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 ATTORNEY GENERAL AND DIRECTOR OF NATIONAL INTELLIGENCE TESTIMONY

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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 admissions made on July 31 and August 1 in correspondence by the Attorney General of the United States and the Director of National Intelligence that the President issued an Executive Order which purported to authorize the National Security Agency ("NSA") to conduct a variety of secret intelligence activities, of which the so-called Terrorist Surveillance Program ("TSP") was merely "[o]ne particular aspect of these activities, and nothing more."

LEGAL AUTHORITIES IN SUPPORT OF THIS REQUEST FOR JUDICIAL NOTICE

Federal Rule of Evidence 201 authorizes the 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). Further, the Rule mandates that judicial notice be taken where it is "requested by a party and supplied with the necessary information." Fed. Rule Evid. 201(d).

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 NSA intelligence activities that come directly from the Attorney General and the Director of National Intelligence. The facts are easily verifiable, as they are taken from public documents created by those officials. Copies of the documents are attached to the instant request.

Many courts have taken judicial notice of the type of information at issue in the instant request. See, e.g., *Texas & Pac. Ry. Co. v. Pottorff*, 291 U.S. 245, 254 n. 4, 78 L. Ed. 777, 54 S. Ct. 416 (1933), *amended on other grounds*, 291 U.S. 649, 54 S. Ct. 525 (1934) (taking judicial notice of official reports put forth by the Comptroller of the Currency); *Heliotrope Gen., Inc. v. Ford Motor Co*., 189 F.3d 971, 981 (9th Cir. 1999) (taking judicial notice of information contained in news articles); *Blair v City of Pomona*, 223 F.3d 1074 (9th Cir. 2000) (taking judicial notice of and independent commission's report on the code of silence among police officers); *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); *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); *Clemmons v Bohannon*, 918 F.2d 858, 865 (10th Cir. 1990), *vacated on other grounds, on reh. en banc* 956 F2d 1523 (10th Cir. 1992) (taking judicial notice of government reports and Surgeon General's reports concerning health risk of environmental tobacco smoke); *Ieradi v. Mylan Laboratories, Inc*., 230 F.3d 594, 597-98 (3rd Cir.

2000) (taking judicial notice of information in a newspaper article); *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); *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).

ADMISSIONS OF THE ATTORNEY GENERAL AND DIRECTOR OF NATIONAL INTELLIGENCE

On July 31, 2007, in letter to Senate Judiciary Committee ranking member Senator Arlen Specter, Director of National Intelligence John M. McConnell attempted to clarify confusion over Attorney General Gonzales' seemingly contradictory Congressional testimony regarding the TSP by stating:

> Shortly after 9/11, the President authorized the National Security Agency to undertake *various intelligence activities* designed to protect the United States from further terrorist attack. … *One particular aspect of these activities*, and nothing more, was publicly acknowledged by the President and described in December 2005, following an unauthorized disclosure. … the Administration first used the term "Terrorist Surveillance Program" to refer specifically to that particular activity the President had publicly described in December 2005. This is the only aspect of the NSA activities that can be discussed publicly because it is the only aspect of *those various activities* whose existence has been officially acknowledged.

Exhibit A (emphasis added).

The Director's letter was followed on August 1 by a letter to Senate Judiciary Committee Chair Patrick J. Leahy from Attorney General Alberto

Gonzales. The Attorney General affirmed that confusion might have resulted from his shorthand reference to the TSP as the "program," which he said might have given the impression that these "highly classified intelligence activities" of the NSA constituted a single program. Exhibit B at p. 1. The Attorney General also noted that the legal bases of these "other aspects of the NSA activities" – i.e. the non-TSP intelligence activities mentioned by the Director – were subject to "very serious disagreement." *Id*. at p. 2.

While these statements had not occurred at the time of the District Court's ruling, Plaintiffs-Appellees seek judicial notice of the letters because they demonstrate that certain statements in the appellate briefing filed by both the United States and AT&T are erroneous.

The formal acknowledgment by the Executive, in the context of Congressional investigations into its surveillance activities, that it operates a range of NSA intelligence activities other than the TSP (under a single Executive Order) means that the government can no longer claim that it has never disclosed "whether any alleged secret activities beyond the TSP ever existed." (Gov't Opening Brief at p. 12). Furthermore, the recent statements by the Executive highlight the narrow limits of the Government's agreement to submit the TSP to the Foreign Intelligence Surveillance Court. When one inserts Director McConnell's definition of the "TSP" into the Attorney General's letter regarding

the submission of the "TSP" to the FISA Court, the Government's position appears to be this:

> "As a result of these orders, any electronic surveillance that was occurring as part of **[*one particular aspect of these activities, and nothing more,*]** will now be conducted subject to the approval of the Foreign Intelligence Surveillance Court."

See Gov't Opening Brief at pp. 9-10. Moreover, as the letters admit, the very phrase "Terrorist Surveillance Program" was an afterthought — not describing a program per se, but rather shorthand for those aspects of the broader program in which the NSA targeted al Qaeda and their known affiliates.

The letters also undermine the arguments made by both the government and AT&T that dismissal of this action is required because there has been "no admission of any other program" by the government (AT&T Opening Brief at p. 35) and that Appellees' claims must fail because they could not possibly show that a "broader program ever existed." (Gov't Opening Brief at p. 33).1

In the context of this appeal, the United States and AT&T have attempted to downplay Appellees' evidence regarding the existence of non-TSP surveillance

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[1] *See also* AT&T Opening Brief at p. 35 ("Plaintiffs' claims based on alleged surveillance activities other than the TSP … have to be dismissed."); AT&T Reply Brief at p.5 ("[Appellees'] case now stands bereft of the only post-911 1 NSA surveillance program whose existence the United States has ever acknowledged."); Gov't Opening Brief at p. 34 ("[B]ecause plaintiffs cannot establish the existence of any such broader surveillance program, the allegation of the existence of such a program does not establish standing."); *Id.* ("Plaintiffs' 'dragnet' theory challenges a purported secret program *other than and* broader than the TSP, an activity which the Government has never acknowledged.") (emphasis in the original).

activities, such as the evidence presented by Mr. Klein supporting NSA interception of communications (Appellees' Answering Brief at p. 5-10) and statements by members of Congress regarding NSA collection of call records (Appellee's Answering Brief at p. 11-12), by dismissing them as "speculation." Gov't Reply Brief at p. 7, 10-12.

The United States seems to suggest that any statements that "are not statements by the Executive" are invalid. Id. While Appellees disagree that Executive admissions are the only relevant evidence of whether non-TSP activities exist, the statements by the DNI and the Attorney General settle the question.

As a result of these recent admissions, there can be no doubt that the President authorized a "broader program" of surveillance without court approval of any kind from 2001 to January 2007, at the very least. These points alone would appear to direct that the "very subject matter" of this case is no longer a state secret.

CONCLUSION

For the reasons stated above, the Plaintiffs-Appellees respectfully request that this Court take judicial notice that the President issued an Executive Order in 2001 that purported to authorize the National Security Agency to conduct a variety of surveillance activities, of which the so-called Terrorist Surveillance Program was only one aspect.

Respectfully submitted,

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