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August 7, 2007

Ms. Cathy Catterson
Clerk, United States Court of Appeals
for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103

Re: *Hepting v. AT&T*, Nos. 06-17132, 06-17137.

Dear Ms. Catterson:

This letter responds to plaintiffs' submission regarding *In re Sealed Case*, No. 04-5313 (D.C. Cir. July 20, 2007). The Government does not agree with that divided decision, and is considering seeking further review. In any event, *In re Sealed Case* does not support plaintiffs here.

In re Sealed Case reaffirms the basic principle -- recognized in *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998) -- that a case "must be dismissed" when its "subject matter" is a state secret. Slip op. 24. In *Tenet v. Doe*, 544 U.S. 1 (2005), and *Totten v. United States*, 92 U.S. 105 (1875), the Supreme Court established that a case must be dismissed when its subject matter is the existence of an alleged secret espionage arrangement with the Government. See Gov't Br. 17.

In *In re Sealed Case*, the court held that this principle was not implicated because, it found, "the United States does not claim that secret agreements of this sort were implicated." Slip op. 21. In *Hepting*, however, plaintiffs' action turns on whether such a secret relationship exists.

Plaintiffs claim that *In re Sealed Case* holds that *Totten* and *Tenet* are "limited to secret espionage contracts." Ltr. 2. *Tenet*, however, itself rejected the notion that "*Totten* developed merely a contract rule." 544 U.S. at 8. Moreover, *In re Sealed Case* states that *Tenet* "clarifie[s] that *Totten* * * * eliminates actions that 'depend[] upon the existence of [a] secret espionage relationship.'" Slip op. 21. Because this action depends upon the existence of such a relationship between AT&T and the Government, *In re Sealed Case* requires dismissal.

Plaintiffs argue that *In re Sealed Case* permits reliance on “inferences and circumstantial evidence” to establish a *prima facie* case. Ltr. 1. Here, however, plaintiffs rely on *speculation* by persons with no direct knowledge of the facts. See Reply Br. 10-13. In any event, *Kasza* holds that a case must be dismissed if its subject matter is a state secret—“*notwithstanding* the plaintiff’s ability to produce nonprivileged evidence”—or if the existence of state secrets otherwise precludes litigation on jurisdiction or the merits. 133 F.3d at 1166.

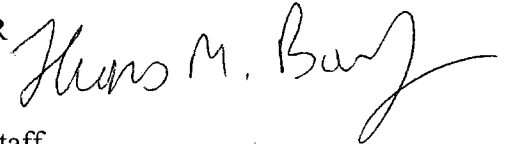
Respectfully submitted,

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