IN THE

United States District Court

FOR THE DISTRICT OF NEW JERSEY

No. 06 Civ. 2683 (FLW-TJB)

THE UNITED STATES OF AMERICA,

Plaintiff,

v.

STUART RABNER, *in his official capacity as Attorney General of New Jersey,* **CATHLEEN O'DONNELL***, in her official capacity as Deputy Attorney General of New Jersey,* **STEPHEN B. NOLAN,** *in his official capacity as Acting Director of the New Jersey Division of Consumer Affairs,* **AT&T CORP., VERIZON COMMUNICATIONS INC., QWEST COMMUNICATIONS INTERNATIONAL, Inc., SPRINT NEXTEL CORPORATION,** *and* **CINGULAR WIRELESS LLC,**

Defendants.

BRIEF OF AMICUS CURIAE PUBLIC ADVOCATE OF NEW JERSEY IN OPPOSITION TO PLAINTIFF UNITED STATES OF AMERICA'S MOTION FOR SUMMARY JUDGMENT AND IN FURTHER SUPPORT OF THE NEW JERSEY ATTORNEY GENERAL'S MOTION TO DISMISS

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PRELIMINARY STATEMENT

Amicus curiae, the Public Advocate of New Jersey, respectfully submits this brief in opposition to Plaintiff United States of America's motion for summary judgment and in further support of the New Jersey Attorney General's motion to dismiss.

SUMMARY OF ARGUMENT

The United States' bold assertion that it enjoys a free-wheeling non-statutory cause of action against all whose actions it seeks to challenge should be roundly rejected. Only Congress may determine whether such a civil cause of action should exist, and since it has not done so, this action should be dismissed for failure to state a cognizable claim. (Point I).

Even if the Court reaches the merits of the United States' claim, there are no grounds for preemption in this case. Federal law does not defeat the power of the Attorney General of New Jersey to issue and enforce subpoenas in accordance with New Jersey law. No act of Congress purports to supplant the traditional police power of the states, and without Congressional authorization, no agency of the federal executive branch is empowered to preempt state law on its own. (Point II).

The "state secrets" evidentiary privilege has no applicability at this procedural juncture. The United States

should not be able both to assert the "state secrets" privilege as a shield and by that same action use it as a sword to seek summary judgment as a plaintiff. Such an extension of the state secrets privilege would immunize even unlawful conduct by the federal government. (Point III).

ARGUMENT

I. THE UNITED STATES' CLAIM TO THE UNBRIDLED POWER TO CREATE CIVIL CAUSES OF ACTION IN ITS FAVOR MUST BE REJECTED.

The United States makes the remarkable contention that "the United States possesses a non-statutory cause of action to vindicate federal interests in the federal courts." Plaintiff's Memorandum of Points and Authorities in Support of Its Motion for Summary Judgment, Sept. 8, 2006, at 7 (hereafter "USA Mem. at __"). Citing only the statute granting jurisdiction to the district courts to entertain civil cases in which the United States is the plaintiff, 28 U.S.C. § 1345, it further argues that "[N]o further authorization for this suit is needed and the United States may utilize the federal district courts to vindicate its proprietary or sovereign interests." Id.

It is difficult to overstate how ambitious this claim is. If it were to be accepted, then the United States, simply by virtue of the broad jurisdictional grant to the district courts under 28 U.S.C. § 1345, would be able to claim a correlative, and presumably equally broad power to invent substantive causes

of action in its favor without functional limitation and without the intervention of Congress. This contention is too extreme, and its results too inconsistent with separation of powers principles, to be countenanced.

A. A Cause of Action Cannot Be Implied Merely by a Grant of Jurisdiction.

There is of course a "distinction between the existence of subject matter jurisdiction and the existence of a cause of action." Airco Industrial Gases, Inc. Div. of BOC Group, Inc. v. The Teamsters Health and Welfare Pension Fund, 850 F.2d 1028, 1032 (3d Cir. 1988). Thus, the fact that Congress may have granted jurisdiction to the courts to hear a matter usually has no bearing on whether Congress intended to grant a civil cause of action to the plaintiff. See generally, Bell v. Hood, 327 U.S. 678 (1946) (discussing distinction between jurisdiction and existence of cause of action). As the Court restated recently in Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004):

> The general rule as formulated in [Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981)], is that "[t]he vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law." This rule applies not only to applications of federal common law that would displace a state rule, but also to applications that simply create a private cause of action under a federal statute.

Thus, the federal courts have squarely rejected the contention of the United States that the jurisdictional statute, 28 U.S.C. § 1345, by itself creates civil causes of action in its favor.

A substantive federal cause of action may be inferred from a grant of jurisdiction to the courts only in rare and exceptional circumstances. And in contrast to the power to fashion substantive law implied by a font of jurisdiction granted directly by the Constitution, such as admiralty and interstate controversies,[1] Amicus is aware of only one instance in which the Court has found that a federal cause of action was implied by a statutory grant of jurisdiction.[2] In Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957), the Court found

[1] It has long been recognized that the grant of admiralty jurisdiction to the federal courts implies with it the power to craft "federal admiralty law [i.e.] . . . a system of law coextensive with, and operating uniformly in, the whole country." See Moragne v. States Marine Lines, 398 U.S. 375, 402 (1970); Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917). And the Supreme Court has the power to fashion law governing litigation between states, implied through Article III's grant of jurisdiction over interstate controversies. See, e.g., Connecticut v. Massachusetts, 282 U.S. 660 (1931).

[2] In Sosa, the Court held out the theoretical possibility that the Alien Tort Statute, 28 U.S.C. § 1350, which grants jurisdiction to the district courts to hear tort actions brought by aliens for violation of the law of nations or treaties of the United States, would allow the courts to fashion civil remedies, but it limited those remedies to those that the common law would have provided for the modest number of international law violations with a potential for personal liability at the time, i.e. the year 1789, when the statute was adopted. Sosa, 542 U.S. at 724, 732. The Court therefore rejected plaintiff's cause of action since it was not recognized by the law of nations as it was known in the 18th century.

that Section 301 of the Labor Management Relations Act, which granted jurisdiction to hear disputes arising under collective bargaining agreements, implied the existence of a federal cause of action to enforce such agreements, supplanting existing state law governing contracts. Given the strong and express federal interest in promoting labor relations, Lincoln Mills is one of those "havens of specialty, . . . defined by express congressional authorization to devise a body of law directly." Sosa, 542 U.S. at 726 (referring to Lincoln Mills). Lincoln Mills therefore has no applicability to the current matter.

Moreover, in none of the specialized instances described above, in which the power to create a civil cause of action was implied through a grant of jurisdiction, did the courts actually create a cause of action out of whole cloth without any pre-existing legal predicates. Admiralty law and actions under the Alien Torts Statute merely recognize causes of action that already existed under the law of nations. Likewise, the law governing interstate controversies is not spontaneously invented, but is informed by existing state law. Connecticut v. Massachusetts, 282 U.S. at 670. And in Lincoln Mills, federal courts did not literally invent a cause of action for breach of a collective bargaining agreement, which was a legal construct obviously well-known under pre-existing state contract law, but

merely standardized that cause of action under a uniform federal rule of decision.

In contrast, the United States in this case asks the Court to recognize a hitherto unknown "one size fits all" cause of action whenever the United States is a civil plaintiff. Such a cause of action exists, the United States claims, whenever it seeks "to vindicate its proprietary or sovereign interests." USA Mem. at 7. As it is difficult to imagine situations in which the United States is not claiming to vindicate either its proprietary or sovereign interests, its argument amounts to a plea for a "wild card" cause of action whenever the courts, rather than Congress, can be convinced to recognize it.

B. The Separation of Powers Doctrine Limits the Ability of the Executive Branch To Invent Its Own Causes of Action.

The Supreme Court has often noted the superior competence of Congress in determining whether to create a civil cause of action. "[T]his Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004). And in a variety of contexts, the Court has deferred to "Congress' institutional competence in crafting appropriate relief" to determine whether a cause of action should exist. Correctional Services Corp. v. Malesko, 534 U.S. 61, 68 (2001) (declining to create negligence

action against private operator of halfway house for federal inmates); Bush v. Lucas, 462 U.S. 367, 389 (1983) ("Congress is in a far better position than a court to evaluate the impact of a new species of litigation between federal employees on the efficiency of the civil service"); Chappell v. Wallace, 462 U.S. 296, 304 (1983) (judicial creation of civil claim against military superior would be "plainly inconsistent with Congress' authority in this field").

The main source of support cited by the United States for its contention that it has free-wheeling authority to join with the federal courts to invent causes of action in its favor is In re Debs, 158 U.S. 564 (1895) (upholding federal injunction against Pullman strike of 1894), "and its progeny." USA Mem. at 7. Ascribing "progeny" to In re Debs, however, overstates its fecundity.[3] While Debs has not been expressly overruled, it has been explained in such a way as to render it irrelevant for purposes of the current case.[4] Thus, in United Steelworkers of

[3] As a matter of substantive law, Congress overrode In re Debs when it enacted the Norris-LaGuardia Act, 29 U.S.C. § 101 (proscribing federal court injunction in a case involving a labor dispute). And to the extent that In re Debs is cited for the power of the federal executive to intervene in private labor disputes, it was at least limited by Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[4] If it is necessary to resort to 19th century jurisprudence, then Amicus respectfully suggests that reference to United States v. San Jacinto Tin Co., 125 U.S. 273 (1888), is more helpful than reliance on Debs. In San Jacinto Tin, the

America v. United States, 361 U.S. 39 (1959), the Court, while acknowledging Debs' critics, noted cautiously that the "crux of the Debs decision, that the Government may invoke judicial power to abate what is in effect a nuisance detrimental to the public interest, has remained intact." Id. at 61. So understood and narrowed, the Court found that Debs stood for the unremarkable observation that the "judicial power to enjoin public nuisance at the instance of the Government has been a commonplace of jurisdiction in American judicial history." Id.

Whatever one may say about a subpoena issued by the attorney general of a sovereign state pursuant to the state's police powers, however, it is impossible to characterize it as a "public nuisance," as that term has been historically understood and applied. See generally, RESTATEMENT (SECOND) OF TORTS § 821B ("A public nuisance is an unreasonable interference with a right common to the general public"); United Steelworkers, 361 U.S. at 60 (noting traditional use of doctrine "to prevent nuisances to public harbours and public roads").

Court noted after extended discussion that, in the absence of a Congressionally created right of action, the United States could only "institute such a suit ... upon the same general principles which authorize a private citizen to apply to a court of justice for relief". Id. at 288. Thus, without statutory authorization, the only causes of action available to the United States are those that would exist under state common law or statute in favor of a similarly situated private party. No such cause of action is even alleged here.

The expansive reading of Debs urged by the United States was expressly presented to, and rejected by, our Court of Appeals in United States v. City of Philadelphia, 644 F.2d 187 (3d Cir. 1981). In City of Philadelphia, the district court had rejected an expansive reading of Debs that would permit the United States to bring a non-statutory cause of action to remedy alleged acts of brutality by a city police department.[5] Although Judge Gibbons argued vigorously and valiantly, with extended reference to Debs, that there existed "a broad Executive Branch right and duty to sue to protect the public interest," id. at 209, 216-17 (Gibbons, J., dissenting from denial of rehearing in banc), the Third Circuit nevertheless rejected that contention and dismissed the action by the United States for failure to state a claim.

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[5] As the district court noted:

> "[I]n most circumstances, civil injunctive suits brought by the Attorney General should be allowed only where they are authorized by an express statutory enactment. Any other approach would permit the executive branch to usurp the function of Congress, thereby doing great violence to the separation of powers doctrine. See Note, Nonstatutory Executive Authority to Bring Suit, 85 Harv. L. Rev. 1566, 1573-74 (1972)."

United States v. City of Philadelphia, 482 F. Supp. 1248, 1266-67 (E.D. Pa. 1979) (rejecting Debs as source of non-statutory authority for United States to bring suit), aff'd, 644 F.2d 187 (3d Cir. 1981).

In light of this history, it is misleading for the United States to cite Commonwealth of Pennsylvania v. Porter, 659 F.2d 306 (3d Cir. 1981) (en banc), in support of its broad license to assert non-statutory causes of action. See USA Mem. at 8.[6] First, it is important to note that there was no majority opinion in Porter. The opinion of Judge Gibbons, to which the United States cites, was subscribed to by only three out of the eight members of the court. 659 F.2d at 309. As Judge Garth noted in his opinion, City of Philadelphia, which had been decided only a few months prior to Porter, had "specifically rejected any notion that the Attorney General may sue to enjoin

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[6] Reference by the United States to other cases is similarly enigmatic. In United States v. Virginia, 139 F.3d 984 (4th Cir. 1998), the state attempted to impose its licensing requirements upon federal contractors. Since co-plaintiff was one of the individual investigators affected, however, and since, unlike the United States, a private person clearly may bring an action to challenge preempted state action under 42 U.S.C. § 1983, the issue presented here never arose. See Golden State Transit Corp. v. Los Angeles, 493 U.S. 103 (1989) (§ 1983 provides monetary remedy for claim of preemption); Shaw v. Delta Air Lines, 463 U.S. 85, 96 n.14 (1983).

In United States v. Colorado Supreme Court, 87 F.3d 1161 (10th Cir. 1996), the Tenth Circuit engaged in a fact-specific inquiry as to whether the plaintiff had successfully established "injury in fact" for purposes of Article III justiciability, and whether the United States could assert third-party standing to represent the interests of lawyers employed in the United States Attorney's Office to challenge application of the state's professional rules of conduct to federal prosecutors. By contrast, the issue presented in this case is not whether Article III standing exists or whether the United States may invoke the ius tertii doctrine, but rather whether Congress has authorized a cause of action in the first place.

widespread due process violations in the absence of an authorizing statute." Porter, 659 F.2d at 331.

At any rate, Porter is inapposite because it deals with the completely different issue of when a state attorney general may bring a parens patriae action to protect the interests of members of the community. Since the sovereign states, rather than the federal government, are the default successors to the common law parens patriae power, and also operate under a completely different statutory scheme than does the United States Attorney General, conclusions about the scope of authority of a state official to bring an action without statutory authorization have no bearing on this case. Judge Gibbons himself acknowledged this distinction, in the sentence immediately preceding the one quoted by the United States: "The presence or absence of an authorizing statute, however, bears not on the standing of the United States, an Article III issue, but on federal separation of powers concerns which are not implicated in this case." Porter, 659 F.2d at 316. Those separation of powers concerns, however, are exactly what is at issue in this case, and the absence of an authorizing statute is precisely the reason why the United States cannot maintain a civil cause of action without legislative authorization. United States v. Standard Oil Co., 332 U.S. 301, 316 (1947) (creating a cause of action in favor of the United States "would be

intruding within a field properly within Congress' control and as to a matter concerning which it has seen fit to take no action.").

The absence of Congressional authorization to initiate this lawsuit should, standing alone, be the definitive reason why it should be dismissed. As Justice Black noted in the Pentagon Papers case:

> The Government does not even attempt to rely on any act of Congress. Instead it makes the bold and dangerously far-reaching contention that the courts should take it upon themselves to "make" a law abridging freedom of the press in the name of equity, presidential power and national security, even when the representatives of the people in Congress have adhered to the command of the First Amendment and refused to make such a law.

New York Times Co. v. United States, 403 U.S. 713, 718 (1971) (Black, J., concurring) (emphasis added). The United States makes the same "bold and dangerously far-reaching contention" here. And as Justice Marshall warned in similarly stern terms:

> It would, however, be utterly inconsistent with the concept of separation of powers for this Court to use its power of contempt to prevent behavior that Congress has specifically declined to prohibit. There would be a similar damage to the basic concept of these co-equal branches of Government if when the Executive Branch has adequate authority granted by Congress to protect "national security" it can choose instead to invoke the contempt power of a court to enjoin the threatened conduct. The Constitution provides that Congress shall make laws, the President execute laws, and courts interpret laws. It did not provide for government by injunction in which the courts and the Executive Branch can "make law" without regard to the action of Congress. It may be more convenient for the Executive Branch if it need only

> convince a judge to prohibit conduct rather than ask the Congress to pass a law, and it may be more convenient to enforce a contempt order than to seek a criminal conviction in a jury trial. Moreover, it may be considered politically wise to get a court to share the responsibility for arresting those who the Executive Branch has probable cause to believe are violating the law. But convenience and political considerations of the moment do not justify a basic departure from the principles of our system of government.

Id. at 742-43 (emphasis added; citations omitted).

It is therefore unnecessary, and perhaps unwise, for this Court to consider the weighty constitutional issues raised by the substance of the United States' claim, when Congress has not seen fit to provide the Executive Branch with access to the judicial power. To do so would legitimate, in Justice Marshall's words, "a basic departure from the principles of our system of government."

II. THE UNITED STATES HAS NOT DEMONSTRATED THAT FEDERAL LAW PREEMPTS NEW JERSEY LAW AUTHORIZING THE ATTORNEY GENERAL TO ISSUE AND ENFORCE SUBPOENAS.

If this Court should feel it necessary to address the substantive issue of whether federal law preempts the powers of the Attorney General of this State (but see, supra Point I), then it must approach that question informed by the usual heavy presumption against federal preemption of state sovereign prerogatives. It is fundamental that a federal agency "literally has no power to act, let alone to preempt the validly

enacted legislation of a sovereign state, unless Congress confers power on it." Louisiana Public Service Comm'n v. F.C.C., 476 U.S. 355, 374 (1986). Moreover, any statute authorizing preemption must speak with a loud voice. As the Supreme Court held in Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991) (quoting Will v. Michigan Dep't of State Police, 491 U.S. 58, 65 (1989)(internal citations omitted)):

> If Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute." Congress should make its intention "clear and manifest" if it intends to preempt the historic powers of the States . . . . "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."

The Court continued: "This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." Ashcroft, 501 U.S. at 461.

Thus, a federal statute preempts a state statute only: (1) when it contains an explicit preemption provision ("express" preemption), see Louisiana Public Service Comm'n, 476 U.S. at 368-69 (citing Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)); (2) where Congress has legislated so thoroughly across a field "as to make reasonable the inference that Congress left

no room for the States to supplement it . . ." ("field" preemption), see id. (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)); or (3) if a conflict exists between a state law and a federal statute that address the same general subject area ("conflict" preemption), see Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n, 461 U.S. 190, 204 (1983).

Here, the Attorney General of New Jersey, acting pursuant to powers granted him by the New Jersey Legislature to investigate possible violations of the state Consumer Fraud Act, N.J.S.A. §§ 56:8-3, 56:8-4, has merely issued subpoenas to private companies subject to regulation by the state, to determine whether violations of the Act, or of New Jersey's substantive privacy law, may have occurred. Although the subpoenas issued by the New Jersey Attorney General may not literally so state,[7] the public context of this controversy obviously implies that the State is interested in whether individual call information was disclosed by the co-defendant

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[7] If there is an issue as to whether the administrative subpoenas issued by the Attorney General should be narrowed in scope or instead enforced as issued, then that is all the more reason why this Court should abstain under Younger v. Harris, 401 U.S. 37 (1971), and Burford v. Sun Oil Co., 319 U.S. 315 (1943). It is the Superior Court of New Jersey, rather than the United States District Court, that is the proper forum to apply the jurisprudence developed under N.J. Ct. R. 1:9-6 (Enforcement of Subpoena of Public Officer or Agency), in order to determine the subpoena's proper reach. See Brief Of Amicus Curiae Public Advocate Of New Jersey In Support Of Defendant Attorney General Of New Jersey's Motion To Dismiss at 24-29 (Sept. 8, 2006).

telephone companies without a warrant or judicial approval required under federal law applicable to "pen register" information.

The United States has failed to demonstrate in this case any plain statement of Congress' intention to override the New Jersey Attorney General's exercise of the traditional police powers of the state, nor has it demonstrated how the Attorney General's subpoena interferes with any lawful use of federal law enforcement or national security powers.

A. Federal Law Cannot Preempt Inquiry by the New Jersey Attorney General into Activity That Is Not Permitted Under Federal Law.

It is of course premature to suggest factual findings as to whether, or to what extent, the alleged NSA call database described in the media actually exists, and the extent to which data may have been procured without a judicial warrant. The very point of the subpoenas at issue here was to inquire into that matter, and the task before this Court is merely to determine whether those subpoenas were validly issued, not to predict what evidence those subpoenas may adduce. Nevertheless, since the brief of the United States asserts interference with the activity of the NSA as the basis for preemption, it is instructive to describe what the lawful activity of the NSA might be.

The Pen Register Act, 18 U.S.C. § 3121 et seq., prescribes the circumstances under which "pen register" devices or processes may be implemented.[8] The Act specifically provides:

> Except as provided in this section, no person may install or use a pen register or a trap and trace device without first obtaining a court order under section 3123 of this title [18 USCS § 3123] or under the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.).

18 U.S.C. § 3121(a). Moreover, the Act requires that the federal attorney making application for such a court order must certify in writing and under oath to: (1) the identity of the attorney for the Government making the application and the identity of the law enforcement agency conducting the investigation; and (2) that the information likely to be obtained is relevant to an ongoing criminal investigation being conducted by that agency. Similarly, the Foreign Intelligence

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[8] 18 U.S.C. § 3127(3) defines "pen register" as:

> a device or process which records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted, provided, however, that such information shall not include the contents of any communication, but such term does not include any device or process used by a provider or customer of a wire or electronic communication service for billing, or recording as an incident to billing, for communications services provided by such provider or any device or process used by a provider or customer of a wire communication service for cost accounting or other like purposes in the ordinary course of its business.

Surveillance Act of 1978 (FISA), 50 U.S.C. § 1801 et seq., requires an application under oath attesting to no less than eleven qualifying conditions. 50 U.S.C. § 1804(a)(1) to (11).

The United States does not refer in its brief to the Pen Register Act, nor to FISA, 50 U.S.C. § 1842, where the use of pen registers is addressed in the context of foreign intelligence and international terrorism investigations. Consistent with the Pen Register Act, FISA requires an applicant for a court order allowing surveillance to provide information regarding the purpose of the investigation and the persons to be investigated. The applicant must also certify that the information likely to be obtained is foreign intelligence information not concerning a "United States person."

The point of traversing the provisions of the Pen Register Act and of FISA is not to speculate, at least before this Court, on what activity the NSA or the telephone companies may or may not have undertaken. Again, that is a question the subpoenas themselves were intended to address. But if federal law requires a court order when the government tracks outgoing and incoming calls through the use of a pen register placed on the telephone of a person under suspicion, at least as much is necessary if the United States were to seek the very same information from telephone companies about potentially millions of New Jersey citizens. For purposes of determining as a matter

of law whether state police power has been preempted, these statutes demarcate the territory that Congress has claimed for federal supremacy, and conversely also define the area in which Congress has not authorized such surveillance. To the extent that the Attorney General's subpoenas probe the latter area, they cannot be said to have been preempted by Congress, which went to great pains to abjure such activity. Since there is no federal law authorizing the NSA's alleged actions, there is nothing to support the government's claim of preemption.

B. The Statutes and Executive Orders the United States Cites Do Not Support Its Actions or Its Claim of Preemption.

The statutes and executive orders cited by the United States in its brief to this Court do not support its position. The United States claims that "various federal statutes and Executive Orders govern and regulate access to information relating to foreign intelligence gathering." Complaint ¶ 15. None of the statutes and orders cited in the Complaint, however, supports the United States' arguments either in the portions quoted or in their entirety.

The brief filed by the United States cites to executive orders as authority for the database program and as a basis for preemption, but executive orders, in and of themselves, do not preempt state law. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). It is only when executive orders are

necessary as a means of carrying out federal laws that they can preempt state law. Cf. Fidelity Federal Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 154 (1982) (administrative regulations may preempt state law when Congress has delegated that rule-making power). In Youngstown, the President attempted by executive order to seize a steel factory during the Korean War, when a strike by steel workers would affect national security. The Court affirmed the district court's injunction restraining the seizure of the steel factory, finding that the executive order was not within the President's Constitutional authority.

> The essence of our free Government is "leave to live by no man's leave, underneath the law" -- to be governed by those impersonal forces which we call law. Our Government is fashioned to fulfill this concept so far as humanly possible. The Executive, except for recommendation and veto, has no legislative power. The executive action we have here originates in the individual will of the President and represents an exercise of authority without law. No one, perhaps not even the President, knows the limits of the power he may seek to exert in this instance and the parties affected cannot learn the limit of their rights. We do not know today what powers over labor or property would be claimed to flow from Government possession if we should legalize it, what rights to compensation would be claimed or recognized, or on what contingency it would end. With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.

Id. at 654. Insofar as the United States relies in this case on Executive Orders 13292 and 12968, those orders

cannot preempt state action to enforce the subpoenas because the orders are pure expressions of executive will, unsupported by any act of Congress.

Even those executive orders cited by the United States that do rest on federal law fail to support its case, and the statutes cited provide no better basis for the program in question. The United States asserts that 50 U.S.C. § 403-1(i)1 confers upon the Director of National Intelligence the authority and responsibility to protect intelligence sources and methods from unauthorized disclosure. Complaint ¶ 16. In the context of the entire statute, however, it becomes clear that this is the basic language of an enabling statute which describes the organizational structure of the agency. No part of this statute confers the authority to designate information as "classified" in response to a State's inquiry into activities that may violate the law.

The United States then cites to 18 U.S.C. § 798 in support of the assertion that it is a felony for any person to divulge classified information "concerning the communication intelligence activities of the Unites States" to any person who has not been authorized to receive it. Complaint ¶ 17. The United States does not assert, however, that the employees of the common carriers in question have any level of authorization

to handle classified materials as per 18 U.S.C. § 798 or executive order 12958, both of which articulate the process of classifying information and determining who may be authorized to handle such information.

The United States also does not assert that the subpoenas request any classified information as defined in 18 U.S.C. § 798 or Executive Order 12958, but generally claims that to honor the subpoenas at all would reveal sensitive information. As the information in question does not meet the statutory definition of "classified" and the subpoenas are directed to common carriers that are not authorized to possess classified information, compliance with the subpoenas will not reveal classified information in violation of 18 U.S.C. § 798 or executive order 12958. Neither is a telephone company an industrial or commercial contractor of a federal agency as claimed by the United States. Complaint ¶ 21. In fact, telephone companies are parties to contracts with the general public and operate subject to State law.

The United States also relies on 50 U.S.C. § 402 Note 6, which was enacted as part of the 1959 statute constituting the National Security Agency:

> Except as provided in subsection (b) of this section, nothing in this Act or any other law (including, but not limited to, the first section and section 2 of the Act of August 28, 1935 (5 U.S.C. 654) [repealed by Act July 12, 1960, P.L. 86-626, Title I, § 101, 74 Stat. 427]) shall be construed to require the disclosure of

> the organization or any function of the National Security Agency, of any information with respect to the activities thereof, or of the names, titles, salaries, or number of the persons employed by such agency.

Whatever "information with respect to the activities [of the NSA]" may mean, however, Congress must have intended to shield only the lawful activity of the NSA. Thus, inquiry into activity not sanctioned by the Pen Register Act or FISA would not be included in its proscriptions. In Terkel v. AT&T Corp., 441 F. Supp. 2d 899 (N.D. Ill. 2006), the district court declined to apply Note 6 so as to "allow the federal government to conceal information regarding blatantly illegal or unconstitutional activities simply by assigning these activities to the NSA or claiming they implicated information about the NSA's functions." Id. at 18. See also Hayden v. National Security Agency/Central Security Service, 608 F.2d 1381, 1389 (D.C. Cir. 1979)(limiting its discussion of § 402 Note 6 to situations "where the function or activity is authorized by statute and not otherwise unlawful").

There is no conflict in the present case between New Jersey State law and federal law because there is no federal law to which the government can point as authorizing its actions, with which, in turn, a New Jersey law is in conflict. Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." Building &

Constr. Trades Council v. Associated Builders & Contractors, 507 U.S. 218, 224, (1993) (quoting Maryland v. Louisiana, 451 U.S. 725, 746 (1981)). The claim of preemption therefore fails.[9]

III. INVOCATION OF THE "STATE SECRETS PRIVILEGE" CANNOT ENTITLE THE UNITED STATES TO SUMMARY JUDGMENT.

Finally, the United States asserts the so-called "state secrets" privilege. It does not do so to prevent introduction of particular evidence it finds objectionable, which is the usual role of the state secrets privilege. Indeed, it does not do so in order to assert an absolute defense that would cause this action to be dismissed, which is the extremely rare outcome of successful invocation of the privilege. Rather, it claims a previously unknown expansion of the state secrets privilege that

[9] While admittedly the phrase "any other law" in Note 6 of § 402, is grammatically broad, it does not make express reference to state law. In applying the "plain statement" rule to discern Congressional intent to preempt state activity, courts have been extremely demanding in requiring reference to state law in order to find such preemption. And even when Congress explicitly mentions state law, the courts construe that term narrowly. For instance, in Florida East Coast R.R. v. City of West Palm Beach, 266 F.3d 1324, 1330 (11th Cir. 2001), the Eleventh Circuit did not extend a preemption clause mentioning "state law" to a local zoning ordinance.

> When Congress has sought to "underscore its intent that [the preemption provision] be expansively applied, [it has] used . . . broad language in defining the 'State law' that would be preempted," for example, by stating that such law included all "'State action having the effect of law.'"

it believes requires automatic judgment in its favor and entry of equitable relief against the defendants, without even an answer having been filed. The United States truly seeks to use the privilege as a sword and not a shield in this matter.

A. There Are No Valid Secrets To Be Protected in this Case Under the State Secrets Privilege

It is of course in the nature of this case that we do not know the precise information that the United States seeks to keep hidden. But it is useful to restate what we know from common knowledge is not secret.

- It is no secret that pen register and phone billing information is kept and recorded. This information is known to any customer who has ever paid a phone bill.
- It is no secret that telephone companies, such as co-defendants here, are the parties who possess individual pen register and phone billing information. Again, this is common knowledge known to the general public.
- It is no secret that the technology would exist to transfer individual call record information in bulk to the NSA (or anyone else), whether in hardcopy or more likely by electronic medium.[10] Storage and transfer of gigabytes of

[10] Of course, the NSA is reputed to have developed advanced algorithms by which to sift and analyze mass quantities of raw electronic data. Obviously, those algorithms would constitute confidential and secret government information that should not

information are now within the capabilities and understanding of anyone with a personal computer.

It is therefore not immediately apparent what information exists whose disclosure to terrorists (or others who would do evil) would actually result from the enforcement of the subpoenas at issue. It stretches credulity beyond the breaking point to contend that Al Qaeda is relying upon its sophisticated understanding of American law and is thereby being lulled into a false sense of security that it is evading warrantless electronic surveillance. And of course it would not be appropriate to use the "state secrets" privilege to keep secret the fact that phone records might be subject to surveillance and acquisition by the NSA <u>without the judicial approval</u> required by the Pen Register Act, or by FISA, or even by the USA PATRIOT Act. That "secret" would be kept not from terrorists to avoid breaches in national security, but rather from the American public to avoid political liability.

The state secrets privilege was been developed as a shield to protect military secrets. Here, however, the United States is attempting to use the privilege as a sword to prevent legitimate state action and to protect a program that cannot and

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be subject to disclosure. But no one seeks access to such confidential information. Rather it is information regarding the raw data -- information in the possession of private phone companies and their employees -- that is of interest here.

should not enjoy this privilege if it should turn out to be illegal. And even if the privilege applied, it could not justify the relief the United States seeks here: a declaration that the New Jersey Attorney General's subpoenas are unenforceable and an injunction to prevent their execution.

B. Assertion of the State Secrets Privilege at this Stage of the Proceedings and on the Current Record Is Improper.

The "state secrets" privilege is a common law evidentiary rule that permits the government to "block discovery in a lawsuit of any information that, if disclosed, would adversely affect national security." Ellsberg v. Mitchell, 709 F.2d 51, 56 (D.C. Cir. 1983). It is employed sparingly to protect against disclosure of information that will impair "the nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments." Id. at 57; Tenenbaum v. Simonini, 372 F.3d 776, 777 (6th Cir. 2004); Jabara v. Kelley, 75 F.R.D. 475, 483 (E.D. Mich. 1977). It is a rule of evidence, not of justiciability, and is intended to protect from disclosure only such evidence as would legitimately cause harm to national security. Ellsberg, 709 F.2d at 57 (the privilege may not be used to "shield any material not strictly necessary to prevent injury to national security . . . .").

The Supreme Court outlined the proper use of the state secrets privilege fifty years ago in United States v. Reynolds, 345 U.S. 1 (1953).[11] In Reynolds, the family members of three civilians who died in the crash of a military plane in Georgia sued for damages. In response to a discovery request for the flight accident report, the government asserted the state secrets privilege, arguing that the report contained information about secret military equipment that was being tested aboard the aircraft during the fatal flight. Id. at 3. The Court first held that the privilege could be invoked only upon "a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." Id. at 7-8.

At the outset, it should be noted that the state secrets privilege was formally invoked in this case through a declaration of John Negroponte, Director of National

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[11] As a historical matter, the state secrets privilege in the United States originated when Aaron Burr, charged with treason, attempted to subpoena a letter written by an alleged coconspirator to President Thomas Jefferson. Chief Justice John Marshall, who was riding circuit, ordered that the subpoena be issued but that portions of the letter be suppressed if they were not applicable to the point and would be imprudent to disclose. Thus, even sensitive information, if it pertained to Aaron Burr's case, was held to be discoverable. The Chief Justice thus struck a balance that preserved both Aaron Burr's due process rights and the government's need to protect information. United States v. Burr, 25 F. Cas. 30 (C.C.D. Va. 1807).

Intelligence, that was dated May 12, 2006, and that bore the caption of Hepting v. AT&T Corp., an unrelated case in the Northern District of California. (Complaint Exh. A) It is therefore unclear how much "actual personal consideration" Mr. Negroponte could have possibly given to the circumstances of this case, since he executed the declaration several weeks before the subpoenas involved in this case were even issued. And since Hepting involves a private plaintiff's claim against a telephone company, Mr. Negroponte could not have considered the weighty federalism concerns and deference due a coordinate sovereignty involved here.

Even if Mr. Negroponte's "actual personal consideration" of the matter were sufficient to assert a claim of privilege in this case, however, a person who objects may seek a judicial determination of whether the circumstances justify the privilege. In United States v. Reynolds, The Court cautioned that this determination requires a "formula of compromise" as "judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." 345 U.S. at 10. The "occasion for the privilege is appropriate," the Court held, "when a court is satisfied from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." Id. The Court

found that the plaintiffs had made a "dubious showing of necessity" and sustained the claim of privilege. Id. at 14. Thus, it was for the Court, not the Executive, to decide whether information should be divulged.

Courts have not hesitated to reject state secrets claims where the invocation of the privilege was inappropriate or untimely. See, e.g., Jabara, 75 F.R.D. at 492-93 (rejecting application of the privilege to "relevant factual information pertaining to the 'arrangement' by which the FBI had requested and obtained information about the plaintiff from the [NSA]," the "'general' manner by which . . . such information was ultimately used by the FBI," and the name of the agency (NSA) that intercepted plaintiff's communications without a warrant); In re United States, 872 F.2d 472, 478 (D.C. Cir. 1989) (rejecting premature and overbroad claim of privilege); Ellsberg, 709 F.2d at 60 (rejecting claim of privilege over name of Attorney General who authorized warrantless wiretapping, explaining that no "disruption of diplomatic relations or undesirable education of hostile intelligence analysts would result from naming the responsible officials"); In re Grand Jury Subpoena Dated August 9, 2000, 218 F. Supp. 2d 544, 560 (S.D.N.Y. 2002) ("[T]he contours of the privilege for state secrets are narrow, and have been so defined in accord with uniquely American concerns for democracy, openness, and

separation of powers."); Spock v. United States, 464 F. Supp. 510, 520 (S.D.N.Y. 1978) (rejecting as premature assertion of state secrets privilege at pleading stage). As the District of Columbia Circuit cautioned in In re United States: "Because evidentiary privileges by their very nature hinder the ascertainment of the truth, and may even torpedo it entirely, their exercise should in every instance be limited to their narrowest purpose." 872 F.2d at 478-79 (internal quotation marks omitted).

Outright dismissal of a suit on the basis of the privilege, and the resultant "denial of the forum provided under the Constitution for the resolution of disputes . . . is a drastic remedy." Fitzgerald v. Penthouse Int'l, Ltd., 776 F.2d 1236, 1242 (4th Cir. 1985); see also In re United States, 872 F.2d at 477 ("[d]ismissal of a suit" on state secrets grounds at any point of the litigation "and the consequent denial of a forum without giving the plaintiff her day in court . . . is . . . draconian"); Monarch Assur. P.L.C. v. United States, 244 F.3d 1356, 1364 (Fed. Cir. 2001) (upholding CIA's privilege claim in contract action involving alleged financing of clandestine CIA activity, but remanding for further discovery because "the court was premature in its resolution of the difficult issue regarding the circumstances under which national security compels a total bar of an otherwise valid suit"). Similarly, courts have refused

to dismiss cases based on the privilege where the purported state secrets are not relevant or necessary to the parties' claims or defenses, or where it appears that the parties can proceed with non-privileged evidence. See, e.g., Clift v. United States, 597 F.2d 826, 830 (2d Cir. 1979) (remanding for further proceedings where plaintiff has "not conceded that without the requested documents he would be unable to proceed, however difficult it might be to do so"); Crater Corp. v. Lucent Technologies., Inc., 423 F.3d 1260, 1269 (Fed. Cir. 2005)(reversing dismissal on the basis of the privilege where the non-privileged record was not sufficiently developed and the relevancy of any privileged evidence was unclear). Thus, courts have routinely rejected a "categorical rule mandating dismissal whenever the state secrets privilege is validly invoked." DTM Research L.L.C v. AT&T Corp., 245 F.3d 327, 334 (4th Cir. 2001).

Since the implementation of the NSA's alleged program of gathering telephone records, several plaintiff classes of consumers around the country have filed federal lawsuits against the government and telephone companies to enjoin the disclosure of their telephone records and to learn the extent of the program.[12] In one of these seventeen cases, Hepting v. AT&T

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[12] Seventeen class actions regarding the NSA's request of phone records from common carriers have been transferred to the Northern District of California by the Judicial Panel on Multidistrict Litigation. Counsel for AT&T has notified the

Corp., 439 F. Supp. 2d 974 (N.D. Cal. 2006), the plaintiff alleged that AT&T was collaborating with the United States in a warrantless surveillance program that illegally tracked the communications records of millions of Americans in violation of state and federal law. The government asserted, as an affirmative privilege, that the very subject matter of the opposing parties' inquiry was a state secret and that further litigation would inevitably risk disclosure.[13] The government sought dismissal based on the state secrets privilege. Chief Judge Walker refused to dismiss the action.

> But it is important to note that even the state secrets privilege has its limits. While the court recognizes and respects the executive's constitutional duty to protect the nation from threats, the court also takes seriously its constitutional duty to adjudicate the disputes that come before it. See Hamdi v Rumsfeld, 542 U.S. 507, 536, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004) (plurality opinion) ("Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."). To defer to a blanket assertion of secrecy

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Judicial Panel on Multidistrict Litigation of seven potential "tag-along" actions, including this one.

[13] As a preliminary matter, before the district court in Hepting passed upon the state secrets privilege, it found that it could not determine applicability of the privilege without first reviewing, in camera, classified records offered by the United States which apparently "disclose the sources and methods, the intelligence activities, etc., that could be brought into play by the allegations in plaintiffs' complaint." Hepting v. AT&T Corp., No. C-06-672 VRW, 2006 U.S. Dist. LEXIS 41160, at *6 (N.D. Cal. June 6, 2006) (interlocutory ruling on discovery dispute).

> here would be to abdicate that duty, particularly because the very subject matter of this litigation has been so publicly aired. 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.

Hepting, 439 F. Supp. 2d at 995. Chief Judge Walker cited to Reynolds for the required "'formula of compromise' as judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." Hepting, 439 F. Supp. 2d. at 981 (quoting Reynolds, 345 U.S. at 10). Thus, the assertion of the state secrets privilege is subject to judicial review, and the court denied the government's motion to dismiss.

In the present case, the New Jersey Attorney General is trying to learn whether telephone companies may be violating State law by disclosing the calling records of New Jersey consumers. The United States has responded by attempting to stop the investigation before it starts. The state secrets privilege cannot serve this end because it operates not to prevent entire cases from proceeding, but only to protect certain evidence from disclosure, with the approval of the court. Moreover, if the United States has obtained telephone records in violation of federal law, see supra Point II.A., the state secrets privilege cannot shield such action.

CONCLUSION

For the reasons stated herein and in its Brief in Support of New Jersey Attorney General's Motion to Dismiss, amicus curiae Public Advocate of New Jersey respectfully urges the Court to deny the motion for summary judgment of plaintiff United States of America and to grant the motion to dismiss of defendant Attorney General of New Jersey.

October 13, 2006

Respectfully submitted,

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