BEFORE THE JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

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

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

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

AVERMENTS IN SUPPORT OF THE UNITED STATES' MOTION

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

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

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

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

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

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

5. The United States bases this motion on a Memorandum in Response to Verizon's Motion and in Support of this Motion to Transfer and Coordinate, the pleadings and papers on file herein, and such other matters as may be presented to the Panel at the time of hearing.

RESPONSES TO AVERMENTS IN VERIZON'S MOTION

The United States responds to the specific allegations in Verizon's Motion as follows:

1. The United States admits that the actions subject to Verizon's Motion allege that telecommunications carriers purportedly assisted the United States by providing access to or disclosing customer telephone and internet records. The United States admits that most of these actions were filed immediately following a May 11, 2006, *USA Today* article reporting that these alleged actions had occurred. The United States admits that all but one of these cases seek relief under the Electronic Communications Privacy Act, 18 U.S.C. § 2701 et seq., and that most additionally seek some type of nationwide or regional class action relief. The United States admits any remaining allegations of paragraph 1.

2. The United States admits that the actions subject to Verizon's Motion involve common questions of fact. The United States admits that one common questions is plaintiffs' factual allegations that the telecommunications carriers intercepted customer communications and provided the NSA with access to customer calling records. The United States admits all remaining allegations of paragraph 2.

3. The United States admits that transfer and coordination of these related cases "will be for the convenience of the parties and witnesses and will promote the just and efficient conduct" of the actions for purposes of 28 U.S.C. § 1407(a).

4. The United States admits that coordinating these actions before a single court will eliminate duplicative discovery, reduce the potential disclosure of classified information, prevent duplicative and conflicting pretrial rulings, conserve judicial resources, reduce the costs of litigation, and allow the cases to proceed more quickly to trial. Specifically, the United States admits that it intends to assert the state secrets privilege in these actions and to seek their

dismissal and admits that coordination will protect the national security interests.

5. The United States admits that the United States District Court for the District of Columbia would be an appropriate transferee forum and a convenient forum for counsel and the defendants. The United States further admits that the District of Columbia has substantial expertise in dealing with legal issues involving national security and avers that due to the manner in which classified material is maintained, it would also be the most secure and convenient forum for the Government if the cases were transferred to the District of Columbia. The United States also avers that the risks associated with national security information would be lessened in a judicial district coextensive with the seat of Federal Government. The United States admits that three related cases were pending before the District Court for the District of Columbia when Verizon's Motion was filed. The United States admits all remaining allegations of paragraph 5.

6. The United States admits that Verizon's Motion is based on Verizon's Brief in Support of its Motion, the pleadings and papers attached thereto, and all other such matters that will be presented to the Panel at the time of hearing.

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BEFORE THE JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

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

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

INTRODUCTION

Verizon Communications Inc., Verizon Global Networks Inc., and Verizon Northwest Inc.'s (hereinafter "Verizon") have moved the Judicial Panel on Multidistrict Litigation (hereinafter "Panel" or "JPML") for an order, pursuant to 28 U.S.C. § 1407: (1) transferring at least 20 virtually identical purported class actions (pending before at least 14 different district courts) to a single district court; and (2) coordinating those actions for pretrial proceedings (hereinafter "Motion for Transfer and Coordination" or "Verizon's Motion"). All of these purported class actions essentially allege that various telecommunication companies, including Verizon, unlawfully disclosed the content of and/or records regarding plaintiffs' telephone and/or internet communications records to the National Security Agency ("NSA"). Verizon's

Motion asserts that a multidistrict litigation proceeding is warranted because all of the statutory criteria for transfer and coordination – *i.e.,* the civil actions "involve[] one or more common questions of fact" and transfer for coordinated pretrial proceedings "will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions," 28 U.S.C. § 1407(a) – are clearly met.

The United States strongly supports Verizon's Motion for Transfer and Coordination, and urges this Panel to transfer all the pending lawsuits to one district court for all pretrial proceedings. Most significantly, each of these cases puts at issue alleged foreign intelligence surveillance activities undertaken by the United States Government. As such, the unique aspect of these actions – *i.e.,* the United States' intention to assert the military and state secrets privilege and other relevant statutory privileges[1] in these actions and seek their dismissal – warrants the transfer of these cases to one court to allow the resolution of this threshold matter in the most efficient manner for the courts and the parties, while protecting highly-sensitive and classified information, the disclosure of which would be harmful to the national security. Moreover, these cases fall squarely within the requirements of section 1407. All of these similar purported class actions allege that the telecommunications companies unlawfully provided the plaintiffs' telephone and/or internet communications records to the United States Government. It is beyond dispute that all of these actions share common questions of fact, including the same causes of actions and overlapping alleged classes. Transferring all of these cases to one court for pretrial proceedings will be more convenient for the parties, will not prejudice any parties' interest, and will conserve judicial resources.

[1] The phrase "state secrets privilege" is often used in this memorandum to refer collectively to the military and state secrets privilege and the statutory privileges invoked by the United States.

In addition, the United States also seeks to add to the proceedings in MDL 1791 a total of five actions (hereinafter "added actions") directly solely against the United States, *See* United States' Schedule of Added National Security Agency Actions for Transfer and Coordination Pursuant to 28 U.S.C. § 1407 to MDL 1791. These cases, like the cases against the telecommunications companies, allege that the United States is engaged in a foreign intelligence program that involves the alleged disclosure of or access to the content of, and/or records concerning, telephone and/or internet communications, in purported violation of federal statutes and the U.S. Constitution. The added actions also allege that the United States violated a host of statutory provisions, many of which overlap with the claims in cases subject to Verizon's Motion. In addition, common questions relating to pretrial procedure, particularly the United States' intention to assert the state secrets privilege and seek dismissal, arise across all the cases regardless of whether the case is against a telecommunications company, the Government, or both. Thus, judicial economy and convenience to the parties and witnesses strongly favor the transfer and coordination of the added actions with those subject to Verizon's Motion. Finally, the United States' unique concerns over the integrity and security of the presentation of national security information are a unifying factor militating in favor of transfer and coordination of the added actions.

BACKGROUND

A. The Events Of September 11, 2001

On September 11, 2001, the al Qaeda terrorist network launched a set of coordinated attacks along the East Coast of the United States. Four commercial jetliners, each carefully selected to be fully loaded with fuel for a transcontinental flight, were hijacked by al Qaeda operatives. Those operatives targeted the Nation's financial center in New York with two of the

jetliners, which they deliberately flew into the Twin Towers of the World Trade Center. Al Qaeda targeted the headquarters of the Nation's Armed Forces, the Pentagon, with the third jetliner. Al Qaeda operatives were apparently headed toward Washington, D.C. with the fourth jetliner when passengers struggled with the hijackers and the plane crashed in Shanksville, Pennsylvania. The intended target of this fourth jetliner was most evidently the White House or the Capitol, strongly suggesting that al Qaeda's intended mission was to strike a decapitation blow to the Government of the United States—to kill the President, the Vice President, or Members of Congress. The attacks of September 11 resulted in approximately 3,000 deaths—the highest single-day death toll from hostile foreign attacks in the Nation's history. In addition, these attacks shut down air travel in the United States, disrupted the Nation's financial markets and Government operations, and caused billions of dollars of damage to the economy.

On September 14, 2001, the President declared a national emergency "by reason of the terrorist attacks at the World Trade Center, New York, New York, and the Pentagon, and the continuing and immediate threat of further attacks on the United States." Proclamation No. 7463, 66 Fed. Reg. 48199 (Sept. 14, 2001). The United States also launched a massive military response, both at home and abroad. In the United States, combat air patrols were immediately established over major metropolitan areas and were maintained 24 hours a day until April 2002. The United States also immediately began plans for a military response directed at al Qaeda's training grounds and haven in Afghanistan. On September 14, 2001, both Houses of Congress passed a Joint Resolution authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" of September 11. Authorization for Use of Military Force, Pub. L. No. 107-40 § 21(a), 115 Stat. 224, 224 (Sept. 18, 2001) ("Cong. Auth."). Congress also

expressly acknowledged that the attacks rendered it "necessary and appropriate" for the United States to exercise its right "to protect United States citizens both at home and abroad," and acknowledged in particular that the "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." *Id.* pmbl.

As the President made clear at the time, the attacks of September 11 "created a state of armed conflict." Military Order, § 1(a), 66 Fed. Reg. 57833, 57833 (Nov. 13, 2001). Indeed, shortly after the attacks, NATO took the unprecedented step of invoking article 5 of the North Atlantic Treaty, which provides that an "armed attack against one or more of [the parties] shall be considered an attack against them all." North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246; see also Statement by NATO Secretary General Lord Robertson (Oct. 2, 2001), available at http://www.nato.int/docu/speech/2001/s011002a.htm ("[I]t has now been determined that the attack against the United States on 11 September was directed from abroad and shall therefore be regarded as an action covered by Article 5 of the Washington Treaty . . . ."). The President also determined that al Qaeda terrorists "possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government," and he concluded that "an extraordinary emergency exists for national defense purposes." Military Order, § 1(c), (g), 66 Fed. Reg. at 57833-34.

B. **The Continuing Terrorist Threat Posed by al Qaeda**

With the attacks of September 11, Al Qaeda demonstrated its ability to introduce agents into the United States undetected and to perpetrate devastating attacks. But, as the President has made clear, "[t]he terrorists want to strike America again, and they hope to inflict even more

damage than they did on September the 11th." Press Conference of President Bush (Dec. 19, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/12/20051219-2.html. ("President's Statement"). Thus, the President has explained that finding al Qaeda sleeper agents in the United States remains one of the paramount national security concerns to this day. *See id*.

Since the September 11 attacks, al Qaeda leaders have repeatedly promised to deliver another, even more devastating attack on America. For example, in October 2002, al Qaeda leader Ayman al-Zawahiri stated in a video addressing the "citizens of the United States": "I promise you that the Islamic youth are preparing for you what will fill your hearts with horror." In October 2003, Osama bin Laden stated in a released videotape that "We, God willing, will continue to fight you and will continue martyrdom operations inside and outside the United States . . . ." And again in a videotape released on October 24, 2004, bin Laden warned U.S. citizens of further attacks and asserted that "your security is in your own hands." In recent months, al Qaeda has reiterated its intent to inflict a catastrophic terrorist attack on the United States. On December 7, 2005, al-Zawahiri stated that al Qaeda "is spreading, growing, and becoming stronger," and that al Qaeda is "waging a great historic battle in Iraq, Afghanistan, Palestine, and even in the Crusaders' own homes." Since September 11, al Qaeda has staged several large-scale attacks around the world, including in Indonesia, Madrid, and London, killing hundreds of people.

Against this backdrop, the President has explained that, following the devastating events of September 11, 2001, he authorized the NSA to intercept international communications into and out of the United States of persons linked to al Qaeda or related terrorist organizations. *See* President's Statement. The Attorney General of the United States has further explained that, in

order to intercept a communication, there must be "a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda." Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005), *available at* http://whitehouse.gov/news/releases/2005/12/20051219-1.html. The purpose of these intercepts is to provide the United States with an early warning system to detect and prevent another catastrophic terrorist attack in the United States. *See* President's Statement. The President has stated that the NSA activities "ha[ve] been effective in disrupting the enemy, while safeguarding our civil liberties." *Id.*

C. Pending Lawsuits Against the Telecommunications Companies and the United States

Upon media reports in December 2005 of certain post-9/11 intelligence gathering activities as well as other more recent news articles, over twenty putative class action complaints have been filed in numerous district courts across the country against various telecommunications companies. All of these complaints essentially allege that the telecommunication companies provided the content and/or records of plaintiffs' telephone and internet communications records to the NSA in violation of various federal and state statutes as well as the Constitution of the United States. *See* Verizon's Motion for Transfer and Coordination at 4-7 (brief summary of cases), and attached complaints subject to Verizon's Motion for Transfer. The complaints generally seek an injunction against the telecommunications companies that would prohibit them from providing the alleged information to the Government.[2] *Id*. Many of the complaints seek substantial monetary damages. *Id*.

[2] Some complaints seek preliminary relief as well. *See, e.g., Terkel et al. v. AT&T Corp. et al.*, No. 06C2837 (N.D. Ill.).

The first of these cases – *Hepting v. AT&T Corp*., No. 06-0672 (N.D. Cal.), which was filed on January 31, 2006 – challenges AT&T's purported cooperation with the alleged foreign-intelligence activities. On May 13, 2006, before the bulk of these other lawsuits against the telecommunication companies were even filed, the United States asserted the state secrets privilege by the Director of National Intelligence ("DNI"), and related statutory privilege assertions (by the DNI and the Director of the National Security Agency ("DIRNSA")), in the *Hepting* case. Through these assertions of privilege, the United States seeks to protect against the unauthorized disclosure in litigation of certain intelligence activities, information, sources, and methods, implicated by the allegations in *Hepting*. The United States explained both in a public and in an *in camera, ex parte* memorandum (supported by declarations submitted by the DNI and DIRNSA) that the disclosure of the information to which these privilege assertions apply would cause exceptionally grave harm to the national security of the United States. The United States also moved to intervene in *Hepting*, pursuant to Federal Rule of Civil Procedure 24, for the purpose of seeking dismissal of the action or, in the alternative, summary judgment based on the United States' assertion of the state secrets privilege. The United States explained that *Hepting* cannot be litigated because adjudication of the plaintiffs' claims would put at risk the disclosure of privileged national security information. The United States' assertion of the state secrets privilege and motion to dismiss or, in the alternative, for summary judgment is currently pending.

On May 24, 2006, Verizon submitted to this Panel its Motion for Transfer and Coordination pursuant to 28 U.S.C. § 1407. Verizon's Motion requests that the Panel (1) transfer these approximately 20 virtually identical purported class actions (pending before 14 different federal district courts) to a single district court; and (2) coordinate those actions for

pretrial proceedings pursuant to 28 U.S.C. § 1407.

The United States is a named defendant in only one of the actions subject to Verizon's Motion[3] and has moved to intervene in *Hepting*. Nonetheless, the United States, as explained below, intends to assert the state secrets privilege in all of these actions and seek their dismissal.

D. **Pending Lawsuits Against Only the United States**

Plaintiffs in the added actions against the Government are individuals and organizations who allege either that they have been subject to surveillance or that they face a great likelihood of being subject to the challenged surveillance program because they make frequent calls and send emails to overseas destinations where terrorists might be located. *See American Civil Liberties Union, et al. v. National Security Agency, et al.*, No. 06-cv-10204 (E.D. Mich.); *Center for Constitutional Rights, et al. v. Bush, et al.*, No. 06-cv-313 (S.D.N.Y.); *Al-Haramain Islamic Foundation, et al. v. Bush, et al.*, No. 06-cv-274 (D. Or.); *Shubert v. Bush, et al.*, No. 06-cv-02282 (E.D.N.Y.); *Guzzi v.Bush, et al.*, No. 06-cv-0136 (N.D. Ga.). While these cases are at various stages, the most recent of these cases – *Shubert v. Bush, et al.* – was filed less than a week before Verizon's Motion. Plaintiffs in all these cases contend that the alleged surveillance activities violate their rights under the First and Fourth Amendments and exceeds statutory authority and the President's constitutional authority. Many of the statutory challenges to the United States' authority, such as those under the Electronic Communications Privacy Act and Federal Communications Act, raise issues similar to those in the cases against the

[3] The NSA and President Bush have been named as defendants in *Mayer et al. v. Verizon et al.*, 1:06-cv-03650-LBS (S.D.N.Y.). Moreover, the NSA has been named as a defendant in two similar cases filed after Verizon's Motion for Transfer – *Electron Tubes Inc. v. Verizon et al.*, No. 06cv4048 (S.D. N.Y.), and *Lebow et al. v. BellSouth Corp. et al*, No 1:06-cv-1289 (N.D. Ga.).

telecommunications companies.

Two of these cases, *American Civil Liberties Union, et al. v. National Security Agency, et al.*, No. 06-cv-10204 (E.D. Mich.); *Center for Constitutional Rights, et al. v. Bush, et al.*, No. 06-cv-313 (S.D.N.Y.), have been pending since January 17, 2006. The United States has asserted the state secrets privilege and moved to dismiss both of those cases.

ARGUMENT

This Panel is authorized under 28 U.S.C. § 1407 to consolidate and transfer "civil actions involving one or more common questions of fact" to any district court for coordinated or consolidated pretrial proceedings upon the Panel's "determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." 28 U.S.C. § 1407(a). The purpose of this transfer procedure is to conserve judicial resources and to avoid the delays that are bound to result if all aspects of pretrial proceedings were conducted separately. *See* Moore's Federal Practice – Civil, Chapter 112 Multidistrict Litigation § 112.02.

All of the cases that the parties seek to transfer and coordinate in one district court fall squarely within the requirements of 28 U.S.C. § 1407(a). In fact, given that the cases implicate alleged foreign-intelligence surveillance activities undertaken by the United States Government, unique and important considerations warrant transferring all these cases to one district court for coordination and pretrial proceeding.

I. The Actions Subject to Verizon's Motion Satisfy All of the Requirements of Section 1407(a), and the Added Consideration of the United States' Intention to Assert the State Secrets Privilege Warrants Transfer and Coordination in One District Court

All of the cases subject to Verizon's Motion for Transfer satisfy the requirements of

section 1407(a), *i.e.*, they "involve[] one or more common questions of fact" and transfer for coordinated pretrial proceedings "will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions." 28 U.S.C. § 1407(a).

A. **All of the Actions Share One or More Common Questions of Fact**

It is without doubt that all of these actions share "one or more common questions of fact." *See* 28 U.S.C. § 1407(a); *see also* Verizon's Motion for Transfer. All of these actions put at issue the alleged foreign-intelligence surveillance activities undertaken by the United States Government. The factual allegations in each of these complaints are virtually identical: they all essentially allege that, after September 11, 2001, the telecommunications companies have unlawfully provided the NSA with information regarding the communications of plaintiffs and the putative class members without judicial review or approval and without notice. *See, e.g., Marck v. Verizon Communications, Inc.*, No. CV-06-2455 (E.D.N.Y. filed May 19, 2006); *Harrington v. AT&T*, No. A06CA374LY (W.D. Tex. filed May 18, 2006); *Trevino v. AT&T Corp.*, No. 2:06-cv-00209 (S.D. Tex. filed May 17, 2006).[4] Indeed, except for the named plaintiffs, many of the complaints are similarly drafted and assert the same allegations regarding the alleged disclosure of records by the telecommunications companies. *See, e.g., Schwarz v. AT&T Corp*., No. 1:06-cv-2680 (N.D. Ill. filed May 15, 2006); *Mahoney v. AT&T Communications, Inc*., No. 1:06-cv-00224-S-LDA (D.R.I. filed May 15, 2006) And the purported classes in each of the actions tend to overlap each other. *See, e.g.*, *Bissitt v. Verizon Communications, Inc*., No. 1:06-cv-00220-T-LDA (D.R.I. filed May 15, 2006); *Marck v. Verizon Communications, Inc.*, No. CV-06-2455 (E.D.N.Y. filed May 19, 2006); *Hepting v.*

[4] A list of all cases cited herein, which are subject to Verizon's Motion for Transfer and Coordination, are attached to Verizon's Motion.

AT&T Corp., No. C 06 00672 (N.D. Cal. filed Jan. 31, 2006); *Mahoney v. AT&T Communications, Inc*., No. 1:06-cv-00224-S-LDA (D.R.I. filed May 15, 2006).

In addition, these actions generally bring the same causes of actions – namely under the Electronic Communications Privacy Act, 18 U.S.C. § 2701 *et seq*. – and seek the same injunctive relief, *i.e.,* to enjoin the telecommunications companies from providing foreign intelligence assistance to the Government, as all these plaintiffs allege to have occurred. *See, e.g., Terkel v. AT&T Inc.*, No. 06C 2837 (N.D. Ill. filed May 22, 2006); *Dolberg v. AT&T Corp*., No. CV 06-78-M-DWM (D. Mont. filed May 15, 2006); *Fuller v. Verizon Communications, Inc*., No. 06-cv-00077-DWM (D. Mont. filed May 12, 2006). Most of the complaints also seek substantial monetary damages. *See*, *e.g*., *Ludman v. AT&T Inc*., No. 06-cv-00917-RBW; *Mayer v. Verizon Communications Inc.*, No. 1:06-cv-03650 (S.D.N.Y. filed May 12, 2006); *Hepting v. AT&T Corp.*, No. C-06-00672 JCS (N.D. Cal. filed Jan. 31, 2006).

There cannot be any dispute that all of these actions share "one or more common questions of fact."

B. The United States Intends to Assert the State Secrets Privilege in All of the Pending Actions Brought and Seek Their Dismissal

As noted, all of these actions against the telecommunications companies put at issue alleged foreign-intelligence surveillance activities undertaken by the United States Government. The United States intends to assert the state secrets privilege in these actions and to seek their dismissal. The United States' assertion of the state secrets privilege is fully supported by Supreme Court and other established case law, and in the circumstances further supports transfer and consolidation of these actions to one district court.

The ability of the executive to protect military or state secrets from disclosure has been

recognized from the earliest days of the Republic. *See Totten v. United States*, 92 U.S. 105 (1875); *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807); *United States v. Reynolds*, 345 U.S. 1 (1953). The privilege derives from the President's Article II powers to conduct foreign affairs and provide for the national defense. *United States v. Nixon*, 418 U.S. 683, 710 (1974). Accordingly, it "must head the list" of evidentiary privileges. *Halkin v. Helms,* 598 F.2d 1, 7 (D.C. Cir. 1978).

"Once the privilege is properly invoked and the court is satisfied that there is a reasonable danger that national security would be harmed by the disclosure of state secrets, the privilege is absolute," and the information at issue must be excluded from disclosure and use in the case. *Kasza v. Browner*, 133 F.3d 1159 (9th Cir.), *cert. denied*, 525 U.S. 967 (1998). Moreover, if "the 'very subject matter of the action' is a state secret, then the court should dismiss the plaintiff's action based solely on the invocation of the state secrets privilege." *Id*. at 1166. In such cases, "sensitive military secrets will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters." *See Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236 (4th Cir. 1985). Dismissal is also necessary when either the plaintiff cannot make out a prima facie case in support of its claims absent the excluded state secrets, or if the privilege deprives the defendant of information that would otherwise provide a valid defense to the claim. *Kasza*, 133 F.3d at 1166.

Upon transfer by the Panel, the United States intends to assert the state secrets privilege in the transferee court and will demonstrate why disclosure of certain information necessary to the litigation of these actions would be harmful to the national security. Also upon transfer by the Panel, the United States intends to seek dismissal by demonstrating that the very subject matter of plaintiffs' suits is a state secret, that plaintiffs will be unable to make out a prima facie

case in support of their claims, and that defendants are unable to defend any alleged actions. Because all the factual allegations of these actions are essentially the same, the United States should be required to make this assertion and seek dismissal as few times as necessary.

C. Transfer of These Cases Promotes Just and Efficient Conduct of These Actions

1. Transfer and Coordination Would Facilitate Pretrial Proceedings

Because all these cases are factually similar, advance similar causes of actions, and seek certification of similar and overlapping classes, pretrial proceedings in all these actions will virtually be the same. Transfer and coordination to one district court will preclude inconsistent rulings relating to pretrial proceedings by different district courts on similar issues. For this reason alone, transfer and coordination of these actions will promote the just and efficient conduct of these actions. *See, e.g., In re Prempro Products Liability Lit.*, 254 F. Supp. 2d 1366, 1367 (J.P.M.L. 2003) ("[c]entralization under Section 1407 is necessary in order to eliminate duplicative discovery, prevent inconsistent pretrial rulings (especially with respect to the question of class certification), and conserve the resources of the parties, their counsel and the judiciary").

The resolution of the United States' intended assertion of the state secrets privilege and motion to dismiss by a single district court, moreover, further supports the judicial economy of centralization of these actions. Pretrial motions, such as motions to dismiss or summary judgment, are the types of pretrial proceedings that are appropriate for the transferee court to consider. *See, e.g., U.S. v. Baxter Intern., Inc.* 345 F.3d 866 (11th Cir. 2003), *cert. denied*, 542 U.S. 946 (2004) (court affirmed in part and reversed in part district court's granting of defendants' motions to dismiss in multidistrict litigation actions). And the United States'

submissions will present a threshold question as to whether, by virtue of state secrets and the harm to national security that would result from unauthorized disclosure in litigation, these actions should proceed any further. *See*, *e.g.*, *Tenet v. Doe*, 544 U.S. 1, 6 n. 4 (2005) (court should first consider threshold issues raised by the applicability of a rule barring adjudication relating to secret espionage agreements). Consolidation of these actions in one district court will facilitate the prompt resolution of the United States' intended assertions and preclude any potential inconsistent rulings in similar cases.

2. Reasons of National Security Favor Transfer and Coordination in One District Court

The United States' assertion of the state secrets privilege presents unique national security concerns that this Panel should consider in making its decision whether these cases should be transferred in one district court. Given the highly sensitive and classified information at issue, there is an increased risk of disclosure of such information, which would be harmful to the national security, if the United States is required to present state secrets in multiple fora. The Supreme Court has recognized the unique aspects of the assertion of the state secrets privilege and the need to use extreme care in reviewing materials submitted in support of this assertion. *See Reynolds*, 345 U.S. at 10; *see also Clift v. United States*, 597 F.2d 826, 829 (2d Cir. 1979) ("It is not to slight judges, lawyers or anyone else to suggest that any such disclosure carries with it serious risk that highly sensitive information may be compromised. In our own chambers, we are ill equipped to provide the kind of security highly sensitive information should have.") (quoting *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1369 (4th Cir. 1975), *cert. denied*, 421 U.S. 992 (1975)). The Government often submits classified declarations for *in camera, ex parte* review where the state secrets privilege is invoked. *See Kasza*, 133 F.3d at 1169-70;

Zuckerbraun v. General Dynamics Corp., 935 F.2d 544 (2d Cir. 1991); *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236 (4th Cir. 1985); *Molerio v. FBI*, 749 F.2d 815, 819, 822 (D.C. Cir. 1984); *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc); *see also, e.g., Sterling v. Tenet*, 416 F.3d 338, 342 (4th Cir. 2005) (upholding dismissal based on determination, after reviewing *in camera* affidavits, that any attempt by plaintiffs to make out a prima facie case at trial would entail revelation of state secrets), *cert. denied*, 126 S.Ct. 1052 (2006). Thus, for example, in *Hepting v. AT&T Corp., et al.*, No. C-06-0672-VRW (N.D. Cal.), the assertion of the state secrets privilege was supported by the United States' public and *in camera, ex parte* memorandum and declarations submitted by the DNI and DIRNSA establishing that the disclosure of the information to which these privilege assertions apply would cause exceptionally grave harm to the national security of the United States.

It is unnecessary and serves no interest to require the same litigation to proceed in multiple courts around the country where the Government intends to protect significant matters of national security. Efficiency and security dictate that as few courts as possible – rather than multiple courts proceedings on similar tracks – should decide the appropriateness and effect of the United States' assertion of the state secrets privilege in all these actions. In the interest of national security, therefore, this Panel should exercise its authority under 28 U.S.C. § 1407 to transfer these cases for coordination of pretrial proceedings.

D. Transfer of These Cases Will Serve the Convenience of the Parties and Witnesses

The statutory requirement that transfer and coordination of these cases serve the convenience of the parties and witnesses is also met here. Litigating these cases in multiple courts across the country will cause substantial inconvenience to senior government officials,

including the Director of National Intelligence, who is required to give personal consideration to invocation of the state secrets privilege and whose declaration will be required separately in each action. Given the significant day-to-day responsibilities of the DNI, the need for him to personally consider over twenty separate lawsuits and claims of privilege will impose a substantial and unwarranted distraction for an extend period of time. The same will be true for any other Government officials whose declarations will be needed in support of the United States' submissions as well.

It would serve the convenience of all parties, moreover, to have such similar matters resolved in one forum. As noted, these cases assert the same factual allegations, bring similar causes of actions, have overlapping putative classes, and seek similar relief. Resolving the pretrial proceedings in one court would resolve the claims in a timely manner without the risk of inconsistent rulings.

II. The Added Actions Directed Solely Against the United States Should Also Be Transferred and Coordinated

For substantially the same reasons that the cases subject to Verizon's Motion should be transferred and coordinated, *see* Part I *supra*, the United States also seeks to include the added actions with the Panel's transfer and coordination decision.

Regardless of whether the actions are against the telecommunications carriers, the Government, or both, numerous common questions of fact, law, and pretrial procedure strongly counsel in favor of the transfer and coordination of the added actions. For example, like the cases against the telecommunication companies, the actions against the United States allege that the United States is engaged in foreign intelligence activities that involve the alleged disclosure of or access to the content and/or records of telephone and internet communications, in purported

violation of federal statutes and the U.S. Constitution. Thus, the added actions against the Government each arise out of the same common nucleus of fact as those subject to Verizon's Motion. In addition, many of the asserted statutory challenges to the Government in the added actions are related to the causes of action against the telecommunication companies.

Finally, common questions relating to pretrial procedure, particularly the United States' intention to assert the state secrets privilege and seek dismissal, arise across all the cases, regardless of whether the case is against a telecommunications company, the Government, or both. For this reason alone, the transfer and coordination of the added actions with the cases subject to Verizon's Motion would facilitate the common pretrial procedures in all of the cases. Indeed, the convenience to the parties and witnesses would be substantial if the Panel transferred and coordinated the added actions against the Government with those subject to Verizon's Motion. Thus, both judicial economy and convenience to the parties strongly favor the transfer and coordination of the added actions with those subject to Verizon's Motion. Finally, the United States' unique concerns regarding the integrity and security of the presentation of national security information are a unifying factor weighing in favor of transfer and coordination of the added actions with those subject to Verizon's Motion.

III. **The District of Columbia is a Convenient Forum**

In its motion, Verizon recommends that this Panel transfer these cases to the United States District Court for the District of Columbia. *See* Verizon's Motion for Transfer at 16-19. The United States agrees that, in light of the national security concerns discussed above and the familiarity of the judges in that district with national security issues, the District of Columbia would be the most logical and convenient forum. Due to the manner in which classified material is maintained, it would also be the most secure forum for the Government if the cases were

transferred to the District of Columbia. Finally, the Judges in the District of Columbia generally have particular experience with cases involving classified national security information. *See, e.g.*, *Islamic American Relief Agency v. Unidentified FBI Agents, et al.*, 394 F. Supp. 2d 34 (D.D.C. 2005), *appeal docketed*, (D.C. Cir. Nov. 8, 2005)*; Edmonds v. U.S. Dept. of Justice*, 323 F. Supp. 2d 65, 67-68 (D.D.C. 2004)*, aff'd*, 161 Fed. Appx. 6 (D.C. Cir.), *cert. denied*, 126 S. Ct. 734 (2005); *Holy Land Found. for Relief and Dev. v. Ashcroft*, 219 F. Supp. 2d 57 (D.D.C. 2002), *aff'd*, 333 F.3d 156 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1218 (2004).

CONCLUSION

Accordingly, the United States respectfully requests that this Panel (i) grant Verizon's Motion for Transfer and Coordination of all actions subject to Verizon's motion, (ii) grant the United States' Motion for Transfer and Coordination, as well as any other similar pending case to either motion, and (iii) transfer all such actions to one district court for pretrial proceedings.

Respectfully submitted,

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Dated: June 19, 2006

Attorneys for the United States of America

BEFORE THE JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

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

THE UNITED STATES' SCHEDULE OF ADDED NATIONAL SECURITY AGENCY ACTIONS FOR TRANSFER AND COORDINATION PURSUANT TO 28 U.S.C. § 1407 TO ADD TO MDL 1791

Pursuant to Rule 7.2(a)(ii) of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, defendant the United States of American provides the following information on the actions that will be affected by their Motion for Transfer and Coordination Pursuant to 28 U.S.C. § 1407:

Plaintiffs	Defendant	District/ Division	Civil Action No.	Judge Assigned
American Civil Liberties Union; American Civil Liberties Union Foundation; American Civil Liberties Union of Michigan; Council on American-Islamic Relations; Council on American-Islamic Relations Michigan; Greenpeace, Incorporated; National Association of Criminal Defense Lawyers; James Bamford; Larry Diamond; Christopher Hitchens; Tara McKelvey; Barnett R. Rubin;	National Security Agency/Central Security Service; Keith B. Alexander	**E.D. Mich.**/ Detroit	06-cv-10204-ADT-RSW	The Honorable Anna Diggs Taylor
Center for Constitutional Rights; Tina M. Foster; Gitanjali S. Gutierrez; Seema Ahmad; Maria LaHood; Rachel Meeropol;	George W. Bush; National Security Agency; Defense Intelligence Agency; Central Intelligence Agency; Department of Homeland Security; Federal Bureau of Investigation; John D. Negroponte	**S.D.N.Y.** / New York	06-cv-313-GEL	The Honorable Gerald Lynch

Al-Haramain Islamic Foundation, Inc.; Wendell Belew; Asim Ghafoor;	George W Bush; National Security Agency; Keith B. Alexander; Office of Foreign Assets Control; Robert W. Werner; Federal Bureau of Investigation; Robert S. Mueller, III	**D. Or.** (Portland)	06-cv-00274-KI	The Honorable Garr M. King
Virginia Shubert; Noha Arafa; Sarah Dranoff; Hilary Botein;	George W. Bush; Michael V. Hayden; Keith B. Alexander; Alberto Gonzales; John Ashcroft	**E.D.N.Y.** (Brooklyn)	06-cv-02282-FB-MDG	The Honorable Frederic Block
Mark E. Guzzi	George W. Bush; Keith B. Alexander; National Security Agency	**N.D. Ga.** (Atlanta)	06-cv-0136-JEC	The Honorable Julie E. Carnes

Respectfully submitted,

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DATED: June 19, 2006