IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TASH HEPTING, ET AL.,	)	
	)	
Plaintiffs/Appellees,	)	
	)	
v.	)	Nos. 06-17132/17137
	)	(consolidated with
AT&T CORP., ET AL.,	)	No. 06-36083)
	)	
Defendants/Appellants,	)	
	)	
and	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Intervenor/Appellant.	)	
	)	

GOVERNMENT'S RESPONSE TO PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE

The United States hereby respectfully responds to plaintiffs' request for judicial notice of testimony of the Attorney General. We have no objection to judicial notice of the statement in question, but do strongly object to plaintiffs' characterization of the statement and its impact on this case. As explained below, the Attorney General's statement does not detract from the Government's arguments that the very subject matter of this action — *viz.*, whether AT&T has entered into a secret espionage relationship with the Government as to any of the alleged surveillance activities —

is a state secret, and that this action cannot be litigated without disclosing state secrets.

Plaintiffs focus on a passing reference in the Attorney General's lengthy July 24, 2007, testimony before the Senate Judiciary Committee during which he repeatedly referred to the highly classified nature of the Government's surveillance activities. The lone statement to which plaintiffs point came in response to an objection by Senator Feingold that the Government has "*refuse[d]*" to publicly disclose who has "cooperate[d] with the government" in "*unidentified* intelligence activities" in the course of seeking Congress's enactment of an "immunity" provision for intelligence activities. Request for Judicial Notice, Ex. A, p.50 (emphasis added). The Attorney General stated: "And, again, we don't think – you know, we went to companies for help. They provided help in trying to protect this country. And we think that's appropriate for the Congress to consider." See *ibid.*

Nothing in this statement undermines the Government's assertion of the state secrets privilege in this case. As explained in the principal briefs, plaintiffs' complaint is directed solely against AT&T. They allege that AT&T has collaborated with the Government in a secret "dragnet" surveillance program. In addition, although they have largely abandoned the claim on appeal (they devote only two pages to it in their 86-page brief), plaintiffs also alleged that AT&T collaborated with

the Government in a secret "communications records" program. The Government has never acknowledged the existence of any such "dragnet" or "communications records" program, much less AT&T's involvement in any such activities.[1]

To the contrary, the Government has asserted the state secrets privilege over the means, sources, and methods of the Government's foreign surveillance activities. In particular, the Government has asserted the state secrets privilege over plaintiffs' "allegations about the NSA's purported involvement with AT&T." ER 58 (Negroponte Decl. ¶ 5); ER 64 (Alexander Decl. ¶ 8). As the Nation's top intelligence officials explained in their public and classified declarations, "any further elaboration on the public record concerning these matters would reveal information that could cause the very harms [that the] assertion of the state secrets privilege is intended to prevent." ER 59 (Negroponte Decl. ¶ 12); ER 64 (Alexander Decl. ¶ 8).

Plaintiffs claim that the Attorney General, in the cited statement, admitted that "the Government requested and received the cooperation of *telecommunications* companies for the NSA's surveillance program." Mot. 3 (emphasis added). That is

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[1] Plaintiffs initially also alleged that AT&T collaborated with the Government in connection with a third surveillance activity — the "Terrorist Surveillance Program," or TSP. Although the Government has publicly acknowledged the existence of that program (though not its sources or methods), plaintiffs have abandoned any challenge to alleged AT&T assistance with the TSP and explicitly stated that (Br. 82) that alleged conduct related to the "TSP * * * is not at issue in this case."

flat wrong. The Attorney General stated simply that unspecified "companies" have "provided help in trying to protect this country." That statement says absolutely nothing about whether the "companies" referred to were *telecommunications* carriers, much less whether one of the "companies" was AT&T (or, for that matter, any other telecommunications carrier). Nor did the Attorney General acknowledge any particular surveillance activity or give any indication as to whether any involvement of the unspecified companies was in any way related to any particular surveillance activity, much less to the surveillance activities at issue in this case.[2]

The fact that unspecified "companies" may have furnished unspecified "help" under unspecified circumstances in protecting the United States in no way divulges the existence of any "dragnet" surveillance program, much less any such "dragnet" program in which AT&T was somehow involved. Nor does the cited statement in any way suggest the existence of a "communications records" program, much less such

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[2] The generic nature of the Attorney General's reference to "companies" is underscored by the immunity provision in the draft bill that prompted Senator Feingold's question in the exchange on which plaintiffs rely. The draft immunity provision would grant immunity to "*any person* for the alleged provision to an element of the intelligence community of any information (including records or other information pertaining to a customer), facilities, or *any other form of assistance*, during the period of time beginning on September 11, 2001, and ending on the date that is the effective date of this Act, in connection with any alleged classified communications intelligence activity." §408, Proposed 2008 Intelligence Reauthorization.

a "communications record" program involving AT&T. Nor does the Attorney General's statement provide any support for plaintiffs' allegations that their *own* communications have been intercepted as a result of AT&T's involvement in the alleged surveillance activities. As the Government has explained in its briefs, litigation over these central facts — *i.e.*, the very subject matter of this action — would be impossible in this case without disclosing carefully guarded state secrets.

This conclusion is underscored by the July 31, 2007 letter (attached) from the Director of National Intelligence to the Ranking Member of the Senate Judiciary Committee before which the Attorney General testified. As Director McConnell explained, the President after September 11, 2001, authorized the National Security Agency (NSA) to undertake a number of different intelligence activities, but only one aspect of those activities, the TSP, has been publicly acknowledged. No other specific surveillance activity has been disclosed by the Government and, as the DNI reiterated in his letter, "[i]t remains the case that the operational details even of the activity acknowledged and described by the President have not been made public and cannot be disclosed without harming national security."

As the classified declarations filed in this case explain in detail, potentially grave harm to national security could result from disclosing whether the Government is engaged in the alleged surveillance activities at issue and whether or to what extent

any particular company (or type of company) is assisting the government in those activities. Doing so would reveal the sources and methods of the Government's vital intelligence gathering efforts undertaken in the wake of the September 11, 2001 attacks in the context of an ongoing conflict in which the enemy has repeatedly avowed its intention to strike Americans again.

Moreover, the disclosure of specific espionage relationships can discourage cooperation with the Government in vital national security matters and potentially subject sources of intelligence to harm, including harm from terrorists seeking to disrupt this Nation's intelligence gathering activity. Confirming that any particular individual or entity was involved in secret intelligence activities could heighten the risk of harm to that individual or entity (including its facilities or personnel), particularly if such an individual or entity has a foreign presence. Likewise, routinely denying the existence of alleged espionage relationships could expose possible gaps in intelligence methods or sources that could be exploited by foreign adversaries.

Accordingly, as the Supreme Court recently reaffirmed, the settled law of this Nation since at least 1875 has barred the litigation of cases, such as this one, that are predicated on delving into and disclosing the existence of secret espionage relationships and activities with the Government. *Tenet* v. *Doe*, 544 U.S. 1, 11 (2005) ("Even a small chance that some court will order disclosure of a source's identity

could well impair intelligence gathering."). *Accord Kasza* v. *Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998). And, as this Court has independently recognized, the state secrets privilege precludes litigation when, as here, the plaintiffs cannot establish a prima facie case or the defendant cannot fairly defend against a claim without divulging state secrets. See *ibid.*[3]

* * * * *

In short, the Attorney General's statement does not assist plaintiffs in any way, because it does not answer the critical question in this case: whether AT&T assisted the Government, much less whether AT&T assisted the Government as to the specific activities alleged by plaintiffs in this case. And attempting to litigate whether or to what extent any of the alleged surveillance activities exist, whether or to what extent AT&T was involved in any such programs, and whether or to what extent plaintiffs' own communications were intercepted as a result of AT&T's involvement in any such

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[3] For example, as the district court recognized, "if this litigation verifies that AT&T assists the government in monitoring communications records, a terrorist might well cease using AT&T and switch to other, less detectable forms of communication. Alternatively, if this litigation reveals that the communications records program does not exist, then a terrorist who had been avoiding AT&T might [switch back]." *Hepting* v. *AT&T Corp.*, 439 F. Supp. 2d 974, 990 (N.D. Cal. 2006). In this way, "[a] terrorist who operates with full information is able to communicate more securely and more efficiently than a terrorist who operates in an atmosphere of uncertainty." *Ibid.*

activities — the central facts underlying plaintiffs' claims and necessary predicates for this action — would reveal sources and methods of intelligence that lie at the heart of the Government's assertion of the state secrets privilege in this case.[4]

[4] Given the highly sensitive and classified nature of the subject matter of this action, the Government has submitted (ex parte, in camera) classified briefs and excerpts of record that expound on the validity of the Government's assertion of the state secrets privilege. These classified materials of course cannot be publicly discussed in briefs (or at oral argument), but they provide additional support for concluding that the Attorney General's statement does not undermine the assertion of the state secrets privilege in this case, and that this action must be dismissed.

CONCLUSION

For the foregoing reasons, the United States has no objection to plaintiffs' request for judicial notice, but does object to plaintiffs' characterization of the cited statement and its impact on this litigation. The Attorney General's statement does not undermine the force of the Government's assertion of the state secrets privilege, and does not alter the fact that this action must be dismissed under the state secrets doctrine established by the Supreme Court and recognized and affirmed by this Court in *Kasza* v. *Browner*, 133 F.3d 1159 (9th Cir. 1998), and other cases.

Respectfully submitted,

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AUGUST 2007

CERTIFICATE OF SERVICE

I certify that on this 7th day of August, 2007, I caused to be served via Federal Express one true and correct copy of the foregoing response properly addressed to the following:

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DIRECTOR OF NATIONAL INTELLIGENCE
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July 31, 2007

The Honorable Arlen Specter
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Specter:

I write in response to your request at our meeting of yesterday.

Shortly after 9/11, the President authorized the National Security Agency to undertake various intelligence activities designed to protect the United States from further terrorist attack. A number of these intelligence activities were authorized in one order, which was reauthorized by the President approximately every 45 days, with certain modifications. The details of the activities changed in certain respects over time and I understand from the Department of Justice these activities rested on different legal bases.

One particular aspect of these activities, and nothing more, was publicly acknowledged by the President and described in December 2005, following an unauthorized disclosure. The particular aspect of these activities that the President publicly described was limited to the targeting for interception without a court order of international communications of al Qaeda and affiliated terrorist organizations coming into or going out of the United States. I understand that in early 2006, as part of the public debate that followed the President's acknowledgment, the Administration first used the term "Terrorist Surveillance Program" to refer specifically to that particular activity the President had publicly described in December 2005. This is the only aspect of the NSA activities that can be discussed publicly because it is the only aspect of those various activities whose existence has been officially acknowledged. (It remains the case that the operational details even of the activity acknowledged and described by the President have not been made public and cannot be disclosed without harming national security.) I understand that the phrase "Terrorist Surveillance Program" was not used prior to 2006 to refer to the activities authorized by the President.

I hope that this information is helpful to you.

Sincerely,

J.M. McConnell

cc: The Honorable Patrick J. Leahy