



**Statement of Kevin S. Bankston
Senior Staff Attorney
Electronic Frontier Foundation**

**before the
U.S. House of Representatives Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties**

**for the
Oversight Hearing on Reform of the State Secrets Privilege**

January 29, 2008

I. INTRODUCTION

Good morning Chairman Nadler, Ranking Member Franks, and Members of the Committee. Thank you for inviting me to testify today.

The Electronic Frontier Foundation¹ (EFF) is pleased to have this opportunity to discuss the critical issue of reform of the state secrets privilege, and to describe how the Administration has attempted to use the privilege to deprive my clients of their day in court and avoid any judicial scrutiny of the National Security Agency's warrantless wiretapping program.

EFF is a non-profit, member-supported public interest organization dedicated to protecting privacy and free speech in the digital age. As part of that mission, EFF is currently representing average AT&T customers in a civil action against that company for assisting the NSA's warrantless electronic surveillance of AT&T customers' telephone calls and Internet communications.² EFF is also co-coordinating counsel for all NSA-related lawsuits pending before Chief Judge Vaughn Walker in the Northern District of California, cases which were transferred to him from across the country by the Panel on Multi-District Litigation.³ These include cases against AT&T, Verizon, Sprint, BellSouth and Cingular,⁴ cases against several other carriers that have been dropped,⁵ cases against the government,⁶ and finally,

¹ For more information on EFF, visit <http://www.eff.org>.

² *Hepting v. AT&T*, 439 F.Supp.2d 974 (N.D. Cal. 2006) (on appeal to the Ninth Circuit).

³ *In Re National Security Agency Telecommunications Records Litigation*, Transfer Order, MDL Docket No. 1791 (Dec. 15, 2006).

⁴ The 39 cases brought against various telecommunications carriers have been consolidated for pleading purposes into five combined complaints, organized by carrier: AT&T, Sprint, Verizon, Cingular and BellSouth. While BellSouth and Cingular have since been purchased by AT&T, those complaints remain separate since the facts underlying them occurred before the merger. The cases against all entities other than AT&T and Verizon have been voluntarily stayed by the plaintiffs pending the appeal of the *Hepting v. AT&T* case on the issue of the state secrets privilege.

⁵ These carriers have been dropped from the litigation: Bright House Networks, Transworld Network Corp, Charter Communications, McLeod USA Telecommunications Services, Comcast, and T-Mobile.

⁶ *Shubert, et al. v. Bush, et al.*, E.D. New York, C.A. No 1:06-cv-02282 (government states secrets privilege motion to dismiss pending); *Center for Constitutional Rights, et al. v. Bush, et al.*, S.D. New York, C.A. No. 1:06-cv-00313 (government states secrets

cases brought by the Administration itself to prevent state investigations into the carriers' cooperation in the NSA program.⁷

II. STATE SECRETS AND THE NSA LITIGATION

EFF filed its complaint in *Hepting v. AT&T* two years ago this Thursday. Yet, two years later, our case like all the others has barely moved out of the starting gate: no answer has been filed and no discovery has been conducted. The reason for this is the state secrets privilege.

Relying on this common law evidentiary privilege,⁸ the Administration has asserted an astonishingly broad claim: that the courts simply cannot hear any case concerning the NSA's warrantless domestic surveillance, or the telecommunications industry's participation in such surveillance. They maintain that those cases must be dismissed at the outset, regardless of whether the law has been broken.

Indeed, the Administration has gone so far as to argue that even if a court were to find that the law was broken and the Constitutional rights of millions of Americans were violated, the court still could not proceed to create a remedy "because to do so would confirm Plaintiffs' allegations."⁹

privilege motion expected after amended complaint); *Al-Haramain Islamic Foundation, Inc., et al. v. Bush, et al.*, D. Oregon, C.A. No. 3:06-cv-00274; 451 F.Supp.2d 1215 (D. Ore. 2006), reversed and remanded, 507 F.3d 1190 (9th Cir. 2007).

⁷ *United States v. Rabner, et al*, 07-1324; *Unites States v. Gaw, et al*, 07-1242; *United States v. Adams, et al*, 07-1323; *United States v. Palermino, et al*, 07-1326; *United States v. Volz, et al*, 07-1396; and *Clayton et al. v. AT&T Communications of the Southwest, Inc. et al* 07-1187.

⁸ *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190, 1196 (9th Cir. 2007) ("common law evidentiary privilege"); *Kasza v. Browner*, 133 F.3d 1159, 1165 (9th Cir. 1998) ("[t]he state secrets privilege is a common law evidentiary privilege that allows the government to deny discovery of military secrets"); *Monarch Assur. P.L.C. v. U.S.*, 244 F.3d 1356, 1358 (Fed. Cir. 2001) (per curiam) ("common-law state secrets privilege"); *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 546 (2d Cir. 1991) ("The state secrets privilege is a common law evidentiary rule"); *In re United States*, 872 F.2d 472, 474 (D.C. Cir. 1989) (same).

⁹ United States' Reply in Support of the Assertion of the Military and State Secrets Privilege and Motion to Dismiss or, in the Alternative, for Summary Judgment by the United States (*Hepting v. AT&T*, N.D. Cal. Case No. 06-672-VRW, Dkt. No. 245) at p.

The government argues, essentially, that the state secrets privilege provides complete immunity from suit for any surveillance purportedly related to national security, and provides a shield against any judicial inquiry into its wrongdoing or that of the carriers.

This is a startling claim, considering that Congress thirty years ago established as part of FISA a civil cause of action for those aggrieved by illegal foreign intelligence surveillance,¹⁰ in addition to providing criminal penalties—which makes no sense if the entire subject matter of foreign intelligence surveillance is off limits to the courts.

Nor, as this Committee is doubtless aware, is it a secret that the telephone carriers participated in the NSA's warrantless surveillance program. There have been extensive discussions, often at the behest of the Administration, ranging from testimony from the previous Attorney General to the Director of National Intelligence's interview with the *El Paso Times* to Administration leaks to newspapers, confirming this fact.¹¹ As the Ninth Circuit noted, "much of what is known about the Terrorist Surveillance Program ("TSP") was spoon-fed to the public by the President and his Administration."¹²

Apparently, the Administration believes that the disclosures it makes about the program, to politically defend itself and urge this Congress to pass an immunity for the telephone companies that cooperated with the NSA, will not harm the national security, but allowing the judicial branch to actually examine the legality of its and the carriers' conduct somehow will. Indeed, last week gives us a final example of how this Administration has been playing the secrecy card to avoid Congressional and court scrutiny of the

20:19-20 (emphasis added), available at http://www.eff.org/legal/cases/att/gov_MTD_reply.pdf.

¹⁰ 50 U.S.C. § 1810.

¹¹ See Testimony of the Attorney General of the United States before the Senate Judiciary Committee at its July 24, 2007 hearing on the Oversight of the Department of Justice (stating that the Government requested and received the cooperation of telecommunications companies for the NSA surveillance program); Interview with Director of National Intelligence, *El Paso Times*, August 22, 2007, available at http://www.elpasotimes.com/news/ci_6685679.

¹² *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190, 1192 (9th Cir. 2007).

NSA program. The timing of the Administration's belated disclosure to House members of materials related to the NSA program, after over a year of Congressional demands and at the height of the debate over whether to give AT&T and the other carriers immunity, was clearly dictated not by a need to protect state secrets but by political considerations.

The Administration should not be allowed to share or withhold information for its own political advantage, or to avoid accountability. Rather, as Judge Walker ruled last summer when denying the Administration's motion to dismiss *Hepting v. AT&T*:

If the government's public disclosures have been truthful, revealing whether AT&T [assisted] in monitoring communication content should not reveal any new information that would assist a terrorist and adversely affect national security. And if the government has not been truthful, the state secrets privilege should not serve as a shield for its false public statements.¹³

This is particularly true when the integrity of Congress' surveillance laws, and the Constitutional rights of millions of average Americans, are at stake.

III. CONGRESS CAN AND SHOULD LEGISLATE TO REFORM THE STATE SECRETS PRIVILEGE

Congress can and should legislate to ensure accountability and prevent Executive from shutting down litigation without the court even considering the evidence. The state secrets privilege is an evidentiary privilege, and has never been an absolute immunity from suit. As the Supreme Court has explained, the "privilege" is "well established in the *law of evidence*,"¹⁴ not

¹³ *Hepting* at 996. This decision is currently before the Ninth Circuit. It was argued in August 2007, and we are awaiting the Court's decision. Transcript available at http://www.eff.org/files/filenode/att/hepting_9th_circuit_hearing_transcript_08152007.pdf.

¹⁴ *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953)(emphasis added); see also *In re United States*, 872 F.2d 472, 474 (D.C. Cir. 1989) (rejecting the Government's effort to inflate a "common law evidentiary rule that protects information from discovery" into an immunity from suit) (emphasis added); *Halpern v. United States*, 258 F.2d 36, 43 (2d Cir. 1958) (Congress's creation of private rights of action in Invention Secrecy Act "must be

in Constitutional law. Therefore, it is well within Congress's prerogative to reform the common law of evidence by statute.¹⁵

EFF believes that any state secrets reform legislation should provide fair and secure procedures by which the federal court is empowered to privately examine purportedly secret evidence and evaluate the government's claim of privilege, so that miscarriages of justice may be avoided. EFF further agrees with the "essential premise" of the American Bar Association's recommendations on state secrets reform, which is that any reform legislation should allow the courts to "mak[e] every effort to avoid dismissing a civil action based on the state secrets privilege."¹⁶

EFF further believes that at least in certain types of cases, especially where constitutional rights are at issue, Congress should pass legislation ensuring that a legal ruling on the merits may be reached even if critical evidence is privileged, based on the court's evaluation of that evidence in chambers or in a secure facility. While we believe that this is already what FISA provides in the realm of electronic surveillance, Congress can use this opportunity to put the Administration's claims to the contrary to rest.

viewed as waiving the [state secrets] privilege," because Congress could not have "created rights which are completely illusory, existing only at the mercy of government officials"). Even if the Executive asserts a constitutional power, "[w]hen the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

¹⁵ Where Congress "speaks directly to the question otherwise answered by . . . common law"—including the question of how to handle state secrets in litigation—Congress's judgment binds both the Executive and the Courts. *Kasza*, 133 F.3d at 1167 (internal citation and brackets omitted).

¹⁶ American Bar Association, *Report and Recommendation on Reform of the State Secrets Privilege*, August 2007, available at <http://fas.org/sgp/jud/statesec/aba081307.pdf>. See also The Constitution Project, *Reforming the State Secrets Privilege*, May 31, 2007, available at http://openthegovernment.org/otg/Reforming_the_State_Secrets_Privilege_Statement.pdf, and *Constitutional Scholars' Letter to Congress on State Secrets Reform*, October 4, 2007, available at http://www.constitutionproject.org/pdf/State_Secrets_ltr_to_Congress_10-4-07.pdf.

IV. FISA AND THE STATE SECRETS PRIVILEGE

As I mentioned before, Congress has already considered the issue of state secrets in the context of litigation over illegal surveillance, and when passing FISA in 1978 correctly chose not to allow the Executive to use the state secrets privilege as a shield against litigation. In fact, Congress created a specific procedure to be followed when the Executive asserts that the disclosure of information concerning electronic surveillance would harm national security.

Section 1806(f) of FISA provides that if during litigation the Attorney General files a sworn affidavit with the court that disclosure of materials related to electronic surveillance would harm the national security, then the court “*shall*, notwithstanding any other law,” review those materials *in camera* and *ex parte* to determine the legality of the surveillance.¹⁷ Furthermore, when reviewing those materials to determine whether the surveillance was lawfully authorized and conducted, the court may *only* disclose information about the surveillance to the aggrieved person seeking discovery where *necessary* to make an accurate determination.

Section 1806(f) reflects several key judgments made by Congress when crafting FISA. First, it reflects Congress’s recognition that the legality of surveillance *must be litigable* in order for any of its laws on the subject to have teeth, a recognition bolstered by its creation of a civil remedy in FISA for those who have been illegally surveilled.¹⁸ Second, it reflects Congress’s intent to carefully balance the special need for accountability in the area of electronic surveillance with the Executive’s interest in avoiding disclosure of information that may harm the national security, and to achieve a “fair and just balance between protection of national security and protection of personal liberties.”¹⁹ Finally, it reflects Congress’s recognition that the final decision as to what information should be disclosed cannot be left to the Executive’s unilateral discretion, but must instead be made by the courts²⁰—

¹⁷ See 50 U.S.C. § 1806(f) (emphasis added).

¹⁸ See 50 U.S.C. § 1810.

¹⁹ S. Rep. No. 94-1035, at 9 (1976) (discussing § 1806(f)).

²⁰ Congress explicitly stated that the appropriateness of disclosure is a “decision ... *for the Court to make*[.]” S. Rep. No. 95-701, at 64 (emphasis added); *accord* S. Rep. No. 95-604(I), at 58.

courts that both Congress and the Executive trusted could handle sensitive national security information in a reasonable and secure manner.²¹

Yet now, even though Section 1806(f) applies by its own plain language to any case in which a motion is made to discover materials related to electronic surveillance, even though the legislative history makes clear it was intended to apply in both criminal and civil cases,²² and even though Congress in 2001, as part of the USA PATRIOT Act, made Section 1806(f)'s procedures the exclusive means by which evidence in surveillance cases against the government shall be handled,²³ the Administration is arguing that it does not apply in the NSA litigation.

Therefore, in addition to considering the broader question of state secrets reform, Congress should move immediately to clarify that FISA's existing procedures, which have been used for thirty years without any harm to national security, apply in these cases. Such a clarification of FISA's procedures, and not immunity, is the only appropriate response to claims by telephone carriers that they were acting legally and in good faith when they assisted the NSA, but are prevented from defending themselves because of the government's invocation of the privilege.

V. ELECTRONIC SURVEILLANCE CASES DO NOT REQUIRE TRANSFER TO THE FISA COURT

We appreciate various Senators' attempts to reach a compromise on the issue of immunity, but two of the proposals on the table, the immunity

²¹ See Foreign Intelligence Surveillance Act of 1978: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary 95th Cong., at 26 (1977) (Attorney General Bell asserting that "[t]he most leakproof branch of the Government is the judiciary . . . I have seen intelligence matters in the courts. . . I have great confidence in the courts," to which Senator Hatch replied, "I do also").

²² The final conference report on FISA clearly states that "[t]he conferees agree that an *in camera* and *ex parte* procedure is appropriate for determining the lawfulness of electronic surveillance in both criminal and civil cases. The conferees also agree that the standard for disclosure in the Senate bill adequately protects the right of the aggrieved person, and that the provision for security measures and protective orders ensures adequate protection of national security interests." H.R. Rep. No. 95-1720, 32 (1978) (Conf. Rep.), reprinted in 1978 U.S.C.C.A.N 4048, 4061.

²³ 18 U.S.C. § 2712(b)(4).

amendment offered by Senator Feinstein and the substitution proposal of Senators Specter and Whitehouse, contain troubling provisions that this House should view with great skepticism. Both of these purported compromise proposals would sweep all of the carrier lawsuits out of the regular court system and into the secretive FISA Court for key determinations. Essentially, they would legislatively enable the Administration to “forum shop” and shuttle all cases regarding its surveillance activities into a court whose only role for nearly thirty years has been to routinely approve the Executive’s applications for surveillance authorization.

Proponents of these forum-shopping provisions argue that only the FISA Court can be trusted to handle sensitive national security information. Yet as already discussed, Congress and previous administrations have long trusted the regular court system to handle such information responsibly, and the Administration—despite its claims to the contrary—has been unable to point to a single instance in which the judiciary has failed to do so. Such baseless rhetoric about the need to maintain security cannot justify the diversion of properly maintained lawsuits into a court staffed by judges that are hand-picked by the Chief Justice of the Supreme Court and are accustomed to considering such matters in completely secret and non-adversarial proceedings. Rather, such cases should remain before the fairly and randomly selected state and federal judges that would otherwise adjudicate those disputes—subject, of course, to the carefully balanced FISA procedures already discussed.

VI. CONCLUSION

The Administration’s expansive view of the state secret privilege has highlighted the need for sensible reform of that evidentiary privilege, as well as immediate clarification of Section 1806(f). The Electronic Frontier Foundation looks forward to working with this Committee to help achieve such reform, and I will be delighted to take any questions you may have.