Nos. 06-17132 and 06-17137

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TASH HEPTING *et al.*,
Plaintiffs-Appellees,

v.

AT&T CORP. *et al.*,
Defendants-Appellants.

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

BRIEF OF *AMICI CURIAE* PROFESSOR ERWIN CHEMERINSKY *ET AL.* IN SUPPORT OF HEPTING AND URGING AFFIRMANCE

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INTEREST OF AMICI CURIAE

Amici curiae are the constitutional law professors listed below, all of whom teach and write in field of the separation of powers, and who respectfully submit this brief addressing the momentous constitutional questions posed both by the allegations of unlawful government surveillance at the core of this lawsuit and the invocation of the state secrets privilege by the U.S. government.

This brief is filed with the consent of the parties.

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ARGUMENT

I. CONGRESS HAS DISPLACED THE STATE SECRETS PRIVILEGE IN CASES CHALLENGING GOVERNMENTAL ELECTRONIC SURVEILLANCE, AND IT IS WELL WITHIN CONGRESS'S CONSTITUTIONAL POWER TO DO SO

a. Congress Has Rejected the Use of a State Secrets Privilege in Cases Challenging Governmental Electronic Surveillance

At bottom, this case is about the separation of powers. Although the government repeatedly attempts to characterize the separation-of-powers concerns at issue as turning on the proper deference owed by the courts to the need for executive secrecy during wartime, this case is not a simple conflict between the executive and the judiciary. Not only does the executive challenge two roles of the judiciary—its Fourth Amendment role of reviewing ex ante executive searches or seizures and its Article III role of deciding cases or controversies — the executive challenges Congress as well.

Thus, of equal — if not greater — significance is the proper respect for the extensive, well-established, and time-honored constitutional role that Congress has played in regulating the field of electronic surveillance by reinforcing the courts' dual roles. Where Congress has properly legislated in the field, and has manifested its intent to deny to the President a privilege to which he otherwise claims entitlement, the congressional intent must be vindicated. As Justice Jackson so famously put it a half-century ago, "[w]hen the President takes measures

incompatible with the expressed 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). Indeed, "[c]ourts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject." *Id*. at 637–38. And there is simply no colorable argument that, within the confines of the Fourth Amendment, Congress lacks the constitutional authority to regulate domestic electronic surveillance.

Just last Term, the Supreme Court decisively reinvigorated both the spirit and the continuing force of Justice Jackson's canonical concurrence in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). In holding that the military tribunals established by President Bush were unlawful because they were inconsistent with both the Uniform Code of Military Justice, 10 U.S.C. §§ 801 *et seq.*, and the 1949 Geneva Conventions, the Court concluded that "[w]hether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers." *Id*. at 2774 n.23 (citing *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)).

Hamdan thereby recognized that the President may not "disregard limitations" that Congress has validly imposed upon the government's authority,

even — if not especially — in cases where the government's strong national security interest is implicated:

> Where a statute provides the conditions for the exercise of governmental power, its requirements are the result of a deliberative and reflective process engaging both of the political branches. Respect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment.

126 S. Ct. at 2799 (Kennedy, J., concurring in part).

Effectuating congressional intent is precisely what the plaintiffs ask this court to do. Both by creating extensive statutory procedures for lawsuits challenging governmental electronic surveillance (and suits against private parties such as AT&T), and by refusing to enact a proposed Federal Rule of Evidence that would have codified the state secrets privilege, Congress has repeatedly and unequivocally manifested its intent to preclude application of the state secrets privilege in challenges to electronic surveillance, and for good reason. Electronic surveillance in the name of national security necessarily implicates the most fundamental Fourth Amendment freedoms, *see, e.g., United States v. U.S. Dist. Court* (*Keith*), 407 U.S. 297, 309–14 (1972), and Congress understandably left unrestrained the courts' constitutional prerogative to entertain challenges thereto.

Thus, whether or not it would be appropriate to apply the state secrets privilege in other contexts and in lawsuits raising other issues, *see, e.g.*, *El-Masri v.*

United States, 479 F.3d 296 (4th Cir. 2007) (dismissing damages suit brought by detainee alleging illegal detention and torture as part of government's "extraordinary rendition" program on the basis of the state secrets privilege), it simply cannot and should not apply to foreclose judicial consideration of challenges to electronic surveillance in the face of such overwhelming evidence of countervailing congressional intent. Given the weight of contraindicated authority, application of the state secrets privilege in this case would be tantamount to an assertion that Congress is constitutionally disabled from providing otherwise, a result fundamentally at odds with this court's recognition that "[t]he state secrets privilege is a *common law* evidentiary privilege . . . ." *Kasza v. Browner*, 133 F.3d 1159, 1165 (9th Cir. 1998) (emphasis added).

i. Congress Has Established Precise Statutory Rules for the Secrecy of Governmental Electronic Surveillance

Whereas significant attention has been devoted in recent years to various provisions of the Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. §§ 1801 *et seq.*, what has been consistently overlooked is the extent to which FISA itself contemplates — and provides guidance for resolving — the disclosure of national security secrets in the course of litigation arising under the Act. Indeed, in addition to the numerous causes of action FISA created to allow private enforcement of its provisions, the statute also provided for disclosure of national security information to the courts, and for independent Article III determination of

the propriety of releasing such information to the plaintiffs. *See generally* H.R. CONF. REP. NO. 95-1720, at 32 (1978), 1978 U.S.C.C.A.N. 4048, 4061 ("The Conferees agree that an *in camera* and *ex parte* proceeding 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 rights of the aggrieved person, and that the provision for security measures and protective orders ensures adequate protection of national security interests.").

Perhaps foremost among the provisions recognizing the potential disclosure of national security secrets is 18 U.S.C. § 2511(2)(a)(ii), which provides that:

> No provider of wire or electronic communication service, officer, employee, or agent thereof, or landlord, custodian, or other specified person shall disclose the existence of any interception or surveillance or the device used to accomplish the interception or surveillance with respect to which the person has been furnished a court order or certification under this chapter, *except as may otherwise be required by legal process* . . . .

18 U.S.C. § 2511(2)(a)(ii) (emphasis added). In one sentence, FISA thus made the "existence of any interception or surveillance or the device used to accomplish the interception or surveillance" a secret, the unauthorized disclosure of which would give rise to civil liability, *see id*. ("Any such disclosure, shall render such person liable for the civil damages provided for in section 2520."), and at the same time

recognized that such a secret could — and, indeed, *would* — properly be disclosed in the course of legal proceedings.

To similar effect is FISA's discovery provision, 50 U.S.C. § 1806(f):

> [W]henever any motion or request is made by an aggrieved person pursuant to any other statute or rule of the United States or any State before any court or other authority of the United States or any State to discover or obtain applications or orders or other materials relating to electronic surveillance or to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance under this chapter, the United States district court . . . shall, *notwithstanding any other law*, if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States, review *in camera* and *ex parte* the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted.

50 U.S.C. § 1806(f) (emphasis added); *see also id*. ("In making this determination, the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance.").

Taken together, these provisions reflect the careful balance Congress sought to draw in FISA "between an entirely *in camera* proceeding . . . and mandatory disclosure, which might occasionally result in the wholesale revelation of sensitive foreign intelligence information." S. REP. NO. 95-701 (1978), 1978 U.S.C.C.A.N. 3973, 4032–33. Thus, FISA expressly contemplates the disclosure to independent

Article III judges of "the existence of any interception or surveillance or the device used to accomplish the interception or surveillance," and provides that, "notwithstanding any other law," those courts may order the disclosure of "portions of the application, order, or other materials relating to the surveillance . . . where such disclosure is necessary to make an accurate determination of the legality of the surveillance."

Such preclusion by Congress, moreover, vindicates important policy interests. As the Fourth Circuit has observed, "FISA was enacted 'to put to rest a troubling constitutional issue' regarding the President's 'inherent power to conduct warrantless electronic surveillance in order to gather foreign intelligence in the interests of national security,' a question that had not been definitively answered by the Supreme Court." *United States v. Squillacote*, 221 F.3d 542, 552 (4th Cir. 2000) (quoting *ACLU Found. of S. Cal. v. Barr*, 952 F.2d 457, 460 (D.C. Cir. 1991)). Given the abuses that motivated FISA, this "troubling constitutional issue" was hardly abstract. *See generally United States v. Rosen*, 447 F. Supp. 2d 538, 542–43 & n.2 (E.D. Va. 2006). Although FISA has repeatedly been upheld against Fourth Amendment challenges, it cannot be gainsaid that Congress envisioned an active role for the courts in carefully policing the statute's outer constitutional limits.

To the contrary, entirely *because* FISA represented an unprecedented and concerted effort by Congress to restore the proper checks and balances with respect to executive electronic surveillance, vigorous and searching judicial review — to which the state secrets privilege would have necessarily proven anathema — was absolutely essential. *See* S. REP. NO. 95-701, at 15, 1978 U.S.C.C.A.N. at 3984 ("Because of the wider latitude granted by the bill, judicial review of the necessity for surveillance of U.S. persons and regular congressional oversight are required to ensure the proper exercise of administrative discretion.").

ii. FISA's Statutory Procedures Apply in This Case, and Have Not Been Invoked by the Government

Notwithstanding the explicit statutory language that, together with Title III and the Stored Communications Act, FISA "shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire, oral, and electronic communications may be conducted," 18 U.S.C. § 2511(2)(f), both the government and AT&T have repeatedly suggested that FISA's disclosure and discovery procedures do not apply to this case, since it involves electronic surveillance conducted *not* pursuant to FISA. Such an argument fails for two reasons:

First, the language of § 1806(f) is not limited to electronic surveillance conducted pursuant to FISA. As the plain language indicates, the statute contemplates the disclosure to Article III courts of "applications or orders or other

materials relating to electronic surveillance *or* . . . evidence or information obtained or derived from electronic surveillance under [FISA].” 50 U.S.C. § 1806(f). The disjunctive nature of the provision ensures that courts are able to consider lawsuits challenging *any* electronic surveillance, and not just surveillance that complies with FISA’s procedures. Such a conclusion is consistent with § 2511, for it would make little sense to render FISA’s procedures exclusive if courts were unable to review claims that the government (and third parties acting at the government’s request) failed to comply with those procedures

Second, even if the language were so limited, the purpose of the above analysis is to demonstrate the extent to which application of the state secrets privilege is more broadly incompatible with the congressional intent animating FISA. The important point for present purposes is the extent to which FISA itself makes clear Congress’s intent to occupy the field with respect to the procedures to be employed in lawsuits challenging electronic surveillance, and to thereby preclude application of any other statutes, rules, or privileges that might otherwise be relevant.

Of equal, if not greater, relevance, the government has refused to invoke the procedures outlined in FISA for ensuring that no more sensitive national security information is disclosed in lawsuits under FISA than is absolutely necessary. Relying on a blanket assertion of the state secrets privilege, the government has

repeatedly maintained that it is not bound to follow the FISA procedures, even though those very procedures would help vindicate the government's undisputed national security interest in preventing disclosure of protected materials. Thus, although FISA provides a statutory procedure for the government to attempt to minimize the disclosure of national security secrets, *see* 50 U.S.C. § 1806(f), and although that procedure is both exclusive and designed to protect the very interests the government contends are imperiled by the case sub judice, the government has simply refused to comply.

Whereas the above analysis is enough, on its own, to compel the conclusion that application of the state secrets privilege in lawsuits challenging electronic surveillance has been specifically rejected by Congress, and that the application of the privilege therefore falls into Justice Jackson's "lowest ebb" category, further support for that conclusion may be derived from Congress's repeated refusal to codify the state secrets privilege as part of the Federal Rules of Evidence. *See, e.g.*, S. REP. NO. 93-1277 (1974), 1974 U.S.C.C.A.N. 7051, 7053–54. Although proposed Rule 509 of the Federal Rules of Evidence would have included a more specific provision (Rule 509(e)) regulating the disclosure of national security secrets, *see* 56 F.R.D. 183, 251–54 (1973), the provision also engendered controversy because of the extent to which it might do more than simply recognize existing law. *See* S. REP. NO. 93-1277, 1974 U.S.C.C.A.N. at 7053.

iii. Taken Together, Congress Has Clearly Expressed Its Intent To Preclude Application of the State Secrets Privilege to Challenges to Governmental Electronic Surveillance, and Its Authority To Do So Falls Well Within Congress's Article I Powers

To paraphrase Justice Kennedy, "[t]his is not a case, then, where the Executive can assert some unilateral authority to fill a void left by congressional inaction. It is a case where Congress, in the proper exercise of its powers as an independent branch of government, and as part of a long tradition of legislative involvement in matters of [electronic surveillance], has considered the subject of [disclosure of national security secrets in lawsuits challenging electronic surveillance] and set limits on the President's authority." *Hamdan*, 126 S. Ct. at 2799 (Kennedy, J., concurring in part). Moreover, as in *Hamdan*, there is little question that these initiatives fall within the scope of Congress's regulatory authority under Article I. Although the government has repeatedly asserted that FISA might be unconstitutional to the extent that it infringes upon the President's constitutional authority as commander-in-chief, *see, e.g.*, U.S. DEP'T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT 30–31 (Jan. 19, 2006), http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/nsa/dojnsa11906wp.pdf, *Hamdan* reaffirms that such an argument has Justice Jackson's concurrence in *Youngstown* entirely backwards. To whatever extent the government might be

entitled to assert the state secrets privilege in situations where Congress has *not* manifested a clear intent to preclude its applicability, Congress *has* so provided here. *Cf. United States v. Texas*, 507 U.S. 529, 534 (1993) ("Statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, *except* when a statutory purpose to the contrary is evident." (emphasis added; internal quotation marks omitted)).

Thus, the only question is whether Congress may not constitutionally preclude application of an evidentiary privilege. To ask that question, though, is to answer it, for "Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution." *Dickerson v. United States*, 530 U.S. 428, 437 (2000); *see also United States v. Fell*, 360 F.3d 135, 145 (2d Cir. 2004) ("Congress has the authority to set forth rules of evidence in federal trials subject only to the requirement that the rules comport with the Constitution . . . ."). Thus, so long as the state secrets privilege is not "required by the Constitution," Congress has unfettered constitutional authority to abridge or modify its scope and applicability.

b. The State Secrets Privilege is, at Most, a Common-Law Evidentiary Privilege, and Can Therefore Be Overridden by Congress, Acting Within its Article I Powers

As this court recognized in *Kasza*, "[t]he state secrets privilege is a common law evidentiary privilege that allows the government to deny discovery of military

secrets." 133 F.3d at 1165. Such a conclusion — that the privilege sounds in the common law — is consistent with the decisions of every other circuit, *see, e.g.*, *Monarch Assur. P.L.C. v. United States*, 244 F.3d 1356, 1358 (Fed. Cir. 2001) (per curiam); *In re Under Seal*, 945 F.2d 1285, 1287 n.2 (4th Cir. 1991); *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 546 (2d Cir. 1991); *In re United States*, 872 F.2d 472, 474 (D.C. Cir. 1989); and with *United States v. Reynolds*, 345 U.S. 1 (1953), the Supreme Court decision first giving the privilege modern vitality.

Thus, unlike executive privilege, which the Supreme Court has suggested is "inextricably rooted in the separation of powers under the Constitution," *United States v. Nixon*, 418 U.S. 683, 708 (1974), the state secrets privilege is a common-law evidentiary rule that may generally be superseded — and the applicability of which may be regulated — by statute. *See Dickerson*, 530 U.S. at 437. That is what Congress has done here. In an analogous case, considering whether the state secrets privilege should preclude a lawsuit under the Invention Secrecy Act of 1951, 35 U.S.C. §§ 181 *et seq.*, the Second Circuit was emphatic that Congress's intent in creating a cause of action must be given conclusive force:

> Congress has created rights which it has authorized federal district courts to try. Inevitably, by their very nature, the trial of cases involving patent applications placed under a secrecy order will always involve matters within the scope of [the state secrets] privilege. *Unless Congress has created rights which are completely illusory, existing only at the mercy of government officials, the act must be viewed as waiving the privilege*. . . .

Halpern v. United States, 258 F.2d 36, 43 (2d Cir. 1958) (emphasis added). So too, here.

c. Even if the State Secrets Privilege is Grounded Partly in Article II, Congress May Override It By Statute

i. Articles I and II Evince a Framework Whereby Executive Secrecy is within the Ultimate Control of the People through Legislation

Even if the state secrets privilege were grounded partly in Article II values, Congress can override it by statute. Congress's ability to limit executive branch secrecy itself is part of the constitutional separation of powers. Articles I and II of the Constitution outline a nuanced and balanced relationship between the executive branch's structural capacity for secrecy and legislative tools to guard against secrecy's abuses. The Constitution accords the executive branch the structural capacity to operate in secret, *not* the prerogative to do so in the face of statutory limits.

Congress's constitutional ability conclusively to limit executive branch secrecy is evidenced in three major ways. First, Articles I and II create a President with substantial capacities to act effectively, but leave it to Congress to activate or constrain those capacities. *See* Saikrishna Prakash, *A Critical Comment on the Constitutionality of Executive Privilege*, 83 MINN. L. REV. 1143, 1154–64 (1999). As the Framers noted, Article II creates a President capable of "secrecy

[sic] . . . dispatch . . . vigor and energy." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 112 (Max Farrand, ed., 1966) (quoting George Mason). These qualities flow from the structure of the presidential office, specifically, from the fact of one rather than multiple Presidents and from the relative lack of constitutional specificity as to how the President must carry out his tasks. *Id*. Yet Articles I and II leave it to the legislature to activate and to contain these features. As Professor Prakash explains, the President has no budgetary entitlements beyond what Congress grants him, even though, "[w]ithout a steady and sufficient supply of funds, the President cannot possibly satisfy his constitutional duties or fulfill the promise of his executive powers." Prakash, *supra*, at 1154.

Congress also has the sole power to create and maintain the armed forces and thus to make the President the "Commander-in-Chief . . . of absolutely no one from time to time." *Id*. at 1157–59. And only Congress can "staff[] the Executive Department" by creating and funding various agencies, offices, and officers, despite the President's obvious need for such assistance. *Id*. at 1159–64. How then, "can we believe that the President has either an inherent or a penumbral right to secret communications? . . . [C]onstitutional structure makes clear that [even more important presidential means] are *completely* left to Congress to provide." *Id*. at 1163 (emphasis added).

Second, it is hardly a coincidence that the President, with his deep capacities for "secrecy, vigor and dispatch," is beholden to Congress to activate or to limit those capacities. The Constitution creates a framework wherein Congress's extensive policy-setting authority is matched by procedural constraints that keep that authority in check. These constraints include requirements that make the legislative process arduous, dialogue-driven, and relatively transparent. When it comes to the presidency, the Constitution strikes the balance between liberty and efficacy differently. Unlike the legislature, the President can act efficiently and secretly. But the President's use of these capacities is subject to legislative limits. Absent this constitutional constraint, there would be little to stop the abuse of Presidential capacities. The President's capacity for secrecy, for example, can be used (and historically has been used) to cloak activities that work against the interests and liberties of the people. Boundaries set through the relatively liberty-enhancing legislative process are a crucial means to protect against such abuses.

Third, it is noteworthy that the only explicit textual reference to secrecy is in Article I, § 5, of the Constitution, which requires Congress to keep journals of its proceedings, but allows each chamber to exempt "'such Parts as may in their Judgment require Secrecy.'" U.S. CONST. art. I, § 5, cl. 3. The uniqueness of this textual contemplation of secrecy reflects a constitutional structure that permits secrecy only under conditions that mitigate its risks. "The very framing of the

congressional secrecy provision as an exception to an openness mandate, combined with [a logical and historical] expectation that a large and deliberative legislative body generally will operate in sunlight . . . suggests a framework wherein final decisions as to political secrecy are trusted only to bodies likely to face internal and external pressures against such secrecy." *See* Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 523–24 (2007).

A presidential privilege of secrecy against legislative constraints poses precisely the dangers to liberty against which the Constitution guards. It thus is no surprise that the Constitution explicitly privileges exceptional instances of congressional secrecy, but makes no mention of a Presidential secrecy privilege.

ii. History Bolsters the Understanding That Executive Secrecy is Subject to Legislative Controls

History also supports the understanding that presidential secrecy must be subject to legislative checks. Indeed, the two *Federalist* essays typically cited to support a presidential privilege to keep secrets indicate that the President's *capacity* to keep secrets, while an advantage of the office, must be subject to inter-branch checks. In the first, Alexander Hamilton wrote that the advantages of a unitary President (as opposed to a council of co-Presidents) include enhancement of the important qualities of "[d]ecision, activity, secrecy, and dispatch." THE FEDERALIST NO. 70, at 424 (Clinton Rossiter ed., 1961) (Alexander Hamilton). Yet

Hamilton followed this point by approvingly citing the enhanced transparency of a unitary President. He observed that "multiplication of the executive adds to the difficulty of detection," including the "opportunity of discovering [misconduct] with facility and clearness." One person "will be more narrowly watched and most readily suspected." *Id*. at 427–30. Similarly, in a separate essay, John Jay linked the virtues of the President's capacity for secrecy with the ability of other actors to check presidential abuses. Jay lauded the President's capacity for secrecy in treaty negotiations. Yet he assured that any corrupt negotiations would be uncovered and checked through oversight, including by Congress and the international community. *See* THE FEDERALIST NO. 64, *supra*, at 395–96 (John Jay).

The linkage between the President's capacity for secrecy and the capacity of others to oversee him is echoed by other ratification era statements. For example, as William Davie explained in the North Carolina ratification debate:

> With respect to the unity of the Executive, the superior energy and secrecy wherewith one person can act, was one of the principles on which the Convention went. But a more predominant principle was, the more obvious responsibility of one person. It was observed that, if there were a plurality of persons, and a crime should be committed, when their conduct was to be examined, it would be impossible to fix the fact on any one of them, but that the public were never at a loss when there was but one man.

3 THE RECORDS OF THE FEDERAL CONVENTION, *supra*, at 347.

Those who wrote and ratified the Constitution understood that the great capacities accorded the President — including his capacity for secrecy — create

serious risks of abuse. They thus carefully linked these capacities with inter-branch constraints. This care is reflected in a Constitutional framework that accords the President substantial capacities but subjects them to legislative constraints. Thus, even if the state secrets privilege stems partly from Article II values, Congress can override it through legislation that courts can enforce.

II. EVEN IF CONGRESS HAS NOT GENERALLY DISPLACED THE STATE SECRETS PRIVILEGE IN CASES INVOLVING ELECTRONIC SURVEILLANCE, THE DISTRICT COURT CORRECTLY DENIED THE GOVERNMENT'S MOTION TO DISMISS

a. As Noted Above, the State Secrets Privilege Derives from the Common Law, and Suggestions That the Judiciary Lacks the Prerogative or Capacity to Reject its Application Are Patently Erroneous

As the Supreme Court has explained,

> Rule 501 of the Federal Rules of Evidence authorizes federal courts to define new privileges by interpreting "common law principles . . . in the light of reason and experience." The authors of the Rule borrowed this phrase from our opinion in *Wolfle* v. *United States*, 291 U.S. 7, 12 (1934), which in turn referred to the oft-repeated observation that "the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions." *Funk* v. *United States*, 290 U.S. 371, 383 (1933). . . . The Rule thus did not freeze the law governing the privileges of witnesses in federal trials at a particular point in our history, but rather directed federal courts to "continue the evolutionary development of testimonial privileges."

Jaffee v. Redmond, 518 U.S. 1, 8–9 (1996) (additional citations and footnotes omitted).

Just as Rule 501 bestows upon courts the power to recognize new evidentiary privileges, as in *Jaffee*, *see, e.g.*, *Northwestern Mem. Hosp. v. Ashcroft*, 362 F.3d 923, 926–27 (7th Cir. 2004) (Posner, J.), it necessarily recognizes the judiciary's authority — and responsibility — to carefully police the limits of such privileges. Indeed, the Supreme Court has noted that it is "especially reluctant to recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself." *Univ. of Pa. v. EEOC*, 493 U.S. 182, 189 (1990). And the case law provides its own examples of courts *rejecting* applicability of the state secrets privilege where Congress has otherwise provided a cause of action. *See, e.g.*, *Halpern*, 258 F.2d 36. Thus, there is simply no question that the district court had the authority to reject blanket applicability of the privilege in this case.

b. The Precedent Recognizing A Blanket Privilege is Extremely Narrow in Application and Readily Distinguishable From This Case

The district court was also correct to reject the blanket applicability of the privilege in this case. Although *Totten v. United States*, 92 U.S. 105 (1876), and *Tenet v. Doe*, 544 U.S. 1 (2005), both sustained pre-discovery dismissal, those cases recognized the exceedingly narrow circumstances where such dismissal is warranted — *i.e.*, where "alleged spies" bring claims and "success depends upon the existence of their secret espionage relationship with the government." *Tenet*,

544 U.S. at 9; *see also Hepting v. AT&T*, 439 F. Supp. 2d 974, 993 (N.D. Cal. 2006) ("[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. Indeed, most cases in which the "very subject matter" was a state secret involved classified details about either a highly technical invention or a covert espionage relationship.").

As Chief Justice Rehnquist repeatedly emphasized in *Tenet*, the central fact in *Totten* was the existence *vel non* of a covert espionage agreement between Totten and President Lincoln. *See, e.g.*, *Tenet*, 544 U.S. at 3 (describing *Totten* as establishing the "longstanding rule . . . prohibiting suits against the Government based on covert espionage agreements") Thus, in *Tenet*, the Court held that a lawsuit alleging that the CIA had reneged on an agreement with two individuals who alleged that they were Cold War spies could not proceed, because the lawsuit was based on the alleged spies' own covert espionage agreement with the government. *See id*. at 8–11.

In marked contrast to *Totten* and *Tenet*, "this case focuses only on whether AT&T intercepted and disclosed communications or communication records to the government. . . . [S]ignificant amounts of information about the government's monitoring of communication content and AT&T's intelligence relationship with the government are already nonclassified or in the public record." *Hepting*, 439 F.

Supp. 2d at 994. As such, *Totten* and *Tenet* simply have no applicability here, and the district court correctly denied the government's motion to dismiss.

c. The Judiciary Must Carefully Assess any State Secrets Claims That Fall Outside of the Blanket Privilege; To Do Otherwise Would Provide an Automatic Shield for Unlawful Government Action

As the district court correctly recognized, "it is certainly possible that AT&T might be entitled to summary judgment at some point if the court finds that the state secrets privilege blocks certain items of evidence that are essential to plaintiffs' prima facie case or AT&T's defense." *Hepting*, 439 F. Supp. 2d at 995. But it is absolutely vital to the separation of powers — and to the courts' institutional prerogative — that such a determination be made by the district court *after* a full and unfettered opportunity for the district court to review all relevant materials, even those that must be considered *in camera* and/or *ex parte*.

We need not speculate as to the potential danger of judicial deference to sweeping invocations of the state secrets privilege. As numerous commentators have pointed out, there are serious questions as to the propriety of the government's invocation of the state secrets privilege in *Reynolds* itself. *See generally* LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE *REYNOLDS* CASE (2006). Although the Third Circuit concluded in 2005 that there was insufficient proof that the government had perpetrated a fraud upon the courts, *see Herring v. United States*, 424 F.3d 384 (3d

Cir. 2005), *cert. denied*, 126 S. Ct. 1909 (2006), the court recognized that the standard for establishing fraud was "demanding," and that the plaintiffs could not carry their burden merely by establishing that government witnesses committed perjury. *See id*. at 390.

Reference to the disturbing questions that have arisen with respect to the nature of the state secrets at issue in *Reynolds* is not meant to call the Supreme Court's decision therein into question, but rather to emphasize the importance of meaningful and rigorous judicial scrutiny of government invocations of the state secrets privilege. Thus, although "the critical feature of the inquiry in evaluating the claim of privilege is *not* a balancing of ultimate interests at stake in the litigation," *Halkin v. Helms*, 690 F.2d 977, 990 (D.C. Cir. 1982) (emphasis added), it is incumbent upon the judiciary unequivocally to *require* a showing that "the harm that might reasonably be seen to flow from disclosure is adequate in a given case to trigger the absolute right to withhold the information sought in that case." *Id*. Put differently, although the case law interpreting the privilege does not empower courts to balance the competing interests, that does not relieve courts of their independent authority — and, given the absolute nature of the privilege, responsibility — to scrutinize governmental claims to the privilege with as much rigor as is possible, under the circumstances. That is all that Judge Walker did below.

Any less-rigorous standard would risk turning the state secrets privilege into an automatic shield for unlawful governmental action, an outcome the Supreme Court pointedly and emphatically rejected in *Reynolds*. More to the point, in *Reynolds*, there was no allegation that the government had acted unlawfully; the plaintiffs' central claim was that the accident resulted from negligence. Here, plaintiffs allege an ongoing series of unconstitutional actions by the government against U.S. citizens within the United States. To pretermit judicial consideration of claims implicating such fundamental individual liberties would be to confer upon the government the very "blank check" in the name of fighting the "war on terrorism" that the Supreme Court has emphatically disclaimed. *See Hamdan*, 126 S. Ct. at 2799 (Breyer, J., concurring); *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion).

d. Unchecked Executive Branch Secrecy Itself Can Deeply Endanger National Security and Foreign Relations

It also bears emphasizing that national security can be risked not only by too much disclosure, but by too much secrecy. Countless executive branch officials, legislatures, journalists and historians have observed and commented on this phenomenon. In the ongoing debate over Iraq, for example, it now is acknowledged that obsessive White House secrecy created an insular culture of "groupthink," *see, e.g.*, Barbara Ehrenreich, *All Together Now*, N.Y. TIMES, July 15, 2004, at A23, in which questionable data on weapons of mass destruction were

embraced while predictions of a peaceful post-invasion Iraq similarly went unquestioned.[1]

Similar concerns have been raised about the negative impact of secrecy on homeland security both prior to and in the wake of September 11. "Thomas H. Kean, chairman of the Sept. 11 commission and a former Republican governor of New Jersey said the failure to prevent the 2001 attacks was rooted not in leaks of sensitive information but in the barriers to sharing information between agencies and with the public."[2] Moreover, congressional investigators have observed that "CIA and National Security Agency reports regarding the terrorist threat to the United States [prior to September 11th] were so highly classified that they were not even made available to FBI agents in the field who might have been able to act on them." Steven Aftergood, *The Bush Administration's Suffocating Secrecy*, FORWARD, Mar. 28, 2003, at 9. And concerns have been raised that the rush to hide yet more information in the wake of September 11 will prove counter-productive

1. *See, e.g.*, Alasdair Roberts, *National Security and Open Government*, 9 GEO. PUB. POL'Y REV. 69, 75 (2004); Andrew Rosenthal, *Decoding the Senate Intelligence Committee Investigation on Iraq*, N.Y.TIMES, July 18, 2004, § 4, at 12; Ron Suskind, *Without a Doubt*, N.Y. TIMES, Oct. 17, 2004, § 6 (Magazine), at 44.
2. Scott Shane, *Since 2001 (Sharp) Increase in the Number of Documents Classified by the Government*, N.Y. TIMES, July 3, 2005, § 1; *see also* Editorial, *The Dangerous Comfort of Secrecy*, N.Y. TIMES, July 12, 2005, at A20.

to the public good, keeping the public in the dark about everything from nuclear safety risks to the diminution of civil liberties.[3]

Comparable analyses about more distant historical events abound. James C. Thompson, who served in the Kennedy and Johnson Administrations during the Vietnam War, posed the question: "How did men of superior ability, sound training, and high ideals — American policy-makers of the 1960s — create such costly and divisive policy?" James C. Thompson, Jr., *How Could Vietnam Happen?*, THE ATLANTIC, Apr. 1968, at 47–53, *available at* http://www.echeat.com/essay.php?t=25543. Thompson attributed the situation partly to massive government secrecy that prevented executive branch specialists from engaging in informed analysis and debate. *See id.* Similarly, Daniel Patrick Moynihan, in his extensive study of government secrecy in the United States, chronicles profound misunderstandings by the United States of the nature of the military and strategic threats posed by the Soviet Union throughout the Cold War. *See generally* DANIEL PATRICK MOYNIHAN, SECRECY (1998) Moynihan attributes these misunderstandings and subsequent strategic missteps largely to government secrecy. *See id*.[4]

3. *See, e.g.*, Roberts, at 77–82; Trudy Lieberman, *Homeland Security: What We Don't Know Can Hurt Us*, COLUM. JOURN. REV., Sept./Oct. 2004, at 24; Charlie Savage, *In Terror War's Name, Public Loses Information*, BOSTON GLOBE, Apr. 24, 2005, at A1; Editorial, *The Costs of Secrecy*, WASH. POST, Apr. 18, 2005, at A16.

4. These examples of dangerous secrecy also are discussed in Kitrosser, *supra*, at 537–41.

e. Application of the State Secrets Privilege To This Case Would Gravely Endanger the Separation of Powers

Lastly, although the above analysis suggests in specific terms why the district court correctly denied the government's motion to dismiss, it is important to step back and consider the potential impact that reversal would have on the separation of powers. The Supreme Court has long recognized the need to preserve essential judicial functions, and has protected the institutional prerogative of the courts from extrajudicial encroachment throughout its history, from *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), in which Chief Justice Marshall famously invalidated a statute expanding the Court's original jurisdiction, through modern times, where the Court has consistently interpreted statutes to avoid the grave constitutional questions that might arise if the statute divested the Court of jurisdiction over constitutional claims. *See, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 301 n.13 (2001).

The Supreme Court has also taken an increasingly skeptical view toward attempts to restrict the scope of constitutional arguments that can be presented in lawsuits. In *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), for example, the Court invalidated on First Amendment grounds a statute that prohibited recipients of federal legal services funds from engaging in representation challenging the validity of existing welfare laws. As Justice Kennedy explained,

> Section 504(a)(16) sifts out cases presenting constitutional challenges in order to insulate the Government's laws from judicial inquiry. If the restriction on speech and legal advice were to stand, the result would be two tiers of cases. In cases where LSC counsel were attorneys of record, there would be lingering doubt whether the truncated representation had resulted in complete analysis of the case, full advice to the client, and proper presentation to the court. . . . A scheme so inconsistent with accepted separation-of-powers principles is an insufficient basis to sustain or uphold the restriction on speech.

Id. at 546. Of course, *Velazquez* does not call the state secrets privilege into question, but it does reaffirm that the "judicial function," and therefore the proper separation of powers, are implicated whenever courts are not presented with the full subject-matter of a dispute. That is to say, the separation of powers mandates that the state secrets privilege be applied no broader than is absolutely necessary to protect state secrets. Thus, even if Congress has not displaced the privilege in lawsuits challenging electronic surveillance, the privilege must be narrowly construed to as to avoid the serious affront to the separation of powers that would otherwise result.

CONCLUSION

For the foregoing reasons, the district court's denial of the government's motion to dismiss should be affirmed.

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May 2, 2007

CERTIFICATION OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(c) AND CIRCUIT RULE 32-1 FOR CASE NOS. 06-17132 AND 06-17137

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 6992 words. This certificate was prepared in reliance on the word count feature of the word-processing system (Microsoft Word) used to prepare this brief.

STEPHEN I. VLADECK

CERTIFICATE OF SERVICE

I hereby certify that, on this 1st day of May, 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:

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