whether requiring AT&T to answer more generalized questions would avoid implicating the state secrets privilege. Some examples of such questions might be whether AT&T has disclosed *any* of its customers' records to the federal government; whether it has ever done so without statutory authorization or proper justification; and whether it has ever done so with regard to the telephone records of any of the named plaintiffs. The problem, however, is that such generalized answers would not allow the

named plaintiffs to establish standing to seek injunctive relief – the only relief they seek[10] – either on behalf of themselves or a class.[11]

To obtain prospective relief, the plaintiffs must show that there is a "real or immediate threat" that AT&T will, in the future, violate their rights under section 2702(a)(3). *See City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). In *Lyons*, the plaintiff had sued the Los Angeles Police Department to enjoin the practice of using chokeholds absent the threat of deadly force. *Id.* at 98. The Supreme Court concluded that although the plaintiff had been subjected to this practice on a prior occasion and at least sixteen people in Los Angeles had died from the practice, the plaintiff had failed to establish that he had standing to seek injunctive relief. *Id.* at 97-98, 100. Drawing on its decision in *O'Shea v. Littleton*, 414 U.S. 488 (1974), the Court reiterated that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects." *Id.* at 102 (quoting *O'Shea*, 414 U.S. at 495-96). Though "[p]ast wrongs [are] evidence bearing on 'whether there is a real and immediate threat of repeated injury,'" *id.* at 102 (quoting *O'Shea*, 414 U.S at 496), the Court in *Lyons* concluded that the plaintiff lacked standing to seek prospective relief because even if he could prove that he was likely to be arrested again, he would have to prove "(1) that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation or

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10 Ordinarily, a court may grant appropriate relief to a plaintiff whether he seeks it or not. *See* Fed. R. Civ. P. 54(c). But in this case, the plaintiffs advised the Court both prior to and during oral argument that in their current complaint, they seek only prospective relief and not damages for past alleged violations.

11 The Court also notes that the plaintiffs have cited no authority that would allow us to modify the standards for proving standing under Article III.

for questioning or, (2) that the City ordered or authorized police officers to act in such manner." *Id.* at 106 (emphasis in original).

By successfully invoking the state secrets privilege, the government has foreclosed discovery that would allow the plaintiffs to attempt to establish that they are suffering ongoing harm or will suffer harm in the future. First, the *Terkel* plaintiffs cannot establish whether AT&T has unlawfully disclosed their records in the past, a fact which would allow them to sue for prospective relief if they could also show they are suffering "continuing, present adverse effects." *Id.* at 102 (quoting *O'Shea*, 414 U.S. at 495-96). Second, the plaintiffs cannot establish whether AT&T is currently disclosing their records, which would tend to show that there is a real and immediate threat of repeated injury. *Id.* (quoting *O'Shea*, 414 U.S at 496).

The thrust of plaintiffs' claim is that AT&T shares *all* of its customer telephone records with the government and that as a result, the plaintiffs are among the persons who have suffered and will continue to suffer the harm that flows from such disclosures. Standing doctrine normally allows courts to adjudicate such claims: though the harm impacts a wide class of people, each member of the class has suffered a particularized injury. *See FEC v. Akins*, 524 U.S. 11, 23 (1998) (concluding that standing doctrine only bars adjudication of such cases "where the harm at issue is not only widely shared, but is also of an abstract and indefinite nature"). The problem in this case, however, is that the state secrets doctrine bars the disclosure of matters that would enable the *Terkel* plaintiffs to establish standing in this manner, specifically whether or not AT&T discloses or has disclosed *all* of its customer records to the government, or whether or not it discloses or has disclosed the named plaintiffs' records specifically. *See Halkin II*, 690 F.2d at 998-1003.

The named plaintiffs' inability to establish standing on their claims for prospective relief is fatal to their claims as representatives of a putative class. It is clear that the named plaintiffs in a class action must establish standing individually to serve as class representatives; the *Terkel* plaintiffs do not contend otherwise. *See Warth v. Seidlin*, 422 U.S. 490, 502 (1975) (named plaintiffs seeking to represent a class "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent."). Thus, even were AT&T to answer whether it had disclosed to the government the telephone records of some of its customers, none of the named plaintiffs would be able to establish standing, because they still could not establish a personal injury. *See id.*

The Court has great antipathy for dismissing a claim at the pleading stage in a case in which the plaintiffs claim they have suffered a violation of their rights. But "[a]bsent the presence of an identifiable party whose claim of injury can be evaluated on its particular facts, the contentions raised here are simply a request for an advisory opinion" that the federal courts cannot entertain. *Halkin II*, 690 F.2d at 1003 n.6. Nothing in this opinion, however, prevents the plaintiffs from using of the legislative process, not to mention their right to free speech, to seek further inquiry by the executive and legislative branches into the allegations in their complaint. In short, though the *Terkel* plaintiffs cannot seek relief in court for the claims made in their complaint as it now stands, they are free to seek redress from the political branches, which are equally responsible to ensure that the law is followed.

Conclusion

For the reasons stated above, the Court denies AT&T's motion to dismiss [docket no. 39] and grants the government's motion to dismiss [docket no. 48]. The *Terkel* plaintiffs' complaint is dismissed, with leave to amend on or before August 1, 2006 if they wish to do so. The case, along with the *Joll* and *Waxman* cases, is set for a status hearing on August 3, 2006 at 9:30 a.m.

MATTHEW F. KENNELLY
United States District Judge

Date: July 25, 2006

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

TASH HEPTING, et al,

Plaintiffs,

v

AT&T CORPORATION, et al,

Defendants.

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No C-06-672 VRW

ORDER

Plaintiffs allege that AT&T Corporation (AT&T) and its holding company, AT&T Inc, are collaborating with the National Security Agency (NSA) in a massive warrantless surveillance program that illegally tracks the domestic and foreign communications and communication records of millions of Americans. The first amended complaint (Doc #8 (FAC)), filed on February 22, 2006, claims that AT&T and AT&T Inc have committed violations of:

(1) The First and Fourth Amendments to the United States Constitution (acting as agents or instruments of the government) by illegally intercepting, disclosing, divulging and/or using plaintiffs' communications;

(2) Section 109 of Title I of the Foreign Intelligence Surveillance Act of 1978 (FISA), 50 USC § 1809, by engaging in illegal electronic surveillance of plaintiffs' communications under color of law;

(3) Section 802 of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by section 101 of Title I of the Electronic Communications Privacy Act of 1986 (ECPA), 18 USC §§ 2511(1)(a), (1)(c), (1)(d) and (3)(a), by illegally intercepting, disclosing, using and/or divulging plaintiffs' communications;

(4) Section 705 of Title VII of the Communications Act of 1934, as amended, 47 USC § 605, by unauthorized divulgence and/or publication of plaintiffs' communications;

(5) Section 201 of Title II of the ECPA ("Stored Communications Act"), as amended, 18 USC §§ 2702(a)(1) and (a)(2), by illegally divulging the contents of plaintiffs' communications;

(6) Section 201 of the Stored Communications Act, as amended by section 212 of Title II of the USA PATRIOT Act, 18 USC § 2702(a)(3), by illegally divulging records concerning plaintiffs' communications to a governmental entity and

(7) California's Unfair Competition Law, Cal Bus & Prof Code §§ 17200 et seq, by engaging in unfair, unlawful and deceptive business practices.

The complaint seeks certification of a class action and redress through statutory damages, punitive damages, restitution, disgorgement and injunctive and declaratory relief.

On April 5, 2006, plaintiffs moved for a preliminary injunction seeking to enjoin defendants' allegedly illegal activity. Doc #30 (MPI). Plaintiffs supported their motion by filing under seal three documents, obtained by former AT&T technician Mark Klein, which allegedly demonstrate how AT&T has implemented a warrantless surveillance system on behalf of the NSA at a San Francisco AT&T facility. Doc #31, Exs A-C (the "AT&T documents"). Plaintiffs also filed under seal supporting declarations from Klein (Doc #31) and J Scott Marcus (Doc #32), a putative expert who reviewed the AT&T documents and the Klein declaration.

On April 28, 2006, AT&T moved to dismiss this case. Doc #86 (AT&T MTD). AT&T contends that plaintiffs lack standing and were required but failed to plead affirmatively that AT&T did not receive a government certification pursuant to 18 USC § 2511(2)(a)(ii)(B). AT&T also contends it is entitled to statutory, common law and qualified immunity.

On May 13, 2006, the United States moved to intervene as a defendant and moved for dismissal or, alternatively, for summary judgment based on the state secrets privilege. Doc #124-1 (Gov MTD). The government supported its assertion of the state secrets privilege with public declarations from the Director of National Intelligence, John D Negroponte (Doc #124-2 (Negroponte Decl)), and the Director of the NSA, Keith B Alexander (Doc #124-3 (Alexander Decl), and encouraged the court to review additional classified submissions *in camera* and *ex parte*. The government also asserted two statutory privileges under 50 USC § 402 *note* and 50 USC § 403-1(i)(1).

At a May 17, 2006, hearing, the court requested additional briefing from the parties addressing (1) whether this case could be decided without resolving the state secrets issue, thereby obviating any need for the court to review the government's classified submissions and (2) whether the state secrets issue is implicated by an FRCP 30(b)(6) deposition request for information about any certification that AT&T may have received from the government authorizing the alleged wiretapping activities. Based on the parties' submissions, the court concluded in a June 6, 2006, order that this case could not proceed and discovery could not commence until the court examined *in camera* and *ex parte* the classified documents to assess whether and to what extent the state secrets privilege applies. Doc #171.

After performing this review, the court heard oral argument on the motions to dismiss on June 23, 2006. For the reasons discussed herein, the court DENIES the government's motion to dismiss and DENIES AT&T's motion to dismiss.

I

The court first addresses the government's motion to dismiss or, alternatively, for judgment on state secrets grounds. After exploring the history and principles underlying the state secrets privilege and summarizing the government's arguments, the court turns to whether the state secrets privilege applies and requires dismissal of this action or immediate entry of judgment in favor of defendants. The court then takes up how the asserted privilege bears on plaintiffs' discovery request for any government certification that AT&T might have received authorizing the alleged

surveillance activities. Finally, the court addresses the statutory privileges raised by the government.

A

"The state secrets privilege is a common law evidentiary rule that protects information from discovery when disclosure would be inimical to the national security. Although the exact origins of the privilege are not certain, the privilege in this country has its initial roots in Aaron Burr's trial for treason, and has its modern roots in United States v Reynolds, 345 US 1 (1953)." In re United States, 872 F2d 472, 474-75 (DC Cir 1989) (citations omitted and altered). In his trial for treason, Burr moved for a *subpoena duces tecum* ordering President Jefferson to produce a letter by General James Wilkinson. United States v Burr, 25 F Cas 30, 32 (CCD Va 1807). Responding to the government's argument "that the letter contains material which ought not to be disclosed," Chief Justice Marshall riding circuit noted, "What ought to be done under such circumstances presents a delicate question, the discussion of which, it is hoped, will never be rendered necessary in this country." Id at 37. Although the court issued the subpoena, id at 37-38, it noted that if the letter "contain[s] any matter which it would be imprudent to disclose, which it is not the wish of the executive to disclose, such matter, if it be not immediately and essentially applicable to the point, will, of course, be suppressed." Id at 37.

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The actions of another president were at issue in Totten v United States, 92 US 105 (1876), in which the Supreme Court established an important precursor to the modern-day state secrets privilege. In that case, the administrator of a former spy's estate sued the government based on a contract the spy allegedly made with President Lincoln to recover compensation for espionage services rendered during the Civil War. Id at 105-06. The Totten Court found the action to be barred:

> The service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed. Both employer and agent must have understood that the lips of the other were to be for ever sealed respecting the relation of either to the matter. This condition of the engagement was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent.

Id at 106, quoted in Tenet v Doe, 544 US 1, 7-8 (2005). Hence, given the secrecy implied in such a contract, the Totten Court "thought it entirely incompatible with the nature of such a contract that a former spy could bring suit to enforce it." Tenet, 544 US at 8. Additionally, the Totten Court observed:

> It may be stated as a general principle, 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, and respecting which it will not allow the confidence to be violated. * * * Much greater reason exists for the application of the principle to cases of contract for secret services with the government, as the existence of a contract of that kind is itself a fact not to be disclosed.

Totten, 92 US at 107. Characterizing this aspect of Totten, the Supreme Court has noted, "No matter the clothing in which alleged spies dress their claims, Totten precludes judicial review in cases such as [plaintiffs'] where success depends upon the existence of their secret espionage relationship with the Government." Tenet, 544 US at 8. "Totten's core concern" is "preventing the existence of the [alleged spy's] relationship with the Government from being revealed." Id at 10.

In the Cold War era case of Reynolds v United States, 345 US 1 (1953), the Supreme Court first articulated the state secrets privilege in its modern form. After a B-29 military aircraft crashed and killed three civilian observers, their widows sued the government under the Federal Tort Claims Act and sought discovery of the Air Force's official accident investigation. Id at 2-3. The Secretary of the Air Force filed a formal "Claim of Privilege" and the government refused to produce the relevant documents to the court for *in camera* review. Id at 4-5. The district court deemed as established facts regarding negligence and entered judgment for plaintiffs. Id at 5. The Third Circuit affirmed and the Supreme Court granted certiorari to determine "whether there was a valid claim of privilege under [FRCP 34]." Id at 6. Noting this country's theretofore limited judicial experience with "the privilege which protects military and state secrets," the court stated:

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> The privilege belongs to the Government and must be asserted by it * * *. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.

Id at 7-8 (footnotes omitted). The latter determination requires a "formula of compromise," as "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers," yet a court may not "automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case." Id at 9-10. Striking this balance, the Supreme Court held that the "occasion for the privilege is appropriate" when a court is satisfied "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." Id at 10.

The degree to which the court may "probe in satisfying itself that the occasion for invoking the privilege is appropriate" turns on "the showing of necessity which is made" by plaintiffs. Id at 11. "Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." Id. Finding both a "reasonable danger that the accident investigation report would contain" state secrets and a "dubious showing of necessity," the court reversed the Third Circuit's decision and sustained the claim of privilege. Id at 10-12.

In Halkin v Helms, 598 F2d 1 (DC Cir 1978) (Halkin I), the District of Columbia Circuit applied the principles enunciated in Reynolds in an action alleging illegal NSA wiretapping. Former Vietnam War protestors contended that "the NSA conducted warrantless interceptions of their international wire, cable and telephone communications" at the request of various federal defendants and with the cooperation of telecommunications providers. Id at 3. Plaintiffs challenged two separate NSA operations: operation MINARET, which was "part of [NSA's] regular signals intelligence activity in which foreign electronic signals were monitored," and operation SHAMROCK, which involved "processing of all telegraphic traffic leaving or entering the United States." Id at 4.

The government moved to dismiss on state secrets grounds, arguing that civil discovery would impermissibly "(1) confirm the identity of individuals or organizations whose foreign communications were acquired by NSA, (2) disclose the dates and contents of such communications, or (3) divulge the methods and techniques by which the communications were acquired by NSA." Id at 4-5. After plaintiffs "succeeded in obtaining a limited amount of discovery," the district court concluded that plaintiffs' claims challenging operation MINARET could not proceed because "the ultimate issue, the fact of acquisition, could neither be admitted nor denied." Id at 5. The court denied the government's motion to dismiss on claims challenging operation SHAMROCK because the court "thought congressional committees investigating intelligence matters had revealed so much information about SHAMROCK that such a disclosure would pose no threat to the NSA mission." Id at 10.

On certified appeal, the District of Columbia Circuit noted that even "seemingly innocuous" information is privileged if that information is part of a classified "mosaic" that "can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate." Id at 8. The court affirmed dismissal of the claims related to operation MINARET but reversed the district court's rejection of the privilege as to operation SHAMROCK, reasoning that "confirmation or denial that a particular plaintiff's communications have been acquired would disclose NSA capabilities and other valuable intelligence information to a sophisticated intelligence analyst." Id at 10. On remand, the district court dismissed plaintiffs' claims against the NSA and individuals connected with the NSA's alleged monitoring. Plaintiffs were left with claims against the Central Intelligence Agency (CIA) and individuals who had allegedly submitted watchlists to the NSA on the presumption that the submission resulted in interception of plaintiffs' communications. The district court eventually dismissed the CIA-related claims as well on state secrets grounds and the case went up again to the court of appeals.

The District of Columbia Circuit stated that the state secrets inquiry "is not a balancing of ultimate interests at stake in the litigation," but rather "whether the showing of the harm that might reasonably be seen to flow from disclosure is adequate in a given case to trigger the absolute right to withhold the information sought in that case." Halkin v Helms, 690 F2d 977, 990 (DC Cir 1982) (Halkin II). The court then affirmed dismissal of "the claims for injunctive and declaratory relief against the CIA defendants based upon their submission of plaintiffs' names on

'watchlists' to NSA." Id at 997 (emphasis omitted). The court found that plaintiffs lacked standing given the court's "ruling in Halkin I that evidence of the fact of acquisition of plaintiffs' communications by NSA cannot be obtained from the government, nor can such fact be presumed from the submission of watchlists to that Agency." Id at 999 (emphasis omitted).

In Ellsberg v Mitchell, 709 F2d 51 (DC Cir 1983), the District of Columbia Circuit addressed the state secrets privilege in another wiretapping case. Former defendants and attorneys in the "Pentagon Papers" criminal prosecution sued individuals who allegedly were responsible for conducting warrantless electronic surveillance. Id at 52-53. In response to plaintiffs' interrogatories, defendants admitted to two wiretaps but refused to answer other questions on the ground that the requested information was privileged. Id at 53. The district court sustained the government's formal assertion of the state secrets privilege and dismissed plaintiffs' claims pertaining to foreign communications surveillance. Id at 56.

On appeal, the District of Columbia Circuit noted that "whenever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter." Id at 57. The court generally affirmed the district court's decisions regarding the privilege, finding "a 'reasonable danger' that revelation of the information in question would either enable a sophisticated analyst to gain insights into the nation's intelligence-gathering methods and capabilities or would disrupt diplomatic relations with foreign governments." Id at 59. The court disagreed with the district court's decision that the

privilege precluded discovery of the names of the attorneys general that authorized the surveillance. Id at 60.

Additionally, responding to plaintiffs' argument that the district court should have required the government to disclose more fully its basis for asserting the privilege, the court recognized that "procedural innovation" was within the district court's discretion and noted that "[t]he government's public statement need be no more (and no less) specific than is practicable under the circumstances." Id at 64.

In considering the effect of the privilege, the court affirmed dismissal "with regard to those [individuals] whom the government ha[d] not admitted overhearing." Id at 65. But the court did not dismiss the claims relating to the wiretaps that the government had conceded, noting that there was no reason to "suspend the general rule that the burden is on those seeking an exemption from the Fourth Amendment warrant requirement to show the need for it." Id at 68.

In Kasza v Browner, 133 F3d 1159 (9th Cir 1998), the Ninth Circuit issued its definitive opinion on the state secrets privilege. Former employees at a classified United States Air Force facility brought a citizen suit under the Resource Conservation and Recovery Act (RCRA), 42 USC § 6972, alleging the Air Force violated that act. Id at 1162. The district court granted summary judgment against plaintiffs, finding discovery of information related to chemical inventories impossible due to the state secrets privilege. Id. On appeal, plaintiffs argued that an exemption in the RCRA preempted the state secrets privilege and even if not preempted, the privilege was improperly asserted and

too broadly applied. Id at 1167-69. After characterizing the state secrets privilege as a matter of federal common law, the Ninth Circuit recognized that "statutes which invade the common law * * * are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." Id at 1167 (omissions in original) (citations omitted). Finding no such purpose, the court held that the statutory exemption did not preempt the state secrets privilege. Id at 1168.

Kasza also explained that the state secrets privilege can require dismissal of a case in three distinct ways. "First, by invoking the privilege over particular evidence, the evidence is completely removed from the case. The plaintiff's case then goes forward based on evidence not covered by the privilege. * * * If, after further proceedings, the plaintiff cannot prove the *prima facie* elements of her claim with nonprivileged evidence, then the court may dismiss her claim as it would with any plaintiff who cannot prove her case." Id at 1166. Second, "if the 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." Id (internal quotation omitted) (emphasis in original). Finally, and most relevant here, "notwithstanding the plaintiff's ability to produce nonprivileged evidence, 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." Id (quoting Reynolds, 345 US at 11 n26). See also Reynolds, 345 US at 11 n26 (characterizing Totten as a case "where the very subject

matter of the action, a contract to perform espionage, was a matter of state secret. The action was dismissed on the pleadings without ever reaching the question of evidence, since it was so obvious that the action should never prevail over the privilege.").

According the "utmost deference" to the government's claim of privilege and noting that even "seemingly innocuous information" could be "part of a classified mosaic," id at 1166, Kasza concluded after *in camera* review of classified declarations "that release of such information would reasonably endanger national security interests." Id at 1170. Because "no protective procedure" could salvage plaintiffs' case, and "the very subject matter of [her] action [was] a state secret," the court affirmed dismissal. Id.

More recently, in Tenet v Doe, 544 US 1 (2005), the Supreme Court reaffirmed Totten, holding that an alleged former Cold War spy could not sue the government to enforce its obligations under a covert espionage agreement. Id at 3. Importantly, the Court held that Reynolds did not "replac[e] the categorical Totten bar with the balancing of the state secrets evidentiary privilege in the distinct class of cases that depend upon clandestine spy relationships." Id at 9-10.

Even more recently, in El-Masri v Tenet, 2006 WL 1391390, 05-cv-01417 (ED Va May 12, 2006), plaintiff sued the former director of the CIA and private corporations involved in a program of "extraordinary rendition," pursuant to which plaintiff was allegedly beaten, tortured and imprisoned because the government mistakenly believed he was affiliated with the al Qaeda terrorist organization. Id at *1-2. The government intervened "to protect

its interests in preserving state secrets." Id at *3. The court sustained the government's assertion of the privilege:

> [T]he 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 * * * would present a grave risk of injury to national security.

Id at *5. The court also rejected plaintiff's argument "that government officials' public affirmation of the existence" of the rendition program somehow undercut the claim of privilege because the government's general admission provided "no details as to the [program's] means and methods," which were "validly claimed as state secrets." Id. Having validated the exercise of privilege, the court reasoned that dismissal was required because "any answer to the complaint by the defendants risk[ed] the disclosure of specific details [of the program]" and special discovery procedures would have been "plainly ineffective where, as here, the entire aim of the suit [was] to prove the existence of state secrets." Id at *6.

B

Relying on Kasza, the government advances three reasons why the state secrets privilege requires dismissing this action or granting summary judgment for AT&T: (1) the very subject matter of this case is a state secret; (2) plaintiffs cannot make a *prima facie* case for their claims without classified evidence and (3) the privilege effectively deprives AT&T of information necessary to raise valid defenses. Doc #245-1 (Gov Reply) at 3-5.

In support of its contention that the very subject matter of this action is a state secret, the government argues: "AT&T cannot even confirm or deny the key factual premise underlying [p]laintiffs' entire case -- that AT&T has provided any assistance whatsoever to NSA regarding foreign-intelligence surveillance. Indeed, in the formulation of Reynolds and Kasza, that allegation is 'the very subject of the action.'" Id at 4-5.

Additionally, the government claims that dismissal is appropriate because plaintiffs cannot establish a *prima facie* case for their claims. Contending that plaintiffs "persistently confuse speculative allegations and untested assertions for established facts," the government attacks the Klein and Marcus declarations and the various media reports that plaintiffs rely on to demonstrate standing. Id at 4. The government also argues that "[e]ven when alleged facts have been the 'subject of widespread media and public speculation' based on '[u]nofficial leaks and public surmise,' those alleged facts are not actually established in the public domain." Id at 8 (quoting Afshar v Dept of State, 702 F2d 1125, 1130-31 (DC Cir 1983)).

The government further contends that its "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 communications were intercepted as a result of any such activity." Gov MTD at 17-18. The government reasons that "[w]ithout these facts * * * [p]laintiffs ultimately will not be able to prove injury-in-fact and causation," thereby justifying dismissal of this action for lack of standing. Id at 18.

The government also notes that plaintiffs do not fall within the scope of the publicly disclosed "terrorist surveillance program" (see *infra* I(C)(1)) because "[p]laintiffs do not claim to be, or to communicate with, members or affiliates of [the] al Qaeda [terrorist organization] -- indeed, [p]laintiffs expressly exclude from their purported class any foreign powers or agent of foreign powers * * *." Id at 18 n9 (citing FAC, ¶ 70). Hence, the government concludes the named plaintiffs "are in no different position from any other citizen or AT&T subscriber who falls outside the narrow scope of the [terrorist surveillance program] but nonetheless disagrees with the program." Id (emphasis in original).

Additionally, the government contends that plaintiffs' Fourth Amendment claim fails because no warrant is required for the alleged searches. In particular, the government contends that the executive has inherent constitutional authority to conduct warrantless searches for foreign intelligence purposes, id at 24 (citing In re Sealed Case, 310 F3d 717, 742 (For Intel Surv Ct of Rev 2002)), and that the warrant requirement does not apply here because this case involves "special needs" that go beyond a routine interest in law enforcement, id at 26. Accordingly, to make a *prima facie* case, the government asserts that plaintiffs would have to demonstrate that the alleged searches were unreasonable, which would require a fact-intensive inquiry that the government contends plaintiffs could not perform because of the asserted privilege. Id at 26-27.

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The government also argues that plaintiffs cannot establish a *prima facie* case for their statutory claims because plaintiffs must prove "that any alleged interception or disclosure was not authorized by the Government." The government maintains that "[p]laintiffs bear the burden of alleging and proving the lack of such authorization," id at 21-22, and that they cannot meet that burden because "information confirming or denying AT&T's involvement in alleged intelligence activities is covered by the state secrets assertion." Id at 23.

Because "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," Doc #145-1 (Gov 5/17/06 Br) at 17, the government contends that its state secrets assertion precludes AT&T from "present[ing] the facts that would constitute its defenses." Gov Reply at 1. Accordingly, the government also argues that the court could grant summary judgment in favor of AT&T on that basis.

C

The first step in determining whether a piece of information constitutes a "state secret" is determining whether that information actually is a "secret." Hence, before analyzing the application of the state secrets privilege to plaintiffs' claims, the court summarizes what has been publicly disclosed about NSA surveillance programs as well as the AT&T documents and accompanying Klein and Marcus declarations.

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1

Within the last year, public reports have surfaced on at least two different types of alleged NSA surveillance programs, neither of which relies on warrants. The New York Times disclosed the first such program on December 16, 2005. Doc #19 (Cohn Decl), Ex J (James Risen and Eric Lichtblau, *Bush Lets US Spy on Callers Without Courts*, The New York Times (Dec 16, 2005)). The following day, President George W Bush confirmed the existence of a "terrorist surveillance program" in his weekly radio address:

> In the weeks following the [September 11, 2001] terrorist attacks on our Nation, I authorized the National Security Agency, consistent with US law and the Constitution, to intercept the international communications of people with known links to Al Qaeda and related terrorist organizations. Before we intercept these communications, the Government must have information that establishes a clear link to these terrorist networks.

Doc #20 (Pl Request for Judicial Notice), Ex 1 at 2, available at http://www.whitehouse.gov/news/releases/2005/12/print/20051217.html (last visited July 19, 2006). The President also described the mechanism by which the program is authorized and reviewed:

> The activities I authorized are reviewed approximately every 45 days. Each review is based on a fresh intelligence assessment of terrorist threats to the continuity of our Government and the threat of catastrophic damage to our homeland. During each assessment, previous activities under the authorization are reviewed. The review includes approval by our Nation's top legal officials, including the Attorney General and the Counsel to the President. I have reauthorized this program more than 30 times since the September the 11th attacks, and I intend to do so for as long as our Nation faces a continuing threat from Al Qaeda and related groups.

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> The NSA's activities under this authorization are throughly reviewed by the Justice Department and NSA's top legal officials, including NSA's General Counsel and Inspector General. Leaders in Congress have been briefed more than a dozen times on this authorization and the activities conducted under it. Intelligence officials involved in this activity also receive extensive training to ensure they perform their duties consistent with the letter and intent of the authorization.

Id.

Attorney General Alberto Gonzales subsequently confirmed that this program intercepts "contents of communications where * * * one party to the communication is outside the United States" and the government has "a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda." Doc #87 (AT&T Request for Judicial Notice), Ex J at 1 (hereinafter "12/19/05 Press Briefing"), available at http://www.whitehouse.gov/news/releases/2005/12/print/20051219-1.html (last visited July 19, 2005). The Attorney General also noted, "This [program] is not about wiretapping everyone. This is a very concentrated, very limited program focused at gaining information about our enemy." Id at 5. The President has also made a public statement, of which the court takes judicial notice, that the government's "international activities strictly target al Qaeda and their known affiliates," "the government does not listen to domestic phone calls without court approval" and the government is "not mining or trolling through the personal lives of millions of innocent Americans." The White House, *President Bush Discusses NSA Surveillance Program* (May 11, 2006) (hereinafter "5/11/06 Statement"), http://www.whitehouse.

gov/news/releases/2006/05/20060511-1.html (last visited July 19, 2005).

On May 11, 2006, USA Today reported the existence of a second NSA program in which BellSouth Corp, Verizon Communications Inc and AT&T were alleged to have provided telephone calling records of tens of millions of Americans to the NSA. Doc #182 (Markman Decl), Ex 5 at 1 (Leslie Cauley, *NSA Has Massive Database of Americans' Phone Calls*, USA Today (May 11, 2006)). The article did not allege that the NSA listens to or records conversations but rather that BellSouth, Verizon and AT&T gave the government access to a database of domestic communication records that the NSA uses "to analyze calling patterns in an effort to detect terrorist activity." Id. The report indicated a fourth telecommunications company, Qwest Communications International Inc, declined to participate in the program. Id at 2. An attorney for Qwest's former CEO, Joseph Nacchio, issued the following statement:

> In the Fall of 2001 * * * while Mr Nacchio was Chairman and CEO of Qwest and was serving pursuant to the President's appointment as the Chairman of the National Security Telecommunications Advisory Committee, Qwest was approached to permit the Government access to the private telephone records of Qwest customers.
>
> Mr Nacchio made inquiry as to whether a warrant or other legal process had been secured in support of that request. When he learned that no such authority had been granted and that there was a disinclination on the part of the authorities to use any legal process, including the Special Court which had been established to handle such matters, Mr Nacchio concluded that these requests violated the privacy requirements of the Telecommications [sic] Act. Accordingly, Mr Nacchio issued instructions to refuse to comply with these requests. These requests continued throughout Mr Nacchio's tenure and until his departure in June of 2002.

Markman Decl, Ex 6.

BellSouth and Verizon both issued statements, of which the court takes judicial notice, denying their involvement in the program described in USA Today. BellSouth stated in relevant part:

> As a result of media reports that BellSouth provided massive amounts of customer calling information under a contract with the NSA, the Company conducted an internal review to determine the facts. Based on our review to date, we have confirmed no such contract exists and we have not provided bulk customer calling records to the NSA.

News Release, BellSouth Statement on Governmental Data Collection (May 15, 2006), available at http://bellsouth.mediaroom.com/index.php?s=press_releases&item=2860 (last visited July 19, 2006). Although declining to confirm or deny whether it had any relationship to the NSA program acknowledged by the President, Verizon stated in relevant part:

> One of the most glaring and repeated falsehoods in the media reporting is the assertion that, in the aftermath of the 9/11 attacks, Verizon was approached by NSA and entered into an arrangement to provide the NSA with data from its customers' domestic calls.
>
> This is false. From the time of the 9/11 attacks until just four months ago, Verizon had three major businesses - its wireline phone business, its wireless company and its directory publishing business. It also had its own Internet Service Provider and long-distance businesses. Contrary to the media reports, Verizon was not asked by NSA to provide, nor did Verizon provide, customer phone records from any of these businesses, or any call data from those records. None of these companies -- wireless or wireline -- provided customer records or call data.

See News Release, Verizon Issues Statement on NSA Media Coverage (May 16, 2006), available at http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=93450 (last visited July 19, 2006). BellSouth and Verizon's denials have been at least somewhat

substantiated in later reports. Doc #298 (DiMuzio Decl), Ex 1 (*Lawmakers: NSA Database Incomplete*, USA Today (June 30, 2006)). Neither AT&T nor the government has confirmed or denied the existence of a program of providing telephone calling records to the NSA. Id.

2

Although the government does not claim that the AT&T documents obtained by Mark Klein or the accompanying declarations contain classified information (Doc #284 (6/23/06 Transcript) at 76:9-20), those papers remain under seal because AT&T alleges that they contain proprietary and trade secret information. Nonetheless, much of the information in these papers has already been leaked to the public or has been revealed in redacted versions of the papers. The summary below is based on those already disclosed facts.

In a public statement, Klein explained that while working at an AT&T office in San Francisco in 2002, "the site manager told me to expect a visit from a National Security Agency agent, who was to interview a management-level technician for a special job." Doc #43 (Ericson Decl), Ex J at 1. While touring the Folsom Street AT&T facility in January 2003, Klein "saw a new room being built adjacent to the 4ESS switch room where the public's phone calls are routed" and "learned that the person whom the NSA interviewed for the secret job was the person working to install equipment in this room." Id. See also Doc #147 (Redact Klein Decl), ¶ 10 ("The NSA agent came and met with [Field Support Specialist (FSS)] #2. FSS #1 later confirmed to me that FSS #2 was working on the special

job."); id, ¶ 16 ("In the Fall of 2003, FSS #1 told me that another NSA agent would again visit our office * * * to talk to FSS #1 in order to get the latter's evaluation of FSS #3's suitability to perform the special job that FSS #2 had been doing. The NSA agent did come and speak to FSS #1.").

Klein then learned about the AT&T documents in October 2003, after being transferred to the Folsom Street facility to oversee the Worldnet Internet room. Ericson Decl, Ex J at 2. One document described how "fiber optic cables from the secret room were tapping into the Worldnet circuits by splitting off a portion of the light signal." Id. The other two documents "instructed technicians on connecting some of the already in-service circuits to [a] 'splitter' cabinet, which diverts some of the light signal to the secret room." Id. Klein noted the secret room contained "a Narus STA 6400" and that "Narus STA technology is known to be used particularly by government intelligence agencies because of its ability to sift through large amounts of data looking for preprogrammed targets." Id. Klein also "learned that other such 'splitter' cabinets were being installed in other cities, including Seattle, San Jose, Los Angeles and San Diego." Id.

D

Based on the foregoing, it might appear that none of the subject matter in this litigation could be considered a secret given that the alleged surveillance programs have been so widely reported in the media.

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The court recognizes, however, that simply because a factual statement has been publicly made does not necessarily mean that the facts it relates are true and are not a secret. The statement also must come from a reliable source. Indeed, given the sheer amount of statements that have been made in the public sphere about the alleged surveillance programs and the limited number of permutations that such programs could take, it would seem likely that the truth about these programs has already been publicly reported somewhere. But simply because such statements have been publicly made does not mean that the truth of those statements is a matter of general public knowledge and that verification of the statement is harmless.

In determining whether a factual statement is a secret for purposes of the state secrets privilege, the court should look only at publicly reported information that possesses substantial indicia of reliability and whose verification or substantiation possesses the potential to endanger national security. That entails assessing the value of the information to an individual or group bent on threatening the security of the country, as well as the secrecy of the information.

For instance, if this litigation verifies that AT&T assists the government in monitoring communication records, a terrorist might well cease using AT&T and switch to other, less detectable forms of communication. Alternatively, if this litigation reveals that the communication records program does not exist, then a terrorist who had been avoiding AT&T might start using AT&T if it is a more efficient form of communication. In short, when deciding what communications channel to use, a

terrorist "balanc[es] the risk that a particular method of communication will be intercepted against the operational inefficiencies of having to use ever more elaborate ways to circumvent what he thinks may be intercepted." 6/23/06 Transcript at 48:14-17 (government attorney). A terrorist who operates with full information is able to communicate more securely and more efficiently than a terrorist who operates in an atmosphere of uncertainty.

It is, of course, an open question whether individuals inclined to commit acts threatening the national security engage in such calculations. But the court is hardly in a position to second-guess the government's assertions on this matter or to estimate the risk tolerances of terrorists in making their communications and hence at this point in the litigation eschews the attempt to weigh the value of the information.

Accordingly, in determining whether a factual statement is a secret, the court considers only public admissions or denials by the government, AT&T and other telecommunications companies, which are the parties indisputably situated to disclose whether and to what extent the alleged programs exist. In determining what is a secret, the court at present refrains from relying on the declaration of Mark Klein. Although AT&T does not dispute that Klein was a former AT&T technician and he has publicly declared under oath that he observed AT&T assisting the NSA in some capacity and his assertions would appear admissible in connection with the present motions, the inferences Klein draws have been disputed. To accept the Klein declaration at this juncture in connection with the state secrets issue would invite attempts to undermine the

privilege by mere assertions of knowledge by an interested party. Needless to say, this does not reflect that the court discounts Klein's credibility, but simply that what is or is not secret depends on what the government and its alleged operative AT&T and other telecommunications providers have either admitted or denied or is beyond reasonable dispute.

Likewise, the court does not rely on media reports about the alleged NSA programs because their reliability is unclear. To illustrate, after Verizon and BellSouth denied involvement in the program described in USA Today in which communication records are monitored, USA Today published a subsequent story somewhat backing down from its earlier statements and at least in some measure substantiating these companies' denials. See *supra* I(C)(1).

Finally, the court notes in determining whether the privilege applies, the court is not limited to considering strictly admissible evidence. FRE 104(a) ("Preliminary questions concerning * * * the existence of a privilege * * * shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges."). This makes sense: the issue at bar is not proving a question of liability but rather determining whether information that the government contends is a secret is actually a secret. In making this determination, the court may rely upon reliable public evidence that might otherwise be inadmissible at trial because it does not comply with the technical requirements of the rules of evidence.

With these considerations in mind, the court at last determines whether the state secrets privilege applies here.

E

Because this case involves an alleged covert relationship between the government and AT&T, the court first determines whether to apply the categorical bar to suit established by the Supreme Court in Totten v United States, 92 US 105 (1875), acknowledged in United States v Reynolds, 345 US 1 (1953) and Kasza v Browner, 133 F3d 1159 (9th Cir 1998), and reaffirmed in Tenet v Doe, 544 US 1 (2005). See id at 6 ("[A]pplication of the Totten rule of dismissal * * * represents the sort of 'threshold question' we have recognized may be resolved before addressing jurisdiction."). The court then examines the closely related questions whether this action must be presently dismissed because "the very subject matter of the action" is a state secret or because the state secrets privilege necessarily blocks evidence essential to plaintiffs' *prima facie* case or AT&T's defense. See Kasza, 133 F3d at 1166-67.

1

Although the principles announced in Totten, Tenet, Reynolds and Kasza inform the court's decision here, those cases are not strictly analogous to the facts at bar.

First, the instant plaintiffs were not a party to the alleged covert arrangement at issue here between AT&T and the government. Hence, Totten and Tenet are not on point to the extent they hold that former spies cannot enforce agreements with the government because the parties implicitly agreed that such suits would be barred. The implicit notion in Totten was one of equitable estoppel: one who agrees to conduct covert operations impliedly agrees not to reveal the agreement even if the agreement

is breached. But AT&T, the alleged spy, is not the plaintiff here. In this case, plaintiffs made no agreement with the government and are not bound by any implied covenant of secrecy.

More importantly, unlike the clandestine spy arrangements in Tenet and Totten, AT&T and the government have for all practical purposes already disclosed that AT&T assists the government in monitoring communication content. As noted earlier, the government has publicly admitted the existence of a "terrorist surveillance program," which the government insists is completely legal. This program operates without warrants and targets "contents of communications where * * * one party to the communication is outside the United States" and the government has "a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda." 12/19/05 Press Briefing at 1.

Given that the "terrorist surveillance program" tracks "calls into the United States or out of the United States," 5/11/06 Statement, it is inconceivable that this program could exist without the acquiescence and cooperation of some telecommunications provider. Although of record here only in plaintiffs' pleading, it is beyond reasonable dispute that "prior to its being acquired by SBC, AT&T Corp was the second largest Internet provider in the country," FAC, ¶ 26, and "AT&T Corp's bundled local and long distance service was available in 46 states, covering more than 73 million households," id, ¶ 25. AT&T's assistance would greatly help the government implement this program. See also id, ¶ 27 ("The new AT&T Inc constitutes the largest telecommunications

provider in the United States and one of the largest in the world."). Considering the ubiquity of AT&T telecommunications services, it is unclear whether this program could even exist without AT&T's acquiescence and cooperation.

Moreover, AT&T's history of cooperating with the government on such matters is well known. AT&T has recently disclosed that it "performs various classified contracts, and thousands of its employees hold government security clearances." FAC, ¶ 29. More recently, in response to reports on the alleged NSA programs, AT&T has disclosed in various statements, of which the court takes judicial notice, that it has "an obligation to assist law enforcement and other government agencies responsible for protecting the public welfare, whether it be an individual or the security interests of the entire nation. * * * If and when AT&T is asked to help, we do so strictly within the law and under the most stringent conditions." News Release, AT&T Statement on Privacy and Legal/Security Issues (May 11, 2006) (emphasis added), available at http://www.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=22285. See also Declan McCullagh, CNET News.com, *Legal Loophole Emerges in NSA Spy Program* (May 19, 2006) ("Mark Bien, a spokesman for AT&T, told CNET News.com on Wednesday: 'Without commenting on or confirming the existence of the program, we can say that when the government asks for our help in protecting national security, and the request is within the law, we will provide that assistance.'"), available at http://news.com.com/Legal+loophole+emerges+in+NSA+spy+program/2100-1028_3-6073600.html; Justin Scheck, *Plaintiffs Can Keep AT&T Papers in Domestic Spying Case*, The Recorder (May 18, 2006) ("Marc Bien, a spokesman for

AT&T, said he didn't see a settlement on the horizon. 'When the government asks for our help in protecting American security, and the request is within the law, we provide assistance,' he said."), available at http://www.law.com/jsp/article.jsp?id=1147856734796. And AT&T at least presently believes that any such assistance would be legal if AT&T were simply a passive agent of the government or if AT&T received a government certification authorizing the assistance. 6/23/06 Transcript at 15:11-21:19. Hence, it appears AT&T helps the government in classified matters when asked and AT&T at least currently believes, on the facts as alleged in plaintiffs' complaint, its assistance is legal.

In sum, the government has disclosed the general contours of the "terrorist surveillance program," which requires the assistance of a telecommunications provider, and AT&T claims that it lawfully and dutifully assists the government in classified matters when asked.

A remaining question is whether, in implementing the "terrorist surveillance program," the government ever requested the assistance of AT&T, described in these proceedings as the mother of telecommunications "that in a very literal way goes all the way back to Alexander Graham Bell summoning his assistant Watson into the room." Id at 102:11-13. AT&T's assistance in national security surveillance is hardly the kind of "secret" that the Totten bar and the state secrets privilege were intended to protect or that a potential terrorist would fail to anticipate.

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The court's conclusion here follows the path set in Halkin v Helms and Ellsberg v Mitchell, the two cases most factually similar to the present. The Halkin and Ellsberg courts did not preclude suit because of a Totten-based implied covenant of silence. Although the courts eventually terminated some or all of plaintiffs' claims because the privilege barred discovery of certain evidence (Halkin I, 598 F2d at 10; Halkin II, 690 F2d at 980, 987-88; Ellsberg, 709 F2d at 65), the courts did not dismiss the cases at the outset, as would have been required had the Totten bar applied. Accordingly, the court sees no reason to apply the Totten bar here.

For all of the above reasons, the court declines to dismiss this case based on the categorical Totten/Tenet bar.

2

The court must also dismiss this case if "the very subject matter of the action" is a state secret and therefore "any further proceeding * * * would jeopardize national security." Kasza, 133 F3d at 1170. As a preliminary matter, the court agrees that the government has satisfied the three threshold requirements for properly asserting the state secrets privilege: (1) the head of the relevant department, Director of National Intelligence John D Negroponte (2) has lodged a formal claim of privilege (Negroponte Decl, ¶¶ 9, 13) (3) after personally considering the matter (Id, ¶¶ 2, 9, 13). Moreover, the Director of the NSA, Lieutenant General Keith B Alexander, has filed a declaration supporting Director Negroponte's assertion of the privilege. Alexander Decl, ¶¶ 2, 9.

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The court does not "balanc[e the] ultimate interests at stake in the litigation." Halkin II, 690 F2d at 990. But no case dismissed because its "very subject matter" was a state secret involved ongoing, widespread violations of individual constitutional rights, as plaintiffs allege here. Indeed, most cases in which the "very subject matter" was a state secret involved classified details about either a highly technical invention or a covert espionage relationship. See, e g, Sterling v Tenet, 416 F3d 338, 348 (4th Cir 2005) (dismissing Title VII racial discrimination claim that "center[ed] around a covert agent's assignments, evaluations, and colleagues"); Kasza, 133 F3d at 1162-63, 1170 (dismissing RCRA claim regarding facility reporting and inventory requirements at a classified Air Force location near Groom Lake, Nevada); Zuckerbraun v General Dynamics Corp, 935 F2d 544, 547-48 (2d Cir 1991) (dismissing wrongful death claim implicating classified information about the "design, manufacture, performance, functional characteristics, and testing of [weapons] systems and the rules of engagement"); Fitzgerald v Penthouse Intl, 776 F2d 1236, 1242-43 (4th Cir 1985) (dismissing libel suit "charging the plaintiff with the unauthorized sale of a top secret marine mammal weapons system"); Halpern v United States, 258 F2d 36, 44 (2d Cir 1958) (rejecting government's motion to dismiss in a case involving a patent with military applications withheld under a secrecy order); Clift v United States, 808 F Supp 101, 111 (D Conn 1991) (dismissing patent dispute over a cryptographic encoding device).

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By contrast, the very subject matter of this action is hardly a secret. As described above, public disclosures by the government and AT&T indicate that AT&T is assisting the government to implement some kind of surveillance program. See *supra* I(E)(1).

For this reason, the present action is also different from El-Masri v Tenet, the recently dismissed case challenging the government's alleged "extraordinary rendition program." In El-Masri, only limited sketches of the alleged program had been disclosed and the whole object of the suit was to reveal classified details regarding "the means and methods the foreign intelligence services of this and other countries used to carry out the program." El-Masri, 2006 WL 1391390, *5. By contrast, this case focuses only on whether AT&T intercepted and disclosed communications or communication records to the government. And as described above, significant amounts of information about the government's monitoring of communication content and AT&T's intelligence relationship with the government are already non-classified or in the public record.

3

The court also declines to decide at this time whether this case should be dismissed on the ground that the government's state secrets assertion will preclude evidence necessary for plaintiffs to establish a *prima facie* case or for AT&T to raise a valid defense to the claims. Plaintiffs appear to be entitled to at least some discovery. See *infra* I(G)(3). It would be premature to decide these issues at the present time. In drawing this conclusion, the court is following the approach of the courts in

Halkin v Helms and Ellsberg v Mitchell; these courts did not dismiss those cases at the outset but allowed them to proceed to discovery sufficiently to assess the state secrets privilege in light of the facts. The government has not shown why that should not be the course of this litigation.

4

In sum, for much the same reasons that Totten does not preclude this suit, the very subject matter of this action is not a "secret" for purposes of the state secrets privilege and it would be premature to conclude that the privilege will bar evidence necessary for plaintiffs' *prima facie* case or AT&T's defense. Because of the public disclosures by the government and AT&T, the court cannot conclude that merely maintaining this action creates a "reasonable danger" of harming national security. Accordingly, based on the foregoing, the court DENIES the government's motion to dismiss.

F

The court hastens to add that its present ruling should not suggest that its *in camera, ex parte* review of the classified documents confirms the truth of the particular allegations in plaintiffs' complaint. Plaintiffs allege a surveillance program of far greater scope than the publicly disclosed "terrorist surveillance program." The existence of this alleged program and AT&T's involvement, if any, remain far from clear. And as in Halkin v Helms, it is certainly possible that AT&T might be entitled to summary judgment at some point if the court finds that

the state secrets privilege blocks certain items of evidence that are essential to plaintiffs' *prima facie* case or AT&T's defense. The court also recognizes that legislative or other developments might alter the course of this litigation.

But it is important to note that even the state secrets privilege has its limits. While the court recognizes and respects the executive's constitutional duty to protect the nation from threats, the court also takes seriously its constitutional duty to adjudicate the disputes that come before it. See Hamdi v Rumsfeld, 542 US 507, 536 (2004) (plurality opinion) ("Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."). To defer to a blanket assertion of secrecy here would be to abdicate that duty, particularly because the very subject matter of this litigation has been so publicly aired. The compromise between liberty and security remains a difficult one. But dismissing this case at the outset would sacrifice liberty for no apparent enhancement of security.

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G

The government also contends the issue whether AT&T received a certification authorizing its assistance to the government is a state secret. Gov 5/17/06 Br at 17.

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The procedural requirements and impact of a certification under Title III are addressed in 18 USC § 2511(2)(a)(ii):

> Notwithstanding any other law, providers of wire or electronic communication service, their officers, employees, and agents, * * * are authorized to provide information, facilities, or technical assistance to persons authorized by law to intercept wire, oral, or electronic communications or to conduct electronic surveillance, as defined in section 101 of [FISA] * * * if such provider, its officers, employees, or agents, * * * has been provided with -- * * *
>
> (B) a certification in writing by a person specified in section 2518(7) of this title [18 USCS § 2518(7)] or the Attorney General of the United States that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required * * *.

Although it is doubtful whether plaintiffs' constitutional claim would be barred by a valid certification under section 2511(2)(a)(ii), this provision on its face makes clear that a valid certification would preclude the statutory claims asserted here. See 18 USC § 2511(2)(a)(ii) ("No cause of action shall lie in any court against any provider of wire or electronic communication service * * * for providing information, facilities, or assistance in accordance with the terms of a * * * certification under this chapter.").

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As noted above, it is not a secret for purposes of the state secrets privilege that AT&T and the government have some kind of intelligence relationship. See *supra* I(E)(1). Nonetheless, the court recognizes that uncovering whether and to what extent a certification exists might reveal information about AT&T's assistance to the government that has not been publicly disclosed. Accordingly, in applying the state secrets privilege to the certification question, the court must look deeper at what information has been publicly revealed about the alleged electronic surveillance programs. The following chart summarizes what the government has disclosed about the scope of these programs in terms of (1) the individuals whose communications are being monitored, (2) the locations of those individuals and (3) the types of information being monitored:

	Purely domestic communication content	Domestic-foreign communication content	Communication records
General public	Government DENIES	Government DENIES	Government NEITHER CONFIRMS NOR DENIES
al Qaeda or affiliate member/agent	Government DENIES	Government CONFIRMS	

As the chart relates, the government's public disclosures regarding monitoring of "communication content" (i e, wiretapping or listening in on a communication) differ significantly from its disclosures regarding "communication records" (i e, collecting ancillary data pertaining to a communication, such as the telephone

numbers dialed by an individual). See *supra* I(C)(1). Accordingly, the court separately addresses for each alleged program whether revealing the existence or scope of a certification would disclose a state secret.

3

Beginning with the warrantless monitoring of "communication content," the government has confirmed that it monitors "contents of communications where * * * one party to the communication is outside the United States" and the government has "a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda." 12/19/05 Press Briefing at 1. The government denies listening in without a warrant on any purely domestic communications or communications in which neither party has a connection to al Qaeda or a related terrorist organization. In sum, regarding the government's monitoring of "communication content," the government has disclosed the universe of possibilities in terms of whose communications it monitors and where those communicating parties are located.

Based on these public disclosures, the court cannot conclude that the existence of a certification regarding the "communication content" program is a state secret. If the government's public disclosures have been truthful, revealing whether AT&T has received a certification to assist in monitoring communication content should not reveal any new information that would assist a terrorist and adversely affect national security.

And if the government has not been truthful, the state secrets privilege should not serve as a shield for its false public statements. In short, the government has opened the door for judicial inquiry by publicly confirming and denying material information about its monitoring of communication content.

Accordingly, the court concludes that the state secrets privilege will not prevent AT&T from asserting a certification-based defense, as appropriate, regarding allegations that it assisted the government in monitoring communication content. The court envisions that AT&T could confirm or deny the existence of a certification authorizing monitoring of communication content through a combination of responses to interrogatories and *in camera* review by the court. Under this approach, AT&T could reveal information at the level of generality at which the government has publicly confirmed or denied its monitoring of communication content. This approach would also enable AT&T to disclose the non-privileged information described here while withholding any incidental privileged information that a certification might contain.

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Turning to the alleged monitoring of communication records, the court notes that despite many public reports on the matter, the government has neither confirmed nor denied whether it monitors communication records and has never publicly disclosed whether the NSA program reported by USA Today on May 11, 2006, actually exists. Although BellSouth, Verizon and Qwest have denied participating in this program, AT&T has neither confirmed nor

denied its involvement. Hence, unlike the program monitoring communication content, the general contours and even the existence of the alleged communication records program remain unclear.

Nonetheless, the court is hesitant to conclude that the existence or non-existence of the communication records program necessarily constitutes a state secret. Confirming or denying the existence of this program would only affect a terrorist who was insensitive to the publicly disclosed "terrorist surveillance program" but cared about the alleged program here. This would seem unlikely to occur in practice given that the alleged communication records program, which does not involve listening in on communications, seems less intrusive than the "terrorist surveillance program," which involves wiretapping. And in any event, it seems odd that a terrorist would continue using AT&T given that BellSouth, Verizon and Qwest have publicly denied participating in the alleged communication records program and would appear to be safer choices. Importantly, the public denials by these telecommunications companies undercut the government and AT&T's contention that revealing AT&T's involvement or lack thereof in the program would disclose a state secret.

Still, the court recognizes that it is not in a position to estimate a terrorist's risk preferences, which might depend on facts not before the court. For example, it may be that a terrorist is unable to avoid AT&T by choosing another provider or, for reasons outside his control, his communications might necessarily be routed through an AT&T facility. Revealing that a communication records program exists might encourage that terrorist to switch to less efficient but less detectable forms of

communication. And revealing that such a program does not exist might encourage a terrorist to use AT&T services when he would not have done so otherwise. Accordingly, for present purposes, the court does not require AT&T to disclose what relationship, if any, it has with this alleged program.

The court stresses that it does not presently conclude that the state secrets privilege will necessarily preclude AT&T from revealing later in this litigation information about the alleged communication records program. While this case has been pending, the government and telecommunications companies have made substantial public disclosures on the alleged NSA programs. It is conceivable that these entities might disclose, either deliberately or accidentally, other pertinent information about the communication records program as this litigation proceeds. The court recognizes such disclosures might make this program's existence or non-existence no longer a secret. Accordingly, while the court presently declines to permit any discovery regarding the alleged communication records program, if appropriate, plaintiffs can request that the court revisit this issue in the future.

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Finally, the court notes plaintiffs contend that Congress, through various statutes, has limited the state secrets privilege in the context of electronic surveillance and has abrogated the privilege regarding the existence of a government certification. See Doc #192 (Pl Opp Gov MTD) at 16-26, 45-48. Because these arguments potentially implicate highly complicated separation of powers issues regarding Congress' ability to abrogate

what the government contends is a constitutionally protected privilege, the court declines to address these issues presently, particularly because the issues might very well be obviated by future public disclosures by the government and AT&T. If necessary, the court may revisit these arguments at a later stage of this litigation.

H

The government also asserts two statutory privileges in its motion to dismiss that it contends apply "to any intelligence-related information, sources and methods implicated by [p]laintiffs' claims and the information covered by these privilege claims are at least co-extensive with the assertion of the state secrets privilege by the DNI." Gov MTD at 14. First, the government relies on 50 USC § 402 *note*, which provides:

> [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, of any information with respect to the activities thereof, or of the names, titles, salaries, or number of the persons employed by such agency.

The government also relies on 50 USC § 403-1(i)(1), which states, "The Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure."

Neither of these provisions by their terms requires the court to dismiss this action and it would be premature for the court to do so at this time. In opposing a subsequent summary judgment motion, plaintiffs could rely on many non-classified materials including present and future public disclosures of the government or AT&T on the alleged NSA programs, the AT&T documents

and the supporting Klein and Marcus declarations and information gathered during discovery. Hence, it is at least conceivable that some of plaintiffs' claims, particularly with respect to declaratory and injunctive relief, could survive summary judgment. After discovery begins, the court will determine step-by-step whether the privileges prevent plaintiffs from discovering particular evidence. But the mere existence of these privileges does not justify dismissing this case now.

Additionally, neither of these provisions block AT&T from producing any certification that it received to assist the government in monitoring communication content, see *supra* I(G)(3). Because information about this certification would be revealed only at the same level of generality as the government's public disclosures, permitting this discovery should not reveal any new information on the NSA's activities or its intelligence sources or methods, assuming that the government has been truthful.

Accordingly, the court DENIES the government's motion to dismiss based on the statutory privileges and DENIES the privileges with respect to any certification that AT&T might have received authorizing it to monitor communication content.

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II

AT&T moves to dismiss plaintiffs' complaint on multiple grounds, contending that (1) plaintiffs lack standing, (2) the amended complaint fails to plead affirmatively the absence of immunity from suit and (3) AT&T is entitled to statutory, common law and qualified immunity. Because standing is a threshold jurisdictional question, the court addresses that issue first. See Steel Company v Citizens for a Better Environment, 523 US 83, 94, 102 (1998).

A

"[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." Lujan v Defenders of Wildlife, 504 US 555, 560 (1992). To establish standing under Article III, a plaintiff must satisfy three elements: (1) "the plaintiff must have suffered an injury in fact -- an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical," (2) "there must be a causal connection between the injury and the conduct complained of" and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Id at 560-61 (internal quotation marks, citations and footnote omitted). A party invoking federal jurisdiction has the burden of establishing its standing to sue. Id at 561.

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In the present case, AT&T contends plaintiffs have not sufficiently alleged injury-in-fact and their complaint relies on "wholly conclusory" allegations. AT&T MTD at 20-22. According to AT&T, "Absent some concrete allegation that the government monitored their communications or records, all plaintiffs really have is a suggestion that AT&T provided a means by which the government could have done so had it wished. This is anything but injury-in-fact." Id at 20 (emphasis in original). AT&T compares this case to United Presbyterian Church v Reagan, 738 F2d 1375 (DC Cir 1984) (written by then-Judge Scalia), in which the court found that plaintiffs' allegations of unlawful surveillance were "too generalized and nonspecific to support a complaint." Id at 1380.

As a preliminary matter, AT&T incorrectly focuses on whether plaintiffs have pled that the government "monitored [plaintiffs'] communications or records" or "targeted [plaintiffs] or their communications." Instead, the proper focus is on AT&T's actions. Plaintiffs' statutory claims stem from injuries caused solely by AT&T through its alleged interception, disclosure, use, divulgence and/or publication of plaintiffs' communications or communication records. FAC, ¶¶ 93-95, 102-05, 113-14, 121, 128, 135-41. Hence, plaintiffs need not allege any facts regarding the government's conduct to state these claims.

More importantly, for purposes of the present motion to dismiss, plaintiffs have stated sufficient facts to allege injury-in-fact for all their claims. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presume that general allegations embrace those specific facts that are necessary

to support the claim.'" Lujan, 504 US at 561 (quoting Lujan v National Wildlife Federation, 497 US 871, 889 (1990)). Throughout the complaint, plaintiffs generally describe the injuries they have allegedly suffered because of AT&T's illegal conduct and its collaboration with the government. See, e g, FAC, ¶ 61 ("On information and belief, AT&T Corp has provided the government with direct access to the contents of the Hawkeye, Aurora and/or other databases that it manages using Daytona, including all information, records, [dialing, routing, addressing and/or signaling information] and [customer proprietary network information] pertaining to [p]laintiffs and class members, by providing the government with copies of the information in the databases and/or by giving the government access to Daytona's querying capabilities and/or some other technology enabling the government agents to search the databases' contents."); id, ¶ 6 ("On information and belief, AT&T Corp has opened its key telecommunications facilities and databases to direct access by the NSA and/or other government agencies, intercepting and disclosing to the government the contents of its customers' communications as well as detailed communications records about millions of its customers, including [p]laintiffs and class members.").

By contrast, plaintiffs in United Presbyterian Church alleged they "ha[d] been informed on numerous occasions" that mail that they had sent never reached its destination, "ha[d] reason to believe that, for a long time, [their] officers, employees, and persons associated with [them had] been subjected to government surveillance, infiltration and disruption" and "discern[ed] a long-term pattern of surveillance of [their] members, disruption of

their speaking engagements in this country, and attempts at character assassination." See 738 F2d at 1380 n2. Because these allegations were more attenuated and less concrete than the specific injuries alleged here, United Presbyterian Church does not support dismissing this action.

AT&T also contends "[p]laintiffs lack standing to assert their statutory claims (Counts II-VII) because the FAC alleges no facts suggesting that their statutory rights have been violated" and "the FAC alleges nothing to suggest that the named plaintiffs were themselves subject to surveillance." AT&T MTD at 24-25 (emphasis in original). But AT&T ignores that the gravamen of plaintiffs' complaint is that AT&T has created a dragnet that collects the content and records of its customers' communications. See, e g, FAC, ¶¶ 42-64. The court cannot see how any one plaintiff will have failed to demonstrate injury-in-fact if that plaintiff effectively demonstrates that all class members have so suffered. This case is plainly distinguishable from Halkin II, for in that case, showing that plaintiffs were on a watchlist was not tantamount to showing that any particular plaintiff suffered a surveillance-related injury-in-fact. See Halkin II, 690 F2d at 999-1001. As long as the named plaintiffs were, as they allege, AT&T customers during the relevant time period (FAC, ¶¶ 13-16), the alleged dragnet would have imparted a concrete injury on each of them.

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This conclusion is not altered simply because the alleged injury is widely shared among AT&T customers. In FEC v Akins, 524 US 11 (1998), the Supreme Court explained:

> Whether styled as a constitutional or prudential limit on standing, the Court has sometimes determined that where large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance.
>
> [This] kind of judicial language * * * however, invariably appears in cases where the harm at issue is not only widely shared, but is also of an abstract and indefinite nature.

Id at 23. The Court continued:

> [W]here a harm is concrete, though widely shared, the Court has found "injury in fact." Thus the fact that a political forum may be more readily available where an injury is widely shared (while counseling against, say, interpreting a statute as conferring standing) does not, by itself, automatically disqualify an interest for Article III purposes. Such an interest, where sufficiently concrete, may count as an "injury in fact."

Id at 24.

Here, the alleged injury is concrete even though it is widely shared. Despite AT&T's alleged creation of a dragnet to intercept all or substantially all of its customers' communications, this dragnet necessarily inflicts a concrete injury that affects each customer in a distinct way, depending on the content of that customer's communications and the time that customer spends using AT&T services. Indeed, the present situation resembles a scenario in which "large numbers of individuals suffer the same common-law injury (say, a widespread mass tort)." Id.

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AT&T also contends that the state secrets privilege bars plaintiffs from establishing standing. Doc #244 (AT&T Reply) at 16-18. See also Gov MTD 16-20. But as described above, the state secrets privilege will not prevent plaintiffs from receiving at least some evidence tending to establish the factual predicate for the injury-in-fact underlying their claims directed at AT&T's alleged involvement in the monitoring of communication content. See *supra* I(G)(3). And the court recognizes that additional facts might very well be revealed during, but not as a direct consequence of, this litigation that obviate many of the secrecy concerns currently at issue regarding the alleged communication records program. Hence, it is unclear whether the privilege would necessarily block AT&T from revealing information about its participation, if any, in that alleged program. See *supra* I(G)(4). The court further notes that the AT&T documents and the accompanying Klein and Marcus declarations provide at least some factual basis for plaintiffs' standing. Accordingly, the court does not conclude at this juncture that plaintiffs' claims would necessarily lack the factual support required to withstand a future jurisdictional challenge based on lack of standing.

Because plaintiffs have sufficiently alleged that they suffered an actual, concrete injury traceable to AT&T and redressable by this court, the court DENIES AT&T's motion to dismiss for lack of standing.

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B

AT&T also contends that telecommunications providers are immune from suit if they receive a government certification authorizing them to conduct electronic surveillance. AT&T MTD at 5. AT&T argues that plaintiffs have the burden to plead affirmatively that AT&T lacks such a certification and that plaintiffs have failed to do so here, thereby making dismissal appropriate. Id at 10-13.

As discussed above, the procedural requirements for a certification are addressed in 18 USC § 2511(2)(a)(ii)(B). See *supra* I(G)(1). Under section 2511(2)(a)(ii), "No cause of action shall lie in any court against any provider of wire or electronic communication service * * * for providing information, facilities, or assistance in accordance with the terms of a * * * certification under this chapter." This provision is referenced in 18 USC § 2520(a) (emphasis added), which creates a private right of action under Title III:

> Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter [18 USCS §§ 2510 et seq] may in a civil action recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate.

A similar provision exists at 18 USC § 2703(e) (emphasis added):

> No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, agents, or other specified persons for providing information, facilities, or assistance in accordance with the terms of a court order, warrant, subpoena, statutory authorization, or certification under this chapter.

The court recognizes that the language emphasized above suggests that to state a claim under these statutes, a plaintiff must affirmatively allege that a telecommunications provider did not receive a government certification. And out of the many statutory exceptions in section 2511, only section 2511(2)(a)(ii) appears in section 2520(a), thereby suggesting that a lack of certification is an element of a Title III claim whereas the other exceptions are simply affirmative defenses. As AT&T notes, this interpretation is at least somewhat supported by the Senate report accompanying 18 USC § 2520, which states in relevant part:

> A civil action will not lie [under 18 USC § 2520] where the requirements of sections 2511(2)(a)(ii) of title 18 are met. With regard to that exception, the Committee intends that the following procedural standards will apply:
>
> > (1) The complaint must allege that a wire or electronic communications service provider (or one of its employees) (a) disclosed the existence of a wiretap; (b) acted without a facially valid court order or certification; (c) acted beyond the scope of a court order or certification or (d) acted on bad faith. Acting in bad faith would include failing to read the order or collusion. If the complaint fails to make any of these allegations, the defendant can move to dismiss the complaint for failure to state a claim upon which relief can be granted.

ECPA, S Rep No 99-541, 99th Cong, 2d Sess 26 (1986) (reprinted in 1986 USCCAN 3555, 3580) (emphasis added).

Nonetheless, the statutory text does not explicitly provide for a heightened pleading requirement, which is in essence what AT&T seeks to impose here. And the court is reluctant to infer a heightened pleading requirement into the statute given that in other contexts, Congress has been explicit when it intended to create such a requirement. See, e g, Private Securities Litigation

Reform Act of 1995, § 101, 15 USC § 78u-4(b)(1), (2) (prescribing heightened pleading standards for securities class actions).

In any event, the court need not decide whether plaintiffs must plead affirmatively the absence of a certification because the present complaint, liberally construed, alleges that AT&T acted outside the scope of any government certification it might have received. In particular, paragraphs 81 and 82, which are incorporated in all of plaintiffs' claims, state:

> 81. On information and belief, the above-described acts [by defendants] of interception, disclosure, divulgence and/or use of Plaintiffs' and class members' communications, contents of communications, and records pertaining to their communications occurred without judicial or other lawful authorization, probable cause, and/or individualized suspicion.
>
> 82. On information and belief, at all relevant times, the government instigated, directed and/or tacitly approved all of the above-described acts of AT&T Corp.

FAC, ¶¶ 81-82 (emphasis added).

Plaintiffs contend that the phrase "occurred without judicial or other lawful authorization" means that AT&T acted without a warrant or a certification. Doc #176 (Pl Opp AT&T MTD) at 13-15. At oral argument, AT&T took issue with this characterization of "lawful authorization":

> The emphasis there is on the word 'lawful[.'] When you read that paragraph in context, it's clear that what [plaintiffs are] saying is that any authorization [AT&T] receive[s] is, in [plaintiffs'] view, unlawful. And you can see that because of the other paragraphs in the complaint. The very next one, [p]aragraph 82, is the paragraph where [plaintiffs] allege that the United States government approved and instigated all of our actions. It wouldn't be reasonable to construe Paragraph 81 as saying that [AT&T was] not authorized by the government to do what [AT&T] allegedly did when the very next paragraph states the exact opposite.

6/23/06 Transcript at 10:21-11:6. Indeed, the court does not question that it would be extraordinary for a large, sophisticated entity like AT&T to assist the government in a warrantless surveillance program without receiving a certification to insulate its actions.

Nonetheless, paragraph 81 could be reasonably interpreted as alleging just that. Even if "the government instigated, directed and/or tacitly approved" AT&T's alleged actions, it does not inexorably follow that AT&T received an official certification blessing its actions. At the hearing, plaintiffs' counsel suggested that they had "information and belief based on the news reports that [the alleged activity] was done based on oral requests" not a written certification. Id at 24:21-22. Additionally, the phrase "judicial or other lawful authorization" in paragraph 81 parallels how "a court order" and "a certification" appear in 18 USC §§ 2511(2)(a)(ii)(A) and (B), respectively; this suggests that "lawful authorization" refers to a certification. Interpreted in this manner, plaintiffs are making a factual allegation that AT&T did not receive a certification.

In sum, even if plaintiffs were required to plead affirmatively that AT&T did not receive a certification authorizing its alleged actions, plaintiffs' complaint can fairly be interpreted as alleging just that. Whether and to what extent the government authorized AT&T's alleged conduct remain issues for further litigation. For now, however, the court DENIES AT&T's motion to dismiss on this ground.

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C

AT&T also contends that the complaint should be dismissed because it failed to plead the absence of an absolute common law immunity to which AT&T claims to be entitled. AT&T MTD at 13-15. AT&T asserts that this immunity "grew out of a recognition that telecommunications carriers should not be subject to civil liability for cooperating with government officials conducting surveillance activities. That is true whether or not the surveillance was lawful, so long as the government officials requesting cooperation assured the carrier that it was." Id at 13. AT&T also argues that the statutory immunities do not evince a "congressional purpose to displace, rather than supplement, the common law." Id.

AT&T overstates the case law when intimating that the immunity is long established and unequivocal. AT&T relies primarily on two cases: Halperin v Kissinger, 424 F Supp 838 (DDC 1976), revd on other grounds, 606 F2d 1192 (DC Cir 1979) and Smith v Nixon, 606 F2d 1183 (DC Cir 1979). In Halperin, plaintiffs alleged that the Chesapeake and Potomac Telephone Company (C&P) assisted federal officials in illegally wiretapping plaintiffs' home telephone, thereby violating plaintiffs' constitutional and Title III statutory rights. 424 F Supp at 840. In granting summary judgment for C&P, the district court noted:

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> Chesapeake and Potomac Telephone Company, argues persuasively that it played no part in selecting any wiretap suspects or in determining the length of time the surveillance should remain. It overheard none of plaintiffs' conversations and was not informed of the nature or outcome of the investigation. As in the past, C&P acted in reliance upon a request from the highest Executive officials and with assurances that the wiretap involved national security matters. Under these circumstances, C&P's limited technical role in the surveillance as well as its reasonable expectation of legality cannot give rise to liability for any statutory or constitutional violation.

Id at 846.

Smith v Nixon involved an allegedly illegal wiretap that was part of the same surveillance program implicated in Halperin. In addressing C&P's potential liability, the Smith court noted:

> The District Court dismissed the action against C&P, which installed the wiretap, on the ground cited in the District Court's opinion in Halperin: 'C&P's limited technical role in the surveillance as well as its reasonable expectation of legality cannot give rise to liability for any statutory or constitutional violation. * * *.' We think this was the proper disposition. The telephone company did not initiate the surveillance, and it was assured by the highest Executive officials in this nation that the action was legal.

606 F2d at 1191 (citation and footnote omitted) (omission in original).

The court first observes that Halperin, which formed the basis for the Smith decision, never indicated that C&P was "immune" from suit; rather, the court granted summary judgment after it determined that C&P played only a "limited technical role" in the surveillance. And although C&P was dismissed in Smith on a motion to dismiss, Smith never stated that C&P was immune from suit; the only discussion of "immunity" there related to other defendants who claimed entitlement to qualified and absolute immunity.

At best, the language in Halperin and Smith is equivocal: the phrase "C&P's limited technical role in the surveillance as well as its reasonable expectation of legality cannot give rise to liability for any statutory or constitutional violation" could plausibly be interpreted as describing a good faith defense. And at least one court appears to have interpreted Smith in that manner. See Manufacturas Intl, Ltda v Manufacturers Hanover Trust Co, 792 F Supp 180, 192-93 (EDNY 1992) (referring to Smith while discussing good faith defenses).

Moreover, it is not clear at this point in the litigation whether AT&T played a "mere technical role" in the alleged NSA surveillance programs. The complaint alleges that "at all relevant times, the government instigated, directed and/or tacitly approved all of the above-described acts of AT&T Corp." FAC, ¶ 82. But given the massive scale of the programs alleged here and AT&T's longstanding history of assisting the government in classified matters, one could reasonably infer that AT&T's assistance here is necessarily more comprehensive than C&P's assistance in Halperin and Smith. Indeed, there is a world of difference between a single wiretap and an alleged dragnet that sweeps in the communication content and records of all or substantially all AT&T customers.

AT&T also relies on two Johnson-era cases: Fowler v Southern Bell Telephone & Telegraph Co, 343 F2d 150 (5th Cir 1965), and Craska v New York Telephone Co, 239 F Supp 932 (NDNY 1965). Fowler involved a Georgia state claim for invasion of right of privacy against a telephone company for assisting federal officers to intercept plaintiff's telephone conversations. Fowler noted that a "defense of privilege" would extend to the telephone company

only if the court determined that the federal officers acted within the scope of their duties:

> If it is established that [the federal officers] acted in the performance and scope of their official powers and within the outer perimeter of their duties as federal officers, then the defense of privilege would be established as to them. In this event the privilege may be extended to exonerate the Telephone Company also if it appears, in line with the allegations of the complaint, that the Telephone Company acted for and at the request of the federal officers and within the bounds of activity which would be privileged as to the federal officers.

343 F2d at 156-57 (emphasis added). Accordingly, Fowler does not absolve AT&T of any liability unless and until the court determines that the government acted legally in creating the NSA surveillance programs alleged in the complaint.

Craska also does not help AT&T. In that case, plaintiff sued a telephone company for violating her statutory rights by turning over telephone records to the government under compulsion of state law. Craska, 239 F Supp at 933-34, 936. The court declined to ascribe any liability to the telephone company because its assistance was required under state law: "[T]he conduct of the telephone company, acting under the compulsion of State law and process, cannot sensibly be said to have joined in a knowing venture of interception and divulgence of a telephone conversation, which it sought by affirmative action to make succeed." Id at 936. By contrast, it is not evident whether AT&T was required to help the government here; indeed, AT&T appears to have confirmed that it did not have any legal obligation to assist the government implement any surveillance program. 6/23/06 Transcript at 17:25-18:4 ("The Court: Well, AT&T could refuse, could it not, to

provide access to its facilities? [AT&T]: Yes, it could. Under [18 USC §] 2511, your Honor, AT&T would have the discretion to refuse, and certainly if it believed anything illegal was occurring, it would do so.").

Moreover, even if a common law immunity existed decades ago, applying it presently would undermine the carefully crafted scheme of claims and defenses that Congress established in subsequently enacted statutes. For example, all of the cases cited by AT&T as applying the common law "immunity" were filed before the certification provision of FISA went into effect. See § 301 of FISA. That provision protects a telecommunications provider from suit if it obtains from the Attorney General or other authorized government official a written certification "that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required." 18 USC § 2511(2)(a)(ii)(B). Because the common law "immunity" appears to overlap considerably with the protections afforded under the certification provision, the court would in essence be nullifying the procedural requirements of that statutory provision by applying the common law "immunity" here. And given the shallow doctrinal roots of immunity for communications carriers at the time Congress enacted the statutes in play here, there is simply no reason to presume that a common law immunity is available simply because Congress has not expressed a contrary intent. Cf Owen v City of Independence, 445 US 622, 638 (1980) ("[N]otwithstanding § 1983's expansive language and the absence of any express incorporation of common-law immunities, we have, on several occasions, found that a tradition of immunity was so firmly rooted in the common law and

was supported such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine.'" (quoting Pierson v Ray, 386 US 547, 555 (1967))).

Accordingly, the court DENIES AT&T's motion to dismiss on the basis of a purported common law immunity.

D

AT&T also argues that it is entitled to qualified immunity. AT&T MTD at 16. Qualified immunity shields state actors from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v Fitzgerald, 457 US 800, 818 (1982). "Qualified immunity strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions." Wyatt v Cole, 504 US 158, 167 (1992). "[T]he qualified immunity recognized in Harlow acts to safeguard government, and thereby to protect the public at large, not to benefit its agents." Wyatt v Cole, 504 US 158, 168 (1992). Compare AT&T MTD at 17 ("It would make little sense to protect the principal but not its agent."). The Supreme Court does not "draw a distinction for purposes of immunity law between suits brought against state officials under [42 USC] § 1983 and suits brought directly under the Constitution [via Bivens v Six Unknown Named Agents, 403 US 388 (1971)] against federal officials." Butz v Economou, 438 US 478, 504 (1978).

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At the pleadings stage, qualified immunity analysis entails three steps. First, the court must determine whether, taken in the light most favorable to the plaintiff, the facts alleged show a violation of the plaintiffs' statutory or constitutional rights. Saucier v Katz, 533 US 194, 201 (2001). If a violation has been alleged, the court next determines whether the right infringed was clearly established at the time of the alleged violation. Finally, the court assesses whether it would be clear to a reasonable person in the defendant's position that its conduct was unlawful in the situation it confronted. Id at 202, 205. See also Frederick v Morse, 439 F3d 1114, 1123 (9th Cir 2006) (characterizing this final inquiry as a discrete third step in the analysis). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." Hope v Pelzer, 536 US 730, 739 (2002) (citation omitted).

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When a private party seeks to invoke qualified immunity, the court must first decide whether qualified immunity is "categorically available," which "requires an evaluation of the appropriateness of qualified immunity given its historical availability and the policy considerations underpinning the doctrine." Jensen v Lane County, 222 F3d 570, 576 (9th Cir 2000). This inquiry is distinct from the question whether a nominally private party is a state actor for purposes of a section 1983 or Bivens claim.

In Wyatt v Cole, 504 US 158 (1992), the Supreme Court laid the foundation for determining whether a private actor is entitled to qualified immunity. The plaintiff there sued under section 1983 to recover property from a private party who had earlier obtained a writ of replevin against the plaintiff. See Lugar v Edmondson Oil Co, 457 US 922 (1982) (holding that a private party acted under color of law under similar circumstances). After determining that the common law did not recognize an immunity from analogous tort suits, the court "conclude[d] that the rationales mandating qualified immunity for public officials are not applicable to private parties." Wyatt, 504 US at 167. Although Wyatt purported to be limited to its facts, id at 168, the broad brush with which the Court painted suggested that private parties could rarely, if ever, don the cloak of qualified immunity. See also Ace Beverage Co v Lockheed Information Mgmt Servs, 144 F3d 1218, 1219 n3 (9th Cir 1998) (noting that "[i]n cases decided before [the Supreme Court's decision in Richardson v McKnight, 521 US 399 (1997)]," the Ninth Circuit had "adopted a general rule that private parties are not entitled to qualified immunity").

Applying Wyatt to a case involving section 1983 claims against privately employed prison guards, the Supreme Court in Richardson v McKnight, 521 US 399 (1997), stated that courts should "look both to history and to the purposes that underlie government employee immunity in order to" determine whether that immunity extends to private parties. Id at 404. Although this issue has been addressed by the Ninth Circuit in several cases, the court has yet to extend qualified immunity to a private party under McKnight. See, e g, Ace Beverage, 144 F3d at 1220; Jensen, 222 F3d at 576-80.

The court now determines whether the history of the alleged immunity and purposes of the qualified immunity doctrine support extending qualified immunity to AT&T.

As described in section II(C), *supra*, no firmly rooted common law immunity exists for telecommunications providers assisting the government. And presently applying whatever immunity might have previously existed would undermine the various statutory schemes created by Congress, including the certification defense under 18 USC § 2511(2)(a)(ii)(B).

Turning to the purposes of qualified immunity, they include: "(1) protecting the public from unwarranted timidity on the part of public officials and encouraging the vigorous exercise of official authority; (2) preventing lawsuits from distracting officials from their governmental duties; and (3) ensuring that talented candidates are not deterred by the threat of damages suits from entering public service." Jensen, 222 F3d at 577 (citations, quotations and alterations omitted). See also Harlow, 457 US at 816 (recognizing "the general costs of subjecting officials to the risks of trial -- distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service"). AT&T contends that national security surveillance is "a traditional governmental function of the highest importance" requiring access to the "critical telecommunications infrastructure" that companies such as AT&T would be reluctant to furnish if they were exposed to civil liability. AT&T MTD at 17.

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AT&T's concerns, while relevant, do not warrant extending qualified immunity here because the purposes of that immunity are already well served by the certification provision of 18 USC § 2511(2)(a)(ii). As noted above, although it is unclear whether a valid certification would bar plaintiffs' constitutional claim, section 2511(2)(a)(ii) clearly states that a valid certification precludes the statutory claims asserted here. See *supra* I(G)(1). Hence, but for the government's assertion of the state secrets privilege, the certification provision would seem to facilitate prompt adjudication of damages claims such as those at bar. And because section 2511(2)(a)(ii)'s protection does not appear to depend on a fact-intensive showing of good faith, the provision could be successfully invoked without the burdens of full-blown litigation. Compare Tapley v Collins, 211 F3d 1210, 1215 (11th Cir 2000) (discussing the differences between qualified immunity and good faith defense under Title III, 18 USC § 2520(d)).

More fundamentally, "[w]hen Congress itself provides for a defense to its own cause of action, it is hardly open to the federal court to graft common law defenses on top of those Congress creates." Berry v Funk, 146 F3d 1003, 1013 (DC Cir 1998) (holding that qualified immunity could not be asserted against a claim under Title III). As plaintiffs suggest, the Ninth Circuit appears to have concluded that the only defense under Title III is that provided for by statute -- although, in fairness, the court did not explicitly address the availability of qualified immunity. See Jacobson v Rose, 592 F2d 515, 522-24 (9th Cir 1978) (joined by then-Judge Kennedy). But cf Doe v United States, 941 F2d 780, 797-99 (9th Cir 1991) (affirming grant of qualified immunity from

liability under section 504 of the Rehabilitation Act without analyzing whether qualified immunity could be asserted in the first place). Nonetheless, at least two appellate courts have concluded that statutory defenses available under Title III do not preclude a defendant from asserting qualified immunity. Blake v Wright, 179 F3d 1003, 1013 (6th Cir 1999) (The court "fail[ed] to see the logic of providing a defense of qualified immunity to protect public officials from personal liability when they violate constitutional rights that are not clearly established and deny them qualified immunity when they violate statutory rights that similarly are not clearly established."); accord Tapley, 211 F3d at 1216. But see Mitchell v Forsyth, 472 US 511, 557 (1985) (Brennan concurring in part and dissenting in part) ("The Court's argument seems to be that the trial court should have decided the legality of the wiretap under Title III before going on to the qualified immunity question, since that question arises only when considering the legality of the wiretap under the Constitution.").

With all due respect to the Sixth and Eleventh Circuits, those courts appear to have overlooked the relationship between the doctrine of qualified immunity and the schemes of state and federal official liability that are essentially creatures of the Supreme Court. Qualified immunity is a doctrinal outgrowth of expanded state actor liability under 42 USC § 1983 and Bivens. See Monroe v Pape, 365 US 167 (1961) (breathing new life into section 1983); Scheuer v Rhodes, 416 US 232, 247 (1974) (deploying the phrase "qualified immunity" for the first time in the Supreme Court's jurisprudence); Butz v Economou, 438 US 478 (1978) (extending qualified immunity to federal officers sued under Bivens for

Similarly, Congress specifically contemplated that communications carriers could be liable for violations of Title III. See Jacobson, 592 F2d at 522. And in providing for a "good faith" defense in Title III, Congress specifically sought "'to protect telephone companies or other persons who cooperate * * * with law enforcement officials.'" Id at 522-23 (quoting Senate debates). See also id at 523 n 13. Cf 18 USC § 2511(2)(a)(ii) (providing a statutory defense to "providers of wire or electronic communication service").

In sum, neither the history of judicially created immunities for telecommunications carriers nor the purposes of qualified immunity justify allowing AT&T to claim the benefit of the doctrine in this case.

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The court also notes that based on the facts as alleged in plaintiffs' complaint, AT&T is not entitled to qualified immunity with respect to plaintiffs' constitutional claim, at least not at this stage of the proceedings. Plaintiffs' constitutional claim alleges that AT&T provides the government with direct and indiscriminate access to the domestic communications of AT&T customers. See, e g, FAC, ¶ 42 ("On information and belief, AT&T Corp has provided and continues to provide the government with direct access to all or a substantial number of the communications transmitted through its key domestic telecommunications facilities, including direct access to streams of domestic, international and foreign telephone and Internet communications."); id, ¶ 78 (incorporating paragraph 42 by reference into plaintiffs'

constitutional claim). In United States v United States District Court, 407 US 297 (1972) (Keith), the Supreme Court held that the Fourth Amendment does not permit warrantless wiretaps to track domestic threats to national security, id at 321, reaffirmed the "necessity of obtaining a warrant in the surveillance of crimes unrelated to the national security interest," id at 308, and did not pass judgment "on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country," id. Because the alleged dragnet here encompasses the communications of "all or substantially all of the communications transmitted through [AT&T's] key domestic telecommunications facilities," it cannot reasonably be said that the program as alleged is limited to tracking foreign powers. Accordingly, AT&T's alleged actions here violate the constitutional rights clearly established in Keith. Moreover, because "the very action in question has previously been held unlawful," AT&T cannot seriously contend that a reasonable entity in its position could have believed that the alleged domestic dragnet was legal.

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Accordingly, the court DENIES AT&T's instant motion to dismiss on the basis of qualified immunity. The court does not preclude AT&T from raising the qualified immunity defense later in these proceedings, if further discovery indicates that such a defense is merited.

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III

As this case proceeds to discovery, the court flags a few procedural matters on which it seeks the parties' guidance. First, while the court has a duty to the extent possible to disentangle sensitive information from nonsensitive information, see Ellsberg, 709 F2d at 57, the court also must take special care to honor the extraordinary security concerns raised by the government here. To help perform these duties, the court proposes appointing an expert pursuant to FRE 706 to assist the court in determining whether disclosing particular evidence would create a "reasonable danger" of harming national security. See FRE 706(a) ("The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection."). Although other courts do not appear to have used FRE 706 experts in the manner proposed here, this procedural innovation seems appropriate given the complex and weighty issues the court will confront in navigating any future privilege assertions. See Ellsberg, 709 F2d at 64 (encouraging "procedural innovation" in addressing state secrets issues); Halpern, 258 F2d at 44 ("A trial *in camera* in which the privilege relating to state secrets may not be availed of by the United States is permissible, if, in the judgment of the district court, such a trial can be carried out without substantial risk that secret information will be publicly divulged").

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The court contemplates that the individual would be one who had a security clearance for receipt of the most highly sensitive information and had extensive experience in intelligence matters. This individual could perform a number of functions; among others, these might include advising the court on the risks associated with disclosure of certain information, the manner and extent of appropriate disclosures and the parties' respective contentions. While the court has at least one such individual in mind, it has taken no steps to contact or communicate with the individual to determine availability or other matters. This is an appropriate subject for discussion with the parties.

The court also notes that should it become necessary for the court to review additional classified material, it may be preferable for the court to travel to the location of those materials than for them to be hand-carried to San Francisco. Of course, a secure facility is available in San Francisco and was used to house classified documents for a few days while the court conducted its *in camera* review for purposes of the government's instant motion. The same procedures that were previously used could be employed again. But alternative procedures may also be used and may in some instances be more appropriate.

Finally, given that the state secrets issues resolved herein represent controlling questions of law as to which there is a substantial ground for difference of opinion and that an immediate appeal may materially advance ultimate termination of the litigation, the court certifies this order for the parties to apply for an immediate appeal pursuant to 28 USC § 1292(b). The court notes that if such an appeal is taken, the present proceedings do

not necessarily have to be stayed. 28 USC § 1292(b) ("[A]pplication for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."). At the very least, it would seem prudent for the court to select the expert pursuant to FRE 706 prior to the Ninth Circuit's review of this matter.

Accordingly, the court ORDERS the parties to SHOW CAUSE in writing by July 31, 2006, why it should not appoint an expert pursuant to FRE 706 to assist in the manner stated above. The responses should propose nominees for the expert position and should also state the parties' views regarding the means by which the court should review any future classified submissions. Moreover, the parties should describe what portions of this case, if any, should be stayed if this order is appealed.

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IV

In sum, the court DENIES the government's motion to dismiss, or in the alternative, for summary judgment on the basis of state secrets and DENIES AT&T's motion to dismiss. As noted in section III, *supra*, the parties are ORDERED TO SHOW CAUSE in writing by July 31, 2006, why the court should not appoint an expert pursuant to FRE 706 to assist the court. The parties' briefs should also address whether this action should be stayed pending an appeal pursuant to 28 USC § 1292(b).

The parties are also instructed to appear on August 8, 2006, at 2 PM, for a further case management conference.

IT IS SO ORDERED.

VAUGHN R WALKER
United States District Chief Judge

EXHIBIT 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION FOUNDATION; AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN; COUNCIL ON AMERICAN-ISLAMIC RELATIONS; COUNCIL ON AMERICAN ISLAMIC RELATIONS MICHIGAN; GREENPEACE, INC.; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; JAMES BAMFORD; LARRY DIAMOND; CHRISTOPHER HITCHENS; TARA MCKELVEY; and BARNETT R. RUBIN,

Plaintiffs,

v.

NATIONAL SECURITY AGENCY / CENTRAL SECURITY SERVICE; and LIEUTENANT GENERAL KEITH B. ALEXANDER, in his official capacity as Director of the National Security Agency and Chief of the Central Security Service,

Defendants.

Case No. 06-CV-10204

Hon. Anna Diggs Taylor

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MEMORANDUM OPINION

I. Introduction

This is a challenge to the legality of a secret program (hereinafter "TSP") undisputedly inaugurated by the National Security Agency (hereinafter "NSA") at least by 2002 and continuing today, which intercepts without benefit of warrant or other judicial approval, prior or subsequent, the international telephone and internet communications of numerous persons and organizations

within this country. The TSP has been acknowledged by this Administration to have been authorized by the President's secret order during 2002 and reauthorized at least thirty times since.[1]

Plaintiffs are a group of persons and organizations who, according to their affidavits, are defined by the Foreign Intelligence Surveillance Act (hereinafter "FISA") as "U.S. persons."[2] They conducted regular international telephone and internet communications for various uncontestedly legitimate reasons including journalism, the practice of law, and scholarship. Many of their communications are and have been with persons in the Middle East. Each Plaintiff has alleged a "well founded belief" that he, she, or it, has been subjected to Defendants' interceptions, and that the TSP not only injures them specifically and directly, but that the TSP substantially chills and impairs their constitutionally protected communications. Persons abroad who before the program spoke with them by telephone or internet will no longer do so.

Plaintiffs have alleged that the TSP violates their free speech and associational rights, as guaranteed by the First Amendment of the United States Constitution; their privacy rights, as guaranteed by the Fourth Amendment of the United States Constitution; the principle of the Separation of Powers because the TSP has been authorized by the President in excess of his Executive Power under Article II of the United States Constitution, and that it specifically violates the statutory limitations placed upon such interceptions by the Congress in FISA because it is conducted without observation of any of the procedures required by law, either statutory or Constitutional.

Before the Court now are several motions filed by both sides. Plaintiffs have requested a

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[1]Available at http://www.white-house.gov//news/releases/2005/12/20051219-2.html

[2]Pub. L. 95-511, Title I, 92 Stat 1976 (Oct. 25, 1978), codified as amended at 50 U.S.C. §§ 1801 *et seq.*

permanent injunction, alleging that they sustain irreparable damage because of the continued existence of the TSP. Plaintiffs also request a Partial Summary Judgment holding that the TSP violates the Administrative Procedures Act ("APA"); the Separation of Powers doctrine; the First and Fourth Amendments of the United States Constitution, and the statutory law.

Defendants have moved to dismiss this lawsuit, or in the alternative for Summary Judgment, on the basis of the state secrets evidentiary privilege and Plaintiffs' lack of standing.

II. State Secrets Privilege

Defendants argue that the state secrets privilege bars Plaintiffs' claims because Plaintiffs cannot establish standing or a *prima facie* case for any of their claims without the use of state secrets. Further, Defendants argue that they cannot defend this case without revealing state secrets. For the reasons articulated below, the court rejects Defendants' argument with respect to Plaintiffs' claims challenging the TSP. The court, however, agrees with Defendants with respect to Plaintiffs' data- mining claim and grants Defendants' motion for summary judgment on that claim.

The state secrets privilege is an evidentiary rule developed to prevent the disclosure of information which may be detrimental to national security. There are two distinct lines of cases covering the privilege. In the first line of cases the doctrine is more of a rule of "non-justiciability because it deprives courts of their ability to hear suits against the Government based on covert espionage agreements." *El-Masri v. Tenet*, 2006 WL 1391390 at 7 (E.D.Va., 2006). The seminal decision in this line of cases is *Totten v. United States* 92 U.S. 105 (1875). In *Totten*, the plaintiff brought suit against the government seeking payment for espionage services he had provided during the Civil War. In affirming the dismissal of the case, Justice Field wrote:

> The secrecy which such contracts impose precludes any action for their enforcement. The publicity produced by an action would itself

be a breach of a contract of that kind, and thus defeat a recovery. *Totten,* 92 U.S. at 107.

The Supreme Court reaffirmed *Totten* in *Tenet v. Doe,* 544 U.S. 1, (2005). In *Tenet,* the plaintiffs, who were former Cold War spies, brought estoppel and due process claims against the United States and the Director of the Central Intelligence Agency (hereinafter "CIA") for the CIA's alleged failure to provide them with the assistance it had allegedly promised in return for their espionage services. *Tenet,* 544 U.S. at 3. Relying heavily on *Totten,* the Court held that the plaintiffs claims were barred. Delivering the opinion for a unanimous Court, Chief Justice Rehnquist wrote:

> We adhere to *Totten.* The state secrets privilege and the more frequent use of *in camera* judicial proceedings simply cannot provide the absolute protection we found necessary in enunciating the *Totten* rule. The possibility that a suit may proceed and an espionage relationship may be revealed, if the state secrets privilege is found not to apply, is unacceptable: "Even a small chance that some court will order disclosure of a source's identity could well impair intelligence gathering and cause sources to 'close up like a clam.'" (citations omitted). *Tenet,* 544 U.S. at 11.

The second line of cases deals with the exclusion of evidence because of the state secrets privilege. In *United States v. Reynolds,* 345 U.S. 1 (1953), the plaintiffs were the widows of three civilians who died in the crash of a B-29 aircraft. *Id.* at 3-4. The plaintiffs brought suit under the Tort Claims Act and sought the production of the Air Force's official accident investigation report and the statements of the three surviving crew members. *Id.* The Government asserted the states secret privilege to resist the discovery of this information, because the aircraft in question and those aboard were engaged in a highly secret mission of the Air Force. *Id.* at 4. In discussing the state secrets privilege and its application, Chief Justice Vinson stated:

> The privilege belongs to the Government and must be asserted by it;

> it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect. *Reynolds,* 345 U.S. at 8.

The Chief Justice further wrote:

> In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but 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.

The Court sustained the Government's claim of privilege, finding the plaintiffs' "necessity" for the privileged information was "greatly minimized" by the fact that the plaintiffs had an available alternative. *Reynolds,* 345 U.S. at 11. Moreover, the Court found that there was nothing to suggest that the privileged information had a "causal connection with the accident" and that the plaintiffs could "adduce the essential facts as to causation without resort to material touching upon military secrets." *Id.*

In *Halkin v. Helms,* 598 F.2d 1 (D.C.Cir.1978) (*Halkin I*), the District of Columbia Circuit Court applied the holding in *Reynolds* in a case in which the plaintiffs, Vietnam War protestors, alleged that the defendants, former and present members of the NSA, the CIA, Defense Intelligence Agency, the Federal Bureau of Investigation and the Secret Service engaged in warrantless surveillance of their international wire, cable and telephone communications with the cooperation of telecommunications providers. *Id.* at 3. The telecommunications providers were also named as defendants. *Id.* The plaintiffs specifically challenged the legality of two separate NSA surveillance

operations undertaken from 1967 to 1973 named operation MINARET and operation SHAMROCK.[3] *Id.* at 4.

The Government asserted the state secrets privilege and moved for dismissal for the following reasons: (1) discovery would "confirm the identity of individuals or organizations whose foreign communications were acquired by NSA"; (2) discovery would lead to the disclosure of "dates and contents of such communications"; or (3) discovery would "divulge the methods and techniques by which the communications were acquired." *Halkin,* 598 F.2d at 4-5. The district court held that the plaintiffs' claims against operation MINARET had to be dismissed "because the ultimate issue, the fact of acquisition, could neither be admitted nor denied." *Id.* at 5. The district court, however, denied the Government's motion to dismiss the plaintiffs' claims regarding operation SHAMROCK, because it "thought congressional committees investigating intelligence matters had revealed so much information about operation SHAMROCK that such a disclosure would pose no threat to the NSA mission." *Id.* at 10.

On appeal, the District of Columbia Circuit Court affirmed the district court's dismissal of the plaintiffs' claims with respect to operation MINARET but reversed the court's ruling with respect to operation SHAMROCK. In reversing the district court ruling regarding SHAMROCK, the circuit court stated:

> . . . we think the affidavits and testimony establish the validity of the state secrets claim with respect to both SHAMROCK and MINARET acquisitions; our reasoning applies to both. There is a "reasonable danger", (citation omitted) that confirmation or denial that a particular plaintiff's communications have been acquired would

[3]Operation MINARET was part of the NSA's regular intelligence activity in which foreign electronic signals were monitored. Operation SHAMROCK involved the processing of all telegraphic traffic leaving or entering the United States. *Hepting v. AT & T Corp* 2006 WL 2038464 (N.D.Cal.2006) quoting *Halkin.*

> disclose NSA capabilities and other valuable intelligence information to a sophisticated intelligence analyst. *Halkin,* 598 F.2d at 10.

The case was remanded to the district court and it dismissed the plaintiffs' claims against the NSA and the individuals connected with the NSA's alleged monitoring. *Halkin v. Helms,* 690 F.2d 977, 984 (D.C. Cir.1982) (*Halkin II*).

In *Halkin II,* 690 F.2d 977, the court addressed plaintiffs' remaining claims against the CIA, which the district court dismissed because of the state secrets privilege. In affirming the district court's ruling, the District of Columbia Circuit stated:

> It is self-evident that the disclosures sought here pose a "reasonable danger" to the diplomatic and military interests of the United States. Revelation of particular instances in which foreign governments assisted the CIA in conducting surveillance of dissidents could strain diplomatic relations in a number of ways-by generally embarrassing foreign governments who may wish to avoid or may even explicitly disavow allegations of CIA or United States involvements, or by rendering foreign governments or their officials subject to political or legal action by those among their own citizens who may have been subjected to surveillance in the course of dissident activity. *Halkin II,* 690 F.2d at 993.

Ellsberg v. Mitchell, 709 F.2d 51 (D.C. Cir.1983) was yet another case where the District of Columbia Circuit dealt with the state secrets privilege being raised in the defense of a claim of illegal wiretapping. In *Ellsberg,* the plaintiffs, the defendants and attorneys in the "Pentagon Papers" criminal prosecution brought suit when, during the course of that litigation, they discovered "that one or more of them had been the subject of warrantless electronic surveillance by the federal Government." *Id.* at 51. The defendants admitted to two wiretaps but refused to respond to some of the plaintiffs' interrogatories, asserting the state secrets privilege. *Id.* at 54. The plaintiffs sought an order compelling the information and the district court denied the motion, sustaining the Government's assertion of the state secrets privilege. *Id.* at 56. Further, the court dismissed the

plaintiffs' claims that pertained "to surveillance of their foreign communications." *Ellsberg v. Mitchell,* 709 F.2d at 56.

On appeal, the District of Columbia Circuit reversed the district court with respect to the plaintiffs' claims regarding the Government's admitted wiretaps, because there was no reason to "suspend the general rule that the burden is on those seeking an exemption from the Fourth Amendment warrant requirement to show the need for it." *Ellsberg,* 709 F.2d at 68. With respect to the application of the state secrets privilege, the court stated:

> When properly invoked, the state secrets privilege is absolute. No competing public or private interest can be advanced to compel disclosure of information found to be protected by a claim of privilege. However, because of the broad sweep of the privilege, the Supreme Court has made clear that "[i]t is not to be lightly invoked." Thus, the privilege may not be used to shield any material not strictly necessary to prevent injury to national security; and, whenever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter. *Ellsberg,* 709 F.2d at 56.

In *Kasza v. Browner,* 133 F.3d 1159 (9th Cir.1998), the plaintiffs, former employees at a classified United States Air Force facility, filed suit against the Air Force and the Environmental Protection Agency under the Resource Conservation and Recovery Act, alleging violations at the classified facility. *Id.* at 1162. The district court granted summary judgment against the plaintiffs, because discovery of information necessary for the proof of the plaintiffs' claims was impossible due to the state secrets privilege. *Id.* In affirming the district court's grant of summary judgment against one of the plaintiffs, the Ninth Circuit stated:

> Not only does the state secrets privilege bar [the plaintiff] from establishing her prima facie case on any of her eleven claims, but any further proceeding in this matter would jeopardize national security. No protective procedure can salvage [the plaintiff's] suit. *Kasza,* 133 F.3d at 1170.

The *Kasza* court also explained that "[t]he application of the state secrets privilege can have . . . three effects." *Kasza,* 133 F.3d at 1166. First, when the privilege is properly invoked "over particular evidence, the evidence is completely removed from the case." *Id.* The plaintiff's case, however, may proceed "based on evidence not covered by the privilege." *Id.* "If . . . the plaintiff cannot prove the *prima facie* elements of her claim with nonprivileged evidence, then the court may dismiss her claim as it would with any plaintiff who cannot prove her case." *Id.* Second, summary judgement may be granted, "if the privilege deprives the defendant of information that would otherwise give the defendant a valid defense to the claim." *Id.* Lastly, "notwithstanding the plaintiff's ability to produce nonprivileged evidence, 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." *Id.*

The Sixth Circuit delivered its definitive opinion regarding the states secrets privilege, in *Tenenbaum v. Simonini,* 372 F.3d 776 (6th Cir. 2004). In that case, the plaintiffs sued the United States and various employees of federal agencies, alleging that the defendants engaged in criminal espionage investigation of the plaintiff, David Tenenbaum, because he was Jewish. *Id.* at 777. The defendants moved for summary judgment, arguing that they could not defend themselves against the plaintiffs' "claims without disclosing information protected by the state secrets doctrine." *Id.* The district court granted the defendants' motion and the Sixth Circuit affirmed stating:

> We further conclude that Defendants cannot defend their conduct with respect to Tenenbaum without revealing the privileged information. Because the state secrets doctrine thus deprives Defendants of a valid defense to the Tenenbaums' claims, we find that the district court properly dismissed the claims. *Tenenbaum,* 372 F.3d at 777.

Predictably, the War on Terror of this administration has produced a vast number of cases,

in which the state secrets privilege has been invoked.[4] In May of this year, a district court in the Eastern District of Virginia addressed the state secrets privilege in *El-Masri v. Tenet*, 2006 WL 1391390, (E.D. Va. May 12, 2006). In *El Masri*, the plaintiff, a German citizen of Lebanese descent, sued the former director of the CIA and others, for their alleged involvement in a program called Extraordinary Rendition. *Id.* at 1. The court dismissed the plaintiff's claims, because they could not be fairly litigated without the disclosure of state secrets.[5] *Id.* at 6.

In *Hepting v. AT & T Corp.*, 2006 WL 2038464, (E.D. Cal. June 20, 2006), which is akin to our inquiry in the instant case, the plaintiffs brought suit, alleging that AT & T Corporation was collaborating with the NSA in a warrantless surveillance program, which illegally tracked the domestic and foreign communications and communication records of millions of Americans. *Id.* at 1. The United States intervened and moved that the case be dismissed based on the state secrets privilege. *Id.* Before applying the privilege to the plaintiffs' claims, the court first examined the information that had already been exposed to the public, which is essentially the same information that has been revealed in the instant case. District Court Judge Vaughn Walker found that the Government had admitted:

> . . . it monitors "contents of communications where * * * one party to the communication is outside the United States and the government has a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda." (citations omitted). *Hepting*, 2006 WL

[4]In *Terkel v. AT & T Corp.*, 2006 WL 2088202 (N.D. Ill. July 25, 2006), the plaintiffs alleged that AT&T provided information regarding their telephone calls and internet communications to the NSA. *Id.* at 1. District Court Judge Matthew F. Kennely dismissed the case because the state secrets privilege made it impossible for the plaintiffs to establish standing. *Id.* at 20.

[5]Further, the court was not persuaded by the plaintiff's argument that the privilege was negated because the Government had admitted that the rendition program existed because it found the Government's admissions to be without details.

2038464, at 19.

Accordingly Judge Walker reasoned that "[b]ased on these public disclosures," the court could not "conclude that the existence of a certification regarding the 'communication content' program is a state secret." *Id.*

Defendants' assertion of the privilege without any request for answers to any discovery has prompted this court to first analyze this case under *Totten/Tenet*, since it appears that Defendants are arguing that this case should not be subject to judicial review. As discussed *supra,* the *Totten/Tenet* cases provide an absolute bar to any kind of judicial review. *Tenet,* 544 U.S. at 8. This rule should not be applied in the instant case, however, since the rule applies to actions where there is a secret espionage relationship between the Plaintiff and the Government. *Id.* at 7-8. It is undisputed that Plaintiffs' do not claim to be parties to a secret espionage relationship with Defendants. Accordingly, the court finds the *Totten/Tenet* rule is not applicable to the instant case. The state secrets privilege belongs exclusively to the Executive Branch and thus, it is appropriately invoked by the head of the Executive Branch agency with control over the secrets involved. *Reynolds,* 345 U.S. at 1. In the instant case, the court is satisfied that the privilege was properly invoked. Defendants' publicly-filed affidavits from Director of National Intelligence John D. Negroponte and Signal Intelligence Director, NSA Major General Richard J. Quirk, set forth facts supporting the Government's contention that the state secrets privilege and other legal doctrines required dismissal of the case. Additionally, Defendants filed classified versions of these declarations *ex parte* and *in camera* for this court's review. Defendants also filed *ex parte* and *in camera* versions of its brief along with other classified materials, further buttressing its assertion of the privilege. Plaintiffs concede that the public declaration from Director Negroponte satisfies the

procedural requirements set forth in *Reynolds*. Therefore, this court concludes that the privilege has been appropriately invoked.

Defendants argue that Plaintiffs' claims must be dismissed because Plaintiffs cannot establish standing or a *prima facie* case for any of its claims without the disclosure of state secrets. Moreover, Defendants argue that even if Plaintiffs are able to establish a *prima facie* case without revealing protected information, Defendants would be unable to defend this case without the disclosure of such information. Plaintiffs argue that Defendants' invocation of the state secrets privilege is improper with respect to their challenges to the TSP, since no additional facts are necessary or relevant to the summary adjudication of this case. Alternatively, Plaintiffs argue, that even if the court finds that the privilege was appropriately asserted, the court should use creativity and care to devise methods which would protect the privilege but allow the case to proceed.

The "next step in the judicial inquiry into the validity of the assertion of the privilege is to determine whether the information for which the privilege is claimed qualifies as a state secret." *El Masri,* 2006 WL 1391390, at 4. Again, the court acknowledges that it has reviewed all of the materials Defendants submitted *ex parte* and *in camera*. After reviewing these materials, the court is convinced that the privilege applies "because a reasonable danger exists that disclosing the information in court proceedings would harm national security interests, or would impair national defense capabilities, disclose intelligence-gathering methods or capabilities, or disrupt diplomatic relations with foreign governments." *Tenenbaum,* 372 F.3d at 777.

Plaintiffs, however, maintain that this information is not relevant to the resolution of their claims, since their claims regarding the TSP are based solely on what Defendants have publicly admitted. Indeed, although the instant case appears factually similar to *Halkin,* in that they both

involve plaintiffs challenging the legality of warrantless wiretapping, a key distinction can be drawn. Unlike *Halkin* or any of the cases in the *Reynolds* progeny, Plaintiffs here are not seeking any additional discovery to establish their claims challenging the TSP.[6]

Like Judge Walker in *Hepting,* this court recognizes that simply because a factual statement has been made public it does not necessarily follow that it is true. *Hepting,* 2006 WL 2038464 at 12. Hence, "in determining whether a factual statement is a secret, the court considers only public admissions or denials by the [G]overnment." *Id.* at 13. It is undisputed that Defendants have publicly admitted to the following: (1) the TSP exists; (2) it operates without warrants; (3) it targets communications where one party to the communication is outside the United States, and the government has a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda. As the Government has on many occasions confirmed the veracity of these allegations, the state secrets privilege does not apply to this information.

Contrary to Defendants' arguments, the court is persuaded that Plaintiffs are able to establish a *prima facie* case based solely on Defendants' public admissions regarding the TSP. Plaintiffs' declarations establish that their communications would be monitored under the TSP.[7] Further, Plaintiffs have shown that because of the existence of the TSP, they have suffered a real and concrete harm. Plaintiffs' declarations state undisputedly that they are stifled in their ability to

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[6]In *Halkin,* the plaintiffs were requesting that the Government answer interrogatories and sought to depose the secretary of defense. *Halkin,* 598 F.2d at 6.

[7]See generally, in a Declaration, attorney Nancy Hollander stated that she frequently engages in international communications with individuals who have alleged connections with terrorist organizations. (Exh. J, Hollander). Attorney William Swor also provided a similar declaration. (Exh. L, Swor Decl.). Journalist Tara McKelvey declared that she has international communications with sources who are suspected of helping the insurgents in Iraq. (Exh. K, McKelvey Decl.).

vigorously conduct research, interact with sources, talk with clients and, in the case of the attorney Plaintiffs, uphold their oath of providing effective and ethical representation of their clients.[8] In addition, Plaintiffs have the additional injury of incurring substantial travel expenses as a result of having to travel and meet with clients and others relevant to their cases. Therefore, the court finds that Plaintiffs need no additional facts to establish a *prima facie* case for any of their claims questioning the legality of the TSP.

The court, however, is convinced that Plaintiffs cannot establish a *prima facie* case to support their data- mining claims without the use of privileged information and further litigation of this issue would force the disclosure of the very thing the privilege is designed to protect. Therefore, the court grants Defendants' motion for summary judgment with respect to this claim.

Finally, Defendants assert that they cannot defend this case without the exposure of state secrets. This court disagrees. The Bush Administration has repeatedly told the general public that there is a valid basis in law for the TSP.[9] Further, Defendants have contended that the President has the authority under the AUMF and the Constitution to authorize the continued use of the TSP. Defendants have supported these arguments without revealing or relying on any classified information. Indeed, the court has reviewed the classified information and is of the opinion that this information is not necessary to any viable defense to the TSP. Defendants have presented support

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[8]Plaintiffs' Statement of Undisputed Facts (hereinafter "SUF") SUF 15 (Exh. J, Hollander Decl. ¶¶12, 16, 25; Exh. L, Swor Decl. ¶¶9, 11-12, 14-16);Plaintiffs;' Reply Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment (hereinafter "Pl.'s Reply") (Exh. P, Dratel Decl. ¶¶9-11; Exh. Q, Abdrabboh Decl. ¶¶7-8; Exh. R. Ayad. Decl. ¶¶ 4, 6-8); (Exh. M Niehoff Decl. ¶¶ 12).

[9]On December 17, 2005, in a radio address, President Bush stated:

> In the weeks following the terrorist attacks on our nation, I authorized the National Security Agency, consistent with U.S. law and the Constitution, to intercept the international communications of people with known links to al Qaeda and related terrorist organizations.
> http://www.whitehouse.gov/news/releases/2005/12/20051217.html

for the argument that "it . . is well-established that the President may exercise his statutory and constitutional authority to gather intelligence information about foreign enemies."[10] Defendants cite to various sources to support this position. Consequently, the court finds Defendants' argument that they cannot defend this case without the use of classified information to be disingenuous and without merit.

In sum, the court holds that the state secrets privilege applies to Plaintiffs' data-mining claim and that claim is dismissed. The privilege, however, does not apply to Plaintiffs' remaining claims challenging the validity of the TSP, since Plaintiffs are not relying on or requesting any classified information to support these claims and Defendants do not need any classified information to mount a defense against these claims.[11]

III. Standing

Defendants argue that Plaintiffs do not establish their standing. They contend that Plaintiffs' claim here is merely a subjective fear of surveillance which falls short of the type of injury necessary to establish standing. They argue that Plaintiffs' alleged injuries are too tenuous to be recognized, not "distinct and palpable" nor "concrete and particularized."

Article III of the U.S. Constitution limits the federal court's jurisdiction to "cases" and "controversies". *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To have a genuine case or controversy, the plaintiff must establish standing. "[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v.*

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[10]Defendants' Brief in Support of Summary Judgment pg. 33.

[11]Defendants also contend that Plaintiffs' claims are barred because they properly invoked statutory privileges under the National Security Agency Act of 1959, 50 U.S.C. § 402 and the Intelligence Reform and Terrorism Prevention Act of 2004, 50 U.S.C. § 403-(i)(1). Again, these privileges are not availing to Defendants with respect to Plaintiffs' claims challenging the TSP, for the same reasons that the state secrets privilege does not bar these claims.

Defenders of Wildlife, 504 U.S. at 560. To establish standing under Article III, a plaintiff must satisfy the following three requirements: (1) "the plaintiff must have suffered an injury in fact - an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) "there must be a causal connection between the injury and the conduct complained of", and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 560-561. The party invoking federal jurisdiction bears the burden of establishing these elements. *Id.* at 561.

"An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests it seeks to protect are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 181 (2000) (citing *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 342 (1977)).

"At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presume that general allegations embrace those specific facts that are necessary to support the claim.' " *Id.* at 561 (quoting *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990)). "In response to a motion for summary judgment, however, the plaintiff can no longer rest upon such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts' Fed.R.Civ.Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true." *Id.* This court is persuaded that Plaintiffs in this case have set forth the necessary facts to have satisfied all three of the prerequisites listed above to establish standing.

To determine whether Plaintiffs have standing to challenge the constitutionality of the TSP, we must examine the nature of the injury-in-fact which they have alleged. "The injury must be ... 'distinct and palpable,' and not 'abstract' or 'conjectural' or 'hypothetical.'" *National Rifle Association of America v. Magaw*, 132 F.3d 272, 280 (6th Cir. 1997) (citing *Allen v. Wright*, 468 U.S 737, 751 (1982)).

Plaintiffs here contend that the TSP has interfered with their ability to carry out their professional responsibilities in a variety of ways, including that the TSP has had a significant impact on their ability to talk with sources, locate witnesses, conduct scholarship, engage in advocacy and communicate with persons who are outside of the United States, including in the Middle East and Asia. Plaintiffs have submitted several declarations to that effect. For example, scholars and journalists such as plaintiffs Tara McKelvey, Larry Diamond, and Barnett Rubin indicate that they must conduct extensive research in the Middle East, Africa, and Asia, and must communicate with individuals abroad whom the United States government believes to be terrorist suspects or to be associated with terrorist organizations.[12] In addition, attorneys Nancy Hollander, William Swor, Joshua Dratel, Mohammed Abdrabboh, and Nabih Ayad indicate that they must also communicate with individuals abroad whom the United States government believes to be terrorist suspects or to be associated with terrorist organizations,[13] and must discuss confidential information over the phone and email with their international clients.[14] All of the Plaintiffs contend that the TSP has caused clients, witnesses and sources to discontinue their communications with plaintiffs out of fear that

[12]SUF 15B (Exh. I, Diamond Decl. ¶9; Exh. K, McKelvey Decl. ¶8-10).

[13]SUF 15B (Exh. J, Hollander Decl. ¶¶12-14, 17-24; Exh. L, Swor Decl. ¶¶5-7, 10);Pl.'s Reply (Exh. M, Dratel Decl. ¶¶5-6; Exh. Q, Abdrabboh Decl. ¶¶3-4; Exh. R, Ayad Decl. ¶¶ 5, 7-9).

[14]SUF 15 (Exh. J, Hollander Decl. ¶¶12, 16, 25; Exh. L, Swor Decl. ¶¶9, 11-12, 14-16); Pl.'s Reply (Exh. P, Dratel Decl. ¶¶5-6; Exh. Q, Abdrabboh Decl. ¶¶3-4; Exh. R, Ayad Decl. ¶¶ 6-7).

their communications will be intercepted.[15] They also allege injury based on the increased financial burden they incur in having to travel substantial distances to meet personally with their clients and others relevant to their cases.[16]

The ability to communicate confidentially is an indispensable part of the attorney-client relationship. As University of Michigan legal ethics professor Leonard Niehoff explains, attorney-client confidentiality is "central to the functioning of the attorney-client relationship and to effective representation."[17] He further explains that Defendants' TSP "creates an overwhelming, if not insurmountable, obstacle to effective and ethical representation" and that although Plaintiffs are resorting to other "inefficient" means for gathering information, the TSP continues to cause "substantial and ongoing harm to the attorney-client relationships and legal representations."[18] He explains that the increased risk that privileged communications will be intercepted forces attorneys to cease telephonic and electronic communications with clients to fulfill their ethical responsibilities.[19]

Defendants argue that the allegations present no more than a "chilling effect" based upon purely speculative fears that the TSP subjects the Plaintiffs to surveillance. In arguing that the injuries are not constitutionally cognizable, Defendants rely heavily on the case of *Laird v. Tatum*, 408 U.S. 1 (1972).

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[15]SUF 15 (Exh. J, Hollander Decl. ¶¶12, 16, 25; Exh. L, Swor Decl. ¶¶9, 11-12, 14-16);Pl.'s Reply (Exh. P, Dratel Decl. ¶¶9-11; Exh. Q, Abdrabboh Decl. ¶¶7-8; Exh. R. Ayad. Decl. ¶¶ 4, 6-8).

[16]SUF 15 (Exh. J, Hollander Decl. ¶¶20, 23-25; Exh. L, Swor Decl. ¶¶13-14); Pl.'s Reply (Exh. P, Dratel Decl. ¶¶9-11; Exh. Q, Abdrabboh Decl. ¶¶7-8; Exh. R, Ayad Decl. ¶¶ 6-8).

[17]Pl.'s Reply (Exh. M Niehoff Decl. ¶¶ 12)

[18]Pl.'s Reply (Exh. M Niehoff Decl. ¶¶ 19-20)

[19]Pl.'s Reply (Exh. M Niehoff Decl. ¶¶ 15-20)

In *Laird*, the plaintiffs sought declaratory and injunctive relief on their claim that their rights were being invaded by the Army's domestic surveillance of civil disturbances and "public activities that were thought to have at least some potential for civil disorder." *Id.* at 6. The plaintiffs argued that the surveillance created a chilling effect on their First Amendment rights caused by the existence and operation of the surveillance program in general. *Id.* at 3. The Supreme Court rejected the plaintiffs' efforts to rest standing upon the mere "chill" that the program cast upon their associational activities. It said that the "jurisdiction of a federal court may [not] be invoked by a complainant who alleges that the exercise of his First Amendment rights is being chilled by the mere existence, *without more*, of a governmental investigative and data-gathering activity." *Id.* (emphasis added)

Laird, however, must be distinguished here. The plaintiffs in *Laird* alleged only that they *could conceivably* become subject to the Army's domestic surveillance program. *Presbyterian Church v. United States*, 870 F.2d 518, 522 (1989) (citing *Laird v. Tatum*, 408 U.S at 13) (emphasis added). The Plaintiffs here are not merely alleging that they "could conceivably" become subject to surveillance under the TSP, but that continuation of the TSP has damaged them. The President indeed has publicly acknowledged that the types of calls Plaintiffs are making are the types of conversations that would be subject to the TSP.[20]

Although *Laird* establishes that a party's allegation that it has suffered a subjective "chill" alone does not confer Article III standing, *Laird* does not control this case. As Justice (then Judge)

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[20]In December 2005, the President publicly acknowledged that the TSP intercepts the contents of certain communications as to which there are reasonable grounds to believe that (1) the communication originated or terminated outside the United States, and (2) a party to such communication is a member of al Qaeda, a member of a group affiliated with al Qaeda, or an agent of al Qaeda or its affiliates. Available at http://www.white-house.gov//news/releases/2005/12/20051219-2.html.

Breyer has observed, "[t]he problem for the government with Laird . . . lies in the key words 'without more.'" *Ozonoff v. Berzak*, 744 F.2d 224, 229 (1st Cir. 1984). This court agrees with Plaintiffs' position that "standing here does not rest on the TSP's 'mere existence, without more.'" The Plaintiffs in this case are not claiming simply that the Defendants' surveillance has "chilled" them from making international calls to sources and clients. Rather, they claim that Defendants' surveillance has chilled their sources, clients, and potential witnesses from communicating with them. The alleged effect on Plaintiffs is a concrete, actual inability to communicate with witnesses, sources, clients and others without great expense which has significantly crippled Plaintiffs, at a minimum, in their ability to report the news and competently and effectively represent their clients. See *Presbyterian Church v. United States*, 870 F.2d 518 (1989) (church suffered substantial decrease in attendance and participation of individual congregants as a result of governmental surveillance). Plaintiffs have suffered actual concrete injuries to their abilities to carry out their professional responsibilities. The direct injury and objective chill incurred by Plaintiffs are more than sufficient to place this case outside the limitations imposed by *Laird*.

The instant case is more akin to *Friends of the Earth*, in which the Court granted standing to environmental groups who sued a polluter under the Clean Water Act because environmental damage caused by the defendant had deterred members of the plaintiff organizations from using and enjoying certain lands and rivers. *Friends of the Earth*, 528 U.S. at 181-183. The Court there held that the affidavits and testimony presented by plaintiffs were sufficient to establish reasonable concerns about the effects of those discharges and were more than "general averments" and "conclusory allegations." *Friends of the Earth*, 528 U.S. at 183-184. The court distinguished the case from *Lujan*, in which the Court had held that no actual injury had been established where

plaintiffs merely indicated "'some day' intentions to visit endangered species around the world." *Friends of the Earth*, 528 U.S. at 184 (quoting *Lujan*, 504 U.S. at 564). The court found that the affiants' conditional statements that they would use the nearby river for recreation if defendant were not discharging pollutants into it was sufficient to establish a concrete injury. *Id.* at 184.

Here, Plaintiffs are not asserting speculative allegations. Instead, the declarations asserted by Plaintiffs establish that they are suffering a present concrete injury in addition to a chill of their First Amendment rights. Plaintiffs would be able to continue using the telephone and email in the execution of their professional responsibilities if the Defendants were not undisputedly and admittedly conducting warrantless wiretaps of conversations. As in *Friends of the Earth,* this damage to their interest is sufficient to establish a concrete injury.

Numerous cases have granted standing where the plaintiffs have suffered concrete profession-related injuries comparable to those suffered by Plaintiffs here. For example, the First Circuit conferred standing upon claimants who challenged an executive order which required applicants for employment with the World Health Organization to undergo a "loyalty" check that included an investigation into the applicant's associations and activities. The court there determined that such an investigation would have a chilling effect on what an applicant says or does, a sufficient injury to confer standing. *Ozonoff,* 744 F.2d at 228-229. Similarly, the District of Columbia Circuit Court of Appeals granted standing to a reshelver of books at the Library of Congress who was subjected to a full field FBI investigation which included an inquiry into his political beliefs and associations and subsequently resulted in his being denied a promotion or any additional employment opportunities; the court having determined that plaintiff had suffered a present objective harm, as well as an objective chill of his First Amendment rights and not merely a

potential subjective chill as in *Laird*. Also, the Supreme Court in *Presbyterian Church v. United States*, granted standing to a church which suffered decreased attendance and participation when the government actually entered the church to conduct surveillance. *Presbyterian Church*, 870 F.2d at 522. Lastly, in *Jabara v. Kelley*, 476 F.Supp. 561 (E.D. Mich. 1979), *vac'd on other grounds sub. nom. Jabara v. Webster*, 691 F.2d 272 (6th Cir. 1982), the court held that an attorney had standing to sue to enjoin unlawful FBI and NSA surveillance which had deterred others from associating with him and caused "injury to his reputation and legal business." *Id.* at 568.

These cases constitute acknowledgment that substantial burdens upon a plaintiff's professional activities are an injury sufficient to support standing. Defendants ignore the significant, concrete injuries which Plaintiffs continue to experience from Defendants' illegal monitoring of their telephone conversations and email communications. Plaintiffs undeniably have cited to distinct, palpable, and substantial injuries that have resulted from the TSP.

This court finds that the injuries alleged by Plaintiffs are "concrete and particularized", and not "abstract or conjectural." The TSP is not hypothetical, it is an actual surveillance program that was admittedly instituted after September 11, 2001, and has been reauthorized by the President more than thirty times since the attacks.[21] The President has, moreover, emphasized that he intends to continue to reauthorize the TSP indefinitely.[22] Further, the court need not speculate upon the kind of activity the Plaintiffs want to engage in - they want to engage in conversations with individuals abroad without fear that their First Amendment rights are being infringed upon. Therefore, this court concludes that Plaintiffs have satisfied the requirement of alleging "actual or threatened

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[21] Available at http://www.white-house.gov//news/releases/2005/12/20051219-2.html

[22] *Id.*

injury" as a result of Defendants' conduct.

It must now be determined whether Plaintiffs have shown that there is a causal connection between the injury and the complained of conduct. *Lujan*, 504 U.S. at 560-561. The causal connection between the injury and the conduct complained of is fairly traceable to the challenged action of Defendants. The TSP admittedly targets communications originated or terminated outside the United States where a party to such communication is in the estimation of Defendants, a member of al Qaeda, a member of a group affiliated with al Qaeda, or an agent of al Qaeda or its affiliates.[23] The injury to the Plaintiffs stems directly from the TSP and their injuries can unequivocally be traced to the TSP.

Finally, it is likely that the injury will be redressed by the requested relief. A determination by this court that the TSP is unconstitutional and a further determination which enjoins Defendants from continued warrantless wiretapping in contravention of FISA would assure Plaintiffs and others that they could freely engage in conversations and correspond via email without concern, at least without notice, that such communications were being monitored. The requested relief would thus redress the injury to Plaintiffs caused by the TSP.

Although this court is persuaded that Plaintiffs have alleged sufficient injury to establish standing, it is important to note that if the court were to deny standing based on the unsubstantiated minor distinctions drawn by Defendants, the President's actions in warrantless wiretapping, in contravention of FISA, Title III, and the First and Fourth Amendments, would be immunized from judicial scrutiny. It was never the intent of the Framers to give the President such unfettered control, particularly where his actions blatantly disregard the parameters clearly enumerated in the Bill of

[23] Available at http://www.white-house.gov//news/releases/2005/12/20051219-2.html

Rights. The three separate branches of government were developed as a check and balance for one another. It is within the court's duty to ensure that power is never "condense[d] ... into a single branch of government." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion). We must always be mindful that "[w]hen the President takes official action, the Court has the authority to determine whether he has acted within the law." *Clinton v. Jones*, 520 U.S. 681, 703 (1997). "It remains one of the most vital functions of this Court to police with care the separation of the governing powers . . . . When structure fails, liberty is always in peril." *Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring).

Because of the very secrecy of the activity here challenged, Plaintiffs each must be and are given standing to challenge it, because each of them, is injured and chilled substantially in the exercise of First Amendment rights so long as it continues. Indeed, as the perceived need for secrecy has apparently required that no person be notified that he is aggrieved by the activity, and there have been no prosecutions, no requests for extensions or retroactive approvals of warrants, no victim in America would be given standing to challenge this or any other unconstitutional activity, according to the Government. The activity has been acknowledged, nevertheless.

Plaintiffs have sufficiently alleged that they suffered an actual, concrete injury traceable to Defendants and redressable by this court. Accordingly, this court denies Defendants' motion to dismiss for lack of standing.

IV. The History of Electronic Surveillance in America

Since the Court's 1967 decision of *Katz v. U.S.*, 389 U.S. 347 (1967), it has been understood that the search and seizure of private telephone conversations without physical trespass required

prior judicial sanction, pursuant to the Fourth Amendment. Justice Stewart there wrote for the Court that searches conducted without prior approval by a judge or magistrate were per se unreasonable, under the Fourth Amendment. *Id.* at 357.

Congress then, in 1968, enacted Title III of the Omnibus Crime Control and Safe Streets Act (hereinafter "Title III")[24] governing all wire and electronic interceptions in the fight against certain listed major crimes. The Statute defined an " aggrieved person",[25] and gave such person standing to challenge any interception allegedly made without a judicial order supported by probable cause, after requiring notice to such person of any interception made.[26]

The statute also stated content requirements for warrants and applications under oath therefor made,[27] including time, name of the target, place to be searched and proposed duration of that search, and provided that upon showing of an emergency situation, a post-interception warrant could be obtained within forty-eight hours.[28]

In 1972 the court decided *U.S. v. U.S. District Court*, 407 U.S. 297 (1972) (the *Keith* case) and held that, for lawful electronic surveillance even in domestic security matters, the Fourth Amendment requires a prior warrant.

In 1976 the Congressional "Church Committee"[29] disclosed that every President since 1946

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[24]Pub. L. 90-351, 82 Stat. 211, codified as amended at 18 U.S.C. §§ 2510 *et seq.*

[25]18 U.S.C. § 2510(11) ("aggrieved person" means a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed.)

[26]18 U.S.C. § 2518

[27]18 U.S.C. § 2518(1)

[28]18 U.S.C. § 2518(7)

[29]The "Church Committee" was the United States Committee to Study Governmental Operations with Respect to Intelligence Activities.

had engaged in warrantless wiretaps in the name of national security, and that there had been numerous political abuses[30], and in 1978 Congress enacted the FISA.[31]

Title III specifically excluded from its coverage all interceptions of international or foreign communications; and was later amended to state that "the FISA of 1978 shall be the exclusive means by which electronic surveillance of foreign intelligence communications may be conducted."[32]

The government argues that Title III's disclaimer language, at 18 U.S.C. § 2511(2)(f), that nothing therein should be construed to limit the constitutional power of the President (to make international wiretaps). In the *Keith* case, Justice Powell wrote that "Congress simply left Presidential powers where it found them", that the disclaimer was totally neutral, and not a grant of authority. *U.S. v. U.S. District Court*, 407 U.S. at 303.

The FISA defines a "United States person"[33] to include each of Plaintiffs herein and requires a prior warrant for any domestic international interception of their communications. For various exigencies, exceptions are made. That is, the government is granted fifteen days from Congressional Declaration of War within which it may conduct intercepts before application for an order.[34] It is also granted one year, on certification by the Attorney General,[35] and seventy-two hours for other

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[30]S. REP. NO. 94-755, at 332 (1976)

[31]Pub. L. 95-511, Title I, 92 Stat 1976 (Oct. 25, 1978), codified as amended at 50 U.S.C. §§ 1801 *et seq.*

[32]18 U.S.C. §2511(2)(f)

[33]50 U.S.C. § 1801(h)(4)(i)("United States person) means a citizen of the United States, an alien lawfully admitted for permanent residence, an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States which is not a foreign power.

[34]50 U.S.C. § 1811

[35]50 U.S.C. § 1802

defined exigencies.[36]

Those delay provisions clearly reflect the Congressional effort to balance executive needs against the privacy rights of United States persons, as recommended by Justice Powell in the *Keith* case when he stated that:

> Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens.. *U.S. v. U.S. District Court*, 407 U.S. at 322-323.

Also reflective of the balancing process Congress pursued in FISA is the requirement that interceptions may be for no longer than a ninety day duration, minimization is again required[37], and an aggrieved person is again (as in Title III) required to be notified of proposed use and given the opportunity to file a motion to suppress.[38] Also again, alternatives to a wiretap must be found to have been exhausted or to have been ineffective.[39]

A FISA judicial warrant, moreover, requires a finding of probable cause to believe that the target was either a foreign power or agent thereof,[40] not that a crime had been or would be committed, as Title III's more stringent standard required. Finally, a special FISA court was required to be appointed, of federal judges designated by the Chief Justice.[41] They were required to hear, *ex parte*, all applications and make all orders.[42]

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[36]50 U.S.C. § 1805(f)

[37]50 U.S.C. § 1805(e)(1)

[38]50 U.S.C. § 1806(c)

[39]50 U.S.C. § 1804(a)(7)(E)(ii), § 1805(a)(5)

[40]50 U.S.C. § 1805(b)

[41]50 U.S.C § 1803

[42]50 U.S.C § 1805

The FISA was essentially enacted to create a secure framework by which the Executive branch may conduct legitimate electronic surveillance for foreign intelligence while meeting our national commitment to the Fourth Amendment. It is fully described in *United States v. Falvey*, 540 F. Supp. 1306 (E.D.N.Y. 1982), where the court held that FISA did not intrude upon the President's undisputed right to conduct foreign affairs, but protected citizens and resident aliens within this country, as "United States persons." *Id.* at 1312.

The Act was subsequently found to meet Fourth Amendment requirements constituting a reasonable balance between Governmental needs and the protected rights of our citizens, in *United States v. Cavanagh*, 807 F.2d 787 (9th Cir. 1987), and *United States v. Duggan*,743, F.2d 59 (2d Cir. 1984).

Against this background the present program of warrantless wiretapping has been authorized by the administration and the present lawsuit filed.

V. The Fourth Amendment

The Constitutional Amendment which must first be discussed provides:

> The right the of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. Amend. IV.

This Amendment ". . . was specifically propounded and ratified with the memory of . . . *Entick v. Carrington*, 95 Eng. Rep. 807 (1765) in mind", stated Circuit Judge Skelly Wright in *Zweibon v. Mitchell*, 516 F.2d 594, 618 n.67 (D.C. Circ. 1975) (en banc) (plurality opinion). Justice Douglas, in his concurrence in the *Keith* case, also noted the significance of *Entick* in our history,

stating:

> For it was such excesses as the use of general warrants and the writs of assistance that led to the ratification of the Fourth Amendment. In *Entick v. Carrington* (citation omitted), decided in 1765, one finds a striking parallel to the executive warrants utilized here. The Secretary of State had issued general executive warrants to his messengers authorizing them to roam about and to seize libelous material and libellants of the sovereign. Entick, a critic of the Crown, was the victim of one such general search during which his seditious publications were impounded. He brought a successful damage action for trespass against the messengers. The verdict was sustained on appeal. Lord Camden wrote that if such sweeping tactics were validated, then the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel.' (citation omitted) In a related and similar proceeding, *Huckle v. Money* (citation omitted), the same judge who presided over Entick's appeal held for another victim of the same despotic practice, saying '(t)o enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition . . .' See also *Wilkes v. Wood* (citation omitted), . . . [t]he tyrannical invasions described and assailed in *Entick*, *Huckle*, and *Wilkes*, practices which also were endured by the colonists, have been recognized as the primary abuses which ensured the Warrant Clause a prominent place in our Bill of Rights. *U.S. v. U.S. District Court*, 407 U.S. at 328-329 (Douglas, J., concurring).

Justice Powell, in writing for the court in the *Keith* case also wrote that:

> Over two centuries ago, Lord Mansfield held that common-law principles prohibited warrants that ordered the arrest of unnamed individuals who the officer might conclude were guilty of seditious libel. 'It is not fit,' said Mansfield, 'that the receiving or judging of the information should be left to the discretion of the officer. The magistrate ought to judge; and should give certain directions to the officer.' (citation omitted).
>
> Lord Mansfield's formulation touches the very heart of the Fourth Amendment directive: that, where practical, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's

> private premises or conversation. Inherent in the concept of a warrant is its issuance by a 'neutral and detached magistrate.' (citations omitted) The further requirement of 'probable cause' instructs the magistrate that baseless searches shall not proceed. *U.S. v. U.S. District Court*, 407 U.S. at 316.

The Fourth Amendment, accordingly, was adopted to assure that Executive abuses of the power to search would not continue in our new nation.

Justice White wrote in 1984 in *United States v. Karo*, 468 U.S. 705 (1984), a case involving installation and monitoring of a beeper which had found its way into a home, that a private residence is a place in which society recognizes an expectation of privacy; that warrantless searches of such places are presumptively unreasonable, absent exigencies. *Id.* at 714-715. *Karo* is consistent with *Katz* where Justice Stewart held that:

> 'Over and again this Court has emphasized that the mandate of the (Fourth) Amendment requires adherence to judicial processes,' (citation omitted) and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions. *Katz,* 389 U.S. at 357.

Justice Powell's opinion in the *Keith* case also stated that:

> The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute. (citation omitted) But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech. *U.S. v. U.S. District Court*, 407 U.S. at 317.

Accordingly, the Fourth Amendment, about which much has been written, in its few words requires

reasonableness in all searches. It also requires prior warrants for any reasonable search, based upon prior-existing probable cause, as well as particularity as to persons, places, and things, and the interposition of a neutral magistrate between Executive branch enforcement officers and citizens.

In enacting FISA, Congress made numerous concessions to stated executive needs. They include delaying the applications for warrants until after surveillance has begun for several types of exigencies, reducing the probable cause requirement to a less stringent standard, provision of a single court of judicial experts, and extension of the duration of approved wiretaps from thirty days (under Title III) to a ninety day term.

All of the above Congressional concessions to Executive need and to the exigencies of our present situation as a people, however, have been futile. The wiretapping program here in litigation has undisputedly been continued for at least five years, it has undisputedly been implemented without regard to FISA and of course the more stringent standards of Title III, and obviously in violation of the Fourth Amendment.

The President of the United States is himself created by that same Constitution.

VI. The First Amendment

The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. Amend. I.

This Amendment, the very first which the American people required to be made to the new Constitution, was adopted, as was the Fourth, with *Entick v. Carrington,* and the actions of the star chamber in mind. As the Court wrote in *Marcus v. Search Warrants,* 367 U.S. 717 (1961):

> Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure. . . .
>
> * * * *
>
> This history was, of course, part of the intellectual matrix within which our own constitutional fabric was shaped. The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression. *Marcus,* 367 U.S. at 724, 729

As Justice Brennan wrote for the Court in *Dombrowski v. Pfister,* 380 U.S. 479 (1965), the appellant organizations had been subjected to repeated announcements of their subversiveness which frightened off potential members and contributors, and had been harmed irreparably, requiring injunctive relief. The Louisiana law against which they complained, moreover, had a chilling effect on protected expression because, so long as the statute was available, the threat of prosecution for protected expression remained real and substantial.

Judge Wright, in *Zweibon*, noted that the tapping of an organization's office phone will provide the membership roster of that organization, as forbidden by *Bates v. City of Little Rock*, 361 U.S. 516 (1960); thereby causing members to leave that organization, and thereby chilling the organization's First Amendment rights and causing the loss of membership. *Zweibon*, 516 F.2d at 634.

A governmental action to regulate speech may be justified only upon showing of a compelling governmental interest; and that the means chosen to further that interest are the least restrictive of freedom of belief and association that could be chosen. *Clark v. Library of Congress,* 750 F.2d 89, 94 (D.C. Cir. 1984).

It must be noted that FISA explicitly admonishes that ". . . no United States person may be

considered . . . an agent of a foreign power solely upon the basis of activities protected by the First Amendment to the Constitution of the United States." 50 U.S.C. §1805(a)(3)(A). See also *United States v. Falvey*, 540 F. Supp. at 1310.

Finally, as Justice Powell wrote for the Court in the *Keith* case:

> National security cases, moreover, often reflect a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech. 'Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power,' (citation omitted). History abundantly documents the tendency of Government –however benevolent and benign its motives – to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. *U.S. v. U.S. District Court*, 407 U.S. at 313-314.

The President of the United States, a creature of the same Constitution which gave us these Amendments, has undisputedly violated the Fourth in failing to procure judicial orders as required by FISA, and accordingly has violated the First Amendment Rights of these Plaintiffs as well.

VII. The Separation of Powers

The Constitution of the United States provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States. . . ."[43] It further provides that "[t]he executive Power shall be vested in a President of the United States of America."[44] And that ". . . he shall take care that the laws be faithfully executed . . . ."[45]

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[43]U.S. CONST. art. I, § 1

[44]U.S. CONST. art. II, § 1

[45]U.S. CONST. art. II, § 3

Our constitution was drafted by founders and ratified by a people who still held in vivid memory the image of King George III and his General Warrants. The concept that each form of governmental power should be separated was a well-developed one. James Madison wrote that:

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. THE FEDERALIST NO. 47, at 301 (James Madison).

The seminal American case in this area, and one on which the government appears to rely, is that of *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952) in which Justice Black, for the court, held that the Presidential order in question, to seize steel mills, was not within the constitutional powers of the chief executive. Justice Black wrote that:

> The founders of this Nation entrusted the law-making power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand. *Youngstown*, 343 U.S. at 589.

Justice Jackson's concurring opinion in that case has become historic. He wrote that, although the Constitution had diffused powers the better to secure liberty, the powers of the President are not fixed, but fluctuate, depending upon their junctures with the actions of Congress. Thus, if the President acted pursuant to an express or implied authorization by Congress, his power was at it maximum, or zenith. If he acted in absence of Congressional action, he was in a zone of twilight reliant upon only his own independent powers. *Youngstown*, 343 U.S. at 636-638. But "when the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for he can rely only upon his own Constitutional powers minus any Constitutional powers of Congress over the matter." *Youngstown*, 343 U.S. at 637 (Jackson, J.,

concurring).

In that case, he wrote that it had been conceded that no congressional authorization existed for the Presidential seizure. Indeed, Congress had several times covered the area with statutory enactments inconsistent with the seizure. He further wrote of the President's powers that:

> The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image. Continental European examples were no more appealing. And if we seek instruction from our own times, we can match it only from the executive powers in those governments we disparagingly describe as totalitarian. I cannot accept the view that this clause is a grant in bulk of all conceivable executive power but regard it as an allocation to the presidential office of the generic powers thereafter stated. *Id.* at 641.

After analyzing the more recent experiences of Weimar, Germany, the French Republic, and Great Britain, he wrote that:

> This contemporary foreign experience may be inconclusive as to the wisdom of lodging emergency powers somewhere in a modern government. But it suggests that emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them. That is the safeguard that would be nullified by our adoption of the 'inherent powers' formula. Nothing in my experience convinces me that such risks are warranted by any real necessity, although such powers would, of course, be an executive convenience. *Id.* at 652.

Justice Jackson concluded that:

> With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. *Youngstown*, 343 U.S. at 655 (Jackson, J., concurring).

Accordingly, Jackson concurred, the President had acted unlawfully.

In this case, the President has acted, undisputedly, as FISA forbids. FISA is the expressed statutory policy of our Congress. The presidential power, therefore, was exercised at its lowest ebb and cannot be sustained.

In *United States v. Moussaoui*, 365 F.3d 292 (4th Cir. 2004) a prosecution in which production of enemy combatant witnesses had been refused by the government and the doctrine of Separation of Powers raised, the court, citing *Mistretta v. United States*, 488 U.S. 361 (1989), noted that it:

> "[C]onsistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *United States v. Moussaoui*, 365 F.3d at 305 citing *Mistretta v. United States*, 488 U.S. 361, 380 (1989)

Finally, in the case of *Clinton v. Jones*, 520 U.S. 681 (1997), the separation of powers doctrine is again discussed and, again, some overlap of the authorities of two branches is permitted. In that case, although Article III jurisdiction of the federal courts is found intrusive and burdensome to the Chief Executive it did not follow, the court held, that separation of powers principles would be violated by allowing a lawsuit against the Chief Executive to proceed. *Id.* at 701. Mere burdensomeness or inconvenience did not rise to the level of superceding the doctrine of separation of powers. *Id.* at 703.

In this case, if the teachings of *Youngstown* are law, the separation of powers doctrine has been violated. The President, undisputedly, has violated the provisions of FISA for a five-year period. Justice Black wrote, in *Youngstown*:

> Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President.

> In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who make laws which the President is to execute. The first section of the first article says that 'All legislative powers herein granted shall be vested in a Congress of the United States * * *'
>
> The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress – it directs that a presidential policy be executed in a manner prescribed by the President. . . . The Constitution did not subject this law-making power of Congress to presidential or military supervision or control. *Youngstown*, 343 U.S. at 587-588.

These secret authorization orders must, like the executive order in that case, fall. They violate the Separation of Powers ordained by the very Constitution of which this President is a creature.

VIII. The Authorization for Use of Military Force

After the terrorist attack on this Country of September 11, 2001, the Congress jointly enacted the Authorization for Use of Military Force (hereinafter "AUMF") which states:

> That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[46]

The Government argues here that it was given authority by that resolution to conduct the TSP in violation of both FISA and the Constitution.

First, this court must note that the AUMF says nothing whatsoever of intelligence or

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[46]Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (Sept. 18, 2001) (reported as a note to 50 U.S.C.A. § 1541)

surveillance. The government argues that such authority must be implied. Next it must be noted that FISA and Title III, are together by their terms denominated by Congress as the exclusive means by which electronic surveillance may be conducted. Both statutes have made abundantly clear that prior warrants must be obtained from the FISA court for such surveillance, with limited exceptions, none of which are here even raised as applicable. Indeed, the government here claims that the AUMF has by implication granted its TSP authority for more than five years, although FISA's longest exception, for the Declaration of War by Congress, is only fifteen days from date of such a Declaration.[47]

FISA's history and content, detailed above, are highly specific in their requirements, and the AUMF, if construed to apply at all to intelligence is utterly general. In *Morales v. TWA, Inc.*, 504 U.S. 374 (1992), the Supreme Court taught us that "it is a commonplace of statutory construction that the specific governs the general." *Id.* at 384. The implication argued by Defendants, therefore, cannot be made by this court.

The case of *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) in which the Supreme Court held that a United States citizen may be held as an enemy combatant, but is required by the U.S. Constitution to be given due process of law, must also be examined. Justice O'Connor wrote for the court that:

> [D]etention of individuals . . . for the duration of the particular conflict in which they are captured is so fundamental and accepted an incident to war as to be an exercise of the "necessary and appropriate force" Congress has authorized the President to use. *Hamdi*, 542 U.S. at 518.

She wrote that the entire object of capture is to prevent the captured combatant from returning to his same enemy force, and that a prisoner would most certainly return to those forces

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[47] 50 U.S.C. § 1811

if set free. Congress had, therefore, clearly authorized detention by the Force Resolution. *Id.* at 518-519.

However, she continued, indefinite detention for purposes of interrogation was certainly not authorized and it raised the question of what process is constitutionally due to a citizen who disputes the enemy combatant status assigned him. *Hamdi*, 542 U.S. at 521, 524.

Justice O'Connor concluded that such a citizen must be given Fifth Amendment rights to contest his classification, including notice and the opportunity to be heard by a neutral decisionmaker. *Hamdi*, 542 U.S. at 533 (citing *Cleveland Board of Education v. Laudermill*, 470 U.S. 532 (1985)). Accordingly, her holding was that the Bill of Rights of the United States Constitution must be applied despite authority granted by the AUMF.

She stated that:

> It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.
>
> * * * *
>
> Any process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short. *Hamdi*, 542 U.S. at 532, 537.

Under *Hamdi*, accordingly, the Constitution of the United States must be followed.

The AUMF resolution, if indeed it is construed as replacing FISA, gives no support to Defendants here. Even if that Resolution superceded all other statutory law, Defendants have violated the Constitutional rights of their citizens including the First Amendment, Fourth Amendment, and the Separation of Powers doctrine.

IX. Inherent Power

Article II of the United States Constitution provides that any citizen of appropriate birth, age and residency may be elected to the Office of President of the United States and be vested with the executive power of this nation.[48]

The duties and powers of the Chief Executive are carefully listed, including the duty to be Commander in Chief of the Army and Navy of the United States,[49] and the Presidential Oath of Office is set forth in the Constitution and requires him to swear or affirm that he "will, to the best of my ability, preserve, protect and defend the Constitution of the United States."[50]

The Government appears to argue here that, pursuant to the penumbra of Constitutional language in Article II, and particularly because the President is designated Commander in Chief of the Army and Navy, he has been granted the inherent power to violate not only the laws of the Congress but the First and Fourth Amendments of the Constitution, itself.

We must first note that the Office of the Chief Executive has itself been created, with its powers, by the Constitution. There are no hereditary Kings in America and no powers not created by the Constitution. So all "inherent powers" must derive from that Constitution.

We have seen in *Hamdi* that the Fifth Amendment of the United States Constitution is fully applicable to the Executive branch's actions and therefore it can only follow that the First and Fourth Amendments must be applicable as well.[51] In the *Youngstown* case the same "inherent powers" argument was raised and the Court noted that the President had been created Commander in Chief

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[48]U.S. CONST. art. II, § 5

[49]U.S. CONST. art. II, § 2[1]

[50]U.S. CONST. art. II, § 1[8]

[51]See generally *Hamdi*, 542 U.S. 507 (2004)

of only the military, and not of all the people, even in time of war.[52] Indeed, since *Ex Parte Milligan*, we have been taught that the "Constitution of the United States is a law for rulers and people, equally in war and in peace. . . ." *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 120 (1866). Again, in *Home Building & Loan Ass'n v. Blaisdell*, we were taught that no emergency can create power.[53]

Finally, although the Defendants have suggested the unconstitutionality of FISA, it appears to this court that that question is here irrelevant. Not only FISA, but the Constitution itself has been violated by the Executive's TSP. As the court states in *Falvey*, even where statutes are not explicit, the requirements of the Fourth Amendment must still be met.[54] And of course, the *Zweibon* opinion of Judge Skelly Wright plainly states that although many cases hold that the President's power to obtain foreign intelligence information is vast, none suggest that he is immune from Constitutional requirements.[55]

The argument that inherent powers justify the program here in litigation must fail.

X. Practical Justifications for Exemption

First, it must be remembered that both Title III and FISA permit delayed applications for warrants, after surveillance has begun. Also, the case law has long permitted law enforcement action to proceed in cases in which the lives of officers or others are threatened in cases of "hot pursuit", border searches, school locker searches, or where emergency situations exist. See generally *Warden v. Hayden*, 387 U.S. 294 (1967); *Veronia School District v. Acton*, 515 U.S. 646

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[52]See generally *Youngstown*, 343 U.S. 579 (1952)

[53]See generally *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934)

[54]See generally *Falvey*, 540 F. Supp. 1306 (E.D.N.Y. 1982)

[55]See generally *Zweibon*, 516 F.2d 594 (D.C. Circ. 1975)

(1995); and *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990).

Indeed, in *Zweibon*, Judge Wright enumerates a number of Defendants' practical arguments here (including judicial competence, danger of security leaks, less likelihood of criminal prosecution, delay, and the burden placed upon both the courts and the Executive branch by compliance) and finds, after long and careful analysis, that none constitutes adequate justification for exemption from the requirements of either FISA or the Fourth Amendment. *Zweibon*, 516 F.2d at 641. It is noteworthy, in this regard, that Defendants here have sought no Congressional amendments which would remedy practical difficulty.

As long ago as the *Youngstown* case, the Truman administration argued that the cumbersome procedures required to obtain warrants made the process unworkable.[56] The *Youngstown* court made short shift of that argument and, it appears, the present Defendants' need for speed and agility is equally weightless. The Supreme Court in the *Keith*[57], as well as the *Hamdi*[58] cases, has attempted to offer helpful solutions to the delay problem, all to no avail.

XI. Conclusion

For all of the reasons outlined above, this court is constrained to grant to Plaintiffs the Partial Summary Judgment requested, and holds that the TSP violates the APA; the Separation of Powers doctrine; the First and Fourth Amendments of the United States Constitution; and the statutory law.

Defendants' Motion to Dismiss the final claim of data-mining is granted, because litigation of that claim would require violation of Defendants' state secrets privilege.

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[56]See generally *Youngstown*, 343 U.S. 579 (1952)

[57]See generally *U.S. v. U.S. District Court*, 407 U.S. 297 (1972)

[58]See generally *Hamdi*, 542 U.S. 507 (2004)

The Permanent Injunction of the TSP requested by Plaintiffs is granted inasmuch as each of the factors required to be met to sustain such an injunction have undisputedly been met.[59] The irreparable injury necessary to warrant injunctive relief is clear, as the First and Fourth Amendment rights of Plaintiffs are violated by the TSP. See *Dombrowski v. Pfister*, 380 U.S. 479 (1965). The irreparable injury conversely sustained by Defendants under this injunction may be rectified by compliance with our Constitution and/or statutory law, as amended if necessary. Plaintiffs have prevailed, and the public interest is clear, in this matter. It is the upholding of our Constitution.

As Justice Warren wrote in *U.S. v. Robel*, 389 U.S. 258 (1967):

> Implicit in the term 'national defense' is the notion of defending those values and ideas which set this Nation apart. . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of . . . those liberties . . . which makes the defense of the Nation worthwhile. *Id.* at 264.

IT IS SO ORDERED.

Date: August 17, 2006
Detroit, Michigan

s/Anna Diggs Taylor
ANNA DIGGS TAYLOR
UNITED STATES DISTRICT JUDGE

[59]It is well-settled that a plaintiff seeking a permanent injunction must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. *eBay Inc. v. MercExchange, L.L.C.* 126 S.Ct. 1837, 1839 (2006). Further, "[a] party is entitled to a permanent injunction if it can establish that it suffered a constitutional violation and will suffer "continuing irreparable injury" for which there is no adequate remedy at law." *Women's Medical Professional Corp. v. Baird*, 438 F.3d 595, 602 (6th Cir. 2006).

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing *Memorandum Order* was served upon counsel of record via the Court's ECF System to their respective email addresses or First Class U.S. mail disclosed on the Notice of Electronic Filing on **August 17, 2006**.

s/Johnetta M. Curry-Williams
Case Manager

EXHIBIT 4

**BEFORE THE JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION**

IN RE NATIONAL SECURITY AGENCY LITIGATION	)	MDL Docket No. ____

DEFENDANTS VERIZON COMMUNICATIONS INC., VERIZON GLOBAL NETWORKS INC., AND VERIZON NORTHWEST INC.'S MOTION FOR TRANSFER AND COORDINATION PURSUANT TO 28 U.S.C. § 1407

Defendants Verizon Communications Inc., Verizon Global Networks Inc., and Verizon Northwest Inc. (collectively "Verizon") hereby respectfully move the Judicial Panel on Multidistrict Litigation for an order: (a) transferring 20 virtually identical purported class actions (pending before 14 different federal district courts) to a single district court; and (b) coordinating those actions for pretrial proceedings pursuant to 28 U.S.C. § 1407. A list of the 20 pending actions, 19 of which have been filed in the last two weeks, is attached hereto as Verizon's Schedule of National Security Agency Actions for Transfer and Coordination.

In support of the transfer and coordination of these actions, the movants aver the following, as more fully set forth in the accompanying supporting memorandum:

1. The actions for which transfer and coordination is proposed allege participation by Verizon in a Government program to intercept and analyze domestic telephone and Internet

communications as reported in a U.S.A. Today article published on May 11, 2006. All save one of these actions have been filed within two weeks since that article was published. Plaintiffs in each case claim that Verizon and other telecommunication company defendants assisted the Government in its intelligence efforts by providing the Government, at the request of the National Security Agency, with information concerning their customers' telephone and internet communications and detailed records of their customers' telephone calls. All but one of the proposed classes seek relief under the Electronic Communications Privacy Act, 18 U.S.C. § 2701 *et seq.* Most of the cases propose nationwide classes comprising all of Verizon's or other providers' subscribing customers; five cases propose regional classes or classes without precise definition.

2. As required by 28 U.S.C. § 1407(a), the cases proposed for transfer and coordination "involv[e] one or more common questions of fact" inasmuch as they are premised on identical factual allegations, contending that Verizon disclosed records pertaining to plaintiffs' use of Verizon's telecommunications services to the National Security Agency, that Verizon disclosed the records without the knowledge or consent of its customers, and that it did so without authorization or a warrant.[1]

3. In multiple respects, the proposed transfer and coordination "will be for the convenience of parties and witnesses and will promote the just and efficient conduct" of the actions. 28 U.S.C. § 1407(a).

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[1] By asserting that the Section 1407 standard has been satisfied to warrant multidistrict transfer, movants do not address whether or concede that the requirements for class certification, including, but not limited to, the commonality and/or the predominance requirements, have been met. The Section 1407 inquiry is distinct from analysis of the class certification criteria, and is applied by courts with different purposes in mind. As the Manual for Complex Litigation makes clear, one of the main objectives of a multidistrict transfer is pretrial administrative efficiency. *See* MANUAL FOR COMPLEX LITIGATION § 10.1 (4th ed. 2004). Whether the case should be certified as a class action and proceed to trial on that basis is a different inquiry altogether. For purposes of this motion, movants demonstrate only that the actions should be coordinated for Section 1407 purposes.

4. For example, coordination of the actions before a single court will eliminate duplicative discovery activity (particularly multiple depositions of the same witnesses) and concomitantly minimize the potential disclosure of classified information, prevent duplicative and conflicting pretrial rulings, conserve judicial resources, reduce the costs of litigation, and allow the cases to proceed more efficiently to trial. Coordination will also protect unique national security interests that will color discovery in this action.

5. Defendants respectfully suggest that the U.S. District Court for the District of Columbia would be an appropriate transferee forum. Three related cases – *Driscoll v. Verizon Communications, Inc.*, No. 06-cv-916, *Ludman v. AT&T Inc.*, No. 06-cv-917, and *Phillips v. BellSouth Corp.*, 06-cv-918 – are pending before that Court, and the forum would be a convenient one for counsel and for the defendants. Moreover, the U.S. District Court for the District of Columbia has fewer cases pending before it than any other federal courts in which a National Security Agency case is currently pending save one and has substantial expertise in dealing with the national-security and state-secrets issues inherent in these cases.

6. This Motion is based on the Brief in Support of this Motion to Transfer and Coordinate filed by Verizon, the pleadings and papers on file herein, and such other matters as may be presented to the Panel at the time of hearing.

Dated: May 24, 2006

Respectfully submitted,

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BEFORE THE JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

IN RE NATIONAL SECURITY AGENCY LITIGATION	)	MDL Docket No. ____

MEMORANDUM IN SUPPORT OF DEFENDANTS VERIZON COMMUNICATIONS INC., VERIZON GLOBAL NETWORKS INC., AND VERIZON NORTHWEST INC.'S MOTION FOR TRANSFER AND COORDINATION PURSUANT TO 28 U.S.C. § 1407

Pursuant to 28 U.S.C. § 1407 and Rule 7.1(b) of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, Verizon Communications Inc., Verizon Global Networks Inc., and Verizon Northwest Inc. – collectively "Verizon" – seek transfer and pretrial coordination of 20 class action lawsuits filed against Verizon and other defendants, the majority of which seek nationwide class certification and were filed within the past two weeks on the basis of the same factual allegations.[1] A multidistrict litigation ("MDL") proceeding is warranted because all of the statutory criteria for transfer and coordination are present.

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[1] The cases in which Verizon is a named defendant are *Bissitt v. Verizon Communications, Inc.*, No. 1:06-cv-00220-T-LDA (D.R.I.); *Conner v. AT&T*, No. 06-0225 (E.D. Cal.) *Driscoll v. Verizon Communications, Inc.*, No. 1:06-cv-00916-RBW (D.D.C.); *Fuller v. Verizon Communications, Inc.*, No. 9:06-cv-00077-DWM (D. Mont.); *Herron v. Verizon Global Networks, Inc.*, No. 2:06-cv-02491-JCZ-KWR (E.D. La.); *Hines v. Verizon Northwest, Inc.*, No. 9:06-cv-00694 (D. Or.); *Mahoney v. Verizon Communications, Inc.*, No. 1:06-cv-00224-S-LDA (D.R.I.); *Marck v. Verizon Communications, Inc.*, No. CV-06-2455 (E.D.N.Y.); *Mayer v. Verizon Communications, Inc.*, No. 1:06-cv-03650 (S.D.N.Y.). Verizon may notify the Panel of and move to transfer cases in which it is not a party if otherwise appropriate under 28 U.S.C. § 1407. *In re Cable Tie Patent Litigation*, 487 F. Supp. 1351, 1353 n.3 (J.P.M.L. 1980). Those other cases are *Dolberg v. AT&T Corp*, No. CV 06-78-M-DWM (D. Mont.); *Harrington v.*

First, the core allegations underlying each of these purported class actions are common. All plaintiffs allege that, following the terrorist attacks on the United States on September 11, 2001, Verizon and other telecommunications companies cooperated in a Government program that involved providing the National Security Agency ("NSA") with access to the content of their subscribers' telephone calls and/or records concerning those calls. Indeed, all but one of the lawsuits were clearly prompted by the same article appearing in the *USA Today* on May 11, 2006.

Second, not only are the factual allegations underlying these complaints common, so too are the causes of action asserted. Each complaint alleges that the defendants violated one or more federal statutes concerning electronic surveillance and similar activities. Coordinated proceedings are warranted to benefit the parties and the federal courts alike, and to eliminate the possibility of inconsistent pretrial rulings.

Third, the proposed class definitions overlap substantially. The majority of the complaints seek certification of nationwide classes of telephone customers, while the remainder seek to certify geographically defined subsets of those putative classes. Absent centralization, multiple federal judges will be required to decide the same issues with respect to the same plaintiffs and the same defendants.

Fourth, the United States is likely to intervene in and seek dismissal of these cases – as it already has in the one and only case filed prior to the May 11, 2006 article in the *USA Today* – in order to assert its "state secret" privilege and prevent any disclosure of highly classified

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AT&T, Inc., No. A06CA374-LY (W.D. Tex.); *Ludman v. AT&T Inc.*, No. 1:06-cv-00917-RBW (D.D.C.); *Mahoney v. AT&T Communications, Inc.*, No. 1:06-cv-00223-T-LDA (D.R.I.); *Schwarz v. AT&T Corp.*, No. 1:06-cv-02680 (N.D. Ill.); *Souder v. AT&T, Corp.*, No. 06CV1058-DMS AJB (S.D. Cal.); *Trevino v. AT&T Corp.*, No. 2:06-cv-00209 (S.D. Tex.); *Terkel v. AT&T Inc.*, No. 06C-2837 (N.D. Ill.); *Phillips v. BellSouth Corp.*, No. 3:06-CV-00469 (D.D.C.); *Potter v. BellSouth Corp.*, No. 3 06-0469 (M.D. Tenn.); *Hepting v. AT&T Corp.*, No. 06-0672 (N.D. Cal.). All complaints are attached hereto at Tab A.

information critical to both the plaintiffs' and defendants' cases.[2] There is no reason to require litigation involving important matters of national security to remain pending in various courts around the country.

For these reasons, these complaints present ***the*** classic case for transfer and coordination: (i) they "involv[e] one or more common questions of fact"; (ii) transfer will further "the convenience of the parties and witnesses"; and (iii) transfer "will promote the just and efficient conduct of [the] actions by" reducing the risk of inconsistent rulings on critical pretrial matters affecting national security and the national telecommunications network, avoiding duplicative proceedings, and ensuring centralized oversight of any pretrial fact development.

Verizon respectfully submits that these cases are especially appropriate for transfer to the United States District Court for the District of Columbia. Three constituent actions are already pending there, and the District of Columbia District Court and the United States Court of Appeals for the District of Columbia Circuit both have significant experience in handling cases involving national security. Any Government witnesses and documents will likely be located in or near the District of Columbia. Similarly, classified information that may require *in camera* inspection can be maintained in highly secured locations in the District of Columbia – a factor that few other venues can offer. Finally, the case-load of the District of Columbia renders that Court more than capable of taking on this MDL proceeding.

Background

These cases concern an alleged national security program involving the collection and analysis of telephone and Internet communications."[3] There is little doubt that they share

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[2] *See* Notice of Motion and Motion to Dismiss or, in the Alternative, for Summary Judgment by the United States of America, *Hepting*, 3:06-CV-0672-VRW (D.D.C., filed May 13, 2006), attached hereto at Tab B.

[3] *See, e.g., Driscoll* Compl. ¶ 1.

"common" factual underpinnings. Nineteen of the 20 cases Verizon seeks to transfer and coordinate have been filed since May 11, 2006, when the *USA Today* reported that the National Security Agency ("NSA") was allegedly engaged in a classified program to amass a database including information about the calling records of millions of Americans. The article claimed that the NSA sought the help of telecommunications companies in the Government's efforts to identify terrorists both inside and outside the United States. According to the article, Verizon, AT&T Corp. ("AT&T"), and BellSouth Corp. ("BellSouth") all agreed to assist the Government in its efforts by providing the NSA with the call records of many of its customers.

Literally the next day, six complaints were filed against Verizon and other defendants. And in the eleven days since then, 13 additional complaints have been filed. All told, the following 20 putative class action complaints are now pending in various district courts:

- *Bissitt v. Verizon Communications, Inc.*, No. 1:06-cv-00220-T-LDA (D.R.I., filed May 15, 2006), was filed in the District of Rhode Island against Verizon Communications Inc. and BellSouth Corp. The complaint alleges that defendants disclosed plaintiffs' telephone and internet communications records to the Government. The complaint asserts violations of the Electronic Communications Privacy Act and the First and Fourth Amendments on behalf of all subscribers of defendants' telephonic and/or communications services since September 2001.
- *Driscoll v. Verizon Communications, Inc.*, No. 1:06-cv-00916-RBW (D.D.C., filed May 15, 2006), was filed in the District of Columbia against Verizon Communications Inc. The complaint alleges that Verizon disclosed plaintiffs' telephone and internet communications records to the Government. The complaint asserts violations of the Electronic Communications Privacy Act on behalf of all subscribers of Verizon's telephone and internet services since September 2001.
- *Fuller v. Verizon Communications, Inc.*, No. 9:06-cv-00077-DWM (D. Mont., filed May 12, 2006), was filed in the District of Montana against Verizon Communications Inc. and Verizon Wireless, L.L.C. The complaint alleges that the defendants disclosed plaintiff's telephone and internet communications records to the Government. The complaint asserts violations of the Electronic Communications Privacy Act on behalf of all subscribers of defendants' telephone and internet services since September 2001.
- *Herron v. Verizon Global Networks, Inc.*, No. 2:06-cv-02491-JCZ-KWR (E.D. La., filed May 12, 2006), was filed in the Eastern District of Louisiana against Verizon Global Networks Inc., AT&T Corp., American Telephone and Telegraph Company,

BellSouth Communication Systems, LLC, and BellSouth Telecommunications, Inc. The complaint alleges that defendants disclosed plaintiffs' telephone and internet communications records to the Government. The complaint asserts violations of the Electronic Communications Privacy Act on behalf of all persons and other entities whose phone records have allegedly been disclosed by defendants to the NSA.

- *Hines v. Verizon Northwest, Inc.*, No. 9:06-cv-00694 (D. Or., filed May 12, 2006), was filed in the District of Oregon against Verizon Northwest Inc. The complaint alleges that Verizon disclosed plaintiffs' telephone and internet communications records to the Government. The complaint asserts violations of the Electronic Communications Privacy Act on behalf of all persons within Oregon, Washington, Idaho, and California who subscribed to Verizon's electronic communication services since September 11, 2001.
- *Mahoney v. Verizon Communications, Inc.*, No. 1:06-cv-00224-S-LDA (D.R.I., filed May 15, 2006), was filed in the District of Rhode Island against Verizon Communications Inc. The complaint alleges that Verizon disclosed plaintiff's telephone and internet communications records to the Government. The complaint asserts violations of the Electronic Communications Privacy Act on behalf of all subscribers of Verizon's telephone and internet services since September 2001.
- *Marck v. Verizon Communications, Inc.*, No. CV-06-2455 (E.D.N.Y., filed May 19, 2006), was filed in the Eastern District of New York against Verizon Communications Inc. The complaint alleges that Verizon disclosed plaintiffs' telephone communications records to the Government. The complaint asserts violations of the Electronic Communications Privacy Act and the First and Fourth Amendments on behalf of all subscribers of Verizon's telephone and internet services since September 11, 2001. The complaint also asserts violations of New York's consumer protection statute on behalf of a sub-class of all New York resident subscribers of Verizon services since September 11, 2001.
- *Mayer v. Verizon Communications, Inc.*, No. 1:06-cv-03650 (S.D.N.Y., filed May 12, 2006), was filed in the Southern District of New York against Verizon Communications Inc. The complaint alleges that Verizon disclosed plaintiffs' telephone and internet communications records to the Government. The complaint asserts violations of the Electronic Communications Privacy Act and the First and Fourth Amendments on behalf of all, though possibly only New Jersey, subscribers of Verizon's telephone and internet services since September 2001.
- *Conner v. AT&T*, No. 06-0225 (E.D. Cal., removed May 23, 2006), was filed in the Superior Court of California, and later removed to the Eastern District of California, against AT&T, BellSouth, and Verizon. The complaint alleges that defendants disclosed plaintiffs' telephone communications records to the Government. The complaint asserts violations of the Communications Act and common law invasion of privacy on behalf of all California-resident subscribers of defendants' whose information has allegedly been disclosed or sold to the Government.
- *Dolberg v. AT&T Corp*, No. CV 06-78-M-DWM (D. Mont., filed May 15, 2006), was filed in the District of Montana against AT&T Corp. and AT&T Inc. The complaint alleges that defendants disclosed plaintiff's telephone communications records to the

Government. The complaint asserts violations of the Electronic Communications Privacy Act on behalf of all subscribers of AT&T since September 2001.

- *Harrington v. AT&T, Inc.*, No. A06CA374-LY (W.D. Tex., filed May 18, 2006), was filed in the Western District of Texas against AT&T Inc. The complaint alleges that AT&T disclosed plaintiff's telephone communications records to the Government. The complaint asserts violations of the Electronic Communications Privacy Act on behalf of all Texas-resident subscribers of defendants' whose information has been disclosed to the Government.
- *Ludman v. AT&T Inc.*, No. 1:06-cv-00917-RBW (D.D.C., filed May 15, 2006), was filed in the District of Columbia against AT&T, Inc. The complaint alleges that AT&T disclosed plaintiff's telephone and internet communications records to the Government. The complaint asserts violations of the Electronic Communications Privacy Act on behalf of all subscribers of AT&T telephone and internet services since September 2001.
- *Mahoney v. AT&T Communications, Inc.*, No. 1:06-cv-00223-T-LDA (D.R.I., filed May 15, 2006), was filed in the District of Rhode Island against AT&T Communications, Inc. The complaint alleges that AT&T disclosed plaintiff's telephone and internet communications records to the Government. The complaint asserts violations of the Electronic Communications Privacy Act on behalf of all subscribers of AT&T's telephone and internet services since September 2001.
- *Schwarz v. AT&T Corp.*, No. 1:06-cv-02680 (N.D. Ill., filed May 15, 2006), was filed in the Northern District of Illinois against AT&T. The complaint alleges that AT&T disclosed plaintiffs' telephone and internet communications records to the Government. The complaint asserts violations of the Electronic Communications Privacy Act and the First and Fourth Amendments on behalf of all subscribers of AT&T's telephone and internet services since September 2001.
- *Souder v. AT&T, Corp.*, No. 06CV1058-DMS AJB (S.D. Cal., filed May 12, 2006), was filed in the Southern District of California against AT&T Corp. and AT&T Inc. The complaint alleges that AT&T disclosed plaintiff's telephone and internet communications records to the Government. The complaint asserts violations of the Electronic Communications Privacy Act on behalf of all subscribers of AT&T's telephone and internet services since September 2001.
- *Trevino v. AT&T Corp.*, No. 2:06-cv-00209 (S.D. Tex., filed May 17, 2006), was filed in the Southern District of Texas against AT&T Corp. and AT&T Inc. The complaint alleges that AT&T disclosed plaintiff's telephone and internet communications records to the Government. The complaint asserts violations of the Electronic Communications Privacy Act on behalf of all subscribers of AT&T's telephone and internet services since September 2001.
- *Terkel v. AT&T Inc.*, No. 06C-2837 (N.D. Ill., filed May 22, 2006) was filed in the Northern District of Illinois against AT&T Inc. The complaint alleges that AT&T disclosed plaintiffs' telephone and internet communications records to the Government. The complaint asserts violations of the Electronic Communications Privacy Act on behalf of all Illinois-resident subscribers of AT&T's electronic and computing services.

- *Phillips v. BellSouth Corp.*, No. 3:06-CV-00469 (D.D.C., filed May 15, 2006), was filed in the District of Columbia against BellSouth Corp. The complaint alleges that BellSouth disclosed plaintiffs' telephone and internet communications records to the Government. The complaint asserts violations of the Electronic Communications Privacy Act on behalf of all subscribers of BellSouth's telephone and internet services since September 2001.
- *Potter v. BellSouth Corp.*, No. 3 06-0469 (M.D. Tenn., filed May 15, 2006), was filed in the Middle District of Tennessee against BellSouth Corp. The complaint alleges that BellSouth disclosed plaintiffs' telephone and internet communications records to the Government. The complaint asserts violations of the Electronic Communications Privacy Act on behalf of all subscribers of BellSouth's remote computing or electronic communication services since September 2001.
- *Hepting v. AT&T Corp.*, No. 06-0672 (N.D. Cal., filed Jan. 31, 2006), like the cases identified above, challenges telecommunications companies' alleged cooperation with Government intelligence collection programs. The *Hepting* complaint involves the alleged disclosure of the *content* of international telephone calls. In *Hepting*, the United States filed a statement of interest, moved to intervene, and filed a motion to dismiss or for summary judgment on the grounds that the "state secrets" privilege bars the prosecution of this civil action.

Argument

I. THESE ACTIONS ARE APPROPRIATE FOR TRANSFER AND PRETRIAL COORDINATION UNDER 28 U.S.C. § 1407.

28 U.S.C. § 1407(a) provides that this Panel may transfer for pretrial coordination two or more civil cases upon a determination (a) that the cases "involve[] one or more common questions of fact," (b) that the transfers would further "the convenience of the parties and witnesses," and (c) that the transfers "will promote the just and efficient conduct of [the] actions." *Id.* As explained below, the cases listed in defendants' Schedule of Actions clearly meet these criteria and should be transferred for coordinated pretrial proceedings.

A. There are Unique Reasons To Centralize These Cases.

As discussed below, these cases meet all the traditional requirements of Section 1407. But there are also unique and critical aspects of these cases which independently (and strongly) support their pretrial transfer and coordination. These cases are not standard commercial, products liability, or securities actions, but rather involve issues of vital national security and the

handling of classified information. Allowing this litigation to go forward in multiple venues simply increases the likelihood that classified information might inadvertently be compromised. *See* National Security Agency Act, 50 U.S.C. § 402; *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953); *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (1983), *cert. denied sub nom. Russo v. Mitchell*, 465 U.S. 1038 (1984). Even assuming that each court decides to review the same sensitive evidence *in camera* and *ex parte*, such review still carries grave risks, including the risks associated with transporting classified information to multiple venues across the country. As one court has recognized,

> It is not to slight judges, lawyers or anyone else to suggest that [even *in camera, ex parte* review] disclosure carries with it serious risk that highly sensitive information may be compromised. In our own chambers, we are ill equipped to provide the kind of security highly sensitive information should have.

Clift v. United States, 597 F.2d 826, 829 (2d Cir. 1979) (quoting *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1369 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975)). These security concerns will be reduced if the litigation is conducted in one forum.

B. These Actions Involve One Or More Common Questions Of Fact.

1. The Cases Involve the Same or Similar Facts and Theories of Recovery.

The actions at issue clearly meet the first requirement of § 1407(a). The factual allegations underlying each of the purported class actions are essentially identical. All of the complaints generally allege that, starting in late 2001, the defendants disclosed records pertaining to plaintiffs' use of telecommunications services to the National Security Agency.[4] They further

[4] (*See, e.g.*, *Bissitt* Compl. ¶ 2; *Conner* Compl. ¶ 1; *Driscoll* Compl. ¶¶ 2-5; *Fuller* Compl. ¶¶ 3-6; *Herron* Compl. ¶ 4; *Hines* Compl. ¶¶ 11-12; *Mahoney v. Verizon* Compl. ¶¶ 2-5; *Mahoney v. AT&T* Compl. ¶¶ 2-5; *Marck* Compl. ¶ 6; *Mayer* Compl. ¶¶ 7-8; *see also Dolberg* Compl. ¶¶ 3-6; *Harrington* Compl. ¶ 1; *Ludman* Compl. ¶¶ 2-5; *Phillips* Compl. ¶¶ 2-5; *Potter* Compl. ¶ 7; *Schwarz* Compl. ¶¶ 3-6; *Souder* Compl. ¶¶ 2-5; *Trevino* Compl. ¶¶ 2-4; *Terkel* Compl. ¶ 2.)

allege that the defendants disclosed these records without Plaintiffs' knowledge or consent.[5] And, at bottom, all of the complaints except *Hepting* purport to be based on the May 11, 2006 *USA Today* article described above. "Common" factual allegations thus exist across these cases.

The claims for relief are also similar. All but one of the complaints (*Conner*) asserts that the defendants violated the Electronic Communications Privacy Act, 18 U.S.C. § 2701, *et seq.*[6] In fact, many of the complaints are "copycat" putative class actions that are in all material respects identical save for the identity of the named plaintiffs and the district courts in which they were filed. The *Driscoll*, *Fuller*, and *Mahoney* complaints against Verizon, for example, offer virtually identical allegations,[7] propose the same putative class,[8] and assert the same causes of action.[9]

The Panel has long recognized that class actions asserting such similar claims based on such similar underlying factual allegations are particularly well suited for coordination pursuant to § 1407. *See, e.g.*, *In re Cooper Tire & Rubber Co. Tires Prods. Liab. Litig.*, No. 1393, 2001 WL 253115 (J.P.M.L. Feb. 23, 2001) (transfer ordered where "[a]ll actions involve allegations relating to Cooper's tire design and its manufacturing process"); *In re St. Jude Med., Inc., Silzone Heart Valves Prods. Liab. Litig.*, Docket No. 1396, 2001 U.S. Dist. LEXIS 5226, at *2-3

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[5] (*See Bissitt* Compl. ¶ 33; *Conner* Compl. ¶ 6; *Driscoll* Compl. ¶¶ 46, 53; *Fuller* Compl. ¶¶ 45, 52; *Herron* Compl. ¶ 4 (disclosure "without proper authorization"); *Hines* Compl. ¶ 12; *Mahoney v. Verizon* Compl. ¶¶ 44, 51; *Mahoney v. AT&T* Compl. ¶¶ 44, 51; *Marck* Compl. ¶ 3; *Mayer* Compl. ¶ 13; *see also Dolberg* Compl. ¶¶ 45, 52; *Harrington* Compl. ¶¶ 3-4; *Ludman* Compl. ¶¶ 44, 51; *Phillips* Compl. ¶¶ 44, 51; *Potter* Compl. ¶¶ 6-7; *Schwarz* Compl. ¶¶ 122-29; *Souder* Compl. ¶¶ 45, 52; *Trevino* Compl. ¶ 54; *Terkel* Compl. ¶ 24.)

[6] (*See Bissitt* Compl. ¶¶ 29-43; *Driscoll* Compl. ¶¶ 43-56; *Fuller* Compl. ¶¶ 42-55; *Herron* Compl. ¶ 7; *Hines* Compl. ¶¶ 15-17; *Mahoney v. Verizon* Compl. ¶¶ 41-54; *Mayer* Compl. ¶¶ 18-31; *Dolberg* Compl. ¶¶ 42-55; *Harrington* Compl ¶¶ 26-28; *Ludman* Compl. ¶¶ 41-54; *Mahoney v. AT&T* Compl. ¶¶ 41-54; *Phillips* Compl. ¶¶ 41-54; *Potter* Compl. ¶ 1; *Schwarz* Compl. ¶¶ 119-32; *Souder* Compl. ¶¶ 42-55; *Trevino* Compl. ¶¶ 51-57; *Terkel* Compl. ¶¶ 29-32.)

[7] (*See Driscoll* Compl. ¶¶16-32, *Fuller* Compl. ¶¶ 15-31; *Mahoney v. Verizon* Compl. ¶¶ 14-30; *Mahoney v. AT&T* Compl. ¶¶ 14-30.)

[8] (*See Driscoll* Compl. ¶ 33, *Fuller* Compl. ¶ 32; *Mahoney v. Verizon* Compl. ¶ 31; *Mahoney v. AT&T* Compl. ¶ 31.)

[9] (*See Driscoll* Compl. ¶¶ 43-56; *Fuller* Compl. ¶¶ 42-55; *Mahoney v. Verizon* Compl. ¶¶ 41-54; *Mahoney v. AT&T* Compl. ¶¶ 41-54.)

(J.P.M.L. Apr. 18, 2001) (transfer ordered where "[a]ll actions are brought as class actions . . . and arise from the same factual milieu, namely the manufacture and marketing of allegedly defective heart valve and replacement products"); *In re America Online, Inc., Version 5.0 Software Litig.*, Docket No. 1341, 2000 U.S. Dist. LEXIS 13262 (J.P.M.L. June 2, 2000) (transfer ordered where class action plaintiffs alleged that AOL Version 5.0 conflicted with various types of non-AOL software); *In re Gen. Motors Corp. Type III Door Latch Prods. Liab. Litig.*, Docket No. 1266, 1999 U.S. Dist. LEXIS 5075, at *1-2 (J.P.M.L. Apr. 14, 1999) (transfer ordered where "the three actions in this litigation involve common questions of fact concerning allegations that the 'unmodified Type III door latches' on certain GM vehicles are defective and prone to failure"); *In re Chrysler Corp. Vehicle Paint Litig.*, Docket No. 1239, 1998 U.S. Dist. LEXIS 15675 (J.P.M.L. October 2, 1998) (transfer ordered where "the actions in this litigation involve common questions of fact concerning allegations by overlapping classes of defects in the paint of certain Chrysler vehicles that result in chipping, peeling and discoloration of the paint finish").

2. The Cases Seek Certification of Overlapping Nationwide Classes.

The case for transfer and coordination is particularly strong here because plaintiffs seek certification of not merely "parallel" class actions in various states but completely "overlapping" proposed classes purporting to join consumers from coast to coast. Fifteen of the 20 cases propose nationwide class actions on behalf of customers of residential telecommunications services provided by the defendants. Others involve single-state class allegations.[10] Another complaint involves a proposed multi-state class action.[11] Still another complaint is ambiguous,

[10] (*Connnor* Compl. ¶ 18; *Harrington* Compl. ¶ 17; *Terkel* Compl. ¶ 16.)

[11] (*Hines* Compl. ¶ 4.)

but could be read to encompass a request for nationwide class certification.[12] Such overlapping class actions almost by definition satisfy the requirements of § 1407. *See, e.g.*, *In re Jamster Mktg. Litig.*, No. 3:05-1915, 2006 WL 1023460 (J.P.M.L. Apr. 14, 2006) (ordering transfer where "[e]ach action is brought as a class action against overlapping defendants and is predicated on the same factual allegations"); *In re Hydrogen Peroxide Antitrust Litig.*, 374 F. Supp. 2d 1345, 1346 (J.P.M.L. 2005) (finding centralization warranted when "[e]ach of the actions now before the Panel is brought under the Sherman Act to recover for injuries sustained as a result of an alleged conspiracy engaged in by overlapping defendants to fix, raise, maintain, or stabilize prices for hydrogen peroxide and its downstream products sodium perborate and sodium percarbonate"); *In re High Sulfur Content Gasoline Prods. Liab. Litig.*, 344 F. Supp. 2d 755, 756 (finding centralization warranted of five "overlapping putative class actions brought on behalf of purchasers of gasoline that contained high levels of sulfur in May 2004"); *In re Chrysler Corp. Vehicle Paint Litig.*, 1998 U.S. Dist. LEXIS 15675 (transfer ordered where "the actions in this litigation involve common questions of fact concerning allegations by overlapping classes of defects in the paint of certain Chrysler vehicles that result in chipping, peeling and discoloration of the paint finish"). Absent coordination, multiple federal courts will simultaneously be handling the same claims brought by the same classes of plaintiffs against the same defendants.

3. There is No Warrant for Waiting for Additional Filings.

The 20 putative class actions already on file plainly warrant transfer and coordination. This Panel has not hesitated to afford MDL treatment to litigation matters involving as few as two or three class actions to serve the interests and convenience and judicial economy.[13] This

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[12] (*Mayer* Compl. ¶¶ 1, 33.)

[13] *See, e.g., In re LifeUSA Holdings, Inc. Annuity Contracts Sales Practices Litig.*, No. 1273, 1999 U.S. Dist. LEXIS 4918 (J.P.M.L. Apr. 7, 1999) (consolidating two actions) *In re the Hartford Sales Practices Litig.*, No. 1204, 1997 U.S. Dist. LEXIS 19671 (J.P.M.L. Dec. 8, 1997) (consolidating two actions); *In re Mountain States Tel. & Tel.*

litigation involves 19 purported class actions filed in the past 12 days. If the pending cases are transferred and coordinated, any later-filed lawsuits could be included as "tag-along" cases in the MDL proceeding. *See In re Gas Meter Antitrust Litig.*, 464 F. Supp. 391 (J.P.M.L. 1979) (major reason for the Panel's transfer order was the salutary effect of providing a ready forum for the inclusion of expected newly filed actions).

C. Coordination Will Serve The Convenience Of Parties And Witnesses.

Coordination of these actions will also satisfy the second criterion of § 1407(a) – it will serve the "convenience of [the] parties and witnesses." As discussed in more detail above, the allegations in these cases implicate classified information. Without coordination, that information might have to be transported to multiple venues simply to support *in camera* and *ex parte* review in connection with the Government's likely intervention and invocation of the state secrets privilege. That would not be a matter of mere inconvenience, but a risk to national security. Further, the pretrial activities in these cases – starting with the likely litigation over the state-secrets privilege – almost certainly will overlap considerably. To the extent pretrial discovery is required, the defendants may be subjected to myriad duplicative discovery demands, and witnesses may be subjected to equally duplicative depositions. Absent coordination, unnecessary burdens will be imposed upon the courts, the parties, and the United States.

By contrast, centralization will avoid those grave risks and wasteful duplicative efforts. Because discovery has not yet been conducted, it can be efficiently coordinate from the start of any MDL proceeding by the transferee court. Transfer would thus "effectuate a significant overall savings of cost and a minimum of inconvenience to all concerned with the pretrial

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Co. Employees Benefit Litig., No. 798, 1989 U.S. Dist. LEXIS 13673 (J.P.M.L. Feb. 2, 1989) (consolidating two actions); *In re New Mexico Natural Gas Antitrust Litig.*, 482 F. Supp. 333 (J.P.M.L. 1979) (consolidating three actions); *In re California Armored Car Antitrust Litig.*, 476 F. Supp. 452, 454 (J.P.M.L. 1979) (consolidating three actions); *In re First Nat'l Bank*, 451 F. Supp. 995, 997 (J.P.M.L. 1978) (consolidating two actions); *In re E. Airlines,*

activities." *In re Cuisinart Food Processor Antitrust Litig.*, 506 F. Supp. 651, 655 (J.P.M.L. 1981).

D. Coordination Will Promote Just And Efficient Conduct Of The Actions.

Coordination of the pending actions will also promote the third Section 1407(a) criterion – the just and efficient conduct of the actions.

1. Coordination Will Prevent Conflicting Pretrial Rulings.

Given the virtually identical factual allegations, theories of recovery, and proposed class definitions, pretrial activities such as motion practice will overlap substantially. As the United States has already explained in the *Hepting* case, a threshold question in this litigation is whether these cases may proceed at all, or whether they should instead be dismissed as a result of the Government's likely assertion of the "state-secret" privilege. Absent coordinated proceedings, that singular threshold issue involving national security will needlessly be decided by multiple federal judges across the country.

Moreover, additional motions and discovery will overlap considerably, risking inconsistent rulings by different district courts on the same issues. Transfer is thus warranted. *See, e.g.*, *In re Cooper Tire & Rubber Co. Tires Prods. Liab. Litig.*, No. 1393, 2001 WL 253115, at *1 ("Motion practice and relevant discovery will overlap substantially in each action. Centralization under Section 1407 is thus necessary in order to eliminate duplicative discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel and the judiciary."); *In re St. Jude Med., Inc., Silzone Heart Valves Prods. Liab. Litig.*, Docket No. 1396, 2001 U.S. Dist. LEXIS 5226, at *3 (J.P.M.L. Apr. 18, 2001) ("Centralization under Section 1407 is necessary in order to eliminate duplicative discovery, prevent inconsistent

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Inc. Flight Attendant Weight Program Litig., 391 F. Supp. 763 (J.P.M.L. 1975) (consolidating two actions); *In re Cross-Florida Barge Canal Litig.*, 329 F. Supp. 543 (J.P.M.L. 1971) (consolidating two actions).

pretrial rulings (especially with respect to questions of privilege issues, confidentiality issues and class certification), and conserve the resources of the parties, their counsel and the judiciary."); *In re Am. Online, Inc., Version 5.0 Software Litig.*, Docket No. 1341, 2000 U.S. Dist. LEXIS 13262, at *3-4 (J.P.M.L. June 2, 2000) (to same effect); *In re Gen. Motors Corp. Type III Door Latch Prods. Liab. Litig.*, Docket No. 1266, 1999 U.S. Dist. LEXIS 5075, at *2 (J.P.M..L. Apr. 14, 1999) (to same effect); *In re Chrysler Corp. Vehicle Paint Litig.*, Docket No. 1239, 1998 U.S. Dist. LEXIS 15675, at *2 (J.P.M.L. Oct. 2, 1998) (to same effect).

Plaintiffs in various cases have already begun rattling their sabers by suggesting that they will seek preliminary injunctive relief, raising the specter (absent coordination) that the defendants could possibly be subjected to competing injunctions entered in short order by various federal courts.[14] Coordination is needed to prevent inconsistent injunctive orders. *See In re Operation of the Mo. River Sys. Litig., 277 F. Supp. 2d 1378*, 1379 (J.P.M.L. 2003) (holding that MDL treatment was necessary to avoid inconsistent pretrial rulings "particularly with respect to requests for preliminary injunctive relief imposing or threatening to impose conflicting standards of conduct"); *In re General Motors Class E Stock Buyout Sec. Litig.*, 696 F. Supp. 1546, 1547 (J.P.M.L. 1988) ("The presence of common questions in *Hart* and MDL-720 is further illustrated by the overlapping injunctive relief sought in both proceedings. Transfer of *Hart* under Section 1407 is thus necessary to avoid duplication of discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel and the judiciary.")

[14] *Bissit* Compl. Prayer for Relief; *Driscoll* Compl. Request for Relief; *Fuller* Compl. Request for Relief; *Mahoney* Compl. Request for Relief; *Dolberg* Compl. Request for Relief; *Harrington* Compl. ¶ 39; *Ludman* Compl. Request for Relief; *Mahoney v. AT&T* Compl. Request for Relief; *Schwarz* Compl. Prayer for Relief; *Souder* Compl. Request for Relief; *Trevino* Compl. Prayer for Relief; *Terkel* Compl. Prayer for Relief; *Phillips* Compl. Request for Relief; *Hepting* Compl. Prayer for Relief.

2. Transfer Will Facilitate Uniform Class Certification Decisions.

Because the purported class allegations in each of these cases are virtually identical, and the proposed classes overlap in significant respects, the arguments presented both for and against certification will presumably be similar. There is a danger of inconsistent rulings on class certification and other class action-related issues if these cases are not coordinated, not to mention unnecessary duplication of effort by the parties and the courts.

The Panel has "consistently held that transfer of actions under § 1407 is appropriate, if not necessary, where the possibility of inconsistent class determinations exists." *In re Sugar Indus. Antitrust Litig.*, 395 F. Supp. 1271, 1273 (J.P.M.L. 1975); *see also In re Bridgestone/Firestone, Inc. ATX, ATX II and Wilderness Tires Prods. Liab. Litig.*, 2000 U.S. Dist. LEXIS 15926 (J.P.M.L. Oct. 24, 2000) ("Centralization under Section 1407 is thus necessary in order to . . . prevent inconsistent pretrial rulings (particularly with respect to overlapping class certification requests)"); *In re America Online, Inc., Version 5.0 Software Litig.*, 2000 U.S. Dist. LEXIS 13262 (same); *In re Temporamandibular TMJ Implants Prods. Liab. Litig.*, 844 F. Supp. 1553, 1554 (J.P.M.L. 1994) (same); *In re Roadway Express, Inc. Employment Practices Litig.*, 384 F. Supp. 612, 613 (J.P.M.L. 1974) ("the existence of and the need to eliminate [the possibility of inconsistent class determinations] presents a highly persuasive reason favoring transfer under Section 1407"); *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 493 (J.P.M.L. 1968) (transfer necessary to avoid "pretrial chaos in conflicting class action determinations"); *In re Hawaiian Hotel Room Rate Antitrust Litig.*, 438 F. Supp. 935, 936 (J.P.M.L. 1977) ("[s]ection 1407 centralization is especially important to ensure consistent treatment of the class action issues"); *In re Mut. Fund Sales Anti-Trust Litig.*, 361 F. Supp. 638, 639-40 (J.P.M.L. 1973) ("we have frequently held that the possibility for conflicting class

determinations under [Fed. R. Civ. P. 23] is an important factor favoring transfer of all actions to a single district").

II. THIS PANEL SHOULD TRANSFER THESE ACTIONS TO THE DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

Verizon respectfully recommends that this Panel transfer these cases to the United States District Court for the District of Columbia. Transfer of these cases there would maximize the benefits of coordination by serving the interests and convenience of the parties and the courts.

First, the District Court for the District of Columbia already has three constituent actions pending before it – more cases than are pending in any other district. Between them, the three cases name as defendants all three principal telecommunications carriers identified in the May 11, 2006 *USA Today* article: Verizon, AT&T, and BellSouth. MDL actions are commonly transferred to a forum where one or more actions is pending. *In re A.H. Robins Co. "Dalkon Shield" Liab. Litig.*, 406 F. Supp. 540, 542 (J.P.M.L. 1975).

Second, the District of Columbia is the preferable forum for transfer because of the district court's and court of appeals' extensive experience with national security issues in past cases. It is no overstatement to suggest that both this District and Circuit are, given their proximity to the United States Government, uniquely experienced to handle this kind of case. *See, e.g., Bancoult v. McNamara*, No. 05-5049, 2006 U.S. App. LEXIS 10065 (D.C. Cir. Apr. 21, 2006) (suit under FTCA against the Government for setting up military base on Diego Garcia); *Bennett v. Chertoff*, 425 F.3d 999 (D.C. Cir. 2005) (Title VII suit against Defense Department arising out of termination after employee could not sustain security clearance); *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005) (suit against Henry Kissinger for alleged torture acts committed against deceased Chilean general); *In re Grand Jury Subpoena (Miller)*, 397 F.3d 964 (D.C. Cir. 2005) (New York Times reporter refused to reveal source

notwithstanding Government's insistence that she do so on national security grounds); *ACLU v. FBI*, No. 05-1004, 2006 U.S. Dist. LEXIS 25290 (D.D.C. May 2, 2006) (addressing FOIA request in light of national-security exemption); *Millennium Pipeline Co., L.P. v. Gutierrez*, No. 04-233, 2006 U.S. Dist. LEXIS 14273 (D.D.C. Mar. 31, 2006) (discussing national security issues under Coastal Zone Management Act); *Adem v. Bush*, No. 05-00723, 2006 U.S. Dist. LEXIS 17070 (D.D.C. Mar. 14, 2006) (representation of prisoner at Guantanamo Bay); *AFGE v. Rumsfeld*, No. 05-2183, 2006 U.S. Dist. LEXIS 7068 (D.D.C. Feb. 27, 2006) (addressing national security justification for collective bargaining policy at Department of Defense); *Elec. Privacy Info. Ctr. v. DOJ*, 416 F. Supp. 2d 30 (D.D.C. 2006) (FOIA requests for information about domestic communications surveillance); *Leighton v. CIA*, 412 F. Supp. 2d 30 (D.D.C. 2006) (Privacy Act suit against CIA for publication of facts surrounding plaintiff's stripped security clearance following communication of classified information). Indeed, Judge Walton, to whom the three constituent cases pending in the District of Columbia have been assigned, has specific experience with both the state-secrets privilege and similar national security matters. *See Edmonds v. United States*, 323 F. Supp. 2d 65, (D.D.C. 2004); *United States v. Libby*, Criminal No. 05-394, 2006 U.S. Dist. LEXIS 24911 (D.D.C. May 3, 2006).

Third, although the Government is currently a defendant only in one of these actions, the complaints center on an alleged Government program.[15] Relevant information will likely be located in or near the District of Columbia, yet another reason to transfer the cases there. *See In re Salomon Bros. Treasury Sec. Litig.*, 796 F. Supp. 1537, 1538 (J.P.M.L. 1992) (designating as transferee court the district where the documents and witnesses relating to the defendant's

conduct were located); *In re Air Disaster at Denver*, 486 F. Supp. 241, 243 (J.P.M.L. 1980) (same); *In re Air Crash Disaster at Stapleton International Airport*, 447 F. Supp. 1071, 1073 (J.P.M.L. 1978) (same); *In re U. S. Financial Sec. Litig.*, 375 F. Supp. 1403, 1404 (J.P.M.L. 1978) (same). Further, given the Government's interest in the allegations of these complaints, as well as its actions in the *Hepting* case, it is also likely that the United States will intervene in these cases to protect national security interests. Accordingly, the Justice Department, which has already expressed a strong interest in this matter on behalf of the United States, will be well served by centralization in the District of Columbia.

Fourth, centralizing the cases in the District of Columbia will reduce the considerable logistical burdens associated with protecting classified information. For instance, in the *Hepting* proceeding, the classified affidavits supporting the Government's assertion of the state secret privilege must be flown to San Francisco for the court's review, and then flown back to the District of Columbia immediately after that review, because of the absence of suitable secure facilities in San Francisco. *See* Hearing Transcript, *Hepting*, No. 3:06-CV-0672-VRW, at 32 (D.D.C. May 17, 2006), attached hereto at Tab C. Absent coordination, the same cumbersome procedure might be necessary in a multitude of locations. It is logistically far superior to have any classified information reviewed *in camera* either in chambers or a suitable alternative in the District of Columbia, where secure facilities exist, than in a judicial district hundreds or thousands of miles away from the facilities housing the classified information. These cases involve matters of national security, and there is no warrant for potentially jeopardizing that

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[15] (*See, e.g.*, *Bissitt* Compl. ¶ 2; *Driscoll* Compl. ¶¶ 2-5; *Fuller* Compl. ¶¶ 3-6; *Herron* Compl. ¶ 4; *Hines* Compl. ¶¶ 11-12; *Mahoney v. Verizon* Compl. ¶¶ 2-5; *Marck* Compl. ¶ 6; *Mayer* Compl. ¶¶ 7-8; *see also Dolberg* Compl. ¶¶ 3-6; *Harrington* Compl. ¶ 1; *Ludman* Compl. ¶¶ 2-5; *Mahoney v. AT&T* Compl. ¶¶ 2-5; *Phillips* Compl. ¶¶ 2-5; *Potter* Compl. ¶ 7; *Schwarz* Compl. ¶¶ 3-6; *Souder* Compl. ¶¶ 2-5; *Trevino* Compl. ¶¶ 2-4; *Terkel* Compl. ¶ 2.)

security by requiring classified information to be transported from one side of the country to the other.

Fifth, The District of Columbia has the capacity to give an MDL proceeding the necessary time and attention. Of the district courts where these cases have been filed, the District of Columbia had among the fewest pending cases on its docket per judge last year:

Dist.	**Pending Cases 2005 (U.S. Rank)**
D.R.I.	329 (70)
E.D.N.Y.	622 (11)
S.D.N.Y.	689 (10)
E.D. La.	444 (32)
S.D. Tex.	529 (18)
W.D. Tex.	404 (42)
M.D. Tenn.	391 (48)
N.D. Ill.	360 (59)
D. Mont.	401 (43)
D. Or.	535 (16)
E.D. Cal.	1060 (4)
N.D. Cal.	468 (25)
S.D. Cal.	256 (83)
D.D.C.	***309 (76)***

Federal Court Management Statistics (2005) *at* http://www.uscourts.gov/fcmstat/index.html (emphasis added).

Sixth, the District of Columbia is a convenient forum for most of the parties, including the United States. Verizon and AT&T both maintain a significant corporate presence in the District of Columbia, making Washington D.C. a logical center of gravity for the defendants. Counsel for a number of parties are also present in the District of Columbia. Finally, and as noted above, the United States Government is likely to intervene in these cases, and the District of Columbia is obviously the most convenient forum for it.

Conclusion

For all the foregoing reasons, the coordination of these overlapping putative class actions would further "the convenience of [the] parties and witnesses and [would] promote the just and efficient conduct of [the] actions." 28 U.S.C. § 1407(a). Therefore, Verizon respectfully requests that this Panel enter an order transferring the actions listed in the accompanying Schedule of Actions to the United States District Court for the District of Columbia.

Dated: May 24, 2006

Respectfully submitted,

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BEFORE THE JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

In re NATIONAL SECURITY AGENCY LITIGATION	MDL Docket No. _____

VERIZON'S SCHEDULE OF NATIONAL SECURITY AGENCY ACTIONS FOR TRANSFER AND COORDINATION

Pursuant to Rule 7.2(a)(ii) of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, defendants Verizon Communications Inc., Verizon Global Networks Inc., and Verizon Northwest Inc. (collectively "Verizon") provide the following information on the actions that will be affected by their Motion for Transfer and Coordination Pursuant to 28 U.S.C. § 1407:

Plaintiffs	Defendants	Division / City	Civil Action No.	Judge Assigned
E.D. Cal.				
Greg Conner; Mark Boulet; Sergio Vasquez; James Bolich; Debra Bolich; Cheryl Scroggins; Melissa Scroggins; M. Diedre Wilten; Stephen M. Kampmann; Lloyd Brown; Claudia Salazar	AT&T; BellSouth; Verizon; Does 1 - 50	Fresno	1:06-at-00225	None assigned yet.
S.D. Cal.				
Shelly D. Souder	AT&T Corp.; AT&T Inc.		06 cv 1058 DMS AJB	The Honorable Dana M. Sabraw
N.D. Cal.				
Tash Hepting; Gregory Hicks; Erik Knutzen	AT&T Corp.; AT&T, Inc.; Does 1 - 20		C 06 0672	The Honorable Vaughn R. Walker
D.D.C.				
David M. Driscoll, Jr.; Anne Brydon Taylor; Cory Brown	Verizon Communications, Inc.		06-cv-00916-RBW	The Honorable Reggie B. Walton
Harold Ludman	AT&T, Inc.		06-cv-00917-RBW	The Honorable Reggie B. Walton
Lawrence Phillips	BellSouth Corporation		06-cv-00918-RBW	The Honorable Reggie B. Walton
N.D. Ill.				
Steven Schwarz; James Joll; Ramon Goggins	AT&T Corp.; AT&T Inc.; Does 1 - 20		1:06-cv-0280	The Honorable Matthew F. Kennelly
Studs Terkel; Barbara Flynn Curie; Diane C. Geraghty; Gary S. Gerson; James D. Montgomery; Quentin Young; American Civil Liberties Union of Illinois	AT&T Inc.		06C 2837	The Honorable James B. Zagel

E.D. La.				
Tina Herron; Brandy Sergi	Verizon Global Networks, Inc.; AT&T Corp; American Telephone and Telegraph Company; BellSouth Communication Systems, LLC; BellSouth Telecommuncations, Inc.		06-2491	The Honorable Jay C. Zainey
D. Mont.				
Steve Dolberg	AT&T Corp., AT&T, Inc.	Missoula	CV-06-78-M-DWM	The Honorable Donald W. Molloy
Rhea Fuller	Verizon Communications, Inc.; Verizon Wireless, LLC	Missoula	CV-06-77-DWM	The Honorable Donald W. Molloy
E.D.N.Y.				
Edward Marck; Carol Waltuch	Verizon Communications, Inc.; Does 1 - 10		CV-06 2455	The Honorable Joseph F. Bianco
S.D.N.Y.				
Carl J. Mayer; Bruce I. Afran	Verizon Communciations Inc.; National Security Agency; George W. Bush		06 cv 3650	The Honorable Leonard B. Sand
D. Or.				
Darryl Hines	Verizon Northwest, Inc.		CV 06 694	The Honorable Janice M. Stewart

D.R.I.				
Charles F. Bissitt, Sandra Bissit, George Hayek, III, June Matrumalo, Gerard Thibeault, Arthur Bouchard, Maryann Bouchard, Aldo Caparco, Janice Caparco, Jenna Caparco, Rose Deluca, Nicole Mirabella, Patricia Pothier, Paul Pothier, Marshall Votta, Vincent Matrumalo, Paula Matrumalo, Jennifer Thomas, Christine Douquette, Maryanne Klaczynski	Verizon Communications, Inc., BellSouth Corporation		06-220	The Honorable William E. Smith
Pamela A. Mahoney	AT&T Communications, Inc.		CA 06 223	The Honorable Ernest C. Torres
Pamela A. Mahoney	Verizon Communications, Inc.		CA 06 224	The Honorable William E. Smith
M.D. Tenn.				
Kathryn Potter	BellSouth Corp.		3 06*0469	The Honorable William J. Haynes, Jr.
S.D. Tex.				
Mary J. Trevino	AT&T Corp.; AT&T Inc.	Corpus Christi	2:06-cv-00209	The Honorable Hayden W. Head, Jr.
W.D. Tex.				
James C. Harrington; Richard A. Grigg; Louis Black; The Austin Chronicle; Michael Kentor	AT&T, Inc.	Austin	A06CA374 LY	The Honorable Earl Leroy Yeakel III

Dated: May 24, 2006

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of Defendants Verizon Communcations Inc., Verizon Global Networks Inc., and Verizon Northwest Inc.'s Notice of Filing of Motion for Transfer and Coordination Pursuant to 28 U.S.C. § 1407 (with supporting memorandum and the exhibits thereto) have been delivered via first class mail to the clerk of the following federal district courts in which an action is pending that will be affected by this Motion, on this 24th day of May, 2006:

The Honorable Donald S. Black United States District Court for the Eastern District of California Fresno Division 2500 Tulare St Fresno, CA 93721	The Honorable Dana M. Sabraw United States District Court for the Southern District of California United States Courthouse 940 Front Street San Diego, CA 92101
The Honorable Vaughn R. Walker United States District Court for the Northern District of California United States Courthouse 450 Golden Gate Avenue San Francisco, CA 94102	The Honorable Reggie B. Walton United States District Court for the District of Columbia United States Courthouse 333 Constitution Avenue, N.W. Washington, D.C. 20001-2866
The Honorable Matthew F. Kennelly United States District Court for the Northern District of Illinois Everett McKinley Dirksen Building 20th floor 219 South Dearborn Street Chicago, Illinois 60604	The Honorable James B. Zagel United States District Court for the Northern District of Illinois Everett McKinley Dirksen Building 20th floor 219 South Dearborn Street Chicago, Illinois 60604
The Honorable Jay C. Zainey United States District Court for the Eastern District of Louisiana 500 Poydras Street New Orleans, LA 70130	The Honorable Donald W. Molloy United States District Court for the District of Montana Russell Smith Federal Building 201 East Broadway Post Office Box 7309 Missoula, MT 59801
The Honorable Joseph F. Bianco United States District Court for the Eastern District of New York 225 Cadman Plaza East Brooklyn, NY 11201	The Honorable Leonard B. Sand United States District Court for the Southern District of New York 500 Pearl Street New York, NY 10007

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The Honorable Janice M. Stewart United States District Court for the District of Oregon Mark O. Hatfield U.S. Courthouse 1000 S.W. Third Avenue Portland, OR 97204-2902	The Honorable William E. Smith United States District Court for the District of Rhode Island Federal Building and Courthouse One Exchange Terrace Providence, RI 02903
The Honorable Ernest C. Torres United States District Court for the District of Rhode Island Federal Building and Courthouse One Exchange Terrace Providence, RI 02903	The Honorable William J. Haynes, Jr. United States District Court for the Middle District of Tennessee United States Courthouse 801 Broadway Nashville, TN 37203
The Honorable Hayden W. Head, Jr. United States District Court for the Southern District of Texas 1133 N Shoreline Blvd Corpus Christi, TX 78401	The Honorable Earl Leroy Yeakel III United States District Court for the Western District of Texas U.S. District Clerk's Office 200 West 8th St., Room 130 Austin, Texas 78701

I, the undersigned, certify that a copy of Defendants Verizon Communcations Inc., Verizon Global Networks Inc., and Verizon Northwest Inc.'s Motion for Transfer and Coordination Pursuant to 28 U.S.C. § 1407 (with supporting memorandum and the exhibits thereto) has been served via first class mail to the following plaintiff's counsel of record for all of the actions that will be affected by this motion, on this 24th day of May, 2006:

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I, the undersigned, certify that a copy of Defendants Verizon Communcations Inc., Verizon Global Networks Inc., and Verizon Northwest Inc.'s Motion for Transfer and Coordination Pursuant to 28 U.S.C. § 1407 (with supporting memorandum and the exhibits thereto) has been served via first class mail (and through agreement) to the following defense counsel of record for all of the actions that will be affected by this motion, on this 24th day of May, 2006:

Bradford A. Berenson Sara J. Gourley Susan A. Weber Sidley & Austin LLP 1501 K Street, N.W. Washington, D.C. 20005 (202) 736-8971 (202) 736-8711 *Attorney to Defendants AT&T Corp.; AT&T Inc.; AT&T Communications Inc.*	Jane F. Thorpe Alston & Bird LLP One Atlantic Center 1201 West Peachtree Street Atlanta, GA 30309-3424 (404) 881-7822 (404) 881-7777 *Attorney to Defendants BellSouth Corp.*

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Matthew Shors

EXHIBIT 5

**BEFORE THE JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION**

IN RE NATIONAL SECURITY AGENCY LITIGATION	)	MDL Docket No. 1791

THE UNITED STATES' MOTION FOR TRANSFER AND COORDINATION PURSUANT TO 28 U.S.C. § 1407 TO ADD ACTIONS TO MDL 1791 AND RESPONSE TO VERIZON'S MOTION FOR TRANSFER AND COORDINATION

Pursuant to Rule 7.1(b) and 7.2(h) of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, the United States of America hereby respectfully responds to Verizon's Motion for Transfer and Coordination ("Verizon's Motion") and also separately moves the Judicial Panel on Multidistrict Litigation (hereinafter "Panel" or "JPML") for an order pursuant to 28 U.S.C. § 1407: (1) transferring an additional five actions (pending before five different district courts) (hereinafter "added actions") against the United States as sole defendant to the district court chosen to coordinate the above-captioned multidistrict litigation; and (2) coordinating those added actions for pretrial proceedings with the actions subject to Verizon's Motion. A list of the added actions is attached hereto as the United States' Schedule of National Security Cases For Transfer and Coordination to be Added as Actions to MDL 1791.

AVERMENTS IN SUPPORT OF THE UNITED STATES' MOTION

In support of adding these actions to MDL 1791 and thereby in support of the transfer and coordination of these actions, movant United States avers to the following, as more fully set forth in the accompanying memorandum in support of this motion and in response to Verizon's pending motion for transfer and coordination.

1. Like the 20 civil actions subject to the motion of Verizon Communications Inc., Verizon Global Networks Inc., and Verizon Northwest Inc.'s (hereinafter "Verizon") for transfer and coordination (hereinafter "Verizon Motion"), the added actions put at issue the lawfulness of foreign intelligence surveillance activities by the National Security Agency ("NSA"). Accordingly, there is a clear commonality of legal theory and purported statutory violations claimed across all the cases. In particular, each of the added actions alleges that the United States is engaged in a foreign intelligence program that involves the alleged disclosure of access to the content and/or records of telephone and internet communications, in purported violation of federal statutes and the U.S. Constitution.

2. As required by 28 U.S.C. § 1407(a), the added actions proposed for transfer and coordination "involv[e] one or more common questions of fact" with the cases already under consideration by the Panel. In addition, the added actions contend that a common foreign intelligence surveillance program involving the alleged disclosure or access to the content of, and/or records concerning, telephone and/or internet communications occurred and that this was in violation of United States law.

3. The proposed transfer and coordination "will be for the convenience of parties and witnesses and will promote the just and efficient conduct" of the actions. 28 U.S.C. § 1407(a). For example, because both the existing cases subject to Verizon's Motion and the

added actions arise from a common set of claims over the nature of the purported Government program at issue here, common questions of pretrial procedure exist. In particular, the United States intends to assert the state secrets privilege in the various cases subject to the transfer motions to seek their dismissal. This will entail common submissions of a highly sensitive nature that, if transferred and coordinated, would serve the convenience of the United States and its declarants. The United States' assertion of the state secrets privilege is fully supported by Supreme Court and other established case law, and in the circumstances further supports transfer and consolidation of these actions to one district court.

4. Given the national security concerns in this case, the District of Columbia would be the most logical and convenient forum. Indeed, the large number of cases against the telecommunications companies and the United States that make allegations relating to foreign intelligence activities would make the District of Columbia most convenient for the federal government.

5. The United States bases this motion on a Memorandum in Response to Verizon's Motion and in Support of this Motion to Transfer and Coordinate, the pleadings and papers on file herein, and such other matters as may be presented to the Panel at the time of hearing.

RESPONSES TO AVERMENTS IN VERIZON'S MOTION

The United States responds to the specific allegations in Verizon's Motion as follows:

1. The United States admits that the actions subject to Verizon's Motion allege that telecommunications carriers purportedly assisted the United States by providing access to or disclosing customer telephone and internet records. The United States admits that most of these actions were filed immediately following a May 11, 2006, *USA Today* article reporting that these alleged actions had occurred. The United States admits that all but one of these cases seek relief under the Electronic Communications Privacy Act, 18 U.S.C. § 2701 et seq., and that most additionally seek some type of nationwide or regional class action relief. The United States admits any remaining allegations of paragraph 1.

2. The United States admits that the actions subject to Verizon's Motion involve common questions of fact. The United States admits that one common questions is plaintiffs' factual allegations that the telecommunications carriers intercepted customer communications and provided the NSA with access to customer calling records. The United States admits all remaining allegations of paragraph 2.

3. The United States admits that transfer and coordination of these related cases "will be for the convenience of the parties and witnesses and will promote the just and efficient conduct" of the actions for purposes of 28 U.S.C. § 1407(a).

4. The United States admits that coordinating these actions before a single court will eliminate duplicative discovery, reduce the potential disclosure of classified information, prevent duplicative and conflicting pretrial rulings, conserve judicial resources, reduce the costs of litigation, and allow the cases to proceed more quickly to trial. Specifically, the United States admits that it intends to assert the state secrets privilege in these actions and to seek their

dismissal and admits that coordination will protect the national security interests.

5. The United States admits that the United States District Court for the District of Columbia would be an appropriate transferee forum and a convenient forum for counsel and the defendants. The United States further admits that the District of Columbia has substantial expertise in dealing with legal issues involving national security and avers that due to the manner in which classified material is maintained, it would also be the most secure and convenient forum for the Government if the cases were transferred to the District of Columbia. The United States also avers that the risks associated with national security information would be lessened in a judicial district coextensive with the seat of Federal Government. The United States admits that three related cases were pending before the District Court for the District of Columbia when Verizon's Motion was filed. The United States admits all remaining allegations of paragraph 5.

6. The United States admits that Verizon's Motion is based on Verizon's Brief in Support of its Motion, the pleadings and papers attached thereto, and all other such matters that will be presented to the Panel at the time of hearing.

Respectfully submitted,

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Attorneys for the United States of America

DATED: June 19, 2006

BEFORE THE JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

IN RE NATIONAL SECURITY AGENCY LITIGATION	MDL Docket No. 1791

THE UNITED STATES' COMBINED MEMORANDUM IN SUPPORT OF VERIZON COMMUNICATIONS INC.'S, VERIZON GLOBAL NETWORKS INC.'S, AND VERIZON NORTHWEST INC.'S MOTION FOR TRANSFER AND COORDINATION PURSUANT TO 28 U.S.C. § 1407 AND MEMORANDUM IN SUPPORT OF THE UNITED STATES' MOTION FOR TRANSFER AND COORDINATION PURSUANT TO 28 U.S.C. § 1407

INTRODUCTION

Verizon Communications Inc., Verizon Global Networks Inc., and Verizon Northwest Inc.'s (hereinafter "Verizon") have moved the Judicial Panel on Multidistrict Litigation (hereinafter "Panel" or "JPML") for an order, pursuant to 28 U.S.C. § 1407: (1) transferring at least 20 virtually identical purported class actions (pending before at least 14 different district courts) to a single district court; and (2) coordinating those actions for pretrial proceedings (hereinafter "Motion for Transfer and Coordination" or "Verizon's Motion"). All of these purported class actions essentially allege that various telecommunication companies, including Verizon, unlawfully disclosed the content of and/or records regarding plaintiffs' telephone and/or internet communications records to the National Security Agency ("NSA"). Verizon's

Motion asserts that a multidistrict litigation proceeding is warranted because all of the statutory criteria for transfer and coordination – *i.e.*, the civil actions "involve[] one or more common questions of fact" and transfer for coordinated pretrial proceedings "will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions," 28 U.S.C. § 1407(a) – are clearly met.

The United States strongly supports Verizon's Motion for Transfer and Coordination, and urges this Panel to transfer all the pending lawsuits to one district court for all pretrial proceedings. Most significantly, each of these cases puts at issue alleged foreign intelligence surveillance activities undertaken by the United States Government. As such, the unique aspect of these actions – *i.e.*, the United States' intention to assert the military and state secrets privilege and other relevant statutory privileges[1] in these actions and seek their dismissal – warrants the transfer of these cases to one court to allow the resolution of this threshold matter in the most efficient manner for the courts and the parties, while protecting highly-sensitive and classified information, the disclosure of which would be harmful to the national security. Moreover, these cases fall squarely within the requirements of section 1407. All of these similar purported class actions allege that the telecommunications companies unlawfully provided the plaintiffs' telephone and/or internet communications records to the United States Government. It is beyond dispute that all of these actions share common questions of fact, including the same causes of actions and overlapping alleged classes. Transferring all of these cases to one court for pretrial proceedings will be more convenient for the parties, will not prejudice any parties' interest, and will conserve judicial resources.

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[1] The phrase "state secrets privilege" is often used in this memorandum to refer collectively to the military and state secrets privilege and the statutory privileges invoked by the United States.

In addition, the United States also seeks to add to the proceedings in MDL 1791 a total of five actions (hereinafter "added actions") directly solely against the United States, *See* United States' Schedule of Added National Security Agency Actions for Transfer and Coordination Pursuant to 28 U.S.C. § 1407 to MDL 1791. These cases, like the cases against the telecommunications companies, allege that the United States is engaged in a foreign intelligence program that involves the alleged disclosure of or access to the content of, and/or records concerning, telephone and/or internet communications, in purported violation of federal statutes and the U.S. Constitution. The added actions also allege that the United States violated a host of statutory provisions, many of which overlap with the claims in cases subject to Verizon's Motion. In addition, common questions relating to pretrial procedure, particularly the United States' intention to assert the state secrets privilege and seek dismissal, arise across all the cases regardless of whether the case is against a telecommunications company, the Government, or both. Thus, judicial economy and convenience to the parties and witnesses strongly favor the transfer and coordination of the added actions with those subject to Verizon's Motion. Finally, the United States' unique concerns over the integrity and security of the presentation of national security information are a unifying factor militating in favor of transfer and coordination of the added actions.

BACKGROUND

A. The Events Of September 11, 2001

On September 11, 2001, the al Qaeda terrorist network launched a set of coordinated attacks along the East Coast of the United States. Four commercial jetliners, each carefully selected to be fully loaded with fuel for a transcontinental flight, were hijacked by al Qaeda operatives. Those operatives targeted the Nation's financial center in New York with two of the

jetliners, which they deliberately flew into the Twin Towers of the World Trade Center. Al Qaeda targeted the headquarters of the Nation's Armed Forces, the Pentagon, with the third jetliner. Al Qaeda operatives were apparently headed toward Washington, D.C. with the fourth jetliner when passengers struggled with the hijackers and the plane crashed in Shanksville, Pennsylvania. The intended target of this fourth jetliner was most evidently the White House or the Capitol, strongly suggesting that al Qaeda's intended mission was to strike a decapitation blow to the Government of the United States—to kill the President, the Vice President, or Members of Congress. The attacks of September 11 resulted in approximately 3,000 deaths—the highest single-day death toll from hostile foreign attacks in the Nation's history. In addition, these attacks shut down air travel in the United States, disrupted the Nation's financial markets and Government operations, and caused billions of dollars of damage to the economy.

On September 14, 2001, the President declared a national emergency "by reason of the terrorist attacks at the World Trade Center, New York, New York, and the Pentagon, and the continuing and immediate threat of further attacks on the United States." Proclamation No. 7463, 66 Fed. Reg. 48199 (Sept. 14, 2001). The United States also launched a massive military response, both at home and abroad. In the United States, combat air patrols were immediately established over major metropolitan areas and were maintained 24 hours a day until April 2002. The United States also immediately began plans for a military response directed at al Qaeda's training grounds and haven in Afghanistan. On September 14, 2001, both Houses of Congress passed a Joint Resolution authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" of September 11. Authorization for Use of Military Force, Pub. L. No. 107-40 § 21(a), 115 Stat. 224, 224 (Sept. 18, 2001) ("Cong. Auth."). Congress also

expressly acknowledged that the attacks rendered it "necessary and appropriate" for the United States to exercise its right "to protect United States citizens both at home and abroad," and acknowledged in particular that the "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." *Id.* pmbl.

As the President made clear at the time, the attacks of September 11 "created a state of armed conflict." Military Order, § 1(a), 66 Fed. Reg. 57833, 57833 (Nov. 13, 2001). Indeed, shortly after the attacks, NATO took the unprecedented step of invoking article 5 of the North Atlantic Treaty, which provides that an "armed attack against one or more of [the parties] shall be considered an attack against them all." North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246; see also Statement by NATO Secretary General Lord Robertson (Oct. 2, 2001), available at http://www.nato.int/docu/speech/2001/s011002a.htm ("[I]t has now been determined that the attack against the United States on 11 September was directed from abroad and shall therefore be regarded as an action covered by Article 5 of the Washington Treaty . . . ."). The President also determined that al Qaeda terrorists "possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government," and he concluded that "an extraordinary emergency exists for national defense purposes." Military Order, § 1(c), (g), 66 Fed. Reg. at 57833-34.

B. **The Continuing Terrorist Threat Posed by al Qaeda**

With the attacks of September 11, Al Qaeda demonstrated its ability to introduce agents into the United States undetected and to perpetrate devastating attacks. But, as the President has made clear, "[t]he terrorists want to strike America again, and they hope to inflict even more

damage than they did on September the 11th." Press Conference of President Bush (Dec. 19, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/12/20051219-2.html. ("President's Statement"). Thus, the President has explained that finding al Qaeda sleeper agents in the United States remains one of the paramount national security concerns to this day. *See id.*

Since the September 11 attacks, al Qaeda leaders have repeatedly promised to deliver another, even more devastating attack on America. For example, in October 2002, al Qaeda leader Ayman al-Zawahiri stated in a video addressing the "citizens of the United States": "I promise you that the Islamic youth are preparing for you what will fill your hearts with horror." In October 2003, Osama bin Laden stated in a released videotape that "We, God willing, will continue to fight you and will continue martyrdom operations inside and outside the United States . . . ." And again in a videotape released on October 24, 2004, bin Laden warned U.S. citizens of further attacks and asserted that "your security is in your own hands." In recent months, al Qaeda has reiterated its intent to inflict a catastrophic terrorist attack on the United States. On December 7, 2005, al-Zawahiri stated that al Qaeda "is spreading, growing, and becoming stronger," and that al Qaeda is "waging a great historic battle in Iraq, Afghanistan, Palestine, and even in the Crusaders' own homes." Since September 11, al Qaeda has staged several large-scale attacks around the world, including in Indonesia, Madrid, and London, killing hundreds of people.

Against this backdrop, the President has explained that, following the devastating events of September 11, 2001, he authorized the NSA to intercept international communications into and out of the United States of persons linked to al Qaeda or related terrorist organizations. *See* President's Statement. The Attorney General of the United States has further explained that, in

order to intercept a communication, there must be "a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda." Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005), *available at* http://whitehouse.gov/news/releases/2005/12/20051219-1.html. The purpose of these intercepts is to provide the United States with an early warning system to detect and prevent another catastrophic terrorist attack in the United States. *See* President's Statement. The President has stated that the NSA activities "ha[ve] been effective in disrupting the enemy, while safeguarding our civil liberties." *Id.*

C. **Pending Lawsuits Against the Telecommunications Companies and the United States**

Upon media reports in December 2005 of certain post-9/11 intelligence gathering activities as well as other more recent news articles, over twenty putative class action complaints have been filed in numerous district courts across the country against various telecommunications companies. All of these complaints essentially allege that the telecommunication companies provided the content and/or records of plaintiffs' telephone and internet communications records to the NSA in violation of various federal and state statutes as well as the Constitution of the United States. *See* Verizon's Motion for Transfer and Coordination at 4-7 (brief summary of cases), and attached complaints subject to Verizon's Motion for Transfer. The complaints generally seek an injunction against the telecommunications companies that would prohibit them from providing the alleged information to the Government.[2] *Id.* Many of the complaints seek substantial monetary damages. *Id.*

[2] Some complaints seek preliminary relief as well. *See, e.g., Terkel et al. v. AT&T Corp. et al.*, No. 06C2837 (N.D. Ill.).

The first of these cases – *Hepting v. AT&T Corp.*, No. 06-0672 (N.D. Cal.), which was filed on January 31, 2006 – challenges AT&T's purported cooperation with the alleged foreign-intelligence activities. On May 13, 2006, before the bulk of these other lawsuits against the telecommunication companies were even filed, the United States asserted the state secrets privilege by the Director of National Intelligence ("DNI"), and related statutory privilege assertions (by the DNI and the Director of the National Security Agency ("DIRNSA")), in the *Hepting* case. Through these assertions of privilege, the United States seeks to protect against the unauthorized disclosure in litigation of certain intelligence activities, information, sources, and methods, implicated by the allegations in *Hepting*. The United States explained both in a public and in an *in camera, ex parte* memorandum (supported by declarations submitted by the DNI and DIRNSA) that the disclosure of the information to which these privilege assertions apply would cause exceptionally grave harm to the national security of the United States. The United States also moved to intervene in *Hepting*, pursuant to Federal Rule of Civil Procedure 24, for the purpose of seeking dismissal of the action or, in the alternative, summary judgment based on the United States' assertion of the state secrets privilege. The United States explained that *Hepting* cannot be litigated because adjudication of the plaintiffs' claims would put at risk the disclosure of privileged national security information. The United States' assertion of the state secrets privilege and motion to dismiss or, in the alternative, for summary judgment is currently pending.

On May 24, 2006, Verizon submitted to this Panel its Motion for Transfer and Coordination pursuant to 28 U.S.C. § 1407. Verizon's Motion requests that the Panel (1) transfer these approximately 20 virtually identical purported class actions (pending before 14 different federal district courts) to a single district court; and (2) coordinate those actions for

pretrial proceedings pursuant to 28 U.S.C. § 1407.

The United States is a named defendant in only one of the actions subject to Verizon's Motion[3] and has moved to intervene in *Hepting*. Nonetheless, the United States, as explained below, intends to assert the state secrets privilege in all of these actions and seek their dismissal.

D. **Pending Lawsuits Against Only the United States**

Plaintiffs in the added actions against the Government are individuals and organizations who allege either that they have been subject to surveillance or that they face a great likelihood of being subject to the challenged surveillance program because they make frequent calls and send emails to overseas destinations where terrorists might be located. *See American Civil Liberties Union, et al. v. National Security Agency, et al.*, No. 06-cv-10204 (E.D. Mich.); *Center for Constitutional Rights, et al. v. Bush, et al.*, No. 06-cv-313 (S.D.N.Y.); *Al-Haramain Islamic Foundation, et al. v. Bush, et al.*, No. 06-cv-274 (D. Or.); *Shubert v. Bush, et al.*, No. 06-cv-02282 (E.D.N.Y.); *Guzzi v.Bush, et al.*, No. 06-cv-0136 (N.D. Ga.). While these cases are at various stages, the most recent of these cases – *Shubert v. Bush, et al.* – was filed less than a week before Verizon's Motion. Plaintiffs in all these cases contend that the alleged surveillance activities violate their rights under the First and Fourth Amendments and exceeds statutory authority and the President's constitutional authority. Many of the statutory challenges to the United States' authority, such as those under the Electronic Communications Privacy Act and Federal Communications Act, raise issues similar to those in the cases against the

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[3] The NSA and President Bush have been named as defendants in *Mayer et al. v. Verizon et al.*, 1:06-cv-03650-LBS (S.D.N.Y.). Moreover, the NSA has been named as a defendant in two similar cases filed after Verizon's Motion for Transfer – *Electron Tubes Inc. v. Verizon et al.*, No. 06cv4048 (S.D. N.Y.), and *Lebow et al. v. BellSouth Corp. et al*, No 1:06-cv-1289 (N.D. Ga.).

telecommunications companies.

Two of these cases, *American Civil Liberties Union, et al. v. National Security Agency, et al.*, No. 06-cv-10204 (E.D. Mich.); *Center for Constitutional Rights, et al. v. Bush, et al.*, No. 06-cv-313 (S.D.N.Y.), have been pending since January 17, 2006. The United States has asserted the state secrets privilege and moved to dismiss both of those cases.

ARGUMENT

This Panel is authorized under 28 U.S.C. § 1407 to consolidate and transfer "civil actions involving one or more common questions of fact" to any district court for coordinated or consolidated pretrial proceedings upon the Panel's "determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." 28 U.S.C. § 1407(a). The purpose of this transfer procedure is to conserve judicial resources and to avoid the delays that are bound to result if all aspects of pretrial proceedings were conducted separately. *See* Moore's Federal Practice – Civil, Chapter 112 Multidistrict Litigation § 112.02.

All of the cases that the parties seek to transfer and coordinate in one district court fall squarely within the requirements of 28 U.S.C. § 1407(a). In fact, given that the cases implicate alleged foreign-intelligence surveillance activities undertaken by the United States Government, unique and important considerations warrant transferring all these cases to one district court for coordination and pretrial proceeding.

I. The Actions Subject to Verizon's Motion Satisfy All of the Requirements of Section 1407(a), and the Added Consideration of the United States' Intention to Assert the State Secrets Privilege Warrants Transfer and Coordination in One District Court

All of the cases subject to Verizon's Motion for Transfer satisfy the requirements of section 1407(a), *i.e.*, they "involve[] one or more common questions of fact" and transfer for

coordinated pretrial proceedings "will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions." 28 U.S.C. § 1407(a).

A. **All of the Actions Share One or More Common Questions of Fact**

It is without doubt that all of these actions share "one or more common questions of fact." *See* 28 U.S.C. § 1407(a); *see also* Verizon's Motion for Transfer. All of these actions put at issue the alleged foreign-intelligence surveillance activities undertaken by the United States Government. The factual allegations in each of these complaints are virtually identical; they all essentially allege that, after September 11, 2001, the telecommunications companies have unlawfully provided the NSA with information regarding the communications of plaintiffs and the putative class members without judicial review or approval and without notice. *See, e.g., Marck v. Verizon Communications, Inc.*, No. CV-06-2455 (E.D.N.Y. filed May 19, 2006); *Harrington v. AT&T*, No. A06CA374LY (W.D. Tex. filed May 18, 2006); *Trevino v. AT&T Corp.*, No. 2:06-cv-00209 (S.D. Tex. filed May 17, 2006).[4] Indeed, except for the named plaintiffs, many of the complaints are similarly drafted and assert the same allegations regarding the alleged disclosure of records by the telecommunications companies. *See, e.g., Schwarz v. AT&T Corp.*, No. 1:06-cv-2680 (N.D. Ill. filed May 15, 2006); *Mahoney v. AT&T Communications, Inc.*, No. 1:06-cv-00224-S-LDA (D.R.I. filed May 15, 2006) And the purported classes in each of the actions tend to overlap each other. *See, e.g., Bissitt v. Verizon Communications, Inc.*, No. 1:06-cv-00220-T-LDA (D.R.I. filed May 15, 2006); *Marck v. Verizon Communications, Inc.*, No. CV-06-2455 (E.D.N.Y. filed May 19, 2006); *Hepting v. AT&T Corp.*, No. C 06 00672 (N.D. Cal. filed Jan. 31, 2006); *Mahoney v. AT&T*

[4] A list of all cases cited herein, which are subject to Verizon's Motion for Transfer and Coordination, are attached to Verizon's Motion.

Communications, Inc., No. 1:06-cv-00224-S-LDA (D.R.I. filed May 15, 2006).

In addition, these actions generally bring the same causes of actions – namely under the Electronic Communications Privacy Act, 18 U.S.C. § 2701 *et seq.* – and seek the same injunctive relief, *i.e.*, to enjoin the telecommunications companies from providing foreign intelligence assistance to the Government, as all these plaintiffs allege to have occurred. *See, e.g., Terkel v. AT&T Inc.*, No. 06C 2837 (N.D. Ill. filed May 22, 2006); *Dolberg v. AT&T Corp.*, No. CV 06-78-M-DWM (D. Mont. filed May 15, 2006); *Fuller v. Verizon Communications, Inc.*, No. 06-cv-00077-DWM (D. Mont. filed May 12, 2006). Most of the complaints also seek substantial monetary damages. *See, e.g., Ludman v. AT&T Inc.*, No. 06-cv-00917-RBW; *Mayer v. Verizon Communications Inc.*, No. 1:06-cv-03650 (S.D.N.Y. filed May 12, 2006); *Hepting v. AT&T Corp.*, No. C-06-00672 JCS (N.D. Cal. filed Jan. 31, 2006).

There cannot be any dispute that all of these actions share "one or more common questions of fact."

B. The United States Intends to Assert the State Secrets Privilege in All of the Pending Actions Brought and Seek Their Dismissal

As noted, all of these actions against the telecommunications companies put at issue alleged foreign-intelligence surveillance activities undertaken by the United States Government. The United States intends to assert the state secrets privilege in these actions and to seek their dismissal. The United States' assertion of the state secrets privilege is fully supported by Supreme Court and other established case law, and in the circumstances further supports transfer and consolidation of these actions to one district court.

The ability of the executive to protect military or state secrets from disclosure has been recognized from the earliest days of the Republic. *See Totten v. United States*, 92 U.S. 105

(1875); *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807); *United States v. Reynolds*, 345 U.S. 1 (1953). The privilege derives from the President's Article II powers to conduct foreign affairs and provide for the national defense. *United States v. Nixon*, 418 U.S. 683, 710 (1974). Accordingly, it "must head the list" of evidentiary privileges. *Halkin v. Helms*, 598 F.2d 1, 7 (D.C. Cir. 1978).

"Once the privilege is properly invoked and the court is satisfied that there is a reasonable danger that national security would be harmed by the disclosure of state secrets, the privilege is absolute," and the information at issue must be excluded from disclosure and use in the case. *Kasza v. Browner*, 133 F.3d 1159 (9th Cir.), *cert. denied*, 525 U.S. 967 (1998). Moreover, 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." *Id.* at 1166. In such cases, "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." *See Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236 (4th Cir. 1985). Dismissal is also necessary when either the plaintiff cannot make out a prima facie case in support of its claims absent the excluded state secrets, or if the privilege deprives the defendant of information that would otherwise provide a valid defense to the claim. *Kasza*, 133 F.3d at 1166.

Upon transfer by the Panel, the United States intends to assert the state secrets privilege in the transferee court and will demonstrate why disclosure of certain information necessary to the litigation of these actions would be harmful to the national security. Also upon transfer by the Panel, the United States intends to seek dismissal by demonstrating that the very subject matter of plaintiffs' suits is a state secret, that plaintiffs will be unable to make out a prima facie case in support of their claims, and that defendants are unable to defend any alleged actions.

Because all the factual allegations of these actions are essentially the same, the United States should be required to make this assertion and seek dismissal as few times as necessary.

C. Transfer of These Cases Promotes Just and Efficient Conduct of These Actions

1. Transfer and Coordination Would Facilitate Pretrial Proceedings

Because all these cases are factually similar, advance similar causes of actions, and seek certification of similar and overlapping classes, pretrial proceedings in all these actions will virtually be the same. Transfer and coordination to one district court will preclude inconsistent rulings relating to pretrial proceedings by different district courts on similar issues. For this reason alone, transfer and coordination of these actions will promote the just and efficient conduct of these actions. *See, e.g., In re Prempro Products Liability Lit.*, 254 F. Supp. 2d 1366, 1367 (J.P.M.L. 2003) ("[c]entralization under Section 1407 is necessary in order to eliminate duplicative discovery, prevent inconsistent pretrial rulings (especially with respect to the question of class certification), and conserve the resources of the parties, their counsel and the judiciary").

The resolution of the United States' intended assertion of the state secrets privilege and motion to dismiss by a single district court, moreover, further supports the judicial economy of centralization of these actions. Pretrial motions, such as motions to dismiss or summary judgment, are the types of pretrial proceedings that are appropriate for the transferee court to consider. *See, e.g., U.S. v. Baxter Intern., Inc.* 345 F.3d 866 (11th Cir. 2003), *cert. denied*, 542 U.S. 946 (2004) (court affirmed in part and reversed in part district court's granting of defendants' motions to dismiss in multidistrict litigation actions). And the United States' submissions will present a threshold question as to whether, by virtue of state secrets and the

harm to national security that would result from unauthorized disclosure in litigation, these actions should proceed any further. *See, e.g., Tenet v. Doe*, 544 U.S. 1, 6 n. 4 (2005) (court should first consider threshold issues raised by the applicability of a rule barring adjudication relating to secret espionage agreements). Consolidation of these actions in one district court will facilitate the prompt resolution of the United States' intended assertions and preclude any potential inconsistent rulings in similar cases.

2. Reasons of National Security Favor Transfer and Coordination in One District Court

The United States' assertion of the state secrets privilege presents unique national security concerns that this Panel should consider in making its decision whether these cases should be transferred in one district court. Given the highly sensitive and classified information at issue, there is an increased risk of disclosure of such information, which would be harmful to the national security, if the United States is required to present state secrets in multiple fora. The Supreme Court has recognized the unique aspects of the assertion of the state secrets privilege and the need to use extreme care in reviewing materials submitted in support of this assertion. *See Reynolds*, 345 U.S. at 10; *see also Clift v. United States*, 597 F.2d 826, 829 (2d Cir. 1979) ("It is not to slight judges, lawyers or anyone else to suggest that any such disclosure carries with it serious risk that highly sensitive information may be compromised. In our own chambers, we are ill equipped to provide the kind of security highly sensitive information should have.") (quoting *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1369 (4th Cir. 1975), *cert. denied*, 421 U.S. 992 (1975)). The Government often submits classified declarations for *in camera, ex parte* review where the state secrets privilege is invoked. *See Kasza*, 133 F.3d at 1169-70; *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544 (2d Cir. 1991); *Fitzgerald v. Penthouse*

Int'l, Ltd., 776 F.2d 1236 (4th Cir. 1985); *Molerio v. FBI*, 749 F.2d 815, 819, 822 (D.C. Cir. 1984); *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc); *see also, 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 revelation of state secrets), *cert. denied*, 126 S.Ct. 1052 (2006). Thus, for example, in *Hepting v. AT&T Corp., et al.*, No. C-06-0672-VRW (N.D. Cal.), the assertion of the state secrets privilege was supported by the United States' public and *in camera, ex parte* memorandum and declarations submitted by the DNI and DIRNSA establishing that the disclosure of the information to which these privilege assertions apply would cause exceptionally grave harm to the national security of the United States.

It is unnecessary and serves no interest to require the same litigation to proceed in multiple courts around the country where the Government intends to protect significant matters of national security. Efficiency and security dictate that as few courts as possible – rather than multiple courts proceedings on similar tracks – should decide the appropriateness and effect of the United States' assertion of the state secrets privilege in all these actions. In the interest of national security, therefore, this Panel should exercise its authority under 28 U.S.C. § 1407 to transfer these cases for coordination of pretrial proceedings.

D. **Transfer of These Cases Will Serve the Convenience of the Parties and Witnesses**

The statutory requirement that transfer and coordination of these cases serve the convenience of the parties and witnesses is also met here. Litigating these cases in multiple courts across the country will cause substantial inconvenience to senior government officials, including the Director of National Intelligence, who is required to give personal consideration to

invocation of the state secrets privilege and whose declaration will be required separately in each action. Given the significant day-to-day responsibilities of the DNI, the need for him to personally consider over twenty separate lawsuits and claims of privilege will impose a substantial and unwarranted distraction for an extend period of time. The same will be true for any other Government officials whose declarations will be needed in support of the United States' submissions as well.

It would serve the convenience of all parties, moreover, to have such similar matters resolved in one forum. As noted, these cases assert the same factual allegations, bring similar causes of actions, have overlapping putative classes, and seek similar relief. Resolving the pretrial proceedings in one court would resolve the claims in a timely manner without the risk of inconsistent rulings.

II. The Added Actions Directed Solely Against the United States Should Also Be Transferred and Coordinated

For substantially the same reasons that the cases subject to Verizon's Motion should be transferred and coordinated, *see* Part I *supra*, the United States also seeks to include the added actions with the Panel's transfer and coordination decision.

Regardless of whether the actions are against the telecommunications carriers, the Government, or both, numerous common questions of fact, law, and pretrial procedure strongly counsel in favor of the transfer and coordination of the added actions. For example, like the cases against the telecommunication companies, the actions against the United States allege that the United States is engaged in foreign intelligence activities that involve the alleged disclosure of or access to the content and/or records of telephone and internet communications, in purported violation of federal statutes and the U.S. Constitution. Thus, the added actions against the

Government each arise out of the same common nucleus of fact as those subject to Verizon's Motion. In addition, many of the asserted statutory challenges to the Government in the added actions are related to the causes of action against the telecommunication companies.

Finally, common questions relating to pretrial procedure, particularly the United States' intention to assert the state secrets privilege and seek dismissal, arise across all the cases, regardless of whether the case is against a telecommunications company, the Government, or both. For this reason alone, the transfer and coordination of the added actions with the cases subject to Verizon's Motion would facilitate the common pretrial procedures in all of the cases. Indeed, the convenience to the parties and witnesses would be substantial if the Panel transferred and coordinated the added actions against the Government with those subject to Verizon's Motion. Thus, both judicial economy and convenience to the parties strongly favor the transfer and coordination of the added actions with those subject to Verizon's Motion. Finally, the United States' unique concerns regarding the integrity and security of the presentation of national security information are a unifying factor weighing in favor of transfer and coordination of the added actions with those subject to Verizon's Motion.

III. The District of Columbia is a Convenient Forum

In its motion, Verizon recommends that this Panel transfer these cases to the United States District Court for the District of Columbia. *See* Verizon's Motion for Transfer at 16-19. The United States agrees that, in light of the national security concerns discussed above and the familiarity of the judges in that district with national security issues, the District of Columbia would be the most logical and convenient forum. Due to the manner in which classified material is maintained, it would also be the most secure forum for the Government if the cases were transferred to the District of Columbia. Finally, the Judges in the District of Columbia generally

have particular experience with cases involving classified national security information. *See, e.g., Islamic American Relief Agency v. Unidentified FBI Agents, et al.*, 394 F. Supp. 2d 34 (D.D.C. 2005), *appeal docketed*, (D.C. Cir. Nov. 8, 2005); *Edmonds v. U.S. Dept. of Justice*, 323 F. Supp. 2d 65, 67-68 (D.D.C. 2004), *aff'd*, 161 Fed. Appx. 6 (D.C. Cir.), *cert. denied*, 126 S. Ct. 734 (2005); *Holy Land Found. for Relief and Dev. v. Ashcroft*, 219 F. Supp. 2d 57 (D.D.C. 2002), *aff'd*, 333 F.3d 156 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1218 (2004).

CONCLUSION

Accordingly, the United States respectfully requests that this Panel (i) grant Verizon's Motion for Transfer and Coordination of all actions subject to Verizon's motion, (ii) grant the United States' Motion for Transfer and Coordination, as well as any other similar pending case to either motion, and (iii) transfer all such actions to one district court for pretrial proceedings.

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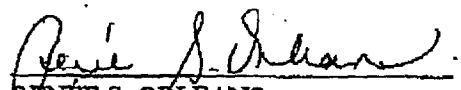

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the United States' Motion for Transfer and Coordination Pursuant to 28 U.S.C. § 1407 To Add Actions to MDL 1791 and Response to Verizon's Motion For Transfer and Coordination, Memorandum in support thereof and exhibits, and schedule of added actions has been delivered via first class mail on June 19, 2006, to the addresses identified on the attached service list.

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Docket: 1791 - In re National Security Agency Telecommunications Records Litigation
Status: Pending on / /
Transferee District: Judge:

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