Judge Pregerson — Got a sellout crowd today, huh? Um, we'll call the matters as they appear on the calendar. First matter: Tash Hepting versus AT&T Corporation, and the United States is a defendant-intervenor-slash-appellant.

Gregory Garr — Thank you, Judge Pregerson, and may it please the Court, my name is Gregory Garr, and I'm appearing here today on behalf of the United States. Your Honors, the nation's top officials, whose job it is to assess and protect foreign intelligence, have determined that litigating this action could result in exceptionally grave harm to the national security of the United States. They've reached that judgment because litigating this action would require the adjudication of three central facts, each of which directly implicates the state secrets: first, whether, or to what extent, any secret intelligence-gathering relationship exists between AT&T and the government; second, whether, or to what extent, any alleged surveillance activities have taken place; and third, whether, or to what extent, any particular communications have been intercepted. As a Director of National Intelligence and the Director of the National Security Agency, I've explained in the public and nonpublic declarations filed with this Court, litigating those central facts could compromise the sources, methods and operational details of our intelligence-gathering capabilities and equally important, could disclose potential gaps in those capabilities.

Judge Pregerson — The State Secret Doctrine is a common-law doctrine, isn't it?

Gregory Garr — Your Honor, this Court described it as a common-law doctrine in the *Kasza* decision. In our view, it also has Constitutional underpinnings. We think that's supported by the Supreme Court's decision in *United States v. Nixon*. It's something that the Fourth Circuit recently illuminated in the *El Maseri* case, and it's something that the D.C. Circuit discussed in the *Halkin* decisions. And that stems from the fundamental duty of the Executive to protect the national security in our Constitution.

Judge Hawkins — Why shouldn't we view the FISA law as having supplanted the common-law doctrine?

Gregory Garr — Well, Your Honor, the plaintiffs in this case refer the Court in particular to one provision, Section 1806(f). And that argument doesn't work for a couple of reasons: first, 1806 by its terms doesn't apply (and I'll explain why in a moment) and second,

under this Court's decision in *Kasza*, the Court determined that you need to conclude more than just the Congress legislated in area, but that there is a clear statement, a clear indication on the part of Congress that it intended to supplant the State Secrets Doctrine. And certainly no clear statement is in the law in this case.

Judge Hawkins — Wasn't FISA enacted after Congressional hearings and findings about abuses of telecommunications and interceptions of telecommunications?

Gregory Garr — It was, Your Honor, but one thing that both the text of the law and the legislative history makes clear is that the provision—I think you have in mind 1806(f)—is addressed to the situation where the government uses FISA-obtained surveillance against a person who knows he's been subject to surveillance. The one court that we think has come closest to considering this issue, and that's the D.C. Circuit in the *ACLU Foundation v. Barr* case, concluded that FISA does not impose an obligation on the government to disclose intelligence that's never been disclosed. And that's the question that the Court has before it.

Judge McKeown — So in your view, then, the State Secrets Doctrine would trump any Congressional legislation in the FISA provisions.

Gregory Garr — Well, in our view, Judge, there is no provision in FISA that supplants the Doctrine, and there is in particular certainly no clear statement on the part of Congress that it intended to supplant it. And keep in mind, plaintiffs' argument would require the Court to adopt the position that FISA establishes a FOIA provision in effect that would permit any criminal, any drug-dealer or any terrorist to come into court, to bring suit, to demand the United States to establish whether or not that person has been subject to surveillance and what type of surveillance.

Judge Hawkins — Doesn't FISA have a provision for *in camera* examination of documents and determination of secrets by Article-3 judges?

Gregory Garr — It does—It does, Judge Hawkins, and it's in 1806(f). That's the provision of the statute that deals with use of information, and if your look at the terms of that provision, it refers to situations where the government is either affirmatively using the evidence against an aggrieved person. That's the term that the statute uses, and it's a term that it defines to mean someone who knows

he's been subject to surveillance. The plaintiffs in this case have not offered any bit of evidence or proof to establish that they themselves have been subject and therefor—

Judge McKeown Let me ask you though: one of their complaints is that there is a widespread program for domestic surveillance, and if that's true, which some people have termed a dragnet, then wouldn't these plaintiffs, like everyone, be subject to that surveillance?

Gregory Garr Let me respond to that in a couple ways: first, in fact what they've alleged is that all or a substantial number—that's the language that comes from their complaint—have been subject to some kind of surveillance. So it's not—it's certainly not all. And second, more fundamentally, we don't think that a plaintiff can plead around the restrictions that have existed for decades on establishing their standing on establishing an ability to proceed with a claim by pleading the broadest imaginable claim, a quote-unquote surveillance dragnet of all Americans' communications, which is something that the government [of] course has denied.

Judge McKeown Well, may I ask you about that because I did look. I mean, President Bush said the government does not listen to domestic phone calls without court approval. Does the government stand by that position?

Gregory Garr Yes, we do, Your Honor.

Judge McKeown And so my question is if that's true, and presumably there's evidence to back that up since there would be nothing—since it doesn't happen, and there would be documents to back up that the President has or has not authorized that, why wouldn't at least that portion of the lawsuit be permitted to proceed to in effect come to verification of this statement by President Bush?

Gregory Garr For these reasons, Your Honor: first of all, the court dealt with a similar issue in the *Kasza* where they sought—the plaintiffs sought to deny—to litigate the government's denial that the name of the location at issue was Area 51. And the court rejected the argument that because the arg—because the government had made a denial that the courts could litigate the veracity of that denial because the surrounding matter was shrouded with state secrets. Second and more generally, in effect the court's—

Judge McKeown — Let's stop there because *there* it implicated state secrets. If the government is not as alleged in the complaint intercepting millions of customers' communications, why is that a state secret? Why wouldn't the government in fact want to put that on the record in a sworn statement in addition to President Bush's statement?

Gregory Garr — Your Honor, we would be thrilled if this litigation would go away if that government made that denial, but I would venture to guess that the plaintiffs wouldn't accept that denial and that what they would want to do is pro—is force the government to prove the negative, which would require it to get into precisely the matters that are subject to the state-secrets assertion: the sources, methods and operational details of any surveillance activities that *are* taking place and equally important, the potential gaps in any capabilities of the United States to engage in surveillance. If the denial itself would put an end to the litigation, that would be fine, but again, they in effect are asking the government to prove the negative. And in proving the negative, that would take the courts precisely into the heartland of the matters that are the subject of the assertion—

Judge McKeown — Well, maybe one of the problems is that we're painting too broad a brush when we talk about *the* litigation because as I perceive the complaint and now the documents, there's really three aspects of it—and maybe you can tell me if you agree with this: one, that what I call this dragnet claim of all these communications—maybe not every one but many—which President Bush says doesn't happen. The second is what's now being called the Terrorist Surveillance Program, where there is one end is foreign, and they target Al-Qaeda affiliates, and then a third is what I'll call communications records. Would you agree that those are the three areas that are in the litigation?

Gregory Garr — One of those areas is not in the litigation, and that is the Terrorist Surveillance Program. The plaintiffs have made clear on page 82 of their brief that that conduct is not at issue in this case. It's something that they reiterated in their 28(j) letter with respect to the *ACLU* decision from Sixth Circuit. The other two programs, I would agree with you, Judge McKeown, are at issue: the dragnet and the communications records. And I think it's—just to focus on the communication records for a bit because it has become the lost part of this case because the plaintiffs have

spent so little time on it in their appellant brief, the District Court with respect to *that* program—as has every court that has considered it, the District Court in the Sixth Circuit case and the Sixth Circuit unanimously concluded that the existence or not of the type of communications-records program that plaintiffs alleged is a state secret, is currently a secret. But the District Court nevertheless allowed that claim to proceed under the guise that there might be inadvertent disclosures during the course of this litigation.

Judge McKeown — Now on that point, if it is a state secret, and typically if that were upheld, of course *that* portion of the litigation would end, correct?

Gregory Garr — That's correct, Your Honor.

Judge McKeown — But of course if later there were disclosures, then presumably there could be subsequent litigation over that point.

Gregory Garr — That's true, Your Honor. That's absolutely true. But what the precedents made clear is that courts should not play fire with chance and risk further disclosure once they've determined that the state-secrets privilege has been properly asserted. At *that* point, *Kasza* make[s] this clear, the *Kasza* case makes this clear, the Supreme Court's decision in *Tenet* makes this clear, the litigation must come to an end in order to protect the essential interests of national security that the privilege is designed to facilitate.

Judge Pregerson — Well, who decides whether there's—whether something's a state secret or not?

Gregory Garr — Ultimately, the courts do, Your Honor, in adjudicating the government's assertion of the privilege. And they do, as this Court said in the *Kasza* case, apply the utmost deference to the assertion of the privilege and the judgments of the people whose job it is to make predictive assessments of foreign—

Judge Pregerson — Are you saying the courts are to rubberstamp the determination that the Executive makes that there's a state secret?

Gregory Garr — We are not, Your Honor, and we think that the courts play an important role—

Judge Pregerson What is our job?

Gregory Garr Your job is to determine whether or not the requirements of the privilege have been properly met. And that includes the declaration, the sworn declaration of the head of the agency asserting the privilege, and the assertion that that individual asserting it has personal knowledge of the matter [at hand].

Judge Pregerson So we just have to take the word of the members of the Executive Branch that tell us it's a state secret.

Gregory Garr We don't—

Judge Pregerson ['Cause] that's what you're saying, isn't it?

Gregory Garr No, Your Honor, what this Court's precedents say is the court has to give the utmost deference to the assertion, and the second part of the—

Judge Pregerson But what does "utmost deference" mean? We just bow to it?

Judge Hawkins It doesn't mean abdication, does it?

Gregory Garr It does not mean abdication, Your Honor, but it means the court gives great deference to the judgments of the individuals whose job it is to assess whether or not the disclosure or nondisclosure of particular information would harm national security, and the Consti—

Judge Pregerson Well, how can I do that?

Gregory Garr Your Honor, you would look at the declarations that had been filed with the Court—

Judge Pregerson Yeah.

Gregory Garr —the public declarations and the private declarations, and you would make us an assessment, as the District Court did, as to whether or not there's a reasonable danger of harm to national security if the matters discussed are disclosed. The District Court—

Judge McKeown Do we do that to *de novo* then since this is on a legal question on a motion to dismiss?

Gregory Garr — Essentially we think the court *does* to that *de novo*, Your Honor. The District Court—

Judge McKeown — So we basically start over, review the sealed record along with the public record and determine whether or not we agree or disagree with the District Court.

Gregory Garr — Because this is on a motion to dismiss, and we think it's a legal question. The District Court agreed with the government that the assertion of the privilege was proper, but it disagreed with the government as to the consequences of the application of the privilege in this case.

Judge Hawkins — Judge Walker thought the case could go forward notwithstanding the invocation of the privilege.

Gregory Garr — And with respect to Judge Walker, we think that that's wrong. We think it's wrong for a couple of reasons: first of all, the controlling precedents of the Supreme Court in *Tenet* and this Court in *Kasza* make clear that when the very subject-matter of the action is the existence of a secret espionage relationship with the government, litigation must come to an end. The Supreme Court put it this way in the *Tenet* case on page 10 of the decision: "When the plaintiff's success in the litigation depends on establishing the existence of a secret espionage relationship with the government, the matter cannot be litigated."

Judge Hawkins — As I understand in this case what the plaintiffs are saying is that AT&T has provided telecommunications information about its subscribers to the government without a warrant and that in pursuing this claim, they don't want to know the content, the method of grabbing this information if you will. In their mind, simply providing the information to an agency of the United States without a warrant is enough.

Gregory Garr — Your Honor, that's not correct. Certainly the premise of their litigation is that AT&T has entered into a secret intelligence-gathering relationship with the United States. But what they're seeking from the government and what they're seeking to establish is necessarily much more, and that's—

Judge Hawkins — Couldn't they prove their case by simply proving that A[T]&T has acquiesced in providing this information to the government

and did so knowing there was no warrant in between?

Gregory Garr — No, Your Honor, they could not do so. In order to litigate the merits of this claim, this Court would have to get into the details of any surveillance activities that were taking place or not. And the adjudication of that (whether any activities are taking place or whether any activities are not taking place) is a state secret. The Supreme Court in the *Tenet* case said even a small chance that some court will order disclosure of sources of intelligence cou—of the identity of the sources of intelligence could impair intelligence gathering.

Judge McKeown — May I— Let me go back to my first point then. I can appreciate that argument with respect to what we've described as the communications records, that is, the noncontent time, location etc. But as to the claim of widespread domestic surveillance which the government denies and says that they do not do it, they don't do any such surveillance without a warrant and that there is no such program, I'm having trouble understanding why you couldn't have basic discovery on *that* point without disclosure as to other surveillance that may or may not be taking place because *this* seems to me to otherwise put us in the position of being in the trust-us category. We don't do it. Trust us. And you can't ask us about it.

Gregory Garr — Well, a couple responses to that, Judge McKeown: first of all, if the Court concludes as we think it should that this case is about the existence of a secret espionage relationship with AT&T, then the Court *has* to dismiss under the *Kasza* and the *Tenet* decisions. But even if the Court gets beyond that, then it has to look at whether or not this case could be litigated. And I bring you back to my prior answer with respect to the denial of the existence of this alleged surveillance dragnet: The government would be put into a situation where it would have to prove the negative. And I think plaintiffs have made some discovery requests already in this case, and if I could just give you a sense of what they're seeking and what they would—what they therefore believe is necessary to—

Judge Pregerson — Let me just ask you this question: These are things that bother *me*. I mean, is it the government's position that when our country is engaged in a war that the power of the Executive when it comes to wiretapping is unchecked.

Gregory Garr — It is not, Your Honor, and that's why we're here today. Our—

Judge Pregerson — But what are the checks on it? If we're getting affidavits from folks in the Executive Branch, and we have to take their word for it, what is the check?

Gregory Garr — Your Honor, this Court plays an important role in evaluating the legitimacy of the government's assertion of the state-secrets privilege, and of course in other courts

Judge Pregerson — How do we do that?

Gregory Garr — Your Honor, you look at the *in camera* submissions, and our position is is that those—the District Court was correct that those submissions establish that there is at a minimum a reasonable danger that litigating this action could result in exceptional harm to national security. And of course there is a whole other branch of our government, as other courts have recognized, that is open and available to address perceived claims against the Executive. This Court's role—

Judge Pregerson — What is that, impeachment?

Gregory Garr — The Congress, as the Fourth Circuit has recognized, the D.C. Circuit has recognized—

Judge Pregerson — So there are other avenues. What are the other avenues?

Gregory Garr — Well certainly, Congress has already undertaken inquiries into issues, but the point is that plaintiffs don't have the ability in this context to come into court and force the disclosure of matters that would compromise national security, force the disclosure by litigating issues that directly implicate state secrets because what—

Judge Hawkins — Let me stop you and ask you this question: Has Judge Walker make that determination? In other words, has he determined after looking at the top-secret information that the case cannot go forward without the disclosure of that information?

Gregory Garr — Judge Walker believed that the case *could* go forward.

Judge Hawkins — *Could* go forward.

Gregory Garr — *Could* go forward.

Gregory Garr — And we that that was—

Judge Hawkins — And ordinarily in a piece of litigation where there's some contention that state secrets may be involved, the ordinarily course—wouldn't you agree?—would be to let the litigation go forward, and as the government asserts the privilege, the Article-3 district judge looks at the information *in camera* and then makes that determination. The government can always appeal back to *us* if they feel that determination is in error and against them. Why wouldn't that work here?

Gregory Garr — Your Honor, it's not the ordinary course where the very subject-matter of the action is a state secret. The Supreme Court by unanimous vote make that clear in the *Tenet* case, and it reversed a decision by this Court where the Court believe[d] that the case should go forward through the use of what it called "creative *in camera* proceedings."

Judge McKeown — Well, there's some question about *Tenet* and *Totten*: whether they really apply to *this* situation because in *those* cases, one of the parties to the contract was the one suing to enforce it in effect. And we don't have that here; what we have is the plaintiff alleging a *different* contract between ATT and the government. So it seems to me that there really is some feature there that the Supreme Court focused on in those cases, wouldn't you agree?

Gregory Garr — I agree that it focused on it, but what it said in black-and-white terms is that *Tenet*—that *Totten* is not quote-unquote contract rule. And the *Kasza* case establishes that because that case after all was not a suit against the government suing for a breach of contract. The *Weinberger* case establishes that, and it makes sense if you think about it this way: If this action had been brought by AT&T against the government, suing for breach of some kind of alleged espionage relationship, I don't think there would be any serious argument but they would have to be dismissed under the *Kasza* decision and the *Tenet* decision. And the result is no different where third parties bringing suit against AT&T and seeking through the courts to disclose the same type of information that AT&T would be seeking to litigate if it brought the suit on behalf [of the government].

Judge McKeown — See, w— Let me go back to the discovery issue because that follows up on Judge Hawkins as to whether the suit should be permitted to go forward in a preliminary way. And *then* determine— So for example, you know, *not* with respect to the communication record, I want to focus again on the very program that you say does not occur, and that is the widespread communications. And I *have* looked at the discovery requests, many of which would probably be barred by the State Secrets Doctrine, but why couldn't there be documents which would not reveal anything about surveillance but simply be Executive Branch statements, whether by declaration or in documents, that no-one is authorized to do indiscriminate domestic surveillance *without* court order. What would be a state secret about such a document?

Gregory Garr — Your Honor, I want to answer, but I also want to say just so that my co-counsel doesn't get deprived of his time that we're dividing the argument here, and he's hopefully going to have ten minutes of the time, so I see that I've gone over my twenty minutes, but of course I want answer all the questions.

Judge Pregerson — But we can help AT&T out. We just charge a little overtime, that's all.

Gregory Garr — Thank you, Your Honor.

Judge Pregerson — Or we can have them dial in and start pushing buttons, you know.

Gregory Garr — Judge McKeown, ultimately the answer to that is regardless of what type of evidence plaintiffs might think that they could come forward with or that might exist, ultimately you would be asking the court to prove matters that are protected by the state-secrets privilege: whether or to what extent any relationship existed, whether or to what extent any surveillance activities took place and whether or to what extent any particular communications were intercepted.

Judge Hawkins — What would be wrong with an appropriate official of the government signing the affidavit that Judge McKeown suggests?

Gregory Garr — Well, Your Honor, again—

Judge Hawkins — First of all, would that be subject to state secret, the affidavit

itself, a simple affidavit denying that the government has intercepted the telephone conversations of American citizens without a warrant?

Gregory Garr — As we indicated earlier, the government, the President of the United States and the Attorney-General of the United States has made clear that the government is not doing that, but [what] would it be subject to the state-secrets privilege is the litigation of the veracity to that because it would put the government—

Judge Hawkins — That brings my next question: You filed the affidavit and then you explain to Judge Walker why it is you can't reveal the information behind it. At least the public has the benefit of a sworn statement from a public official that what they suspect is going on is not.

Gregory Garr — And again, Your Honor, if plaintiffs are willing to accept that today as a conclusion of this litigation, we'd be thrilled, but in asking—

Judge McKeown — We're not asking whether the plaintiff would accept or not; we're asking really whether—

Judge Pregerson — Whether you'll do it.

Judge McKeown — Well, whether it's so preliminary. We're just asking if, you know, we take President Bush as he says it. It seems to me that that's based on— It could be not just a sworn affidavit, but there must be documents that say the same thing, whether from the NSA or otherwise, that would not be state secrets because documents that would corroborate that and say essentially the same thing would be no more of a state secret than the statement, correct? If you had a document that said exactly that, would that be a state secret?

Gregory Garr — No, the denial itself, the going beyond that—and this is a critical point—going beyond that would put the court into the position of getting into the sources, methods and operational details as well as—

Judge Pregerson — No, it won't.

Gregory Garr — —any potential gaps, intelligence

Judge Pregerson — We're not— That's— You're way out of line, making that statement.

Gregory Garr — I'm sorry, Your Honor, I di—

Judge Pregerson — What did you just say?

Gregory Garr — That going beyond the denial would take you into litigating the sources, methods, operational details or potential gaps in that, and what we know is—

Judge McKeown — Well, if that— Let's say that's true, and I underst— I appreciate the argument that you're making, and that is, you can go a little ways, but in your view, you can't go the entire way. Why wouldn't that determination really be made in the trial court because it may well be you could get summary judgment on the basis of a sworn affidavit and the supporting document, and you wouldn't *need* to go any further. If you *did* need to go further, it may well be a state secret because you would need to go into what you *are* doing to show what you're *not* doing. And that— I understand that's where you're saying it would be a state secret, but why— The real question is should we at this stage of the litigation, you know, simply draw the line?

Gregory Garr — And I think the court struggled with the same exact question in the *Tenet* case, and there was a divided decision by this court. The majority thought that the court should be creative in finding ways of going for the litigation using *in camera* and other procedures. Judge [Tallman] who dissent—disagreed, he thought that precedent required the different result, and the Supreme Court unanimously held that where the existence of the espionage relationship is itself at issue, the litigation has to come to conclusion. And we think that that precedent controls this case. The one thing that intelligence offic—

Judge McKeown — Oh, but the difference there is that you had— We wouldn't— In other words, ATT would fall out of this equation I'm talking about because if the government does not, as the President says, listen to domestic phone calls without court approval, it wouldn't matter whether it was, you know, ATT or Subway because if the government doesn't do it, then that's the end of the litigation on that point.

Gregory Garr — I don't think AT&T falls out first, because this entire action—and it's clear from paragraph [3] of the complaint, and it's clear from all the pleadings—is predicated on the existence of this secret relationship between AT&T and the government. They're claims are that AT&T acquires information and discloses it to the government. I don't think you can peel that apart and litigate forward in this case as if the case that was brought doesn't exist any more.

Judge Pregerson — Was a warrant obtained in this case?

Gregory Garr — Your Honor—

Judge Pregerson — You go through the FISA court on this case?

Gregory Garr — Again, Your Honor, that gets into matters that are protected by the state secrets. Whether it was or whether it was not, again—

Judge Pregerson — But we know—at least we've read—that in the past (oh-five and oh-six), there's something like more than three thousand applications presented to the FISA court, and there was only one denial, and that was a partial denial. So we know that the FISA court is working hard.

Gregory Garr — That's certainly true, Your Honor, but again—and this gets down to the fundamental—

Judge Pregerson — What— I don't understand what your—what the problem is.

Gregory Garr — That the fundamental—

Judge Pregerson — You just don't want to say whether this particular matter went through the FISA court. Is that it?

Judge McKeown — Can't you— Can you say that without— Since those are confidential and protected—

Gregory Garr — I cannot.

Judge McKeown — —proceedings.

Gregory Garr — I cannot, Your Honor, because again, it would disclose methods or means *or* the existence of intelligence. How— To the extent that any surveillance is taking place—

Judge Pregerson How would that disclose the methods and means?

Gregory Garr Your Honor, getting it—

Judge Pregerson Everybody knows about the FISA court.

Gregory Garr But, but what is—

Judge Pregerson Most people do.

Gregory Garr The plaintiffs in this case allege that there is a secret room at AT&T and that alleged activities are taking place in that room. They have no proof of that except the affidavit from someone who says that there's a leaky air-conditioner and some poorly installed cable in the room which is hardly consistent with this sort of breathtaking program they have in mind. But once you go beyond that, Your Honor, we are getting into the operational details of intelligence capabilities, and the one thing that the intelligence experts will say is the more publicly and the more concretely we educate our adversaries on our intelligence-gathering capabilities, the easier it is for them to evade detection by adapting their means.

Judge Hawkins Didn't the President do that in part by making the statement that he did?

Gregory Garr And, Your Honor, again, the President did deny the existence of any sort of dragnet surveillance, but again—

Judge Hawkins Well, no, no— His statement was that the domestic calls of American citizens are not being intercepted without a warrant. Now, if I'm a member of Al-Qaeda, that tells me if I'm in Miami, and my buddy is up in Orlando, that we can call phone-to-phone, and unless they've obtained a warrant, those conversations are not going to be intercepted.

Gregory Garr But the plaintiffs in this case, Your Honor—

Judge Hawkins So he's opened the door a bit, hasn't he?

Gregory Garr The President has denied the existence of this general program.

Judge Hawkins Oh, that's not what Judge McKeown quoted. He said we're not doing this. We're not do— If it's citizen-to-citizen within the

United States, we don't do it without a warrant.

Gregory Garr — And in answering Judge Pregerson's question, I understood the question to be broader than the narrow issue that you're focusing on, Judge Hawkins. I mean, the President said what he said and certainly the United States, but that does not abrogate the state secrets—

Judge Hawkins — He didn't have to say it, right?

Gregory Garr — Well, that's true, and again, the *Kasza* decision dealt with the exact same issue, and the court there agreed that litigating the veracity of a denial would take you precisely into the matters that the state-secrets privilege is designed to protect.

Judge McKeown — So are you saying that even though President Bush said that that the allegations in the complaint as plead could include an allegation that ATT, apart from whatever B— President Bush says, is undertaking such activities and that for the government or ATT to defend against that would implicate the state secrets.

Gregory Garr — Well certainly, adding AT&T into the mix creates a different dimension and brings this case squarely into the *Tenet* and *Totten* world because there you're talking about disclosing the existence of secret intelligence relationships or the nonexistence of those relationships, and that, as we explained, can discourage cooperation—

Judge McKeown — Let's say that you said without admitting or denying—which seems to be something that is pretty common in the intelligence world and on all these documents we're looking at—without admitting or denying that the government has a relationship with ATT, I, Mr. or Mrs. So-and-So from the Executive Branch, under oath, essentially affirm what President Bush said. That wouldn't cause you to get into the secret room with leaky air-conditioning, would it?

Gregory Garr — Well, Your Honor, again, I mean, the government—the President has made a statement, and the government stands behind it. Our view—and maybe we're wrong about this—but our view is that plaintiffs wouldn't accept that. And the discovery requests that they've made, and the way they've litigating this action makes perfectly clear that they want to go beyond that. They want to go into what exactly was taking place, matters that would be

protected by the privilege because they would either disclose sources and methods or they would disclose potential gaps in our intelligence-gathering capabilities.

Judge Pregerson — Let me ask you. Some of these things aren't clear to me. Under FISA, can the government monitor foreign-to-foreign communications?

Gregory Garr — Your Honor, the recent amendments—

Judge Pregerson — Can't you just answer that answer that yes or no?

Gregory Garr — Therea— I-I— I-It's— No, I can't, Your Honor, because the language of FISA is very specific.

Judge Pregerson — Okay. All right.

Gregory Garr — There's a definition for electronic surveillance—

Judge Pregerson — All right.

Gregory Garr — —that is very specific. And the recent amendments to FISA make clear that electronic surveillance does not include surveillance that is directed at foreign individuals.

Judge Pregerson — Does not include surveillance directed at foreign individuals.

Gregory Garr — That's correct, Your Honor.

Judge Pregerson — I mean— I'm talking about people in— Are you talking about people in foreign countries? Or foreign individuals who are here?

Gregory Garr — The recent amendment, Your Honor, and I direct you to the language, makes clear that that is accepted in the definition of electronic surveillance.

Judge Hawkins — A phone call from Finland or Japan would—

Judge McKeown — We're talking about outside the territory of the United States.

Gregory Garr — It says "directed at foreign individuals, individuals who are reasonably believed. . . ." And that—the answer to those questions, Your Honor, I mean, FISA says what it says. And Congress has recently amended that.

Judge Pregerson — You're the expert. Some of this stuff confuses me. I'm just trying to get some answers, that's all.

Gregory Garr — I can't answer your questions.

Judge Pregerson — Does it cover foreign-to-foreign? We're not sure. Foreign to U.S.?

Gregory Garr — Your Honor, again, I point you to the recent definition which exempts from definition of electronic surveillance surveillance that is directed at individuals reasonably believed to be foreign individuals.

Judge Pregerson — Individuals recently what?

Gregory Garr — Reasonably believed to be foreign. FISA ultimately was not concerned with that type of surveillance, and it's something that the Congress has reaffirmed in the recent amendments. Plaintiffs in this case of course have abandoned their claims—

Judge Pregerson — Does FISA apply to U.S., someone in the United States to someone in the United States, someone in New York calling someone in San Francisco?

Gregory Garr — Your Honor, I think ordinarily it would. There's a very complicated definition of electronic surveillance, and I'm not—certainly not trying to be evasive on this or trying to be difficult, but it's a very complicated technical definition of electronic surveillance.

Judge Pregerson — Yeah.

Gregory Garr — And that complicates the litigation of questions—

Judge Pregerson — It can't be any more complicated than my phone bill.

Gregory Garr — I certainly I think I could agree with you on that line.

Judge Pregerson — I'm having trouble with that. This Protect America Act of 2007, what effect does that all have on this case?

Gregory Garr — Well, Your Honor, plaintiffs have brought a FISA claim so ultimately in the litigation of that claim, the Court would have to view the recent amendments, particularly with respect to any prospective relief. But fundamentally, we don't think that any of

their claims can be litigated without getting into matters protected by the state secrets. The three matters that I've already mentioned: whether or not any relationship existed, whether or not any particular surveillance activities are taking place and whether or not—and this is a critical piece which I hope Mr.—I assume Mr. Kellogg's going to talk about—whether or not any particular communications have been intercepted, which if you get beyond all the other issues that we've discussed, plaintiffs could not establish their standing in this case because they couldn't establish whether or not their own communications had been intercepted.

Judge Pregerson So the bottom line here is that once the Executive declares that certain activity is a state secret, that's the end of it.

Gregory Garr It's not—

Judge Pregerson No cases, no litigation, absolute immunity. The King can do no wrong. That's about what it comes down to.

Gregory Garr No, Your Honor. First of all, as I have explained, although the courts do give the utmost deference to the assertion of the privilege, that is not absolute deference; the court plays an important role. And second, as this Court said in the *Kasza* case, although dismissal is a harsh remedy, it's the remedy in this context which is for what the Court called the greater public good. If I have any time remaining, I'd like to reserve the balance of my time for rebuttal unless the Court has further questions.

Judge McKeown Yes, my only question or comment on your final remark is that we have a denial here of broad-spread domestic surveillance. If we didn't have a denial and if the government were undertaking that, I imagine from your comments that your response would be we can't—no-one could litigate that kind of an invasion because of the state-secrets doctrine.

Gregory Garr Well, the Supreme Court has rejected the notion that the fact that plaintiffs are asserting Constitutional rights means that the privilege can't apply. This Court had a different view in the *Tenet* case and—

Judge McKeown But I think my questions calls for a simpler answer of yes or no. Is your answer that no, if there were in fact widespread domestic

surveillance of American citizens without a warrant, there would be no judicial remedy to challenge that. Yes or no in your view.

Gregory Garr — I would answer it this way, and I make it as direct as I can: If the courts looked at the *in camera* submissions of the Executive and concluded, agreed with the Executive's submission that litigating the case could result in grave harm to the national security, the answer would be that action could not go forward, but ultimately, the court would have the role in making that determination.

Judge Hawkins — Even if the *in camera* submission were a denial.

Gregory Garr — Yes.

Judge Hawkins — Okay.

Gregory Garr — Thank you, Your Honors.

Judge Hawkins — Thank you. AT&T?

Judge Pregerson — AT&T.

Michael Kellogg — Thank you Judge Pregerson, and may it please the Court, Michael Kellogg on behalf of AT&T. I'd like to make three point today focused on the issue of plaintiffs' standing. And the first point is that the questions that the Court would have to resolve in order to determine that the plaintiffs *have* standing are the very questions as to which the government has invoked the state-secrets privilege. In other words, they would have to show not only that there is such a dragnet program but that AT&T participated in it and that their own individual communications were captured pursuant to that. But those precise questions which are necessary to standing are ones that the government, invoking the state-secrets privilege according to proper procedures, have said cannot be litigated and cannot be resolved one way or another. AT&T is not allowed to put in any defense with respect to those questions. Evidence is not allowed to be presented on those questions. Under those circumstances, at this stage in the litigation, as you asked, Judge McKeown, courts have repeated said that once it becomes clear that the very questions at issue cannot be litigated, the case has to be dismissed. That's what this Court did in *Kasza*, what the Supreme Court did in *Tenet*, it's what the Sixth Circuit did

recently in the *ACLU v. NSA* case and what the Fourth Circuit did recently in *El Maseri*.

Judge McKeown — Do you have any other case that you can think of where a third party brings a challenge to a contract between the government and a company or third party such as ATT?

Michael Kellogg — Well, there's a number of cases involving third-party suits against private individuals in which the government intervenes and invokes the state-secrets privilege.

Judge McKeown — But in those cases, is there a claim of a contractual relationship between that third party and the government? That's what I'm trying to assess. Is there any other case other than *Tenet* and *Totten* from which we would draw any guidance on the contractual issue?

Michael Kellogg — Well, a couple of points on that: First of all, they are alleging here a relationship, an espionage relationship between the United States and AT&T which raises a classic *Tenet* and *Totten* question. But the state-secrets privilege is not limited to such questions; it extends far beyond the scope of individual espionage relationships into *any* discovery into methods, modes and operations of clandestine government programs, which are alleged to be at issue here.

Judge Hawkins — But the President has said with respect to widespread domestic telecommunications interceptions, that's not happening. Why wouldn't— How would it impact any relationship AT&T might have with the government or implicates the state secrets if that's the case?

Michael Kellogg — Because in order to litigate the question, it's going to be necessary to present evidence as to just what if anything AT&T *is* doing in cooperation with the NSA. The plaintiffs were not satisfied—

Judge McKeown — Why would you have to do th— I mean, that's really kind of where we get into the rub. If— Let's just assume that ATT *is* doing something with the government that implicates intelligence gathering. So we'll put that over there. The question is: Is ATT doing something where there's no warrant required. Why would that require ATT to put at issue the first

agreement that we referenced?

Michael Kellogg — Because the government has said that whatever, if anything, AT&T is doing with the government is a state secret, and we're not allowed to put in any evidence whatsoever on the question. And as a consequence, no evidence can come in as to whether the individual plaintiffs' communications were ever intercepted and whether we played any role in that. Judge Hawkins, you asked about cases. Why can't the case go forward to allow evidence to be presented, as it has been in a number of other cases where the questions at issue are peripheral to the state secrets. For example, in *United States v. Reynolds*, there was a plane crash. The plane had secret information on it. The court said okay, you cabin that off, and you can proceed to deal with the question of whether there was negligence involved and whether these plaintiffs were harmed. In *In re Sealed Case* recently decided by the D.C. Circuit where it said the question at issue there, whether a State Department employee improperly surveilled another employee, was not a state secret and that the state-secret evidence was not entwined with the evidence that the plaintiffs would need to make their *prima facie* case. But here, that is certainly not true because the Court cannot make a resolution of the question: Is AT&T participating, or are they not participating? Were plaintiffs' communications surveilled? Were they not surveilled? Because those are the very questions on which the Court—the government has invoked the state-secret privilege.

Judge McKeown — Let me just hearken back to my lawyer days, and I can see a very simple document request. It would run something like this: To ATT, produce any agreement, you know, document or otherwise, between ATT and the government with respect to listening to domestic phone calls without court approval. That would simply mimic President Bush's words. And presumably, taking President Bush at *his* word, ATT's response would be: No such document exists, correct?

Michael Kellogg — I assume that would be the response. I have no idea actually what is going on, but I assume that would be the response to that question.

Judge McKeown — Let's hope that—

Michael Kellogg — It's a state secret. I have no idea what AT&T is—

Judge McKeown — Well, how would it be a state secret if there were no document that authorized ATT to listen to domestic phone calls without court approval? Now, if there *were* such a document, then maybe you'd have to say "state secret," but if there is not such document, and ATT doesn't do anything more than President Bush say, wouldn't that be the end [of it]. And if the plaintiffs wanted more information, *then* maybe you'd get into the state secret. But why couldn't ATT say whether it has *this* document in its possession, which is an agreement to listen without court approval?

Michael Kellogg — Because any sort of probing into what, if anything, AT&T is doing for the government has been designated as a state secret.

Judge McKeown — Even if it doesn't exist? It's a state secret that it doesn't exist?

Michael Kellogg — You know, as Mr. Garr said, even gaps in intelligence gathering can be state secrets. What the government is *not* doing can be a state secret [in some instances].

Judge McKeown — But President Bush says they're not doing it so it can't be a state secret that they're *not* doing it if ATT simply confirmed it has no such agreement. I mean, why couldn't the litigation go at least *that* far and then leave to Judge Walker to determine well, if that's the end of the road or not the end of the road?

Michael Kellogg — Well, I'm not sure how it could not be the end of the road. But plaintiffs clearly will indicate that it's not. Plaintiffs— If you saw their discovery requests which are in the record materials, the materials that they wanted go far beyond the scope of it. Indeed,

Judge McKeown — Well, maybe they're not proper discovery requests. I'm just asking you based on everything we have in our record going back to this issue of: How is that the public is going to have some assurance on the record that this is not occurring? Without getting into what may or may not be occurring with ATT on other fronts.

Michael Kellogg — Well, Your Honor, if there's a remand to say that a simple denial is sufficient to end the case, I believe Mr. Garr said that that would satisfy the government. Um, I won't— I'll let him clarify

that on rebuttal if he said so.

Judge Hawkins — Yeah, it might be a good PR move, huh?

Michael Kellogg — I'm sorry, Your Honor?

Judge Hawkins — It might be helpful in assuring the public that what is alleged in part in this complaint, widespread dragnet domestic interception of private telephone conversations is in fact not occurring.

Michael Kellogg — Well, the President has already, you know, issued a denial that that is occurring. Plaintiffs obviously are not satisfied with that. They've presented materials—

Judge Hawkins — No court in the land would be satisfied with a public statement by anyone, be it the President of the United States or the president of AT&T or the custodian of the air-conditioner in that room on Folsom Street. What would be required would become some kind of affidavit, right?

Michael Kellogg — As I said, I leave it to the government whether they'd be satisfied with that approach. Certainly AT&T would be very happy to have the case end on those terms.

I would like to stress that the second point that I wanted to make if I…I'm not quite sure how much time I actually have given the overrun. But the Plaintiffs here have abandoned Judge Walker's approach to this case. Judge Walker thought that the case could go on through a somewhat complicated series of reasoning dealing with the terrorist surveillance program which the Plaintiffs have abandoned on appeal.

Their whole theory has to do now with the Klien and Marcus materials which Judge Walker rightly said were insufficient to establish a prima facie case and that he would not rely upon it. And at best, what those materials do, is they speculate about what a certain configuration of equipment would be capable of doing, but they provide no indication as to what is actually happening in the so-called sealed room. What information, if any, is being turned over to the NSA as part of the alleged program.

Judge McKeown — Let me ask you about this, this is kind of an odd case because it's a motion to dismiss with, you know, a record the size of this mystery room I think, and so we're not just sitting here with, you

know, this complaint on a motion to dismiss.

Judge Walker found, through stringing together various statements, that AT&T must be involved. Do we look at that conclusion on a de novo basis or on some other standard of review?

Michael Kellogg — I would note that the government also made a motion for summary judgment, but Judge Walker's decision was on the motion to dismiss and there is de novo review of a decision on a motion to dismiss.

Judge McKeown — So, where in your view did Judge Walker go wrong in coming to his conclusion about AT&T

Michael Kellogg — Well, he speculated that if there were a large program going on, that the government would need help from large telecommunications carriers, that AT&T is the largest carrier, that AT&T has a history of having government contracts and confidential relations with the government and therefore it was reasonable to infer that possibly AT&T participated.

Now as I say, we obviously attacked that series of reasoning in our brief, as I say, the Plaintiffs have not defended it, they have abandoned it on appeal and they have instead tried to rely on the Klien and Marus materials which we're precluded…

Judge Mckeown — Which Judge Walker did not do.

Michael Kellogg — Which Judge Walker did not do. And which are clearly inadequate under *Tenet v. Doe*, the Supreme Court's decision and under this court's decision [in *Kasza*] where there were also attempts to present affidavits or other evidence showing what is a secret, it's not actually secret because there's some information out there. What the Supreme Court made absolutely clear in *Tenet v. Doe* is that a mere fact that there's some information floating around there in the public domain does not mean that it is not a state secrete issue because there could be all sorts of small bits and pieces that are critical to the intelligence determination and that the director of intelligence deserves the utmost deference in that determination.

Judge Pregerson — Did Judge Walker get into the state secret issue at any depth?

Michael Kellogg — He did not discuss the sealed materials in any depth, but my understanding is he examined those materials with great care, he determined that the state secret privilege was properly invoked procedurally by both the Director of National Intelligence and the Director of the NSA.

His issue then was whether there were enough extraneous information out there to say that well, maybe it's not a state secret after all.

Judge Pregerson — In dealing with a motion of this list it doesn't take much to confirm or deny a motion to dismiss.

Michael Kellog — That's why the point I tried to make at the outset is so critical. It's because the very questions, it would have to be resolved in order to establish the Plaintiffs even have standing, Article III standing to bring this case are themselves been properly designated as state secrets. Which means that we cannot litigate those questions, we can't provide any defense on them and the court cannot ultimately resolve them.

Judge Pregerson — The Plaintiffs are clear in saying that in the AT&T case that they think they can prove their case without any of that.

Michael Kellogg — They do, relying on Klein and Marcus, which Judge Walker found insufficient, which for the reasons we explained in our brief are insufficient. They, at most, establish what a certain configuration of equipment might be capable of. If you read the Marcus declaration with care, he talks about capability at least twelve times in there and he concludes that with this configuration traffic "would have been available for interception". That is not a conclusion that individual people's traffic was intercepted. In deed, he himself refutes the dragnet by saying while this configuration actually would not allow you to listen in ordinary telephone calls and it wouldn't allow any interception of traffic between AT&T customers. So there are gaps even what he says might be possible under the configuration.

Certainly there's no basis on which the Plaintiffs would be able to establish standing under those circumstances, or that AT&T would be able to litigate the question because our hands are completely tied here by the government's invocation.

Judge Pregerson That would be something Judge Walker will have to look into in the future I suppose. But in the future, I suppose.

Michael Kellogg Well not under this Court's precedents and Supreme Court precedents once the determination is made…a final point I'd like to make, if I may, concerning the records program, is that the Plaintiffs don't even pretend to have a prima facie case there. They don't pretend to have any legitimate evidence that a call records program…they cite a few stray newspaper reports…a few congressional statements, but under well established precedent, none of that material is sufficient to advocate the states secret privilege and every judge to have considered the question has said this is a legitimate invocation of the states secret privilege. 6th Circuit recently dealt with the same issue and even the dissenting judge in that case said that the call records portion was properly dismissed at the outset for lack of standing.

Judge Pregerson All right. Will that do it?

Michael Kellog Thank you, your Honor.

Judge Pregerson Thank you.

Robert Fram May it please the Court. Robert Fram for the Plaintiffs

Your Honors. We believe that dismissal of this case is premature for two very simple reasons.

First, the statute. Congress established causes of action, private rights of action directed against persons, such as AT&T, when they act under color of law and improperly conduct electronic surveillance. In plain English, Congress established private rights of action when AT&T has a surveillance with the government, the NSA. Congress was not unmindful of the need to protect national security. What I've said is, it would be an extraordinary case for that mere relationship of a person acting under color of law and conducting surveillance to be able to…

Judge Pregerson Let me ask you this, had the government gone to the FISA court and gotten authorization for whatever is happening, would you be here today?

Robert Fram We would have a very different set of claims, your Honor. It would have to do with whether they satisfied the substantive

provisions of FISA.

Judge Pregerson — Lets assume they did.

Robert Fram — If they did, the claims as we plead them would not be here today.

Judge Hawkins — How would you know that?

Robert Fram — Well, that's a very interesting question.

Judge Hawkins — I mean, we have to talk practicalities here, because if they'd gone to the FISA Court and maybe they have, we don't know, but your answer doesn't really make sense to me in a practical consequence of saying well we'd have a different case. What would you know that would put you in a different position?

Robert Fram — Sometimes we find out things the FISA Court does, sometimes we don't. So I can't speculate as to those circumstances. But in terms of what we have here is that Congress thought about how to handle the problem of national security in a claim against a party acting under color of law conducting electronic surveillance.

This is not a one-sided statute or one-sided act on Congress' part. That is why it enacted Section 1806(f) so that the Attorney General, upon seeing a request for discovery implicating national security concerns, could go to the District Court, obtain *in camera* review, that's mandatory, it is not withstanding any other law, that would happen. The District Court then looks at the material in dispute. This would not be a hollow exercise in this case. While AT&T and the government have sought to characterize the Klein evidence as being speculative, as being hearsay, as being a story about an air conditioner, if one actually fairly looks at the evidence itself rather than the characterization of the evidence, we see some very specific points which we believe clearly establish our claims. There's a splitter cabinet on the 7th floor at 611 Folsom Street. Mr. Klein declares that under penalty of perjury, how does he know that? He knows it because it was his job, as he tells us in paragraph 15 of his declaration, to oversee the room where the splitter cabinet is installed. He tells us in paragraph 36 that he personally installed the circuits in the splitter cabinet. What does it do? Mr. Klein tells us. The splitter cabinet splits a fiber optic signal. And what happens next? He provides an Exhibit, which is…the Exhibit is under seal so I

cannot quote from the Exhibit. It's under seal because AT&T has contended it's proprietary but it is described in the Klein declaration which is in the public record. And what the splitter cabinet does is it sends the light signal from the 7th floor on Folsom Street to the 6th Floor where the SG3, that stands for Study Group 3, secure room is located. How do we know that? He attaches Exhibit C to his declaration. Exhibit C provides, I can't quote it, again it's under seal, but it's described, the manner in which these connections are made. And if there's any question as to it, I would at least direct the Court, it's a long document, to page 122 in it's excerpts of record. As regards and to see whether or not this is a credible statement.

But when one needn't take our word for it, that this isn't just hearsay or speculation. AT&T vigorously sought the return of the Klein materials unsuccessfully in the District Court. They submitted a declaration, also still under seal, by one Mr. Russell and I direct the Court's attention to Paragraph's 19-23 of the Russell declaration where he says, I cannot quote him but what our brief describes, how he describes that this is about the facility's at issue. Again, just a short declaration, I commend it to the Court's own review.

My point of describing the evidence is simply this. If one takes Congress' balanced scheme and says, look, when people engage in surveillance relationships with the government, presumptively there's a right of action, but if we're concerned about national security 1806(f) should apply. In this case there's a lot to apply it to. There's a lot of…

Judge McKeown — What is your response to the earlier argument that 1806(f) isn't really applicable here by its terms in the way it reads with respect to an aggrieved person and putting this matter in evidence?

Robert Fram — The government says, makes the following arguments, as to the non-applicability of 1806(f); one is the definition of aggrieved person, and the other has to do with whether it only is triggered by persons who are defending against the use of information obtained through the surveillance. I understand their arguments. We believe neither…it makes sense in light of the statutory language. First, the statutory language specifically is broader than individuals who have been provided with notice, the government's going to use the information, or who are seeking

motions to suppress. There is a third clause in 1806(f) and that third clause in the disjunctive concerns any discovery motion what-so-ever, that is not…statute by its' terms is expressly not limited to persons who are in a motion to suppress posture or dealing with the use of evidence against them. That's first, second, aggrieved person…

Judge McKeown — But where is that in 1806(f)?

Robert Fram — One looks in 1806(f) and I believe it's in paragraph…statutory appendix, I believe it's on 2A

Judge McKeown — Just tell me the surrounding language.

Robert Fram — Sure…

Judge McKeown — We're dealing with different electronics.

Robert Fram — Okay different statutory appendix?

Judge McKeown — Just tell me the surrounding language.

Robert Fram — Sure…So the language that I'm referring to is…it says…

Judge Pregerson — That *in camera* and *ex parte* review…

Robert Fram — After one gets there, or to discover or obtain applications or orders of or other materials relating to electronic surveillance. That's the language that I'm quoting from. It says, whenever any motion request is made by an aggrieved person pursuant to any other statute or rule of the United States or to discover or obtain applications or orders.

Judge McKeown — But then doesn't it go on in making the determination that go back to the aggrieved person situation?

Robert Fram — It has to be an aggrieved person, I agree with your Honor on that, I'm simply making the point that it does not have to be a person who is defending against the use of evidence. There's a very broad grant of review for all discovering motions.

On the question of aggrieved person, one looks a the definition of aggrieved person in Section 1801, what is clear there are two things. First, it does not say an aggrieved person is a notified aggrieved person, or a person who has already established that

they are aggrieved. That is the same definition that appears in the private right of action, under Section 1810. In other words, 1810 says you have a private right of action if you are an aggrieved person. An aggrieved person is a person who is, by the definition, merely subject to electronic surveillance. Not who's already established that they are subject to electronic surveillance, not if they had been notified that they are subject to electronic surveillance.

So what we have is a standard statutory provision, providing…

Judge McKeown — Doesn't that kind of beg the question, we're still back to the standing issue of whether they're aggrieved from a constitutional or prudential dimension or whether they're aggrieved pursuant to the statute and whether they can prove that without invoking the very state secret that is being argued about.

Robert Fram — I'd like to address that directly. The only point I was making here is that there's nothing in the statute saying you first have to prove that you were subject to surveillance before you can bring your claim. And the government's reading of aggrieved person would have that affect. Now as to what it is we do need to show, to answer your honor's question in terms of on standing, it's important again to look at what the claims under say FISA or Title III require, the gist of our claim, the gist of the evil here is in the improper giving of the communication. It is in the acquisition by a device, is what the definition of electronic surveillance, and that's in 1801(f) subparagraph 2 provides. It's the acquisition of a communication by a device without consent. No reference whatsoever to a human being reading it. No reference to an NSA technician analyzing it. No reference whatsoever to what goes on inside the SG3 secure room. Put into concrete factual terms of our case, we have completed our case, we have completed privacy violations upon the hand-over of the copy of the internet traffic at the splitter cabinet and it's transfer to the SG3 secure room, which room has access that is limited to NSA cleared personnel.

Judge McKeown — And are you referring now to records communication or also to content?

Robert Fram — Well clearly as to the content, as to the records, we believe records are within the definition of content under the FISA statute which is not limited by its plain language to the verbal

content. It can include information regarding the existence or identity. There's a broad …

Judge McKeown — So let me just be clear. Is the room, however, one may or may not conceive it, essential to your claim of widespread domestic surveillance?

Robert Fram — Yes, the fact that there's a mass handover of a copy of communications to a room as to which access is limited to NSA cleared persons, that is the gist of our dragnet claim. What is not implicated in our dragnet claim is what happens inside the room.

Judge McKeown — So that goes then back to a topic I was discussing both with AT&T and the government and that is President Bush's statement that there is not any domestic surveillance without judicial authority. If that were established. With respect to the claim of widespread domestic surveillance or dragnet what then, what would be left of your claim?

Robert Fram — Well, one has to be careful as the government is careful in reading their words, exactly what they're saying. My understanding is the President said that they're not trolling through the communications of ordinary Americans. I do not know the government has ever said we are not obtaining a fiber optic split of all internet traffic.

If they have information, in other words, that basically what Mr. Klein says and what his documents say are wrong, then that is exactly the sort of thing that one would expect to see hashed out in an 1806(f) procedure in front of Judge Walker. So it may or may not be that the declaration as provided has been contemplated here that would be provided by the President would be adequate.

Judge McKeown — We didn't suggest that there would need to be any kind of declaration of the President, just to be clear on the record.

Robert Fram — Okay. But it's not clear what he would say and…

Judge McKeown — It wouldn't have to be the President, it could be a member of the Executive Branch and I wouldn't expect it would be the President, would you?

Robert Fram — I would agree, unlikely, it might be the Attorney General.

But in any event, would have to look carefully at the words, whoever said it on behalf of the Administration and see whether or not it net the specific factual points that are in the record. And by the way, Judge Walker never said that he did not find the Klein evidence to lack credibility. He actually went out of his way to say that he was not passing on this issue at the time. What we believe that the statute calls for is exactly an evaluation of those points.

And one final issue. There's been a concern around the Klein evidence might improperly be opening the door, that anyone can come off the street and jeopardize the national security of the United States. I want to take a look at the narrowness of what we're proposing here: First, this is evidence as to which the Assistant Attorney General expressly declined to assert the privilege, he did twice because Judge Walker asked him. He expressly declined to assert the privilege not only over the declarations but over the Exhibits. The very Exhibits that AT&T fought ferociously to have returned, because they thought they were so valuable and proprietary.

Judge McKeown — Well there is a difference of course between trade secret proprietary information and a state secret.

Robert Fram — We understand that, but we think it's an odd circumstance for them to have it both ways and say this information is all hearsay and speculative and trivial and should be disregarded and at the same time say, but of course it's incredibly proprietary, important and valuable when it comes to [inaudible] a trade secret.

Judge McKeown — But the gist of your claim then, is that AT&T has a device by which it is acquiring data and/or voice communications. Is that correct?

Robert Fram — Certainly data, we believe, voiceover IP, is internet traffic.

Judge McKeown — The IPs. So is…there's a third kind of communication of course and that's just a standard telephony and that is with phone calls, what we call phone calls. Do your allegations include a claim that there is either monitoring or acquisition of phone call content?

Robert Fram — They do your honor. As to that the Klein material speaks to internet traffic. Our point there is simply this, the government's made a very broad contention that the entire subject matter of AT&Ts surveillance relationship with the NSA is a secret. We're saying, we've proven it already. We not only alleged it, we've proved it, and so, we're saying in this case we've gotten that far…

Judge McKeown — What have you proved?

Robert Fram — What?

Judge McKeown — You've proved that some NSA guy was supposed to show up in the room. I mean, that's what the Klein and Marcus…I mean you haven't proved one way or the other what is or is not the relationship between AT&T and the government have you?

Robert Fram — What we have…if one looks at Klein, in paragraph 17 and paragraph 14 he says the following, "that as regards to the SG3 secure room, first the ordinary technicians who worked in the building with him did not have access, second, that only Field Support Specialists, he designates No. 2, he does not use his personal name, had access. Subsequently Field Support 3, when the first individual left. Third, that only those individuals had clearances from the NSA. Now, it may be he's wrong, it may be that AT&T can come in or the government can come in with evidence to Judge Walker and say that's unfortunately not true, SG3 secure room is available to everyone or the full technician force, that predicate is wrong. They've done no such thing as far as we know. I don't know everything that are in their confidential papers but in any argument they've made on the public record that's available to us, they never said any such thing.

They attack Klein's allegation on this specific issue as hearsay and is made on his knowledge. Well, that he made it on his knowledge that the only people allowed in the room after he works there every day doesn't that strikes us as a perfectly appropriate assertion. He can be challenged, but there's nothing speculative about it. They say, well he was told by another person, some field support person No. 1…

Judge McKeown — But let me just say that…I'm just trying to narrow this. Let's say we take him at the word…there is a room, people that work there

have NSA clearance, then there's another affidavit that said that the equipment has certain capabilities. Correct?

Robert Fram — He actually does say that and that's in the documents as does Marcus. That's all discussed, however, our point as regards electronic surveillance being defined as acquisition by a device without consent is that that violation is complete when the information is sent from the splitter cabinet on the 7th floor over to the SG3 secure room, which is a facility room that NSA controls.

Judge Hawkins — Without a warrant.

Robert Fram — Without legal authorization, correct your Honor.

Judge McKeown — Let me just speculate, because that seems to be what we need to do when we don't have certain facts that anyone can talk about, but, what if there were a warrant, but because of various other security regulations they couldn't tell you about that warrant or they couldn't tell you about some other authorization.

Robert Fram — If they had their warrant or if they had a certification for statutory defenses certifications. We believe all of that would be information they should properly put in front of Judge Walker, but it's very clear NSA – a person with the NSA clearance is a person performing or assisting the performance of a government function in the record with the executive order. It's 12968, it's in the record I believe at SCR697, and it's very clear. It says that you only get those clearances if you have a need to know. That's in section 1.2 and it says a need to know is defined in section 1.1H as a person who assists or performs a government function. The violation is complete at the splitter cabinet. When they….

Judge McKeown — If that's true then it wouldn't matter whether there is or is not an NSA person.

Robert Fram — It has to be…

Judge McKeown — Or you need that for your color of law.

Robert Fram — If acting under color of law your Honor. That there is to be said that _____.

Judge McKeown — But if the acquisition is complete, why can you say then just because you have an NSA guy in there, that it's occurring under

color of law.

Robert Fram — Well the claim is…

Judge McKeown — I understand what the claim is, but I'm asking of the evidence, not the claim. Because you're saying that simply because there's a NSA person inside the room that that gives you the color of law.

Robert Fram — We're saying that access to the room is restricted to persons with NSA clearance. Not merely if there happens to be an NSA person who floats through the room. So there's a handover of the fibreoptic split to a room as which access is limited in that way.

Much was made previously if I might turn to the *Totten* and *Tenet* cases, and just to briefly address that one of the – the governor of AT&T said that *Tenet* said that *Totten* was there's language they're saying that this is not just a contract bar case. I think it's useful to look at the actual language of the opinion itself, and making it 544 U.S. 1 believe page 7. The issue there of course it was the claim brought by one of the spies. there was not a third party, but they brought claims based on due process and estoppel, and it was in the context of that situation that the Supreme Court said it does not matter how the spies dress up their claims -- how the spies dress up their claims. This is not about third parties. We do not have a case where Congress in access statute is directed at persons who have a surveillance relationship, and Congress provides for ways to consider how that could be a secret, even though they created the private client causes of action where there's evidence to consider as to how to deal with it, and the court says at this early juncture, not the threshold, we're going to stop the case. On the contrary, I would say that case that we suggest provides very good guidance as what did you hear is the reason DC Circuit case, the *In re Sealed Case*, it came out in July its provided under Rule 28 to the Court. Some very interesting facts about the case – put it on all fours with this case cause it was not dealing with an 1806 review process. It was just trying to figure out how do we deal with a state secret case where we have some secret and non-secret evidence, and we've got the government arguing that this non-secret evidence is mere hearsay. What do we do? And what it found was as to one of the defendants was to remand it, and to have the district court conduct what is called a tailored *in camera*

review and to segregate the secret and the non-secret evidence. So even if the court were to accept the government's arguments regarding the limits of 1806F which we suggest would not be the right reading. It doesn't matter. The end of the day as the DC Circuit pointed out it doesn't make sense to dismiss this case at the threshold, when there's this amount of non-secret evidence. Evidence that is credible on its terms, that is documenting that AT&T has vouched for and for which the government has itself expressly declined to assert the privilege. That's a very narrow case. This is not opening the flood gates.

Judge McKeown — If you think of the sealed cased out of the DC circuit, the facts were with a fair amount of precision you had an individual state department employee who claimed his communications were intercepted and he had the exact statements that he had made that were then transmitted and repeated. Of course all of that he knew, there was no state secret involved in that. So you had a non-secret component that was essential both to his standing, and to his prima facie case. And you don't really have that with respect to your plaintiffs. They really don't stand in the same position as this _____ affair from the state department

Robert Fram — In some states your Honor, we think our actual evidentiary situation is superior. We have asked the establishment of the existence of the splitter cabinet, the making of the copy, the routing of the copy, and the sending it to the SG3 secure room where the access is controlled with sworn declaration on all points. If you would look at the descent in re sealed case it's quite harsh in looking at the evidence that the plaintiff had there. They say it's a cable or table and some gossip or something because there is a question about or the apparent lie of their adversary, but the thought was how on such a floozy batch of evidence, not documents that their adversary tried to obtain and return. How on that sort of floozy evidence could this go forward and not inevitably wind up with a risk to the disclosure of national security information. That was the counter argument.

Judge McKeown — Let me just – I just want to be clear on your point from before, and make sure I understood that central to your claim, all of your claims then is the existence of the splitter cable and the existence of the room, but not what goes on inside the room.

Robert Fram — That is correct. What goes on inside the room is not central to

our claims.

Judge McKeown — It has a Las Vegas quality about it in other words. What goes on here, stays here. (Laughter) Is that basically your argument?

Robert Fram — Once it's handed over to the NSA your Honor -- to a room as to which access is restricted to persons who are assisting the NSA. That is all we need. We do not …..

Judge McKeown — You're saying you don't care for purposes of your claim what the NSA does or doesn't do if they do anything with it. It's just the fact that the NSA gives us _____ as color of law to the splitter cable. That's your case?

Robert Fram — In a net shell yes your honor because what Congress did when it passed these statutes it established a protective perimeter for our privacy. It looked at what had gone on previously in proper mass interceptions in a cold war and the Viet Nam war. And it wanted to have some set of rights that could be clearly and easily enforced without people having to dive into the specifics of who's a target or not. It was said several times that we have to know if we're a target or not. We don't. We absolutely don't . If you were part of a mass dragnet and your email goes to Folsom Street, and that copy is made and given to the NSA. It does not have to mean that you were a target, and there's no need here to disclose who the NSA is targeting. In many cases there's a concern in surveillance that the government should not disclose who's being targeted because it is a mosaic intelligence analysis the concern is that the enemies of this country will obtain valuable information if they know who is or is not being targeted. We need know such information. So the entire suggestion if that's a block on _____, is simply not right.

Robert Fram — I also confess to have loss track of the time and I'm also not sure frankly what the rules are regarding time. Let me just see if there's anything.

Judge Pregerson — We don't want you to leave out anything important.

Robert Fram — Thank you your Honor.

Robert Fram — There's one item that the government has not discussed yet, but they may cause its in their briefs. They often say they can't come in with a certification defense cause it will give away the

very secret. I would simply commend the court to look at the actual language of the certification provision itself. Again, here's where Congress was trying to have a balanced team, to allow these claims to go forward while protecting national security. Cause in the certification provision itself it says that if a carrier obtained a valid legal certification this is under 2511 2A2 in our statutory appendix it's at page 10A. If says if they got the certification which requires them to make sure that they've identified the duration of the surveillance and the information being sought and the facilities used, they do all of that then they have an obligation to keep confidential the surveillance, but only with respect to what was certified. So the suggestion that they can't litigate the certification, and they will not have an defense, and they can't use their defenses Congress already thought of that. Congress already said we understand that you may get a certification and do all these things, and it might have to be kept confidential if you do it. Of course, if you're doing things that were not certified, you're outside the confidentiality cloak provided by Congress. And certainly there's no provision to say you don't even have to bother to get the certification. Just like you don't have to bother to get a warrant. Just assert the State secret privilege, and you're done. That seems to be completely contrary to deceive Congress was setting up claims regarding persons under color of law providing for *in camera* review, providing for certifications, providing for confidentially of those certifications or within various specific procedures. The government has followed that when this case goes back to Judge Walker they should present it to him.

Judge Pregerson — Thank you very much. Do you have any rebuttal? I'll give you two minutes. It that enough for you? Two and half. (Laughter)

Gregory Garr — Thank you your Honors. First, let's split the difference. First, because the point tends to get lost. I wanted to stress the outset that at a minimum we think this court should reverse the district court decision allowing the communications records claim to go forward the district court acknowledge that claim, the existence of that program or not a state secret and permitting that claim to survive in this litigation was clear error. Secondly, with respect to the room, plaintiffs acknowledge first that the existence of the room is essential to the case. And second that they don't know what's going on in that room. There could be many things going on in that room, so just to pick an obvious possibility there could

be ____ a court surveillance authorized going on in that room. There could be communications law enforcement assisting activities going on in that room. There could be other activities. Plaintiffs' own witness acknowledge that Mr. Marcus in his declaration he concludes however that AT&T would have no business justification for those purposes, but whatever he's an expert in, he's not an expert in AT&T's business practices. Third, with respect to the notion of the declaration, plaintiff in discussing the declaration with the court today said something very important I think. You'd have to look at the words of the declaration very carefully, and I think that's just the beginning of what would happen as soon as there 's a type of declaration that we've discussed. There would be litigated issues over the meaning of every single word, and that would take you exactly back into what is going on or what is not going on in the room which is a matter squarely protected by the State Secrets. Fourth, with respect to the in re Seal Case he mentioned Judge McKeown you're right that case is completely different . There was no claim in that case of a secret relationship with the government, and the privilege was asserted over two documents, and the director of the CIA himself in that case acknowledged the case could go forward with respect to some litigation and the court distinguish the relevant precedent in that case _____ saying that that case involved the challenge to the legality of the classified program. That's just like this case. With respect to the FISA argument again, the argument asked this Court to adopt radical interpretation that FISA is a four year provision that allows anyone to come off the street and the suit determine whether they are subject to FISA court surveillance. FISA itself establishes a court which has classified proceedings the existence or not of FISA court surveillance is itself a classified bank. There's nothing in the text of provision with a purpose of the statute or any other case law that would support that radical interpretation of the statute. Your honors foreign intelligence gathering is an increasingly important tool in accessing the nature of foreign threats and protecting the nation from foreign attack. The district court decision in this case allows us action to proceed at the risk of disclosing sources, methods, or operational details of the nations intelligence gathering capabilities. Because that decision not only poses an exceptional threat to the natural security of the United States but directly contravenes the legal principals established by this court and the Supreme Court. The District Court's decision should be reversed in a case or manner

with instructions to dismiss. Thank you very much.

Judge Pregerson Thank you, and this matter will stand submitted.

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