CASE NOS.: 06-17132, 06-17137

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TASH HEPTING, GREGORY HICKS, CAROLYN JEWEL, AND ERIK KNUTZEN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

PLAINTIFFS-APPELLEES,

V.

AT&T CORPORATION,

DEFENDANT-APPELLANT, AND

THE UNITED STATES,

INTERVENOR AND APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
THE HONORABLE VAUGHN R. WALKER, CHIEF DISTRICT JUDGE
CIVIL No. C-06-0672-VRW

REQUEST OF PLAINTIFFS-APPELLEES FOR JUDICIAL NOTICE OF STATEMENTS BY THE UNITED STATES

ELECTRONIC FRONTIER FOUNDATION
CINDY COHN
LEE TIEN
KURT OPSAHL
KEVIN S. BANKSTON
JAMES S. TYRE
454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333
Facsimile: (415) 436-9993

HELLER EHRMAN LLP
ROBERT D. FRAM
E. JOSHUA ROSENKRANZ
MICHAEL M. MARKMAN
SAMUEL F. ERNST
NATHAN E. SHAFROTH
ELENA M. DIMUZIO
333 Bush Street
San Francisco, CA 94104
Telephone: (415) 772-6000
Facsimile: (415) 772-6268

Additional Counsel Listed Below

ATTORNEYS FOR APPELLEES TASH HEPTING ET AL.

COUGHLIN STOIA
GELLER RUDMAN & ROBBINS LLP
ERIC ALAN ISAACSON
655 West Broadway, Suite 1900
San Diego, CA 92101-3301
Telephone: (619) 231-1058
Facsimile: (619) 231-7423

RICHARD R. WIEBE
LAW OFFICE OF RICHARD R. WIEBE
425 California Street
Suite 2025
San Francisco, CA 94104
Telephone: (415) 433-3200
Facsimile: (415) 433-6382

LAW OFFICE OF ARAM ANTARAMIAN
ARAM ANTARAMIAN
1714 Blake Street
Berkeley, CA 94703
Telephone: (510) 841-2369

HAGENS BERMAN SOBEL SHAPIRO LLP
REED R. KATHREIN
JEFFREY FRIEDMAN
SHANA E. SCARLETT
715 Hearst Avenue, Suite 202
Berkeley, CA
Telephone: (510) 725-3000
Facsimile: (510) 725-3001

PLAINTIFFS-APPELLEES' REQUEST FOR JUDICIAL NOTICE

The Plaintiffs-Appellees in *Hepting v. AT&T Corp.*, No. 06-17132 and *Hepting v. United States* No. 06-17137 (hereinafter collectively "*Hepting*") respectfully request, pursuant to Federal Rule of Evidence 201 and the inherent authority of the Court, that the Court take judicial notice of certain facts established by the statements of United States representatives since oral arguments took place.

These statements were made by the President of the United States, his spokesperson, the Director of National Intelligence of the United States ("DNI") Michael McConnell, and senior Administration officials in published briefings; they are corroborated by a recent Senate Intelligence Report that has been endorsed by DNI McConnell. Their admissions establish that the NSA had an espionage relationship with the telecommunications companies currently being sued and where the government has intervened to assert the state secrets privilege, a group that is well known to include AT&T. The statements further establish that it is not a secret that those companies received certifications or directives provided by the government.

Given these statements, it appears that the government is attempting to use its claim of state secrets privilege in its relationship with the telecomm carriers before this Court as a shield to prevent court review, even as it consistently

discloses the same information to the public and Congress when those disclosures serve its political ends. Notably, most of these the disclosures were made as part of the government's political lobbying campaign seeking legislative immunity for AT&T and other carriers.

This Court should not allow the government to misuse the states secrets privilege for political purposes, especially when those purposes are to evade court review of the legality of their behavior. The government's state secret claims rest, as they must, on its solemn assertion that there will be "grave danger to national security" if this information is revealed, even in secret to a federal judge. The ongoing series of admissions made to the public and Congress in support of its lobbying campaign severely undermine the governments national security claim, and instead create the troubling indication that the government is misusing the state secret privilege to shield its actions from judicial review, rather than to protect the nation.

In *Al Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190 (9th Cir. 2007), this Court "agree[d] with the district court's conclusion that the very subject matter of the litigation—the government's alleged warrantless surveillance program under the TSP—is not protected by the state secrets privilege." *Id.* at 1198. This Court found that

> the subject matter of Al Haramain's lawsuit can be discussed, as it has been extensively in publicly-filed pleadings, televised arguments in open court in

> this appeal, and in the media and the blogosphere, without disturbing the dark waters of privileged information.

Id. (footnote omitted). It continued:

> the government's many attempts to assuage citizens' fears that *they* have not been surveilled now doom the government's assertion that the very subject matter of this litigation, the existence of a warrantless surveillance program, is barred by the state secrets privilege.

Id. at 1200 (emphasis original). Likewise, as explained in detail below, the government's numerous factual admissions in support of its efforts to secure retroactive immunity for the defendants in this lawsuit have doomed the government's assertion that the very subject matter of this litigation is a state secret.

I. LEGAL AUTHORITIES IN SUPPORT OF THIS REQUEST FOR JUDICIAL NOTICE

Federal Rule of Evidence 201 authorizes this Court to take judicial notice of such admissions because they are "not subject to reasonable dispute in that" they are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. Rule Evid. 201(b); *Singh v. Ashcroft*, 393 F.3d 903, 905 (9th Cir. 2004). Further, the Rule mandates that judicial notice be taken where it is "requested by a party and supplied with the necessary information," *id*. at 201(d), and authorizes judicial notice "at any stage of the proceeding," *id*. at 201(f).

The facts for which the Plaintiffs-Appellees request judicial notice can and should be judicially noticed because they are "not subject to reasonable dispute," as they are party-admissions about the NSA program that come directly from DNI McConnell, President Bush, and senior Administration officials. The facts are easily verifiable, as they are taken from public statements made by these figures in recorded interviews and hearings. True and correct copies of the transcripts of these statements are attached hereto as Exhibit Nos. A through G. As the admissions of the United States, a party to this litigation, the statements are not hearsay and are admissible. Fed. R. Evid. 801(d)(2).

Many courts have taken judicial notice of the type of information at issue in this request. *See* Sept. 20, 2007 Order Granting *Hepting* Plaintiffs' Request for Judicial Notice (Docket No. 113); *See also*, *e.g.*, *Texas & Pac. Ry. Co. v. Pottorff*, 291 U.S. 245, 254 n. 4 (1933), amended on other grounds, 291 U.S. 649 (1934) (taking judicial notice of official reports put forth by the Comptroller of the Currency); *Ieradi v. Mylan Laboratories, Inc*., 230 F.3d 594, 597-98 (3rd Cir. 2000) (taking judicial notice of information in a newspaper article); *Blair v. City of Pomona*, 223 F.3d 1074 (9th Cir. 2000) (taking judicial notice of an independent commission's report on the code of silence among police officers); *Heliotrope Gen., Inc. v. Ford Motor Co*., 189 F.3d 971, 981 (9th Cir. 1999) (taking judicial notice of information contained in news articles); *Clemmons v. Bohannon*, 918

F.2d 858, 865 (10th Cir. 1990), vacated on other grounds, on reh. *en banc* 956 F2d 1523 (10th Cir. 1992) (taking judicial notice of government reports and Surgeon General's reports concerning health risk of environmental tobacco smoke); *B.T. Produce Co. v. Robert A. Johnson Sales, Inc*. (S.D.N.Y. 2004) 354 F.Supp.2d 284, 285-286 (taking judicial notice of U.S. Department of Agriculture report); *Wietschner v. Monterey Pasta Co*., 294 F.Supp.2d 1102, 1108 (N.D. Cal. 2003) (taking judicial notice of press releases issued by the Securities and Exchange Commission); *Del Puerto Water Dist. v. United States Bureau of Reclamation*, 271 F.Supp.2d 1224, 1234 (E.D. Cal. 2003) (taking judicial notice of public documents, including Senate and House Reports); *Feldman v. Allegheny Airlines, Inc*. (D. Conn. 1974) 382 F.Supp. 1271, reversed on other grounds 524 F.2d 384 (2nd Cir. 1975) (taking judicial notice of data contained in President's Economic Report).

II. ADMISSIONS REGARDING THE NSA'S ESPIONAGE RELATIONSHIP WITH TELECOMMUNICATIONS COMPANIES

The Government argues that "[b]ecause plaintiffs' entire action rests upon alleged secret espionage activities, including an alleged secret espionage relationship between AT&T and the Government concerning the alleged activities, this suit must be dismissed now as a matter of law." Government's Ninth Circuit Appeal Unclassified Opening Brief at 11 (Docket No. 20). It asserts that "disclosure of any information tending to confirm or deny alleged secret

surveillance activities, including any relationship between AT&T and the Government in connection with such alleged activities, would pose a grave threat to national security." *Id*. at 11.

However, public admissions by the United States contradict this position. These statements establish, independently of the evidence already on record,[1] that the NSA had an espionage relationship with telecommunications companies, specifically those who are currently being sued and on whose behalf the government has intervened to assert the state secrets privilege.

We previously argued to this Court that the espionage relationship between the NSA and telecommunications companies was not a state secret in light of disclosures made by DNI McConnell. Aug. 27, 2007 Plaintiffs Request for Judicial Notice of DNI Statement at 7 (Docket No. 104). The Government responded that "[t]he statements cited by plaintiffs . . . are far too general and ambiguous to have the impact on the case the plaintiffs suggest." Aug. 31, 2007 Government Response to Request for Judicial Notice of DNI Statement at 2 (Docket No. 109). However, the recent statements made by various Administration officials in the public forum are more specific. They further

[1] Plaintiffs' 9th Circuit Appeal Answering Brief at 5-12 (Docket No. 59) and statements by the House Select Committee on Intelligence previously introduced to the Court (Aug. 10, 2007 Corrected Plaintiffs' Reply to Government Response to Request for Judicial Notice of AG Testimony at 4 (Docket No. 98).

illustrate that it is not a secret that the NSA has an espionage relationship with a very specific group of companies: telecommunications carriers who are currently being sued and on whose behalf the government has intervened to assert the state secrets privilege, a group that includes AT&T.[2]

Recent statements by the Administration confirm the assertion already presented to this court that telecommunications companies assisted the NSA in a surveillance program, invalidating the Government's claims that this well known fact remains secret. *See* Aug, 1, 2007 Plaintiffs Request for Judicial Notice of AG Testimony at 6-8 (Docket No. 90). President Bush stated at a meeting with the National Governors Association on February 25, 2008 that the companies that assisted them were told that it was legal and are now being sued[3]:

> [C]ompanies who are believed to have helped us...shouldn't be sued...Our *government told them* that their participation was necessary, and it was—and still is—and that what we had asked them to do was legal. And *now they're getting sued* for billions of dollars

[2] While this Request focuses on the government's statements, we note that AT&T responded to an inquiry by the House Committee on Energy and Commerce, available at <http://energycommerce.house.gov/Press_110/110-ltr.101207.TI.ATTrspto100207.pdf>

[3] This was confirmed by DNI McConnell in multiple settings; see 2/27/08 Hearing of the Senate Armed Services Committee at 18, and 2/7/08 Hearing of the House Permanent Select Committee on Intelligence at 21.

Feb. 25, 2008 Transcript of President Bush Meeting with National Governors Association, attached hereto as Exhibit A (emphasis added).[4]

Likewise, White House Press Secretary Perino confirmed this in a press conference on February 12, 2008:

> Q: But were the telephone companies told that it was legal to wiretap six months before 9/11?
>
> MS. PERINO: The telephone companies that were alleged to have helped their country after 9/11 did so because they are patriotic *and they certainly helped us* and they helped us save lives.

See Feb. 12, 2008 Press Conference Transcript, attached hereto as Exhibit B (emphasis added).[5]

Senior Administration officials[6] have further clarified that the telecommunications companies involved in the NSA wiretapping program include those in whose lawsuits the Government is intervening to the assert state secrets privilege. This was discussed in a background briefing on FISA that took place on February 26, 2008:

---

[4] Available at <http://www.whitehouse.gov/news/releases/2008/02/20080225-2.html>

[5] Available at <http://www.whitehouse.gov/news/releases/2008/02/20080212-2.html>

[6] While the "Senior Administration Officials" are unnamed, they remain agents of the United States for purposes of the party admissions in these statements, and the United States has ratified the statements by publishing them on its websites.

> SENIOR ADMINISTRATION OFFICIAL: … [I]t's absolutely vital to our intelligence community mission that we have the cooperation of the private sector . . . private parties were given documentation showing that the President had authorized the program, and showing that the legality of the program was also certified by high-level administration officials.. . .
>
> What is it from the perspective of the private parties? What are those who are alleged to have assisted with this caught up in, and what is the problem? Well, first, they can't defend themselves. And you say, well, that's our fault because we have asserted state secrets in various lawsuits. And the answer is, we have . . . .
>
> [Question]: . . . I've seen it happen in a lot of cases, like, when you have national security, where the government intervenes and asserts state secrets, and gets -- I mean, I've seen cases that, plaintiff, you may have the greatest case ever, you're out of court because the government successfully asserts state secrets.
>
> So I guess my question is, isn't that another approach? Can't you go in there and try to win on state secrets, and get these cases -- and, therefore, you've done something on behalf of these telecoms who you say patriotically helped? . . .
>
> SENIOR ADMINISTRATION OFFICIAL: And that's -- those are the ways we've been pursuing so far.

See Feb 26, 20008 Background Briefing by Senior Administration Officials on FISA ("Background Briefing"), attached hereto as Exhibit C.[7]

It is important to note a feature common to all the statements of which we ask the Court to take judicial notice. The Government has spoken in broad, inclusive terms when discussing the scope of private sector cooperation with the

[7] Available at < http://www.lifeandliberty.gov/docs/background-briefing-fisa022608.pdf>

NSA. The statements are not limited to only *some* of the companies being sued. They also are not limited to the targeted Terrorist Surveillance Program, as opposed to the dragnet surveillance alleged in this case.[8] Indeed, all of the multi-district litigation cases against telecommunication carriers allege untargeted dragnet survaillance, rather than targeted surveillance.

A plain reading of these public statements indicates two things: that the class of telecommunications companies participating in NSA surveillance activities covers all those being sued, including AT&T, and that these activities were not restricted to the TSP program but instead extended to any surveillance operations being conducted by the NSA, including the dragnet surveillance alleged in this case.[9]

Since the Government has publicly discussed the espionage relationship between NSA and the private sector in significant detail, it cannot continue to

---

[8] We have already brought to the Court's attention the fact that statements by DNI McConnell and Attorney General Gonzales indicate that the NSA's surveillance program was broader than the admitted TSP. See Aug. 7, 2007 Plaintiffs' Request for Judicial Notice of DNI Letter and AG Testimony at 6-7 (Docket No. 92)

[9] Media reports featuring unnamed government sources also continue the steady stream of information about AT&T's involvement in dragnet surveillance. *See* e.g., Siobhan Gorman, *NSA's Domestic Spying Grows As Agency Sweeps Up Data*, The Wall Street Journal (March 10, 2008), at p. A1, available at http://online.wsj.com/article print/SB120511973377523845.html; Michael Isikoff, *Uncle Sam Is Still Watching You*, Newsweek (July 21, 2008). These "unnamed sources" add to the concern that the governments claim of secrecy is not aimed at protecting national security but rather at shielding the behavior from court review.

maintain that its surveillance relationship with the class of telecommunications companies it has identified is a secret. This class necessarily includes AT&T.

ADMISSIONS THAT DEFENDANT TELECOMMUNICATIONS COMPANIES RECEIVED DIRECTIVES OR CERTIFICATIONS ISSUED BY THE ADMINISTRATION

The second "secret" claimed by the government is the existence of written directives or certifications from the government. Yet, in discussing the relationship between telecommunications companies and the NSA, the Government has clearly stated that these companies acted pursuant to certification and assurances of legality by the Administration.

In the February 26, 2008 Background Briefing on FISA, senior Administration officials admitted that:

> the private parties were given documentation showing that the President had authorized the program, and showing that the legality of the program was also certified by high-level administration officials. It said that they had a good-faith basis for cooperating with the government.

See Exhibit C, at p. 4; *see also id.* at p. 11 ("we've shown this to members of Congress, and to the Judiciary Committees and the Intelligence Committees, shown the documents -- the documents that contain the assurances that were given from the administration to the providers at the time when they were asked to assist.")

The Administration official also noted that the defendants acted "in reliance on the documents that they received and are discussed in the Senate

committee report." *Id.* at p. 4. This is a reference to a Senate Select Committee on Intelligence's Report on an earlier version of the FISA Amendments Act, Senate Report No. 110-209 ("Senate Report"):

> . . . beginning soon after September 11, 2001, the Executive branch provided written requests or directives to U.S. electronic communication service providers to obtain their assistance with communications intelligence activities that had been authorized by the President.
>
> The Committee has reviewed all of the relevant correspondence. The letters were provided to electronic communication service providers at regular intervals. All of the letters stated that the activities had been authorized by the President. All of the letters also stated that the activities had been determined to be lawful by the Attorney General, except for one letter that covered a period of less than sixty days. That letter, which like all the others stated that the activities had been authorized by the President, stated that the activities had been determined to be lawful by the Counsel to the President.

S. Rep No. 110-209, at 10 (October 26, 2007).[10] The Senate Report was fully endorsed by a senior Administration official, who called it "the best source of information about this" and an "exhaustive analysis", and "commended [everyone] to read it." Exhibit C at p. 4.

Thus the Administration's Background Briefing confirmed that the defendants are the companies that received the illegal and unconstitutional directives at the heart of the warrantless wiretapping program at issue in this litigation. The Administration also connected the program to this lawsuit by noting

[10] Available at <http://intelligence.senate.gov/071025/report.pdf>

that the government had asserted the state secrets privilege but "some of these cases have gotten some traction." Exhibit C, at p. 7.

This is not the only confirmation. President Bush, speaking to the National Association of Attorneys General on March 3, 2008, said: "If any of the companies believed to have helped us -- I'm just going to tell you, *they were told* it was legal by the government. And they were told it was necessary by the government. And here *they are getting sued*." Mar. 3, 2008 Transcript of President Bush Meeting With National Association of Attorneys General, attached hereto as Exhibit D.[11]

Likewise, a "Senior Administration Official" at a February 22, 2008 "Background Conference Call," explained the liability concerns of "the attorneys for various companies that are assisting us": "they have seen companies who were assured of legality by the Attorney General of the United States be sued for billions of dollars." *See* Feb. 22, 2008 Transcript of Background Conference Call With Senior Administration Officials On The Consequences Of Allowing The Protect America Act To Expire, at p. 3, attached hereto as Exhibit E.[12]

Through these statements President Bush and the Administration have directly connected the defendants in *In re National Security Agency*

[11] Available at <http://www.whitehouse.gov/news/releases/2008/03/20080303-1.html>

[12] Available at <http://www.odni.gov/interviews/20080222_interview.pdf>

Telecommunications Records Litigation to the companies described in the Senate Report.

Moreover, in public testimony, DNI McConnell explicitly identified the companies who received "certifications" as the same ones being sued under questioning by Representative Anna G. Eshoo of California:

> REP. ESHOO: . . .The administration's description of the president's program suggests that certifications were issued. Now, if in fact certifications were issued, why do we need additional laws to bail out the companies? Were there certifications issued?
>
> MR. MCCONNELL: Yes, there were.
>
> REP. ESHOO: There were. So why do we need additional laws to --
>
> MR. MCCONNELL: Because they're being sued, ma'am. That -- it is the fact of the matter they're being sued. So now --
>
> REP. ESHOO: But give -- wait a minute. Let me draw a nexus between the certifications and the suits. If in fact there is a nexus and that exists, the certifications, why is it that you're asking for something that essentially they already have, they're protected by?
>
> MR. MCCONNELL: It's quite simple. They're being sued.

Transcript of Feb. 7, 2008 Hearing of the House Permanent Select Committee on Intelligence at 21, attached hereto as Exhibit F.[13]

Accordingly, it is not a secret that these companies received (and acted under the purported authority of) certifications or directives given by the

[13] This was confirmed by DNI McConnell in multiple settings; see also Feb. 27, 2008 Transcript of Hearing of the Senate Armed Services Committee at 18, attached hereto as Exhibit G.

Administration. In light of the Government's disclosures relating to the identity of private sector participants, it is also not a secret that the telecommunications companies being sued in *In re National Security Agency Telecommunications Records Litigation*, a group that prominently includes AT&T, were participants in the warrantless surveillance program.

CONCLUSION

This Court, in deciding *Al Haramain v. Bush,* noted that the very subject matter of a lawsuit cannot be a state secret when it is discussed publicly by the Administration, even where "there are details about the program that the government has not yet disclosed." *Al Haramain v. Bush*, 507 F.3d at 1200. Similarly here, the Government has publicly revealed information about the scope of the espionage relationship between the NSA and the private sector, clearly specifying a group that necessarily includes AT&T. Pretending that the public does not know AT&T is intimately involved with the warrantless surveillance program at issue in this litigation would amount to no more than a legal fiction, useful only to deny the rights of millions of ordinary Americans with no corresponding gain in security.

Accordingly, the Plaintiffs-Appellees respectfully request that this Court take judicial notice that the existence of this relationship, and the fact that AT&T (and the other companies being sued) cooperated and collaborated with the

warrantless surveillance program under the purported authority of certifications and directives issues by the Administration, because it is no longer a state secret.

Respectfully submitted,

DATED: August 14, 2008

ELECTRONIC FRONTIER FOUNDATION

By _____

CINDY A. COHN
LEE TIEN
KURT OPSAHL
KEVIN S. BANKSTON
JAMES S. TYRE
454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333 x108
Facsimile: (415) 436-9993

ATTORNEYS FOR APPELLEES

HELLER EHRMAN LLP
ROBERT D. FRAM
E. JOSHUA ROSENKRANZ
MICHAEL M. MARKMAN
ETHAN C. GLASS
SAMUEL F. ERNST
NATHAN E. SHAFROTH
ELENA DIMUZIO
333 Bush Street
San Francisco, CA 94104
Telephone: (415) 772-6000
Facsimile: (415) 772-6268

COUGHLIN STOIA
GELLER RUDMAN & ROBBINS LLP
ERIC ALAN ISAACSON
655 West Broadway, Suite 1900
San Diego, CA 92101-3301
Telephone: (619) 231-1058
Facsimile: (619) 231-7423

HAGENS BERMAN SOBEL SHAPIRO LLP
REED R. KATHREIN
JEFFREY FRIEDMAN
SHANA E. SCARLETT
715 Hearst Avenue, Suite 202
Berkeley, CA
Telephone: (510) 725-3000
Facsimile: (510) 725-3001

RICHARD R. WIEBE
LAW OFFICE OF RICHARD R. WIEBE
425 California Street
Suite 2025
San Francisco, CA 94104
Telephone: (415) 433-3200
Facsimile: (415) 433-6382

LAW OFFICE OF ARAM ANTARAMIAN
ARAM ANTARAMIAN
1714 Blake Street
Berkeley, CA 94703
Telephone: (510) 841-2369