US court hears suit against AT&T's collaboration with domestic spying program

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On Wednesday, August 15, a three-judge panel of the Ninth Circuit Court of Appeals in San Francisco heard arguments in the case of *Hepting v. AT&T*, a class action suit filed by the Electronic Frontier Foundation (EFF) in January 2006.

The suit accuses telecommunications giant AT&T of violating the First and Fourth amendments to the Constitution, the Foreign Intelligence Surveillance Act (FISA) (which prohibits spying on Americans unless authorized by the Foreign Intelligence Surveillance Court [FISC]), telecommunications laws and the Electronic Communications Privacy Act by making available to the National Security Agency (NSA) two massive databases that included both the contents of its subscribers' communications and detailed transaction records, such as numbers dialed and internet addresses visited.

One of AT&T's databases, known as "Hawkeye," contains data detailing nearly every telephone communication on AT&T's domestic network since 2001, according to the Complaint. The suit also alleges that AT&T allowed the NSA to use the company's powerful Daytona database management software to quickly search this and other communication databases.

The suit requests an injunction and damages that could amount to at least $21,000 for each affected person. According to the EFF website, EFF brought a class action suit in the matter to ensure that any injunction against AT&T would apply throughout the country, not simply in the district in which the lawsuit was filed. The purpose of filing the suit is "to stop [AT&T's] illegal conduct and hold AT&T responsible for its illegal collaboration with the government's domestic spying program, which has violated the law and damaged the fundamental freedoms of the American public." EFF states that AT&T is being sued because the government's illegal spying program would not be possible without AT&T's collaboration in violating the privacy of US citizens.

In a sworn statement, former company engineer Mark Klein claims that AT&T illegally provided the government with access to subscriber information through a system of communications hubs along the West Coast. He described a super-secure room on the sixth floor of a building at 611 Folsom Street in downtown San Francisco where AT&T assembled high-powered equipment for a "special job" for the NSA. He said that very few people were allowed in the room and that both "a physical key for the cylinder lock and a combination code number to be entered into an electronic keypad on the door" were required for entry. He also described in detail the fiber-optic equipment in the room and said he had heard from other company employees that similar operations were being put together in Los Angeles, San Diego and San Jose in California and in Seattle, Washington.

From the day the suit was filed, the US Justice Department and AT&T have done everything they could to get the case dismissed out of hand, even before an examination of the facts to determine the legality or otherwise of the wiretapping was established, on the basis of the "state secrets privilege." The Department of Justice filed a Statement of Interest re: State and Military Secrets as early as April 28, 2006, and a Motion to Dismiss or for Summary Judgment on May 12, 2006.

Several *amicus curiae* (friend of the court) briefs and declarations were filed by supporters of both sides, including briefs by the American Civil Liberties Union (ACLU) and the Center for Constitutional Rights in support of the plaintiffs, and declarations by none other than John Negroponte, then Director of National Intelligence, and Keith Alexander, Director of the NSA, for the defendants.

Gregory G. Garre, a deputy solicitor general representing the administration, and Michael K. Kellogg, a lawyer for AT&T, claimed in Wednesday's hearing that Klein's sworn statement was built on speculation and inferences. Robert D. Fram, a lawyer for the plaintiffs, said that, on the contrary, the statement provided more than enough direct evidence to allow the case to go forward.

On July 20, 2006, United States District Court Judge Vaughn Walker, a libertarian-leaning judge appointed by the current president's father, George H.W. Bush, denied the motions to dismiss the case on the grounds that it would reveal state secrets, since the government had admitted the existence of the program following its revelation in the *New York Times* in December 2005. He added that if AT&T had a legal order to comply, disclosing it would not assist would-be terrorists.

AT&T argued that it should be immune from the suit because "whatever we did, the government told us to," while the government continued to proclaim that allowing the case to go

on would harm national security. Walker rejected this argument, declaring, "The compromise between liberty and security remains a difficult one. But dismissing this case at the outset would sacrifice liberty for no apparent enhancement of security." The decision was appealed to the Ninth Circuit in November of 2006.

The three justices on the Ninth Circuit panel, Harry Pregerson (appointed by President Jimmy Carter), M. Margaret McKeown, and Michael Daly Hawkins (the latter two appointed by President Bill Clinton), reportedly appeared highly skeptical and occasionally hostile to the Bush administration's central argument, that national security concerns require that the lawsuits be dismissed.

Garre declared that judges must give executive branch determinations "utmost deference" in matters of state secrets. Referring to the assessment of "intelligence officials," he reiterated the canard that any investigation or action delving into the actions of the NSA or AT&T would result in "exceptionally grave harm to the national security of the United States." Judge Pregerson, the senior member of the panel, responded, "What does 'ultimate deference' mean? Bow to it?"

The three judges seemed to be frustrated by the government's insistence that they must defer to intelligence officials' assessments of the need for secrecy and dismiss the lawsuits without deciding whether or not the surveillance was legal. According to an article in the *San Francisco Chronicle* August 16, Judge McKeown paraphrased the government's position as, "We don't do it, trust us, and you can't ask about it," while Judge Pregerson offered a paraphrase of his own, saying, "Once the executive declares that certain activity is a state secret, that's the end of it ... The king can do no wrong."

The judges also appeared unpersuaded by the argument presented by AT&T lawyer Kellogg that "The government has said that whatever AT&T is doing with the government is a state secret." The judges expressed their skepticism, wondering why the issue of whether there was domestic spying on Americans without court approval, violating the law, could not be explored.

Judge McKeown noted that Bush has publicly denied that the government intercepts domestic calls without a warrant. Judge Hawkins suggested that plaintiffs might prove their case without divulging any secrets by showing that the company had provided private information to the government without insisting on a warrant and questioned how such evidence would jeopardize national security.

Judge Pregerson wanted to know whether the Justice Department was asking the judges to "rubber stamp" the Bush administration's claim that state secrets were at risk in the case. "Who decides," he asked, "whether something is a state secret or not?"

The hearing in the Ninth Circuit comes at a time when the debate over the unlawful domestic spying program is producing widespread outrage. At stake is whether the US court system has the power to review the government's wiretapping of Americans if that surveillance is conducted in the name of the so-called "war on terror."

The facts that the Democratic Party-controlled Congress has just enacted legislation that gives the government even more powers to conduct warrantless spying, and that there continue to be increasing legal challenges to these programs across the country, are rapidly bringing the issue to a crisis level. The government is demanding that the courts dismiss lawsuits aimed at shutting down warrantless surveillance and data-mining of Americans' calls and emails, despite the evidence in the suits that backs up the claims of illegal surveillance. Bush administration lawyers have essentially claimed that the courts have no business second-guessing the president when it comes to national security.

There are, according to the *San Jose Mercury News*, roughly 50 pending lawsuits that the Bush administration has attempted to have thrown out of court on the basis of "state secrets" and "national security," a privilege the Bush administration has asserted more than any other administration in history. Therefore, the ultimate ruling by the Ninth Circuit will have important consequences for these cases, since dismissal of the AT&T case would likely result in the dismissal of the others on similar grounds.

There is no set time frame for a decision in *Hepting v. AT&T*. At any rate, the loser in the appeal will probably appeal to a full panel of the Ninth Circuit and from there the case would go to the Supreme Court. Judging by their support for the administration in the past, it seems fairly predictable how the current right-wing majority will view the argument that decisions made by the executive branch supersede any independent judgment made by the courts.

For a detailed history of the case and links to court documents, go to the Electronic Frontier Foundation's AT&T class action page at: http://www.eff.org/legal/cases/att/