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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

TASH HEPTING, et al, No C-06-672 VRW  
Plaintiffs, ORDER  
v  
AT&T CORPORATION, et al,  
Defendants.

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At a May 17, 2006, hearing, the court invited the parties and the government to brief two issues: (1) whether this case can be litigated without deciding whether the state secrets privilege applies, thereby obviating any need for the court to review *ex parte* and *in camera* certain classified documents offered by the government and (2) whether the state secrets privilege implicates plaintiffs' FRCP 30(b)(6) deposition request for information on any certification that defendant AT&T Corporation ("AT&T") might have received from the government. Doc #130. After reviewing the submitted papers, the court concludes that this case cannot proceed and discovery cannot commence until the court examines the classified documents to assess whether and to what extent the state secrets privilege applies.

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

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

1 addressed first.

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

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

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

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

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

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

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

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

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

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

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1 [W]henver any motion or request is made by an aggrieved  
2 person \* \* \* to discover or obtain applications or orders  
3 or other materials relating to electronic surveillance  
4 \* \* \* the United States district court \* \* \* shall,  
5 notwithstanding any other law, if the Attorney General  
6 files an affidavit under oath that disclosure or an  
7 adversary hearing would harm the national security of the  
8 United States, review *in camera* and *ex parte* the  
9 application, order, and such other materials relating to  
10 the surveillance as may be necessary to determine whether  
11 the surveillance of the aggrieved person was lawfully  
12 authorized and conducted. In making this determination,  
13 the court may disclose to the aggrieved person, under  
14 appropriate security procedures and protective orders,  
15 portions of the application, order, or other materials  
16 relating to the surveillance only where such disclosure  
17 is necessary to make an accurate determination of the  
18 legality of the surveillance.

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

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

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

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

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

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19 IT IS SO ORDERED.

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22 VAUGHN R WALKER  
23 United States District Chief Judge  
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