

CASE NO.: 06-17132, 06-17137

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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

PLAINTIFFS-APPELLEES,

v.

AT&T CORPORATION,

DEFENDANT-APPELLANT, AND

THE UNITED STATES,

INTERVENOR AND APPELLANT.

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

**REQUEST OF PLAINTIFFS-APPELLEES FOR
JUDICIAL NOTICE OF TESTIMONY BY THE
ATTORNEY GENERAL OF THE UNITED STATES**

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

Additional Counsel Listed Below

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

ATTORNEYS FOR APPELLEES TASH HEPTING ET AL.

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

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

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

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

PLAINTIFFS-APPELLEES' REQUEST FOR JUDICIAL NOTICE

The Plaintiffs-Appellees in *Hepting v. AT&T Corp.*, No. 06-17132 and *Hepting v. United States* No. 06-17137 (hereinafter collectively “*Hepting*”) respectfully request, pursuant to Federal Rule of Evidence 201 and the inherent authority of the Court, that the Court take judicial notice of the admission made by the Attorney General of the United States, during his testimony under oath before the Senate Judiciary Committee at its July 24, 2007 hearing on the Oversight of the Department of Justice, that the Government requested and received the cooperation of telecommunications companies for the National Security Agency (“NSA”)’s surveillance program.

LEGAL AUTHORITIES IN SUPPORT OF THIS REQUEST FOR JUDICIAL NOTICE

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

The facts for which the Plaintiffs-Appellees request judicial notice can and should be judicially noticed because they are “not subject to reasonable dispute,” as they are party-admissions about the NSA program that come directly from the Attorney General. The facts are easily verifiable, as they are taken from public statements that Attorney General Alberto Gonzales made under oath in formal testimony to the Senate Judiciary Committee. The oral statement was recorded in the transcripts of proceedings. A true and correct copy of the transcript is attached hereto as Exhibit A. As the admissions of the United States, a party to this litigation, the statements are not hearsay and are admissible. Fed. R. Evid. 801(d)(2).

Many courts have taken judicial notice of the type of information at issue in this request. *See, e.g., Texas & Pac. Ry. Co. v. Pottorff*, 291 U.S. 245, 254 n. 4 (1933), amended on other grounds, 291 U.S. 649 (1934) (taking judicial notice of official reports put forth by the Comptroller of the Currency); *Ieradi v. Mylan Laboratories, Inc.*, 230 F.3d 594, 597-98 (3rd Cir. 2000) (taking judicial notice of information in a newspaper article); *Blair v City of Pomona*, 223 F.3d 1074 (9th Cir. 2000) (taking judicial notice of an independent commission’s report on the code of silence among police officers); *Heliotrope Gen., Inc. v. Ford Motor Co.*, 189 F.3d 971, 981 (9th Cir. 1999) (taking judicial notice of information contained in news articles); *Clemmons v Bohannon*, 918 F.2d 858, 865 (10th Cir. 1990),

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

ATTORNEY GENERAL GONZALES' ADMISSION

On July 24, 2007, during a Congressional oversight hearing, Senator Russell Feingold questioned Attorney General Gonzales regarding the Department of Justice's legislative proposal for certain changes to the Foreign Intelligence Surveillance Act, as follows:

[SENATOR] FEINGOLD: You state in your testimony that the administration has transmitted to Congress a proposal to modernize the Foreign Intelligence Surveillance Act. And yet your department still refuses to share with this committee and with the Intelligence Committee basic information about the

evolution of the department's legal justifications for the illegal wiretapping program from 2001 to the present.

And your legislative proposal contains a provision that would grant blanket immunity to individuals who cooperate with the government for participating in certain unidentified intelligence activities.

How can you come to Congress with a straight face and ask for this immunity provision, yet at the same time refuse to tell most members of Congress what they would be granting immunity for?

[ATTORNEY GENERAL] GONZALES: Well, of course, we have provided briefings to the Intel Committees.

And, again, we don't think -- you know, *we went to companies for help. They provided help* in trying to protect this country. And we think that's appropriate for the Congress to consider.

Exhibit A, at p. 50 (emphasis added), *see also id.* at p. 6 (Attorney General put under oath at the beginning of his testimony).

While this statement had not occurred at the time of the District Court's ruling, Plaintiffs-Appellees seek judicial notice of the transcript because the Attorney General's admission that private companies have assisted in the Government's communications surveillance and interception activities disproves certain assertions made by the United States and by AT&T in the appellate briefs filed by each. For example, the Government's opening brief states that "[t]he court's initial premise—that NSA could not conduct the alleged activities without the assistance of the private sector (ER 323)—has no foundation in the public record, and the court cited none." Gov't Opening Brief at p. 21. Although the

Plaintiff-Appellees maintain that the record evidence presented to the District Court (discussed more fully in Plaintiff-Appellees Answering Brief at pp. 5-16) already established AT&T's cooperation, the Attorney General's admission has now put to rest any doubt as to whether the surveillance program was conducted with the assistance of the private sector.

Likewise, AT&T's opening brief states "the government has not acknowledged the methods used to accomplish the electronic interception, *whether those methods involve any assistance from private parties...*" AT&T Opening Brief, at p. 7 (emphasis added). AT&T goes on to state that "[t]he [district] court, for instance, relied on its own unfounded and inexpert speculation that *content surveillance requires the cooperation of a telecommunications provider.*" *Id.* at p. 19 (emphasis added). As Attorney General Gonzales' testimony makes clear, the District Court's conclusion was correct.

Furthermore, AT&T states that:

... the court speculated that it was 'inconceivable' that the TSP 'could exist without the acquiescence and cooperation of some telecommunications provider.' 439 F. Supp. 2d at 992 (ER 323) ... And there is no reason to assume that the court's conjecture is correct. There may be any number of ways in which the government might be able to carry out surveillance without the participation of telecommunications carriers — by intercepting satellite signals, covertly tapping or splicing into carrier cables (undersea or elsewhere), or by employing interception technologies that are simply unknown to the public.

Id. at p. 38-9. The Attorney General's admission that private companies are indeed participants in the Government's surveillance activities likewise renders moot AT&T's speculation about whether it could have been possible for the Government to conduct its massive, warrantless electronic surveillance without the participation of any telecommunications company.

CONCLUSION

For the reasons stated above, the Plaintiffs-Appellees respectfully request that this Court take judicial notice that the United States has admitted that it sought and received the participation of companies in conducting its warrantless surveillance program.

Respectfully submitted,

DATED: August 2, 2007

ELECTRONIC FRONTIER FOUNDATION

By _____

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

ATTORNEYS FOR APPELLEES

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

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

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

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

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