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## **Brief says secrecy trumps any wiretap ruling**

### **Government claims an award of damages to plaintiffs would undermine security**

- [Bob Egelko, Chronicle Staff Writer](#)

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The Bush administration says its program of clandestine electronic surveillance, and AT&T's alleged participation in it, are secrets so important that a federal judge couldn't consider awarding damages even if he agreed with a lawsuit that accuses the company of breaking the law.

Justice Department lawyers made a sweeping claim of immunity, for both the government and the telecommunications company, in their latest filing seeking dismissal of the lawsuit by customers against AT&T. A hearing is scheduled Friday before Chief U.S. District Judge Vaughn Walker in San Francisco.

The suit, filed in January, accuses AT&T of illegally giving the National Security Agency access to its voice and data network and to its databases of customers' phone calls and e-mails, to be used in a government program of monitoring Americans' contacts with suspected terrorists.

President Bush has acknowledged authorizing wiretaps of calls between Americans and alleged terrorists abroad without court warrants since shortly after the Sept. 11 attacks on the World Trade Center and the Pentagon. But the administration has refused to discuss allegations of telecommunications company collaboration, the subject of numerous media reports, and has insisted that the subject is too sensitive to be aired in court.

Although the government is not a defendant in the AT&T case, government lawyers have asked Walker to rule that the suit would endanger state secrets and must be dismissed. In its latest filing, the administration said AT&T can't admit or deny participating in the program -- and thus can't fully respond to the plaintiffs' accusations -- because its alleged role is a secret.

Even if Walker, in a closed-door review, "were to find unlawfulness," Justice Department lawyers wrote, he "could not then proceed to adjudicate the very question of awarding damages because to do so would confirm plaintiffs' allegations."



That appeared to refer to the alleged law-breaking by AT&T rather than the overall surveillance program. But the Electronic Frontier Foundation, a privacy-rights organization that represents the plaintiffs, said the government's brief amounts to a claim "that the program is above the law."

"We intend to vigorously oppose this radical assertion of power," the foundation said.

The Bush administration has also invoked state secrets in seeking to dismiss a lawsuit by the American Civil Liberties Union directly challenging the National Security Agency surveillance program on behalf of writers and scholars who believe their calls were intercepted. That case is before a federal judge in Detroit.

Gregory Sisk, a law professor at St. Thomas University in Minnesota who has studied the government's use of state secrets as a legal defense, said courts have occasionally found that an entire federal program -- the alleged wiretapping of dissenters during the Vietnam War, for example -- was immune from judicial review.

"Taking something out of the context of litigation doesn't mean that there aren't checks and balances available," such as congressional action, Sisk said. But he said the government could argue in the current cases that even if the surveillance were found to be illegal, allowing individuals to seek damages would "confirm that their communications have been intercepted, and that would violate national security."

On Tuesday, Walker sent a series of questions to lawyers that indicated he was keeping his options open.

One question was how he could "minimize the conflict between plaintiffs' right to litigate this case and the government's duty to protect state secrets."

He also asked how confirming or denying the existence of the surveillance program, or AT&T's participation, could amount to disclosing a state secret "when the program has been so widely reported in the public sphere."

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