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IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MISSOURI  
CENTRAL DIVISION

ROBERT CLAYTON and	)	
STEVE GAW,	)	
	)	No. 06-4177-CV-C-NKL
Plaintiffs,	)	October 13, 2006
	)	Jefferson City, Missouri
v.	)	CIVIL
	)	
AT&T COMMUNICATIONS OF THE	)	
SOUTHWEST, INC., et al.,	)	
	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE NANETTE K. LAUGHREY  
UNITED STATES DISTRICT JUDGE

Proceedings recorded by electronic stenography  
Transcript produced by computer

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OCTOBER 13, 2006

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THE COURT: Good afternoon, everyone. This is the matter of Steve Gaw and Robert Clayton versus AT&T Communications, et al., Case No. 06-4177. And the purpose of this hearing is to have oral argument on the motion for remand, as well as for the motion for change of venue.

And I just want to tell you all that in the process of setting this up, I had communicated with Judge Jackson in the Eastern District of Missouri. She has received notice of conditional transfer to the MDL. We have not received such notice, although it appears that the name of this case is on that MDL order, as well.

So I just want to alert you to that fact that I know that, I assume that you all know it, and we will proceed from there.

It is plaintiffs' motion for remand. We'll let her go first.

MS. WHIPPLE: Thank you, Your Honor. Preliminary matter, please, if I might.

THE COURT: Yes.

MS. WHIPPLE: There was a brief filed last night in this case, I assume the court is aware, came in at 5:37 p.m. And considering the lateness of the filing, considering that it was filed by the United States, which is not a party to this

1 case, considering it is filed out of time for briefing on these  
2 matters, and considering that it is well in excess of the page  
3 limit set by this court, in total disregard of this court's  
4 rules, and, frankly, is not very fair, I'm going to move to  
5 strike it.

6 THE COURT: Okay. Are you the United States person  
7 that did that?

8 MR. TANNENBAUM: I'm one of the United States  
9 persons, yes, Your Honor. I would be happy to address that now  
10 or after you address the other issues. But we are not a party  
11 to this case, as least as of now. There are no deadlines,  
12 obviously, on us to make any filings.

13 28 U.S.C. Section 517 gives us the statutory right  
14 to appear in any court in the United States, to file a  
15 statement of interest, and to represent the interests of the  
16 government, and that is what we did yesterday. We did so -- as  
17 soon as we learned of the court's order setting argument, we  
18 worked diligently trying to get it in as quickly as possible so  
19 the parties and the court would have an opportunity to see our  
20 position before the hearing today. And particularly -- with  
21 respect, we wanted the court particularly to have the benefit  
22 of our position that we would be, we would move to intervene in  
23 this case, should the case be remanded.

24 So we just wanted the court to have the benefit of  
25 that when it heard the proceedings today. We, of course,

1 oppose any motion to strike our statement, which is provided  
2 for by federal statute.

3 THE COURT: I'll defer ruling on the motion to  
4 strike. I would just as a practical matter tell you, if you  
5 file something at 5 o'clock the night before an oral argument,  
6 you might give us a call because we're not sitting by ECF  
7 looking for things to be filed.

8 MR. TANNENBAUM: We apologize for that, Your Honor.

9 THE COURT: Okay. All right.

10 MS. WHIPPLE: May it please the court, my name is  
11 Peggy Whipple, and I'm an attorney for the Missouri Public  
12 Service Commission. I'm here today on behalf of the  
13 plaintiffs, Commissioners Robert Gaw -- Robert Clayton and  
14 Steve Gaw. Although I'm honored to stand before this court,  
15 this matter requires remand, and so I must defer the privilege  
16 of this court's jurisdiction to another day and another case.

17 On behalf of the plaintiffs, I present argument in  
18 support of their motion to remand, and I also stand ready to  
19 answer any question this court may pose.

20 Now, as the court has just advised, there has been a  
21 development in this case since the briefing schedule closed.  
22 Yes, there is a conditional transfer order that has been issued  
23 which may transfer this matter to the Northern District of  
24 California. I will tell the court that the plaintiffs filed  
25 today their notice of opposition to that conditional transfer

1 order and that we expect our briefing on that matter to be due  
2 around October 27th.

3 We will be urging the judicial panel, just as we  
4 urge this court today in this motion to remand, to recognize  
5 that this narrowly focused state law investigation into the  
6 possible violation of Missouri law by private parties belongs  
7 in state court and before a state agency.

8 THE COURT: Let me interrupt one minute, then.  
9 Effectively, then, you're going to ask them for a remand?

10 MS. WHIPPLE: What I'll be doing is I'll be opposing  
11 their transfer at all. The transfer order is conditional; and  
12 with my filing of the notice of opposition today, they hold it  
13 in abeyance for 15 more days. And I have briefs to file, and  
14 then they'll set it for some sort of hearing. I don't know,  
15 frankly, if I'll get to physically appear or if it will be a  
16 ruling on the briefs; but at some time after the 27th of  
17 October, I'll either get a hearing or I'll get a ruling that  
18 will say, yes, it's going to be transferred in any way or, no,  
19 it's not, we agree with you that there is no federal subject  
20 matter jurisdiction, which, of course, would mean that it  
21 couldn't go to the MDL, only federal cases can.

22 THE COURT: That's my point is that clearly the MDL  
23 can address the issue of subject matter jurisdiction of the  
24 federal courts and address the remand of the case to the  
25 states.

1 MS. WHIPPLE: Yes, they can. As a matter of fact, I  
2 anticipated the court might have questions, and I brought you  
3 some cases. Because you're right, in the 30-year history or so  
4 of the MDL, the courts have been divided on whether or not a  
5 pending motion of any type, even remand for lack of federal  
6 subject matter jurisdiction, whether or not that should be  
7 ruled on in this court where it was first presented or whether  
8 or not it should be deferred to the transferee court and ruled  
9 on at that point. And I brought you three cases for your  
10 convenience, and I'm going to very briefly discuss them because  
11 I know we've got a time limit today.

12 The first one is called Tortola Restaurants vs.  
13 Kimberly-Clark. The citation is 987 F.Supp. 1186. It's a  
14 Northern District of California case, 1997.

15 The second case is Villarreal, V-I-L-L-A-R-R-E-A-L,  
16 vs. Chrysler Corp., 1996 U.S. District Lexis 3159. It is also  
17 a Northern District of California case from 1996.

18 Now, both of these cases, the transfer court, the  
19 court in the position that this court is in, did go ahead and  
20 remand the case back down to the state court. In those two  
21 cases, it was for a lack of diversity jurisdiction. Both of  
22 those courts stated that judicial economy is best served by  
23 addressing the remand issue prior to an MDL transfer in order  
24 to facilitate litigation in the proper forum.

25 Now, I want to give the court just one more case,

1 and I'm going to tell you right up front that the ruling in  
2 that case wasn't the complete and total remand that I would be  
3 asking from you here, but I think it's an important case, and I  
4 want to bring it to the court's attention.

5 It's called Meyers, M-E-Y-E-R-S, vs. Bayer AG, and  
6 the citation is 143 F.Supp.2d. Page number is 1044. It's out  
7 of the Eastern District of Wisconsin. It's a 2001 case.

8 And I bring that case to the court's attention  
9 because the court there carefully weighed its obligation to  
10 rule on a remand motion prior to an MDL transfer because of  
11 four factors.

12 The court looked first at the constitutional  
13 importance of determining jurisdiction before a court  
14 determines anything.

15 The court looked second at the requirement in  
16 1447(c) that a case be remanded if at any time the federal  
17 court learns that there is no federal subject matter  
18 jurisdiction.

19 Third, the court looked at the judicial economy that  
20 can be gained by a timely ruling on jurisdiction, rather  
21 than -- and this was that Court's words, not mine -- rather  
22 than wasting the time of the transferee court to send a motion  
23 that just gets ordered anyway.

24 And the fourth element the court looked at was the  
25 effect of a delay on a ruling on a jurisdictional motion, that



1 it has on the litigation itself. And that four-part analysis  
2 is found at page 1048 of that decision.

3 I'll underscore the fact that that Meyers ruling was  
4 significantly affected by at least eight other cases, and that  
5 pending MDL had also been removed from state courts, and they  
6 all had motions for remand pending for lack of federal subject  
7 matter jurisdiction.

8 Here, I'll advise the court to the very best of my  
9 knowledge that of all of the cases that are already in the MDL  
10 that have been ordered in the Northern District of California  
11 and of all of the cases that have been identified as potential  
12 tag-alongs like this case, none of them began in state court,  
13 except this case. To my best information and belief, this is  
14 the only case that will be putting forth a motion for remand  
15 for lack of subject matter jurisdiction such as we have here.

16 And that point brings us beyond my discussion of the  
17 judicial panel's conditional transfer order and directly to the  
18 motion for remand.

19 At the heart of this proceeding, there are two  
20 issues. The first issue, the primary issue has never been  
21 addressed by the defendants, and it is whether or not any of  
22 these six Missouri public utilities doing business in Missouri  
23 used or permitted access to Missouri telecommunications  
24 customer records in violation of Missouri law.

25 This is a simple threshold question; and it is the

1 basis for the investigative subpoenas that were issued by the  
2 plaintiffs who, as Missouri Public Service Commissioners, have  
3 their own statutory obligations to investigate possible  
4 violations of Missouri law by public utilities.

5 I submit to this court that an answer to this  
6 question would end plaintiffs' investigation. I also submit to  
7 this court that the plaintiffs' investigation was never  
8 directed at the actions of anyone other than the six public  
9 utilities regulated by the Missouri Public Service Commission.

10 I invite the court to examine the language of the  
11 plaintiffs' subpoenas which are marked as Exhibits A through M  
12 in the circuit court below. They're a little out of order in  
13 the Exhibit A to the defendants' notice of removal that's filed  
14 here, but they're there. All of the defendants' alleged  
15 concerns about intruding upon the secret actions of the  
16 National Security Agency are irrelevant to the focus of these  
17 plaintiffs' attempted investigation, and all of those concerns,  
18 frankly, are a time-consuming distraction here.

19 Perhaps the defendants have raised these issues  
20 because some other cases that are already in the MDL have  
21 alleged that the NSA is data mining or conducting keyword  
22 searches, and some of those cases that are already in the MDL  
23 have even named the National Security party directly as a party  
24 in the lawsuit.

25 However, this proceeding, the investigation of these

1 two public service commissioners, is focused only on the  
2 actions of these six private parties, these six  
3 telecommunications companies doing business in Missouri.  
4 Therefore, there is no federal subject matter jurisdiction over  
5 this first primary issue.

6           The second issue in this proceeding, the only issue  
7 the defendants have addressed is the defendants' refusal to  
8 comply with the plaintiffs' duly executed and served subpoenas.  
9 This refusal resulted in the plaintiffs' application to compel  
10 that was filed in the Circuit Court of Cole County. The  
11 plaintiffs' authority to enforce their subpoenas against these  
12 utilities is grounded only in Missouri law and only in state  
13 courts. It is that state court proceeding that has been  
14 removed to this court. There is no federal subject matter  
15 jurisdiction over this second issue.

16           The defendants have raised numerous arguments in  
17 defense of their refusal to comply with these subpoenas; and  
18 when examined, their argument for federal subject matter  
19 jurisdiction really arises from these defenses that they've  
20 alleged. And I'm sure, as the court is well-aware, the Eighth  
21 Circuit has consistently ruled that there is no federal subject  
22 matter jurisdiction when the petition itself is grounded solely  
23 in state law. All of that is in our brief, and I won't take  
24 time with that today.

25           THE COURT: Let me interrupt a minute. Are you

1 saying that this lawsuit is over if they admit that they  
2 cooperated with the NSA to provide access to telecommunication  
3 records of Missouri residents?

4 MS. WHIPPLE: I can tell you absolutely that the  
5 investigation will be concluded. Now, the two commissioners  
6 have a statutory obligation to take back the results of their  
7 investigation to the body of the Missouri Public Service  
8 Commission. What they would do with that, no one knows. They  
9 might do nothing with it, they might do something with it. I  
10 just don't know. That would be a future action that none of  
11 us, none of us would know about. But I can tell you for sure  
12 that the investigation into the actions would be concluded with  
13 an answer to that question.

14 The defenses that are asserted by the defendants,  
15 the ones that take up the bulk of the briefing that is before  
16 this court, are really attention-grabbing. I mean, honestly,  
17 protecting the national security, preserving state secrets, and  
18 winning the war on terror is, I dare say, important to everyone  
19 in this courtroom. It's certainly important to me.

20 However, I respectfully submit that these things are  
21 not at issue here. That's not how we got started in Cole  
22 County, and that's not why we're here. Therefore, they're not  
23 relevant to this motion for remand. Because this is an oral  
24 argument and not another opportunity for briefing, I'm going to  
25 make just two points that I submit are sufficient to disprove

1 the defendants' excuses for their unlawful refusal to comply  
2 with the subpoenas.

3 First, I question the validity of the evidence of  
4 any official direction or any official assertion of the state  
5 secrets privilege that is so rampant through the briefing. The  
6 defendants cite the letter of Benjamin Powell, General Counsel  
7 in the Office of the Director of National Intelligence. His  
8 letter was marked Exhibit N to the Cole County application to  
9 compel, and it's page 15 of 17 of document 1 that's filed  
10 herein. That's Exhibit A to the notice of removal.

11 A look at this letter is illustrative. The letter  
12 is not signed by Mr. Powell. It's, rather, signed by someone  
13 else. I don't know what the initials are. It's dated July  
14 11th, 2006, only one day prior to the defendants' refusal to  
15 comply with these subpoenas. This letter is not addressed to  
16 any of the defendants, but, rather, to an attorney in  
17 Washington D.C. At best, this letter is from one attorney to  
18 another attorney. The language of this letter is general and  
19 vague.

20 Now, the United States Supreme Court has set forth  
21 the test for the assertion of the state secrets privilege, and  
22 the requirements of that test are not met here. That test is  
23 set forth in United States vs. Reynolds. That's at 345 U.S. 1,  
24 and I'll be looking particularly at pages 7 and 8. That's a  
25 1953 decision.

1           The court there ruled -- and I'm going to quote --  
2 (quoted as read) "The privilege belongs to the government and  
3 must be asserted by it. It can neither be claimed nor waived  
4 by a private party. It is not to be lightly invoked. There  
5 must be a formal claim of the privilege, lodged by the head of  
6 the department which has control over the matter after actual  
7 personal consideration by that officer."

8           Here, it is the defendants, private parties, who  
9 seek to invoke the government's privilege. Here, there has  
10 been no formal claim of this privilege. Mr. Powell's letter  
11 only refers to the invoking of the privilege in another case in  
12 another state. Here, no head of any department purporting to  
13 have control over national security has spoken. We have only a  
14 letter signed by an unknown person over the title of the  
15 general counsel. Finally, no one, not even Mr. Powell, claims  
16 to have personally considered the actual focus of these  
17 Missouri subpoenas under Missouri law.

18           The second point I make to disprove the defendants'  
19 excuses for their unlawful refusal to comply with the subpoenas  
20 is that the records at issue are not and never have been on  
21 their face state secrets. These are customer records. They're  
22 defined in Title 4, Missouri Code of State Regulations,  
23 240-33.160, and that citation is even on the subpoenas.

24           For those of us who are Missouri telecommunications  
25 customers, these are our regular customer records. These

1 records are used every day by the defendants to generate our  
2 monthly bills. These records --

3 THE COURT: Maybe I'm not sure I understand. Are  
4 you saying that if they turn over all of their  
5 telecommunications records to you that you'll be satisfied, or  
6 do you want them just to identify the ones that they gave to  
7 the NSA? And then wouldn't that give certain information that  
8 turning over all of the records would not give?

9 MS. WHIPPLE: Right. We have only asked for  
10 information about classifications or categories of information  
11 that may have been disclosed. We have not asked for, you know,  
12 a listing of John Smith's records were disclosed on  
13 such-and-such date. We have asked for categories of records.  
14 And what we did is we tracked the Code of State Regulations.  
15 That cite that I just gave to the Code of State Regulations, it  
16 actually provides that these records are to be kept private and  
17 are not to be disclosed to any third parties, absent some  
18 safeguards, which includes things like notifying the customer  
19 that your records have been disclosed to somebody.

20 All we've asked is, did you abide by those  
21 safeguards that are in that Code of State Regulations if, in  
22 fact, you even did disclose any of those records; but we have  
23 definitely not asked for a detailed listing of exactly what  
24 records were disclosed. It's all by categories, and it tracks  
25 the language of that.

1 THE COURT: But my question is, you said there are  
2 the records of the customers here in Missouri.

3 MS. WHIPPLE: Yes. That is actually what we're  
4 worried about here. The everyday records for all of us who are  
5 Missouri telecommunications customers, those are used every day  
6 by us and by our telephone companies, right? And those  
7 records, my point is, are not top secret military or state  
8 secrets. I mean, good heavens. We all --

9 THE COURT: Those records are not, but the process  
10 by which we identify certain records, certain people that the  
11 NSA is looking at, that, in fact, reveals something about the  
12 process.

13 MS. WHIPPLE: I hear you. We're not asking about  
14 that. We don't want to know anything about what the NSA may be  
15 doing or may have done or may like to do with any particular  
16 records. All we have asked of the six private parties is, did  
17 you six unilaterally, your actions only, did you let go of any  
18 of these records to any third party? And if you did, say yes.

19 Now, that answer -- let's say it is a yes. That  
20 answer would then end the investigation, and my two  
21 commissioners would have to go back to the Missouri Public  
22 Service Commission and report that. What would happen after  
23 that, I don't know. But we specifically do not inquire into  
24 whatever might have been done with the records, or even  
25 particularly what records might have been disclosed. We track



1 the language of the statute and only asked for just general  
2 categories. Did you let go of any of this stuff? It makes us  
3 different from the other cases. That is very important.

4 Let me wrap up. This narrowly focused state law  
5 investigation by the two Missouri Public Service Commissioners  
6 into the actions of the six public utilities must not be blown  
7 out of proportion by concerns over national security that  
8 appear to be stemming from other cases with other issues, other  
9 parties, in other jurisdictions.

10 I'll beg the court's indulgence as I close for just  
11 an illustration because, you know, sometimes a picture is worth  
12 a thousand words.

13 I'll ask the court to picture a lovely American  
14 forest. The dogwood tree, which is of particular significance  
15 to we Missourians, thrives in the understory of that forest.  
16 Towering over it but at a healthy distance are stately  
17 hardwoods. Properly spaced with sufficient room for sunlight  
18 to filter down to all the leaves and water and nutrients to  
19 filter up through the roots, the dogwoods and the hardwoods  
20 both thrive. However, if the taller hardwoods become too  
21 numerous, too close, crowd in upon the dogwood, it will be  
22 deprived of both sunlight and nutrients, and it will die.

23 I'll close my argument with this illustration and  
24 respectfully request that this court remand this proceeding  
25 back down to the Cole County Circuit Court of Missouri. And I

1 thank you.

2 THE COURT: Who is speaking for the  
3 telecommunication companies, or do you all want to talk  
4 separately?

5 MR. BERENSON: I will be, Your Honor. Brad Berenson  
6 from the Sidley Austin firm in Washington D.C. on behalf of the  
7 AT&T-affiliated defendants.

8 THE COURT: I'll tell you what. I really appreciate  
9 that you're here in Jefferson City because I know it's not easy  
10 to get here.

11 MR. BERENSON: Well, it's my first time, and it's a  
12 pleasure to be here.

13 THE COURT: All right. Welcome.

14 MR. BERENSON: May it please the court, I'd like to  
15 start out where Ms. Whipple began, which is with a slight  
16 discussion of what's going on in the JPML and the MDL  
17 proceeding.

18 We largely agree with what Ms. Whipple said about  
19 the status of the JPML's consideration. There are a few  
20 points, though, that need clarification.

21 It is correct that unless and until the JPML decides  
22 to transfer this case to the Northern District of California,  
23 this court has its full complement of jurisdiction, and it may  
24 do one of two things. It may either decide the remand motion  
25 that's pending in front of it, as Ms. Whipple suggested that it

1 should, or it may not. It may choose to wait and see what the  
2 JPML does.

3 We think that as a purely prudential matter, the  
4 latter course of conduct is probably the better one for the  
5 simple reason that if the JPML decides to transfer this  
6 proceeding to Judge Walker in San Francisco, that will allow  
7 him to decide all of the legal issues associated with remand  
8 motions.

9 One of the points that Ms. Whipple made that is not  
10 correct is that this is the only case that was originally filed  
11 in state court or in which a remand motion has been filed.  
12 There are actually, by my count, at least three or four others  
13 currently, which include the Conner case, the Riordon case, the  
14 Campbell case, and the Chelsea (ph.) case. There are also four  
15 other matters like this one which involve a conflict between  
16 the state and the federal government which have been tagged for  
17 transfer to the MDL; and in many of those cases, there may be a  
18 remand motion filed in the future. So there are going to be  
19 somewhere between five and ten motions raising similar issues.  
20 And --

21 THE COURT: Let me ask you for clarification. Have  
22 any motions for remand been filed in any of these cases?

23 MR. BERENSON: Yes. In the Campbell case and the  
24 Riordon case, motions for remand have been filed and are  
25 pending before Judge Walker. So given the interests --

1 THE COURT: You say pending before Judge Walker.  
2 They were originally filed in Judge Walker's court -- or  
3 removed to Judge Walker's court -- as opposed to some other  
4 court and then transferred?

5 MR. BERENSON: That's correct. They were originally  
6 filed in state court in California, both Campbell and Riordon.  
7 I believe both of them were removed and then transferred to him  
8 outside of the MDL process. I don't think those cases were  
9 shifted to him by operation of the judicial panel.

10 But remand motions have been filed, and very similar  
11 issues to those that you see in the briefing on the motion for  
12 remand here are pending before him. And the interest of  
13 judicial economy and uniformity of decisions certainly would be  
14 served by using the MDL process, assuming that the JPML  
15 decides -- and it's certainly not clear that it will -- that  
16 this category of cases belongs in the MDL and allowing a  
17 uniform disposition.

18 THE COURT: Tell me what is being sought in each of  
19 those generally in those cases. Is it a state statute that  
20 authorizes the commissioners to, in fact, subpoena records?

21 MR. BERENSON: No, the two cases in which remand  
22 motions have currently been filed, Campbell and Riordon, are  
23 both private civil actions on behalf of classes of California  
24 consumers, largely under state law, which seek various forms of  
25 relief, including monetary relief and declaratory and

1 injunctive relief, for alleged violations of state law.

2           There are, however, other cases involving New  
3 Jersey, Vermont, Maine, and Connecticut that are in a posture  
4 very similar to this one, which is to say the dispute is not  
5 really between AT&T and Commissioners Gaw and Clayton, it's not  
6 really between AT&T and Vermont, it's between the state  
7 government and the federal government, one of which is  
8 asserting authority to ask questions about certain alleged  
9 conduct of the telecommunications carriers, and the other  
10 sovereign, the federal government, is asserting that they do  
11 not have the right to ask those questions, do not have the  
12 authority under the U.S. Constitution to probe into whatever  
13 any relationship may be between a private telecommunications  
14 carrier and the federal intelligence establishment.

15           THE COURT: What's the procedural posture in those  
16 cases, New Jersey, Vermont, Maine, and Connecticut?

17           MR. BERENSON: Each one of those cases varies. In  
18 New Jersey, which was the first one of these cases to be filed,  
19 briefing is due to be completed next week on cross-motions for  
20 summary judgment and motion to dismiss.

21           THE COURT: Is that in a state or federal court?

22           MR. BERENSON: That's in a federal court. The New  
23 Jersey Attorney General agreed to stay her hand and not to seek  
24 to enforce her subpoenas pending resolution of the ultimate  
25 legal issues by the federal court, so there is only a federal

1 action involving New Jersey.

2 THE COURT: Are there any state actions involved in  
3 these other three states?

4 MR. BERENSON: In Vermont, in Maine, and in  
5 Connecticut, I think all we have are federal lawsuits. I think  
6 each of those states, likewise, has desisted from trying to  
7 enforce compliance with its investigative demands in the state  
8 court system pending resolution of the ultimate question by the  
9 federal courts, whether they have authority to do that, which  
10 is really what's at issue here.

11 THE COURT: Did the states go into federal court in  
12 order to --

13 MR. BERENSON: No.

14 THE COURT: How did those cases get into federal  
15 court?

16 MR. BERENSON: In each of those cases, the United  
17 States sued the state when matters reached a point where the  
18 state was imposing a ripe obligation on the telecommunications  
19 carriers to divulge information that the United States took the  
20 position could not be divulged consistent with federal law.

21 THE COURT: In some kind of administrative process?

22 MR. BERENSON: Correct. They were state public  
23 utility commissions, by and large, with the exception of New  
24 Jersey, which involved a subpoena from the attorney general of  
25 the state.

1 THE COURT: So in all of those cases, they were  
2 similar to this where the state was trying to force the  
3 utilities to 'fess up.

4 MR. BERENSON: Exactly. The fundamental legal issue  
5 is the same. They all had a similar genesis, which was  
6 initially press coverage starting with the May 11th story in  
7 USA Today, then followed by a coordinated campaign organized by  
8 the American Civil Liberties Union seeking to have state  
9 commissions around the country conduct these kinds of  
10 investigations as an adjunct to an overall effort, through  
11 litigation and otherwise, to bring whatever facts may exist  
12 about these programs to light, expose what the ACLU contends is  
13 unlawful action by either the federal government or the  
14 carriers, and impose some appropriate remedy or sanction for  
15 that.

16 Ms. Whipple said that the threshold question here is  
17 whether we violated Missouri law. With respect, we really  
18 don't think that is the threshold question. In fact, it's not  
19 a question at all in this particular case or this particular  
20 remand dispute. The question really is whether the state  
21 Public Service Commission has the authority to ask the  
22 questions that it's asking and whether, if it got the answers  
23 it's looking for, that could even be considered a violation of  
24 state law.

25 It is clearly, this investigation is clearly about

1 the question whether the AT&T-affiliated entities have a  
2 relationship with the NSA, whether as part of that relationship  
3 they shared information with the NSA. It's patent, right on  
4 the face of the subpoenas. The subpoena ad testificandum wants  
5 an AT&T witness to come in before the Public Service Commission  
6 and tell them, quote, the number of Missouri customers, if any,  
7 whose calling records have been delivered or otherwise  
8 disclosed to the National Security Agency; the legal authority,  
9 if any, under which that was done; the nature or type of  
10 information disclosed to the NSA; the dates on which this  
11 happened; and the particular exchanges for which any number was  
12 disclosed to the NSA. This is 100 percent about the question  
13 raised by the news article that I referred to earlier.

14           The United States has taken the position  
15 consistently all across the country that the question whether a  
16 program like this even exists, a calling records program, is  
17 itself a state secret, as is the question whether any  
18 particular telecommunications carrier in this country assists  
19 the NSA with that program. Three different federal courts have  
20 considered the question of whether calling records programs  
21 allegedly pursued by the NSA, with or without the cooperation  
22 of this or that telecommunications carrier, are state secrets;  
23 and all of them have held that, in fact, they are. That there  
24 has been no public disclosure whatsoever, no confirmation, no  
25 denial from the U.S. government or any other source, whether



1 any such program exists, nor is there any information in the  
2 public record about whether any telecommunications carrier  
3 participates in any such program. And all of these courts,  
4 including the court in Michigan whose ruling was as hostile  
5 overall to the position of the United States as one could  
6 possibly imagine, none of these courts held that discovery  
7 could be had on this subject, yet that is exactly what the  
8 state Public Service Commission seeks by way of its subpoenas.

9           The question before the court today is really  
10 whether the court has jurisdiction over this matter. If it  
11 doesn't, it needs to remand the case to state court. If it  
12 does, this is the proper forum in which to litigate the merits.  
13 We're not here today to discuss the merits.

14           And I would submit to Your Honor that it is crystal  
15 clear that this court does, in fact, have jurisdiction over  
16 this dispute. There are three separate and independent  
17 reasons.

18           The easiest and most obvious is under Section 1442,  
19 which is federal officer removal. The action complained of in  
20 the underlying suit in state court, which was AT&T's refusal to  
21 furnish the information that the Public Service Commission  
22 sought, was taken directly based upon the instructions received  
23 from the federal government in the person of the general  
24 counsel of the Office of the Director of National Intelligence.  
25 This letter from Ben Powell, who is the general counsel of

1 ODNI, far exceeds the threshold established by the Eighth  
2 Circuit in the Watson case for federal direction and control to  
3 give rise to federal officer removal. It's far, far, far  
4 beyond the threshold that the Eighth Circuit has established.

5 Among other things, Mr. Powell says -- and I'm  
6 quoting here from his letter -- (quoted as read) "That the  
7 subpoenas infringe upon federal operations, are contrary to  
8 federal law, and, accordingly, are invalid under the supremacy  
9 clause of the United States Constitution."

10 And he then advises the carriers -- the addressee,  
11 by the way, is a partner of mine who represents, as I do, the  
12 AT&T entities.

13 And he, Mr. Powell advises that responding to the  
14 subpoenas, including disclosing whether or to what extent any  
15 responsive materials or information even exist, would violate  
16 various specific provisions of federal statutes and executive  
17 orders. And among these are federal felony statutes. 18 USC,  
18 Section 798 --

19 THE COURT: Let me interrupt just a moment. Watson  
20 vs. Phillip Morris is an Eighth Circuit case. It's somewhat  
21 outside the norm in the United States. If this case is, in  
22 fact, transferred to the MDL, is it your position that Eighth  
23 Circuit law would control in this case but not in other cases?

24 MR. BERENSON: No, Your Honor. If Your Honor were  
25 to stay her hand and await the decision of the JPML, and if the

1 JPML decided to shift this case to Judge Walker, it would then  
2 be the Ninth Circuit that would have jurisdiction over all  
3 appellate questions that might arise in the course of this  
4 proceeding.

5 Now, if Your Honor were to rule before the JPML and  
6 an appeal were to be taken, then the Eighth Circuit would  
7 control those questions as to this case, even if this case were  
8 subsequently transferred.

9 So we have here a direct instruction from the  
10 federal government, the head of the Office of the Director of  
11 National Intelligence, not to respond to these subpoenas on  
12 paying of felony sanction, frankly. 18 U.S.C., Section 798,  
13 makes it a felony to disclose to unauthorized persons  
14 information about the communications intelligence activities of  
15 the United States. That's one of the statutes to which Mr.  
16 Powell is referring.

17 Under federal officer removal, that's all you need.  
18 You have to have the direction from a federal officer, a  
19 colorable federal defense, and you have to be a person within  
20 the meaning of the statute. All of that, I would submit, is  
21 quite clear in this case.

22 The other two grounds on which jurisdiction exists  
23 in this court are legally much more complex and less clearcut,  
24 but, nonetheless, both of them also vest this court with  
25 jurisdiction.

1           The first is the Grabel Doctrine, so named after the  
2 2005 Supreme Court decision that is its most recent embodiment.

3           THE COURT: Actually, I think its most recent  
4 embodiment is the case after that that made clear that that was  
5 an extremely narrow -- I forget its name.

6           MR. BERENSON: Empire Healthchoice you're referring  
7 to, one year later. I don't construe Empire Healthchoice as  
8 having narrowed or limited Grabel in any way. I think it was  
9 distinguishing Grabel because really --

10          THE COURT: The commentators seem to think it's  
11 narrowing it, but go ahead.

12          MR. BERENSON: Some do, some don't. The way I read  
13 it is it was distinguishing Grabel. And the essential  
14 difference between Grabel, where federal jurisdiction was  
15 found, and Empire Healthchoice, where federal jurisdiction was  
16 not found, had to do with the weight and seriousness of the  
17 federal issue involved. In Empire Healthchoice, it was a  
18 question --

19          THE COURT: So if it's a really, really important  
20 federal issue, then we throw out the Dow case, and we go with  
21 Grabel? That's the measure, is it really, really important, as  
22 opposed to substantial?

23          MR. BERENSON: No, but the nature of the federal  
24 interest, the constitutional grounding and the nature of the  
25 federal interest have an important effect on the analysis. In

1 a case like Merrell Dow, it would have upset a long-standing  
2 state/federal balance to hold that that kind of federal issue  
3 could create federal jurisdiction. You would have had  
4 thousands of state tort suits all of a sudden in federal court.

5 This couldn't be further from a situation like  
6 Merrell Dow, and this is in an area which is really way beyond  
7 even Grabel in terms of the gravity of the federal interest.  
8 Here what we're talking about is an area where the United  
9 States contends, and the AT&T-affiliated entities agree as you  
10 can see from the briefing, that the states under the U.S.  
11 Constitution literally lack all authority to act in any way,  
12 shape, or form, through their executive, through their  
13 legislature, through their regulatory agencies, or through  
14 their courts.

15 What we're talking about here fundamentally is a  
16 military intelligence program being operated allegedly in time  
17 of war. That is something that is constitutionally committed  
18 only to the federal government, and the states have no  
19 authority to oversee it, to regulate it, to intrude upon it, or  
20 to impede it. There is currently a lot of --

21 THE COURT: Are you saying, then, that, in fact, a  
22 state court would not have jurisdiction to exercise its  
23 authority to advance the interests of national security?

24 MR. BERENSON: What I'm saying, Your Honor, is that  
25 the validity of actions that the federal government is taking

1 or those who are alleged to be cooperating with it in the  
2 nature of gathering intelligence against a military foe during  
3 a war is controlled completely and exclusively by federal law,  
4 and disputes over that have to be adjudicated in federal court.

5           There are substantial disputed threshold questions  
6 of federal law that the plaintiffs would have to get over  
7 before they could make a prima facie case. Those include the  
8 State Secrets Doctrine, which Ms. Whipple alluded to. And I  
9 hasten to point out, we are not invoking the State Secrets  
10 Doctrine. She is exactly right that it can only be invoked by  
11 the federal government, by the head of an agency. All we're  
12 saying is that it's going to be an issue here. The federal  
13 government has said it's going to be an issue here, and it's  
14 been an issue in every one of these cases. That's the kind of  
15 threshold issue of justiciability that clearly creates federal  
16 jurisdiction and needs to be resolved in a federal court.

17           The related Totten Doctrine which renders completely  
18 nonjusticiable certain categories of disputes which require the  
19 exposure of a secret espionage relationship with the United  
20 States is another such doctrine of federal common law that  
21 exists right at the threshold before any subpoenas could be  
22 enforced. That, too, is the kind of issue that Grabel is  
23 talking about that does give rise to removal jurisdiction in a  
24 federal court.

25           Finally, the third doctrine under which we contend

1 this court has jurisdiction in addition to federal officer  
2 removal and Grabel substantial federal question removal is the  
3 Doctrine of Complete Preemption, which is an exception to the  
4 normal principle that a mere preemption defense does not get  
5 you into federal court.

6 The Doctrine of Complete Preemption says that there  
7 are certain cases in which the nature of the preemption is so  
8 complete and there is a parallel federal remedy which is meant  
9 to be exclusive that cases do come out of state courts and are  
10 properly litigated in the federal courts.

11 THE COURT: And the United States Supreme Court has  
12 recognized how many times complete preemption?

13 MR. BERENSON: I don't know exactly how many times,  
14 but they've done it in this century, in the Beneficial National  
15 Bank case, a case involving a state usury action. The Supreme  
16 Court just a few years ago found complete preemption and held  
17 that it was appropriate to remove that case to federal court  
18 because federal banking statutes provided the exclusive remedy  
19 for usury as against a national bank.

20 This is exactly the same sort of thing, again, if  
21 anything, on a magnitude and level of gravity far beyond usury  
22 and national banks. Here we have a remedy in 18 U.S.C.,  
23 Section 2707, for the improper sharing of CPNI customer billing  
24 records information. There's another one in the Communications  
25 Act in 47 U.S.C., Section 605. There are literally dozens of

1 federal lawsuits currently pending in which various classes of  
2 plaintiffs are asserting rights of action under those statutes.  
3 And under the Doctrine of Complete Preemption, a plaintiff who  
4 is trying hard to get a state forum to litigate something like  
5 this by pleading a complaint only under state law isn't  
6 necessarily entitled to have that effort respected, because no  
7 matter how they plead it, the cause of action really arises  
8 under federal law.

9           And I think the easiest way to see this is there's  
10 only two possibilities here. AT&T can neither admit nor deny  
11 anything about its alleged participation in these programs.  
12 But if one assumes for a moment that the conduct were actually  
13 occurring, there's only two possibilities: Either that conduct  
14 was in compliance with federal law and federal statute, in  
15 which case there's no possibility that there was any violation  
16 of state law, because even if there were nominally, state law  
17 would be preempted; or what AT&T was doing, if that set of  
18 circumstances were true, would be in violation of the  
19 applicable federal standards, in which case there is a complete  
20 federal remedy for that, and state law is totally superfluous.

21           So this is really the question of the legality of  
22 telecommunication carrier participation with any national  
23 intelligence program is governed solely and exclusively by  
24 federal law, of which there is an abundance that you can see in  
25 the briefs.



1           And so that does give, in our view, give rise to  
2 complete preemption. Again, I think the governing Eighth  
3 Circuit standards in cases like Lundeen and Peters make it  
4 very, very clear that federal jurisdiction would exist under  
5 that basis, as well.

6           I don't know if Your Honor wants me to address the  
7 stay or transfer motion beyond what I said at the outset, but  
8 if I have any time left, I'll reserve the balance. Thanks,  
9 Your Honor.

10           THE COURT: I'll give you a brief opportunity to  
11 respond.

12           MS. WHIPPLE: Very brief is all I will ask for. I  
13 was just going to hit a couple of high points in case there was  
14 any confusion over a couple of areas where maybe we disagreed.

15           I am glad that I believe we do have it clear now  
16 after Mr. Berenson had more knowledge of the other pending  
17 cases than I do. Obviously, I'm not a party in any of them  
18 other than this one here and the one in the Eastern District.  
19 I believe we do understand, though, that there are no other  
20 motions for remand pending that are postured like this case  
21 where state commissioners using state law began in state court  
22 and then got removed up to the federal court.

23           I would also point out that the subpoenas -- I've  
24 already invited the court, obviously, to look at them and I do  
25 that. The subpoenas make reference to the initials NSA because

1 the subpoenas follow communications, letters that were  
2 exchanged between the commissioners and inside lawyers for  
3 AT&T. The commissioners had no desire to issue subpoenas that  
4 looked like they were going on a fishing expedition. So the  
5 reference to, did you disclose to any third party or the NSA,  
6 came from that prior communication. That did come from the  
7 first news article that came to the attention of the  
8 commissioners, which prompted phone calls from Missouri  
9 telecommunications customers.

10 I would ask the court, though, to look at the  
11 language of those subpoenas carefully. There is no request of  
12 the NSA for any information, and there's certainly no request  
13 for any knowledge about actions of the NSA. They're in there  
14 for reference only, just so it's not too vague to be lawfully  
15 grounded.

16 Under 1442, Mr. Berenson talked about that. I would  
17 dispute that there is any federal officer removal type  
18 jurisdiction here, certainly not any evidenced by the Powell  
19 letter. I already walked the court through all of the  
20 evidentiary insufficiencies that I believe are evident in that  
21 letter, and I would just ask the court to apply the United  
22 States vs. Reynolds test, not the Eighth Circuit Watson test,  
23 but I would apply, please, the United States vs. Reynolds test  
24 to whether or not that letter sufficiently is an assertion of  
25 that privilege.

1 I am glad to know that we are in agreement that  
2 there is no United States Supreme Court recognition of complete  
3 federal preemption of the regulation of telecommunications  
4 companies and customer proprietary information. I'm confident  
5 that if there was such a case, Mr. Berenson would have brought  
6 it to the court's attention.

7 And I think that's important for us to focus on as I  
8 wrap up here. We are dealing with a situation where the  
9 federal laws do carve out specifically authority for state  
10 courts, state judges, state officials. Mr. Berenson, I'm sure,  
11 knows those federal statutes better than I do. They don't come  
12 up every day in my work at the Missouri Public Service  
13 Commission, but I have looked through them enough to know that  
14 every one of them currently on the books does carve out  
15 authority and activity for state officials and state  
16 governments and state courts to regulate to the extent allowed  
17 telecommunications companies.

18 So there is no complete federal preemption. We are  
19 proceeding under state law. That's where we began, that's  
20 where we belong. And I just ask the court to remand the case  
21 back to the Cole County Circuit Court. Thank you.

22 THE COURT: All right. I'm going to take a  
23 ten-minute recess here. And perhaps can address -- oh, do you  
24 want to say something?

25 MR. TANNENBAUM: With the court's permission, the

1 government would respectfully request a few minutes of the  
2 court's time.

3 THE COURT: Are you going to contradict him?

4 MR. TANNENBAUM: No. But we do have our own --  
5 particularly with respect to Ms. Whipple's oral motion to  
6 strike, I would like to make a couple of additional points as  
7 to that. And the United States, of course, has a very weighty  
8 issue here, and we'd like at least to address a few points.  
9 Not to repeat anything, necessarily, but to address it.

10 THE COURT: I'll tell you what, you can do that when  
11 I come back. Court is in recess.

12 (A recess was taken from 3:51 p.m. to 4:07 p.m.)

13 THE COURT: If I deny the motion to strike, will you  
14 give up talking?

15 MR. TANNENBAUM: It's very tempting, Your Honor. I  
16 would give up on that issue, but I would like to make just a  
17 couple of quick points, then, other than that.

18 THE COURT: Okay. I'll give you five minutes.

19 MS. WHIPPLE: Your Honor, just for the record, could  
20 I just object?

21 THE COURT: Yes.

22 MS. WHIPPLE: Thank you.

23 THE COURT: You are preserved for the Court of  
24 Appeals.

25 MS. WHIPPLE: Thank you.

1 MR. TANNENBAUM: Thank you, Your Honor, and thank  
2 you for hearing from the government on short notice.

3 Obviously, we filed our statement of interest yesterday.

4 Much has been said about the issues already, so,  
5 again, I'll just make a couple of quick points. The first  
6 is -- and I alluded to this before, I just want to make  
7 clear -- if this case is remanded, the United States would move  
8 to intervene in the state court and will then have a right  
9 under the federal officer statutes to remand it back, remove it  
10 back here. The Eighth Circuit case in the United States vs.  
11 Todd makes it clear that the United States does not have to be  
12 an original party in the suit, it could be an intervention, so  
13 we think clearly remanding it would be futile because we would  
14 just intervene and remove it right back.

15 Just to hit the reasons why removal is necessary or  
16 required anyway at this point, again, not to repeat Mr.  
17 Berenson, but regardless of whether the issues framed as a  
18 complete preemption or necessary and substantial threshold of  
19 federal law under the Grabel line of cases, it's clear this  
20 case is quintessentially a federal case because there's no role  
21 for state law in the regulation of foreign intelligence  
22 activities. As far back as McCulloch vs. Maryland, it's been  
23 fundamental that the state may not regulate the federal  
24 government or its activities taken under the United States  
25 Constitution. That's precisely what the state seeks to do

1 here, to investigate alleged foreign intelligence assistance  
2 that they say defendants have given the NSA.

3           And I understand Ms. Whipple's argument to be that  
4 the subpoena doesn't really, isn't really focused on the NSA,  
5 they just had it in there as an aside or to make it clear; but  
6 when I read the subpoena, it seems rather clear that it's  
7 focused on whether records and which records were disclosed to  
8 the NSA. And that very fact goes to classified information  
9 about alleged foreign intelligence activities. Whether or not  
10 those activities occur is classified, subject to the state  
11 secrets privilege. That privilege has not been asserted in the  
12 letter that Ms. Whipple referenced; of course, we agree under  
13 Reynolds must be asserted by the head of the agency after  
14 personal consideration by that officer.

15           But it's not necessary for the privilege to be  
16 asserted in this action, at least at this time. It's been  
17 asserted in other actions under the very same type of  
18 information. As Mr. Berenson has explained, it's been upheld  
19 by three courts to rule on the question, including the court in  
20 Michigan, as to the telephone call records and just the very  
21 question of whether there is such a program and whether records  
22 have been disclosed to the NSA, that is the state secret.

23           But I would add that that issue is not relevant here  
24 at all to the removal question. Even once you get past that,  
25 it still may not be relevant because there's a threshold

1 question about the state's authority. Of course, state secrets  
2 could then become an issue, and at that point, perhaps, it will  
3 be asserted, and that's up to the Director of National  
4 Intelligence, but it's clearly not relevant to the removal  
5 issue at this time.

6           So the state has no authority to investigate or  
7 regulate foreign intelligence activities. They're just  
8 fundamental threshold federal questions. That satisfies the  
9 substantial and complete preemption, and that preemption  
10 conclusion we think is bolstered by the federal statutes that  
11 occupy this field, including Section 6 of the National Security  
12 Act, which says nothing in this act or any other laws, federal  
13 statute, shall require disclosure of any information with  
14 respect to activities of the NSA. So that federal statute  
15 would expressly preclude and prohibit the type of disclosures  
16 that the plaintiffs are seeking in this case.

17           So together -- let me also add that Ms. Whipple made  
18 an argument that the federal statutes contemplate a role for  
19 state officials. And my understanding is the provisions that  
20 they cite only provide for a role with respect to state law  
21 enforcement matters. And the question, of course, would be  
22 whether there's a role for the state to investigate alleged  
23 foreign intelligence activities. And, of course, those  
24 statutes don't provide that, and that is an exclusively federal  
25 government executive branch realm.

1 I think that's all I have, Your Honor, other than to  
2 say the government also supports the transfer of this action  
3 and a stay, as well, as options that are in the interests of  
4 judicial economy. Thank you.

5 THE COURT: And I'm going to give you an opportunity  
6 if you do have anything else you want to say.

7 MS. WHIPPLE: I'll pass, unless you have questions  
8 for me.

9 THE COURT: No, thank you. All right.

10 Consistent with my prior rulings, I am going to  
11 resolve the motion to remand today. I believe that the judge  
12 sitting in the court of the state where the state laws are at  
13 issue is in a better position to resolve the question as to  
14 whether or not there is any federal jurisdiction, and I am  
15 going to deny the motion for remand.

16 I'm going to deny it on the grounds that the court  
17 has subject matter jurisdiction under the Grabel Doctrine. I  
18 think Grabel is an extremely narrow case. And it would be  
19 unusual for there to be a federal question under the Grabel  
20 Doctrine, but I think that this does -- this claim necessarily  
21 raises a federal issue that's actually disputed in  
22 substantial -- and, indeed, not only does it not upset the  
23 delicate balance between federal and state forums, but, in  
24 fact, this is quintessentially something that needs to be  
25 resolved in the federal court.



