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12 **UNITED STATES DISTRICT COURT**
 13 **NORTHERN DISTRICT OF CALIFORNIA**

14 TASH HEPTING, GREGORY HICKS)
 15 CAROLYN JEWEL and ERIK KNUTZEN)
 on Behalf of Themselves and All Others)
 16 Similarly Situated,)
)
 17 Plaintiffs,)
)
 18 v.)
)
 19 AT&T CORP., AT&T INC. and)
 DOES 1-20, inclusive,)
 20 Defendants.)
 21)
 22)

Case No. C-06-0672-VRW

**RESPONSE OF THE UNITED STATES
 TO THE ORDER TO SHOW CAUSE**

Judge: The Hon. Vaughn R. Walker
 Hearing Date: August 8, 2006
 Time: 2:00 p.m.

INTRODUCTION

23 The Court has ordered the parties to show cause in writing by July 31, 2006 as
 24 to why the Court should not appoint an expert pursuant to Federal Rule of Evidence (“FRE”) 706
 25 to assist the Court in determining whether disclosing particular evidence would create a
 26 “reasonable danger” of harming national security. *See Hepting v. AT&T Corp.*, No. C-06-672,
 27

1 2006 WL 2038464, at *34-35 (N.D. Cal. July 20, 2006) (hereafter “Order”). In addition, the
2 Court requested the parties’ views “regarding the means by which the court should review any
3 further classified submissions.” *Id.* Finally, the Court directed the parties to state their position
4 as to “what portions of this case, if any, should be stayed if this order is appealed” pursuant to 28
5 U.S.C. § 1292(b). *Id.*

6 As set forth herein, it is the position of the United States that all further proceedings in
7 this case should be stayed pending a determination by the Court of Appeals on whether to review
8 the Court’s Order pursuant to 28 U.S.C. § 1292(b) — and, if the Court of Appeals accepts
9 review, pending conclusion of that appeal.^{1/} Any future proceedings in this case are dependent
10 on the issues to be addressed and resolved by the Court of Appeals, should it review the Court’s
11 Order. If the Court’s conclusion that this case need not be dismissed on state secrets grounds is
12 reversed by the Court of Appeals, such a result would obviate the need for any further
13 proceedings. In particular, any further proceedings hinge on the Court’s view that the state
14 secrets privilege does not preclude AT&T from confirming or denying certain information. *See*
15 Order at *19. That question is the very issue on which the United States has sought appellate
16 review. The United States respectfully disagrees with the Court’s view as to whether and to
17 what extent the state secrets privilege precludes AT&T from providing any information in this
18 case. Thus, unless stayed, further proceedings are likely to give rise to precisely the same state
19 secret privilege issues that the Court has certified for appellate review.

20 The United States also urges the Court to defer consideration of whether to appoint an
21 “expert” under FRE 706 until the stay and appellate issues are resolved. Otherwise, the United
22 States must oppose such an appointment.^{2/} The decision on whether to grant access to classified

23
24 ¹ The United States filed its petition for interlocutory appeal with the Court of Appeals
for the Ninth Circuit on July 31, 2006.

25 ² While this Court has suggested that it appoint an “expert” pursuant to Fed. R. Evid. 706,
26 the United States assumes the Court is not suggesting adherence to the literal requirements of
27 that rule—which provides, for example, that any materials reviewed by the expert (in this case,
classified materials) be subject to discovery—but rather envisions having the expert play the role

1 information rests with the Executive Branch, and any order by the Court appointing such an
2 expert to review and assess the status of classified information would raise profound separation
3 of powers concerns that should be avoided. Moreover, the law contemplates that state secrets
4 privilege assertions will be resolved by Article III federal judges who, by virtue of their
5 Constitutional office, may receive access to classified information in order to address questions
6 before them. We are not aware of any case involving the state secrets privilege in which an
7 expert was appointed to assist the Court in addressing the central question to be decided—
8 whether the disclosure of certain information would harm national security.

9 To the extent the Court wishes to probe the Government's assertion of the state secrets
10 privilege further or engage in consultations about the matter, the appropriate course is for the
11 Court to look to the United States to address whatever issues and questions the Court may have.
12 Current officials of the Executive Branch are not only charged with special responsibility to
13 protect national security, but have the particular expertise and full, current background of
14 information as a basis on which to advise the Court. No one outside the Executive Branch,
15 including former officials—even ones who previously were cleared at high levels and
16 undoubtedly remain trustworthy—possess the authority or full range of expertise to make current
17 judgments about harms to national security.

18 Finally, to the extent this case proceeds, the need for additional security measures,
19 including whether the Court should travel to Washington (as suggested by the Court, *see* Order
20 at * 34), can be addressed between the Government and the Court, if necessary, as circumstances
21 arise.^{3/}

22
23 of a “technical advisor.” *See, e.g., Renaud v. Martin Marietta Corp., Inc.*, 972 F.2d 304, 308 n.8
24 (10th Cir. 1992) (finding that because “experts were . . . more technical advisors to the Court than
25 expert witnesses as contemplated by Fed. R. Evid. 706, . . . depositions and cross-examination
were inappropriate”).

26 ³ The United States further addresses the Court's question regarding appropriate
27 procedures for the protection of classified information in an *ex parte, in camera* submission filed
herewith.

ARGUMENT**I. FURTHER PROCEEDINGS IN THIS CASE SHOULD BE STAYED PENDING APPEAL OF THE COURT'S JULY 20, 2006 ORDER.**

A stay of this Court's July 20, 2006 Order pending appellate interlocutory review is appropriate.^{4/} Whether to grant a stay pending appeal is governed by the familiar test that weighs both the likelihood of success on the merits and the relative equities regarding irreparable injury. To obtain a stay, the moving party must demonstrate either a combination of probable success on the merits and the possibility of irreparable injury, or that serious questions are raised and the balance of hardships tips sharply in the moving party's favor. *Artukovic v. Rison*, 784 F.2d 1354, 1355 (9th Cir. 1986) (citing *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir.), *rev'd in part on other grounds*, 463 U.S. 1328 (1983)); *see also Beltran v. Meyers*, 677 F.2d 1317, 1320 (9th Cir. 1982). These tests "represent the outer reaches of a single continuum." *Artukovic*, 784 F.2d at 1355; *see also Benda v. Grand Lodge of Int'l Ass'n of Machinists*, 584 F.2d 308, 314 (9th Cir. 1978), *cert. dismissed*, 441 U.S. 937 (1979). In addition, the Ninth Circuit considers "'strongly' the public interest as an additional factor." *Artukovic*, 784 F.2d at 1355.

A stay pending appeal is plainly warranted here. In certifying the case for interlocutory review, the Court already recognized that this case presents serious questions. In addition, further proceedings necessarily hinge on acceptance of the Court's view that the state secrets privilege does not prevent certain additional disclosures. *See* Order at *19. The very issues on which the United States seeks appellate review are whether the Court properly found that this case should not be dismissed, and whether any information that might tend to confirm or deny any involvement by AT&T in assisting the government to intercept the content of

⁴ Because the Court has requested the parties' views on whether its Order should be stayed, this response should, to the extent necessary, be treated as a motion for a stay pending appeal. *See* Fed. R. App. P. 8(a)(1)(A). There is no apparent reason why the matter should now be calendared as a separate motion. Indeed, should the Court reject the Government's position set forth herein as to why a stay pending appeal is necessary, any motion on the matter would obviously be impracticable and, therefore, unnecessary before seeking such relief in the Court of Appeals. *See id.*, Rule 8(a)(2)(A)(i).

1 communications can be disclosed. Until those questions are resolved, the United States believes
2 that no information can be disclosed at any “level of generality” without risking severe
3 irreparable harm both to the Government’s position and to national security. Indeed, where the
4 issue on appeal concerns the disclosure of information, proceedings should be stayed until a
5 determination is made regarding these threshold questions.

6 Since the Court of Appeals may disagree with this Court’s view that the case can proceed
7 at all, any attempt to proceed now risks the very disclosures that an appeal is intended to address
8 and the potential harm to national security at stake—effectively destroying appellate court
9 jurisdiction by mooted the significant issues on appeal.

10 **A. The Questions at Issue Are of Such Serious Weight That a Stay
Pending Appeal Is Warranted.**

11 To obtain injunctive relief pending appeal, the moving party need not convince the
12 district court, which has just ruled against it on the very question at issue, that it was wrong to
13 have done so. Rather, as to the merits of the matter being appealed, it is sufficient to show that
14 the appeal presents serious legal questions. *Artukovic*, 784 F.2d at 1355; *see also Population*
15 *Institute v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986) (“[I]t will ordinarily be enough
16 that the plaintiff has raised serious legal questions going to the merits, so serious, substantial,
17 difficult as to make them a fair ground of litigation and thus for more deliberative
18 investigation.”) (quoting *Washington Metropolitan Area Transit Commission v. Holiday Tours,*
19 *Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977)). On this factor, it should be dispositive to note that the
20 Court itself has observed that “a substantial ground for difference of opinion” exists regarding
21 whether the state secrets privilege bars further proceedings in this case. *See Order at *35.*

22 Beyond this, the matters at issue on appeal are of obvious weight: whether further
23 proceedings in this case might entail or risk the disclosure of information that would cause
24 exceptionally grave harm to U.S. national security. In its Order, the Court has applied—and, in
25 our view, substantially limited—a long-standing line of Supreme Court precedent holding that
26 “public policy forbids the maintenance of any suit in a court of justice, the trial of which would
27 inevitably lead to the disclosure of matters which the law itself regards as confidential, and

1 respecting which it will not allow the confidence to be violated.” *Totten v. United States*, 92
2 U.S. (2 Otto) 105, 107, 23 L.Ed. 605 (1875); *Tenet v. Doe*, 544 U.S. 1 (2005). Plaintiffs’
3 allegations put squarely at issue whether the United States and AT&T have a relationship
4 pursuant to which AT&T assists the United States with respect to the intelligence activities
5 alleged in the Complaint. Contrary to the Court’s view, *see* Order at *14, the *Totten* doctrine has
6 not been applied solely to preclude adjudication of alleged espionage agreements between the
7 parties thereto. *See Weinberger v. Catholic Action of Haw./Peace Ed. Project*, 454 U.S. 139,
8 146-147 (1981) (citing *Totten* in holding that whether or not the Navy has complied with
9 the National Environmental Policy Act to the fullest extent possible is beyond judicial scrutiny,
10 where, due to national security reasons, the Navy could “neither admit nor deny” the fact that
11 was central to the suit— that it proposed to store nuclear weapons at a facility); *see also Kasza v.*
12 *Browner*, 133 F.3d 1159, 1170 (9th Cir.) (relying in part on *Totten* to dismiss case even though a
13 classified espionage relationship was not at issue but facts about an Air Force facility), *cert.*
14 *denied*, 525 U.S. 967 (1998). In any event, a serious question exists on this point.

15 Further, the Court’s determination that *Tenet* and *Totten* are inapplicable here, and that
16 the “very subject matter” of this action is not a state secret because certain statements made by
17 AT&T and the Government tend to confirm a relationship relevant to this case, *see* Order at *15,
18 *17, are quite far from being free of doubt—indeed, we submit were wrongly decided. The
19 Government has never confirmed or denied a relationship with AT&T regarding the activities
20 alleged by the Plaintiffs. *See* Public Declaration of John D. Negroponte, Director of National
21 Intelligence, ¶¶ 11-12. The Court’s inference of such a relationship based on general statements
22 by AT&T describing a history of cooperation with the Government and noting that it has acted
23 lawfully in doing so; or an acknowledgment by the Government of the mere existence of the
24 TSP; or the prominence of AT&T as a telecommunications provider is, in our view, unfounded
25 speculation.

26 In addition, the Court failed to apply the proper standard of review in deciding whether
27 the very subject matter of a case is a state secret, which turns not on whether public statements

1 bear upon the allegations in the case, but on whether actual proof necessary to decide the merits
2 of the claims would risk or implicate the disclosure of state secrets. *See Kasza*, 133 F.3d at 1170
3 (finding the very subject matter of the case to be a state secret by examining whether the
4 evidence needed for plaintiffs to establish a *prima facie* case and any further proceeding,
5 including trial, would jeopardize national security); *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d
6 1236, 1237 (4th Cir. 1985) (“due to the nature of the question presented in this action *and the*
7 *proof required* by the parties to establish or refute the claim, the very subject of this litigation is
8 itself a state secret”) (emphasis added). Indeed, in finding that the very subject matter of this
9 case is not a state secret, the Court “declined to decide” the issues necessary to make that
10 determination. *See* Order at *17 (declining to deciding whether the case should be dismissed
11 because the state secrets assertion will preclude the evidence necessary for the plaintiffs to
12 establish a *prima facie* case or AT&T to defend). There is at least a serious question as to
13 whether the Court decided this fundamental threshold question properly, thus warranting further
14 review.

15 **B. The Balance of Harms Tips Decidedly in Favor a Stay Pending Appeal.**

16 The question of whether a stay pending appeal should issue turns ultimately on the
17 balance of hardships, which tips squarely in favor of the United States here. In any matter of
18 privilege, but particularly one involving the state secrets privilege to which the “utmost
19 deference” is due, *Kasza*, 133 F.3d at 1166, a stay is required to avoid “disclosure of the very
20 thing the privilege is designed to protect.” *See United States v. Reynolds*, 345 U.S. 1, 8 (1953).

21 It remains the United States’ position that: (i) the very subject matter of this case is a
22 “state secret,” *see Kasza*, 133 F.3d at 1166; (ii) that further litigation is precluded by the
23 *Totten/Tenet* doctrine; (iii) that state secrets are essential to—and, thus, are at risk of disclosure
24 in—any adjudication of the claims on the merits; and, in particular, (iv) that any role AT&T may
25 (or may not) have in assisting the Government in intercepting the content of communications
26 under the TSP cannot be disclosed. The United States does not intend to change its position on
27 these matters in any further proceedings until appellate review has been exhausted. Yet the

1 Court envisions that further disclosures related to these threshold facts are possible.

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

13 *See* Order at *19. The United States disagrees with the Court's views as to what AT&T can and
14 cannot say with respect to any alleged certification without disclosing information properly held
15 privileged. Indeed, a disclosure "at the level of generality at which the government has publicly
16 confirmed or denied its monitoring of communication content" would appear to require a
17 confirmation of denial of the existence of a certification with respect to this activity. Any
18 attempt to go down this road implicates disclosing information subject to the state secrets
19 privilege when the United States' position on appeal is that any such disclosure is improper.
20 Even if some purportedly non-confirmatory statements could be developed at a "level of
21 generality," the risk is great that proceeding as the Court envisions would nonetheless indirectly
22 confirm or deny classified facts, and thus risk the disclosure of information that the United States
23 believes is properly privileged.

24 Courts are "not required to play with fire and chance further disclosure — inadvertent,
25 mistaken, or even intentional — that would defeat the very purpose for which the privilege
26 exists." *Sterling v. Tenet*, 416 F.3d 338, 344 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1052
27 (2006). Neither, of course, should the Government be required to take such a chance. The law
28 is clear, moreover, that where the very issue on appeal is whether information should be
protected, further proceedings that might disclose that information should not be conducted.
Where a movant has "raised 'specific privilege claims,'" such as here, "and there exists a 'real
possibility . . . that privileged information would be irreparably leaked' . . . if it turns out that the
district court erred," the movant has "shown a 'real possibility' that he will be irreparably

1 harmed by the disclosure . . . pursuant to the district court’s order.” *United States v. Griffin*, 440
2 F.3d 1138, 1142 (9th Cir. 2006); *see also Center for National Security Studies v. U.S. Dep’t of*
3 *Justice*, 217 F. Supp. 2d 58, 58 (D.D.C. 2002) (finding that “disclosure of the names of the
4 detainees and their lawyers” pursuant to the Freedom of Information Act “would effectively
5 moot any appeal,” and therefore granting a stay pending appeal); *Providence Journal Company*
6 *v. FBI*, 595 F.2d 889 (1st Cir. 1979) (granting stay pending appeal to preserve status quo of not
7 disclosing information at issue in FOIA case). This Court itself has previously noted that, if an
8 appeal will be rendered moot, such circumstances present “the quintessential form of prejudice’
9 justifying a stay.” *In re Pacific Gas & Electric*, No. C-02-1550 VRW, 2002 WL 32071634, at *2
10 (N.D. Cal. Nov. 14, 2002) (citation omitted).

11 In this case, the Court expressly contemplates that “the state secrets privilege will not
12 prevent AT&T from asserting a certification defense,” *see* Order at *19 — a matter implicating
13 privileged information that the United States seeks to contest on appeal. Thus, the very “real
14 possibility” exists that further proceedings would risk the disclosure of privileged information
15 and irreparably harm the interests of the United States absent a stay of the Court’s July 20 Order
16 pending appeal.

17 **C. The Public Interest Also Favors a Stay Pending Appeal.**

18 Finally, the public interest weighs in favor of a stay pending appeal. At issue is nothing
19 less than the disclosure of information that might cause exceptionally grave harm to national
20 security. While the Court and Plaintiffs may disagree with that assessment, it remains the matter
21 in dispute on appeal, not only as to whether the Government can confirm or deny AT&T’s role
22 in the allegations, but whether the very subject matter of this case implicates state secrets. “[N]o
23 governmental interest is more compelling than the security of the nation,” *Haig v. Agee*, 453
24 U.S. 280, 307 (1981), and that is what remains at issue here on appeal. Moreover, where courts
25 have found that, upon an assertion of the state secrets privilege, the “greater public good” may
26 lie in dismissal of the case, *see Kasza*, 133 F.3d at 1167, the public interest is best served by
27 staying further proceedings until the Court of Appeals decides that very question.

1 **II. APPOINTMENT OF AN EXPERT TO ASSIST THE COURT IN ITS**
 2 **CONSIDERATION OF THE STATE SECRETS PRIVILEGE SHOULD BE**
 3 **DEFERRED TO AVOID SERIOUS SEPARATION OF POWERS CONCERNS.**

4 While the issue of whether there will be appellate review of the Court's Order is pending,
 5 the United States urges the Court to defer consideration of the appointment of an expert to assist
 6 the Court on state secrets matters. Nonetheless, if the Court elects to address the issue now, the
 7 Government opposes such an appointment.^{5/} The authority to grant access to classified material
 8 belongs to the President, through his Executive branch designees. It would be improper for this
 9 Court to appoint an expert or technical advisor to assist it in the course of further proceedings
 10 with the review of classified information to assess the state secrets privilege, its implications for
 11 this case, and whether there is a reasonable danger that disclosure of certain information would
 12 harm national security.

13 It is well established that, under the separation of powers established by the Constitution,
 14 the Executive Branch is responsible for the protection and control of national security
 15 information. *See Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The Supreme Court has
 16 held:

17 [The President's] authority to classify and control access to
 18 information bearing on national security and to determine whether
 19 an individual is sufficiently trustworthy to occupy a position in the
 20 Executive Branch that will give that person access to such
 21 information flows primarily from this constitutional investment of
 22 power in the President and exists quite apart from any explicit
 23 congressional grant.

24 *Id.* By Executive Order, therefore, the President has instructed Executive agencies to strictly
 25 control classified information in their possession and to ensure that such information is disclosed
 26 only where an agency is able to determine that doing so is “clearly consistent with the interests
 27 of the national security.” *See* Exec. Order No. 12,958, 60 Fed. Reg. 19825 (Apr. 17, 1995), *as*
 28 *amended by* Exec. Order No. 13,292, 68 Fed. Reg. 15315 (Mar. 25, 2003); *see also Dorfmont v.*

26 ⁵ If the Court does appoint an expert pursuant to FRE 706, the United States requests,
 27 apart from any independent ground for review, that the Court certify any such order for
 28 immediate appellate review under 28 U.S.C. § 1292(b).

1 *Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990) (quoting *Egan*, 484 U.S. at 528), *cert. denied*, 499
2 U.S. 905 (1991). Accordingly, the decision to grant or deny access to such information lies
3 within the discretion of the Executive. *See Egan*, 484 U.S. at 529; *Dorfmont*, 913 F.2d at 1401
4 (“The decision to grant or revoke a security clearance is committed to the discretion of the
5 President by law.”); *see also Webster v. Doe*, 486 U.S. 592, 601 (1988); *Dorfmont*, 913 F.2d at
6 1401; *Guillot v. Garrett*, 970 F.2d 1320, 1324 (4th Cir. 1992) (noting that President has
7 “exclusive constitutional authority over access to national security information”).

8 Thus, any order by the Court that purports to grant access to classified information to an
9 expert or technical advisor, or that directs the United States to do so, would raise serious
10 separation of powers questions—questions that can be avoided here. The United States has
11 provided the Court with access to classified information, *in camera*, *ex parte*, to assist the Court
12 in reviewing privilege assertions. Even as to such disclosures, the Supreme Court has cautioned
13 that the court itself “should not jeopardize the security which the privilege is meant to protect by
14 insisting upon an examination of the evidence, even by the judge alone, in chambers.” *See*
15 *Reynolds*, 345 U.S. 1 at 10. This admonition readily extends to the appointment of an expert by
16 the Court.

17 Indeed, the same consideration has led courts to reject requests by counsel for plaintiffs
18 for access to classified information. “Our nation’s security is too important to be entrusted to
19 the good faith and circumspection of a litigant’s lawyer . . . or to the coercive power of a
20 protective order.” *Ellsberg v. Mitchell* 709 F.2d 51, 61 (D.C. Cir. 1983) (rule denying private
21 counsel access to classified information is “well settled”); *see also Halkin v. Helms* (“*Halkin I*”),
22 598 F.2d 1, 7 (D.C. Cir. 1978) (“It is not to slight judges, lawyers, or anyone else to suggest that
23 any such disclosure carries with it the serious risk that highly sensitive information may be
24 compromised.”) (quoting *Knopf, Inc. v. Colby*, 509 F.2d 1362 (4th Cir. 1975)); *Weberman v.*
25 *NSA*, 668 F.2d 676, 678 (2d Cir. 1982) (risk presented by giving private counsel access to
26 classified information outweighs benefit of adversarial proceedings); *Jabara v. Kelly*, 75 F.R.D.
27 475, 486 (E.D. Mich. 1977) (“plaintiff and his legal representative should be denied access to

1 classified in camera exhibits submitted in support of the [privilege] claims”); *Salisbury v. United*
2 *States*, 690 F.2d 966, 973-74 & n.3 (D.C. Cir. 1982) (“In any FOIA case in which considerations
3 of national security mandate *in camera* proceedings, the District Court may act to exclude
4 outside counsel when necessary for secrecy or other reasons.”).

5 A different outcome is not warranted for a court-appointed expert. The issue is not the
6 trustworthiness of the individual but, rather, the need to avoid the further risk of disclosure. *See*
7 *Colby v. Halperin*, 656 F.2d 70, 72 (4th Cir. 1981) (“Disclosure to one more person, particularly
8 one found by the CIA to be a person of discretion and reliability, may seem of no great moment,
9 but information may be compromised inadvertently as well as deliberately” and, thus, “*no one*
10 should be given access to such information who does not have a strong, demonstrated need for
11 it”) (emphasis added).

12 In addition, it is the judgment and expertise of *current* Executive Branch officials that
13 matters in resolving whether a disclosure would harm national security. For example, in
14 *Halperin v. National Security Council*, 452 F. Supp. 47, 51 (D.D.C. 1978), *aff’d without opinion*,
15 612 F.2d 586 (D.C. Cir. 1980), the court rejected reliance on the expertise of the plaintiff, a
16 former official of the National Security Council, who offered “his own impressive credentials as
17 a scholar and actor in the field of foreign policy and national security” to demonstrate the “flaws
18 in the reasons given by the several incumbents for their opinions and classifications”—officials
19 who were “constitutionally responsible for the conduct of United States foreign policy as to the
20 proper classification of [certain information].” *See also Snapp v. United States*, 444 U.S. 507,
21 512 (1980) (per curiam) (finding that current CIA officials have a “broader understanding of
22 what may expose classified information” than does a former CIA agent); *see also Egan*, 484 U.S.
23 at 529 (the protection of classified information must be committed to the broad discretion of the
24 agency responsible).⁶

25 ⁶ In FOIA actions, for example, courts are to “accord substantial weight to an agency’s
26 affidavit concerning the details of the classified status of the disputed record” because “the
27 Executive departments responsible for national defense and foreign policy matters have unique
28 insights into what adverse affects [*sic*] might occur as a result of public disclosure of a particular

1 Particularly in a state secrets privilege context, where, under the applicable standard of
2 review, the burden is on the government to make a showing of need to protect certain
3 information, *see Reynolds*, 345 U.S. at 11, the obligation and right to make that showing to the
4 Court resides with current Executive Branch officials, who are fully aware of the panoply of
5 intelligence information at issue and the risks at stake from any disclosure. Moreover, these are
6 judgments to which the Court owes to the Executive the “utmost deference.” *Kasza*, 133 F.3d at
7 1166. As compared to the reasoned judgment of the Executive Branch, the views of an outside
8 expert are entitled to no deference at all, however thoughtful, experienced, and trustworthy that
9 individual may be.

10 Thus, the appropriate course if the Court needs assistance with addressing an assertion of
11 the state secrets privilege is to make further inquiry of the Government regarding whatever
12 issues of questions the Court may have. That is the course taken by the district court in *Edmonds*
13 *v. U.S. Department of Justice*, 323 F. Supp. 2d 65 (D.D.C. 2004), *aff’d*, 161 Fed. Appx. 6,
14 045286 (D.C. Cir. May 6, 2005) (*per curiam*), *cert. denied*, 126 S. Ct. 734 (2005), following the
15 court's initial review of the classified declarations submitted by the Government. After the
16 Government asserted the state secrets privilege, the court issued an Order requiring the
17 Government to detail specifically why it was not possible to disentangle sensitive information
18 from nonsensitive information to permit the plaintiff's claims to go forward and for the
19 Government to defend against the claims in that case. *See id.* at 78-79. The Government
20 subsequently submitted an additional classified declaration in that case which addressed the
21 court's questions and concerns, ultimately leading the court to uphold the state secrets assertion
22 and dismiss the case. *See id.* Through such a process, the Government itself may address
23 questions or concerns raised by the Court in a secure fashion. *See also Terkel v. AT&T Corp.*,
24 No. 06-2837, 2006 WL 2088202, (N.D. Ill. July 25, 2006) at * 5, n.2.

25 At the very least, the Court should avoid the significant constitutional issues raised by the

26 _____
27 classified record.” *See S. Rep. No. 1200, 93d Cong., 2d Sess. (1974), reprinted in 1974*
28 *U.S.C.C.A.N. 6285, 6290.*

1 appointment of an expert to review classified information until the point at which it is clearly
2 necessary. Even if the case proceeds, the Court may find that any questions concerning whether
3 disclosure of information might reasonably harm national security may be resolved through
4 consultations with the Government itself. An analogous situation arose in *Stillman v. Central*
5 *Intelligence Agency*, 319 F.3d 546, 548-49 (D.C. Cir. 2003), a case involving a challenge to the
6 Government's pre-publication review requirements designed to ensure that former Government
7 officials do not disclose classified information. The district court desired the assistance of
8 plaintiff's counsel in evaluating classified information, and ordered that he be given a security
9 clearance. *Id.* at 548. The D.C. Circuit reversed, instructing the district court that it should first
10 attempt to resolve questions concerning the classification of information on its own through an
11 *ex parte* process. *Id.* If such questions could not be resolved in that manner, "then the court
12 should consider whether its need for such assistance outweighs the concomitant intrusion upon
13 the Government's interest in national security." *Id.* at 549. The D.C. Circuit added that, only
14 after the district court determined that it could not resolve a classification issue without
15 assistance should it enter an order requesting assistance by clearing counsel, and the Government
16 could then appeal to resolve the weighty constitutional question presented by such an order. *Id.*
17 In short, given the sensitivity of classified information, the risk to national security from
18 additional disclosures, and the significant separation of powers concerns, the D. C. Circuit in
19 *Stillman* required that any need for assistance on a particular matter clearly be ripe. Such an
20 approach makes sense in cases, such as this, where significant interests are at stake. Indeed, to
21 our knowledge, no court considering a state secrets privilege claim has ever proposed that an
22 expert be cleared by the Government in order to assist the court in determining whether there
23 was a reasonable danger that a disclosure would harm national security.^{7/}

24 ⁷ In *In re U.S. Dept. of Defense*, 848 F.2d 232 (D.C. Cir. 1988), a FOIA case involving a
25 review of over 2000 classified documents totaling 14,000 pages, the district court's decision to
26 appoint a special master to assist in such a voluminous review was upheld, but only where the
27 district court had limited the master's role to summarizing the position of each party and barred
him from making any recommendation on the merits of whether classified information was

1 Finally, given the standard of review as to state secrets claims, the need for an “expert” is
2 not apparent or appropriate. The Ninth Circuit has held that an assertion of the state secrets
3 privilege must be accorded the “‘utmost deference,’ and the court’s review of the claim of
4 privilege is narrow.” *See Kasza*, 133 F.3d at 1165-66. Aside from ensuring that the privilege
5 has been properly invoked as a procedural matter, the sole determination for the Court is
6 whether, “under the particular circumstances of the case, ‘there is a *reasonable danger* that
7 compulsion of the evidence will expose military matters which, in the interest of national
8 security, should not be divulged.’” *See Kasza*, 133 F.3d at 1166 (quoting *Reynolds*, 345 U.S. at
9 10). The Court’s task is simply to determine if those who have expertise as to intelligence
10 matters in the Executive Branch have articulated a reasonable basis for their position that harm
11 would flow from disclosure. These are necessarily the kind of predictive judgments that can
12 properly be made based on “complex political, historical, and psychological” considerations.
13 *See Central Intelligence Agency v. Sims*, 471 U.S. 159, 176 (1985). These are not matters given
14 to “expert” analysis, because they are ultimately policy judgments appropriately made by those
15 charged with the responsibility to protect national security and who have the range of
16 information necessary to inform their judgments. Such review— which is akin to rational basis
17 review— “is not a license for courts to judge the wisdom, fairness, or logic” of governmental
18 policies. *Heller v. Doe*, 509 U.S. 312, 319 (1993). Rather, a judgment must be upheld if there is
19 “any reasonably conceivable state of facts” that supports it. *See Heller*, 509 U.S. at 320; *see also*
20 *McGehee v. Casey*, 718 F.2d 1137, 1148-49 (D.C. Cir. 1983) (courts “should defer to [the
21 Executive Branch’s] judgment as to the harmful results of publication” as long as the

22
23 Circuit found the case was “*sui generis*” and declined to enter a writ of mandamus. *See id* at
24 239. The Government did not raise a separation of powers objection in that case and, hence, the
25 constitutional implications of the matter were not addressed. In this case, there is not yet any
26 issue regarding the review of an extremely large volume of documents. Also, the Court has
27 proposed that the court-appointed expert specifically assist in determinations as to whether a
28 disclosure poses a reasonable danger to national security, *see* Order at * 34, and the United
States does specifically object to the appointment on constitutional grounds.

1 explanations offered to demonstrate a logical connection between the information withheld and
2 the reasons for classification); *Washington Post v. U.S. Dep't of Defense*, 766 F. Supp. 1, 6-7
3 (D.D.C. 1991) (“[s]ubstantive review of classification decisions is quite deferential [because it
4 involves an evaluation of national security]” and “little more than a showing that the agency’s
5 rationale is logical” meets “this lenient standard”). This is especially so where courts have
6 recognized that the disclosure of small bits of seemingly innocuous information, in the proper
7 context, ““can be analyzed and fitted into place to reveal with startling clarity how the unseen
8 whole must operate.”” *Kasza*, 133 F.23d at 1166 (quoting *Halkin I*, 598 F.2d at 8); *see also*
9 *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972).
10 Such judgments are not matters for expert scrutiny, but are inherently within the discretion of the
11 Executive Branch, to which great deference is due, and should be upheld if some reasoned basis
12 supports them.

13 Notwithstanding the United States’ objection to the naming of an expert on classification
14 issues, the Court has ordered the Government to propose a nominee for this position. The United
15 States objects to doing so, and does so only because it has been ordered to at this stage. Without
16 waiving its objection to the appointment of an expert, and solely to comply with the Court’s
17 Order, the United States proposes the Honorable Laurence H. Silberman, Senior Circuit Judge,
18 United States Court of Appeals for the District of Columbia Circuit. Judge Silberman has
19 previously served as Co-Chairman of the Commission on the Intelligence Capabilities of the
20 United States Regarding Weapons of Mass Destruction, and on the Foreign Intelligence
21 Surveillance Court of Review.

22 **III. SECURITY CLASSIFICATION PROCEDURES.**

23 The Court is referred to the United States’ *ex parte, in camera* submission addressing the
24 topic of security classification procedures. Beyond this, to the extent this case proceeds, it is the
25 United States’ position that the need for additional security measures, including the need for any
26 travel by the Court to Washington, *see* Order at * 34, can be addressed between the Government
27 and Court, if necessary, as circumstances arise. The United States requests an opportunity to

1 reply to any procedures proposed by the parties regarding the submission of classified
2 information.

3 Respectfully submitted,

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16 DATED: July 31, 2006

17 *Attorneys for the United States of America*

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **RESPONSE OF THE UNITED STATES TO ORDER TO SHOW CAUSE, Case No. C 06-0672-VRW**, will be served by means of the Court's CM/ECF system, which will send notifications of such filing to the following:

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