Case Nos. 06-17132 & 06-17137

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TASH HEPTING, et al.,

Plaintiffs-Appellees,

v.

AT&T CORP.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF AMICUS CURIAE UNITED STATES TELECOM ASSOCIATION IN SUPPORT OF AT&T CORP. URGING REVERSAL

Jonathan B. Banks
Vice President Law & General Counsel
UNITED STATES TELECOM ASSOCIATION
607 14th Street, N.W., Suite 400
Washington, DC 20005
TEL: 202.326.7300
FAX: 202.326.7333

Andrew G. McBride
Thomas R. McCarthy
William S. Consovoy
WILEY REIN LLP
1776 K Street N.W.
Washington, DC 20006
TEL: 202.719.7000
FAX: 202.719.7049

Attorneys for Amicus Curiae

March 20, 2007

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, United States Telecom Association ("USTelecom") submits the following corporate disclosure statement: USTelecom is a 501(c)(6) not-for-profit corporation organized under the laws of Illinois and represents the interests of the telephony industry. USTelecom has not issued any shares or debt securities to the public, and USTelecom has no parent companies, subsidiaries, or affiliates that have issued any shares or debt securities to the public.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS 1

INTRODUCTION 5

I. THE DISTRICT COURT'S MISINTERPRETATION OF *TOTTEN* UNDERMINES NATIONAL SECURITY 9

A. *Totten* Bars This Suit. 9

1. *Totten* Bars Any Suit Premised Upon An Alleged Secret Agreement With The Government 9

2. This Suit Is Premised Upon An Alleged Secret Relationship Between The Government And AT&T. 16

B. A Rule Permitting Third-Party Circumvention Of The *Totten* Bar Would Damage National Security 19

II. THE DISTRICT COURT ENGAGED IN AN UNPRECEDENTED ATTEMPT TO ESTABLISH THE EXISTENCE OF AN ALLEGED SECRET RELATIONSHIP. 23

CONCLUSION 30

TABLE OF AUTHORITIES

FEDERAL CASES

Chicago & S. Air Lines v. Waterman SS Corp., 333 U.S. 103 (1948)..... 8, 24

CIA v. Sims, 471 U.S. 159 (1985)..*passim*

Doe v. Tenet, 329 F.3d 1135 (9th Cir. 2003)............................ 17, 24, 25, 30

Doe v. Tenet, 353 F.3d 1141 (9th Cir. 2004) (denying reh'g)...................... 18

El-Masri v. Tenet, 437 F. Supp. 2d 530 (E.D. Va. 2006) 28

El-Masri v. United States, -- F.3d --, 2007 WL 625130
(4th Cir. Mar. 2, 2007).. 14, 25, 26

Guong v. United States, 860 F.2d 1063 (Fed. Cir. 1988)................ 18, 27, 28

Hepting v. AT&T Corp., No. C-06-672 (N.D. Cal. July 20, 2006) 11

Kasza v. Browner, 133 F.3d 1159 (9th Cir. 1998)................................*passim*

Kielczynski v. CIA, 128 F. Supp. 2d 151 (E.D.N.Y. 2001) 23, 29

National Lawyers Guild v. Attorney General, 96 F.R.D. 390
(S.D.N.Y. 1982)... 25

Snepp v. United States, 444 U.S. 507 (1980) 20, 21

Sterling v. Tenet, 416 F.3d 338 (4th Cir. 2005)... 22

Tenet v. Doe, 544 U.S. 1 (2005) ....*passim*

Totten v. United States, 92 U.S. 105 (1875)..*passim*

United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936)........... 19

United States v. Reynolds, 345 U.S. 1 (1953).. 9

Weinberger v. Catholic Action of Hawaii/Peace Education Project, 454 U.S. 139 (1981) .... *passim*

FEDERAL STATUTES

50 U.S.C. § 403(d)(3) 20

50 U.S.C. § 404(g) 20

50 U.S.C. § 421 20

MISCELLANEOUS

THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 1745-1799 (J. Fitzpatrick ed. 1933-1944) 19

P.K. Rose, *The Founding Fathers of American Intelligence* (1999) 22

Chris Strohm, *Tenet Warns of Terrorists Combining Physical, Telecommunications Attacks* (Dec. 1, 2004) 4

Christopher Andrew, *For the President's Eyes Only: Secret Intelligence and the American Presidency from Washington to Bush* (1995) 21, 22

THOMAS POWERS, THE MAN WHO KEPT THE SECRETS: RICHARD HELMS & THE CIA (Knopf 1979) 20

INTEREST OF AMICUS CURIAE

Pursuant to Federal Rule of Appellate Procedure 29, the United States Telecom Association ("USTelecom"), by its undersigned counsel, submits this amicus brief in support of AT&T Corp. ("AT&T"), the Defendant-Appellant in the above-captioned matter. All parties have consented to the filing of this brief.

USTelecom is the nation's oldest and leading not-for-profit trade association for the telephony industry. Founded nearly a century ago, USTelecom has hundreds of carrier members that provide a full array of voice, data, and video services over wireline and wireless networks. These carrier members have employees and facilities throughout several countries and provide service to over 100 million customers. USTelecom also has international and associate members that include consultants, communications equipment providers, banks and investors, and other parties with interests in the telephony industry. USTelecom's carrier members generally cooperate with lawful requests for assistance by federal, state, and local officials. Many carrier members serve classified government facilities and may be party to classified contracts with the Government.

USTelecom has a strong interest in this appeal. This litigation arises from a dispute over the national security policies of the United States Government ("Government"). Plaintiffs challenge the lawfulness of AT&T's alleged cooperation with the Government's national security surveillance activities

allegedly implemented in response to the terrorist attacks on September 11, 2001.[1] These alleged surveillance activities, according to published reports, are designed to prevent al Qaeda from launching another attack inside the United States by monitoring international communications linked to al Qaeda. However, instead of pursuing their claims directly against the Government, as have a number of other litigants, Plaintiffs have filed suit against telecommunications providers based on their alleged assistance to the Government in carrying out these national security operations.

USTelecom is deeply troubled by the district court's rejection of the need for secrecy in the context of alleged counterintelligence activities whose existence has neither been confirmed nor denied. Instead of honoring the need for secrecy in an alleged covert relationship with the Government, the district court reached an independent determination as to whether these alleged secret relationships are worthy of protection. Moreover, while conceding that it remains unclear whether AT&T assisted the Government, the district court allowed this suit to proceed because, in its view, public disclosures "indicate that AT&T is assisting the government to implement some kind of surveillance program." This inferential

---

[1] No statement in this brief should be construed as an admission or denial of Plaintiffs' allegations that certain telecommunications providers participated in any Government intelligence-gathering programs, or that any such programs exist. Amicus is not in possession of any non-public facts about the alleged programs.

conclusion was based on nothing more than the Government's acknowledgement that a terrorist surveillance program exists, AT&T's general acknowledgement that, like any good corporate citizen, it cooperates with law enforcement requests, and AT&T's large number of customers. The district court thus erred by conducting its own "review" of the need for secrecy; by confusing the general existence of a counterintelligence program with the identification of particular participants; by ascribing undue significance to AT&T's generic corporate attributes; and by failing to consider the harm to both AT&T and to the Government's counterterrorism efforts that would result from public confirmation of any alleged covert relationship.

Indeed, the sweeping reasoning of the district court could be applied to any number of telecommunications and Internet providers, banks, airlines, and other private entities with interstate and international operations whose assistance might be needed in counterintelligence programs. Leaving those that might assist the Government in secret intelligence efforts exposed to costly and protracted litigation based on unsubstantiated public accusations creates a powerful disincentive for American businesses to assist the Government in any counterintelligence efforts. And of central concern to USTelecom, by seeking to compel the public disclosure of alleged covert operations allegedly conducted with the assistance of telecommunications providers, this suit may well place its carrier

members, which are already in harm's way, at risk of retaliatory terrorist attacks. *See* Chris Strohm, *Tenet Warns of Terrorists Combining Physical, Telecommunications Attacks* (Dec. 1, 2004), *available at* http://www.goexec.com/dailyfed/1204/12104C1.htm (intelligence experts have emphasized the possibility that Al Qaeda could "attempt to couple an attack on telecommunication networks with a physical attack"). At bottom, the ruling jeopardizes the ability of the United States to call upon private enterprise for assistance in areas far beyond the programs alleged here.

Supreme Court and Ninth Circuit precedent compel a different result. *Totten v. United States*, 92 U.S. 105 (1875), erects a jurisdictional bar to any lawsuit that seeks to expose, as alleged here, covert national security relationships between private parties and the Government. *Totten* thus protects those who assist the government in obtaining valuable intelligence from adverse consequences—legal or otherwise—and promotes the efficacy of foreign intelligence programs by ensuring that the Executive Branch will have at its disposal the foreign intelligence necessary to achieve vital national security objectives. USTelecom has a strong interest in restoring *Totten* and the national security interests this jurisdictional bar ultimately vindicates.

INTRODUCTION

This appeal arises from the district court's mistaken attempt to establish independently the existence of an alleged secret intelligence-gathering relationship between AT&T and the Government.[2] The district court improperly cobbled together from generic public facts and its own unsubstantiated inferences an intelligence mosaic that, it concluded, "for all practical purposes . . . disclose[s] that AT&T assists the government in monitoring communications content." *Hepting v. AT&T Corp.*, No. C-06-672, (N.D. Cal. July 20, 2006), Excerpts of Record ("ER") 264. This flawed attempt at independent fact-finding in the national security arena is inconsistent with binding precedent, the policy objectives underlying the absolute bar to lawsuits seeking to reveal covert relationships, and the respect due to the Executive's need to protect foreign intelligence from public disclosure.

The consequences of the district court's ruling are dire. The rule of law established below, if left standing, would routinely allow private litigants to compel through judicial discovery the public disclosure of alleged secret

---

[2] Plaintiffs have alleged the existence of three types of foreign intelligence-gathering activities: (1) the terrorist surveillance program ("TSP"), which entails only the interception of international communications involving suspected al Qaeda operatives; (2) an allegedly broader program of untargeted content surveillance; and (3) the disclosure of records containing non-content call detail information.

relationships with the Government. Such forced disclosure will cause incalculable damage, including risk of physical harm, to private actors who assist the Government in intelligence operations. Indeed, the ruling creates a powerful disincentive for any private party—especially corporate citizens that report to shareholders—from complying with the Government's requests for assistance in national security matters. Worse still, this lack of private assistance will irreparably impair the Executive's ability to conduct intelligence operations necessary to defend the homeland from attack.

A proper understanding of governing precedent would prevent these damaging repercussions. In *Totten*, the Supreme Court forbade "the maintenance of *any suit* in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential." 92 U.S. at 107 (emphasis added). And recently, in *Tenet v. Doe*, 544 U.S. 1 (2005), the Supreme Court reiterated that *Totten* requires the dismissal of all suits premised upon alleged covert agreements with the Government. *Totten* thus erects a jurisdictional bar wholly separate and apart from the more flexible evidentiary-privilege formulation of the state secrets doctrine. It requires dismissal of this suit, which is premised upon allegations that AT&T assisted in secret national security intelligence-gathering activities at the behest of the Government.

The opinion below misapprehends *Totten*. In district court's mistaken view, *Totten* bars only claims by the party engaged in the alleged secret relationship with the Government—not third parties. Both the Supreme Court and the Ninth Circuit, however, have applied the *Totten* bar to suits in which the plaintiff was not a party to a secret relationship with the Government. *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139 (1981); *Kasza v. Browner*, 133 F.3d 1159 (9th Cir. 1998). *Totten* turns on the subject matter of the suit—not the party that brings the action.

The district court's attempt to narrow the categorical bar announced in *Totten* to a rule of "equitable estoppel" is not only contrary to precedent, it would defeat the purpose of this jurisdictional bar. The rule is intended to protect not only the Government, but also private parties that enter into covert arrangements to assist the Government in intelligence operations. Revelation of the existence or nature of such a confidential relationship could have substantial adverse consequences for the private party, the Government, and the public at large. For example, a particular telecommunications provider could become a preferred target for terrorist attack based upon the public revelation of its participation in counterterrorism programs. Or conversely, a telecommunications provider that openly denies assistance reveals to al Qaeda key tactical information. Both results are unacceptable and cannot be squared with *Totten*.

The purpose of the *Totten* bar is much broader than the district court would allow. It is designed to protect intelligence relationships between the Government and private parties to ensure that others will enter into such relationships in the future. The rule thus has its roots in the constitutional power of the Executive to gather intelligence to protect the national security and the recognition that the recruitment of private individuals and private enterprise is essential to that undertaking. *Chicago & S. Air Lines v. Waterman SS Corp.*, 333 U.S. 103 (1948). An interpretation of *Totten* that allows the protection of state secrets—and thus effective implementation of national security policy—to turn on the vagaries of litigation posture cannot stand.

In addition to improperly narrowing *Totten*, the district court incorrectly found that AT&T's alleged covert relationship with the Government is no longer a state secret. Accordingly to the district court, the nature of AT&T's corporate profile, generic company policy statements unrelated to the facts of this case, and the Government's acknowledgement that known al Qaeda operatives have been the target of surveillance operations, lead to the conclusion that AT&T "must" be covertly assisting the Government. *Totten* was intended to prevent the judiciary from engaging in this type of independent supposition.

Last, the district court's summary conclusion that AT&T's assistance or lack thereof was not the type of secret that *Totten* was intended to protect is flatly

wrong. This is *precisely* the kind of covert intelligence-gathering relationship that *Totten* protects from revelation through litigation. The Executive's considered judgment that, in the interest of national security, whether this covert relationship exists should remain a secret commands far more respect than afforded by the district court.

ARGUMENT

I. THE DISTRICT COURT'S MISINTERPRETATION OF *TOTTEN* UNDERMINES NATIONAL SECURITY.

A. *Totten* Bars This Suit.

1. *Totten* Bars Any Suit Premised Upon An Alleged Secret Agreement With The Government.

The Supreme Court's seminal decision in *Totten* requires dismissal of this suit. *Totten* bars any action premised on allegations of a secret relationship between a private party and the Government. Where the subject matter of a lawsuit is a secret intelligence relationship with the Government, *Totten* operates not as an evidentiary privilege, but as a jurisdictional bar separate and distinct from the modern evidentiary-privilege formulation of the state secrets doctrine. *United States v. Reynolds*, 345 U.S. 1, 11 n.26 (1953); *Tenet v. Doe*, 544 U.S. 1, 6 n.4 (2005) ("It would be inconsistent with the unique and categorical nature of the *Totten* bar—a rule designed not merely to defeat the asserted claims, but to preclude judicial inquiry—to first allow discovery or other proceedings in order to

resolve the jurisdictional question."). The *Totten* rule applies foursquare to the complaint before this Court.

In *Totten*, the estate of a Union spy sued the Government "to recover compensation for services alleged to have been rendered . . . under a contract with President Lincoln, made in July, 1861." 92 U.S. at 105. Pursuant to this alleged secret agreement, the decedent "was to proceed South and ascertain the number of troops stationed at different points in the insurrectionary States, procure plans of forts and fortifications, and gain such other information as might be beneficial to the government of the United States, and report the facts to the President." *Id.* at 105-106. Although the Court of Claims had found that the decedent performed according to the contract and was not properly paid by the Government for his services, the Supreme Court dismissed the suit. *Id.* at 106-107.

The Court specifically found that the action, which was premised upon a secret relationship with the Government, must be dismissed because "public policy forbids the maintenance of *any suit* in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential." *Id.* at 107 (emphasis added). The Court explained that "the existence of a contract [for secret services with the government] is itself not a fact to be disclosed" because "disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character

of the agent." *Id.* at 106-07. And the Court emphasized that such a disclosure would be "to the serious detriment of the public" because it would render such secret relationships—which are "sometimes indispensable to the Government"—"impossible." *Id.* at 107. Accordingly, *Totten* bars *any* suit, the trial of which would lead to the disclosure of a secret intelligence-gathering relationship with the Government.

The Supreme Court recently reaffirmed *Totten*. *Tenet*, 544 U.S. 1. In *Tenet*, the Court dismissed a suit against the Government by two foreign nationals who had allegedly performed espionage services during the Cold War. *Id.* at 3. The Court explained that "[t]he possibility that a suit may proceed and an espionage relationship may be revealed, if the state secrets privilege is found not to apply, is unacceptable." *Id.* at 11. Relying on *Totten*, the Court made clear that there is a "categorical bar" against any suit where "the very subject matter of the action, a contract to perform espionage, was a matter of state secret." *Id.* at 8-9 (quotation omitted).

Here, the district court read *Totten* as a mere rule of contract, *viz.* the party to the confidential relationship with the United States has implicitly surrendered his right to reveal the relationship. ER 263 ("The implicit notion in *Totten* was one of equitable estoppel: one who agrees to conduct covert operations impliedly agrees not to reveal the agreement even if the agreement is breached."). Thus, under the

district court's interpretation, *Totten* is nothing more than a party-specific barrier to suit by alleged spies; it is no impediment to plaintiffs who are not party to the alleged secret relationship with the Government. *Id.* ("[T]he instant plaintiffs were not a party to the alleged covert arrangement at issue here between AT&T and the government. Hence, *Totten* and *Tenet* are not on point to the extent they hold that former spies cannot enforce agreements with the government because the parties implicitly agreed that such suits would be barred.").

The district court's (re)construction of *Totten* is wrong. *Totten* is not about who may properly bring a suit, but rather about protecting from disclosure secret intelligence-gathering relationships with the Government: "*Totten*'s core concern [is] preventing the existence of the plaintiff's relationship with the Government from being revealed." *Tenet*, 544 U.S. at 10; *Totten*, 92 U.S. at 107 ("[T]he existence of a contract [for secret services with the government] is itself not a fact to be disclosed."). By rejecting the jurisdictional bar established in *Totten* and reaffirmed in *Tenet*, the district court misapprehended 132 years of Supreme Court precedent.

The Supreme Court's decision in *Weinberger v. Catholic Action of Hawaii/Peace Education Project* makes this point clear. In *Weinberger*, public interest plaintiffs filed suit seeking to require the Navy to file an environmental impact statement in connection with alleged plans to house nuclear weapons at a

base in Hawaii. 454 U.S. at 141. The key issue was whether the Navy had complied with the National Environmental Policy Act by disclosing "to the fullest extent possible" the impact on the environment of its proposed action. *Id.* at 143. Due to national security concerns, the Navy declined to confirm or deny the allegation that it intended to house nuclear weapons at the base. Expressly relying on the "similar situation" of *Totten*, the Court held that the issue was "beyond judicial scrutiny" because "'public policy forbids the maintenance of *any suit* in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential.'" *Id.* at 146-47 (quoting *Totten*, 92 U.S. at 107) (emphasis added). The import of *Weinberger* is unmistakable: *Totten* required dismissal in a case brought by plaintiffs who were *not* parties to any alleged secret agreement with the Government.

Following *Weinberger*, this Court properly applied *Totten* and dismissed an action whose subject matter was a state secret even though there was no allegation of a covert relationship between the plaintiff and the Government. *Kasza v. Browner*, 133 F.3d 1159 (9th Cir. 1998). In *Kasza*, the Air Force was sued for allegedly violating the Resource Conservation and Recovery Act by failing to comply with hazardous waste inventory, inspection, and disclosure obligations at a classified Air Force facility. *Id.* at 1162. The Air Force generally refused to comply with the plaintiffs' discovery requests relating to "security sensitive

environmental data." *Id.* at 1162-63. This Court dismissed the suit under *Totten*, explaining that "as the very subject matter of [the] action is a state secret, we agree with the district court that [the] action must be dismissed." *Id.* at 1170.

The Fourth Circuit's recent decision in *El-Masri v. United States*, -- F.3d --, 2007 WL 625130 (4th Cir. Mar. 2, 2007), cements the understanding that *Totten* is a jurisdictional barrier that cannot be circumvented by a third party. In *El-Masri*, the plaintiff brought an action against the United States and several private companies, alleging their cooperation and participation in a CIA program of "extraordinary rendition" under which he had been unlawfully detained, interrogated, and tortured. *Id.* at *1. The Fourth Circuit dismissed the case, explaining that to proceed with the litigation would require the plaintiff "to demonstrate the existence and details of [Government] espionage contracts, an endeavor practically indistinguishable from that categorically barred by *Totten* and *Tenet*." *Id.* at *9.

The Supreme Court's steady march from *Totten* to *Weinberger* to *Tenet* makes clear that the jurisdictional bar turns on the nature of the suit, not the party that brings the claim. Hence, any suit that would require the disclosure of an allegedly covert relationship between a private party and the Government is subject to immediate dismissal. This Court's decision in *Kasza*, and the Fourth Circuit's

recent decision in *El-Masri*, represent faithful applications of this settled rule. The decision under review here does not.

The district court's ruling also cannot be squared with the policies underlying *Totten*. The *Totten* bar is intended to prevent the disclosure of relationships between the Government and private parties in the areas of national security and foreign affairs—information that might "compromise or embarrass our government in its public duties" to the "serious detriment of the public." *Totten*, 92 U.S. at 106-07; *Tenet*, 544 U.S. at 10. The district court, however, would allow any third party to uncover the same confidential information that the Supreme Court purposefully shielded from litigation and disclosure in *Totten* and *Tenet*. Indeed, the universe of potential plaintiffs who could bypass the *Totten* bar would be virtually limitless. That is, per the ruling below, *anyone* who is not part of the alleged confidential relationship with the Government may bring a lawsuit predicated on that alleged relationship and force its revelation through litigation.

Moreover, such a reading of *Totten* would not even prevent a suit by an alleged party to a secret agreement with the Government if a third party had first opened the door to expose the secret relationship. This interpretation certainly would have permitted the estate of the alleged Civil War spy in *Totten* or the foreign nationals in *Tenet* to maintain their respective suits against the Government if they could have found third-party straw men to bring suit first. Taking the

district court's ruling to its logical conclusion would render *Totten* a nullity; the third-party exception would literally swallow the rule.[3]

2. This Suit Is Premised Upon An Alleged Secret Relationship Between The Government And AT&T.

Application of the *Totten* bar therefore is straightforward—any suit premised upon the existence of an alleged secret relationship with the Government must be dismissed for lack of jurisdiction. *Tenet*, 544 U.S. at 9 ("[L]awsuits premised on alleged espionage agreements are altogether forbidden").[4] There can be no disagreement that a central and necessary allegation of each count of Plaintiffs' complaint is that there exists a covert, intelligence gathering relationship between AT&T and the Government.

Indeed, the allegations set forth in the complaint are in the heartland of the jurisdictional bar erected by *Totten*. First Amended Complaint, ER 2 ("This case

---

[3] Leaving secret relationships to be protected by only the evidentiary-privilege formulation of the state secrets doctrine is insufficient. *Tenet*, 544 U.S. at 11 ("The state secrets privilege and the more frequent use of *in camera* judicial proceedings simply cannot provide the absolute protection we found necessary in enunciating the *Totten* rule. The possibility that a suit may proceed and an espionage relationship may be revealed, if the state secrets privilege is found not to apply, is unacceptable."); *Kasza*, 133 F.3d at 1170 ("[A]ny further proceeding in this matter would jeopardize national security."). Immediate dismissal is the only appropriate remedy.

[4] The Supreme Court's decision in *Tenet* vindicated the dissenting opinion of Judge Tallman. *Doe v. Tenet*, 329 F.3d 1135, 1160 (9th Cir. 2003) (Tallman, J., dissenting) ("*Totten* continues to permit a court to determine that the subject matter of a suit is beyond judicial scrutiny and may properly be dismissed at the pleading stage."), *rev'd* 544 U.S. 1 (2005).

challenges the legality of Defendants' participation in a secret and illegal government program to intercept and analyze vast quantities of Americans' telephone and Internet communications."); ER 9 ("[T]he NSA has accomplished its massive surveillance operation by arranging with some of the nation's largest telecommunications companies, including Defendants, to gain direct access to the telephone and Internet communications transmitted via those companies' domestic telecommunications facilities.").[5] The complaint is equally clear that the claims relating to the alleged provision of communications records also are predicated on an alleged secret relationship between AT&T and the Government. ER 9, 12.[6]

Allowing this suit to proceed to judgment thus would inevitably force the disclosure of whether AT&T "participated" or "collaborated" in the TSP and other alleged intelligence-gathering activities. The *Totten* bar was erected to preclude

---

5 The district court agreed. ER 236 ("Plaintiffs allege that AT&T . . . and its holding company, AT&T Inc., are collaborating with the National Security Agency . . . in a massive warrantless surveillance program that illegally tracks the domestic and foreign communications and communication records of millions of Americans.").

6 The district court agreed that the alleged records program was a state secret, but refused to dismiss the claims based thereon because "[i]t is conceivable that [the Government or telecommunications providers] might disclose, either deliberately or accidentally . . . information . . . [that] might make this program's existence or non-existence no longer a secret." ER 277. This wait-and-see approach is wholly improper: *Totten* requires "dismiss[al] . . . at the outset of the litigation without forcing an acknowledgment by the government and before any of the forbidden details can inadvertently come to light." *Doe v. Tenet*, 329 F.3d at 1162 n.5 (Tallman, J., dissenting).

just such an untenable result. *Tenet*, 544 U.S. at 11 (explaining that "requiring the Government to invoke the privilege on a case-by-case basis risks the perception that it is either confirming or denying relationships"); *Weinberger*, 454 U.S. at 146 (invoking *Totten* because, "[d]ue to national security reasons, . . . the Navy [could] neither admit nor deny that it propose[d] to store nuclear weapons at West Loch"); *Kasza,* 133 F.3d at 1163, 1170 (dismissing suit because the Air Force could neither "confirm or disprove that any hazardous waste had been generated, stored, or disposed of at the operating location").

Accordingly, this suit should have been dismissed at the outset. *Tenet*, 544 U.S. at 9 (*Totten* required dismissal "*on the pleadings without ever reaching the question of evidence*, since it was so obvious that the action should never prevail over the privilege." (quotation omitted)); *Kasza*, 133 F.3d at 1170 ("As the very subject matter of Frost's action is a state secret, we need not reach her other arguments regarding invocation of the privilege because no matter how they are resolved, there will be no effect on her ability to proceed."); *Guong v. United States*, 860 F.2d 1063, 1067 (Fed. Cir. 1988) (concluding that *Totten* required "dismissal of plaintiff's complaint"); *Doe v. Tenet*, 353 F.3d 1141, 1145 (9th Cir. 2004) (Kleinfeld, J., dissenting in denial of rehearing en banc) ("Even asserting that there is a secret to protect, as the state-secrets privilege used in other contexts

requires, amounts to letting the cat out of the bag. It is such disclosure of the relationship's very existence that *Totten* sought to avoid.").

B. **A Rule Permitting Third-Party Circumvention Of The *Totten* Bar Would Damage National Security.**

The district court's ruling allowing third-party circumvention of *Totten* is not only legally flawed—it severely impairs the Government's ability to discharge its constitutional obligation to keep the nation secure from foreign aggressors. The Constitution charges the Executive with the primary role in foreign affairs and national defense. Obtaining intelligence is indispensable to this task. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (The President "has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.").

Third-party circumvention of *Totten* will expose countless classified and sensitive relationships between the Government and private enterprise—dramatically reducing the reach and value of our intelligence gathering. As then-General Washington stated, intelligence and intelligence sources relating to enemy operations must be kept "as secret as possible. For upon secrecy, success depends in most enterprises of the kind, and for want of it, they are generally defeated, however well planned and promising a favourable issue." 8 THE WRITINGS OF

GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 1745-1799 478-79 (J. Fitzpatrick ed. 1933-1944). Congress has likewise recognized the importance of maintaining the secrecy of intelligence and intelligence sources. *See CIA v. Sims*, 471 U.S. 159, 170 (1985) ("Congress intended to give the [CIA director] broad power to protect the secrecy and integrity of the intelligence process. The reasons are too obvious to call for enlarged discussion; without such protections the Agency would be virtually impotent.").[7]

By allowing the exposure of secret relationships, the district court's artificial limitation of *Totten*'s reach will discourage private actors from assisting government efforts to obtain intelligence that could prove vital to national security. *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) ("The continued availability of [intelligence] sources depends upon the [Government]'s ability to guarantee the security of information that might compromise them and even endanger their personal safety."); THOMAS POWERS, THE MAN WHO KEPT THE SECRETS: RICHARD HELMS & THE CIA 102 (Knopf 1979) (Disclosure would harm the "public invisibility without which an intelligence agency cannot inspire confidence in

[7] *See also* 50 U.S.C. § 403(d)(3) (charging CIA Director with "protecting intelligence sources and methods from unauthorized disclosure."); 50 U.S.C. § 404(g) (prohibiting the disclosure of intelligence to the United Nations); 50 U.S.C. § 421 (imposing criminal sanctions on those who have had access to classified information and identify covert agents or disclose information identifying covert agents).

those who trust it with their lives, their fortunes, and their sacred honor; and without which it cannot conduct the sort of operations no nation can undertake openly."). "Even a small chance that some court will order disclosure of a source's identity could well impair intelligence gathering and cause sources to close up like a clam." *Sims*, 471 U.S. at 175 (citations and quotations omitted).

Permitting the adjudication of disputes concerning covert agreements thus would undermine the Government's ability to contract for intelligence services: "A secret service, with liability to publicity in this way, would be impossible." *Totten*, 92 U.S. at 107. This would be no small price to pay; the value of private sources of intelligence cannot be overstated. *Id.* at 107 ("[S]uch [secret agreements] are sometimes indispensable to the government."). Indeed, "American businessmen and American professors and Americans of all types and descriptions who travel around the world are one of the greatest repositories of intelligence that we have." *Sims*, 471 U.S. at 171.

The ultimate cost of the district court's nullification of *Totten* will be borne by the public. *Snepp*, 444 U.S. at 512 n.7 ("It is impossible for a government wisely to make critical decisions about foreign policy and national defense without the benefit of dependable foreign intelligence."); Christopher Andrew, *For the President's Eyes Only: Secret Intelligence and the American Presidency from Washington to Bush* 7 (1995) ("The Continental Congress was quick to grasp the

need for foreign intelligence during the Revolutionary War"; thus "it created the Committee of Secret Correspondence, the distant ancestor of today's CIA, 'for the sole purpose of Corresponding with our friends in Great Britain, Ireland and other parts of the world.'"). As George Washington famously stated, "[t]here is nothing more necessary than good intelligence to frustrate a designing enemy, [and] nothing requires greater pains to obtain." *Id.* (quoting 1 THE WRITINGS OF GEORGE WASHINGTON 269); P.K. Rose, *The Founding Fathers of American Intelligence* 21 (1999) (This "practice of American intelligence in its various forms is readily traceable to the earliest days of the nation's existence. The Founding Fathers . . . fully recognized that intelligence is as vital an element of national defense as a strong military.").

In sum, allowing third-parties to circumvent *Totten* will result in the release of sensitive information, thereby discouraging private actors from assisting the Government in obtaining intelligence, and accordingly compromising counterterrorism efforts, homeland security, and foreign policy objectives. In a choice between protecting these crucial national security objectives or permitting the maintenance of private suits such as the case at bar, the former must prevail: "There can be no doubt that, in limited circumstances like these, the fundamental principle of access to court must bow to the fact that a nation without sound

intelligence is a nation at risk." *Sterling v. Tenet*, 416 F.3d 338, 348 (4th Cir. 2005).

II. THE DISTRICT COURT ENGAGED IN AN UNPRECEDENTED ATTEMPT TO ESTABLISH THE EXISTENCE OF AN ALLEGED SECRET RELATIONSHIP.

The district court refused to apply *Totten* because, in its view, "AT&T and the government have for all practical purposes already disclosed that AT&T assists the government in monitoring communications content," ER 264, and because "AT&T's assistance in national security surveillance is hardly the kind of 'secret' that the *Totten* bar and the state secrets privilege were intended to protect or that a potential terrorist would fail to anticipate," ER 266. These conclusions are beyond the permissible scope of judicial review under *Totten*, legally incorrect, and factually mistaken.

The power to protect or disclose the existence of a covert relationship with a private party rests with the Executive. *Sims*, 471 U.S. at 180 ("[I]t is the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process."). This is particularly true where the state secret concerns the disclosure of a covert relationship between the Government and private party. *Kielczynski v. CIA*, 128 F. Supp. 2d 151, 164 (E.D.N.Y. 2001) ("The

decision of whether information that must be revealed is sensitive, including even an admission or denial of the existence of a secret espionage contract, is reserved under *Totten* to the United States."). Hence, if the subject matter of an action is an alleged covert relationship, then the action should be dismissed "solely on the invocation" of *Totten*. *Kasza*, 133 F.3d at 1166; *Sims*, 471 U.S. at 179 ("It is conceivable that the mere explanation of why information must be withheld can convey valuable information to a foreign intelligence agency.").

Totten thus has a strong separation of powers component—the Judicial Branch should not become involved in a detailed examination of the need for confidentiality in particular intelligence-gathering relationships. *Doe*, 329 F.3d at 1156 (Tallman, J., dissenting) ("[F]undamental principles of separation of powers prohibit judicial review of secret contracts entered into by the Executive Branch in its role as guardian of national security."); *Chicago & S. Air Lines*, 333 U.S. at 111 ("[T]he very nature of executive decisions as to foreign policy is political, not judicial . . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.").

The district court exceeded the limits established in *Totten* by engaging in its own fact-finding mission to establish the existence of an alleged secret agreement between the Government and AT&T. The court had neither cause nor expertise to

evaluate whether that alleged relationship is entitled to the protection of continued secrecy. *Sims*, 471 U.S. at 178 ("The decisions of the Director, who must of course be familiar 'with the whole picture,' as judges are not, are worthy of great deference given the magnitude of the national security interests and potential risks at stake."); *Doe*, 329 F.3d at 1162 (Tallman, J., dissenting) ("The highest judicial deference is owed to the DCI's determination that disclosure of the relationship between the Does and the CIA would pose a threat to national security." (citations omitted)).

Further still, the district court relied on "facts" that do not support the conclusion it reached. For instance, it wrongly found that the Government's acknowledgement of the existence of the TSP renders all covert relationships within that program unprotected. ER 266 ("[T]he government has disclosed the general contours of the 'terrorist surveillance program.'"). But that is not the question at issue here: "The controlling inquiry is not whether the general subject matter of an action can be described without resort to state secrets. Rather, we must ascertain whether an action can be *litigated* without threatening the disclosure of such state secrets." *El-Masri*, 2007 WL 625130, at *8; *Nat'l Lawyers Guild v. Attorney General*, 96 F.R.D. 390, 403 (S.D.N.Y. 1982) ("[D]isclosure of an intelligence method or goal in a generalized way does not preclude protection of an

intelligence method or goal which relates to a particular time and place and a particular target." (citation omitted)).

Here, the "facts that are essential to prosecuting the action or defending it," *El-Masri*, 2007 WL 625130, at *8—such as the indispensable allegation that AT&T has participated in the TSP—are state secrets. ER 2 ("*This case challenges the legality of Defendants' participation in a secret and illegal government program* to intercept and analyze vast quantities of Americans' telephone and Internet communications." (emphasis added)). As the Government explained, the answer to this allegation has never been publicly disclosed and remains a state secret. Brief of the United States ("U.S. Br.") 18; Declaration of John D. Negroponte, Director of National Intelligence, ER 58 ("Plaintiffs . . . make . . . allegations about NSA's purported involvement with AT&T. The United States can neither confirm nor deny allegations concerning intelligence activities, sources, methods, relationships, or targets."); Declaration of Lieutenant General Keith B. Alexander, Director, National Security Agency, ER 64 ("Plaintiffs . . . make . . . allegations about the NSA's purported involvement with AT&T. Regardless of whether these allegations are accurate or not, the United States can neither confirm nor deny alleged NSA activities, relationships, or targets."). This suit therefore falls within the rule that "forbids the maintenance of any suit in a court of justice,

the trial of which would inevitably lead to the disclosure of matters that law itself regards as confidential." *Totten*, 92 U.S. at 107.

Indeed, by focusing on the bare existence of the alleged surveillance activities, rather than on the secrecy of their sources, the district court abstracted to a level of generality sufficient to render the *Totten* bar a dead letter. When *Totten* came before the Supreme Court, some ten years after the Civil War ended, it was common knowledge that the Union had employed covert agents to spy on the Confederacy. *Guong*, 860 F.2d at 1065. Likewise, in *Weinberger*, it was no secret that the United States stored its nuclear arsenal in secure military facilities, 454 U.S. at 141, or in *Tenet* that the CIA routinely recruited and rewarded clandestine operatives in the Soviet Bloc, 544 U.S. at 3.

The Supreme Court nevertheless dismissed all of these cases because the Government, for national security reasons, could not confirm or deny the specific facts necessary to litigate the private suits. Yet it appears that no private suit—including *Totten*, *Weinberger*, and *Tenet*—would be subject to the jurisdictional bar if examined at the level of generality the district court adopted. That this trilogy of Supreme Court decisions cannot be reconciled with the decision below is further proof of the district court's misapplication of controlling precedent.

The district court's mistaken reliance on—and misinterpretation of—AT&T's generic statements to circumvent *Totten* also constitutes reversible error.

ER 265 (relying on "various statements" that recognize that AT&T "performs classified contracts" and has "an obligation to assist law enforcement . . . strictly within the law"). These statements, and others cited by the district court, do nothing more than acknowledge AT&T's general obligation to comply with federal law and assist law enforcement. Such statements could not possibly render the allegedly covert relationship no longer a state secret. AT&T has made no statement that could in any way be considered a confirmation or denial of its participation in the TSP or any other program alleged here. Brief of AT&T 6 n.8.[8]

In addition, the district court's unprecedented leap from the fact that AT&T is a large telecommunications provider to the conclusion that AT&T must be participating in the TSP is pure speculation. ER 264-65, 269 (concluding that "it is inconceivable that this program could exist without the acquiescence and cooperation of some telecommunications provider" and because of "the ubiquity of AT&T telecommunications services," AT&T must be "assisting the government to

---

[8] In any event, unofficial statements are irrelevant. *Guong*, 860 F.2d at 1065-66 (dismissing suit even though "[c]ertain former government officials and military historians may perhaps have uncovered and divulged details of military actions in which plaintiff claims to have participated" because "the legality of those disclosures . . . do not modify the *Totten* precedent"); *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 538 (E.D. Va. 2006) ("A private party's allegations purporting to reveal the conduct of the United States' intelligence services . . . are entirely different from the official admission or denial of those allegations."), *aff'd* 2007 WL 625130 (4th Cir. Mar. 2, 2007).

implement some kind of surveillance program"). This reasoning is, as the Government has explained, flawed in law and fact. U.S. Br. 21-23.

The district court conceded as much: "[a] remaining question is whether, in implementing the 'terrorist surveillance program,' the government ever requested the assistance of AT&T." ER 266; ER 270 ("The existence of this alleged program and AT&T's involvement, if any, remain far from clear."). The *Totten* bar cannot be avoided based on nothing more than the district court's *ipse dixit* that some type of clandestine relationship must have existed between AT&T and the Government. *Kielczynski*, 128 F. Supp. 2d at 164 ("[R]umor and speculation are not the equivalent of public disclosure; and the presence of that kind of surmise is no reason for avoidance of constraints on publication." (citation omitted)).

To avoid the import of its own conclusion, the district court discounted the Government's considered judgment that confirming or denying the existence of this alleged relationship would cause exactly the kind of harm that *Totten* seeks to avoid. ER 266 ("AT&T's assistance in national security surveillance is hardly the kind of 'secret' that the *Totten* bar and the state secrets privilege were intended to protect or that a potential terrorist would fail to anticipate."). But this is precisely the kind of secret *Totten* is intended to protect. 92 U.S. at 107 ("[T]he existence of a contract [for secret services with the government] is itself not a fact to be disclosed."). And, as explained above, the district court's summary rejection of the

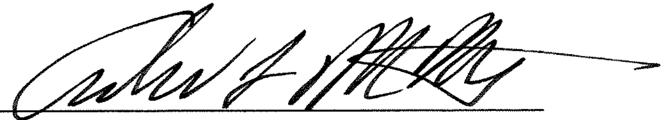
Government's considered judgment as to the national security value of this privileged information exceeds the limits of the judicial office under *Totten*.[9]

CONCLUSION

USTelecom respectfully urges the Court to reverse the judgment of the district court and direct the district court to dismiss this suit.

[9] Despite assurances to the contrary, the district court appeared to be swayed by the nature of the allegations set forth in the complaint. ER 268 ("[N]o case dismissed because its 'very subject matter' was a state secret involved ongoing, widespread violations of individual constitutional rights, as plaintiffs allege here."). Whether rooted in common law, statute, or the Constitution, the particular cause of action used as a vehicle for attempting to uncover an alleged covert relationship between a private party and the Government does not alter the outcome under *Totten*. *Doe*, 329 F.3d at 1161 (Tallman, J., dissenting) ("[T]he *Totten* doctrine applies . . . regardless of whether the . . . claim is based on a secret contract . . . or other theories of relief that necessarily involve the disclosure of that secret relationship. Clever pleading cannot evade a clear prohibition.").

Respectfully submitted,



Andrew G. McBride
Thomas R. McCarthy
William S. Consovoy
WILEY REIN LLP
1776 K Street N.W.
Washington, DC 20006
TEL: 202.719.7000
FAX: 202.719.7049

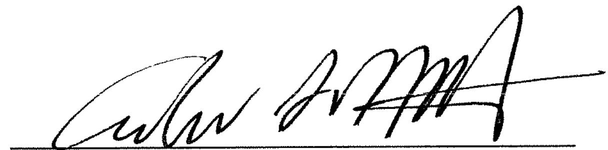
Attorneys for Amicus Curiae

Jonathan B. Banks
Vice President Law & General Counsel
UNITED STATES TELECOM ASSOCIATION
607 14th Street, N.W., Suite 400
Washington, DC 20005
TEL: 202.326.7300
FAX: 202.326.7333

March 20, 2007

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 6,998 words. This certificate was prepared in reliance on the word count of the word-processing system (Microsoft Word) used to prepare this brief.



Andrew G. McBride

CERTIFICATE OF SERVICE

I hereby certify that, on this 20th day of March, 2007, I caused two true and correct copies of the foregoing Amicus Brief to be sent via Federal Express for overnight delivery, to the following:

Robert D. Fram
Michael M. Markman
Heller Ehrman, LLP
333 Bush Street
San Francisco, CA 94104-2878
Counsel for Plaintiffs

Bradford A. Berenson
David Lawson
Edward R. McNicholas
Sidley Austin, LLP
1501 K Street, NW
Washington, DC 20005
Counsel for Defendant AT&T

Paul Clement
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530
Counsel for the United States

Andrew G. McBride