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UNITED STATES DISTRICT COURT

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FOR THE NORTHERN DISTRICT OF CALIFORNIA

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SAN FRANCISCO DIVISION

16

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

No. C-06-0672-VRW

18

Plaintiffs,)

CLASS ACTION

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v.)

**PLAINTIFFS' OPPOSITION TO
 ADMINISTRATIVE MOTION OF THE
 UNITED STATES OF AMERICA TO SET
 HEARING DATE FOR GOVERNMENT
 MOTION TO DISMISS AND MOTION
 TO INTERVENE**

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AT&T CORP., et al.,)

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Defendants.)

[CIVIL L.R. 7-11 AND 6-3(C)]

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Courtroom: 6, 17th Floor

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Judge: The Hon. Vaughn R. Walker

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1 Pursuant to Local Rule 6-3(c), plaintiffs hereby oppose the administrative motion by the
2 United States to Set Hearing Dates on Its Motion to Intervene and Motion to Dismiss.

3 The Court has already set the hearing of Plaintiffs' motion for preliminary injunction for
4 June 21, 2006. The government seeks to have its motions heard on the same date, either
5 supplanting or accompanying Plaintiffs' motion. For the reasons stated below, however, the
6 government's motion is not ripe because no discovery has gone forward and there has been no
7 occasion to decide whether the state secrets privilege applies to any particular request for evidence;
8 nor has the government yet publicly filed sufficient information to allow its claims about the
9 privilege to be rationally evaluated. Given the dramatic constitutional implications that applying
10 the state secrets privilege to foreclose judicial review of the claims of ongoing constitutional and
11 statutory violations here, prudence dictates that the Court should not reach the privilege issue
12 unless and until it is absolutely necessary to do so. Instead, the Court should retain Plaintiffs'
13 preliminary injunction motion for hearing on June 21, 2006, and schedule the government's motion
14 for hearing on the next available motion date thereafter.

15 **BACKGROUND**

16 This case is a class action brought on behalf of all residential customers and subscribers of
17 defendants AT&T Corp. and AT&T Inc. ("AT&T"), alleging, among other things, that AT&T is
18 violating the Fourth Amendment of the United States Constitution and the federal wiretap statutes
19 by conducting, on behalf of the government, warrantless, suspicionless searches and seizures of the
20 domestic and international communications of millions of Americans.

21 On March 31, 2006, plaintiffs filed a preliminary injunction motion seeking interim relief
22 on their claims. (Dkt. 16). The preliminary injunction motion presents evidence that is not a state
23 secret, and that demonstrates that AT&T has been divulging many millions of domestic as well as
24 foreign communications to the government in a surveillance program far broader than the one
25 admitted to by the government so far. The motion also contends that defendants have received no
26 court order or other judicial authorization for this expanded program, and that defendants have
27 received no executive branch authorization that comports with the Foreign Intelligence
28 Surveillance Act, the Wiretap Act, or any other congressionally-established procedure, a question

1 that the Court can plainly consider, notwithstanding the state secrets privilege, under federal
2 statutory provisions that provide specific procedures for the Court to do so.

3 The preliminary injunction motion is supported by evidence including three internal AT&T
4 documents, as well as testimony by a former AT&T employee and by an expert witness who
5 explains how the documents and witness testimony support plaintiffs' claims. Notably, plaintiffs
6 provided the government with copies of the AT&T documents even before filing their motion for
7 preliminary injunction. Far from claiming that the documents contained "state secrets," the
8 government affirmed that the documents could be filed without injury to the government's
9 interests.

10 On April 26, this Court specially set the preliminary injunction motion for hearing on June
11 21, 2006, at 10:00 AM. Order Granting in Part AT&T's Motion to Shorten Time (Dkt. 78).

12 On April 28, defendants filed two Motions to Dismiss, which have not yet been set for
13 hearing. The AT&T Corp. Motion (Dkt. 86) seeks to dismiss the case under various alternative
14 theories of immunity and standing raised under FRCP 12(b). The AT&T Inc. Motion (Dkt. 79)
15 asserts that this Court lacks jurisdiction over AT&T Inc.

16 On May 13, 2006, the government filed its motion to intervene (Dkt. 122) and its motion to
17 dismiss or, in the alternative, for summary judgment (Dkt. 124), along with an administrative
18 motion (Dkt. 123) asking that the hearing date on its motions be set for June 21, 2006, the same
19 date previously set by the Court for the hearing on plaintiffs' motion for preliminary injunction.
20 Defendants have also asked that their two motions to dismiss be set for June 21, 2006.

21 **THE GOVERNMENT'S MOTION SHOULD BE HEARD AFTER**
22 **PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

23 **1. The Government's Motion Is Unripe**

24 The government's motion to dismiss invokes as its basis for dismissal the evidentiary
25 privilege known as the state secrets privilege and certain statutory privileges protecting the
26 National Security Agency from compelled disclosure. The government claims in its scheduling
27 motion that its motions "logically need to be heard prior to, or at the same time as, Plaintiffs'
28 pending Motion for Preliminary Injunction." Scheduling Mo. at 2:14-15 (Dkt.123-1).

1 The government is looking down the wrong end of the telescope. Logically, its motion
2 should be heard last, not first. Because this case stands at the threshold, before any discovery has
3 occurred, the government's motion is premature and unripe. The state secrets privilege and the
4 NSA statutory privileges are evidentiary privileges. No party, however, has sought any evidence
5 from the government. The only party or non-party from whom any discovery has been sought,
6 AT&T Corp., has steadfastly refused to comply. This Court has not compelled any party or non-
7 party to produce evidence. And plaintiffs' preliminary injunction motion does not rely on any state
8 secrets evidence; to the contrary, the government reviewed and approved the filing of plaintiffs'
9 evidence.

10 Given that no compulsory discovery has gone forward to date in this action, the
11 government's motion, and its premise that it is impossible for plaintiffs to prove—or for defendants
12 to defend against—even a single one of the claims in the complaint without relying on state secrets
13 evidence, are entirely speculative and hypothetical. The speculativeness of the government's
14 motion is particularly pronounced in light of recent public disclosures of AT&T's cooperation with
15 NSA spying that have occurred independent of this litigation. New disclosures revealing additional
16 information about the government's surveillance program are appearing regularly. Many of these
17 disclosures originate ultimately with senior government officials, and many of them appear to be
18 authorized leaks designed to sway public opinion in favor of the government's surveillance
19 program. It may well be that all the information necessary to litigate this case will have been
20 publicly disclosed by the time of trial.

21 As noted above, plaintiffs' preliminary injunction motion also demonstrates that this case
22 can be litigated without reliance on state secrets evidence. By hearing the preliminary injunction
23 motion first, the Court will be in a much better position to assess the merits and deficiencies of the
24 government's extreme argument that this case should be dismissed at the outset, rather than
25 proceeding by a case-by-case application of the state secrets privilege as discovery progresses.

26 **2. The Radical Constitutional Revision Proposed By The Government's Motion Should**
27 **Be Reached By This Court Only If Absolutely Necessary**

28 The government's motion is no ordinary state secrets motion, for it seeks to deny all

1 judicial scrutiny of the massive ongoing constitutional and statutory violations of individual
2 liberties by claiming that these continuing violations are themselves state secrets. The
3 government's motion thus seeks to transform a common-law evidentiary privilege into an
4 Executive power to nullify the Article III jurisdiction of the federal courts, a power that is as
5 sweeping as it is questionable. "We have long since made clear that a state of war is not a blank
6 check for the President when it comes to the rights of the Nation's citizens. . . . Whatever power
7 the United States Constitution envisions for the Executive in its exchanges with other nations or
8 with enemy organizations in times of conflict, it most assuredly envisions a role for all three
9 branches when individual liberties are at stake." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004).

10 Before the Court embarks on such a fundamental and radical revision of our constitutional
11 structure of limited government and separated powers and accepts the Executive's withdrawal from
12 Judiciary of the fundamental power of judicial review, it should first assure itself that the
13 government's novel constitutional reworking is necessary. The necessity of addressing the
14 government's proposal will arise only if and when the state secrets privilege is invoked in response
15 to an actual discovery request in this case, something that has not yet occurred, and only if and
16 when the invocation of the state secrets privilege in response to discovery requests becomes so
17 pervasive and all-encompassing that further litigation becomes impossible.

18 **3. The Government's Motion Cannot be Heard Until the Government Provides**
19 **Sufficient Factual Basis for Its Claim of State Secrets.**

20 Because the government's public filings are insufficiently specific, the Court should
21 demand that more public details be provided about the scope of the claimed state secrets and the
22 claimed potential harm from disclosure, before considering an accelerated hearing. As explained by
23 *Ellsberg v. Mitchell*, 709 F.2d 51, 63 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984):

24 The more specific the public explanation, the greater the ability of the opposing
25 party to contest it. The ensuing arguments assist the judge in assessing the risk of
26 harm posed by dissemination of the information in question. This kind of focused
27 debate is of particular aid to the judge when fulfilling his duty to disentangle
privileged from non-privileged materials-to ensure that no more is shielded than is
necessary to avoid the anticipated injuries.

28 In *Ellsberg*, the court noted that in "the case before us . . . considerable time and resources might

1 have been saved by adherence to the principle that *in camera* proceedings should be preceded by as
2 full as possible a public debate over the basis and scope of a privilege claim.” *Id.* at 64.

3 An example of greater specificity is *Kasza v. Browner*, 133 F.3d 1159 (9th Cir.), *cert.*
4 *denied*, 525 U.S. 967 (1998), where the government publicly filed an unclassified affidavit that
5 listed ten categories of information covered by its state secrets privilege claim and provided some
6 public explanation of “why certain environmental data is sensitive to the national security.” *Id.* at
7 1181-1183 (Appendix) (setting forth government’s unclassified affidavit). Here, the government
8 has said virtually nothing about what information is claimed to be subject to the state secrets
9 privilege or how its disclosure might harm national security. *See, e.g.*, Gov’t State Secrets Privilege
10 Mem., at 13 (redacting description of the “categories of privileged information at issue in this
11 case.”) ; *id.* at 16 (redacting discussion of why further litigation would inevitably risk the
12 disclosure of state secrets) (Dkt 124-1).

13 Accordingly, it would be premature for the Court to set a hearing date for the government’s
14 motion before the government provides a more specific public explanation of its state secrets
15 claims.

16 **4. Scheduling The Government’s Motion For Hearing On June 21, 2006 Would**
17 **Prejudice Plaintiffs**

18 In addition, the government’s proposed schedule would prejudice plaintiffs. The
19 government has been aware of this litigation since it was first filed, on January 31, 2006, because
20 plaintiffs provided the government with a courtesy copy of the complaint. The government has
21 therefore had over three months to prepare its motion to dismiss. Yet the schedule it would have
22 the court adopt would provide plaintiffs with only 18 days to prepare an opposition to that motion,
23 plus the motion to intervene. This is not reasonable.

24 Moreover the schedule urged by the government becomes even more untenable in light of
25 the schedule urged by AT&T, which proposes setting AT&T’s two motions for hearing on June 21,
26 2006 as well as the government’s motion.¹ This would require plaintiffs to prepare oppositions to

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28 ¹ Defendants originally sought an even more unreasonable hearing date of June 8, but in their recent filings, including their “Opposition” to plaintiffs Case Management Conference Statement

1 three different dispositive motions all within the next two weeks. By contrast, if the government’s
 2 motions are heard on July 6, the next available Law and Motion date, it will neither substantially
 3 prejudice the government nor impair judicial economy.

4 **5. Plaintiffs’ Proposed Schedule**

5 Plaintiffs propose the following briefing and hearing schedule, incorporating the schedule
 6 previously set by this Court with a proposed schedule for the AT&T and government motions:

8 May 18, 2006	AT&T’s Opposition to Plaintiffs’ Motion for Preliminary Injunction (previously set by the Court)
10 May 25, 2006	Plaintiffs’ Reply to AT&T’s Opposition to Preliminary Injunction Motion (previously set by the Court)
12 June 8, 2006	Plaintiffs’ Oppositions to AT&T’s Motions to Dismiss
13 June 15, 2006	AT&T’s Replies to Plaintiffs’ Oppositions to Motions to Dismiss. Plaintiffs’ Oppositions to the Government’s Motion to Dismiss and Motion to 14 Intervene
16 June 21, 2006	Hearing on Motion for Preliminary Injunction (previously set by the Court)
17 June 22, 2006	Government’s Replies in Support of its Motion to Dismiss and Motion to 18 Intervene
19 June 29, 2006	Hearing on AT&T’s Motions to Dismiss (pursuant to the Court’s current law 20 and motion calendar)
21 July 6, 2006	Hearing on the Government’s Motion to Dismiss and Motion to Intervene 22 (pursuant to the Court’s current law and motion calendar)

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27 (Dkt. 121) and their “Reply” to their own Administrative Motion (Dkt. 107) regarding scheduling,
 28 they have shifted their requested hearing date to June 21, 2006.

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6. Conclusion

For the reasons stated above, plaintiffs respectfully request that the government's Administrative Motion be DENIED.

DATED: May 16, 2006

Respectfully submitted,

ELECTRONIC FRONTIER FOUNDATION

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CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the following non-CM/ECF participants:

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