

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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TASH HEPTING, et al.,

COPY

Plaintiffs,

v.

3:06-CV-0672-VRW

AT&T Corp., et al.,

Defendants.  
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San Francisco, CA  
May 17, 2006  
10:05 a.m.  
Pages 1 - 67

Before:

HON. VAUGHN R. WALKER,

District Judge

APPEARANCES

ELECTRONIC FRONTIER FOUNDATION  
Attorneys for Plaintiffs

BY: CINDY COHN  
KEVIN S. BANKSTON  
KURT OPSAHL  
LEE TIEN

LERACH, COUGHLIN, STOIA, GELLER,  
RUDMAN & ROBBINS, LLP  
Attorneys for Plaintiffs

BY: MARIA V. MORRIS  
REED R. KATHREIN  
ERIC ALAN ISAACSON  
JEFF D. FRIEDMAN  
SHANA E. SCARLETT

RICHARD R. WIEBE  
Attorney for Plaintiffs

THE UNITED STATES OF AMERICA  
The Office of the Attorney General  
BY: CARL J. NICHOLS, Deputy Assistant A.G.

1 APPEARANCES (Cont.)

2 PILLSBURY, WINTHROP, SHAW & PITTMAN, LLP  
Attorneys for Defendants AT&T Corp.

3 BY: DAVID L. ANDERSON  
4 BRUCE A. ERICSON  
JACOB R. SORENSEN

5 SIDLEY, AUSTIN, LLP  
Attorneys for Defendants AT&T Corp.

6 BY: BRADFORD A. BERENSON  
EDWARD R. McNICHOLAS

7 LEVY, RAM & OLSON, LLP  
8 Attorneys for non parties The San Francisco Chronicle,  
9 LA Times, San Jose Mercury News, Bloomberg News,  
Associated Press

10 BY: KARL OLSON

11 HOLME, ROBERTS & OWEN  
Attorneys for non parties CNET News.com, Wired News  
and the California First Amendment Coalition

12 BY: ROGER MYERS

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16 MOTIONS

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1 Wednesday, May 17, 2006

2 10:05 a.m.

3 DEPUTY CLERK: Civil case 06-672, Tash Hepting, *et al.*  
4 versus AT&T Corporation, *et al.*

5 Counsel, state your appearances, please.

6 MR. ANDERSON: David Anderson of the Pillsbury,  
7 Winthrop firm for movant and defendant AT&T Corporation and  
8 AT&T, Inc.

9 THE COURT: Good morning, Mr. Anderson.

10 MR. BERENSON: Bradford Berenson, also for AT&T.

11 THE COURT: Mr. Berenson, good morning.

12 MR. BERENSON: Good morning.

13 MR. KATHREIN: Reid Kathrein with the Lerach, Coughlin  
14 firm, on behalf of plaintiffs. Along with me from the firm  
15 today is Jeff Friedman, Eric Isaacson, Maria Morris, and Shana  
16 Scarlett.

17 MR. FRIEDMAN: Good morning, your Honor.

18 MS. MORRIS: Good morning, your Honor.

19 MS. COHN: Cindy Cohn of the Electronic Frontier  
20 Foundation here representing plaintiffs. With me are Lee Tien,  
21 Kurt Opsahl, Kevin Bankston.

22 THE COURT: Good morning.

23 MR. WIEBE: Good morning, your Honor. Richard Wiebe  
24 of the law office of Richard Wiebe, representing plaintiffs.

25 THE COURT: Good morning.

1 MR. NICHOLS: Good morning, your Honor. Carl Nichols  
2 from the Department of Justice on behalf of intervenor United  
3 States of America.

4 THE COURT: Mr. Nichols, good morning.

5 MR. MYERS: Roger Myers of Holme, Roberts & Owen on  
6 behalf of the electronic media: CNET News.com, Wired News and  
7 the California First Amendment Coalition.

8 THE COURT: Good morning.

9 MR. OLSON: Karl Olson on behalf of the San Francisco  
10 Chronicle, the LA Times, the Associated Press, San Jose Mercury  
11 News, Bloomberg News.

12 THE COURT: You're not a party to this proceeding, are  
13 you, Mr. Olson?

14 MR. OLSON: We are prospective intervenors on the  
15 access issues.

16 THE COURT: The same, I believe, goes for Mr. Myers.  
17 Mr. Meyers?

18 MR. MYERS: That's correct, your Honor. Roger Myers.  
19 We filed a letter in response to AT&T's request to close the  
20 hearing this morning. We'd like to appear only on that issue.

21 THE COURT: I see. Is that also your position,  
22 Mr. Olson?

23 MR. OLSON: We would like to be heard both on AT&T's  
24 request to close the courtroom and its request to seal  
25 documents.

1 THE COURT: All right. Well, let's proceed here,  
2 Counsel, and see if we can't make some progress and perhaps  
3 avoid some of the issues that have been averred to.

4 Seems to me there are four objectives we ought to try  
5 to achieve this morning: First, we ought to deal with AT&T's  
6 motion to compel a return of the documents attached to the  
7 Klein declaration. We ought to deal with the cross motions by  
8 plaintiff and AT&T to unseal, and to seal, respectively, the  
9 plaintiffs' preliminary injunction motion and the supporting  
10 papers.

11 Then I'd like to have some discussion -- and the  
12 government counsel will be most helpful in this regard -- of  
13 the appropriateness of the Court reviewing the classified  
14 versions of the government's motion to dismiss and the  
15 accompanying declarations of Messrs. Necroponte and Alexander.

16 And, finally, a discussion of the schedule that we're  
17 going to proceed on.

18 I think it probably makes most sense to take these  
19 issues up in that order, and I think we can at least begin the  
20 discussion without dealing with the motion to close the  
21 courtroom. Who's going to address the motion to compel the  
22 return of the documents, Mr. Anderson?

23 MR. ANDERSON: And we would like to proceed with our  
24 motion that the courtroom be closed to the extent we're  
25 discussing AT&T confidential and proprietary information. We

1 submit we have intellectual property rights in that  
2 information, and that just as documents are lodged under seal  
3 pending a determination by the Court as to the sealing or the  
4 handling of that information, we submit that the hearing itself  
5 should be handled in camera in that way. And the reason, your  
6 Honor, is that I don't see how I can fully and fairly represent  
7 AT&T before the Court without a fact-intensive discussion of  
8 the Klein declaration, of the Russell declaration and of the  
9 Banks declaration and of its shortcomings.

10 THE COURT: Well, dealing with trade secret documents  
11 are not unprecedented. We do that all the time, Mr. Anderson.  
12 You've done that, I'm sure, yourself in other contexts, and  
13 you've done that in an open courtroom.

14 MR. ANDERSON: I've done it in sealed proceedings,  
15 your Honor.

16 THE COURT: It's not necessary, is it, in connection  
17 with the issue of whether these documents should be or should  
18 not be under seal to have that discussion off the record or  
19 behind closed doors?

20 MR. ANDERSON: I feel like I'm coming into the  
21 argument with one hand tied behind my back if I cannot present  
22 to your Honor the facts, the content, the character of that  
23 information. Now, if plaintiffs are willing to concede that  
24 that information rises to the level sufficiently for the  
25 preliminary purposes of the trade secret; that that

1 information, if exposed, would compromise national security,  
2 well, then, all that I would submit would remain would be your  
3 Honor's determination as to whether those intellectual property  
4 rights should be respected in the face of the First Amendment  
5 argument.

6 THE COURT: Let's talk about the motion to return  
7 documents. Now the first question I have for you is, what  
8 legal authority do you have to support that motion?

9 MR. ANDERSON: Yes, your Honor. We have cited --

10 THE COURT: Your memorandum states you're not relying  
11 on Rules 26 through 37, of the Federal Rules of Civil  
12 Procedure.

13 MR. ANDERSON: Yes, your Honor.

14 THE COURT: You told me what you're not relying on.  
15 Now tell me what you are relying on.

16 MR. ANDERSON: We proceed on the inherent authority of  
17 the Court to control the conduct of the parties and also the  
18 declarant as to things occurring outside of Rule 26. We  
19 proceed on that basis. We proceed on the basis of the  
20 *Pillsbury* case, the *WPS* case, the ABA opinion concerning the  
21 conduct of counsel that appears in our reply brief, and we  
22 submit, your Honor, that those cases and the *Shell Oil* case  
23 stand for the proposition that when counsel receives  
24 information that on its face is confidential and proprietary  
25 and it is brought to them under circumstances that suggest that

1 they do not have right to review it, that the proper procedure  
2 in those circumstances is to notify their litigation adversary  
3 of their receipt of this information and proceed either by  
4 agreement or by judicial determination. And the whole course  
5 of this proceeding, we would submit, your Honor, is an effort  
6 to prejudice the Court's ability to decide how these documents  
7 are going to be handled, and the most recent occurrence of  
8 that, your Honor, was just eight hours ago when Klein's  
9 statement in greater factual detail than ever before was placed  
10 out on the worldwide web. And that's despite the reasonable  
11 precautions of AT&T to protect the confidentiality of this  
12 information.

13 THE COURT: The plaintiffs claim they received these  
14 documents quite innocently, that they had no contact with Klein  
15 until he walked in unsolicited into their offices and provided  
16 the documents.

17 MR. ANDERSON: We address that for the first time in  
18 our opposition papers. I think it's also cited in our opening  
19 memorandum, and that is to say that they do not have the right,  
20 as counsel appearing before this Court, to just handle those  
21 documents in any way that they please. That when they're put  
22 on notice, first by the circumstances of the documents coming  
23 to them. Second, by the character of the documents themselves.  
24 Third, your Honor, by the legends that appear on two of the  
25 three documents that state on their face these are AT&T



1 proprietary information. And then fourth, your Honor, on  
2 April 4th, Mr. Bruce Ericson sent a letter to plaintiffs'  
3 counsel saying these are proprietary; we demand that you return  
4 them; we demand that you give us a list of the names of the  
5 people who have seen these as we proceed to litigate this  
6 before the Court. And instead, what we have was self help if  
7 the form of filing these first and then asking questions later.

8 And we submit, your Honor, that that's entirely  
9 backwards and it's an effort to prejudice the Court's ability  
10 to determine the proper handling of this information.

11 THE COURT: Well, now, I can issue orders that bind  
12 the plaintiffs and bind their counsel, but Mr. Klein's not a  
13 party to this litigation, and Mr. Klein apparently has  
14 possession of these documents. So what I do with respect to  
15 plaintiffs and plaintiffs' counsel might very well be futile.

16 MR. ANDERSON: Your Honor, we are here on the motion  
17 we've brought against these plaintiffs. As your Honor knows  
18 from the proposed order that we submitted and the briefing we  
19 submitted in support of it, we believe that the Court has the  
20 authority also to bind the plaintiffs' declarant, just as your  
21 Honor would have the authority to control the conduct --

22 THE COURT: Is that part of my inherent authority  
23 again, Mr. Anderson? Oh, I'm liking this all the more.  
24 Proceed on, Counsel.

25 MR. ANDERSON: We want your Honor to be very powerful

1 this morning in response to these motions. We would analogize  
2 it, your Honor, to the situation of a witness in a case before  
3 your Honor -- not a party -- acting out in the course of  
4 proceedings. Whether that would occur up on this stand or in  
5 deposition, your Honor would surely have the authority to  
6 control the conduct of that witness. Your Honor would have the  
7 authority to control the conduct of that witness's counsel.  
8 And so we do submit, your Honor, you do have the authority, you  
9 do have the ability to issue the order that we have submitted.

10 Now, we have submitted an order, your Honor, that  
11 says, first of all, that the motion to compel return of  
12 documents should be granted and that the plaintiffs should  
13 bring these documents back to us.

14 In addition, as to the sealing motion that we've  
15 brought, we have asked your Honor to order these be filed under  
16 seal, and asked your Honor to issue an order that says that the  
17 parties shall not disclose the contents, nor shall any of the  
18 declarants disclose the contents of the documents that are  
19 filed under seal. In support of that proposition, your Honor,  
20 we have cited the Lynley Travel case, and in that case, what  
21 happened was that the documents were filed under seal, and so  
22 far so good, and then counsel for one of the parties went out  
23 and spoke to the press, by estimate, in that Court's opinion,  
24 30 or 40 times, effectively disclosing the contents of the  
25 documents, effectively undermining the seal. And that, your

1 Honor, is what is occurring here.

2 THE COURT: Well, isn't the important thing for the  
3 Court to do under these circumstances when we have disputed  
4 issues about the handling of these documents and their  
5 possession and how they happen to come in the hands of the  
6 plaintiffs and plaintiffs' counsel, isn't the important thing  
7 to do at the present time is to maintain the status quo and to  
8 proceed then to sort these issues out in an orderly fashion?

9 MR. ANDERSON: We submit, your Honor, that the best  
10 way to preserve the status quo is to have these documents  
11 returned to AT&T. We will maintain them. Until your Honor  
12 rules on the other motions now pending before the Court, there  
13 is no further legitimate purpose that the plaintiffs can put to  
14 these documents.

15 Now, I don't suggest, your Honor, that the plaintiffs  
16 would act in violation of the Court's order. If your Honor  
17 were to issue a hold-fast order that says that they should  
18 maintain in a certain way, you have good counsel appearing  
19 before you and there's no doubt that they would abide by that.  
20 But we have had a number of instances of mishandling. And the  
21 most recent one occurred when the plaintiffs filed a portion of  
22 our confidential information on the public docket. That  
23 remained out there for 90 minutes.

24 So the way I would present that question, your Honor,  
25 as your Honor frames it, is who is the best party to hold these

1 documents during the pendency of this motion practice which  
2 will then determine the subsequent course of the matter? And I  
3 submit, your Honor, that AT&T is in the best position and most  
4 motivated to maintain the confidentiality of these documents,  
5 not plaintiffs' counsel.

6 THE COURT: There's no doubt about that latter  
7 statement.

8 MR. ANDERSON: Your Honor, if I could, too, I'd like  
9 to address the character of this information. You see, your  
10 Honor, in the Baxton declaration, there's plaintiffs' best  
11 effort to show that this information is already out in the  
12 public domain as a result of action taken by AT&T. And in our  
13 reply brief, your Honor, we have set forth in detailed fashion  
14 on Page 3 the kinds of things that appear in the Klein  
15 documents that do not appear in the public domain. Now, your  
16 Honor may hear argument this morning that these things are out  
17 already, that they've been published in a variety of ways as a  
18 result of the efforts of Klein and others to publish this  
19 information. We submit, your Honor, that that is an effort to  
20 prejudice this hearing before your Honor has an opportunity to  
21 rule.

22 When you look at this from a perspective of a trade  
23 secret, you look at the character of the information, its  
24 commercial value, and you look at the reasonable efforts of the  
25 owner of those trade secrets to maintain the secrecy of them.

1 THE COURT: Well, if this case proceeds, and obviously  
2 that's a hurdle that we have to overcome, but in the event that  
3 it does proceed, the plaintiffs would be entitled to seek these  
4 documents via discovery, wouldn't they?

5 MR. ANDERSON: I've little doubt that they will seek  
6 documents in discovery, and I have little doubt that that will  
7 be the subject of discovery battles yet to come.

8 THE COURT: Well, all right, under those  
9 circumstances, again, doesn't that lead to the conclusion that  
10 the logical thing for the court to do is to maintain the status  
11 quo?

12 MR. ANDERSON: Your Honor, I hope I'm following the  
13 train of thought. In a very short amount of time, the Court  
14 will be in a position of having either decided that this matter  
15 needs to be dismissed on the grounds proffered by the United  
16 States or that this matter will go forward in some form or  
17 fashion. That fork in the road will be before us in a very  
18 short amount of time.

19 Now, if your Honor holds that this matter is to be  
20 dismissed and that the documents are still held by plaintiffs,  
21 we'll be back before the Court talking again about how we're  
22 going to dispose of these documents.

23 THE COURT: Well, but we will be discussing that  
24 subject in an altogether different atmosphere from that which  
25 exists today.

1 MR. ANDERSON: I have every hope that it will be a  
2 different atmosphere on that day.

3 THE COURT: Well, but the legal landscape will be  
4 quite different.

5 MR. ANDERSON: Well, as far as our motion is  
6 concerned, the motion to compel return of documents, we proceed  
7 on the character of the information, the intellectual property  
8 rights that AT&T undeniably possesses in these documents. We  
9 proceed on the basis of the circumstances in which they were  
10 brought to the plaintiffs. There's a confidentiality agreement  
11 that protects these. There is the --

12 THE COURT: There are disputes of what those facts  
13 are.

14 MR. ANDERSON: And the facts that I rely upon, your  
15 Honor, and the thing that I find most instructive is the  
16 publicly-filed Baxton declaration in which he says that  
17 sometime after this lawsuit was filed on February 22nd, I do  
18 believe, he first received complete copies of the Klein  
19 documents. So the parties are in a litigation posture. They  
20 received these outside of discovery. They knew from the face  
21 of the documents the circumstances of their receiving them, and  
22 also from our response to their call to us, belatedly, a month  
23 after they received them, that these were our documents, our  
24 proprietary information, and we asked them to then proceed by  
25 way of judicial determination to give your Honor the first

1 opportunity to rule on what should happen with these documents.  
2 That is the proper procedure, and --

3 THE COURT: Well, this case is different from the  
4 usual situation that arises in a trade secret case where the  
5 party holding the documents is the party that is a party to a  
6 confidentiality agreement. The plaintiffs here are not a party  
7 to any confidentiality agreement with AT&T. Mr. Klein may be,  
8 but not the plaintiffs.

9 MR. ANDERSON: As your Honor well knows, trade secret  
10 rights rise to the level of property. They do not proceed  
11 simply by contract. The existence of that contract with Klein  
12 shows AT&T's reasonable efforts to maintain the secrecy of  
13 those documents. Those reasonable efforts and the commercial  
14 value of that information inure those documents with the value  
15 of intellectual property. And once they are intellectual  
16 property and once plaintiffs are on notice that they are  
17 intellectual property, they have certain obligations to respect  
18 that intellectual property. It not the finders-keepers,  
19 losers-weepers rule that applies to this case.

20 What applies to this case, your Honor, is the rule of  
21 law and your Honor's opportunity to determine the most correct  
22 position of these documents. Although they're not a party of  
23 the confidentiality agreement, they are on notice and they are  
24 bound to respect our intellectual property rights.

25 THE COURT: Very well. Thank you, Mr. Anderson.

1 Let's hear from the plaintiffs on this. Who's going to be  
2 addressing that?

3 MS. MORRIS: Maria Morris of Lerach, Coughlin, your  
4 Honor.

5 THE COURT: Miss Morris?

6 MS. MORRIS: Yes.

7 THE COURT: All right.

8 MS. MORRIS: Your Honor, as counsel said, what matters  
9 here is the rule of law.

10 THE COURT: Well, then let me ask this: Since you're  
11 going to be seeking, I assume, these documents in discovery,  
12 what's the harm of giving those documents back at this point in  
13 the litigation?

14 MS. MORRIS: Well, your Honor, there's a couple  
15 things. First is, we have we obtained these documents through  
16 our informal discovery -- our informal investigation process.  
17 And that is allowed to continue prior to and after discovery.  
18 There's nothing wrong with that under the Ninth Circuit's  
19 decision in LA News Service. These are the fruits of our labor  
20 that we have received them in our investigation.

21 Additionally, it is futile. The point -- the purpose  
22 of returning these documents to them so that we can then ask  
23 for them in discovery, when we've already seen what their  
24 arguments are regarding these documents -- and they're not  
25 arguments that would prevent the production of the documents.



1 They are arguments that, if they are correct and if they're  
2 proven, would have an impact on whether or not the documents  
3 should be sealed. But they have presented no reason why the  
4 documents would not be produced in discovery. There's no  
5 assertion and there's nothing on the face of the documents that  
6 suggests that they're in any way privileged.

7 THE COURT: Well, AT&T claims that these are  
8 proprietary documents, that they contain trade secrets. And  
9 AT&T certainly has a right to make that assertion, and you can  
10 challenge it.

11 MS. MORRIS: They certainly do. And we would like the  
12 opportunity to challenge it. But we haven't yet been given  
13 that opportunity because their entire factual showing of how  
14 these are trade secrets is a statement by their security person  
15 that he understands these are commercially sensitive documents.  
16 He doesn't explain what the trade secret is. And we have --  
17 and because we understand that there could be, somewhere in  
18 these documents, there could be trade secrets, we have treated  
19 them with care. We did not publish the documents. We lodged  
20 them under seal with the Court.

21

22 THE COURT: There was a little mishap along the way,  
23 wasn't there?

24 MS. MORRIS: Yes, there was a little mishap, and that  
25 can happen in any case where there are sealed documents. But

1 additionally, we did not -- the mishap did not involve a sealed  
2 document. And all of the information contained in that  
3 30(b)(6) notice that appeared on the website, everything in  
4 there is in the Mark Klein public statement that Mr. Ericson  
5 submitted to this Court publicly, and has been itself on the  
6 Internet.

7           Additionally -- it's on Exhibit J of Mr. Ericson's  
8 declaration. And if your Honor would like, I've got copies of  
9 that 30(b)(6), the document that was inadvertently posted on  
10 the --

11           THE COURT: All right.

12           MS. MORRIS: Okay.

13           Also, your Honor, we realized within about three or  
14 four minutes of the document being posted on the ECF website  
15 that we had made this error and we immediately called the  
16 Court. The reason it took an hour and a half was that it was  
17 lunchtime.

18           THE COURT: It was what?

19           MS. MORRIS: It was lunchtime, but we took the steps  
20 immediately and it was taken care of as quickly as was possible  
21 once the error had been made. And again, none of the  
22 information included within it is actually information beyond  
23 what was already publicly available.

24           THE COURT: All right.

25           MS. MORRIS: Your Honor, defendants are asking you to

1 return these documents under your inherent authority to control  
2 these proceedings. That is an authority that the Ninth Circuit  
3 says must be exercised with restraint. What defendants are in  
4 fact asking you to do here is something really very  
5 extraordinary, not at all restrained. They are asking this  
6 court to suppress evidence of AT&T's criminal activity on the  
7 basis of a contract with a non party witness that is -- that  
8 they say prevents that non party witness from disclosing  
9 evidence of their crimes. Such a contract isn't enforceable in  
10 most courts, and certainly would not be a proper and restrained  
11 use of your inherent authority to the extent that you have the  
12 authority to compel these documents to be returned.

13 Under the *Kirschner* decision, I think it is highly  
14 doubtful that you, in fact, have the authority to order these  
15 documents that were not obtained through discovery to be  
16 returned to AT&T. In *Kirschner*, the plaintiff had acquired a  
17 privileged document that had been inadvertently produced in  
18 separate litigation. Defendants asked for it to be returned  
19 and the District Court ordered that it be returned, and the  
20 District Court did not say whether it was acting under Rule 26  
21 or under its inherent authority. The Ninth Circuit  
22 specifically noted that the District Court had not identified  
23 what authority it was acting under, and then the Ninth Circuit  
24 went on to say that the District Court lacked the power to  
25 order the return of these nondiscovery documents.

1           Additionally, these documents are in the heart of  
2 litigation that goes to the core of the First Amendment: We  
3 are investigating widespread wrongdoing and governmental  
4 intrusions on privacy rights.

5           THE COURT: Well, there's nothing inconsistent with  
6 trade secrets and the First Amendment.

7           MS. MORRIS: There certainly isn't, and your Honor, we  
8 will be happy to discuss whether or not there are trade  
9 secrets, and to the extent that they can prove to you that  
10 there are trade secrets, we understand that those need to be  
11 protected and that they should be probably kept from the  
12 public. But they haven't made that showing, and it -- and  
13 "trade secrets" do not justify keeping them out of litigation,  
14 which is what the return of the documents would do. At this  
15 point, anyway.

16           THE COURT: Who has possession of the documents now?

17           MS. MORRIS: Well, AT&T has the documents. Mark  
18 Klein, I assume, has the documents. We have copies of the  
19 documents.

20           THE COURT: Anybody else that you know of?

21           MS. MORRIS: The government.

22           THE COURT: Okay. The government's a party here.  
23 Anybody else that you know of?

24           MS. MORRIS: My understanding is that the New York  
25 Times probably has the same documents. We have not -- we're

1 treating the documents with care so we haven't gone to the  
2 New York Times and said, So, do we have the same documents?  
3 But Mr. Klein provided documents to us. Mr. Klein provided  
4 documents to the New York Times. From what we understand,  
5 Mr. Klein has an interest in this information being made  
6 public. I assume they're the same documents.

7 THE COURT: Have the plaintiffs or their counsel  
8 disclosed these documents to anyone other than the Court?

9 MS. MORRIS: We disclosed them to our expert that we  
10 retained for the litigation.

11 THE COURT: And who was that?

12 MS. MORRIS: Jay Scott Marcus.

13 THE COURT: Mr. Marcus. Anybody else besides  
14 Mr. Marcus?

15 MS. MORRIS: No.

16 (Pause)

17 MS. MORRIS: I just wasn't sure if there was another  
18 expert -- no, no.

19 THE COURT: That's what I like, a short answer. The  
20 answer is no.

21 And I gather that you don't, pending the resolution of  
22 the order to return and the order to seal, you don't intend to  
23 disclose these documents to anyone else; is that correct?

24 MS. MORRIS: We certainly don't, your Honor.

25 THE COURT: What's that?

1 MS. MORRIS: We certainly don't, and we have not thus  
2 far.

3 THE COURT: Anything else, Miss Morris?

4 MS. COHN: Excuse me.

5 THE COURT: I see reinforcement is coming to the fore  
6 here.

7 (Off the record)

8 MS. MORRIS: I've just had a little clarification. We  
9 disclosed to a confidential consultant, who is, again, part of  
10 our litigation team.

11 THE COURT: And who's that?

12 MS. MORRIS: He's a confidential consultant. He's  
13 someone that we are using to prepare ourselves for litigation,  
14 and if he becomes an expert to be used in court, we'll be happy  
15 to identify him.

16 THE COURT: Just one individual?

17 MS. COHN: Yes.

18 MS. MORRIS: Yes.

19 THE COURT: But other than that consultant,  
20 Mr. Marcus, and of course the filings that have been made here  
21 in court, you're not aware of and represent to the Court that  
22 these three documents -- and we're talking about the three  
23 documents that are attached to the Klein declaration?

24 MS. MORRIS: Yes, your Honor.

25 THE COURT: -- have not been disclosed to anyone or

1 anything else?

2 MS. MORRIS: Not by anyone in our team.

3 THE COURT: Okay. Nobody on the plaintiffs' side.

4 MS. MORRIS: Right.

5 THE COURT: That includes the plaintiffs and their  
6 counsel, correct?

7 MS. MORRIS: Yes, it does. And it doesn't -- I cannot  
8 make any representations for Mr. Klein.

9 THE COURT: I understand. But I'm talking about the  
10 parties that are before me.

11 MS. MORRIS: Yes.

12 THE COURT: Anything else, Miss Morris?

13 MS. MORRIS: Would you like to address the sealing  
14 issue now or --

15 THE COURT: Well, do we need to say much more about  
16 the sealing issue? I did try to separate out the return issue  
17 from the sealing issue, but I wonder whether we haven't kind of  
18 spilled one issue over into the other? What more needs to be  
19 said on the sealing question?

20 MS. MORRIS: The main thing that we think is that they  
21 need to present what really are the security concerns, what  
22 particular parts of those documents are the security concerns  
23 and the trade secrets, and make a good faith attempt to  
24 narrowly redact the documents so that the public understands  
25 what the documents are. And the rule requires that, Local Rule

1 79.5, and the First Amendment requires it. We are perfectly  
2 willing, if they make reasonable redactions, to say, Okay,  
3 those are reasonable redactions needed to protect trade secrets  
4 and security. But we don't think that they have made that --  
5 made any attempt to narrow down what needs to be kept from the  
6 public.

7 THE COURT: All right.

8 MS. MORRIS: If you'd like to hear any more on this,  
9 Mr. Wiebe would --

10 THE COURT: I'm sorry?

11 MS. MORRIS: If you'd like to hear any more on this,  
12 Mr. Wiebe has prepared a discussion.

13 THE COURT: No, just one lawyer on an issue.

14 Anything further on this, Mr. Anderson, before we move  
15 on?

16 MR. ANDERSON: If I may, your Honor, briefly reply.

17 THE COURT: All right.

18 MR. ANDERSON: New information spills out into the  
19 courtroom even this morning about the extent of the disclosure  
20 of AT&T's confidential documents. We hear not only that these  
21 documents are held by plaintiffs and their previously disclosed  
22 expert but also to an expert that, as I interpreted the  
23 sequence of events, now plaintiffs refuse to disclose. There's  
24 no way in my experience, your Honor, in a trade secret case  
25 that a party would be able to hold and to use the trade secrets



1 of the litigation adversary without disclosing where they go,  
2 who sees them. It's a terribly compromising situation to allow  
3 this to occur, and without a court order that, as your Honor  
4 says, preserves the status quo, AT&T is threatened with the  
5 loss of valuable intellectual property rights, a fact that does  
6 not seem to be meaningfully in dispute.

7 Now, I thought it was unfortunate that counsel chose  
8 to use words like "criminal activity" and "crimes", and unless  
9 your Honor's inclined to suggest otherwise, I will not respond  
10 to that. Those are based on plaintiffs' allegations. We, of  
11 course, completely deny that sort of allegation. What we're  
12 talking about here, your Honor, is one of the great companies  
13 of the United States, and to just attach those kinds of labels  
14 indiscriminately is reckless at best.

15 Now, your Honor, counsel spoke to the *Kirschner* case,  
16 and we submitted that the that case is easily distinguishable,  
17 and the better controlling authority is the *Shell Oil* case, and  
18 that's the one to which the Court should look for instruction  
19 as to how to proceed here.

20 In *Kirschner*, there were two proceedings, and you had  
21 a crossover of documents from one proceeding to the other. And  
22 all the Ninth Circuit held in *Kirschner* was the judge in the  
23 one case could not use Rule 26 to direct discovery, in essence,  
24 in the other case. And that is not remotely analogous to our  
25 situation here.

1           The situation here is very much like the *Shell Oil*  
2 case, which is featured prominently in our brief, and in that  
3 case, the litigant took the documents, provided them -- took  
4 the documents, provided them to a litigant, and the litigant  
5 then chose to use them. And what the Court held in *Shell Oil*  
6 is go back to the start line, return the documents, proceed  
7 through normal discovery. This is no way to conduct affairs.

8           And we ask your Honor to issue the order as we have  
9 submitted returning these to AT&T. If discovery is later to  
10 proceed, well, then, that's something that can be taken up at  
11 that time.

12           Thank you, your Honor.

13           THE COURT: Very well. Here's what I think counsel  
14 should do with respect to these first two motions, the motion  
15 to return, and respective motions to seal and unseal these  
16 documents:

17           First of all, despite the rather encouraging view of  
18 federal judicial authority expounded by Mr. Anderson, I'm  
19 inclined to think the Court's authority is not quite that  
20 expansive. I have no doubt that the Court has the authority to  
21 issue orders that bind the parties before it, including the  
22 plaintiffs and their counsel, and this order will therefore be  
23 directed to them.

24           The documents that we are dealing with are the three  
25 documents that are attached to the Klein declaration. It

1 appears that it is quite possible that those documents contain  
2 significant trade secret or proprietary information properly  
3 belonging to one or the other of the AT&T entities. Certainly  
4 AT&T has so asserted, and the Court, without obviously having  
5 had the opportunity to review that contention in any detail,  
6 believes that there is a strong possibility that those claims  
7 are legitimate claims of trade secret and proprietary  
8 information.

9           Similarly, there are issues before the Court that the  
10 plaintiffs have raised. Plaintiffs' counsel contend they  
11 received these documents innocently from Mr. Klein, that they  
12 are part of the normal fact background information that able  
13 counsel do, and therefore their possession of these documents  
14 is in no way improper much less illegal.

15           Further, the documents have been treated with I think  
16 a degree of discretion on the part of plaintiffs, and  
17 plaintiffs' counsel has assured the Court that, to date, they  
18 have not been disclosed to anyone other than counsel for the  
19 plaintiffs and the two experts that have been mentioned,  
20 Mr. Marcus and the consultant. Under those circumstances, I  
21 think the best course of action is to preserve the status quo,  
22 and the Court will attempt to do that by fashioning the  
23 following order:

24           The motion to compel the return of these documents by  
25 AT&T will be denied without prejudice to that being renewed at

1 a later time in the litigation should other circumstances arise  
2 that would warrant that matter being revisited. The Court  
3 will, however, order that plaintiffs, plaintiffs' counsel and  
4 their consultants not further disclose these documents to  
5 anyone or any entity without further order of the Court. And  
6 that they be maintained in a secure location and their  
7 confidentiality protected until this matter can be further  
8 reviewed.

9 I would suggest that AT&T counsel and plaintiffs'  
10 counsel see if they can work out the terms of a protective  
11 order concerning the possession of these documents and their  
12 handling during the pendency of this litigation in accordance  
13 with the usual procedures that apply to documents of this  
14 nature. In the event that counsel are unable do this, I'll be  
15 happy to take up the matter and fashion a more detailed order.  
16 But the essence of the order is that the documents will remain  
17 under seal pending further order of the Court; that plaintiffs  
18 and their counsel and their consultants will not be permitted  
19 to disclose the documents any further until further review of  
20 the situation and further order of the Court.

21 All right? Now --

22 MS. MORRIS: Your Honor.

23 THE COURT: Yes, Miss Morris?

24 MS. MORRIS: Just for clarification, we need to know  
25 about how you want the brief and the declarations themselves

1 treated, and I think we'll probably need to get more  
2 clarification from defendants as to what exactly is the  
3 information that they're concerned about because, for example,  
4 in their declaration from Mr. Russell, they don't actually cite  
5 to any concerns within the preliminary injunction motion, which  
6 is currently under seal, and we would like that motion to be  
7 unsealed as well.

8 THE COURT: Well, I think that preliminary injunction  
9 motion paper should remain under seal at the present time until  
10 we can further review what it is in that motion and the  
11 supporting memorandum that is properly subject to a claim of  
12 confidentiality. It seems to me, having reviewed that motion,  
13 that there is a great deal of information in it that is not  
14 confidential and that can probably be unsealed but I'm not sure  
15 we can sort that page and line at the present time.

16 MS. MORRIS: I would ask that when we're discussing  
17 scheduling that we would have a schedule for some showing on  
18 their part as to what in there really needs to be kept under  
19 seal so we can move that along and get that out to the public  
20 as soon as possible.

21 THE COURT: Well, you know, be a little less concerned  
22 about getting things out to the public than getting things to  
23 court, Miss Morris. This is a judicial proceeding. I  
24 understand there's a great deal of public interest in this  
25 matter, but you're not running a public relations operation. I

1 hope you understand that.

2 MS. MORRIS: I do certainly understand that, your  
3 Honor.

4 THE COURT: All right.

5 MS. MORRIS: And we got it to the Court and we know  
6 the Court has it and will be considering it.

7 THE COURT: All right.

8 MR. ANDERSON: Your Honor, I'm sorry, we do have -- I  
9 have one item of clarification. Your Honor addressed the  
10 subject -- I wrote the phrase down, I hope, accurately -- that  
11 plaintiffs' counsel and consultants will not disclose these  
12 documents without further order of the Court. And the point of  
13 clarification we seek, your Honor, is as to plaintiffs'  
14 declarants, which we would submit, your Honor, are also within  
15 the authority of the Court.

16 THE COURT: You're talking about Mr. Klein.

17 MR. ANDERSON: Mr. Klein, your Honor.

18 THE COURT: Well, you have remedies against Mr. Klein,  
19 do you not?

20 MR. ANDERSON: We do, your Honor. We intend to pursue  
21 those.

22 THE COURT: Apart from the confidentiality agreement  
23 he signed -- Mr. Klein's not a party before the Court at the  
24 present time.

25 MR. ANDERSON: But he has injected himself into the

1 proceedings as a witness, and your Honor has control over him  
2 as a witness. That would be our position, your Honor.

3 THE COURT: I understand your position, but in view of  
4 the fact that you have available remedies that may reach  
5 Mr. Klein, I don't believe you've made an adequate showing that  
6 the Court should take any action vis-a-vis Mr. Klein at the  
7 present time.

8 MR. ANDERSON: Thank you, your Honor.

9 THE COURT: All right. Now, government counsel, I'm  
10 sure, wants to discuss the issue of the classified version of  
11 the government's motion to dismiss and the two declarations.

12 MR. NICHOLS: Yes, your Honor. Carl Nichols on behalf  
13 of the government.

14 THE COURT: Mr. Nichols.

15 MR. NICHOLS: I'm happy to proceed however you'd like,  
16 your Honor. I think your question was: Can you review and how  
17 you review the materials, ex parte in camera.

18 THE COURT: Yes.

19 MR. NICHOLS: If you look at our public brief, your  
20 Honor, at Page 11, we cite a number of cases that establish the  
21 proposition: A, that the Court does have inherent authority to  
22 review state secrets materials ex parte in camera; B, that to  
23 do so does not violate another party's constitutional rights;  
24 and, C, as a result, a number of courts of appeals, beginning  
25 with the Ninth Circuit in *Kasza*, which itself cites other

1 Courts of Appeals decisions, those courts have in fact reviewed  
2 state secrets declarations and briefs ex parte in camera  
3 precisely because to disclose the materials contained within  
4 those declarations and briefs to the public and on the public  
5 record would cause the very harm that the state secret  
6 privilege is designed to protect. So it is a regular thing for  
7 courts to review such materials ex parte in camera.

8 We, of course, have filed a public brief which is a  
9 redacted version of the classified brief. Only those portions  
10 of the classified brief that are in fact classified have not  
11 been put in the public domain. The classified brief and the  
12 classified declarations on which it relies are available, they  
13 are in the possession of a group called the Litigation Security  
14 Section of the Department of Justice, which is a subgroup of  
15 something called the Security and Emergency Program Staff. The  
16 brief, those materials, are in their possession. And when your  
17 Honor would like to look at those materials, you just call them  
18 up and they fly them out to San Francisco, allow you to take a  
19 look at them. When you're done with them, they take the  
20 materials back. They're maintained in a secure facility, just  
21 like all other documents relating to these materials would be.

22 So that is our view as to both your authority to do  
23 this -- the propriety, frankly, of your doing so -- and the  
24 mechanics of doing so.

25 THE COURT: What about the propriety of doing so? Is



1 it necessary for the Court to deal with the motion you filed,  
2 for example?

3 MR. NICHOLS: To deal with our motion to dismiss?

4 THE COURT: Yes.

5 MR. NICHOLS: It's very difficult to explain to you on  
6 the public record why it is this case cannot be litigated as a  
7 result of state secrets.

8 THE COURT: I'm not asking that question. But  
9 reviewing your motion papers, the public version of your motion  
10 papers, which is all that I have done, it appears that the  
11 heart of your argument, or at least many parts of the heart of  
12 your argument, have been redacted, and can I therefore test the  
13 propositions that you're contending for here without looking at  
14 those classified documents?

15 MR. NICHOLS: I think it depends. I think --

16 THE COURT: Let me give you another way of answering  
17 the question. Is there any way that I can grant your motion  
18 without looking at those classified motions -- classified  
19 documents?

20 MR. NICHOLS: Your Honor, maybe I can step back a  
21 little bit and talk about two different kinds of state secrets  
22 cases. And I believe the answer is going to be no for the most  
23 part, but --

24 THE COURT: No, I cannot?

25 MR. NICHOLS: No you cannot. Here's the reason:

1     There are state secrets cases where the government can disclose  
2     on the public record the general issues subject to the  
3     privilege.  Imagine there was a case about a -- how a weapons  
4     system for a fighter jet was designed.  The whole case was  
5     about how that weapons system was designed.  That was the  
6     secret.  Well, the government could come in and say, Your  
7     Honor, there's a fighter jet, it has a weapons system, and this  
8     is a case about the design of the weapons system, and as a  
9     result, you would know, as a result of that disclosure, those  
10    facts, what it is that we would be asserting the states secrets  
11    privilege over, and you could decide as a result of that the  
12    case couldn't be litigated because it was about the design of  
13    that system without disclosing the design of the system.

14             This case is more difficult, because for us to  
15    disclose the sources and methods, the intelligence activities,  
16    etc., that could be brought into play by the allegations in  
17    plaintiffs' complaint, to tell you those things on the public  
18    record would be necessarily to disclose them.

19             So for you to know why it is that this case cannot be  
20    litigated on the public record really in our view requires you  
21    to look at our classified papers.  And that is why we did not  
22    take the course as we sometimes do to say to the Court, You can  
23    grant our motion based on public facts.  Stop.  Full stop.

24             Here what we believed we needed to do was to disclose  
25    those facts to you that we believe are state secrets,

1 implicated potentially by the allegations in plaintiffs'  
2 complaint.

3 THE COURT: This may be getting ahead of where we are  
4 in this presents stage of the litigation. But what you are  
5 asserting is, in essence, a common-law privilege. And the  
6 plaintiffs are asserting what are in essence constitutional  
7 claims. How am I going to be able to weigh those?

8 MR. NICHOLS: Your Honor, it's a common-law privilege,  
9 but it's not as if it hasn't been recognized by the Supreme  
10 Court numerous times -- *United States versus Reynolds, Tenet,*  
11 *Totten* -- which are --

12 THE COURT: I'm not aware of common-law privileges  
13 that the Supreme Court has recognized contrary to  
14 constitution --

15 MR. NICHOLS: But they're not just common-law  
16 privileges. They have and they are derived from, and *Reynolds*  
17 recognizes this, they are derived from Article II, which is all  
18 about the President's ability to protect national security.  
19 It's clear that the President has inherent authority to conduct  
20 intelligence activities and to protect sources and methods and  
21 classified information. Those are undisputed and those are the  
22 part of the President's constitutional powers and duties.

23 So this is not as if it is a common-law privilege  
24 standing outside the Constitution. It is firmly  
25 constitutionally-based. Frankly, there are courts who have

1 said it is the most important privilege precisely because of  
2 those constitutional bases.

3           So we may be getting ahead of ourselves as to the  
4 merits, but I don't think this is going to be a situation in  
5 which you have an alleged constitutional right in violation and  
6 a mere common-law privilege. This is going to be an inherent  
7 Article II power and a privilege based on that power that the  
8 Court has said trumps -- unfortunately -- but trumps a private  
9 litigant's right to have his or her day in court. The Ninth  
10 Circuit said that, in fact, in *Kasza*, recognized that those are  
11 the two competing interests, but that the assertion of the  
12 state secrets privilege and the public interest that it is  
13 designed to protect trumps those private interests.

14           So -- and it is not as if this is a new thing. The  
15 government does this from time to time. An example that I've  
16 recently been involved in is the *Edmonds* case, which we cite in  
17 our brief, where the District Court -- it was a lawsuit against  
18 the FBI. And, in fact, the FBI could not disclose -- actually,  
19 the defendants were FBI and DOJ -- the defendants could not  
20 disclose what the state secrets were that they were asserting  
21 the privilege over. The District Court denied -- sorry,  
22 granted the motion to dismiss, and the Court of Appeals  
23 affirmed both courts having looked at *ex parte in camera*.

24           We believe it is fundamental, and frankly, to do  
25 otherwise here would risk harm to the national security the

1 state secrets act is designed to protect.

2 THE COURT: But with respect to what's before the  
3 Court this morning, and that is whether or not the Court should  
4 request the classified versions of the memorandum and  
5 declarations, the government believes that the Court should do  
6 so.

7 MR. NICHOLS: Yes, your Honor. First, we believe you  
8 should do so because it will be necessary to resolve our motion  
9 to dismiss. And second, I believe this will probably relate  
10 more to scheduling, but in thinking about the sequence of  
11 events in this case -- and I'm happy to talk about our view of  
12 scheduling if you'd like -- but it would make no sense, it  
13 wouldn't be logical or practical, to have a preliminary  
14 injunction hearing in advance of your reading those papers and  
15 in advance of deciding a motion to dismiss, because the state  
16 secrets privilege and its scope will determine the course of  
17 these proceedings. It would have it exactly backwards to  
18 litigate the preliminary injunction motion without knowing what  
19 is or is not at play with respect to state secrets.

20 THE COURT: All right. Well, you're perhaps getting a  
21 little ahead of where you want --

22 MR. NICHOLS: Understood. But I think there are two  
23 different reasons for you to read the papers, and one is  
24 because it's relevant to our motion to dismiss, which we think  
25 really takes precedence over everything.

1           But the corollary to that is in thinking about  
2 scheduling, what we say about our classified papers I believe  
3 will demonstrate to you why deciding the PI or holding a PI  
4 hearing in advance of deciding our motion would be wrong.

5           THE COURT: Before I let you go, Mr. Nichols, one  
6 other question: Let me ask you what the plaintiffs should do,  
7 if I look at these papers, and you know what's in those papers,  
8 those classified papers, and I will have by that time read  
9 them, I assume AT&T will not have read them, but the plaintiffs  
10 will not -- where does that leave the plaintiffs? How can they  
11 respond to your motion without seeing these papers?

12           MR. NICHOLS: Your Honor, I don't know how the  
13 plaintiffs will respond. It is the case that in order to  
14 protect national security, certain information cannot be  
15 disclosed to litigants. It's well-recognized. Courts have  
16 seen the fact that you have this tension between the private  
17 litigants' rights and the government's need to protect national  
18 security. Frankly --

19           THE COURT: I assume the plaintiffs are going to tell  
20 me that they think national security is not going to be  
21 endangered by proceeding with the lawsuit. And how are they in  
22 a position to make that argument if they're unable to see these  
23 documents?

24           MR. NICHOLS: They won't be, frankly, your Honor.  
25 They won't be in the sense that they will not be able to see

1 nor rebut our showing. And that is why we decided that we  
2 needed to make that showing to you ex parte in camera, and  
3 we've done it through declarations of high ranking officials  
4 and classified brief.

5           Unfortunately, or fortunately, that is the way it is  
6 done, and that is the way it has to be done. Because to do  
7 otherwise would be to disclose facts to a number of people, the  
8 result of which would be harm to national security.

9           THE COURT: All right. Yes, counsel for plaintiffs?  
10 This is Miss...?

11           MS. COHN: Miss Cohn.

12           THE COURT: Miss Cohn, yes.

13           MS. COHN: Thank you, your Honor. I guess I would  
14 like to respond to the government's arguments at least briefly  
15 about this, I think some of it flows into the scheduling  
16 discussion, but some of it is separate.

17           It's plaintiffs position first and foremost that this  
18 can be litigated without reference to any state secrets; that  
19 the burden of proof under the statutes that we have claimed,  
20 that we have raised here is very straightforward. The question  
21 is whether the information has been acquired by AT&T in order  
22 to give it to the government and whether it's been divulged to  
23 the government and what the government does with that  
24 information afterwards, which I think could implicate state  
25 secrets, is completely irrelevant, or not necessary, for us to

1 pursue this case. But -- so I think that that argues for a  
2 two-stage process in terms of the government's motion to  
3 dismiss or, in the alternative, for summary judgment. And the  
4 first step would be to review the public papers, and we'll do  
5 our best to try to respond to the public papers of how the  
6 government has failed to meet its burden to provide sufficient  
7 information about the source of state secrets to allow us a  
8 defense. I mean, there's nothing in the public document. We  
9 think that's consistent with the other state's secrets cases  
10 which require the government to do a little more than that in  
11 order to do that, in order to make their case, in the first  
12 instance, and put us into a position where we can even  
13 reasonably begin to respond.

14 But then we'd like the opportunity to demonstrate to  
15 you that the state secrets information is not important for us  
16 to win this case, it's not necessary for us to win this case,  
17 and that there is a path, I think a fairly clear path, that you  
18 can follow to decide this without implicating state secrets.

19 THE COURT: Can you strike that path for me?

20 MS. COHN: I sure can. I can start, your Honor. I  
21 sure would appreciate the opportunity to brief it to you rather  
22 than just give it, but in -- the statutes are -- the statutes  
23 are very clear, that merely disclosing this information to the  
24 government is illegal for AT&T. AT&T's liability is triggered  
25 by the mere divulging of customer information.



1           THE COURT: And we don't need to get into what the  
2 information is in order to determine that -- the legality or  
3 illegality.

4           MS. COHN: That's correct, and if you believe the  
5 Klein information and other information is, as opposed to  
6 wholesale or targeting of other information, I think that's all  
7 we need to demonstrate in order to prove violation of the  
8 statutes here. That doesn't implicate state secrets. In fact,  
9 the only -- I think the only possible argument that AT&T has in  
10 response to this is that they received some sort of -- the  
11 government's indicated there was no court order here. So I  
12 think that's an admission.

13           So there's two ways that AT&T can hand that  
14 information over to the government: One is with a court order.  
15 I think it's been indicated there is no court order here. And  
16 the second is through some sort of a certification under the  
17 statutes.

18           The question then becomes whether the mere existence  
19 of a certification and the legal sufficiency of that  
20 certification is itself a state secret. And we would argue  
21 that it's not. And it's not because Congress has clearly laid  
22 out in the statutes a process by which you can evaluate the  
23 sufficiency of the certification. If a common-law evidentiary  
24 privilege like the state secrets privilege exists, it's clearly  
25 been trumped by the Congressional assertion of a process by

1 which you can do this very thing, which is take a look at the  
2 certification and decide whether it's legal or not, whether  
3 it's legally sufficient or not.

4 And that process is laid out -- well, first,  
5 18 USC 2511(a)(2) sets out the process by which AT&T can hand  
6 things over. If the government maintains that there is  
7 national security interest here, they then intervene and  
8 provide an affidavit for you. And then maybe you decide that  
9 you can look at things ex parte in camera, but there's an  
10 initial step that has to happen first. That process is laid  
11 out 50 USC 1806(f).

12 THE COURT: Would you have an objection of the Court  
13 looking at the classified version of the government's motion to  
14 dismiss, the two declarations involved?

15 MS. COHN: I think ultimately the Court may make a  
16 decision that it needs to take a look at them.

17 THE COURT: That's not quite an answer to my question.  
18 Miss Morris gave me a yes or no answer. How about you?

19 MS. COHN: She's better than me that way.

20 THE COURT: What's that?

21 MS. COHN: She's better than me that way.

22 THE COURT: Let's see if you can match that statement.

23 MS. COHN: I think ultimately we do not have objection  
24 to the Court taking a look at the classified information, but  
25 we would ask the Court take a two-step process in this and

1 allow us to try to make the argument to you on the public  
2 record that state secrets aren't implemented here. Because I  
3 think you should only look at that information if you deem it  
4 necessary to do so, and I don't think we're at that point yet.

5 THE COURT: Well, what do we need to do to get to that  
6 point?

7 MS. COHN: I think we need to set up a briefing  
8 process that's reasonable that allows us sufficient time to  
9 make that showing to you.

10 THE COURT: When can you get that brief on file?

11 MS. COHN: Well, I think we could do it fairly  
12 quickly. It depends on the -- I think if the government's  
13 motion was actually scheduled according to the Court's ordinary  
14 processes, it would be set for hearing on July 6th, because  
15 that's the next open date, at least as of the last time I  
16 checked the Court's calendar.

17 THE COURT: We haven't checked on scheduling yet, but  
18 I'm giving you a little forwarning, I'm thinking about moving  
19 this case along pretty quickly.

20 MS. COHN: Your Honor, I think we're okay with that.  
21 The thing that I suspect makes me a little worried is the fact  
22 we have to respond to AT&T's motion to dismiss at the same  
23 time.

24 THE COURT: Well, you've got a lot of folks on that  
25 side of the room.

1 MS. COHN: We do, your Honor, and I'm very grateful  
2 for the support my little organization has from some very  
3 respected firms. However --

4 THE COURT: You've got some very able associates and  
5 colleagues.

6 MS. COHN: I still would like the opportunity -- we  
7 got the government's papers at 1:00 o'clock in the morning on  
8 Saturday. So the government's request to have this heard by  
9 July 21st would give us like two weeks to respond. I think  
10 that I don't need a lot more time than that, but I would like a  
11 little more, and I'd like the AT&T motions put off so that we  
12 can focus on this.

13 I also think, however, that our preliminary injunction  
14 motion can go forward at the same time. It's been briefed,  
15 largely, it won't be much more work for me, for our team to  
16 respond to it, and we think the preliminary injunction motion  
17 is going to be instructive for your Honor about the way -- this  
18 path that I'm telling you that I think I can lay out to you,  
19 because we've done it already in the preliminary injunction  
20 motion. There's no state secret information in it. The  
21 government admits that. They allowed us to file those  
22 documents and they have not claimed state secrets. And we  
23 think that that itself demonstrates it.

24 THE COURT: If you think you can submit your  
25 memorandum with respect to the issue of whether or not the

1 Court should look at the classified version of the government's  
2 motion to dismiss and the classified declarations not later  
3 than the close of business on Friday the 19th.

4 MS. COHN: Tomorrow?

5 THE COURT: Tomorrow's not Friday.

6 MS. COHN: I'm sorry. Two days from now.

7 THE COURT: Correct.

8 MS. COHN: Can we have until Monday, give us the  
9 weekend? I would appreciate it.

10 THE COURT: Well, let's see. That would be the 22nd.  
11 All right. I'll give you until that time.

12 MS. COHN: Just on the question of whether the Court  
13 should look at the classified information or not.

14 THE COURT: That's correct. That's all I want at this  
15 point.

16 MS. COHN: That's fine. We're up for moving this case  
17 quickly, your Honor. Our view is that there's an ongoing  
18 massive violation of law and we'd like to see it stopped.

19 THE COURT: Well, that's exactly why you should be  
20 interested in moving along quickly.

21 MS. COHN: I am, and that's why I didn't ask you for  
22 more than the weekend.

23 THE COURT: Mr. Nichols?

24 MR. NICHOLS: Just one clarification. I thought I  
25 heard plaintiff's counsel say they had no objection to your

1 looking at the brief ex parte and in camera, and the classified  
2 declarations. Maybe that's not what you're intending this  
3 brief to be. This is, instead, their view of...?

4 THE COURT: I must say, Miss Cohn was not very  
5 definitive in her answer.

6 MS. COHN: I think that the opportunity to brief to  
7 you about when you see the classified information and how you  
8 should see it is one we'd like to take, your Honor. So I'd  
9 like to -- I mean, as I said, I think it's appropriate for the  
10 Court to at least hear us out about the process by which the  
11 classified information should come in and if it should come in  
12 at all, and I'd like the opportunity to brief that for you,  
13 please.

14 THE COURT: Why shouldn't I give plaintiffs an  
15 opportunity to brief that, Mr. Nichols?

16 MR. NICHOLS: If the issue is when, you obviously  
17 haven't conceded that you should look at it now, so I think  
18 it's fine to give them an opportunity. If the question is  
19 whether, then I think that they've effectively said today they  
20 don't oppose your looking at it at some point. I think those  
21 are different questions. If we're limiting it to the first  
22 issue, that's fine.

23 THE COURT: Well, whether and when and under what  
24 circumstances and how may all kind of be mixed up together.  
25 It's an appropriate issue, and obviously it's your position,

1 Mr. Nichols, that you believe that when the Court has an  
2 opportunity to review these matters, that the Court will be  
3 persuaded that the state secrets privilege applies here.  
4 That's obviously a matter of enormous importance to the  
5 plaintiffs in their case, and I think it would be inappropriate  
6 to look at these documents and not give plaintiffs an  
7 opportunity to weigh in on the issues that we've described.  
8 So --

9 MR. NICHOLS: We don't mind briefing that issue, your  
10 Honor.

11 THE COURT: And if you need a reply, you can reply a  
12 couple of days later.

13 MR. NICHOLS: Sure.

14 THE COURT: All right.

15 MS. COHN: Thank you, your Honor.

16 THE COURT: I assume AT&T does not have a position on  
17 this? Mr. Berenson?

18 MR. BERENSON: Yes, your Honor. Thank you. On the  
19 question, whether you should examine the classified information  
20 or under what circumstances, we do not have a particular  
21 position. Our basic view in this case is that this fight is  
22 properly between people who share the views of the plaintiffs  
23 and the government; that AT&T is essentially an innocent  
24 bystander caught in the crossfire, and that these matters  
25 should be resolved, if they're to be resolved at all, in the

1 judicial process between private parties who object to these  
2 alleged surveillance programs and the government that itself  
3 initiated and ran them.

4           The only point that I would add here, for your Honor's  
5 benefit, is we do take very, very strong exception to the  
6 notion that the statutes at issue, the various aspects of the  
7 Electronic Communications Privacy Act, the Wiretap Act, the  
8 Stored Communications Act, the Foreign Intelligence  
9 Surveillance Act are crystal clear and make it obvious, based  
10 solely on the plaintiffs' allegations, that there are massive  
11 violations of law here going on. Indeed, many violations of  
12 law.

13           These statutes are extraordinarily complex. They do  
14 authorize and in many instances require telecommunications  
15 companies to furnish information of the kind that's been  
16 discussed publicly here in recent months under a variety of  
17 different rubrics. Every single one of those rubrics, not just  
18 the certifications that Miss Cohn alluded to but the use of  
19 subpoenas, of national security letters, of emergency  
20 authority -- all of them implicate facts that are not on the  
21 public record, and to the extent there were any such facts,  
22 they could not be put on the public record in the face of the  
23 government's state secrets assertion.

24           It's important to know that the prejudice here that  
25 arises, if you want to call it prejudice, from the inability to



1 expose classified information in the course of the judicial  
2 process exists on both sides, and the problem is not simply  
3 that the plaintiffs can't make out their case or can't rebut  
4 the showing that national security's implicated by the subject  
5 matter of this suit, but in addition, the defendants can't  
6 defend themselves.

7           If there are facts out here that are relevant, it is  
8 equally likely, indeed, I would suggest far more likely, that  
9 those facts would be exculpatory and would show AT&T's conduct  
10 in the best possible light. And yet we ourselves are prevented  
11 from bringing any of that -- again, to the extent that it  
12 existed -- before the Court or relying on any of it, so we are  
13 precluded from defending ourselves just as much as they are  
14 precluded from making out their claims. And it's for that  
15 reason that the cases recognize that when the state secrets  
16 privilege is properly invoked, these cases have to be dismissed  
17 and they have to go away. And that happens without the  
18 participation of the private parties and the private interests  
19 on either side, the plaintiffs or the defendants.

20           You, your Honor, are the constitutional officer who's  
21 been vested in our -- by our system of government with the  
22 authority to make the necessary determination about whether a  
23 case is to proceed in the face of the submissions that the  
24 executive makes to you.

25           THE COURT: I gather the answer is, "No objection."

1 MR. BERENSON: No objection, your Honor.

2 THE COURT: Let's talk about scheduling.

3 MS. COHN: Yes, your Honor.

4 THE COURT: I am proposing counsel -- Mr. Anderson, I  
5 suspect you're going to join this discussion? Perhaps  
6 Mr. Nichols as well?

7 MR. ANDERSON: Actually, Mr. Berenson, your Honor.

8 MR. BERENSON: Yes, your Honor.

9 THE COURT: I propose that we hear the government's  
10 motion to dismiss and AT&T's motion to dismiss on June 8. And  
11 probably would be best advised to give you a special setting on  
12 that date, perhaps at 10:00 o'clock in the morning. Or even  
13 9:30, if that -- maybe 9:30 would be even better. 9:30 a.m. on  
14 June 8. And we limit the hearing on that date to those two  
15 motions. That we at this point defer the issue of whether we  
16 hear the plaintiffs' motion for a preliminary injunction.

17 And before making that decision, finally, but that's  
18 my inclination, I want to give Miss Cohn or her colleagues an  
19 opportunity to persuade me why we should hear the preliminary  
20 injunction motion before we hear the motions to dismiss.

21 MS. COHN: I'd like to start with persuading you of  
22 something else first. As much as I am, as I said, very  
23 interested in moving this case along, a June 8th hearing date  
24 would mean that our opposition papers are due tomorrow, I  
25 believe.

1 THE COURT: We can adjust the briefing schedule.

2 MS. COHN: Especially if you're going require us to  
3 respond to three substantive, and, I would argue, somewhat  
4 complex motions all on the same schedule, that we get some  
5 additional time to be able to do that. For instance, as I  
6 said, we got the government's motion on Saturday morning at  
7 1:00 a.m. I'm -- I think that it would be very unreasonable to  
8 force us to try to respond on that kind of a schedule.

9 THE COURT: The alternative is to defer that to later  
10 in June. Perhaps as late as the 28th.

11 MS. COHN: Your Honor, I mean, I would also like to  
12 make my pitch about the PI motion coming first, but certainly I  
13 would ask that, at a minimum, that the 28th be the date, if  
14 we're going to have to respond. While I do have a lot of  
15 bodies, there are a lot of issues here, and we want to give you  
16 the best briefing possible on this.

17 THE COURT: The --

18 MR. BERENSON: Your Honor? Before Miss Cohn goes on  
19 to argue about sequencing, may I beg you for a slight  
20 compromise as between the 28th that she has proposed and the  
21 8th, which would be fine with us? Really any date before the  
22 24th of June would be acceptable for AT&T. But a number of  
23 counsel who intend to present argument to you on these motions  
24 have serious scheduling conflicts that arise on the 24th. So  
25 if there were any way to have a date --

1 THE COURT: The 24th of June?

2 MR. BERENSON: The 24th.

3 THE COURT: The 24th of June is a Saturday.

4 MR. BERENSON: Right. These are vacation plans of the  
5 kind that I know you've heard about often: Long-planned,  
6 nonrefundable, extended families and the like. So if there  
7 were any way to hear this prior to the 24th, I know counsel on  
8 our side would very much appreciate it.

9 MS. COHN: Your Honor, if I may, we have vacations on  
10 our side -- in fact, I apologize for actually having to mention  
11 this, but I'm actually getting married on May 27th, and I would  
12 really appreciate the opportunity to attend my own wedding.  
13 And so I would prefer that we move it -- I'm happy to defer  
14 this until after their schedules, but moving it up, I'm afraid,  
15 will cause a pretty significant hardship.

16 MR. BERENSON: I was just running interference for  
17 Cindy here.

18 MS. COHN: I was hoping not to raise this.

19 THE COURT: How does Friday the 23rd sound to  
20 everybody?

21 MR. BERENSON: We love the redeye, your Honor. That's  
22 fine for us.

23 MS. COHN: Thank you, your Honor. I appreciate the  
24 accommodation.

25 THE COURT: Friday the 23rd at 9:30 a.m. We may have

1 some other scheduling difficulties, but we'll make that time  
2 available for you all.

3 MS. COHN: If I could, your Honor, can I make my pitch  
4 for the preliminary injunction motion being heard at the same  
5 time?

6 THE COURT: Sure. As long as we are agreed upon  
7 Friday the 23rd at 9:30 a.m. as the date for at least these two  
8 motions, the AT&T motion to dismiss and the government's motion  
9 to dismiss.

10 All right? Yes?

11 MS. COHN: So, your Honor, I would like to request  
12 that the preliminary injunction motion be set I think  
13 concurrently. I don't think I want to force my friends from  
14 D.C. to come out twice in the same week. But we think that the  
15 preliminary injunction motion will actually help you -- help us  
16 demonstrate to you why there is a clear path for moving forward  
17 in this case that does not implicate state secrets, and that  
18 the briefing is kind of all of a piece, and -- if you look at  
19 their arguments that they've raised.

20 THE COURT: One other thing. We haven't specifically  
21 mentioned Mr. Nichols' motion to intervene, which I believe is  
22 scheduled for the 21st.

23 MR. NICHOLS: We certainly noticed it for the 21st,  
24 your Honor.

25 THE COURT: Why don't we set that hearing date for the

1 23rd?

2 MR. NICHOLS: Frankly, was hoping we wouldn't have an  
3 opposition to that from the plaintiffs, but one never knows.

4 MS. COHN: It's fine with us to set it together, your  
5 Honor.

6 THE COURT: We'll move the hearing on all of these  
7 motions to the 23rd. The question now is whether or not we  
8 should also hear the plaintiffs motion for a preliminary  
9 injunction at that time.

10 Here's the problem I have with that notion, Miss Cohn.  
11 We have the government and AT&T coming in and telling me that  
12 they have serious motions that essentially would end the case  
13 on the 23rd of June, or whenever the Court makes a decision.  
14 Doesn't that suggest that the Court ought to hear those motions  
15 and decide those before proceeding to a preliminary injunction  
16 motion which, in the context of a case like this, is nigh onto  
17 a consideration of the merits of your case?

18 MS. COHN: I think your Honor it is a bit of a piece.  
19 Because I think our arguments about state secrets are going to  
20 be about why it is your Honor can decide this case without  
21 implicating state secrets. I think Exhibit A in that regard is  
22 our motion for preliminary injunction where we have made the  
23 case of a violation of the wiretap act and the Fourth Amendment  
24 without reference to state secrets whatsoever. I think that  
25 the only real issue that will be raised by this is whether

1 there's a certification or not. And the only real defense I  
2 think that AT&T has --

3 THE COURT: A certification?

4 MS. COHN: A certification from the Attorney General,  
5 under the statutory scheme, as said the two ways that AT&T can  
6 legally hand this information over, and I think that doesn't  
7 implicate state secrets for the reasons I've laid out and I'm  
8 happy to lay out further.

9 THE COURT: There's another aspect to this, too.  
10 Given the magnitude of the claims being asserted by the  
11 government here, I would not be surprised if the government, if  
12 I ruled against it, would decide to appeal, and similarly, you  
13 may seek interlocutory appeal if I rule in favor of the  
14 government. And so isn't deciding a preliminary injunction  
15 kind of rushing things when we've got very substantial issues  
16 to deal with first that are threshold?

17 MS. COHN: Well, I mean, I would agree with you to a  
18 point, that I think that there are -- obviously, the motions to  
19 dismiss are going to be substantial, I think it's highly likely  
20 that your Honor is correct that we'll at least see a Ninth  
21 Circuit appeal out of your Honor's decision one way or the  
22 other. I have my hopes about which way that goes.

23 But I think that the question then becomes, What  
24 should the status quo be for the millions of AT&T customers  
25 pending this? And should the status quo be that the millions

1 of AT&T customers have their information continually handed  
2 over to the government in the meantime? Or should your Honor  
3 have the opportunity to decide that while we consider the  
4 important Constitutional and evidentiary issues that are being  
5 raised by the government, that the flow of data should stop,  
6 and that I think is the fundamental reason why we'd like to see  
7 the preliminary injunction go forward, because if your Honor  
8 doesn't go forward with this, the government has given all  
9 indications, and I don't think AT&T has indicated any  
10 differently, that the massive flow of information about  
11 millions of customers private phone calls will continue during  
12 the pendency of this appeal -- this decision, and then this  
13 appeal.

14 So for me, I look at this and I ask, What's the status  
15 quo going to be pending all of this litigation?

16 THE COURT: That all suggests that we ought to hear  
17 these motions sooner rather than later, and you're the one  
18 that's been pushing them back.

19 MS. COHN: But I'm only pushing them back a couple of  
20 weeks, and I apologize that occasionally we must do that, but  
21 I'm not asking for August and I'm not asking for next year. I  
22 think this is an important issue. I also think it's important  
23 that it be briefed fully and properly, so in an effort to  
24 represent my clients as best I can, I asked for a small  
25 continuance, but not a large one.



1           But I think that that's why the PI motion ought to be  
2 in the mix here, because I think it really did go to the  
3 question about what's going to happen to the millions of  
4 customer records in the meantime while we're sorting out these  
5 issues, and we think the Court ought to at least take the  
6 opportunity to decide that the information ought to stop  
7 flowing in the meantime.

8           THE COURT: Well, anything further on this scheduling  
9 issue, Mr. Nichols?

10           MR. NICHOLS: If I may, your Honor, I think what  
11 plaintiffs' counsel was just talking about is to be the subject  
12 of their brief that's coming in a few days. I thought that  
13 brief was supposed to be about sequencing, so in some respects  
14 I take this as a bit of a preview. It's very difficult for  
15 me --

16           THE COURT: It's not unusual for lawyers to preview  
17 their arguments, Mr. Nichols.

18           MR. NICHOLS: Absolutely, but she already asked to  
19 file a brief on these exact issues. But what I wanted to say  
20 was it's very difficult for me to say why it is that they are  
21 wrong that the preliminary injunction motion cannot be decided  
22 absent state secrets, but I can say the following:

23           The Court could not grant a preliminary injunction in  
24 this context without state secrets. As you will see when you  
25 read our papers, plaintiffs could not establish a likelihood of

1 success on their claims absent state secrets. AT&T could not  
2 present its defense with respect to the preliminary injunction  
3 absent state secrets. We cannot defend as an intervenor  
4 defendant against the PI absent state secrets. The plaintiffs  
5 and we could not adjudicate or litigate the issue of the harm  
6 to the public that a preliminary injunction would present  
7 absent stated secrets.

8 So I think in many ways, a preliminary injunction that  
9 is decided before we know what is or is not a state secret and  
10 what the effect of our assertion is makes absolutely no sense.  
11 What I assume the plaintiffs want to do is put on evidence in a  
12 preliminary injunction motion where they have people testifying  
13 in open court about certain facts. That is exactly what our  
14 state secrets privilege assertion is designed to prevent,  
15 assuming that the result of that would be the disclosure of  
16 facts that will harm national security, including, as  
17 Mr. Berenson said, facts that AT&T might want to present in its  
18 defense of the preliminary injunction.

19 So we will respond to this issue in our brief, but I  
20 didn't want to leave unanswered the notion that this is a  
21 simple prima facie case question that all you have to do is  
22 look at the preliminary injunction motion and, Snap, you can  
23 tell you don't need state secrets. It is clearly not that  
24 simple.

25 MS. COHN: Your Honor, if I may, two quick points in

1 response to that. The first is that the government actually  
2 proposed that their motion to dismiss be heard concurrent with  
3 our motion for preliminary injunction in their papers. So I'm  
4 not sure where Mr. Nichols is coming from now, but that's not  
5 what they asked the Court to do in the first instance. So I  
6 find it hard to believe that he's really -- that this is --  
7 he's as sure about this state secrets issue as he was because I  
8 think they would have briefed it if that's what they really  
9 wanted.

10 I also would point out that our motion for preliminary  
11 injunction's already been filed. You have the evidence that  
12 we've relied on. You have the argument. I think it can be  
13 decided on the papers. We may submit some additional reply  
14 evidence, but I think his picture of what this hearing is going  
15 to look like is certainly not what we had envisioned.

16 Thank you.

17 MR. BERENSON: Your Honor, just for the record, I need  
18 to rise to say that the suggestion that issuing the requested  
19 injunction is going to stop, you know, some massive flow of  
20 data from AT&T to the National Security Agency cannot be taken  
21 as a given by any of us or by this court at this point. And  
22 indeed, issues like the balance of the hardships, the threat to  
23 public interest and the national security of the United States  
24 depend critically on whether there is nothing that is being  
25 transferred from AT&T to the NSA, whether there is something

1 but that it is being transferred pursuant perfectly in  
2 accordance with the processes of law, whether there's a  
3 moderate amount of information that pertains specifically to  
4 people who are suspected of affiliation with al Qaeda, or  
5 whether it's an omnibus dragnet the way the plaintiffs suggest.  
6 All that indicates underlying evidence that neither of us on  
7 either side have, and that to the extent it exists in this  
8 preceding at all, it exists only in those classified documents  
9 that have now been filed with you and that are the subject of  
10 the state secrets motion.

11 So I think Miss Cohn's very argument illustrates  
12 exactly why it makes no sense to try to address a PI in advance  
13 of hearing the dispositive motions to dismiss.

14 THE COURT: All right. Mr. Olson, you're back.

15 MR. OLSON: Yes, your Honor. In connection with  
16 scheduling, we would like to address the propriety of sealing  
17 both the Klein documents and any other documents which may be  
18 filed under seal at the time that the motions to dismiss are  
19 heard, and I guess you haven't talked about a briefing schedule  
20 yet.

21 THE COURT: Well, I'm always happy to hear you,  
22 Mr. Olson. It's been a couple of years since you've been here.

23 MR. OLSON: Yes.

24 THE COURT: I gather you're telling me you're going to  
25 file some kind of an amicus.

1           MR. OLSON: We e-filed this morning a motion to  
2 intervene and also a brief in connection with these. And we  
3 would anticipate --

4           THE COURT: When did you notice that motion?

5           MR. OLSON: For this morning in connection with  
6 their --

7           THE COURT: You filed it this morning. But when did  
8 you notice it to be heard?

9           MR. OLSON: This morning in connection with what we  
10 heard about yesterday, which is that they wanted to close this  
11 morning's hearing. So it was partially in connection with  
12 that. And to the extent that it addressed sealing --

13           THE COURT: I thought you said you filed a motion to  
14 intervene under Rule 24? Did I mis-hear you?

15           MR. OLSON: That was part of our opposition to the  
16 motion to disclose the hearing, and there's case law that we  
17 cited in that that certainly addresses the ability of the media  
18 to intervene both on sealing issues and on requests to close  
19 hearings.

20           So we will be happy to file a new version of that and  
21 the motion to intervene, and also to address the sealing issues  
22 in connection with the hearing that your Honor has set for  
23 June 23rd.

24           THE COURT: All right. You can proceed as you are  
25 advised and as your clients address you to proceed, Mr. Olson.

1 Now, I believe we have only one remaining matter.

2 MS. COHN: Your Honor, did you decide that the PI  
3 could be heard?

4 THE COURT: I beg your pardon?

5 MS. COHN: Did you decide the PI could be heard on the  
6 23rd or not?

7 THE COURT: No, I'm afraid you've not persuaded me,  
8 Miss Cohn, that we should hear the preliminary injunction  
9 first. It does seem to me that both government counsel and  
10 AT&T are correct that that really would put the cart before the  
11 horse here. We have motions that may very well terminate the  
12 litigation at the early stage and completely moot any question  
13 of a preliminary injunction.

14 So what we will be hearing on the 23rd is the  
15 government's motion to dismiss, AT&T's motion to dismiss, and  
16 if you want to talk about a briefing schedule with reference to  
17 that date, I'll be happy to work with you on those dates. But  
18 I would think counsel should be able to work out briefing  
19 schedules.

20 Let me simply ask that the last brief, that is, the  
21 reply brief, be submitted not later than the 16th of May.

22 MR. NICHOLS: Of June, your Honor.

23 THE COURT: I'm sorry, 16th of June. I beg your  
24 pardon. Mr. Nichols is correct.

25 MR. BERENSON: That's fine with us, your Honor. And

1 we think we can probably work that out with plaintiffs'  
2 counsel.

3 There is one housekeeping matter, though, that I do  
4 need to address because there is an existing deadline set for  
5 our opposition to the preliminary injunction motion. It is  
6 tomorrow. And in light of that motion being put off beyond the  
7 motions to dismiss, we would ask your Honor to allow us more  
8 time.

9 THE COURT: I think under the circumstances we should  
10 vacate the hearing on the preliminary injunction motion pending  
11 the determination of the motions to dismiss.

12 MR. BERENSON: Thank you.

13 THE COURT: Now, one other issue that we haven't  
14 completely resolved, and that is the status of the preliminary  
15 injunction motion papers, including the declaration. Having  
16 reviewed those, it does appear to me that most of the material  
17 that is submitted in those papers which have been filed under  
18 seal is information which does not implicated a state secret  
19 and does not implicate any proprietary information of AT&T.  
20 Now, I can understand that you may disagree with respect to  
21 certain particulars, but I wonder if it wouldn't be possible  
22 for you to take a look at these papers and to give me some  
23 guidance to see what it is you think does involve either a  
24 claim of confidentiality by AT&T or perhaps the government will  
25 have some claim of state secrets with respect to these

1 materials. I think most of this information probably involves  
2 AT&T information.

3 MR. ANDERSON: Yes, your Honor. We will be happy to  
4 work with plaintiffs' counsel to negotiate, if it's possible,  
5 for us between the parties to negotiate a partially redacted  
6 version of that document. If we have a dispute, we'll bring it  
7 to the Court. And as I understand your Honor's ruling, in the  
8 meantime, that motion papers in support of preliminary  
9 injunction will remain under seal pending our resolution of  
10 this.

11 THE COURT: Can I set a deadline for you to do that?  
12 Let's see, this is the 17th. Can you submit either a proposed,  
13 jointly agreed upon, redacted version; or, if not, your  
14 respective positions, by sometime next week?

15 MS. COHN: Yes, your Honor.

16 THE COURT: Is that agreeable, Miss Cohn?

17 MS. COHN: It is, your Honor.

18 THE COURT: Thank you.

19 MR. ANDERSON: Thursday of next week?

20 MS. COHN: The 25th?

21 MR. ANDERSON: Correct.

22 MS. COHN: I think that would work.

23 THE COURT: All right. The 25th.

24 MR. ANDERSON: Thank you, your Honor.

25 THE COURT: If need be, we can either convene a



1 telephone conference or you can submit your respective  
2 positions in writing.

3 MS. COHN: Your Honor, there is one other issue --  
4 there's always one other issue -- and that is the matter of our  
5 30(b)(6) notice to AT&T. We are, in light of the Court's  
6 rulings, willing to hold in abeyance the vast majority of that  
7 30(b)(6) notice, but there is one item that we've requested,  
8 the single document request that we have at the end that we  
9 think would actually be very helpful to the Court and the  
10 parties in terms of framing these issues, and that is the  
11 request for any certification from the Attorney General that  
12 AT&T may be relying on in claiming its immunity and its motion  
13 to dismiss, and that's why I think it's relevant to -- even if  
14 the PI motion doesn't go forward.

15 THE COURT: Am I looking at the right document here?

16 MS. COHN: You have the 30(b)(6) notice in front of  
17 you.

18 THE COURT: It's numbered Paragraph 7, but 7 resides  
19 between 16 and 18. So I assume that's a --

20 MS. COHN: It's actually on Page 5 of the 30(b)(6)  
21 notice itself. And it's in Lines 5 to 9.

22 THE COURT: Oh, I see.

23 MS. COHN: I would love a 30(b)(6) on this, but I  
24 will, at least for these purposes, I think, at least having  
25 certification itself would allow us to make -- I mean, AT&T's

1 motion to dismiss relies on an argument that they have an  
2 immunity, and their immunity is dependent on whether they have  
3 certification or not. So we think this is specifically at  
4 issue, and it's plainly not a state secret since the statute  
5 has a whole process by which you can evaluate whether these  
6 certifications are legal or not already built into it.

7 MR. ANDERSON: Your Honor, we don't see any way in  
8 which the Court could evaluate Miss Cohn's request without  
9 first reviewing the state secret notification by Mr. Nichols  
10 and the Department of Justice. As Miss Cohn knows even the  
11 existence of these certifications goes right to the heart of  
12 that state secrets indication. So this like the other requests  
13 for discovery, your Honor. We submit it should await the  
14 determination of the legal issues in the case, which your Honor  
15 has set as a threshold in this matter and will be resolved  
16 promptly.

17 THE COURT: Can you give me a very short briefing on  
18 this issue together with your other submission on the 25th?

19 MS. COHN: Yes, your Honor.

20 MR. ANDERSON: Yes, your Honor.

21 THE COURT: Briefing focusing very narrowly on this  
22 issue.

23 MS. COHN: Yes, your Honor.

24 MR. NICHOLS: As I understand this, your Honor, this  
25 is the propriety of discovery at this time into this issue.

1 THE COURT: Correct. Correct.

2 MS. COHN: The one specific request -- if you don't  
3 have the 30(b)(6), I can provide it to you (to Mr. Nichols).

4 THE COURT: Anything further? Very well. Thank you,  
5 Cohn, Mr. Anderson and Mr. Nichols. Thank you, Counsel.

6 MR. NICHOLS: Thank you, your Honor.

7 MR. ANDERSON: Thank you, your Honor.

8 MR. OLSON: Thank you, your Honor.

9 MS. COHN: Thank you, your Honor.

10 (Adjourned)

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CERTIFICATE OF REPORTER

I, CONNIE KUHL, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in Case No. C 06-0672 VRW, Tash Hepting, et al. v. AT&T Corp., et al., were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a true record of said proceedings as bound by me at the time of filing.

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Connie Kuhl, RMR, CRR

Friday, May 19, 2006