

# Hepting v. AT&T

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**Hepting v. AT&T** is a United States class action lawsuit filed in January 2006 by the Electronic Frontier Foundation (EFF) against the telecommunications company AT&T, in which the EFF alleges that AT&T permitted and assisted the National Security Agency (NSA) in unlawfully monitoring the communications of the United States, including AT&T customers, businesses and third parties whose communications were routed through AT&T's network, as well as Voice over IP telephone calls routed via the Internet.

The case is separate from, but related to, the NSA warrantless surveillance controversy, in which the federal government agency bypassed the courts to monitor U.S. phone calls without warrants. Hepting v. AT&T does not include the federal government as a party.

In July 2006, the United States District Court for the Northern District of California – in which the suit was filed – rejected a federal government motion to dismiss the case. The motion to dismiss, which invoked the State Secrets Privilege, had argued that any court review of the alleged partnership between the federal government and AT&T would harm national security.

The case was immediately appealed to the Ninth Circuit. It was dismissed on June 3, 2009, citing retroactive legislation in the Foreign Intelligence Surveillance Act.<sup>[1][2]</sup>

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## Background and allegation

It is alleged in the lawsuit that in 2002-2003, AT&T permitted and assisted the NSA to install a NarusInsight system in its San Francisco switching center, which was capable of monitoring billions of bits of Internet traffic a second, including the playback of telephone calls routed on the Internet, and thus in effect spying upon the entirety of the communication of many or all American citizens and businesses who use the Internet.

A former AT&T engineer, Mark Klein, attested that a supercomputer built by Narus was installed for the purpose, and that similar systems were also installed in at least Seattle, San Jose, Los Angeles and San Diego. *Wired News* states (<http://www.wired.com/news/technology/0,70619-0.html>) Klein said he came forward "because he does not believe that the Bush administration is being truthful about the extent of its extrajudicial monitoring of Americans' communications":

"Despite what we are hearing, and considering the public track record of this administration, I simply do not believe their claims that the NSA's spying program is really limited to foreign communications or is otherwise consistent with the NSA's charter or with FISA [...]. And unlike the controversy over targeted wiretaps of individuals' phone calls, this potential spying appears to be applied wholesale to all sorts of Internet communications of countless citizens."

The EFF alleges in the suit that AT&T also allowed the NSA to data-mine hundreds of terabytes of client records which included detailed transaction records such as domestic numbers dialed since 2001, and all Internet addresses visited, as well as other content. The EFF's attorney Kevin Bankston states:

"Our goal is to go after the people who are making the government's illegal surveillance possible [...]. They could not do what they are doing without the help of companies like AT&T. We want to make it clear to AT&T that it is not in their legal or economic interests to violate the law whenever the president asks them to."

In its Amended Complaint, the EFF seeks injunctive relief against AT&T continuing such surveillance and damages allowed under the Foreign Intelligence Surveillance Act (FISA), the Communications Assistance for Law Enforcement Act, and other U.S. laws. It also seeks aggregated damages under each of four laws. These would exceed \$100,000 for each instance of surveillance,<sup>[3]</sup> creating potentially ruinous liability for AT&T, considering the EFF's claims about the scope of AT&T's cooperation.

## Litigation

AT&T objected to the filing of the documents supporting the case on the grounds they were trade secrets or might compromise the security of its network. The EFF speculated that the federal government would invoke the State Secrets Privilege to bar the entire lawsuit from being heard, but added: "If state secrecy can prevent us from preserving the rights of millions upon millions of people, then there is a profound problem with the law."

EFF's speculation proved accurate when the government indicated, in an April 28 Statement of Interest ([http://www.eff.org/legal/cases/att/USA\\_statement\\_of\\_interest.pdf](http://www.eff.org/legal/cases/att/USA_statement_of_interest.pdf)) in the case, that it intended to invoke the State Secrets Privilege in a bid to dismiss the action. The

Justice Department filed its motion to dismiss on May 15, 2006. On July 20, however, Chief Judge Vaughn R. Walker of the United States District Court for the Northern District of California rejected the federal motion (<http://www.nytimes.com/2006/07/21/washington/21data.html?ex=1311134400&en=8fffb6c71ba705d8&ei=5090&partner=rssuserland&emc=rss>), holding that "[t]he government has opened the door for judicial inquiry by publicly confirming and denying material information about its monitoring of communications content."

## Current status

In his decision not to dismiss the case Judge Walker certified the case for immediate appeal, and the government and AT&T both appealed to the Ninth Circuit. The case was argued in August 2007.<sup>[4]</sup>

In July 2008, Congress passed, and on July 10, 2008, President George Bush signed, the FISA Amendments Act, which granted retroactive immunity to telecommunications companies for past violations of FISA.<sup>[5]</sup> Before any Ninth Circuit decision, the case was returned to the District Court "[i]n light of the FISA Amendments Act of 2008."<sup>[6]</sup> In September 2008, Attorney General Michael Mukasey filed a certification<sup>[7]</sup> pursuant to Section 802 of the FISAAA and the government moved to dismiss the Hepting litigation.

The Hepting plaintiffs opposed the motion to dismiss,<sup>[8]</sup> asserting that the FISA Amendments Act's retroactive immunity provision was unconstitutional. Judge Walker heard oral arguments on December 2, 2008, and took the matter under submission.<sup>[9]</sup>

The case was dismissed on June 3, 2009 by Judge Walker,<sup>[11]</sup> citing retroactive legislation (section 802 of FISA) stating that

in the case of a covered civil action, the assistance alleged to have been provided by the electronic communication service provider was in connection with an intelligence activity involving communications that was authorized by the President during the period beginning on September 11, 2001, and ending on January 17, 2007; designed to detect or prevent a terrorist attack, or activities in preparation for a terrorist attack, against the United States; and the subject of a written request or directive, or a series of written requests or directives, from the Attorney General or the head of an element of the intelligence community (or the deputy of such person) to the electronic communication service provider indicating that the activity was authorized by the President; and determined to be lawful.

[2]

## Related issues

- The American Civil Liberties Union has also sued the NSA for its wiretapping program, as well as drawing attention to federal government spying programs on "grassroots groups." See *ACLU v. NSA* and the web page on ACLU site (<http://www.aclu.org/safefree/nsaspying/index.html>).
- On February 5, 2006, USA Today ran a further story that, according to seven telecommunications executives, NSA had secured the cooperation of the main telecommunications companies in charge of international phone-calls, including AT&T, MCI and Sprint, in its efforts to eavesdrop without warrants on international calls.<sup>[10]</sup>

## See also

- President's Surveillance Program
- Communications Assistance for Law Enforcement Act
- Foreign Intelligence Surveillance Act
- Lawful interception
- List of class action lawsuits
- Mass surveillance
- Privacy
- Room 641A
- SIGINT (Signals Intelligence)
- Telephone tapping
- Traffic analysis

## References

- <sup>1</sup> <sup>^</sup> <sup>a</sup> <sup>b</sup> **Hepting v. AT&T**, U.S. District Court ([http://www.eff.org/files/filenode/att/orderhepting6309\\_0.pdf](http://www.eff.org/files/filenode/att/orderhepting6309_0.pdf)) (U.S. District Court for the Northern District of California 3 June 2009).
- <sup>2</sup> <sup>^</sup> <sup>a</sup> <sup>b</sup> Bazan, Elizabeth B. (7 July 2008). "The Foreign Intelligence Surveillance Act: An Overview of Selected Issues" (<http://www.fas.org/sgp/crs/intel/RL34279.pdf>) (PDF). Congressional Research Service. <http://www.fas.org/sgp/crs/intel/RL34279.pdf>.
- <sup>3</sup> <sup>^</sup> Electronic Frontier Foundation's Amended Complaint ([http://www.eff.org/files/filenode/att/att\\_complaint\\_amended.pdf](http://www.eff.org/files/filenode/att/att_complaint_amended.pdf))
- <sup>4</sup> <sup>^</sup> Unofficial transcript of 9th Circuit hearing in Hepting v. AT&T ([http://www.eff.org/files/filenode/att/hepting\\_9th\\_circuit\\_hearing\\_transcript\\_08152007.pdf](http://www.eff.org/files/filenode/att/hepting_9th_circuit_hearing_transcript_08152007.pdf))
- <sup>5</sup> <sup>^</sup> Lichtblau, Eric (October 10, 2007). "Immunity Crucial in Talks on Eavesdropping Rules" (<http://www.nytimes.com/2007/10/10/washington/10nsa.html>). *The New York Times*. <http://www.nytimes.com/2007/10/10/washington/10nsa.html>. Retrieved May 4, 2010.
- <sup>6</sup> <sup>^</sup> Remand Order ([http://www.eff.org/files/filenode/att/uscaorder\\_917.pdf](http://www.eff.org/files/filenode/att/uscaorder_917.pdf))
- <sup>7</sup> <sup>^</sup> Certification of the Attorney General (<http://www.eff.org/files/filenode/AG-Cert.pdf>)

8. ^ Plaintiff's motion in opposition to motion to dismiss (<http://www.eff.org/files/filenode/att/immunityoppocorrected.pdf>)
9. ^ Wired News: "Feds to Judge: Don't 'Second Guess' Bush Domestic Spy Program," December 02, 2008 (<http://blog.wired.com/27bstroke6/2008/12/feds-to-judge-d.html>)
10. ^ Cauley, Leslie; Diamond, John (February 5, 2006). "Telecoms let NSA spy on calls" ([http://www.usatoday.com/news/washington/2006-02-05-nsa-telecoms\\_x.htm?POE=NEWSVA](http://www.usatoday.com/news/washington/2006-02-05-nsa-telecoms_x.htm?POE=NEWSVA)) . USA Today. [http://www.usatoday.com/news/washington/2006-02-05-nsa-telecoms\\_x.htm?POE=NEWSVA](http://www.usatoday.com/news/washington/2006-02-05-nsa-telecoms_x.htm?POE=NEWSVA). Retrieved July 28, 2009.

## External links

- The story, from Wired News

AT&T Sued Over NSA Eavesdropping, Jan 31 2006 (<http://www.wired.com/news/technology/0,70126-0.html>)  
 Whistle-Blower Outs NSA Spy Room, Apr 07 2006 (<http://www.wired.com/news/technology/0,70619-0.html>)  
 AT&T Seeks to Hide Spy Docs, Apr 12 2006 (<http://www.wired.com/news/technology/0,70650-0.html>)

- Mark Klein's memo ([http://blog.wired.com/27BStroke6/att\\_klein\\_wired.pdf](http://blog.wired.com/27BStroke6/att_klein_wired.pdf))
- unredacted version of Mark Klein's memo (<http://cryptome.org/klein-decl.htm>) on Cryptome
- The lawsuit (PDF) (<http://www.eff.org/legal/cases/att/att-complaint.pdf>)
- The lawsuit (HTML) (<http://thewall.civiblog.org/rsf/att-complaint.html>) on thewall.civiblog.org
- eff.org (<http://www.eff.org/>)
- Judge Declines to Dismiss Privacy Suit Against AT&T, *The New York Times*, July 21, 2006 (<http://www.nytimes.com/2006/07/21/washington/21data.html?ex=1311134400&en=8fffb6c71ba705d8&ei=5090&partner=rssuserland&emc=rss>)
- ACLU page on NSA wiretapping and related issues (<http://www.aclu.org/safefree/nsaspying/index.html>)
- **Complaint:** (HTML) ACLU Complaint (Initial Filing) against the NSA Central Security Service and Lieutenant General Keith B. Alexander (<http://thewall.civiblog.org/rsf/aclu-nsa-complaint.html>) via thewall.civiblog.org, related litigation

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