UC Berkeley School of Law
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2008-2009
James Patterson McBaine Honors Moot Court Competition

Case Record:

No. 07-468

American Civil Liberties Union, *et al.*
v.
National Security Agency, *et al.*

The Record

The Case Record you have should consist of the following documents, arranged in chronological order:

A. Complaint (1/17/06)
B. ACLU statement of Undisputed Facts (3/9/06) and accompanying documents:
    1. Exhibits (3/9/06)
    2. Declaration of Larry Diamond (3/9/06)
    3. Declaration of Nancy Hollander (3/9/06)
    4. Declaration of Tara McKelvey (3/9/06)
    5. Declaration of William Swor (3/9/06)
C. Declaration of John D. Negroponte, Dir. of National Intelligence (5/27/06)
D. Declaration of Major General Richard J. Quirk, NSA Signals Intelligence Director (5/27/06)
E. Declaration of Leonard M. Niehoff (6/5/06)
F. Declaration of Barnett R. Rubin (6/5/06)
G. Declaration of Nazih Hassan (6/5/06)
H. Declaration of Joshua L. Dratel (6/5/06)
I. Declaration of Mohammed Abdrabboh (6/5/06)
J. Declaration of Nabid Ayad (6/5/06)
K. Opinion from the United States District Court, Eastern District of Michigan (8/7/06)
L. Opinion from the United States Circuit Court of Appeals for the Sixth Circuit (7/6/07)

Note that the record purposefully does not contain any of briefs or memoranda in support of motions on the case. You are not permitted to read those in your preparation of your brief. Please be sure to refer to the Official Competition Rules (available at http://www.law.berkeley.edu/3010.htm), especially with respect to consulting outside sources.

The pages of this document have all been numbered for your convenience. You may properly refer to the record as (R. at X) in your brief citations.

If you have any questions, email mcbaine.competition@gmail.com.

Good luck!!

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION FOUNDATION; AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN; COUNCIL ON AMERICAN-ISLAMIC RELATIONS; COUNCIL ON AMERICAN-ISLAMIC RELATIONS MICHIGAN; GREENPEACE, INC.; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; JAMES BAMFORD; LARRY DIAMOND; CHRISTOPHER HITCHENS; TARA MCKELVEY; and BARNETT R. RUBIN,

Plaintiffs,

v.

NATIONAL SECURITY AGENCY / CENTRAL SECURITY SERVICE; and LIEUTENANT GENERAL KEITH B. ALEXANDER, in his official capacity as Director of the National Security Agency and Chief of the Central Security Service,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Case No.

Hon.

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PRELIMINARY STATEMENT

1. This lawsuit challenges the constitutionality of a secret government program to intercept vast quantities of the international telephone and Internet communications of innocent Americans without court approval (hereinafter "the Program"). The National Security Agency / Central Security Service ("NSA") launched the Program in 2001 and the President of the United States ratified it in 2002.

2. Plaintiffs are a group of prominent journalists, scholars, attorneys, and national nonprofit organizations who frequently communicate by telephone and email with people outside the United States, including in the Middle East and Asia. Because of the nature of their calls and emails, and the identities and locations of those with whom they communicate, plaintiffs have a well-founded belief that their communications are being intercepted under the Program. The Program is disrupting the ability of the plaintiffs to talk with sources, locate witnesses, conduct scholarship, and engage in advocacy.

3. By seriously compromising the free speech and privacy rights of the plaintiffs and others, the Program violates the First and Fourth Amendments of the United States Constitution. It also violates constitutional separation of powers principles, because it was authorized by President George W. Bush in excess of his Executive authority and contrary to limits imposed by Congress. In response to widespread domestic surveillance abuses committed by the Executive Branch and exposed in the 1960s and 1970s, Congress enacted legislation that provides "the *exclusive means* by which electronic surveillance . . . and the interception of domestic wire, oral, and electronic communications may be conducted." 18 U.S.C. § 2511(2)(f) (emphasis

added). Plaintiffs respectfully seek a declaration that the Program is unlawful, and a permanent injunction against its use.

JURISDICTION AND VENUE

4. This case arises under the United States Constitution and the laws of the United States and presents a federal question within this Court's jurisdiction under Article III of the United States Constitution and 28 U.S.C. § 1331. The Court also has jurisdiction under the Administrative Procedures Act, 5 U.S.C. § 702. The Court has authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq*. The Court has authority to award costs and attorneys' fees under 28 U.S.C. § 2412. Venue is proper in this district under 28 U.S.C. § 1391(e).

PARTIES

5. The American Civil Liberties Union ("ACLU") is a 501(c)(4) non-profit, non-partisan organization that engages in public education and lobbying about the constitutional principles of liberty and equality. The ACLU has more than 500,000 members and has members in every state, including Michigan. The ACLU sues on its own behalf and on behalf of its staff and members.

6. The American Civil Liberties Union Foundation ("ACLUF") is a 501(c)(3) organization that educates the public about civil liberties issues and employs lawyers who provide legal representation free of charge in cases involving civil liberties. The ACLUF sues on its own behalf and on behalf of its staff.

7. The American Civil Liberties Union of Michigan ("ACLU of Michigan") is a 501(c)(4) non-profit, non-partisan organization that engages in public education and lobbying about civil rights and civil liberties in the state of Michigan. The

ACLU of Michigan has approximately 15,000 members. The ACLU of Michigan sues on its own behalf of on behalf of its members.

8. The National Association of Criminal Defense Lawyers ("NACDL") is a 501(c)(6) non-profit organization based in Washington, D.C. whose direct membership is comprised of more than 13,000 criminal defense lawyers. The NACDL has members in every state, including Michigan. The NACDL sues on its own behalf and on behalf of its members.

9. The Council on American-Islamic Relations ("CAIR") is a 501(c)(4) non-profit organization based in Washington, D.C. and is the largest Islamic civil liberties organization in the United States. CAIR has chapters and members nationwide and members in over 25 countries. CAIR sues on its own behalf and on behalf of its staff and members.

10. The Council on American-Islamic Relations Michigan ("CAIR-Michigan") is a 501(c)(3) organization and represents the interest of the American Muslim community living in the state of Michigan. CAIR-Michigan sues on its own behalf and on behalf of its members.

11. Greenpeace, Inc. ("Greenpeace") is a non-profit advocacy organization based in Washington, D.C. dedicated to combating the most serious threats to the planet's biodiversity and environment. Greenpeace has approximately 250,000 members nationwide, including members in Michigan. Internationally, Greenpeace has a presence in 39 other countries and more than 2.5 million members. Greenpeace sues on its own behalf, and on behalf of its staff and members.

12. James Bamford is an award-winning author and journalist. He is one of the world's leading experts on U.S. intelligence and the National Security Agency and he has published numerous books and articles on those topics. Mr. Bamford lives in Washington, D.C.

13. Larry Diamond is a Senior Fellow at the Hoover Institution at Stanford University. He is a leading expert on governance and development in Iraq, Asia, Africa and Latin America. Professor Diamond lives in Stanford, California.

14. Christopher Hitchens is a prominent reporter and bestselling author who has written numerous articles and books on topics including U.S policy in the Middle East and Islamic fundamentalism. Mr. Hitchens lives in Washington, D.C.

15. Tara McKelvey is a senior editor at The American Prospect, and has written numerous articles and books on topics including U.S. policy in the Middle East. Ms. McKelvey lives in Washington, D.C.

16. Barnett R. Rubin is Director of Studies and Senior Fellow at the New York University Center on International Cooperation. Professor Rubin is an internationally renowned scholar on conflict and peace, with a particular focus on Afghanistan, South Asia, and Central Asia, and has written numerous books and articles about Afghan history, politics, and development. Professor Rubin lives in New York.

17. Defendant National Security Agency / Central Security Service ("NSA") is the agency of the United States government responsible for administering the warrantless surveillance program challenged in this case.

18. Defendant Lieutenant General Keith B. Alexander is the Director of the NSA. Defendant Lieutenant General Alexander has ultimate authority for supervising and implementing all operations and functions of the NSA.

LEGAL FRAMEWORK

19. The First Amendment provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech, or of the press."

20. The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

21. Congress has enacted two statutes that together supply "the *exclusive means* by which electronic surveillance . . . and the interception of domestic wire, oral, and electronic communications may be conducted." 18 U.S.C. § 2511(2)(f) (emphasis added). The first is Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"), 18 U.S.C. § 2510 *et seq*., and the second is the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801 *et seq.* ("FISA").

Title III

22. Congress enacted Title III in response to the U.S. Supreme Court's recognition, in *Katz v. United States*, 389 U.S. 347 (1967), that individuals have a constitutionally protected privacy interest in the content of their telephone calls. Through Title III, Congress created a statutory framework to govern the surveillance of wire and oral communications in law enforcement investigations.

23. In its current form, Title III authorizes the government to intercept wire, oral, or electronic communications in investigations of certain enumerated criminal offenses, *see* 18 U.S.C. § 2516, with prior judicial approval, *see id*. § 2518. In order to obtain a court order authorizing the interception of a wire, oral, or electronic communication, the government must demonstrate "probable cause for belief that an individual is committing, has committed, or is about to commit" one of the enumerated criminal offenses. *Id*. § 2518(3)(a). It must also demonstrate, among other things, "probable cause for belief that particular communications concerning [the enumerated] offense will be obtained through [the] interception," *id*. § 2518(3)(b), and that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous," *id*. § 2518(3)(c).

24. Every court order authorizing surveillance under Title III must include a provision requiring that the interception be "conducted in a such a way as to minimize the interception of communications not otherwise subject to interception under this chapter." *Id*. § 2518(5).

25. While Title III generally permits surveillance only with prior judicial authorization, the statute includes a provision that allows for warrantless surveillance in "emergency situation[s]" – where, for example, a "situation exists that involves . . . immediate danger of death or serious physical injury to any person." *Id*. § 2518(7)(a). Where an emergency situation exists and "there are grounds upon which an order could be entered . . . to authorize . . . interception," the statute permits specified executive officials to authorize warrantless surveillance "if an application for an order approving

the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur." *Id.* § 2518(7)(b).

26. Title III specifies civil and criminal penalties for surveillance that is not authorized. *See id.* §§ 2511 & 2520.

27. As originally enacted, Title III provided that "[n]othing contained in this chapter. . . shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government." *See* 18. U.S.C. § 2511(3) (1976). As discussed below, Congress repealed this provision in 1978.

Foreign Intelligence Surveillance Act

28. In 1978, Congress enacted FISA to govern the use of electronic surveillance against foreign powers and their agents inside the United States. The statute created the Foreign Intelligence Surveillance Court, a court composed of seven (now eleven) federal district court judges, and empowered this court to grant or deny government applications for electronic surveillance orders in foreign intelligence investigations. *See* 50 U.S.C. § 1803(a).

29. Congress enacted FISA after the U.S. Supreme Court held, in *United States v. United States District Court for the Eastern District of Michigan*, 407 U.S. 297 (1972), that the Fourth Amendment does not permit warrantless surveillance in intelligence investigations of domestic security threats. FISA was a response to that decision and to the Report of the Senate Select Committee to Study Government Operations with Respect to Intelligence Activities, S.Rep. No. 94-755, 94th Cong., 2d Sess. (1976) ("Church Committee Report"), which found that the executive had engaged in warrantless wiretapping of numerous United States citizens – including journalists, activists, and Congressmen – who posed no threat to the nation's security and who were not suspected of any criminal offense. The Church Committee Report warned that "[u]nless new and tighter controls are established by legislation, domestic intelligence activities threaten to undermine our democratic society and fundamentally alter its nature."

30. When Congress enacted FISA, it amended Title III to provide that the procedures set out therein and in FISA "shall be the *exclusive means* by which electronic surveillance . . . and the interception of domestic wire, oral, and electronic communications may be conducted." 18 U.S.C. § 2511(2)(f) (emphasis added). FISA provides that no one may engage in electronic surveillance "except as authorized by statute," *id*. § 1809(a)(1), and it specifies civil and criminal penalties for electronic surveillance undertaken without statutory authority, *see id*. §§ 1809 & 1810. The Senate Judiciary Committee explained that "[t]he basis for this legislation is the understanding – concurred in by the Attorney General – that even if the President has an 'inherent' Constitutional power to authorize warrantless surveillance for foreign intelligence

purposes, Congress has the power to regulate the exercise of this authority by legislating a reasonable warrant procedure governing foreign intelligence surveillance." S. Rep. 95-604(I), reprinted at 1978 U.S.C.C.A.N. at 3917. The Committee further explained that the legislation was meant to "spell out that the executive cannot engage in electronic surveillance within the United States without a prior Judicial warrant." *Id*. at 3906.

31. FISA defines "electronic surveillance" broadly to include:

a. "the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire or radio communication sent by or intended to be received by a particular, known United States person who is in the United States, if the contents are acquired by intentionally targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes";

b. "the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States . . .";

c. "the intentional acquisition by an electronic, mechanical, or other surveillance device of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States"; and

d. "the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes." 50 U.S.C. § 1801(f).

32. FISA defines "contents" to include "any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication." 50 U.S.C. § 1801(n). It defines "United States person" to include United States citizens and lawful permanent residents. *Id.* § 1801(d).

33. In order to obtain an order from the FISA Court authorizing electronic surveillance, the government must demonstrate, among other things, probable cause to believe that "the target of the electronic surveillance is a foreign power or an agent of a foreign power" and that "each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power." *Id.* § 1805(a)(3).

34. While FISA generally prohibits surveillance without prior judicial authorization, it, like Title III, includes a provision that allows for warrantless surveillance in "emergency situation[s]." *Id.* § 1805(f). Where an emergency situation exists and "the factual basis for issuance of an order under this subchapter to approve such surveillance exists," the statute permits the Attorney General to authorize warrantless surveillance "if a judge having jurisdiction under section 1803 of this title is informed by the Attorney General or his designee at the time of such authorization that

the decision has been made to employ emergency electronic surveillance and if an application in accordance with this subchapter is made to that judge as soon as practicable, but not more than 72 hours after the Attorney General authorizes such surveillance." *Id*.

35. FISA also allows the Attorney General to authorize electronic surveillance without a court order for up to one year if the Attorney General certifies in writing under oath that the electronic surveillance is directed solely at the property or means of communication used exclusively by a foreign power, that "there is no substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person is a party," and that there are minimization procedures in place. *Id*. § 1802.

36. Finally, FISA permits electronic surveillance without a court order for fifteen days after a formal declaration of war. *Id*. § 1811 ("Notwithstanding any other law, the President, through the Attorney General, may authorize electronic surveillance without a court order under this subchapter to acquire foreign intelligence information for a period not to exceed fifteen calendar days following a declaration of war by the Congress.").

37. FISA requires the Attorney General to report to the House and Senate Intelligence Committees twice a year regarding "all electronic surveillance" authorized under FISA. *Id*. § 1808(a). Statistics released annually by the Justice Department indicate that, between 1978 and 2004, the government submitted almost 19,000 surveillance applications to the FISA Court. The FISC denied four of these applications;

granted approximately 180 applications with modifications; and granted the remainder without modifications.

FACTUAL BACKGROUND

The Program

38. According to published news reports, in the fall of 2001 the NSA launched a secret surveillance program ("the Program") to intercept, without prior judicial authorization, the telephone and Internet communications of people inside the United States. President Bush ratified the Program in 2002. Since then, the President has reauthorized the Program more than 30 times.

39. Under the Program, the NSA engages in "electronic surveillance" as defined by FISA and Title III.

40. Under the Program, the NSA intercepts vast quantities of the international telephone and Internet communications (hereinafter collectively "communications") of people inside the United States, including citizens and lawful permanent residents.

41. Under the Program, the NSA also intercepts some purely domestic communications, that is, communications among people all of whom are inside the United States.

42. Under the Program, the NSA intercepts the communications of people inside the United States without probable cause to believe that the surveillance targets have committed or are about to commit any crime.

43. Under the Program, the NSA intercepts the communications of people inside the United States without probable cause to believe that the surveillance targets are foreign powers or agents thereof.

44. Under the Program, the NSA intercepts the communications of people inside the United States without obtaining authorization for each interception from the President or the Attorney General.

45. Under the Program, NSA shift supervisors are authorized to approve NSA employees' requests to intercept the communications of people inside the United States.

46. Under the Program, the NSA accesses communications in at least three ways.

47. First, the NSA uses NSA-controlled satellite dishes to access communications that are transmitted via satellite. Some of these NSA-controlled satellite dishes are located within the United States.

48. Second, the NSA works with telecommunications companies to access communications that pass through switches controlled by these companies. These switches, which are located inside the United States, serve as primary gateways for communications going into and out of the United States. The switches connect to trans-oceanic fiber optic cables that transmit communications to other countries.

49. Third, the NSA works with Internet providers and telecommunications companies to access communications transmitted over the Internet.

50. Under the Program, the NSA intercepts, retains, and analyzes communications in at least three ways.

51. First, the NSA obtains names, telephone numbers and Internet addresses from the cell phones, computers, and other information found in the possession of persons deemed suspicious. The NSA intercepts the telephone numbers and Internet addresses associated with these people, as well as numbers and emails associated with anyone who communicates with them, and continues to identify additional telephone numbers and Internet addresses in an expanding network of people with fewer and fewer links to the original suspect. Through this method, the NSA intercepts the contents of the communications of as many as a thousand people inside the United States at any one time.

52. Second, the NSA intercepts communications to and from particular countries, including Iraq and Afghanistan. The intercepted communications include calls and emails between people inside the United States and people in those other countries.

53. Third, the NSA engages in wholesale datamining of domestic and international communications. It uses artificial intelligence aids to search for keywords and analyze patterns in millions of communications at any given time. One purpose of this datamining is to identify individuals for targeted surveillance.

54. Under the Program, the NSA does not obtain judicial review before or after intercepting the communications of people inside the United States.

55. The NSA has submitted information obtained through the Program to the Foreign Intelligence Surveillance Court in order to support applications for surveillance orders under FISA.

Plaintiffs' Allegations

56. Plaintiffs and their staff and members (hereinafter "plaintiffs") routinely communicate by email and telephone with people outside the United States, including people in the Middle East and Asia.

57. Some of the plaintiffs, in connection with scholarship, journalism, or legal representation, communicate with people whom the United States government believes or believed to be terrorist suspects or to be associated with terrorist organizations.

58. Plaintiffs communicate about subjects that are likely to trigger scrutiny by the NSA under the Program.

59. Some of the plaintiffs conduct research on the Internet concerning topics that are likely to trigger scrutiny under the Program.

60. Because of the nature of plaintiffs' communications and the identities and locations of those with whom they communicate, plaintiffs have a well-founded belief that their domestic and international communications are being intercepted by the NSA under the Program.

61. The Program is substantially impairing plaintiffs' ability to obtain information from sources abroad, to locate witnesses, to represent their clients, to conduct scholarship, and to engage in advocacy.

62. The Program is inhibiting the lawful, constitutionally protected communications of plaintiffs and others not before the Court.

American Civil Liberties Union and American Civil Liberties Union Foundation

63. The ACLU is a 501(c)(4) non-profit, non-partisan organization that engages in public education and lobbying about the constitutional principles of liberty and equality. The ACLU has more than 500,000 members. The ACLU's activities include lobbying Congress on legislation that affects civil liberties, analyzing and educating the public about such legislation, and mobilizing ACLU members and activists to lobby their legislators to protect civil rights and civil liberties.

64. The ACLUF is a 501(c)(3) organization that educates the public about civil liberties and that employs lawyers who provide legal representation free of charge in cases involving civil liberties.

65. Since September 11, a core priority of the ACLU and the ACLUF has been to publicize and oppose violations of civil liberties effected in the name of national security. This work frequently requires ACLU and ACLUF staff and members to communicate by email and telephone with people and organizations outside the United States. The international communications of ACLU and ACLUF staff and members concern a range of subjects that are likely to trigger scrutiny under the Program.

66. For example, in November and December 2002, ACLU staff traveled to Pakistan to interview men whom the Immigration and Naturalization Service had arrested and held after the terrorist attacks of September 2001 as "special interest" detainees but subsequently deported without having been charged with any terrorism related offense. In preparation for this trip, ACLU staff communicated by telephone and email with people and organizations in Pakistan and India. For example, Marsha Zeesman, the ACLU's Director of Campaigns and Special Projects, and Emily Whitfield, the ACLU's

Media Relations Director, communicated by telephone and email on multiple occasions with staff of the Human Rights Commission of Pakistan, an organization based in Karachi. Whitfield also communicated by email with Ash-har Quraishi, Cable News Network's correspondent in Pakistan; with Carlotta Gall, a New York Times correspondent in Pakistan; and with David Rohde, a New York Times correspondent in India. Some of the communications of ACLU staff concerned individuals whom the Justice Department's website describes as "linked to the September 11th investigation."

67. In January 2004, the ACLUF filed a petition with the United Nations Working Group on Arbitrary Detention on behalf of some of the men whom the INS had held as "special interest" detainees. The drafting of the petition required ACLUF attorney Omar Jadwat and other ACLUF employees to communicate by telephone and email with former detainees living in Pakistan, Egypt, and Jordan.

68. Since March 2005, ACLUF attorneys and staff have been investigating instances in which the CIA has transferred – "rendered" – foreign nationals to detention and interrogation in facilities operated by the CIA outside U.S sovereign territory and to countries and intelligence services that are known to employ torture and other forms of cruel, inhuman or degrading treatment. In connection with this research, ACLUF attorneys and human rights advisors have communicated by telephone and email with individuals whom the CIA has alleged are associated with terrorist organizations. ACLUF attorneys and staff have also communicated by telephone and email with attorneys representing these individuals.

69. ACLUF attorneys currently represent Khaled El-Masri, a German citizen residing in Neu-Ulm, Germany, whom the CIA rendered to a CIA-run prison in

Afghanistan in January 2004. ACLUF human rights advisor Steven Watt regularly communicates by telephone and email with Mr. El-Masri and with Mr. El-Masri's German attorney, Manfred Gnjidic. In addition, as part of the ACLU's research into the extraordinary rendition program, Mr. Watt regularly communicates by telephone with attorneys based in Sweden and Egypt representing Ahmed Agiza and Mohammed Alzery, whom the CIA rendered from Sweden to Egyptian custody in December 2001, and with the Italian attorney representing Abu Omar, whom the CIA rendered from Italy to Egyptian custody in February 2003.

70. ACLUF attorneys also currently represent a number of individuals who were detained and abused by United States forces at Abu Ghraib prison in Iraq and at other detention facilities in Iraq and Afghanistan. ACLUF attorney Omar Jadwat and ACLUF human rights advisor Jamil Dakwar regularly communicate by telephone and email with individuals in Iraq and Afghanistan, including plaintiffs in the litigation, concerning the treatment of prisoners held by United States forces in those countries. Some of these communications concern individuals who remain in the custody of United States forces.

71. Because of the content of their communications and the identities and locations of individuals with whom they are communicating, ACLU and ACLUF staff have a well-founded belief that their communications are being intercepted by the NSA under the Program.

72. The Program substantially impairs the ability of the ACLU and ACLUF to engage in communication that is vital to their respective missions. The Program requires ACLU and ACLUF staff and members to minimize the sensitive information

they include in their communications because of the risk that such information will be intercepted. In addition, ACLU and ACLUF staff and members believe that individuals abroad are more reticent in communicating with them because of the possibility that their communications are being intercepted by the NSA under the Program.

73. Attorneys at the ACLUF have represented to many of their clients that their telephone and email communications with ACLUF attorneys are confidential and covered by the attorney-client privilege. The willingness of ACLUF clients to consult with ACLUF attorneys and to provide information to ACLUF attorneys is based in part on that assurance. The Program is inhibiting candid communication between ACLUF attorneys and their clients and is thereby compromising the ability of ACLUF attorneys to effectively represent their clients.

American Civil Liberties Union of Michigan

74. The ACLU of Michigan is the Michigan affiliate of the ACLU and is dedicated to defending the civil liberties of Michigan residents. Its activities include lobbying the Michigan legislature on proposed bills that affect civil liberties, educating the Michigan public about such legislation and mobilizing ACLU of Michigan members and activists to lobby their representatives to protect civil rights and civil liberties.

75. Since September 11, 2001, a core priority of the ACLU of Michigan has been to publicize and oppose violations of civil liberties affected in the name of national security. For example, the Michigan ACLU established a "Safe and Free Project" devoted to post-9/11 civil liberties issues and hired a staff attorney for the project. It opposed state legislation that it believed unnecessarily sacrificed civil liberties in the name of national security. It mobilized its members to lobby local government bodies

across the state, resulting in the enactment of sixteen local resolutions opposing provisions of the USA PATRIOT Act that pose the most serious threats to civil liberties. The manner in which post-9/11 measures impact Arab-Americans is especially important to the Michigan ACLU affiliate because southeast Michigan has the highest concentration of Arab-Americans in the country.

76. The ACLU of Michigan has many members who regularly communicate with people outside the United States, including in the Middle East and Asia. Because of the nature of these communications, the identities of the individuals with whom they communicate, and the locations of individuals with whom they communicate, ACLU of Michigan members have a well-founded belief that their communications are being intercepted by the NSA under the Program. The Program is inhibiting ACLU of Michigan members from communicating freely and candidly in their personal and professional communications.

Noel Saleh

77. Noel Saleh is a member of the ACLU of Michigan who resides in Wayne County, Michigan. He is a United States citizen. He is a licensed attorney in the State of Michigan and served as the staff attorney for the American Civil Liberties Union of Michigan's "Safe and Free Project" from 2002 to 2004.

78. Mr. Saleh has been a community activist for Arab causes both in the United States and in the Arab World. Since 1989 he has served on the board of ACCESS, the Arab Community Center for Economic and Social Services. Currently, he is the Chair of the ACCESS Board of Directors. As part of his role as an ACCESS Board member, Mr. Saleh is frequently called upon to comment on current affairs and events

affecting the Arab American community.

79. Mr. Saleh has friends and family in Lebanon, Jordan and the Occupied Palestinian Territories with whom he frequently communicates by phone and by email. Prior to becoming aware of the Program, Mr. Saleh communicated with family members about various political topics and their opinions on current events including Israeli repression of Palestinians under occupation, Palestinian Right of Return and statehood, Islamic fundamentalists, terrorism, Osama bin Laden, al Qaeda, and America's role in each of these areas.

80. Because of his frequent communications with numerous people in the Middle East and other foreign countries about topics likely to trigger monitoring, Mr. Saleh has a well-founded belief that his communications are currently being intercepted by the NSA under the Program.

81. The likelihood that his communications are being intercepted by the NSA under the Program impinges on Mr. Saleh's ability to communicate freely and candidly in his international calls and emails. Since learning of the Program in news reports, he has refrained from talking about or emailing friends and family abroad about topics that might trigger monitoring.

82. The Program also interferes with Mr. Saleh's efforts to promote peace and justice in this country. Before he became aware of the Program, he felt free to engage in free and open communication with people in other countries about critical issues of the day. He gained unique insight from these conversations into U.S. foreign policy that he could not gain from the media in this country. Because of the NSA Program, he is less willing to engage in substantive discussions with people abroad and

therefore is not able to either gain these unique insights or share them with others.

Mohammed Abdrabboh

83. Mohammed Abdrabboh is a member of the ACLU of Michigan and has been a member of the ACLU of Michigan's Board of Directors since 2002. He is a United States citizen and a licensed attorney in the State of Michigan, with a practice in immigration, criminal defense and civil rights law, in Wayne County, Michigan. Mr. Abdrabboh serves as a Commissioner on the Michigan Civil Rights Commission, to which he was appointed by the Governor in May 2003. Mr. Abrabboh also teaches a course on civil liberties and national security at the University of Michigan at Dearborn.

84. Mr. Abdrabboh frequently communicates by telephone and email with family in the West Bank, Gaza, and Jerusalem. After law school, Mr. Abdrabboh worked for Al Haq, a human rights organization in the West Bank. He frequently communicates with friends and acquaintances he met while working there. He also communicates a number of times per month by telephone and email with friends and acquaintances in Saudi Arabia.

85. Approximately ninety-percent of Mr. Abdrabboh's clientele come from countries in the Middle East. As part of his immigration practice, he regularly represents individuals who live in the Middle East and are seeking to enter the United States, and as part of his representation he must conduct all communications with them through telephone and email. The nature of Mr. Abdrabboh's law practice requires him to communicate regularly by telephone and email with people in Lebanon, the West Bank and Gaza. His practice also requires that he occasionally communicate with individuals by telephone and email in Jordan, Afghanistan and Yemen. These communications are

essential in providing effective representation to his clients.

86. As part of his criminal defense practice, Mr. Abdrabboh has represented and continues to represent people the government has suspected of allegedly having some link to terrorism or terrorist organizations.

87. Because of the nature of his communications, the identities and locations of people with whom he communicates, Mr. Abdrabboh has a well-founded belief that his communications are being intercepted by the NSA under the Program.

88. The Program has inhibited communications between Mr. Abdrabboh and his family and friends because he is less candid about his political views and avoids saying things that are critical of the U.S. government over the telephone or through email.

89. The Program has inhibited communications between Mr. Abdrabboh and his clients, both foreign and domestic. Since learning of the Program, Mr. Abdrabboh has limited his communications about sensitive or privileged matters over the telephone or by email for fear the government is monitoring the communication. Instead, he has tried to limit such communications to in-person meetings, which has greatly impaired his ability to quickly get information he needs for the purpose of representing clients. Mr. Adbrabboh also believes that some of his clients have now stopped giving him sensitive information over the telephone. In one instance, a client who now lives in Afghanistan refused to share information over the telephone with Mr. Adbrabboh that was necessary to his representation in an immigration matter because the client feared the communication was being monitored by the government.

Nabih Ayad

90. Nabih Ayad is a member of the ACLU of Michigan. He is a licensed

attorney whose practice includes immigration, criminal defense and civil rights cases, in Wayne County, Michigan. Since 2002, he has served on the Lawyers Committee of the ACLU of Michigan, a committee that makes recommendations to the Board of Directors about which cases to pursue.

91. In his immigration practice, Mr. Ayad represents individuals throughout the Middle East and South Asia including individuals from Lebanon, Syria, Jordan, Egypt, United Arab Emirates, Iraq, Iran and Saudi Arabia. The government has attempted to deport some of his clients because of suspected ties to terrorism. For example, the government suspected some of his clients of supporting, or having ties to, the military wing of Hezbollah, a group that has been designated a terrorist organization by the Department of State. Mr. Ayad has also represented individuals from Lebanon, Liberia, and Trinidad who seek political asylum in this country. He successfully prevented 130 immigrants from Lebanon and Yemen accused of visa fraud from being deported through an expedited removal process. In the course of his immigration practice, Mr. Ayad is required to communicate by phone or through email with clients, clients' families and associates, and witnesses in the countries mentioned above.

92. Mr. Ayad has represented criminal defendants from Middle Eastern countries who have been accused of terrorism-related crimes. For example, he represented one individual from Jordan with suspected ties to the Taliban who came into this country with $12 million of counterfeit checks. He represented a man for Yemen who case was dismissed at the preliminary examination after he was wrongfully accused of attempting to blow up a federal building in Detroit. He also represented individuals from Lebanon who were accused of smuggling weapons oversees to Hezbollah. Through

the course of his criminal defense work, it is necessary to prepare a defense by communicating with clients, clients' families, witnesses and others in the client's home countries.

93. Mr. Ayad is a naturalized U.S. Citizen who was born in Lebanon. He has family and friends in Lebanon and Germany with whom he communicates by phone and email. When speaking with friends and family in the past, he discussed current events in the Middle East including the war in Iraq and terrorism.

94. Because of the nature of his communications, the identities of the some of the people with whom he communicates and the subject matter of conversations, Mr. Ayad has a well-founded belief that his communications are being intercepted by the NSA under the Program.

95. The Program has already inhibited communications between Mr. Ayad and individuals in the Middle East and Asia that are necessary to provide effective legal representation to his clients. Because of the Program, Mr. Ayad will not have certain kinds of conversations by phone or email for fear that the government might be monitoring his communications. For example, he will no longer communicate by phone or email about important strategic matters and about certain evidence in terrorist-related immigration or criminal cases. In addition, because of the program Mr. Ayad will even avoid discussing certain political topics with family and friends abroad for fear that such conversations will trigger monitoring.

Council on American-Islamic Relations

96. Plaintiff CAIR is a non-profit and non-partisan grassroots organization dedicated to enhancing the general public's understanding of Islam, protecting civil

liberties, empowering American Muslims and building coalitions that promote social justice and mutual understanding. CAIR is the largest Islamic civil liberties organization in the United States with more than 30 affiliated sister chapters throughout the United States and Canada representing the interests of over seven million American Muslims.

97. CAIR's Communications Department works in conjunction with local, national and international media outlets to ensure that an accurate portrayal of Islam and Muslims is presented to the general public. CAIR's daily news release service reaches individuals and international media outlets on a daily basis. Because of its communications work, CAIR has become a respected and credible source for journalists and other media professionals worldwide. CAIR representatives are regularly interviewed by CNN, BBC World Service, FOX News, The Washington Post, The New York Times, and The Los Angeles Times, as well as media outlets throughout the Muslim world, such as Al-Jazeera, Al-Arabiya, the Middle East Broadcasting Company (MBC), GEO TV (Pakistan), Al-Ahram, and other international print and broadcast outlets.

98. Because of its advocacy work, CAIR makes international telephone calls and write emails to journalists worldwide.

99. CAIR's international media communications are vital to its organizational goals of enhancing understanding of Islam, facilitating inter-cultural understanding, ensuring fair and accurate portrayals of Islam and Muslims in the media, and serving as a bridge between American and the Muslim world. CAIR's communications with members of the American Muslim community are also an essential part of its organizational success. Many members of the American Muslim community

communicate, both electronically and otherwise, to their families abroad.

100. CAIR's international media communications cover a range of subjects that are likely to trigger NSA scrutiny under the Program. These subjects include Islam, extremism, post-9/11 policies, surveillance, terrorism and counterterrorism, the war in Iraq and the American Muslim community.

101. CAIR's Communications Department drafts press releases, edits opinion articles and coordinates public education campaigns related to CAIR's mission and vision. In this role, CAIR's Communications Department receives calls from journalists from all over the world who seek information or official comment from the American Muslim perspective on issues related to CAIR's press releases or official positions.

102. The Program substantially impairs the ability of CAIR to engage in communications that are vital to its mission and the ability of the American Muslim community to freely communicate abroad without the fear of being placed under unlawful surveillance.

103. As a civil rights organization, CAIR also communicates confidential information about pending civil rights cases via international telephone calls and emails.

104. For example, after two high-profile individuals, musician Cat Stevens (known as Yusuf Islam since his conversion to Islam) and world-renowned academic Tariq Ramadan, named one of TIME Magazine's Top 100 Innovators, were denied admission to the United States; CAIR personally spoke with and emailed each of the individuals abroad.

105. The members of the American Muslim community, many of whom are

members of CAIR, are engaged in efforts of commerce, education and social services with individuals and institutions in the Muslim world. The work of the American-Muslim community in being able to engage freely in commerce, education and social services in the Muslim world is a vital part of building bridges between America and the Muslim world and thus, is integral to America's national security and vital interests. The Program substantially impairs the ability of the American Muslim community to engage in communications that are vital to America's national interests.

106. The communications of CAIR, its members and the American Muslim community with individuals and journalists abroad are an integral part of the mission and vision of CAIR, specifically related to building bridges of understanding between America and the Muslim world. The possibility that the American Muslim community's international electronic communications are being intercepted by the NSA impinges their ability to communicate freely and candidly in their international communications.

CAIR-Michigan

107. CAIR-Michigan is a non-profit and non-partisan grassroots organization dedicated to enhancing the general public's understanding of Islam, protecting civil liberties, empowering American Muslims and building coalitions that promote social justice and mutual understanding.

108. Because of its advocacy and civil rights work, CAIR-Michigan makes international telephone calls and writes emails to journalists worldwide related to the large American Muslim population within the state of Michigan.

109. CAIR-Michigan's media communications are vital to its organizational goals of enhancing a better understanding of Islam, facilitating inter-cultural

understanding and ensuring fair and accurate portrayals of Islam and Muslims in the media. CAIR-Michigan's communications are also essential to the organization's communication with its members in the American Muslim community in Michigan; many of whom communicate, both electronically and otherwise, to their families abroad.

Nazih Hassan

110. Nazih Hassan is a member of CAIR-Michigan who resides in Washtenaw County, Michigan. He was born in Lebanon in 1969, and became a legal permanent resident of the United States in 2001. From 2002 to 2003, he served as the president of the Muslim Community Association of Ann Arbor. He has served as chair on MCA' Board of Directors from mid-2005 to the present. Mr. Hassan works as a technology consultant.

111. Mr. Hassan has friends and family in Lebanon, Saudi Arabia, France, Australia and Canada with whom he frequently communicates by telephone and email. Among the people with whom he communicates by phone and email are his friends Islam Almurabit and Rabih Haddad.

112. Mr. Haddad is a native of Lebanon who was educated in the United States and lived in Ann Arbor, Michigan for more than 3 years. Mr. Haddad was an active member and popular volunteer teacher at the mosque to which Mr. Hassan belongs. Mr. Haddad co-founded Global Relief Foundation (GRF) in 1993, a humanitarian organization which the federal government has accused of having provided material support for terrorism. In December 2001, Mr. Haddad was arrested for an immigration violation on the same day that the offices of GRF were raided. Mr. Haddad was held for about a year before being deported to Lebanon. As one of the two media

coordinators for the Free Rabih Haddad Committee, Mr. Hassan drafted press releases, spoke to the media and organized public demonstrations against the detention of Mr. Haddad. Mr. Hassan visits Rabih Haddad when he returns to Lebanon for vacations.

113. Islam Almurabit, the former executive director of Islamic Assembly of North Americh, lived in Ann Arbor for approximately 7-8 years. In 2003, after the IANA offices were raided in Ypsilanti, Mr. Almurabit was visited by the FBI and accused of being a supporter of extremism. Rather than face continual harassment by the FBI, Mr. Almurabit left the United States in 2004 or 2005 and moved to Saudi Arabia.

114. Prior to becoming aware of the NSA Program, Mr. Hassan would speak with or communicate with family members about various political topics and their opinions on current events including Islam and the war in Iraq, Islamic fundamentalists, terrorism, Osama bin Laden, al Qaeda, the war in Afghanistan and the riots in France and Australia. Mr. Hassan would also participate in online discussion groups or bulletin boards about the war in Afghanistan on foreign websites in order to learn what people from other countries were thinking and to voice objections to those who favored extremism.

115. Because of his activism in the United States, his friendship with Islam Almurabit and Rabih Haddad, and his frequent communications with numerous people in the Middle East and other foreign countries about topics likely to trigger monitoring, Mr. Hassan has a well-founded belief that his communications are currently being intercepted by the NSA under the Program.

116. The likelihood that his communications are being intercepted by the NSA under the Program impinges on Mr. Hassan's ability to communicate freely and

candidly in his calls and emails. Since learning of the NSA Program in news reports, he has refrained from talking about or emailing friends and family abroad about any topic that might trigger monitoring. He has not called his friends Islam Al-Murabit or Rabih Haddad or engaged in email communications with them about anything political for fear that such communications would somehow be taken out of context or misconstrued as support for extremism. Finally, he no longer visits websites or discussion groups where some people advocate extremism, even though his purpose in participating in the discussion groups previously had been to oppose extremism.

117. The Program also interferes with Mr. Hassan's efforts to promote peace and justice in this country. Before he became aware of the NSA Program, he felt free to engage in free and open communication with people in other countries about critical issues of the day. He gained unique insight from these conversations into U.S. foreign policy that he could not gain from the media in this country. Mr. Hassan used these communications in his political work in the United States to educate Americans about the consequences of U.S. policy abroad. Because of the Program, he is no longer engaging in substantive discussions with people abroad and therefore is not able to either gain these unique insights or share them with others.

Greenpeace

118. Plaintiff Greenpeace is an advocacy organization dedicated to combating the most serious threats to the planet's biodiversity and environment. Since 1971, Greenpeace has been at the forefront of environmental activism through non-violent protest, research, lobbying, and public education. Greenpeace has approximately 250,000 members and seven offices in the United States. Greenpeace is associated with

international Greenpeace entities, which have a presence in 39 other countries and more than 2.5 million members.

119. As part of its international environmental advocacy, Greenpeace leaders and staff engage in international communications, via telephone and email, on a daily basis. Individuals contacted include staff members of Greenpeace offices in other countries, representatives of multinational organizations, governmental officials, scientific experts, and Greenpeace members. Greenpeace communicates by telephone and email with people in the Netherlands, England, Germany, Canada, Mexico, Australia, Brazil, India and Japan.

120. Greenpeace is aware that it has been targeted for surveillance in the past by the NSA. For example, in 1992 British intelligence officials revealed to the London Observer that in the 1990s the NSA had used the word "Greenpeace" as a keyword to intercept communications outside the United States. Government documents recently obtained under the Freedom of Information Act (FOIA) reveal that Greenpeace has been the subject of surveillance by the FBI and Joint Terrorism Task Forces, whose internal documents contend that the organization is associated with "suspicious activity with a connection to international terrorism." Documents obtained through the FOIA also indicate that the FBI has used confidential informants to obtain information about Greenpeace activities.

121. Greenpeace's recent activities also make the organization a likely target for government surveillance. In the past several years, Greenpeace has repeatedly engaged the Bush administration through public protest and activism. In 2001, Greenpeace held public demonstrations outside the personal residences of President Bush

and Vice President Cheney, attacking the administration's environmental and energy policies. Greenpeace has also actively publicized the Bush administration's ties to the oil industry, particularly to ExxonMobil. Seventeen Greenpeace activists were arrested in 2001 in connection with a protest aimed at disrupting a "star wars" missile test at Vandenberg Air Force Base. In 2002, Greenpeace protestors chained themselves to gas pumps at ExxonMobil stations in New York and Los Angeles, carrying banners that called on the Bush administration to stop favoring the oil industry over the environment. In 2003, there were several European protests against the war in Iraq by Greenpeace activists, including one at Rota Naval Air Base in Spain. More recently, a team of international Greenpeace experts exposed the United States' military's failure to secure and contain nuclear waste facilities in Iraq.

122. Because of the nature of Greenpeace's international communications, Greenpeace's recent activities, and the U.S. government's past surveillance of Greenpeace, Greenpeace has a well-founded belief that its international communications are currently being intercepted by the NSA under the Program.

123. Greenpeace's telephone calls, emails, and other Internet communications with individuals and organizations abroad are vital to its organizational goal of addressing environmental problems of global magnitude. This mission requires free and open communication with international colleagues, members, experts, and leaders of governments and industry.

124. The Program substantially impairs the ability of Greenpeace to engage in communications that are vital to its mission. Knowledge of the Program requires Greenpeace staff to minimize the sensitive information they include in their international

electronic communications and to be more circumspect and less candid in their communications to members and others. Greenpeace also believes that people abroad are more reticent in communicating with Greenpeace because of the likelihood that their conversations will be monitored by the NSA under the Program. Greenpeace fears that the Program will enable the U.S. government to disrupt Greenpeace's lawful activities by taking preemptive action against legitimate, and peaceful, protests.

National Association of Criminal Defense Lawyers

125. The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit organization whose membership is comprised of over 13,000 lawyers and 28,000 affiliate members representing every state. The NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases.

126. NACDL is concerned with the erosion of due process and the rights of criminal defendants and suspects generally, but particularly so with respect to the impact of the "War on Terror" upon the criminal justice system, due process, and the protections afforded by the Fourth, Fifth, and Sixth Amendments.

127. NACDL has been active with respect to those issues. NACDL has filed amicus briefs in a considerable number of cases involving the infringement of rights precipitated by the War on Terror, including in the Courts of Appeal, the Foreign Intelligence Surveillance Court of Review, and the Supreme Court. NACDL has been involved as amicus in all of the cases involving the rights of detainees, either U.S. citizens or those held at Guantanamo Bay, Cuba, in the lower and appeals courts.

128. NACDL also has at least three committees that address these issues: its Select Committee on Military Tribunals, its International Law Committee, and its Ethics Committee. Its Amicus Curiae Committee has also been intensively involved in these issues.

129. At least fifty NACDL members currently represent or have represented terrorism suspects, and many of these members regularly communicate with people outside the United States. Because of the nature of these communications, the identities of the individuals with whom they communicate, and the locations of individuals with whom they communicate, NACDL members have a well-found belief that their communications are being intercepted by the NSA under the Program. The Program is inhibiting communications that are necessary for NACDL members to provide effective legal representation to their clients.

Joshua L. Dratel

130. Joshua L. Dratel is a nationally recognized criminal defense lawyer in New York City. Mr. Dratel is a member of NACDL's Board of Directors and Co-Chair of its Select Committee on Military Tribunals. He is also co-editor of The Torture Papers: The Legal Road to Abu Ghraib (Cambridge University Press: 2005).

131. Mr. Dratel currently represents a number of individuals who have been accused by the federal government of terrorism-related crimes. For example, Mr. Dratel is lead counsel for David Hicks, whom the United States government has detained as an enemy combatant at Guantanamo Bay since 2001, and who is being prosecuted by the U.S. military commission. Mr. Dratel also represents Lynne Stewart, a criminal defense lawyer accused of providing material support for terrorism. Mr. Dratel also represents

Mohamed El-Mezain in a federal prosecution charging material support for terrorism, and Wadih El-Hage, a defendant in *United States v. Usama Bin Laden* (the Embassy Bombings case), in Mr. El-Hage's pending appeal of his conviction. Mr. Dratel also represented Sami Omar Al-Hussayen, who was acquitted in federal court in Idaho of providing material support for terrorism based on the technical support he provided to web sites and discussion boards about terrorism and jihad.

132. In representing these and other clients, Mr. Dratel routinely engages in telephone and email communications with witnesses, foreign counsel, experts, journalists, and government officials in Israel, Germany, Australia, the United Kingdom, and elsewhere. He also routinely communicates with the family members of his clients, many of whom reside in other countries. These communications are essential to his effective representation of his clients.

133. In representing these and other clients, Mr. Dratel conducts research and accesses discussion boards on the Internet as an integral part of the investigatory process. This research often includes review of web sites that allegedly support terrorism and jihad, and/or discuss the issues, including qoqaz.com, azzam.com, alasr.ws, palestine-info.org, islamway.com, and cageprisoners.com, among many others. Because of the charges against Sami Omar Al-Hussayen, Mr. Dratel reviewed hundreds of such web sites and discussion boards in preparation for trial. Mr. Dratel also engages in keyword searches using terms such as "Usama bin Laden," "Chechnya," "qoqaz," "Sheikh Safer al-Hawali," "Sheikh Salman al Odah," and "Hamas."

134. Because of the nature of his communications, the identities of people with whom he communicates, and the subject matter of his online research, Mr. Dratel

has a well-founded belief that his communications are being intercepted under the Program.

135. The Program has already inhibited communications between Mr. Dratel and individuals in other countries that are necessary to provide effective legal representation to his clients. Since learning of the Program, Mr. Dratel has ceased having certain kinds of discussions over the telephone or by email for fear that the government may be monitoring his communications.

Nancy Hollander

136. Nancy Hollander, a member and past President of NACDL, is a nationally recognized criminal defense lawyer in Albuquerque, New Mexico. Ms. Hollander is co-chair of NACDL's International Affairs Committee and also in charge of recruiting volunteers to represent prisoners at Guantanamo.

137. Ms. Hollander currently represents organizations and individuals who have been accused by the federal government of terrorism-related crimes. For example, Ms. Hollander represents Holy Land Foundation and its Executive Director Shukri Abu Baker, who are currently under indictment in Dallas, Texas charged with providing material support to a terrorist organization. She also represents Mohammedou Ould Salahi, who the federal government has declared an enemy combatant and who has been detained at Guantanamo Bay since 2002. She also represented Fawaz Damrah, who was charged and convicted in Ohio of naturalization crimes but whom the federal government attempted to link to Sami Al-Arian, a professor accused and recently acquitted in Florida of terrorism-related crimes.

138. The nature of Ms. Hollander's legal practice requires her to communicate regularly by email and telephone with individuals outside the United States. These communications are essential in providing effective representation to her clients. For example, in representing these and other clients, Ms. Hollander routinely communicates by telephone and email with witnesses, foreign counsel, experts, journalists, government officials and political figures in Israel, Gaza, the West Bank, Egypt, and other countries in the Middle East, as well as in Mauritania.

139. In representing these and other clients, Ms. Hollander also conducts research on the Internet about terrorism, religion, and politics in the Middle East and South Asia, and also participates in Internet discussions on these topics. Ms. Hollander routinely searches web sites using key words such as "Hamas," "Palestianian Islamic Jihad," "muhajadin," and "suicide bomber." This research is a necessary component of the investigatory process.

140. Because of the nature of her communications, the identities of people with whom she communicates, and the subject matter of her online research, Ms. Hollander has a well-founded belief that his communications are being intercepted by the NSA under the Program.

141. The Program has already inhibited communications between Ms. Hollander and individuals in the Middle East that are necessary to provide effective legal representation to her clients. Since learning of the Program, Ms. Hollander has ceased having certain kinds of discussions over the telephone or by email for fear that the government may be monitoring her communications. Ms. Hollander has decided that she will no longer communicate by phone or email about any strategic or privileged

matters with her clients charged in terrorism related cases, or with witnesses, experts, potential experts and co-counsel outside the United States. In one current case, Ms. Hollander is planning an expensive trip to obtain information that she would have previously obtained via telephone and email.

William W. Swor

142. William W. Swor is a member of the NACDL, and a member of the Board of Directors of the Criminal Defense Attorneys of Michigan. He maintains a private practice of law in Detroit, Michigan. His practice is primarily in the areas of federal criminal defense and immigration law.

143. Mr. Swor has represented, currently represents and expects to represent in the future, individuals who were investigated and or prosecuted under one or more of the federal terrorism-related statutes. For example, Mr. Swor represents Abdel-Ilah Elmardoudi who was wrongfully accused by the United States of providing material aid in support of terrorism. Mr. Swor also represents Mahmoud Kourani who was accused by the United States of providing material aid to Hezbollah, in Lebanon. Mr. Swor has other matters pending, both criminal and immigration matters, in several federal districts in which his clients are being investigated or prosecuted under one or more of the federal terrorism-related statutes.

144. In representing these and other clients, Mr. Swor conducts research on the Internet about terrorism, religion and politics in the Middle East, Eastern Europe, Africa and the Caucasus Mountain region. This research includes review of sites that support terrorism and/or organizations that the United States has declared Foreign Terrorist Organizations (FTOs). This research is a necessary component of his

preparation of his cases. Based upon discovery provided by the United States in pending matters, he will continue to need to refer to these sites for information.

145. The nature of Mr. Swor's legal practice also requires him to communicate by telephone with individuals outside of the United States, including individuals whose communications are likely to have been intercepted under the Program. These individuals are witnesses, potential experts, journalists, and others who are located in the Middle East, e.g. Lebanon, and Jordan, as well as western European countries such as France and England. These communications are essential in providing effective representation to his clients.

146. Mr. Swor has a well-founded belief that his communications are being intercepted by the NSA under the program. The Program has already inhibited communications between Mr. Swor and individuals in the Middle East that are necessary to provide effective legal representation to his clients. Since learning of the Program, Mr. Swor has avoided having certain kinds of discussions over the telephone or email for fear that the government may be monitoring his communications. Mr. Swor believes that he will now have to schedule one or more trips overseas to interview witnesses and to obtain information that he would have previously been able to obtain via telephone and email communications.

James Bamford

147. Plaintiff James Bamford, of Washington, D.C., is an award-winning and bestselling author and journalist. He is one of the world's leading experts on U.S. intelligence generally and the National Security Agency specifically. Mr. Bamford is the author of A Pretext for War: 9/11, Iraq, and the Abuse of America's Intelligence

Agencies (Doubleday, 2004), Body of Secrets: Anatomy of the Ultra-Secret National Security Agency (Doubleday, 2001), and The Puzzle Palace: A Report on NSA, America's Most Secret Agency (Houghton Mifflin, 1982). Mr. Bamford has written extensively on national security issues for a range of newspapers and magazines, including investigative cover stories for The New York Times Magazine, The Washington Post Magazine, and The Los Angeles Times Magazine. From 1989 -1998, he was the Washington investigative producer for ABC's World News Tonight with Peter Jennings. In 2002, he was a distinguished visiting professor of National Security at the Goldman School of Public Policy, University of California, Berkeley.

148. As an expert on intelligence, Mr. Bamford has testified before committees of both the Senate and House of Representatives as well as the European Parliament in Brussels and the International Criminal Tribunal for the former Yugoslavia. He has also been a guest speaker at the Central Intelligence Agency's Senior Intelligence Fellows Program, the National Security Agency's National Cryptologic School, the Defense Intelligence Agency's Joint Military Intelligence College, the Pentagon's National Defense University and Air War College, and the Director of National Intelligence's National Counterintelligence Executive.

149. Mr. Bamford first experienced the impact of illegal NSA eavesdropping on Americans, and the lengths to which the U.S. government will go to prevent disclosure of its spying programs, thirty years ago. As Mr. Bamford was writing The Puzzle Palace, he discovered that the Justice Department in 1976, during the Ford administration, began a secret criminal investigation into widespread illegal domestic eavesdropping by the NSA. Mr. Bamford filed a request under the Freedom of

Information Act for documents dealing with that investigation. Several hundred pages of documents were eventually released to him in 1979. The documents showed that the FBI questioned senior NSA officials about the possibility of their having violated federal criminal laws by engaging in warrantless eavesdropping of American citizens. "The investigation," said the documents, "uncovered 23 different categories of questionable activities." However, because of the secrecy of the operations, and the fact that law was undefined in this area, the Justice Department decided against prosecution and instead recommended that new laws be created to outlaw this type of activity.

150. Shortly after President Ronald Reagan took office, the Justice Department, at the request of the NSA, notified Mr. Bamford that the documents had been "reclassified" as top secret and demanded their return. When Mr. Bamford refused, saying that they had been properly declassified and released to him by the Carter administration, he was threatened with prosecution. Mr. Bamford then cited the presidential executive order on secrecy which stated that once a document had been declassified, it *cannot* be reclassified. As a result, President Reagan changed the executive order to indicate that once a document has been declassified it *can* be reclassified. However, because the order could not be applied retroactively, the new executive order could not be applied to Mr. Bamford and the information was subsequently published in The Puzzle Palace.

151. During that period, sources necessary to Mr. Bamford's investigative journalism were much less willing to communicate with him due to the likelihood that his communications were being intercepted by the NSA. The NSA had previously placed another writer, David Kahn, on its watch list, and intercepted his communications, as he

was writing his history of cryptology, The Codebreakers. According to the Senate Select Committee on Intelligence, the agency also considered undertaking "clandestine service applications" against the author, which apparently meant anything from physical surveillance to conducting a "surreptitious entry" into Kahn's New York home.

152. Mr. Bamford's recent work has again made it likely that his communications are being intercepted by the NSA. For example, in the fall of 2001, Mr. Bamford received a book contract from Doubleday Publishing Company to write A Pretext for War, which documents the intelligence mistakes that led to the nation's failure to prevent the 9/11 attacks and the Bush administration's subsequent misuse of intelligence to sell preemptive war to the American people.

153. Since the fall of 2001, Mr. Bamford has also written more than two dozen articles, reviews and opinion pieces on intelligence, 9/11, and the wars in Iraq and Afghanistan. These include "Where Spying Starts and Stops" (The New York Times, January 2006), "The Agency That Could Be Big Brother" (The New York Times, December 2005), "The Labyrinthine Morass of Spying in the Cold War" (The New York Times, July 2003), "This Spy For Rent" (The New York Times, June 2004), "How To De-Centralize Intelligence" (The New York Times, November 2002), "War of Secrets" (The New York Times, September 2005), "Washington Bends The Rules" (The New York Times, September 2002), "A Former CIA Cowboy and his Disillusioning Ride" (The New York Times, September 2002), "We're Watching Them" (The Washington Post, February 2005), "Sowing the Whirlwind" (The Washington Post, February 2004), "A Look Over My Shoulder" (The Washington Post, April 2003), "Shadow Warriors" (The Washington Post, December 2002), "Strategic Thinking" (The Washington Post,

September 2002), “The Wrong Man” (The Washington Post, January 2002), “Intelligence Failures” (The Washington Post, June 2002), “Maintain CIA’s Independence” (USA Today, October 2002), “Untested Administration Hawks Clamor for War” (USA Today, September 2002), “Bush Wrong to Use Pretext as Excuse to Invade Iraq” (USA Today, August 2002), “Linguist Reserve Corp Answers Terror Need” (USA Today, July 2002), “Secret Warriors: The Great Game” (The Los Angeles Times, May 2004), “Secrets on High” (The Los Angeles Times, March 2003), “The Man Who Sold The War” (Rolling Stone, December 2005) and “Breeding Terror: The Intelligence Community Analyzes a Counterproductive War” (The American Conservative, March 2005). Mr. Bamford also is a contributing editor for Rolling Stone and has served on the USA Today Board of Contributors.

154. Communicating with individuals in Iraq, Afghanistan, and elsewhere in the Middle East via email and telephone is a vital part of Mr. Bamford’s work as an author and journalist. Mr. Bamford’s sources in the Middle East include people working for the United States military and intelligence agencies, intelligence officials in other countries, intelligence experts, and foreign journalists specializing in writing on intelligence.

155. Mr. Bamford’s email communications include discussions of the NSA, Central Intelligence Agency, military strategies related to the wars in Iraq and Afghanistan, and the 9/11 attacks and other terrorist attacks. The people with whom Mr. Bamford has communicated, the locations of people with whom he has communicated, and the content of his communications are all likely to have triggered scrutiny by the NSA under the Program.

156. Mr. Bamford also frequently communicates by telephone and email with journalists in the Middle East, both as part of his research and because he is often interviewed as an expert on U.S. intelligence. For example, he has appeared several times on Al-Jazeera, the leading television network in the Arab world.

157. As part of his research, Mr. Bamford also frequently visits web sites that are likely to trigger NSA scrutiny. For example, Mr. Bamford has researched web sites about terrorism, jihad, Osama bin Laden, al Qaeda, Islamic fundamentalism, Saddam Hussein, weapons of mass destruction, and signals intelligence. One web site, Jihad Unleashed, includes translations of Osama bin Laden's communications. Some of these web sites express support for terrorism.

158. Mr. Bamford's ability to research and write about the NSA, intelligence, and the war on terror is seriously compromised by the Program. Because the Program substantially increases the likelihood that his communications are being intercepted by the NSA, Mr. Bamford is less able to communicate freely and candidly in his international calls and emails. In addition, because of the Program, Mr. Bamford believes that sources who have first-hand knowledge about intelligence failures and abuses are less willing to engage in communications with him.

Larry Diamond

159. Larry Diamond is a senior fellow at the Hoover Institution, Stanford University, and founding coeditor of the Journal of Democracy. He is also codirector of the International Forum for Democratic Studies of the National Endowment for Democracy. At Stanford University, he is professor by courtesy of political science and sociology and coordinates the democracy program of the Center on Democracy,

Development, and the Rule of Law. During 2002–03, he served as a consultant to the U.S. Agency for International Development (USAID) and was a contributing author of its report Foreign Aid in the National Interest. Currently he serves as a member of USAID's Advisory Committee on Voluntary Foreign Aid. Professor Diamond has also advised and lectured to the World Bank, the United Nations, the State Department, and other governmental and nongovernmental agencies dealing with governance and development.

160. During the first three months of 2004, Professor Diamond served as a senior adviser on governance to the Coalition Provisional Authority in Baghdad. He is now lecturing and writing about the challenges of post-conflict state building in Iraq, and the challenges of developing and promoting democracy around the world, with a particular focus on the Middle East and Africa. Professor Diamond has worked with a group of Europeans and Americans to produce the Transatlantic Strategy for Democracy and Human Development in the Broader Middle East, published in 2004 by the German Marshall Fund of the United States. During 2004–5, he has been a member of the Council on Foreign Relations' Independent Task Force on United States Policy Toward Arab Reform.

161. Professor Diamond is the author of numerous books, including Squandered Victory: The American Occupation and the Bungled Effort to Bring Democracy to Iraq (Times Books, 2005). His recent edited books include Islam and Democracy in the Middle East (with Marc F. Plattner and Daniel Brumberg) and Assessing the Quality of Democracy (with Leonardo Morlino).

162. Professor Diamond's work requires him to communicate by email, and occasionally by telephone, with advocates of democracy in the Middle East, Asia, and

Africa. For example, Professor Diamond corresponds by email with Saad Eddin Ibrahim, a leading advocate of democratic reform in Egypt, and with Professor Maye Kassem, a political scientist at the American University in Cairo. Professor Diamond corresponds with Adel Abdellatif of the United Nations Development Program in Beiruit. Professor Diamond also corresponds with advocates for democratic reform in many other countries, including Iran, the Palestinian Authority, Pakistan, China, the Philippines, Nigeria, Kenya, and Uganda.

163. Professor Diamond has a well-founded belief that his communications are being intercepted by the Program.

164. Some of Professor Diamond's correspondence with individuals in the Middle East and Asia concerns political and human rights issues that are extremely sensitive. For example, Professor Diamond has corresponded with Sana Baloch, a Pakistani Senator, about human rights issues in Baluchistan. Professor Diamond believes that Senator Baloch would not have provided him with this information had he believed that communications with Professor Diamond were monitored by the United States government. Professor Diamond believes that the existence of the Program makes it less likely that individuals in Afghanistan, Pakistan, Egypt, China, and elsewhere in the Middle East and Asia will provide him with sensitive information over email or by telephone in the future.

165. Because Professor Diamond is a well-known scholar of democratic reform, he is occasionally contacted unsolicited by individuals who live under repressive governments and have complaints about their governments' policies. Professor Diamond believes that the Program makes it substantially less likely that such individuals will

contact him. Professor Diamond believes that this is particularly true of individuals who live under repressive governments that have close relations with the United States, such as Pakistan, Egypt, and Kazakhstan, because these individuals will reasonably fear that their communications may ultimately be provided by the United States to their own governments.

166. Professor Diamond's ability to advocate and advise on democratic reform in the Middle East and Asia depends in part on the willingness of political dissidents to contact him, to consult with him, and to provide him with information about their own governments' policies. Professor Diamond believes that the Program inhibits the exchange of information and ideas among advocates of democratic reform and the victims of human rights abuses and defenders of human rights, and thereby compromises his ability to study the progress of democratic reform and support those in the Middle East and Asia who advocate change.

167. Additionally, Professor Diamond is concerned about the implications of the program for academic freedom. He periodically has undergraduate and graduate students who travel to the Middle East, Asia, and Africa to conduct research on sensitive political questions and who need to be in touch with him by email for advice and coordination while in the field. For example, this past summer, one of his Stanford undergraduate advisees, Omar Shakir, worked for him as a research assistant in Egypt interviewing opposition activists, intellectuals, and advocates of democratic change. Shakir sent weekly reports back to Professor Diamond and they communicated by email while he was in Egypt. Professor Diamond believes the Program inhibits the conduct and coordination of overseas research and the supervision of student research by impairing

the ability to communicate freely and responsibly with his students and assistants overseas, who often give their interviewees pledges of strict confidentiality.

Christopher Hitchens

168. Christopher Hitchens is a reporter and author based in Washington, D.C. He is a prominent and controversial commentator who is vocal in his support for the military interventions in Iraq and Afghanistan. Mr. Hitchens writes frequently on the politics of the Middle East. Many of his articles focus on understanding the role and influence of Islamic fundamentalism in the region. He also probes the success of United States policy in assuaging the threat to security posed by Muslim terrorists harbored in the Middle East and West Asia.

169. Mr. Hitchens' reportage and analysis appear in numerous publications. He has published in Harpers, The Spectator, The Nation, New York Newsday, and Atlantic Monthly. He currently is a frequent contributor to Slate and Vanity Fair. Mr. Hitchens writes a regularly featured column for Slate called Fighting Words, which he used to voice his strong support for the allied military actions in Iraq and Afghanistan. He has traveled throughout the Middle East on behalf of Vanity Fair in order to write a series of articles describing the political climate in various countries. Mr. Hitchens is also a best-selling author of several books. In 2003, he published A Long Short War: The Postponed Liberation of Iraq, a collection of essays analyzing arguments for and against the war in Iraq. In 2005, he contributed an essay to Thomas Cushman's compilation A Matter of Principle: Humanitarian Arguments for War in Iraq.

170. Mr. Hitchens' work requires him to maintain frequent contact with sources in the Middle East and Western Asia. Such communications were necessary for

him to research his Vanity Fair articles on political conditions in various Middle East states. These articles include "On the Frontier of Apocalypse" on Pakistan (January 2002), "The Maverick Kingdom" on Qatar (December 2002), "Saddam's Long Good-Bye" on Kuwait (June 2003), "A Prayer for Indonesia" (January 2004), "Afghanistan's Dangerous Bet" (November 2004), and "Iran's Waiting Game" (July 2005). Mr. Hitchens' upcoming book and continuing journalism will involve contact with, and visits to, the Middle East and Western Asia.

171. As part of his work, Mr. Hitchens regularly exchanges emails and telephone calls with individuals in Iraq, Iran, Afghanistan, Pakistan, India, Indonesia, Qatar and Kuwait. In a typical week, Mr. Hitchens hears from individuals in several of these countries. For example, Mr. Hitchens has spoken with Dr. Masuda Jalal, the only woman who ran for president of Afghanistan; Hossein Khomeini, a cleric whose grandfather overthrew the Iranian monarchy in 1979; Ali Mohmmed Kamal, a TV marketing director for Al Jazeera; and Sardar Sikander Hayat Khan, the prime minister of Pakistani Kashmir. Mr. Hitchens' communications to the Middle East and Western Asia include contacting journalists of a variety of nationalities and individuals in the United States military and diplomatic corps. He also contacts those who are actively hostile to the United States military intervention in Iraq and Afghanistan and the United States more generally. Because of the subject matter of his reporting, many of Mr. Hitchens' communications involve discussions of Islamic fundamentalism, terrorism, jihad, Osama bin Laden, al Qaeda, and Saddam Hussein.

172. Since well before 2001, but more regularly and frequently since then, Mr. Hitchens' work has required him to travel to the Middle East and Western Asia.

Since 2001, the countries he has visited include Iraq, Iran, Afghanistan, Pakistan, India, Indonesia, Qatar and Kuwait. Travel is an important element of Mr. Hitchens' work, as his reporting offers detailed, first-hand accounts of conditions in countries few Westerners have an opportunity to visit. For instance, Mr. Hitchens traveled throughout Iran to prepare "Iran's Waiting Game" (July 2005 Vanity Fair). He visited Tehran, Qom, and Mashhad to gain a sense of life under Iran's theocratic government. In researching "Afghanistan's Dangerous Bet" (November 2004 Vanity Fair), Mr. Hitchens ventured from Kabul to the provincial capital of Herat to witness the run-up to Afghanistan's first democratic elections from different vantage points. Mr. Hitchens visited Qatar to report on its relatively free society, a report in which he devoted much attention to Qatar-based media outlet Al Jazeera (The Maverick Kingdom, December 2002 Vanity Fair). While traveling, Mr. Hitchens communicates regularly by telephone and email with colleagues, editors, and sources in the United States.

173. Because of the nature of his communications with people in the Middle East, the identities of those with whom he communicates, and the subject matter of his online research, Mr. Hitchens has a well-founded belief that his communications are being intercepted by the NSA under the Program. Mr. Hitchens believes that free and open communication with his sources is an essential element of his work as a journalist. Given the sensitive nature of his work, Mr. Hitchens must assure some of his sources that their communications are kept in strict confidentiality. The Program undermines Mr. Hitchens' ability to make that assurance. As a result, individuals are less forthcoming in their conversations with him, and may cut off communications completely. In addition, the likelihood that Mr. Hitchens' international communications are being intercepted by

the NSA under the spying program impinges his own ability to communicate freely and candidly with his sources and others, to the detriment of his effectiveness as an investigative journalist.

Tara McKelvey

174. Plaintiff Tara McKelvey is a senior editor at The American Prospect and a contributing editor to Marie Claire. Her articles have appeared in those two magazines as well as in The Nation, USA Today, Chicago Tribune, and The New York Times.

175. Ms. McKelvey has written extensively about the Middle East, including articles about Iraqi detainees held in United States custody, about women's issues in Iraq, and about the United States military in Iraq. She is working on a book about U.S. legal efforts to fight torture and is editing an upcoming anthology about women and torture.

176. Communicating with individuals in Iraq, Jordan, and Syria via telephone and email is a vital part of Ms. McKelvey's work as a journalist. Since October 2004, Ms. McKelvey regularly emails people in Iraq and Jordan as part of her research. For example, she made frequent calls to individuals in Iraq, Jordan, and Syria during November and December 2004 and January, November, and December 2005. Ms. McKelvey's sources in the Middle East include individuals working for the United States military, Iraqi soldiers, nongovernmental agencies, bankers, school administrators, journalists, activists, human-rights workers, and others.

177. Among Ms. McKelvey's many sources in the Middle East are individuals she believes are likely to have been the targets of United States government surveillance because they have been arrested or investigated by United States or coalition

forces, have been suspected of aiding insurgents, have ties to the former Iraqi regime, or are critical of the United States presence in Iraq.

178. For example, in December 2004, for an article for The American Prospect, Ms. McKelvey interviewed by telephone Khadeja Yassen in Baghdad. Yassen was a ranking member of the Baath Party and is the sister of former vice president Taha Yassin Ramadan, who in turn was included in the United States military's playing card deck of the 55 most wanted Iraqis. Yassen had her house raided by United States forces in 2003 and was thereafter arrested.

179. Also in December 2004, for an article for The American Prospect, Ms. McKelvey interviewed Saja, an engineer in her thirties, by telephone at her home in Damascus. Ms. McKelvey also emailed her. Saja is, according to an American spokesman for coalition forces in Iraq, believed to be a former mistress of Saddam Hussein.

180. As part of her journalistic research, Ms. McKelvey visits numerous websites hosted in the Middle East that include aggressive anti-American propaganda.

181. Because of her journalistic contacts with individuals in Iraq who have been arrested or investigated by United States or coalition forces, who have been suspected of aiding insurgents, who have ties to the former Iraqi regime, or who are critical of the United States presence in Iraq, Ms. McKelvey has a well-founded belief that her international communications are being intercepted by the NSA under the Program.

182. The Program substantially impairs Ms. McKelvey's ability to communicate openly with sources in the Middle East that are essential to her work as a

journalist. Many of Ms. McKelvey's most important sources have spoken to her in the past only with great trepidation: they fear that other Iraqis will kill them for speaking with an American and, at the same time, they fear being arrested (in some cases, re-arrested) by United States or coalition forces who suspect them of being involved in insurgent activities. Ms. McKelvey believes that the Program is diminishing the willingness of her sources to communicate with her and may deter them from communicating with her altogether for fear that their communications may be intercepted.

Barnett R. Rubin

183. Barnett R. Rubin is Director of Studies and Senior Fellow at the New York University Center on International Cooperation ("CIC"). The CIC promotes policy research and international consultations on multilateral responses to transnational problems. He is the chair of the Conflict Prevention and Peace Forum (CPPF), a program of the Social Science Research Council in New York, that provides the United Nations with confidential consultations with experts on issues related to conflict and peace around the world. He is also a member of the board of Gulestan Ariana Ltd., a commercial company registered in Afghanistan to manufacture essential oils, hydrosols, and related proeducts, with offices and operations in Kabul and Jalalabad. Previously Professor Rubin was the Director of the Center for Preventive Action of the Council on Foreign Relations, of which he is now an advisory board member. He was a member of the UN delegation to the UN Talks on Afghanistan in Bonn, Germany, in November-December 2001. Professor Rubin advised the United Nations in Afghanistan during the process of drafting the constitution of the Islamic Republic of Afghanistan in 2003. Professor Rubin

is a member of the advisory board of the Central Eurasia Program of the Open Society Institute, overseeing programs in the Caucasus, Central Asia, Afghanistan, Iran, and Pakistan.

184. Professor Rubin's work and research concerns conflict prevention and peace building in Afghanistan and the surrounding region. Professor Rubin is regularly consulted as an expert on Afghanistan, Central Asia, and South Asia and regularly works in collaboration with officials of Afghanistan, the United Nations, the United States, and other governments and international organizations on development and institution-building projects. In his work with CPPF he works on issues related to conflict prevention in Central Asia and travels to the area. As a board member of Gulestan, he communicates with individuals in Kabul and Jalalabad, and travels to inspect the company's operations in Jalalabad and elsewhere in Nangarhar province, including some areas close to Tora Bora. He has authored and edited numerous books and articles about Afghanistan and conflict prevention, including The Fragmentation of Afghanistan (New Haven: Yale University Press, 2002 (second edition), 1995 (first edition)), The Search for Peace in Afghanistan (New Haven: Yale University Press, 1995), and Blood on the Doorstep: The Politics of Preventing Violent Conflict (New York: The Century Foundation and the Council on Foreign Relations, 2002).

185. Professor Rubin communicates by email and telephone with individuals in Afghanistan almost every day. Professor Rubin frequently communicates by telephone with Afghan government officials in Kabul. In connection with Gulestan's activities he speaks to individuals in Jalalabad. In connection with his work for CPPF and OSI, Professor Rubin communicates with individuals in Central Asia. Professor Rubin

communicates regularly by telephone with Amrullah Saleh, the Director of the National Directorate of Security (Afghanistan's intelligence agency); with Ishaq Nadiri, President Hamid Karzai's Minister Advisor of Economic Affairs; with Adib Farhadi, Director of the Afghanistan Reconstruction and Development Services; with Ali Ahmad Jalali, when he was Minister of the Interior of Afghanistan; with Dr. Ashraf Ghani, Chancellor of Kabul University and former Minister of Finance of Afghanistan; with engineer Mohammad Eshaq, former director of Afghan Radio and Television; and with many others.

186. Professor Rubin also communicates frequently by telephone with United Nations officials in Kabul, including Lakhdar Brahimi, when he was the United Nations Special Representative of the Secretary General for Afghanistan (SRSG); Jean Arnault, the current SRSG; Ameerah Haq, Deputy SRSG; Chris Alexander, Deputy SRSG; and Eckart Schwieck, Mr. Arnault's Executive Assistant.

187. In connection with his work on Afghanistan and South Asia, Rubin frequently communicates by email and telephone with colleagues such as Ahmed Rashid, a journalist and author residing in Lahore, Pakistan. He frequently communicated in the past several years with a Pakistani journalist named Abubaker Saddique, who worked for the International Crisis Group, the Integrated Regional Information Network (Central Asia) of the United Nations and who also worked for CIC as a consultant. These communications concerned particularly sensitive matters, such as the Afghan-Pakistani border areas, a project on which they are now working together.

188. In connection with his work for CPPF and OSI, Professor Rubin has traveled to Tajikistan and other Central Asian countries and engages in email and

telephone communications with journalists in the area as well as with OSI staff, such as Zuhra Halimova, director of the OSI office in Dushanbe, Tajikistan.

189. In connection with his work, Professor Rubin also frequently communicates with Afghan government officials and others by email. For example, between August 2005 and the present, Professor Rubin has exchanged numerous emails with Afghan government officials who are drafting the Afghan National Development Strategy, on which Professor Rubin works as an advisor. Professor Rubin has also communicated by email with Amrullah Saleh, the Director of the Afghan intelligence agency. On occasion, Professor Rubin has also exchanged emails with individuals, including government officials, in Iran. These have included former deputy foreign minister Abbas Maleki, editor of the Hamshahri newspaper and director of the Caspian Studies Institute; and Dr. Sayed Kazem Sajjadpour, former director of the Institute for Political and International Studies; and Kian Tadjbakhsh, Senior Research Fellow, Cultural Research Bureau, Tehran. Rubin traveled to Tehran for a conference in December 2003, and in conjunction with that trip made numerous telephone calls and emails.

190. Because of the nature of Professor Rubin's communications, and the identities and locations of those with whom he communicates, Professor Rubin has a well-founded belief that his communications are being intercepted by the NSA under the Program.

191. Professor Rubin believes that free and open communication with individuals in Afghanistan and elsewhere in the Middle East and Asia is essential to his work as a scholar. A large part of Professor Rubin's work involves exchanging ideas and

information with people in Afghanistan and elsewhere in the Middle East and Asia. The ideas are sometimes controversial and the information is sometimes sensitive. Professor Rubin believes that the Program inhibits the free exchange of controversial ideas and sensitive information and thereby compromises his ability to engage in scholarship and to work collaboratively with individuals in Afghanistan and elsewhere in the Middle East and Asia.

CAUSES OF ACTION

192. The Program violates plaintiffs' free speech and associational rights guaranteed by the First Amendment.

193. The Program violates plaintiffs' privacy rights guaranteed by the Fourth Amendment.

194. The Program violates the principle of separation of powers because it was authorized by President Bush in excess of his Executive authority under Article II of the United States Constitution and is contrary to limits imposed by Congress.

195. The Program violates the Administrative Procedures Act because the NSA's actions under the Program exceed statutory authority and limitations imposed by Congress through FISA and Title III; are not otherwise in accordance with law; are contrary to constitutional right; and are taken without observance of procedures required by law.

PRAYER FOR RELIEF

WHEREFORE plaintiffs respectfully requests that the Court:

1. Declare that the Program is unconstitutional under the First and Fourth Amendments;

2. Declare that the Program violates the principle of separation of powers;

2. Declare that the Program violates the Administrative Procedures Act;

3. Permanently enjoin defendants from utilizing the Program;

4. Award Plaintiff fees and costs pursuant to 28 U.S.C. § 2412;

5. Grant such other and further relief as the Court deems just and proper.

Respectfully submitted,

_____

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January 17, 2006

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION FOUNDATION; AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN; COUNCIL ON AMERICAN-ISLAMIC RELATIONS; COUNCIL ON AMERICAN-ISLAMIC RELATIONS MICHIGAN; GREENPEACE, INC.; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; JAMES BAMFORD; LARRY DIAMOND; CHRISTOPHER HITCHENS; TARA MCKELVEY; and BARNETT R. RUBIN, Plaintiffs, v. NATIONAL SECURITY AGENCY / CENTRAL SECURITY SERVICE; and LIEUTENANT GENERAL KEITH B. ALEXANDER, in his official capacity as Director of the National Security Agency and Chief of the Central Security Service, Defendants.	Case No. 2:06cv10204 Hon. Anna Diggs Taylor

STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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March 9, 2006

1. In the fall of 2001, the President authorized the NSA to launch a secret electronic surveillance program (the "Program").

    A. President Bush has stated: "In the weeks following the terrorist attacks on our Nation, I authorized the National Security Agency, consistent with U.S. law and the Constitution, to intercept the international communications of people with known links to Al Qaida and related terrorist organizations." Exh. A at 1881.

    B. Attorney General Gonzales has stated: "The President has authorized a program to engage in electronic surveillance . . . ." Exh. B.

2. Under the Program, the NSA intercepts electronic communications.

    A. General Michael Hayden, Principal Deputy Director for National Intelligence, has acknowledged that international calls are intercepted under the Program. Exh. C.

    B. President Bush has noted that calls are intercepted. Exh. D at 1889.

    C. Assistant Attorney General William E. Moschella has said: "As described by the President, the NSA intercepts certain international communications . . . ." Exh. F.

3. Under the Program, the NSA intercepts communications of people inside the United States.

    A. Vice President Cheney has described the Program as follows: "It is the interception of communications, one end of which is outside the United States, and one end of which, either outside the United States or inside, we have reason to believe is al-Qaeda-connected." Exh. E.

    B. Assistant Attorney General William E. Moschella has said: "As described by the President, the NSA intercepts certain international communications into and out of the United States . . . ." Exh. F.

    C. In describing surveillance under the Program, Attorney General Alberto Gonzales has said: "To the extent that there is a moderate and heavy communication involving an American citizen, it would be a communication where the other end of the call is outside the United States and where we believe that either the American citizen or the person outside the United States is somehow affiliated with al Qaeda." Exh. B.

4. President Bush has reauthorized the Program more than thirty times. He has stated: "I've reauthorized this program more than 30 times since the September the 11th attacks . . . ." Exh. D at 1885.

5. President Bush intends to continue reauthorizing the Program. He has stated: "I intend to [reauthorize the Program] for so long as our Nation is – for so long as the Nation faces the continuing threat of an enemy that wants to kill American citizens." Exh. D at 1885.

6. Under the Program, the NSA intercepts electronic communications without probable cause.

   A. General Hayden has stated that the NSA targets for interception "calls . . . [the government has] a reasonable basis to believe involve al Qaeda or one of its affiliates." Exh. C.

   B. President Bush has said: "I authorized the interception of international communications of people with known links to Al Qaida and related terrorist organizations." Exh. D at 1885.

   C. President Bush has said: "Before we intercept these communications, the government must have information that establishes a clear link to these terrorist networks." Exh. A at 1881.

   D. Vice President Cheney has said: "It is the interception of communications, . . . one end of which . . . we have reason to believe is al-Qaeda-connected." Exh. E.

   E. Assistant Attorney General William E. Moschella has said: "As described by the President, the NSA intercepts certain international communications into and out of the United States of people linked to al Qaeda or an affiliated terrorist organization." Exh. F.

   F. Attorney General Gonzales has stated that the NSA intercepts "international communications involving someone we reasonably believe is associated with al Qaeda . . . ." Exh. G.

   G. Attorney General Gonzales has stated that the NSA intercepts communications where "we have to have a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda." Exh. B.

   H. General Hayden has said: "We are going after very specific communications that our professional judgment tells us we have reason to believe are those associated with people who want to kill Americans." Exh. C.

   I. General Hayden has stated that the NSA intercepts calls that "we have a reasonable basis to believe involve al Qaeda or one of its affiliates." Exh. C.

J. During his congressional testimony, when Attorney General Gonzales was asked about the standard for intercepting calls under the Program, he responded as follows: "I think it's probable cause. But it's not probable cause as to guilt … Or probable cause as to a crime being committed. It's probable cause that a party to the communication is a member or agent of Al Qaida. The precise language that I'd like to refer to is, 'There are reasonable grounds to believe that a party to communication is a member or agent or Al Qaida or of an affiliated terrorist organization.' It is a probable cause standard, in my judgment." Exh. H.

K. General Hayden has said: "Inherent foreign intelligence value is one of the metrics we must use to ensure that we conform to the Fourth Amendment's reasonableness standard when it comes to protecting the privacy of these kinds of people." Exh. C.

7. The Attorney General has refused to specify the number of Americans whose communications are intercepted under the Program. During a press briefing by Attorney General Gonzales, the following exchange occurred:

> Q General, are you able to say how many Americans were caught in this surveillance?
>
> ATTORNEY GENERAL GONZALES: I'm not -- I can't get into the specific numbers because that information remains classified. Again, this is not a situation where -- of domestic spying. To the extent that there is a moderate and heavy communication involving an American citizen, it would be a communication where the other end of the call is outside the United States and where we believe that either the American citizen or the person outside the United States is somehow affiliated with al Qaeda.
>
> Exh. B.

8. The Attorney General has said that under the Program, "information is collected, information is retained and information is disseminated . . . ." Exh. H.

9. The Program is intercepting communications that are subject to the requirements of the Foreign Intelligence Surveillance Act of 1978 (FISA). In describing the Program, Attorney General Gonzales has stated that "the Foreign Intelligence Surveillance Act . . . requires a court order before engaging in this kind of surveillance . . . unless otherwise authorized by statute or by Congress." Exh. B.

10. The Program does not operate in accordance with the procedures set forth in FISA.

A. General Hayden has said: "I can say unequivocally that we have used this program in lieu of [the FISA process] and this program has been successful." Exh. B.

B. General Hayden has stated: "If FISA worked just as well, why wouldn't I use FISA? To save typing? No. There is an operational impact here, and I have two paths in front of me, both of them lawful, one FISA, one the presidential -- the president's authorization. And we go down this path because our operational judgment is it is much more effective. So we do it for that reason." Exh. C.

C. General Hayden has said: "[T]his is a more . . . 'aggressive' program than would be traditionally available under FISA." Exh. B.

D. General Hayden has said, "[t]he trigger [to intercept communications] is quicker and a bit softer than it is for a FISA warrant . . . ." Exh. C.

E. General Hayden has said in response to a question about the Program: "What you're asking me is, can we do this program as efficiently using the one avenue provided to us by the FISA Act, as opposed to the avenue provided to us by subsequent legislation and the President's authorization. Our operational judgment, given the threat to the nation that the difference in the operational efficiencies between those two sets of authorities are such that we can provide greater protection for the nation operating under this authorization." Exh. B.

F. General Hayden has said: "In the instances where this program applies, FISA does not give us the operational effect that the authorities that the president has given us give us." Exh. C.

G. Assistant Attorney General William E. Moschella has said: "[T]he President determined that it was necessary following September 11 to create an early warning detection system. FISA could not have provided the speed and agility required for the early warning detection system." Exh. F.

11. Under the Program, the NSA intercepts communications without obtaining a warrant or any other type of judicial authorization.

A. Attorney General Gonzales has stated: "[T]he program is triggered [by] a career professional at the NSA." Exh. H

B. General Hayden has stated that "[t]he period of time in which we do this [i.e. intercept a communication] is, in most cases, far less than that which would be gained by getting a court order." Exh. B.

C. During a press briefing by General Hayden, the following exchange occurred:

> QUESTION: . . . Just to clarify sort of what's been said, from what I've heard you say today and an earlier press conference, *the change from going around the FISA law was to -- one of them was to lower the standard from what they call for, which is basically probable cause to a reasonable basis; and then to take it away from a federal court judge, the FISA court judge, and hand it*

over to a shift supervisor at NSA. Is that what we're talking about here -- just for clarification?

GEN. HAYDEN: *You got most of it right.* The people who make the judgment, and the one you just referred to, there are only a handful of people at NSA who can make that decision. They're all senior executives, they are all counterterrorism and al Qaeda experts. So I -- even though I -- you're actually quoting me back, Jim, saying, "shift supervisor." To be more precise in what you just described, the person who makes that decision, a very small handful, senior executive. So in military terms, a senior colonel or general officer equivalent; and in professional terms, the people who know more about this than anyone else.

QUESTION: Well, no, that wasn't the real question. The question I was asking, though, was since you lowered the standard, doesn't that decrease the protections of the U.S. citizens? And number two, if you could give us some idea of the genesis of this. Did you come up with the idea? Did somebody in the White House come up with the idea? Where did the idea originate from? Thank you.

GEN. HAYDEN: Let me just take the first one, Jim. And I'm not going to talk about the process by which the president arrived at his decision. *I think you've accurately described the criteria under which this operates,* and I think I at least tried to accurately describe a changed circumstance, threat to the nation, and why this approach -- limited, focused -- has been effective.

Exh. C (emphasis added).

D. Attorney General Gonzales has said: "[T]he Supreme Court has long held that there are exceptions to the warrant requirement in -- when special needs outside the law enforcement arena. And we think that that standard has been met here." Exh. B.

12. Under the Program, neither the President nor the Attorney General authorizes specific instances of surveillance. General Hayden has said of the communications intercepted under the Program: "These are communications that we have reason to believe are Al Qaeda communications: a judgment made by American intelligence professionals, not folks like me or political appointees . . . ." Exh. C.

13. Under the Program, an NSA "shift supervisor" is authorized to approve interceptions of communications.

A. General Hayden has stated that the judgment to target a communication "is made by the operational work force at the National Security Agency using the information available to them at the time, and the standard that they apply -- and it's a two-person standard that must be signed off by a shift supervisor, and

carefully recorded as to what created the operational imperative to cover any target, but particularly with regard to those inside the United States." Exh. B.

B. Attorney General Gonzales has said of the Program: "The decision as to which communications will be surveilled are made by intelligence experts out at NSA." Exh. H.

14. Attorney General Alberto Gonzales has refused to rule out the possibility that the Administration has engaged in warrantless physical searches of homes or offices in pursuit of its national policies.

> SCHUMER: OK. Good. Now, here's the next question I have: Has the government done this? Has the government searched someone's home, an American citizen, or office, without a warrant since 9/11, let's say?
>
> GONZALES: To my knowledge, that has not happened under the terrorist surveillance program, and I'm not going to go beyond that.
>
> SCHUMER: I don't know what that -- what does that mean, under the terrorist surveillance program? The terrorist surveillance program is about wiretaps. This is about searching someone's home. It's different. So it wouldn't be done under the surveillance program. I'm asking you if it has been done, period.
>
> GONZALES: But now you're asking me questions about operations or possible operations, and I'm not going to get into that, Senator.
>
> Exh. G.

15. The Program has irreparably harmed the First Amendment rights of Plaintiffs and others.

A. Plaintiffs are a group of prominent journalists, scholars, attorneys, and national nonprofit organizations who frequently communicate by telephone and email with people outside the United States, including in the Middle East and Asia. Exh. I, Diamond Decl. ¶¶2-8; Exh. J, Hollander Decl. ¶¶2-12, 14-15; Exh. K, McKelvey Decl. ¶¶2-7; Exh. L, Swor Decl. ¶¶2, 4, 7, 10.

B. Some of the plaintiffs, in connection with scholarship, journalism, or legal representation, communicate with people whom the United States government believes or believed to be terrorist suspects or to be associated with terrorist organizations. Exh. I, Diamond Decl. ¶9; Exh. J, Hollander Decl. ¶¶12-14, 17-24; Exh. K, McKelvey Decl. ¶8-10; Exh. L, Swor Decl. ¶¶5-7, 10.

C. Because of the nature of their calls and emails, and the identities and locations of those with whom they communicate, plaintiffs have a well-founded belief that

their communications are being intercepted under the Program. Exh. I, Diamond Decl. ¶10; Exh. J, Hollander Decl. ¶¶12-13, 16-24; Exh. K, McKelvey Decl. ¶¶8-10, 12; Exh. L, Swor Decl. ¶¶8-11.

D. Plaintiffs have ceased engaging in certain conversations on the phone and by email. Exh. I, Diamond Decl. ¶12; Exh. J, Hollander Decl. ¶¶16, 20, 23-25; Exh. K, McKelvey Decl. ¶16; Exh. L, Swor Decl. ¶¶9, 11-16.

E. The Program is disrupting the ability of the plaintiffs to talk with sources, locate witnesses, conduct scholarship, engage in advocacy, and engage in other activity protected by the First Amendment. Exh. I, Diamond Decl. ¶¶11, 13-15; Exh. J, Hollander Decl. ¶¶12, 16, 25; Exh. K, McKelvey Decl. ¶14-15; Exh. L, Swor Decl. ¶¶9, 11-12, 14-16.

F. The Program has exacted a financial cost from plaintiffs as well. Because the Program inhibits their ability to speak by telephone with sources, clients and others essential to their work, several of the plaintiffs now must travel long distances to meet personally with these individuals. Exh. I, McKelvey Decl. ¶¶16-17; Exh. J, Hollander Decl. ¶¶20, 23-25; Exh. L, Swor Decl. ¶¶13-14.

Respectfully submitted,

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March 9, 2006

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION FOUNDATION; AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN; COUNCIL ON AMERICAN-ISLAMIC RELATIONS; COUNCIL ON AMERICAN-ISLAMIC RELATIONS MICHIGAN; GREENPEACE, INC.; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; JAMES BAMFORD; LARRY DIAMOND; CHRISTOPHER HITCHENS; TARA MCKELVEY; and BARNETT R. RUBIN, Plaintiffs, v. NATIONAL SECURITY AGENCY / CENTRAL SECURITY SERVICE; and LIEUTENANT GENERAL KEITH B. ALEXANDER, in his official capacity as Director of the National Security Agency and Chief of the Central Security Service, Defendants.	Case No. 2:06cv10204 Hon. Anna Diggs Taylor

INDEX OF EXHIBITS IN SUPPORT OF
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Exhibit	**Title/Description**
Exhibit A	The President's Radio Address, 41 WEEKLY COMP. PRES. DOC. 1880 (Dec. 17, 2005), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2005_presidential_documents&docid=pd26de05_txt-9.pdf.

Exhibit B Excerpt from Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence, Press Briefing (Dec. 19, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/12/print/20051219-1.html

Exhibit C Excerpt from General Michael Hayden, Principal Deputy Director of National Intelligence, Address to the National Press Club (Jan. 23, 2006), *available at* http://www.dni.gov/release_letter_012306.html

Exhibit D Excerpt from President's News Conference, 41 WEEKLY COMP. PRES. DOC. 1885 (Dec. 19, 2005), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2005_presidential_documents&docid=pd26de05_txt-11.pdf

Exhibit E Excerpt from James Taranta, *A Strong Executive*, WALL STREET JOURNAL, Jan. 28, 2006, at A8, *available at* http://www.opinionjournal.com/editorial/feature.html?id=110007885

Exhibit F Excerpt from Letter from William E. Moschella, Assistant Attorney General, to Pat Robert, Chairman of Senate Select Committee on Intelligence; John D. Rockefeller IV, Vice Chairman of Senate Select Committee on Intelligence; Peter Hoekstra, Chairman, Permanent Select Committee on Intelligence; Jane Harman, Ranking Minority Member, Permanent Select Committee on Intelligence (Dec. 22, 2005), *available at* http://files.findlaw.com/news.findlaw.com/hdocs/docs/nsa/dojnsa122205ltr.pdf

Exhibit G Excerpt from Alberto Gonzales, "*Ask the Whitehouse"* (Jan. 25, 2006), http://www.whitehouse.gov/ask/20060125.html

Exhibit H Excerpt from *Wartime Executive Power and the NSA's Surveillance Authority: Hearing Before the Senate Judiciary Comm.,* 109th Cong. (2006), available on Westlaw at 2006 WL 270364 (F.D.C.H.)

Exhibit I Declaration of Larry Diamond

Exhibit J Declaration of Nancy Hollander

Exhibit K Declaration of Tara McKelvey

Exhibit L Declaration of William Swor

Respectfully submitted,

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March 9, 2006

EXHIBIT A

- ensure that departments and agencies promote a culture of information sharing by assigning personnel and dedicating resources to terrorism information sharing.

The guidelines build on the strong commitment that my Administration and the Congress have already made to strengthening information sharing, as evidenced by Executive Orders 13311 of July 27, 2003, and 13388 of October 25, 2005, section 892 of the Homeland Security Act of 2002, the USA PATRIOT Act, and sections 1011 and 1016 of the IRTPA. While much work has been done by executive departments and agencies, more is required to fully develop and implement the ISE.

To lead this national effort, I designated the Program Manager (PM) responsible for information sharing across the Federal Government, and directed that the PM and his office be part of the Office of the Director of National Intelligence (DNI), and that the DNI exercise authority, direction, and control over the PM and ensure that the PM carries out his responsibilities under section 1016 of IRTPA. I fully support the efforts of the PM and the Information Sharing Council to transform our current capabilities into the desired ISE, and I have directed all heads of executive departments and agencies to support the PM and the DNI to meet our stated objectives.

Creating the ISE is a difficult and complex task that will require a sustained effort and strong partnership with the Congress. I know that you share my commitment to achieve the goal of providing decision makers and the men and women on the front lines in the War on Terror with the best possible information to protect our Nation. I appreciate your support to date and look forward to working with you in the months ahead on this critical initiative.

George W. Bush

The White House,
December 16, 2005.

NOTE: An original was not available for verification of the content of this message.

The President's Radio Address

December 17, 2005

Good morning. As President, I took an oath to defend the Constitution, and I have no greater responsibility than to protect our people, our freedom, and our way of life. On September the 11th, 2001, our freedom and way of life came under attack by brutal enemies who killed nearly 3,000 innocent Americans. We're fighting these enemies across the world. Yet in this first war of the 21st century, one of the most critical battlefronts is the homefront. And since September the 11th, we've been on the offensive against the terrorists plotting within our borders.

One of the first actions we took to protect America after our Nation was attacked was to ask Congress to pass the PATRIOT Act. The PATRIOT Act tore down the legal and bureaucratic wall that kept law enforcement and intelligence authorities from sharing vital information about terrorist threats. And the PATRIOT Act allowed Federal investigators to pursue terrorists with tools they already used against other criminals. Congress passed this law with a large, bipartisan majority, including a vote of 98–1 in the United States Senate.

Since then, America's law enforcement personnel have used this critical law to prosecute terrorist operatives and supporters and to break up terrorist cells in New York, Oregon, Virginia, California, Texas, and Ohio. The PATRIOT Act has accomplished exactly what it was designed to do: It has protected American liberty and saved American lives.

Yet key provisions of this law are set to expire in 2 weeks. The terrorist threat to our country will not expire in 2 weeks. The terrorists want to attack America again and inflict even greater damage than they did on September the 11th. Congress has a responsibility to ensure that law enforcement and intelligence officials have the tools they need to protect the American people.

The House of Representatives passed reauthorization of the PATRIOT Act. Yet a minority of Senators filibustered to block the renewal of the PATRIOT Act when it came up for a vote yesterday. That decision is irresponsible, and it endangers the lives of our

citizens. The Senators who are filibustering must stop their delaying tactics, and the Senate must vote to reauthorize the PATRIOT Act. In the war on terror, we cannot afford to be without this law for a single moment.

To fight the war on terror, I am using authority vested in me by Congress, including the Joint Authorization for Use of Military Force, which passed overwhelmingly in the first week after September the 11th. I'm also using constitutional authority vested in me as Commander in Chief.

In the weeks following the terrorist attacks on our Nation, I authorized the National Security Agency, consistent with U.S. law and the Constitution, to intercept the international communications of people with known links to Al Qaida and related terrorist organizations. Before we intercept these communications, the Government must have information that establishes a clear link to these terrorist networks.

This is a highly classified program that is crucial to our national security. Its purpose is to detect and prevent terrorist attacks against the United States, our friends, and allies. Yesterday the existence of this secret program was revealed in media reports, after being improperly provided to news organizations. As a result, our enemies have learned information they should not have, and the unauthorized disclosure of this effort damages our national security and puts our citizens at risk. Revealing classified information is illegal, alerts our enemies, and endangers our country.

As the 9/11 Commission pointed out, it was clear that terrorists inside the United States were communicating with terrorists abroad before the September the 11th attacks, and the commission criticized our Nation's inability to uncover links between terrorists here at home and terrorists abroad. Two of the terrorist hijackers who flew a jet into the Pentagon, Nawaf al Hamzi and Khalid al Mihdhar, communicated while they were in the United States to other members of Al Qaida who were overseas. But we didn't know they were here until it was too late.

The authorization I gave the National Security Agency after September the 11th helped address that problem in a way that is fully consistent with my constitutional responsibilities and authorities. The activities I have authorized make it more likely that killers like these 9/11 hijackers will be identified and located in time. And the activities conducted under this authorization have helped detect and prevent possible terrorist attacks in the United States and abroad.

The activities I authorized are reviewed approximately every 45 days. Each review is based on a fresh intelligence assessment of terrorist threats to the continuity of our Government and the threat of catastrophic damage to our homeland. During each assessment, previous activities under the authorization are reviewed. The review includes approval by our Nation's top legal officials, including the Attorney General and the Counsel to the President. I have reauthorized this program more than 30 times since the September the 11th attacks, and I intend to do so for as long as our Nation faces a continuing threat from Al Qaida and related groups.

The NSA's activities under this authorization are thoroughly reviewed by the Justice Department and NSA's top legal officials, including NSA's General Counsel and Inspector General. Leaders in Congress have been briefed more than a dozen times on this authorization and the activities conducted under it. Intelligence officials involved in this activity also receive extensive training to ensure they perform their duties consistent with the letter and intent of the authorization.

This authorization is a vital tool in our war against the terrorists. It is critical to saving American lives. The American people expect me to do everything in my power under our laws and Constitution to protect them and their civil liberties. And that is exactly what I will continue to do, so long as I'm the President of the United States.

Thank you.

NOTE: The President spoke at 10:06 a.m. from the Roosevelt Room at the White House. In his address, he referred to the National Commission on Terrorist Attacks Upon the United States (9/11 Commission). The Office of the Press Secretary also released a Spanish language transcript of this address.

EXHIBIT B

the White House
President George W. Bush

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For Immediate Release
Office of the Press Secretary
December 19, 2005

Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence

James S. Brady Briefing Room

8:30 A.M. EST

MR. McCLELLAN: Good morning, everybody. I've got with me the Attorney General and General Hayden here this morning to brief you on the legal issues surrounding the NSA authorization and take whatever questions you have for them on that. The Attorney General will open with some comments and then they'll be glad to take your questions.

And with that, I'll turn it over to General Gonzales.

ATTORNEY GENERAL GONZALES: Thanks, Scott.

The President confirmed the existence of a highly classified program on Saturday. The program remains highly classified; there are many operational aspects of the program that have still not been disclosed and we want to protect that because those aspects of the program are very, very important to protect the national security of this country. So I'm only going to be talking about the legal underpinnings for what has been disclosed by the President.

The President has authorized a program to engage in electronic surveillance of a particular kind, and this would be the intercepts of contents of communications where one of the -- one party to the communication is outside the United States. And this is a very important point -- people are running around saying that the United States is somehow spying on American citizens calling their neighbors. Very, very important to understand that one party to the communication has to be outside the United States.

Another very important point to remember is that we have to have a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda. We view these authorities as authorities to confront the enemy in which the United States is at war with -- and that is al Qaeda and those who are supporting or affiliated with al Qaeda.

What we're trying to do is learn of communications, back and forth, from within the United States to overseas with members of al Qaeda. And that's what this program is about.

Now, in terms of legal authorities, the Foreign Intelligence Surveillance Act provides -- requires a court order before engaging in this kind of surveillance that I've just discussed and the President announced on Saturday, unless there is somehow -- there is -- unless otherwise authorized by statute or by Congress. That's what the law requires. Our position is, is that the authorization to use force, which was passed by the Congress in the days following September 11th, constitutes that other authorization, that other statute by Congress, to engage in this kind of signals intelligence.

Now, that -- one might argue, now, wait a minute, there's nothing in the authorization to use force that specifically mentions electronic surveillance. Let me take you back to a case that the Supreme Court reviewed this past -- in 2004, the Hamdi decision. As you remember, in that case, Mr. Hamdi was a U.S. citizen who was contesting his detention by the United States government. What he said was that there is a statute, he said, that specifically prohibits the detention of American citizens without permission, an act by Congress -- and he's right, 18 USC 4001a requires that the United States government cannot detain an American citizen except by an act of

Congress.

We took the position -- the United States government took the position that Congress had authorized that detention in the authorization to use force, even though the authorization to use force never mentions the word "detention." And the Supreme Court, a plurality written by Justice O'Connor agreed. She said, it was clear and unmistakable that the Congress had authorized the detention of an American citizen captured on the battlefield as an enemy combatant for the remainder -- the duration of the hostilities. So even though the authorization to use force did not mention the word, "detention," she felt that detention of enemy soldiers captured on the battlefield was a fundamental incident of waging war, and therefore, had been authorized by Congress when they used the words, "authorize the President to use all necessary and appropriate force."

For the same reason, we believe signals intelligence is even more a fundamental incident of war, and we believe has been authorized by the Congress. And even though signals intelligence is not mentioned in the authorization to use force, we believe that the Court would apply the same reasoning to recognize the authorization by Congress to engage in this kind of electronic surveillance.

I might also add that we also believe the President has the inherent authority under the Constitution, as Commander-in-Chief, to engage in this kind of activity. Signals intelligence has been a fundamental aspect of waging war since the Civil War, where we intercepted telegraphs, obviously, during the world wars, as we intercepted telegrams in and out of the United States. Signals intelligence is very important for the United States government to know what the enemy is doing, to know what the enemy is about to do. It is a fundamental incident of war, as Justice O'Connor talked about in the Hamdi decision. We believe that -- and those two authorities exist to allow, permit the United States government to engage in this kind of surveillance.

The President, of course, is very concerned about the protection of civil liberties, and that's why we've got strict parameters, strict guidelines in place out at NSA to ensure that the program is operating in a way that is consistent with the President's directives. And, again, the authorization by the President is only to engage in surveillance of communications where one party is outside the United States, and where we have a reasonable basis to conclude that one of the parties of the communication is either a member of al Qaeda or affiliated with al Qaeda.

Mike, do you want to -- have anything to add?

GENERAL HAYDEN: I'd just add, in terms of what we do globally with regard to signals intelligence, which is a critical part of defending the nation, there are probably no communications more important to what it is we're trying to do to defend the nation; no communication is more important for that purpose than those communications that involve al Qaeda, and one end of which is inside the homeland, one end of which is inside the United States. Our purpose here is to detect and prevent attacks. And the program in this regard has been successful.

Q General, are you able to say how many Americans were caught in this surveillance?

ATTORNEY GENERAL GONZALES: I'm not -- I can't get into the specific numbers because that information remains classified. Again, this is not a situation where -- of domestic spying. To the extent that there is a moderate and heavy communication involving an American citizen, it would be a communication where the other end of the call is outside the United States and where we believe that either the American citizen or the person outside the United States is somehow affiliated with al Qaeda.

Q General, can you tell us why you don't choose to go to the FISA court?

ATTORNEY GENERAL GONZALES: Well, we continue to go to the FISA court and obtain orders. It is a very important tool that we continue to utilize. Our position is that we are not legally required to do, in this particular case, because the law requires that we -- FISA requires that we get a court order, unless authorized by a statute, and we believe that authorization has occurred.

The operators out at NSA tell me that we don't have the speed and the agility that we need, in all circumstances, to deal with this new kind of enemy. You have to remember that FISA was passed by the Congress in 1978. There have been tremendous advances in technology --

Q But it's been kind of retroactively, hasn't it?

ATTORNEY GENERAL GONZALES: -- since then. Pardon me?

Q It's been done retroactively before, hasn't it?

ATTORNEY GENERAL GONZALES: What do you mean, "retroactively"?

Q You just go ahead and then you apply for the FISA clearance, because it's damn near automatic.

ATTORNEY GENERAL GONZALES: If we -- but there are standards that have to be met, obviously, and you're right, there is a procedure where we -- an emergency procedure that allows us to make a decision to authorize -- to utilize FISA, and then we go to the court and get confirmation of that authority.

But, again, FISA is very important in the war on terror, but it doesn't provide the speed and the agility that we need in all circumstances to deal with this new kind of threat.

Q But what -- go ahead.

GENERAL HAYDEN: Let me just add to the response to the last question. As the Attorney General says, FISA is very important, we make full use of FISA. But if you picture what FISA was designed to do, FISA is designed to handle the needs in the nation in two broad categories: there's a law enforcement aspect of it; and the other aspect is the continued collection of foreign intelligence. I don't think anyone could claim that FISA was envisaged as a tool to cover armed enemy combatants in preparation for attacks inside the United States. And that's what this authorization under the President is designed to help us do.

Q Have you identified armed enemy combatants, through this program, in the United States?

GENERAL HAYDEN: This program has been successful in detecting and preventing attacks inside the United States.

Q General Hayden, I know you're not going to talk about specifics about that, and you say it's been successful. But would it have been as successful -- can you unequivocally say that something has been stopped or there was an imminent attack or you got information through this that you could not have gotten through going to the court?

GENERAL HAYDEN: I can say unequivocally, all right, that we have got information through this program that would not otherwise have been available.

Q Through the court? Because of the speed that you got it?

GENERAL HAYDEN: Yes, because of the speed, because of the procedures, because of the processes and requirements set up in the FISA process, I can say unequivocally that we have used this program in lieu of that and this program has been successful.

Q But one of the things that concerns people is the slippery slope. If you said you absolutely need this program, you have to do it quickly -- then if you have someone you suspect being a member of al Qaeda, and they're in the United States, and there is a phone call between two people in the United States, why not use that, then, if it's so important? Why not go that route? Why not go further?

GENERAL HAYDEN: Across the board, there is a judgment that we all have to make -- and I made this speech a day or two after 9/11 to the NSA workforce -- I said, free peoples always have to judge where they want to be on that spectrum between security and liberty; that there will be great pressures on us after those attacks to move our national banner down in the direction of security. What I said to the NSA workforce is, our job is to keep Americans free by making Americans feel safe again. That's been the mission of the National Security Agency since the day after the attack, is when I talked -- two days after the attack is when I said that to the workforce.

There's always a balancing between security and liberty. We understand that this is a more -- I'll use the word "aggressive" program than would be traditionally available under FISA. It is also less intrusive. It deals only with international calls. It is generally for far shorter periods of time. And it is not designed to collect reams of intelligence, but to detect and warn and prevent about attacks. And, therefore, that's where we've decided to draw that balance between security and liberty.

Q Gentlemen, can you say when Congress was first briefed, who was included in that, and will there be a leaks investigation?

ATTORNEY GENERAL GONZALES: Well of course, we're not going to -- we don't talk about -- we try not to talk about investigations. As to whether or not there will be a leak investigation, as the President indicated, this is really hurting national security, this has really hurt our country, and we are concerned that a very valuable tool has been compromised. As to whether or not there will be a leak investigation, we'll just have to wait and see.

And your first question was?

Q When was Congress first briefed --

ATTORNEY GENERAL GONZALES: I'm not going to -- I'm not going to talk about -- I'll let others talk about when Congress was first briefed. What I can say is, as the President indicated on Saturday, there have been numerous briefings with certain key members of Congress. Obviously, some members have come out since the revelations on Saturday, saying that they hadn't been briefed. This is a very classified program. It is probably the most classified program that exists in the United States government, because the tools are so valuable, and therefore, decisions were made to brief only key members of Congress. We have begun the process now of reaching out to other members of Congress. I met last night, for example, with Chairman Specter and other members of Congress to talk about the legal aspects of this program.

And so we are engaged in a dialogue now to talk with Congress, but also -- but we're still mindful of the fact that still -- this is still a very highly classified program, and there are still limits about what we can say today, even to certain members of Congress.

Q General, what's really compromised by the public knowledge of this program? Don't you assume that the other side thinks we're listening to them? I mean, come on.

GENERAL HAYDEN: The fact that this program has been successful is proof to me that what you claim to be an assumption is certainly not universal. The more we discuss it, the more we put it in the face of those who would do us harm, the more they will respond to this and protect their communications and make it more difficult for us to defend the nation.

Q Mr. Attorney General --

Q -- became public, have you seen any evidence in a change in the tactics or --

ATTORNEY GENERAL GONZALES: We're not going to comment on that kind of operational aspect.

Q You say this has really hurt the American people. Is that based only on your feeling about it, or is there some empirical evidence to back that up, even if you can't --

ATTORNEY GENERAL GONZALES: I think the existence of this program, the confirmation of the -- I mean, the fact that this program exists, in my judgment, has compromised national security, as the President indicated on Saturday.

Q I'd like to ask you, what are the constitutional limits on this power that you see laid out in the statute and in your inherent constitutional war power? And what's to prevent you from just listening to everyone's conversation and trying to find the word "bomb," or something like that?

ATTORNEY GENERAL GONZALES: Well, that's a good question. This was a question that was raised in some of

my discussions last night with members of Congress. The President has not authorized -- has not authorized blanket surveillance of communications here in the United States. He's been very clear about the kind of surveillance that we're going to engage in. And that surveillance is tied with our conflict with al Qaeda.

You know, we feel comfortable that this surveillance is consistent with requirements of the 4th Amendment. The touchstone of the 4th Amendment is reasonableness, and the Supreme Court has long held that there are exceptions to the warrant requirement in -- when special needs outside the law enforcement arena. And we think that that standard has been met here. When you're talking about communications involving al Qaeda, when you -- obviously there are significant privacy interests implicated here, but we think that those privacy interests have been addressed; when you think about the fact that this is an authorization that's ongoing, it's not a permanent authorization, it has to be reevaluated from time to time. There are additional safeguards that have been in place -- that have been imposed out at NSA, and we believe that it is a reasonable application of these authorities.

Q Mr. Attorney General, haven't you stretched --

Q -- adequate because of technological advances? Wouldn't you do the country a better service to address that issue and fix it, instead of doing a backdoor approach --

ATTORNEY GENERAL GONZALES: This is not a backdoor approach. We believe Congress has authorized this kind of surveillance. We have had discussions with Congress in the past -- certain members of Congress -- as to whether or not FISA could be amended to allow us to adequately deal with this kind of threat, and we were advised that that would be difficult, if not impossible.

Q If this is not backdoor, is this at least a judgment call? Can you see why other people would look at it and say, well, no, we don't see it that way?

ATTORNEY GENERAL GONZALES: I think some of the concern is because people had not been briefed; they don't understand the specifics of the program, they don't understand the strict safeguards within the program. And I haven't had a discussion -- an opportunity to have a discussion with them about our legal analysis. So, obviously, we're in that process now. Part of the reason for this press brief today is to have you help us educate the American people and the American Congress about what we're doing and the legal basis for what we're doing.

Q Al, you talk about the successes and the critical intercepts of the program. Have there also been cases in which after listening in or intercepting, you realize you had the wrong guy and you listened to what you shouldn't have?

GENERAL HAYDEN: That's why I mentioned earlier that the program is less intrusive. It deals only with international calls. The time period in which we would conduct our work is much shorter, in general, overall, than it would be under FISA. And one of the true purposes of this is to be very agile, as you described.

If this particular line of logic, this reasoning that took us to this place proves to be inaccurate, we move off of it right away.

Q Are there cases in which --

GENERAL HAYDEN: Yes, of course.

Q Can you give us some idea of percentage, or how often you get it right and how often you get it wrong?

GENERAL HAYDEN: No, it would be very -- no, I cannot, without getting into the operational details. I'm sorry.

Q But there are cases where you wind up listening in where you realize you shouldn't have?

GENERAL HAYDEN: There are cases like we do with regard to the global SIGIN system -- you have reasons to go after particular activities, particular communications. There's a logic; there is a standard as to why you would go after that, not just in a legal sense, which is very powerful, but in a practical sense. We can't waste resources on targets that simply don't provide valuable information. And when we decide that is the case -- and in this

ATTORNEY GENERAL GONZALES: I'm not confirming the existence of opinions or the non-existence of opinions. I've offered up today our legal analysis of the authorities of this President.

Q Sir, can you explain, please, the specific inadequacies in FISA that have prevented you from sort of going through the normal channels?

GENERAL HAYDEN: One, the whole key here is agility. And let me re-trace some grounds I tried to suggest earlier. FISA was built for persistence. FISA was built for long-term coverage against known agents of an enemy power. And the purpose involved in each of those -- in those cases was either for a long-term law enforcement purpose or a long-term intelligence purpose.

This program isn't for that. This is to detect and prevent. And here the key is not so much persistence as it is agility. It's a quicker trigger. It's a subtly softer trigger. And the intrusion into privacy -- the intrusion into privacy is significantly less. It's only international calls. The period of time in which we do this is, in most cases, far less than that which would be gained by getting a court order. And our purpose here, our sole purpose is to detect and prevent.

Again, I make the point, what we are talking about here are communications we have every reason to believe are al Qaeda communications, one end of which is in the United States. And I don't think any of us would want any inefficiencies in our coverage of those kinds of communications, above all. And that's what this program allows us to do -- it allows us to be as agile as operationally required to cover these targets.

Q But how does FISA --

GENERAL HAYDEN: FISA involves the process -- FISA involves marshaling arguments; FISA involves looping paperwork around, even in the case of emergency authorizations from the Attorney General. And beyond that, it's a little -- it's difficult for me to get into further discussions as to why this is more optimized under this process without, frankly, revealing too much about what it is we do and why and how we do it.

Q If FISA didn't work, why didn't you seek a new statute that allowed something like this legally?

ATTORNEY GENERAL GONZALES: That question was asked earlier. We've had discussions with members of Congress, certain members of Congress, about whether or not we could get an amendment to FISA, and we were advised that that was not likely to be -- that was not something we could likely get, certainly not without jeopardizing the existence of the program, and therefore, killing the program. And that -- and so a decision was made that because we felt that the authorities were there, that we should continue moving forward with this program.

Q And who determined that these targets were al Qaeda? Did you wiretap them?

GENERAL HAYDEN: The judgment is made by the operational work force at the National Security Agency using the information available to them at the time, and the standard that they apply -- and it's a two-person standard that must be signed off by a shift supervisor, and carefully recorded as to what created the operational imperative to cover any target, but particularly with regard to those inside the United States.

Q So a shift supervisor is now making decisions that a FISA judge would normally make? I just want to make sure I understand. Is that what you're saying?

GENERAL HAYDEN: What we're trying to do is to use the approach we have used globally against al Qaeda, the operational necessity to cover targets. And the reason I emphasize that this is done at the operational level is to remove any question in your mind that this is in any way politically influenced. This is done to chase those who would do harm to the United States.

Q Building on that, during --

Q Thank you, General. Roughly when did those conversations occur with members of Congress?

ATTORNEY GENERAL GONZALEZ: I'm not going to get into the specifics of when those conversations occurred, but they have occurred.

Q May I just ask you if they were recently or if they were when you began making these exceptions?

ATTORNEY GENERAL GONZALEZ: They weren't recently.

MR. McCLELLAN: The President indicated that those -- the weeks after September 11th.

Q What was the date, though, of the first executive order? Can you give us that?

GENERAL HAYDEN: If I could just, before you ask that question, just add -- these actions that I described taking place at the operational level -- and I believe that a very important point to be made -- have intense oversight by the NSA Inspector General, by the NSA General Counsel, and by officials of the Justice Department who routinely look into this process and verify that the standards set out by the President are being followed.

Q Can you absolutely assure us that all of the communications intercepted --

Q Have you said that you -- (inaudible) -- anything about this program with your international partners -- with the partners probably in the territories of which you intercept those communications?

ATTORNEY GENERAL GONZALEZ: I'm not aware of discussions with other countries, but that doesn't mean that they haven't occurred. I simply have no personal knowledge of that.

Q Also, is it only al Qaeda, or maybe some other terrorist groups?

ATTORNEY GENERAL GONZALEZ: Again, with respect to what the President discussed on Saturday, this program -- it is tied to communications where we believe one of the parties is affiliated with al Qaeda or part of an organization or group that is supportive of al Qaeda.

Q Sir, during his confirmation hearings, it came out that now-Ambassador Bolton had sought and obtained NSA intercepts of conversations between American citizens and others. Who gets the information from this program; how do you guarantee that it doesn't get too widely spread inside the government, and used for other purposes?

Q And is it destroyed afterwards?

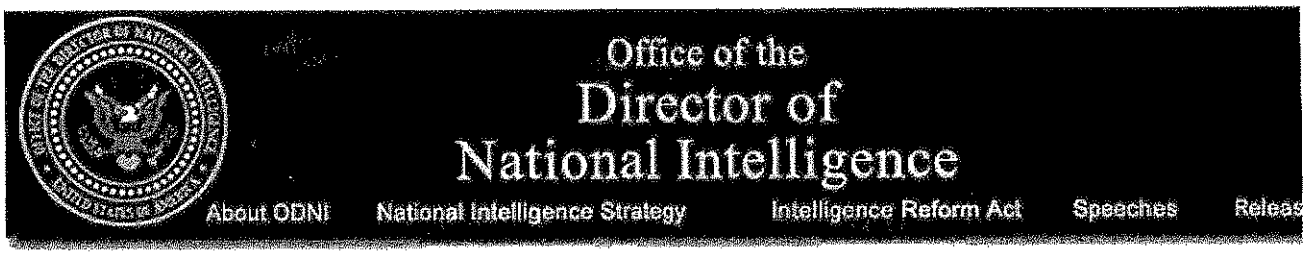
GENERAL HAYDEN: We report this information the way we report any other information collected by the National Security Agency. And the phrase you're talking about is called minimization of U.S. identities. The same minimalizationist standards apply across the board, including for this program. To make this very clear -- U.S. identities are minimized in all of NSA's activities, unless, of course, the U.S. identity is essential to understand the inherent intelligence value of the intelligence report. And that's the standard that's used.

Q General, when you discussed the emergency powers, you said, agility is critical here. And in the case of the emergency powers, as I understand it, you can go in, do whatever you need to do, and within 72 hours just report it after the fact. And as you say, these may not even last very long at all. What would be the difficulty in setting up a paperwork system in which the logs that you say you have the shift supervisors record are simply sent to a judge after the fact? If the judge says that this is not legitimate, by that time probably your intercept is over, wouldn't that be correct?

GENERAL HAYDEN: What you're talking about now are efficiencies. What you're asking me is, can we do this program as efficiently using the one avenue provided to us by the FISA Act, as opposed to the avenue provided to us by subsequent legislation and the President's authorization.

Our operational judgment, given the threat to the nation that the difference in the operational efficiencies between those two sets of authorities are such that we can provide greater protection for the nation operating under this authorization.

EXHIBIT C



REMARKS BY GENERAL MICHAEL V. HAYDEN

PRINCIPAL DEPUTY DIRECTOR OF NATIONAL INTELLIGENCE AND FORMER DIRECTOR OF THE NATIONAL SECURITY AGENCY

ADDRESS TO THE NATIONAL PRESS CLUB WHAT AMERICAN INTELLIGENCE & ESPECIALLY THE NSA HAVE BEEN DOING TO DEFEND THE NATION

NATIONAL PRESS CLUB
WASHINGTON, D.C.

10:00 A.M. EST
MONDAY, JANUARY 23, 2006

MR. HILL: Good morning. My name is Keith Hill. I'm an editor/writer with the Bureau of National Affairs, Press Club governor and vice chair of the club's Newsmaker Committee, and I'll be today's moderator.

Today, we have General Michael Hayden, principal deputy director of National Intelligence with the Office of National Intelligence, who will talk about the recent controversy surrounding the National Security Agency's warrantless monitoring of communications of suspected al Qaeda terrorists.

General Hayden, who's been in this position since last April, is currently the highest ranking military intelligence officer in the armed services, and he also knows a little something about this controversy because in his previous life he was NSA director when the NSA monitoring program began in 2000 -- 2001, sorry.

So with that, I will turn the podium over to General Hayden.

GEN. HAYDEN: Keith, thanks. Good morning. I'm happy to be here to talk a bit about what American intelligence has been doing and especially what NSA has been doing to defend the nation.

Now, as Keith points out, I'm here today not only as Ambassador John Negroponte's deputy in the Office of the Director of National Intelligence, I'm also here as the former director of the National Security Agency, a post I took in March of 1999 and left only last spring.

Serious issues have been raised in recent weeks, and discussion of serious issues should be based on facts. There's a lot of information out there right now.

Some of it is, frankly, inaccurate. Much of it is just simply misunderstood. I'm here to tell the American people what NSA has been doing and why. And perhaps more importantly, what NSA has not been doing.

Now, admittedly, this is a little hard to do while protecting our country's intelligence sources and methods. And, frankly, people in my line of work generally don't like to talk about what they've done until it becomes a subject on the History Channel. But let me make one thing very clear. As challenging as this morning might be, this is the speech I want to give. I much prefer being here with you today telling you about the things we have done when there hasn't been an attack on the homeland. This is a far easier presentation to make than the ones I had to give four years ago telling audiences like you what we hadn't done in the days and months leading up to the tragic events of September 11th.

commonly refer to it as Signals Intelligence or SIGINT. SIGINT is a complex business, with operational and technological and legal imperatives often intersecting and overlapping. There's routinely some freedom of action -- within the law -- to adjust operations. After the attacks, I exercised some options I've always had that collectively better prepared us to defend the homeland.

Look, let me talk for a minute about this, okay? Because a big gap in the current understanding, a big gap in the current debate is what's standard? What is it that NSA does routinely? Where we set the threshold, for example, for what constitutes inherent foreign intelligence value? That's what we're directed to collect. That's what we're required to limit ourselves to -- inherent foreign intelligence value. Where we set that threshold, for example, in reports involving a U.S. person shapes how we do our job, shapes how we collect, shapes how we report. The American SIGINT system, in the normal course of foreign intelligence activities, inevitably captures this kind of information, information to, from or about what we call a U.S. person. And by the way, "U.S. person" routinely includes anyone in the United States, citizen or not.

So, for example, because they were in the United States -- and we did not know anything more -- Mohamed Atta and his fellow 18 hijackers would have been presumed to have been protected persons, U.S. persons, by NSA prior to 9/11.

Inherent foreign intelligence value is one of the metrics we must use. Let me repeat that: Inherent foreign intelligence value is one of the metrics we must use to ensure that we conform to the Fourth Amendment's reasonable standard when it comes to protecting the privacy of these kinds of people. If the U.S. person information isn't relevant, the data is suppressed. It's a technical term we use; we call it "minimized." The individual is not even mentioned. Or if he or she is, he or she is referred to as "U.S. Person Number One" or "U.S. Person Number Two." Now, inherent intelligence value. If the U.S. person is actually the named terrorist, well, that could be a different matter. The standard by which we decided that, the standard of what was relevant and valuable, and therefore, what was reasonable, would understandably change, I think, as smoke billowed from two American cities and a Pennsylvania farm field. And we acted accordingly.

To somewhat oversimplify this, this question of inherent intelligence value, just by way of illustration, to just use an example, we all had a different view of Zacarias Moussaoui's computer hard drive after the attacks than we did before.

Look, this is not unlike things that happened in other areas. Prior to September 11th, airline passengers were screened in one way. After September 11th, we changed how we screen passengers. In the same way, okay, although prior to September 11th certain communications weren't considered valuable intelligence, it became immediately clear after September 11th that intercepting and reporting these same communications were in fact critical to defending the homeland. Now let me make this point. These decisions were easily within my authorities as the director of NSA under and executive order; known as Executive Order 12333, that was signed in 1981, an executive order that has governed NSA for nearly a quarter century.

Now, let me summarize. In the days after 9/11, NSA was using its authorities and its judgment to appropriately respond to the most catastrophic attack on the homeland in the history of the nation. That shouldn't be a headline, but as near as I can tell, these actions on my part have created some of the noise in recent press coverage. Let me be clear on this point -- except that they involved NSA, these programs were not related -- these programs were not related -- to the authorization that the president has recently spoken about. Back then, September 2001, I asked to update the Congress on what NSA had been doing, and I briefed the entire House Intelligence Committee on the 1st of October on what we had done under our previously existing authorities.

Now, as another part of our adjustment, we also turned on the spigot of NSA reporting to FBI in, frankly, an unprecedented way. We found that we were giving them too much data in too raw form. We recognized it almost immediately, a question of weeks, and we made all of the appropriate adjustments. Now, this flow of data to the FBI has also become part of the current background noise, and despite reports in the press of thousands of tips a month, our reporting has not even approached that kind of pace. You know, I actually find this a little odd. After all the findings of the 9/11 commission and other bodies about the failure to share intelligence, I'm up here feeling like I have to explain pushing data to those who might be able to use it. And of course, it's the nature of intelligence that many tips lead nowhere, but you have to go down some blind alleys to find the tips that pay off.

Now, beyond the authorities that I exercised under the standing executive order, as the war on terror has moved forward, we have aggressively used FISA warrants. The act and the court have provided us with important tools, and we make full use of them. Published numbers show us using the court at record rates, and the results have been outstanding. But the revolution in telecommunications technology has extended the actual impact of the FISA regime far beyond what Congress could ever have anticipated in 1978. And I don't think that anyone can make the claim that the FISA statute is optimized to deal with or prevent a 9/11 or to deal with a lethal enemy who likely already had combatants inside the United States.

I testified in open session to the House Intel Committee in April of the year 2000. At the time, I created some looks of disbelief when I said that if Osama bin Laden crossed the bridge from Niagara Falls, Ontario to Niagara Falls, New York, there were provisions of U.S. law that would kick in, offer him protections and affect how NSA could now cover him. At

the time, I was just using this as some of sort of stark hypothetical; 17 months later, this is about life and death.

So now, we come to one additional piece of NSA authorities. These are the activities whose existence the president confirmed several weeks ago. That authorization was based on an intelligence community assessment of a serious and continuing threat to the homeland. The lawfulness of the actual authorization was reviewed by lawyers at the Department of Justice and the White House and was approved by the attorney general.

Now, you're looking at me up here, and I'm in a military uniform, and frankly, there's a certain sense of sufficiency here -- authorized by the president, duly ordered, its lawfulness attested to by the attorney general and its content briefed to the congressional leadership.

But we all have personal responsibility, and in the end, NSA would have to implement this, and every operational decision the agency makes is made with the full involvement of its legal office. NSA professional career lawyers -- and the agency has a bunch of them -- have a well-deserved reputation. They're good, they know the law, and they don't let the agency take many close pitches.

And so even though I knew the program had been reviewed by the White House and by DOJ, by the Department of Justice, I asked the three most senior and experienced lawyers in NSA: Our enemy in the global war on terrorism doesn't divide the United States from the rest of the world, the global telecommunications system doesn't make that distinction either, our laws do and should; how did these activities square with these facts?

They reported back to me. They supported the lawfulness of this program. Supported, not acquiesced. This was very important to me. A veteran NSA lawyer, one of the three I asked, told me that a correspondent had suggested to him recently that all of the lawyers connected with this program have been very careful from the outset because they knew there would be a day of reckoning. The NSA lawyer replied to him that that had not been the case. NSA had been so careful, he said -- and I'm using his words now here -- NSA had been so careful because in this very focused, limited program, NSA had to ensure that it dealt with privacy interests in an appropriate manner.

In other words, our lawyers weren't careful out of fear; they were careful out of a heartfelt, principled view that NSA operations had to e consistent with bedrock legal protections.

In early October 2001, I gathered key members of the NSA workforce in our conference room and I introduced our new operational authority to them. With the historic culture of NSA being what it was and is, I had to do this personally. I told them what we were going to do and why. I also told them that we were going to carry out this program and not go one step further. NSA's legal and operational leadership then went into the details of this new task.

You know, the 9/11 commission criticized our ability to link things happening in the United States with things that were happening elsewhere. In that light, there are no communications more important to the safety of this country than those affiliated with al Qaeda with one end in the United States. The president's authorization allows us to track this kind of call more comprehensively and more efficiently. The trigger is quicker and a bit softer than it is for a FISA warrant, but the intrusion into privacy is also limited: only international calls and only those we have a reasonable basis to believe involve al Qaeda or one of its affiliates.

The purpose of all this is not to collect reams of intelligence, but to detect and prevent attacks. The intelligence community has neither the time, the resources nor the legal authority to read communications that aren't likely to protect us, and NSA has no interest in doing so. These are communications that we have reason to believe are al Qaeda communications, a judgment made by American intelligence professionals, not folks like me or political appointees, a judgment made by the American intelligence professionals most trained to understand al Qaeda tactics, al Qaeda communications and al Qaeda aims.

Their work is actively overseen by the most intense oversight regime in the history of the National Security Agency. The agency's conduct of this program is thoroughly reviewed by the NSA's general counsel and inspector general. The program has also been reviewed by the Department of Justice for compliance with the president's authorization. Oversight also includes an aggressive training program to ensure that all activities are consistent with the letter and the intent of the authorization and with the preservation of civil liberties.

Let me talk for a few minutes also about what this program is not. It is not a driftnet over Dearborn or Lackawanna or Freemont grabbing conversations that we then sort out by these alleged keyword searches or data-mining tools or other devices that so-called experts keep talking about.

This is targeted and focused. This is not about intercepting conversations between people in the United States. This is hot pursuit of communications entering or leaving America involving someone we believe is associated with al Qaeda. We bring to bear all the technology we can to ensure that this is so. And if there were ever an anomaly, and we

Thank you. I'll be happy to take your questions.

MR. HILL: We have microphones on either end of the room, so if you can go to a microphone, and then choose people from there.

All right, we will start with you.

QUESTION: Yes, Wayne Madsen, syndicated columnist. General, how do you explain the fact that there were several rare spectacles of whistleblowers coming forward at NSA, especially after 9/11, something that hasn't really happened in the past, who have complained about violations of FISA and United States Signals Intelligence Directive 18, which implements the law at the agency?

GEN. HAYDEN: I talked to the NSA staff on Friday. The NSA inspector general reports to me, as of last Friday, from the inception of this program through last Friday night, not a single employee of the National Security Agency has addressed a concern about this program to the NSA IG. I should also add that no member of the NSA workforce who has been asked to be included in this program has responded to that request with anything except enthusiasm. I don't know what you're talking about.

QUESTION: General Hayden, the FISA law says that the NSA can do intercepts as long as you go to the court within 72 hours to get a warrant.

I understood you to say that you are aggressively using FISA but selectively doing so. Why are you not able to go to FISA as the law requires in all cases? And if the law is outdated, why haven't you asked Congress to update it?

GEN. HAYDEN: Lots of questions contained there. Let me try them one at a time.

First of all, I need to get a statement of fact out here, all right? NSA cannot -- under the FISA statute, NSA cannot put someone on coverage and go ahead and play for 72 hours while it gets a note saying it was okay. All right? The attorney general is the one who approves emergency FISA coverage, and the attorney general's standard for approving FISA coverage is a body of evidence equal to that which he would present to the court. So it's not like you can throw it on for 72 hours.

I've talked in other circumstances -- I've talked this morning -- about how we've made very aggressive use of FISA. If you look at NSA reporting under this program -- you know, without giving you the X or Y axis on the graph -- NSA reporting under this program has been substantial but consistent. This is NSA counterterrorism reporting. Substantial but consistent. NSA reporting under FISA has gone like that. FISA has been a remarkably successful tool. We use it very aggressively.

In the instances where this program applies, FISA does not give us the operational effect that the authorities that the president has given us give us. Look, I can't -- and I understand it's going to be an incomplete answer, and I can't give you all the fine print as to why, but let me just kind of reverse the answer just a bit. If FISA worked just as well, why wouldn't I use FISA? To save typing? No. There is an operational impact here, and I have two paths in front of me, both of them lawful, one FISA, one the presidential -- the president's authorization. And we go down this path because our operational judgment is it is much more effective. So we do it for that reason. I think I've got -- I think I've covered all the ones you raised.

QUESTION: Quick follow-up. Are you saying that the sheer volume of warrantless eavesdropping has made FISA inoperative?

GEN. HAYDEN: No. I'm saying that the characteristics we need to do what this program's designed to do -- to detect and prevent -- make FISA a less useful tool. It's a wonderful tool, it's done wonderful things for the nation in terms of fighting the war on terror, but in this particular challenge, this particular aspect -- detect and prevent attacks -- what we're doing now is operationally more relevant, operationally more effective.

QUESTION: Sam Husseini from IPA Media. You just now spoke of, quote, "two paths," but of course the FISA statute itself says that it will be the exclusive means by which electronic surveillance may be pursued. Are you not, therefore, violating the law?

GEN. HAYDEN: That's probably a question I should deflect to the Department of Justice, but as I said in my comments, I have an order whose lawfulness has been attested to by the attorney general, an order whose lawfulness has been attested to by NSA lawyers who do this for a living. No, we're not violating the law.

QUESTION: You cited before the congressional powers of the president.

Are you -- are you asserting inherent so-called constitutional powers that a -- to use the term that came up in the Alito hearings -- "a unitary executive" has to violate the law when he deems fit?

GEN. HAYDEN: I'm not asserting anything. I'm asserting that NSA is doing its job.

QUESTION: General, first, thank you for your comments. And I think you somewhat answered this in your response, and this goes to the culture and just to the average American. Let me just say this -- that domestic spying and the faith communities are outraged. Churches in Iowa, churches in Nebraska, mosques across the board are just outraged by the fact that our country could be spying on us. You made a point that the young lady at State Penn shouldn't have to worry, but we're worried that our country has begun to spy on us. We understand the need for terrorism and the need to deal with that, but what assurances -- and how can you answer this question, what can make Americans feel safe? How can the faith community feel safe that their country is not spying on them for any reason?

GEN. HAYDEN: Reverend, thanks for the question, and I'm part of the faith community too. And I've laid it out as well I could in my remarks here as to how limited and focused this program is, what its purpose is, that its been productive. We are not out there -- and again, let me use a phrase I used in the comments -- this isn't a drift net out there where we're soaking up everyone's communications. We are going after very specific communications that our professional judgment tells us we have reason to believe are those associated with people who want to kill Americans. That's what we're doing.

And I realize the challenge the we have. I mentioned earlier the existential issue that NSA has well before this program, that it's got to be powerful if it's going to protect us, and it's also got to be secretive if it's going to protect us. And that creates a tremendous dilemma. I understand that.

I'm disappointed I guess that perhaps the default response for some is to assume the worst. I'm trying to communicate to you that the people who are doing this, okay, go shopping in Glen Burnie and their kids play soccer in Laurel, and they know the law. They know American privacy better than the average American, and they're dedicated to it. So I guess the message I'd ask you to take back to your communities is the same one I take back to mine. This is focused. It's targeted. It's very carefully done. You shouldn't worry.

QUESTION: Just know, General, that the faith communities will take that back, but the faith communities are scared. Where does this stop?

QUESTION: Justine Redman with CNN. How was national security harmed by The New York Times reporting on this program? Don't the bad guys already assume that they're being monitored anyway, and shouldn't Americans, you know, bear in mind that they might be at any time?

GEN. HAYDEN: You know, we've had this question asked several times. Public discussion of how we determine al Qaeda intentions, I just -- I can't see how that can do anything but harm the security of the nation. And I know people say, "Oh, they know they're being monitored." Well, you know, they don't always act like they know they're being monitored. But if you want to shove it in their face constantly, it's bound to have an impact.

And so to -- I understand, as the Reverend's? question just raised, you know, there are issues here that the American people are deeply concerned with. But constant revelations and speculation and connecting the dots in ways that I find unimaginable, and laying that out there for our enemy to see cannot help but diminish our ability to detect and prevent attacks.

QUESTION: My name is Travis Morales. And we've read numerous reports in the Times and other papers about massive spying by the NSA on millions of people, along with reports of rendition, torture, et cetera. And I attended Congressman Conyers' hearings on Friday where a gentleman came from South Florida talking about military intelligence went and infiltrated his Quaker peace group, and that this -- they later saw the documents detailing that.

And my question -- I guess I have two questions for you. One is, as a participant in a group called, "The World Can't Wait: Drive Out the Bush Regime," which is organizing for people to drown out Bush's lies during the State of the Union, and to gather on February 4th demanding that Bush step down, my question is this: Are you or the NSA -- and when I say you, I mean the NSA in its entirety -- is it intercepting our e-mail communications, listening to our telephone conversations, et cetera? Because as Bush has said, you're either against us or you're with us, and they have asserted that whatever the president wants to do in time of war, whether it's holding people without charges or writing memos justifying torture, they can do that.

MR. HILL: Okay, I have to cut you off here.

We have time for two more questions. And if you can keep them fairly brief, we'd appreciate it.

First you, then the gentleman in the red.

QUESTION: Yeah, but --

MR. HILL: I'm sorry.

QUESTION: The first question that I asked --

MR. HILL: Excuse me. I'm sorry --

QUESTION: -- about U.S. citizen abroad.

MR. HILL: All right. Go ahead.

GEN. HAYDEN: I'm sorry, I didn't -- I apologize, I didn't understand the question, the first question. I'm sorry.

QUESTION: Jim Bamford. Good seeing you here in the Press Club, General,

GEN. HAYDEN: Hey, Jim.

QUESTION: Hope we see more of you here.

Just to clarify sort of what's been said, from what I've heard you say today and an earlier press conference, the change from going around the FISA law was to -- one of them was to lower the standard from what they call for, which is basically probable cause to a reasonable basis; and then to take it away from a federal court judge, the FISA court judge, and hand it over to a shift supervisor at NSA. Is that what we're talking about here -- just for clarification?

GEN. HAYDEN: You got most of it right. The people who make the judgment, and the one you just referred to, there are only a handful of people at NSA who can make that decision. They're all senior executives, they are all counterterrorism and al Qaeda experts. So I -- even though I -- you're actually quoting me back, Jim, saying, "shift supervisor." To be more precise in what you just described, the person who makes that decision, a very small handful, senior executive. So in military terms, a senior colonel or general officer equivalent; and in professional terms, the people who know more about this than anyone else.

QUESTION: Well, no, that wasn't the real question. The question I was asking, though, was since you lowered the standard, doesn't that decrease the protections of the U.S. citizens? And number two, if you could give us some idea of the genesis of this. Did you come up with the idea? Did somebody in the White House come up with the idea? Where did the idea originate from?

Thank you.

GEN. HAYDEN: Let me just take the first one, Jim. And I'm not going to talk about the process by which the president arrived at his decision.

I think you've accurately described the criteria under which this operates, and I think I at least tried to accurately describe a changed circumstance, threat to the nation, and why this approach -- limited, focused -- has been effective.

MR. HILL: Final question.

QUESTION: Jonathan Landay with Knight Ridder. I'd like to stay on the same issue, and that had to do with the standard by which you use to target your wiretaps. I'm no lawyer, but my understanding is that the Fourth Amendment of the Constitution specifies that you must have probable cause to be able to do a search that does not violate an American's right against unlawful searches and seizures. Do you use --

GEN. HAYDEN: No, actually -- the Fourth Amendment actually protects all of us against unreasonable search and

EXHIBIT D

The President's News Conference

December 19, 2005

The President. Welcome. Please be seated. Thanks.

Last night I addressed the Nation about our strategy for victory in Iraq and the historic elections that took place in the country last week. In a nation that once lived by the whims of a brutal dictator, the Iraqi people now enjoy constitutionally protected freedoms, and their leaders now derive their powers from the consent of the governed. Millions of Iraqis are looking forward to a future with hope and optimism.

The Iraqi people still face many challenges. This is the first time the Iraqis are forming a Government under their new Constitution. The Iraqi Constitution requires a two-thirds vote of the Parliament for certain top officials, so the formation of the new Government will take time as Iraqis work to build consensus. And once the new Iraqi Government assumes office, Iraq's new leaders will face many important decisions on issues such as security and reconstruction, economic reform, and national unity. The work ahead will require the patience of the Iraqi people and the patience and support of America and our coalition partners.

As I said last night, this election does not mean the end of violence, but it is the beginning of something new, a constitutional democracy at the heart of the Middle East. And we will keep working toward our goal of a democratic Iraq that can govern itself, sustain itself, and defend itself.

Our mission in Iraq is critical to victory in the global war on terror. After our country was attacked on September the 11th and nearly 3,000 lives were lost, I vowed to do everything within my power to bring justice to those who were responsible. I also pledged to the American people to do everything within my power to prevent this from happening again. What we quickly learned was that Al Qaida was not a conventional enemy. Some lived in our cities and communities and communicated from here in America to plot and plan with bin Laden's lieutenants in Afghanistan, Pakistan, and elsewhere. Then they boarded our airplanes and launched the worst attack on our country in our Nation's history.

This new threat required us to think and act differently. And as the 9/11 Commission pointed out, to prevent this from happening again, we need to connect the dots before the enemy attacks, not after. And we need to recognize that dealing with Al Qaida is not simply a matter of law enforcement; it requires defending the country against an enemy that declared war against the United States of America.

As President and Commander in Chief, I have the constitutional responsibility and the constitutional authority to protect our country. Article II of the Constitution gives me that responsibility and the authority necessary to fulfill it. And after September the 11th, the United States Congress also granted me additional authority to use military force against Al Qaida.

After September the 11th, one question my administration had to answer was how, using the authorities I have, how do we effectively detect enemies hiding in our midst and prevent them from striking us again? We know that a 2-minute phone conversation between somebody linked to Al Qaida here and an operative overseas could lead directly to the loss of thousands of lives. To save American lives, we must be able to act fast and to detect these conversations so we can prevent new attacks.

So, consistent with U.S. law and the Constitution, I authorized the interception of international communications of people with known links to Al Qaida and related terrorist organizations. This program is carefully reviewed approximately every 45 days to ensure it is being used properly. Leaders in the United States Congress have been briefed more than a dozen times on this program. And it has been effective in disrupting the enemy while safeguarding our civil liberties.

This program has targeted those with known links to Al Qaida. I've reauthorized this program more than 30 times since the September the 11th attacks, and I intend to do so for so long as our Nation is—for so long as the Nation faces the continuing threat of an enemy that wants to kill American citizens.

I said the other day that a mistake was trying to train a civilian defense force and an Iraqi Army at the same time but not giving the civilian defense force enough training and tools necessary to be able to battle a group of thugs and killers. And so we adjusted.

And the point I'm trying to make to the American people in this, as you said, candid dialog—I hope I've been candid all along, but in the candid dialog—is to say, we're constantly changing our tactics to meet the changing tactics of an enemy. And that's important for our citizens to understand.

Thank you. Kelly [Kelly Wallace, Cable News Network].

Open Dialog on Wiretaps

Q. Thank you, Mr. President. If you believe that present law needs to be faster, more agile, concerning the surveillance of conversations from someone in the United States to somewhere outside the country——

The President. Right.

Q. ——why, in the 4 years since 9/11, has your administration not sought to get changes in the law instead of bypassing it, as some of your critics have said?

The President. No, I appreciate that. First, I want to make clear to the people listening that this program is limited in nature to those that are known Al Qaida ties and/or affiliates. That's important. So it's a program that's limited, and you brought up something that I want to stress, and that is, is that these calls are not intercepted within the country. They are from outside the country to in the country or vice versa. So in other words, this is not a—if you're calling from Houston to L.A., that call is not monitored. And if there was ever any need to monitor, there would be a process to do that.

I think I've got the authority to move forward, Kelly. I mean, this is what it's—and the Attorney General was out briefing this morning and I—about why it's legal to make the decisions I'm making. I can fully understand why Members of Congress are expressing concerns about civil liberties. I know that. And it's—I share the same concerns. I want to make sure the American people understand, however, that we have an obligation to protect you, and we're doing that and, at the same time, protecting your civil liberties.

Secondly, an open debate about law would say to the enemy, "Here's what we're going to do." And this is an enemy which adjusts. We monitor this program carefully. We have consulted with Members of the Congress over a dozen times. We are constantly reviewing the program. Those of us who review the program have a duty to uphold the laws of the United States, and we take that duty very seriously.

Let's see here—Martha [Martha Raddatz, ABC News]—working my way around the electronic media, here.

Domestic Wiretaps

Q. Thank you, Mr. President. You say you have an obligation to protect us. Then why not monitor those calls between Houston and L.A.? If the threat is so great, and you use the same logic, why not monitor those calls? Americans thought they weren't being spied on in calls overseas—why not within the country, if the threat is so great?

The President. We will, under current law, if we have to. We will monitor those calls. And that's why there is a FISA law. We will apply for the right to do so. And there's a difference—let me finish—there is a difference between detecting, so we can prevent, and monitoring. And it's important to know the distinction between the two.

Q. But preventing is one thing, and you said the FISA laws essentially don't work because of the speed in monitoring calls overseas.

The President. I said we use the FISA courts to monitor calls. It's a very important tool, and we do use it. I just want to make sure we've got all tools at our disposal. This is an enemy which is quick, and it's lethal. And sometimes we have to move very, very quickly. But if there is a need based upon evidence, we will take that evidence to a court in order to be able to monitor calls within the United States.

Who haven't I called on, let's see here. Suzanne [Suzanne Malveaux, Cable News Network].

EXHIBIT E

WSJ.com OpinionJournal
from THE WALL STREET JOURNAL Editorial Page

THE WEEKEND INTERVIEW

A Strong Executive

Does Watergate's legacy hinder the war on terror?

BY JAMES TARANTO
Saturday, January 28, 2006 12:01 a.m.

WASHINGTON--In the vice president's office in the West Wing of the White House hang portraits of John Adams and Thomas Jefferson--or "No. 1 and No. 2," as the current occupant of the office calls them. No. 46, Richard B. Cheney, sat at his desk Tuesday morning for an interview with Paul Gigot, editor of this page, and me.

A day earlier, the vice president had attended a farewell dinner for Alan Greenspan, who steps down next week after more than 18 years at the Federal Reserve. Our conversation began with Mr. Cheney reminiscing about when, as a 30-year-old appointee in the Nixon administration, he first met Mr. Greenspan, then an economist consulting for the government. "I was the assistant director of the Cost of Living Council in charge of operations"--that is, of administering wage and price controls. "I had about 3,000 IRS agents trying to enforce those damn things," Mr. Cheney recalls with rueful humor. "I don't put [it] on my résumé."

Not that Mr. Cheney, who turns 65 on Monday, has any need to pad his résumé. In 1975 he became President Ford's chief of staff, at 34 the youngest man ever to hold that job. Three years later he ran successfully for Wyoming's House seat. He served just over a decade in Congress, and in January 1989 he became minority whip, the No. 2 Republican. Two months later, George H.W. Bush tapped him as defense secretary. After spending the Clinton years in the private sector, Mr. Cheney returned to government with the help of another George Bush.

This career path gives Mr. Cheney a unique perspective on today's debate over executive vs. legislative power. He formed his views on the subject during the Ford administration, a time when presidential authority was ebbing. "In the aftermath of Vietnam and Watergate . . . there was a concerted effort to place limits and restrictions on presidential authority--everything from the War Powers Act to the Hughes-Ryan Act on intelligence to stripping the president of his ability to impound funds--a series of decisions that were aimed at the time at trying to avoid a repeat of things like Vietnam or . . . Watergate.


Ismael Roldan

"I thought they were misguided then, and have believed that given the world that we live in, that the president needs to have unimpaired executive authority. It doesn't mean, obviously, that there shouldn't be restraints. There clearly are with respect to the Constitution, and he's bound by those, as he should be. . . . But I do think the pendulum from time to time throughout history has swung from side to side--Congress was pre-eminent, or the executive was pre-eminent--and as I say, I believe in this day and age it's important that we have a strong presidency."

That lesson was reinforced for then-Rep. Cheney in 1987, when he was the ranking Republican on the congressional committee investigating the Iran-Contra scandal. Democrats accused President Reagan of violating the Boland amendment, intended to prevent aid from reaching Nicaragua's anticommunist guerrillas. "If you go back and look at the minority views that were filed with the Iran-Contra report, you'll see a strong statement about the president's prerogatives and responsibilities in the foreign policy/national security area in particular."

Today some argue that the Bush administration finds itself in a roughly analogous position. Critics of the National Security Agency's surveillance of terrorists claim that the administration is violating a statute, the Foreign Intelligence Surveillance Act of 1978, that purports to limit the president's power to act in the interest of national security. That power, Mr. Cheney counters, is inherent in the office: "The combination of the president's constitutional authority under Article II as commander in chief, the resolution Congress passed after 9/11 [authorizing the use of force against al Qaeda], as well as the historical precedent that all presidents have claimed in terms of their authority with respect to intercepting enemy communications" all establish "ample justification for the NSA program."

Does this mean the vice president endorses the argument made in the 1970s by former Deputy Attorney General Laurence Silberman that FISA may itself be unconstitutional because it empowers judges to overrule presidential decisions on national security? "That's an interesting issue," Mr. Cheney says. "There are a number of propositions . . . that never really get tested, like the War Powers Act. Everybody sort of walks around the edges of it, but we never really have a confrontation over it."

After 9/11, surveillance of terrorists would seem an odd subject for a confrontation. Mr. Cheney explains that the program in question is quite modest: "This notion [is] peddled out there by some that this is, quote, 'domestic surveillance' or 'domestic spying.' No, it's not. It is the interception of communications, one end of which is outside the United States, and one end of which, either outside the U.S. or inside, we have reason to believe is al-Qaeda-connected. Those are two pretty clear requirements, both of which need to be met."

Mr. Cheney says key members of Congress--the chairmen and ranking members of the House and Senate intelligence committees, and sometimes both parties' top leaders from each chamber--were fully informed. "These sessions with Congress, most of which I presided over . . . answered every question that they wanted to ask. We've always said, look, if there's anything else you need to know, just let us know."

The lawmakers, Mr. Cheney says, shared the administration's view that secrecy was essential. "Public debate and discussion about the program would have done--in our view and in the view of members of Congress who were consulted--damage to our capabilities in this respect. We'd rather not have *this* conversation about this program, except for the fact that the New York Times went public with it."

Yet after the Times broke the story, Democratic members of Congress changed their tune from the one Mr. Cheney says they had sung in private. Sen. Jay Rockefeller, the top Intelligence Committee Democrat, released a handwritten July 2003 letter to Mr. Cheney in which he said he was "writing to reiterate my concern regarding the sensitive intelligence issues we discussed." We asked Mr. Cheney if he remembered Mr. Rockefeller iterating his concern in the first place. "No, I recall the letter just sort of arriving, and it was never followed up on."

Meanwhile Rep. Jane Harman, Mr. Rockefeller's House counterpart, has opined that the administration broke the law by failing to brief *every* member of the intelligence committees. Says Mr. Cheney, "If we had done that since the beginning of the program back in '01--I ran the numbers yesterday--if we did the full House and Senate committees, as well as the elected leadership, we'd have had to read 70 people into this program" instead of eight or nine. Expecting that many congressmen to keep a secret

EXHIBIT F

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U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

December 22, 2005

The Honorable Pat Roberts
Chairman
Senate Select Committee on Intelligence
United States Senate
Washington, D.C. 20510

The Honorable John D. Rockefeller, IV
Vice Chairman
Senate Select Committee on Intelligence
United States Senate
Washington, D.C. 20510

The Honorable Peter Hoekstra
Chairman
Permanent Select Committee
on Intelligence
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Jane Harman
Ranking Minority Member
Permanent Select Committee
on Intelligence
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairmen Roberts and Hoekstra, Vice Chairman Rockefeller, and Ranking Member Harman:

As you know, in response to unauthorized disclosures in the media, the President has described certain activities of the National Security Agency ("NSA") that he has authorized since shortly after September 11, 2001. As described by the President, the NSA intercepts certain international communications into and out of the United States of people linked to al Qaeda or an affiliated terrorist organization. The purpose of these intercepts is to establish an early warning system to detect and prevent another catastrophic terrorist attack on the United States. The President has made clear that he will use his constitutional and statutory authorities to protect the American people from further terrorist attacks, and the NSA activities the President described are part of that effort. Leaders of the Congress were briefed on these activities more than a dozen times.

The purpose of this letter is to provide an additional brief summary of the legal authority supporting the NSA activities described by the President.

As an initial matter, I emphasize a few points. The President stated that these activities are "crucial to our national security." The President further explained that "the unauthorized disclosure of this effort damages our national security and puts our citizens at risk. Revealing classified information is illegal, alerts our enemies, and endangers our country." These critical national security activities remain classified. All United States laws and policies governing the protection and nondisclosure of national security information, including the information relating to the

reauthorized approximately every 45 days to ensure that they continue to be necessary and appropriate further demonstrates the reasonableness of these activities.

As explained above, the President determined that it was necessary following September 11 to create an early warning detection system. FISA could not have provided the speed and agility required for the early warning detection system. In addition, any legislative change, other than the AUMF, that the President might have sought specifically to create such an early warning system would have been public and would have tipped off our enemies concerning our intelligence limitations and capabilities. Nevertheless, I want to stress that the United States makes full use of FISA to address the terrorist threat, and FISA has proven to be a very important tool, especially in longer-term investigations. In addition, the United States is constantly assessing all available legal options, taking full advantage of any developments in the law.

We hope this information is helpful.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

EXHIBIT G

the White House
President George W. Bush

Click to Print this document

Privacy Policy

Alberto Gonzales
Attorney General
Biography

Welcome to "Ask the White House" -- an online interactive forum where you can submit questions to Administration officials and friends of the White House. Visit the "Ask the White House" archives to read other discussions with White House officials.

January 25, 2006

Alberto Gonzales
Good afternoon, everyone. This is a critical time for two different institutions that both play vital roles in the life of our nation: the Supreme Court, which interprets the Constitution and laws, and our intelligence agencies, which strive to protect us from terrorists and other threats to our national security. The Court is in transition as the Senate considers Judge Alito's nomination to be an Associate Justice, and our nation's dedicated intelligence professionals are watching closely the debates over reauthorization of the USA PATRIOT Act and over the National Security Agency's terrorist surveillance program. These topics are of course very important to me, and so I look forward to your questions.

Laura, from **Rocky River, OH** writes:
Attorney General Gonzales, Can you explain how the Patriot Act protects our nation from terrorist threats?

Thank you.

Alberto Gonzales
I'm happy to do so, Laura. The USA PATRIOT Act helps us protect Americans from terrorist attacks in several ways. First and foremost, the Act helped break down the so-called "wall" that prevented our national security investigators and law enforcement personnel from working together to "connect the dots" to prevent further terrorist attacks. Second, the Act updated some of our laws to reflect changes in technology. And third, the Act provided national security investigators - who pursue terrorists and spies - more of the same tools that were already available for criminal investigators - who pursue drug dealers and mobsters. It has been my experience in the more than four years since the horrific attacks of September 11 that the USA PATRIOT Act has been critical to our efforts to prevent another attack.

Gregory, from **Los Angeles** writes:
Mr. Attorney General, is the patriot act, in any way, in violation of the laws and liberties we are ensured in this country?

Alberto Gonzales
Gregory, I appreciate the opportunity to answer that question, which is crucial to the debate over the USA PATRIOT Act. We at the Department of Justice must be fully comfortable that the answer is "no," or we could not in good conscience support the Act. When I became the Attorney General, I took an oath to defend the Constitution, and it is an oath that I take very seriously. I believe that the USA PATRIOT Act is fully consistent with the Constitution and laws, helping us protect both Americans and the values that we cherish. In my view, many of the concerns about the USA PATRIOT Act are based on either misunderstandings or misinformation. When you look at the Act, you can see that there is extensive judicial and congressional oversight of the tools provided by the Act - not to mention the rigorous protections provided by the Justice Department's own binding procedures and policies. Over the past year, the Act has been the subject of more oversight and debate than any bill in recent memory - and all of the hearings, testimony, briefings, and meetings demonstrated that there has not been a single verified abuse of any of the provisions. That's a record that I'm proud of.

Joel, from **Superior, WI** writes:
Mr. Gonzales, Why is Mr. Alito the best choice for the Supreme Court?

Alberto Gonzales
I appreciate that question, Joel. Judge Alito is a superb pick for the Supreme Court. He is the most experienced nominee in 70 years, having served 15 years as a federal appeals Judge. He has issued approximately 5,000 rulings in cases spanning all of federal law. He has developed a modest and measured approach to judging, making sure to take seriously the arguments of all sides, to keep an open mind until all arguments have been made, and to approach each case by on its own facts and law. Judge Alito has spent his entire career in his nation's service, and he exemplifies the very best of public service. I was gratified yesterday to see the Senate Judiciary Committee report out Judge Alito's nomination to the full Senate with a positive recommendation, and I am sure the Senate will move quickly to approve the nomination of this extremely qualified nominee.

Tom, from **Andover, Minnesota** writes:
Do you expect the Patriot Act to be renewed? I agree with you Mr. Attorney General and the President that the Patriot Act and the NSA Terrorist Surveillance program are vital against terrorists.

Thank you.

Alberto Gonzales
Tom, your question is obviously a timely one. Sixteen provisions of the USA PATRIOT Act, including critical provisions that helped break down the "wall" between national security investigators and law enforcement personnel, are set to expire on February 3, 2006. The majority of Americans support renewing the USA PATRIOT Act, and this Administration does, too. Over the past year, there has been extensive debate over reauthorization and that debate demonstrated two things: the USA PATRIOT Act has been critical to our efforts to protect Americans, and there has not been a single verified abuse of the provisions of the Act. The House has already passed a reauthorization bill that the President and I support. This bill reauthorizes all of the expiring provisions of the Act and - though there have been no verified abuses - adds more than 30 new civil liberties safeguards. This reauthorization bill also has the support of a majority of Senators. Unfortunately, a minority of Senators have filibustered the bill - refusing to allow an up-or-down vote. The President has urged these Senators to abandon their delaying tactics, and I join in that call. Notwithstanding the recent delay, I am optimistic that the USA PATRIOT Act will be renewed.

Sean, from **Michigan** writes:
I Want to get this national spying probelm straight. At that time the N.S.A was spying on known terrorist connections making international calls. it was not by any means affecting the typical american right?

Alberto Gonzales
Sean, thanks for your question. I'm glad you asked this question -- it is a very important question about an issue that has a lot of people confused, in part because of incomplete or inaccurate media reports. First, let me be very clear -- the terrorist surveillance program described by the President is focused solely on international communications where professional intelligence experts have reason to believe that at least one party is a member or agent of al Qaeda or an affiliated terrorist group. As this description demonstrates, the terrorist surveillance program described by the President is very narrow. Because it is focused on international calls of individuals linked to al Qaeda, it is overwhelmingly unlikely that the terrorist surveillance program would ever affect an ordinary American. And if this ever were to happen, the information would be destroyed as quickly as possible. The President authorized this program specifically to protect ordinary Americans from the type of outrageous attacks that took place on September 11, 2001, and you can rest assured that the federal government is fully committed to protecting you and other Americans - both your safety and your civil liberties.

Marc, from **Philadelphia, PA** writes:
I was just wondering sir, with it now known that the NSA has been listening in on phone calls made in the US by al-qaida operatives, are there any safeguards in place to ensure that ONLY thos phone calls are

monitored?

Alberto Gonzales
That's an important question, Marc. As I explained in responding to Sean in Michigan, the terrorist surveillance program described by the President is focused on international communications into or out of the United States where there is reason to believe that at least one party to the communication is a member or agent of al Qaeda or an affiliated terrorist group. This is not about intercepting communications between people in America, it's about the "hot pursuit" of international communications involving someone we reasonably believe is associated with al Qaeda, where one of the parties to the communication is already in the United States. The NSA has processes in place to make sure that only these types of communication are picked up by the program. If the NSA were to discover that a domestic-to-domestic communication inadvertently had been picked up, it would be destroyed as quickly as possible. We are vigilant in ensuring that Americans' civil liberties are protected. My Department - the Department of Justice - has carefully reviewed this program for legality, and approximately every 45 days the President determines whether to reauthorize the program. In addition, the Inspector General and General Counsel of the NSA review the program to make sure that it complies with law and that your civil liberties are protected. In short, there are a lot of safeguards in place to protect the rights of ordinary Americans.

Jim, from **Valentine, NE** writes:
I know the NSA has to stay super secret, and even its oversight has to be limited in some ways. What kinds of oversight does the congress have over the NSA? Thanks

Alberto Gonzales
A very good question, Jim. As the President has frequently mentioned, the Administration has conducted over a dozen briefings on the operational details of the NSA's terrorist surveillance program with Congressional members from both sides of the aisle. Our decision to restrict these briefings to a select group of members of Congress is in keeping with longstanding tradition when dealing with matters of extreme sensitivity such as the terrorist surveillance program - and it's perfectly legal. We believe it is an important obligation of ours to keep Congress informed of the status of this program and will therefore continue to conduct Congressional briefings in a manner that is appropriate and consistent with the law.

Daniel, from **Los Angeles** writes:
Dear Attorney general Gonzales,the only thing about this issue that remains unclear to me is why the current FISA system of approval of wire taps is too slow. You are able to wire tap instantly, and deal with clearance or approval or warrants later, right? So, again, what is too slow? I really want to know the answer to this.

Thanks, Daniel

Alberto Gonzales
I appreciate your question, Daniel, as you raise an important point that I would like to clarify. You are referring to a widely discussed and often misunderstood provision in FISA that allows for so-called "emergency authorizations" of surveillance for 72 hours without a court order. But in order to initiate surveillance even under a FISA emergency authorization, it is not enough to rely on the best judgment of our intelligence officers alone. Those intelligence officers have to get the sign-off of lawyers at the NSA that all provisions of FISA have been satisfied, then lawyers in the Department of Justice would have to be similarly satisfied, and finally as Attorney General I have to be satisfied that the search meets FISA's requirements. All of this must happen before I can authorize even an emergency wiretap under FISA. And then we would have to be prepared to follow up with a full FISA application within the 72 hours - a cumbersome task. As you can see, FISA emergency applications are not so easily secured as some have implied: even for emergency applications, this extensive review process takes precious time. In order to fight the war on terror effectively, sometimes we must be able to take instantaneous action. I want to end by pointing out that although the NSA program may be faster, the FISA system has been a very important and useful tool in the war on terror particularly with respect to long term surveillance.

EXHIBIT H

2006 WL 270364 (F.D.C.H.)

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Verbatim Transcript
February 06, 2006

Senate
Judiciary Committee
Committee Hearing

U.S. Senator Arlen Specter (R-PA) Holds a Hearing on the National Security Agency Domestic Surveillance Program

(FINAL COPY: COMPLETES TRANSCRIPT)
U.S. SENATE JUDICIARY COMMITTEE HOLDS A HEARING ON
WARTIME EXECUTIVE POWER AND THE NATIONAL SECURITY
AGENCY'S SURVEILLANCE AUTHORITY
FEBRUARY 6, 2006
SPEAKERS:
U.S. SENATOR ARLEN SPECTER (R-PA)
CHAIRMAN
U.S. SENATOR ORRIN G. HATCH (R-UT)
U.S. SENATOR CHARLES E. GRASSLEY (R-IA)
U.S. SENATOR JON KYL (R-AZ)
U.S. SENATOR MIKE DEWINE (R-OH)
U.S. SENATOR JEFF SESSIONS (R-AL)
U.S. SENATOR LINDSEY O. GRAHAM (R-SC)
U.S. SENATOR JOHN CORNYN (R-TX)
U.S. SENATOR SAM BROWNBACK (R-KS)
U.S. SENATOR TOM COBURN (R-OK)
U.S. SENATOR PATRICK J. LEAHY (D-VT)
RANKING MEMBER
U.S. SENATOR EDWARD M. KENNEDY (D-MA)
U.S. SENATOR JOSEPH R. BIDEN JR. (D-DE)
U.S. SENATOR HERBERT KOHL (D-WI)
U.S. SENATOR DIANNE FEINSTEIN (D-CA)
U.S. SENATOR RUSSELL D. FEINGOLD (D-WI)
U.S. SENATOR CHARLES E. SCHUMER (D-NY)
U.S. SENATOR RICHARD J. DURBIN (D-IL)
WITNESSES:
ALBERTO GONZALES,
U.S. ATTORNEY GENERAL
SPECTER: It's 9:30. The Judiciary Committee will now proceed with our hearing on the administration's program administered by the National Security Agency on surveillance.
We welcome the attorney general of the United States here today, who will be testifying.
We face, as a nation, as we all know, an enormous threat from international terrorism. The terrorists attacked this country on 9/11, and we remain in danger of renewed terrorist attacks.
The president of the United States has the fundamental responsibility to protect the country, but even, as the Supreme Court has said, the president does not have a blank check.
And this hearing is designed to examine the legal underpinnings of the administration's program from the point of view of the statutory interpretation and also from the point of view of constitutional law.
The Foreign Intelligence Surveillance Act was passed in 1978, and has a forceful and blanket prohibition against any electronic

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2006 WL 270364 (F.D.C.H.)

necessary for the conduct of foreign affairs and military campaigns."
More recently, in 2002, the FISA Court of review explained that, quote, "All the other courts who have decided the issue have held that the president did have inherent authority to conduct warrantless searches to obtain intelligence information."
The court went on to add, quote, "We take for granted that the president does have that authority. And assuming that that is so, FISA could not encroach on the president's constitutional powers."
Now, it is significant, this statement stressing the constitutional limits of the Foreign Intelligence Surveillance Act, or FISA, came from the very appellate court that Congress established to review the decisions of the FISA Court.
Nor is this just the view of the courts. Presidents throughout our history has authorized the warrantless surveillance of the enemy during wartime, and they have done so in ways far more sweeping than the narrowly targeted terrorist surveillance program authorized by President Bush.
General Washington, for example, instructed his army to intercept letters between British operatives, copy them and allow those communications to go on their way.
President Lincoln used the warrantless wiretapping of telegraph messages during the Civil War to discern the movements and intentions of opposing troops.
GONZALES: President Wilson, in World War I, authorized the military to intercept each and every cable, telephone and telegraph communication going into or out of the United States.
During World War II, President Roosevelt instructed the government to use listening devices to learn the plans of spies in the United States. He also gave the military the authority to review, without warrant, all telecommunications, quote, "passing between the United States and any foreign country."
The far more focused terrorist surveillance program fully satisfies the reasonableness requirement of the Fourth Amendment.
Now, some argue that the passage of FISA diminished the president's inherent authority to intercept any communications, even in a time of conflict. Others disagree, contesting whether and to what degree the legislative branch may extinguish core constitutional authorities granted to the executive branch.
Mr. Chairman, I think that we can all agree that both of the elected branches have important roles to play during a time of war. Even if we assume that the terrorist surveillance programs qualifies as electronic surveillance under FISA, it complies fully with the law. This is especially so in light of the principle that statues should be read to avoid serious constitutional questions, a principle that has no more important application than during wartime.
GONZALES: By its plain terms, FISA prohibits the government from engaging in electronic surveillance, quote, "except as authorized by statute."
Those words, "except as authorized by statute," are no mere incident of drafting. Instead, they constitute a far-sighted safety valve.
The Congress that passed FISA in 1978 included those words so that future congresses could address unforeseen challenges. The 1978 Congress afforded future lawmakers the ability to modify or eliminate the need for a FISA application without having to amend or repeal FISA.
Congress provided this safety valve because it knew that the only thing certain about foreign threats is that they change in unpredictable ways.
Mr. Chairman, the resolution authorizing the use of military force is exactly the sort of later statutory authorization contemplated by FISA's safety valve.
Just as the 1978 Congress anticipate, a new Congress in 2001 found itself facing a radically new reality. In that new environment,

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to AL Qaida terrorist B, although they happen to be in the United States.
And it was my understanding you said that the analysis of that had not been conducted. Is that correct?
GONZALES: The legal analysis as to whether or not that kind of surveillance -- we haven't done that kind of analysis, because, of course, the president -- that's not what the president has authorized.
KYL: I understand that, but I would suggest that that analysis should be undertaken. Because I think most Americans now appreciate that this is a very important program. It might warn us of an impending attack.
It could be that the attackers are already in the United States. And therefore, it could involve communication within the United States.
Understanding the need to balance the potential intrusion on privacy of American citizens within the United States, you would want to have a very careful constitutional analysis.
KYL: And certainly the president wouldn't want to authorize such an activity unless he felt that he was on very sound legal ground. On the other hand, there is no less reason to do it than there is to intercept international communications with respect to a potential terrorist warning or attack.
So I would submit that Senator Biden is correct and that this -- at least the inference was in his question that this study should be accomplished. And I would think that it should.
I also think that both he and Senator Grassley and Senator Kennedy, to some extent, talked about, "Well, what happens if we're wrong here? How can we be assured that there is no improper surveillance?"
And in this regard, I would ask you to think about it. And if you care to comment right now, fine. But this might hit you cold. It seems to me that you might consider, either in the presidential directive and the execution of that or even potentially in congressional legislative authorization, some kind of after-action report, some kind of quarterly review or some other appropriate time frame -- maybe ever 45 days; whatever's appropriate -- to the eight people who are currently briefed in the Congress on questions such as whether the program acted as it was intended, whether it appeared that somebody might have been surveilled who, under the guidelines, should not have been, and if there ever were such a case, how it happened and what's done to ensure that it doesn't happen again and whether there was any damage as a result of that, and also just generally whether the program is having the intended result of being able to demonstrate important information to the people that we charge with that responsibility.
It seems to me that reporting on that kind of activity, including information about the guidelines to provide some additional assurance that it's being conducted properly, would be appropriately briefed to the members of Congress.
We do have an oversight responsibility, but we are not the only governmental entity with responsibility here. The president has critical responsibility.
And I agree with those who say that, should there be an attack and a review of all of this activity is conducted, the president would be roundly criticized if he had a tool like this at his disposal and did not utilize it to protect the people of the United States.
GONZALES: Senator, I can say that I have not been present in all the briefings with members of Congress.
But in connection with those briefings where I was present, there was discussion regarding some of the types of issues that you've just outlined.
GONZALES: Be happy to take back your comments.
KYL: Thank you, Mr. Attorney General.
SPECTER: Thank you, Senator Kyl.

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to guard against attacks; we all agree on that.
But this administration is effectively saying, and the attorney general has said it today, it doesn't have to follow the law.
And this, Mr. Attorney General, I believe, is a very slippery slope. It's fraught with consequences.
The Intelligence Committees have not been briefed on the scope and nature of the program. They have not been able to explore what is a link or an affiliate to AL Qaida or what minimization procedures are in place. We know nothing about the program other than what we read in the newspapers.
And so it comes with huge shock, as Senator Leahy said, that the president of the United States in Buffalo, New York, in 2004, would say, and I quote, "Any time you hear the United States government talking about wiretap, it requires -- a wiretap requires a court order. Nothing has changed, by the way. When we're talking about chasing down terrorists, we're talking about getting a court order before we do so."
Mr. Attorney General, in light of what you and the president have said in the past month, this statement appears to be false. Do you agree?
GONZALES: No, I don't, Senator. In fact, I take great issue with your suggestion that somehow that president of the United States was not being totally forthcoming with the American people.
I have his statement, and in the sentence immediately before what you're talking about, he said -- he was referring to roving wiretaps. And so I think anyone...
FEINSTEIN: So you're saying that statement only relates to roving wiretaps, is that correct?
GONZALES: Senator, that discussion was about the Patriot Act. And right before he uttered those words that you're referring to, he said, "Secondly, there are such things as roving wiretaps. Now, by the way, any time you hear the United States government talk about wiretaps, it requires -- a wiretap requires a court order."
GONZALES: So, as you know, the president is not a lawyer, but this was a discussion about the Patriot Act, this was a discussion about roving wiretaps. And I think some people are trying to take part of his statement out of context, and I think that's unfair.
FEINSTEIN: OK, fair enough. Let me move along.
In October 2002, at a public hearing of the Senate-House joint inquiry into NSA activities, the then-NSA Director General Michael Hayden told me, quote, "If at times I seem indirect or incomplete, I hope that you and the public understand that I have discussed our operations fully and unreservedly in earlier closed sessions." As I mentioned, the Intelligence Committee has not been notified.
Let me ask you this: If the president determined that a truthful answer to questions posed by the Congress to you, including the questions I ask here today, would hinder his ability to function as commander in chief, does the authorization for use of military force or his asserted plenary powers authorize you to provide false or misleading answers to such questions?
GONZALES: Absolutely not, Senator. Of course not.
FEINSTEIN: Thank you. I just asked the question. A yes or no...
GONZALES: Nothing would excuse false statements before the Congress.
FEINSTEIN: All right.
You have advanced what I think is a radical legal theory here today. The theory compels the conclusion that the president's power to defend the nation is unchecked by law, that he acts alone and according to his own discretion, and that the Congress's role, at best, is advisory.
FEINSTEIN: You say that the authorization for use of military force allows the president to circumvent the Foreign Intelligence Surveillance Act and that if the AUMF doesn't, then the Constitution

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And I think General Hayden, I believe, testified before the Intel Committee that there are professionals out at NSA -- and I presume from other branches of the intel community -- that provide input as to what it does that mean to be sort of related or working with AL Qaida.
SESSIONS: Well, let me just conclude with this point. I think the system was working in that way. We were conducting a highly classified important operation that had the ability to prevent other people from being killed, as Ms. Burlingame's brother was killed, and several thousand others, on 9/11.
I believe that CIA Director Porter Goss recently in his statement that the revealing of this program resulted in severe damage to our intelligence capabilities is important to note.
And I would just like to follow up on Senator Cornyn's questions, General Gonzales, and ask you to assure us that you will investigate this matter and, if people are found to have violated a law, that the Department of Justice will prosecute those cases when they revealed this highly secret, highly important program?
GONZALES: Of course, we are going to investigate it. And we will make the appropriate decisions regarding a subsequent prosecution.
SESSIONS: Will you prosecute if it's appropriate?
GONZALES: We will prosecute if it's appropriate, yes sir.
SESSIONS: Thank you.
SPECTER: Thank you, Senator Sessions.
Senator Biden?
BIDEN: Thank you very much.
General, how has this revelation damaged the program?
I'm almost confused by it but, I mean, it seems to presuppose that these very sophisticated AL Qaida folks didn't think we were intercepting their phone calls.
I mean, I'm a little confused. How did it damage this?
GONZALES: Well, Senator, I would first refer to the experts in the Intel Committee who are making that statement, first of all. I'm just the lawyer.
And so, when the director of the CIA says this should really damage our intel capabilities, I would defer to that statement. I think, based on my experience, it is true -- you would assume that the enemy is presuming that we are engaged in some kind of surveillance. But if they're not reminded about it all the time in the newspapers and in stories, they sometimes forget.
(LAUGHTER)
And you're amazed at some of the communications that exist. And so when you keep sticking it in their face that we're involved in some kind of surveillance, even if it's unclear in these stories, it can't help but make a difference, I think.
BIDEN: Well, I hope you and my distinguished friend from Alabama are right, that they're that stupid and naive because we're much better off if that's the case.
I go the impression from the work I've done in this area that they're pretty darn sophisticated; they pretty well know.
It's a little like when we talk about -- when I say you all haven't -- not you, personally -- the administration has done very little for rail security.
They've done virtually nothing and people say, oh, my Lord, don't tell them; don't tell them there's vulnerabilities in the rail system. They'll know to use terror. Don't tell them that that tunnel was built in 1860 and there's no lighting, no ventilation.
BIDEN: I mean, I hope they're that stupid.
GONZALES: Sir, I think you can be very, very smart and be careless.
BIDEN: Well, OK. But if that's the extent of the damage, then I hope we focus on some other things, too.
Look, I'd like to submit for the record a letter to the -- it's probably already been done -- to Senators Specter and Leahy from

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operation.
I guess I'm just kind of a strict constructionist, kind of a conservative guy, and that's how I read the statute. And that's my only point. And I understand your legal interpretation, I respect that, but that's it. I don't see it any other way on that.
Let me ask you a couple other questions that I wonder if you could clarify for me.
One is the legal standard that you are using -- that's being used by the NSA under this program for deciding when to conduct surveillance of a suspected terrorist.
In your December 19th press conference you said that you must have a, and I quote, "reasonable basis to conclude that one party to the communication is affiliated with AL Qaida."
Speaking on Fox TV yesterday, General Hayden referred to the standard as "in the probable cause range."
Could you just define it for me? I know you talked about it today, but we're hearing a lot of different definitions. You're the attorney general, just clarify it for me, pinpoint it, give me the definition that the people who are administering this every single day in the field are following.
GONZALES: To the extent there's confusion, we must take some of the credit for some of the confusion, because we have used different words.
The standard is a probable cause standard. It is reasonable grounds to...
DEWINE: A probable cause standard. Is that different than probable cause as we would normally learn that in law school...
GONZALES: Not in my judgment.
DEWINE: OK. So that means...
GONZALES: I think it's probable cause. But it's not probable cause as to guilt.
DEWINE: I understand.
GONZALES: OR probable cause as to a crime being committed. It's probable cause that a party to the communication is a member or agent of AL Qaida. The precise language that I'd like to refer to is, "There are reasonable grounds to believe that a party to communication is a member or agent or AL Qaida or of an affiliated terrorist organization." It is a probable cause standard, in my judgment.
DEWINE: So probable cause...
GONZALES: ... is probable cause.
DEWINE: And so all the case law or anything else that we would learn throughout the years about probable cause, about that specific question, would be what we would look at and what the people are being instructed to follow.
GONZALES: But, again, it has nothing to do with probable cause of guilt or probable cause that a crime had been committed. It's about...
DEWINE: I understand. We're extrapolating that traditional standard over to another question.
GONZALES: And the reason that we use these words instead of "probably cause" is because people who are relying upon the standard are not lawyers.
DEWINE: All right, let me follow up. I don't have much time.
General Hayden described the standard as a softer trigger than the one that's used under FISA.
What does that mean?
GONZALES: I think what General Hayden meant was that the

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION FOUNDATION; AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN; COUNCIL ON AMERICAN-ISLAMIC RELATIONS; COUNCIL ON AMERICAN-ISLAMIC RELATIONS MICHIGAN; GREENPEACE, INC.; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; JAMES BAMFORD; LARRY DIAMOND; CHRISTOPHER HITCHENS; TARA MCKELVEY; and BARNETT R. RUBIN, Plaintiffs, v. NATIONAL SECURITY AGENCY / CENTRAL SECURITY SERVICE; and LIEUTENANT GENERAL KEITH B. ALEXANDER, in his official capacity as Director of the National Security Agency and Chief of the Central Security Service, Defendants.	DECLARATION OF LARRY DIAMOND Case No. 2:06-cv-10204-ADT-RSW Hon. Anna Diggs Taylor and R. Steven Whalen

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I, Larry Diamond, declare:

1. I am a California resident over the age of eighteen. I have personal knowledge of the facts stated in this declaration.

2. I am a senior fellow at the Hoover Institution, Stanford University, and founding co-editor of the Journal of Democracy. I am also co-director of the International Forum for Democratic Studies of the National Endowment for Democracy. At Stanford University, I am professor by courtesy of political science and sociology and coordinate the democracy program of the Center on Democracy, Development, and the Rule of Law.

3. During 2002-03, I served as a consultant to the U.S. Agency for International Development (USAID) and was a contributing author of its report Foreign Aid in the National Interest. Currently I serve as a member of USAID's Advisory Committee on Voluntary Foreign Aid. I have also advised and lectured to the World Bank, the United Nations, the State Department, and other governmental and nongovernmental agencies dealing with governance and development.

4. During the first three months of 2004, I served as a senior adviser on governance to the Coalition Provisional Authority in Baghdad. I am now lecturing and writing about the challenges of post-conflict state building in Iraq and about the challenges of developing and promoting democracy around the world, with a particular focus on the Middle East and Africa.

5. I have worked with a group of Europeans and Americans to produce the Transatlantic Strategy for Democracy and Human Development in the Broader Middle East, published in 2004 by the German Marshall Fund of the United States.

6. During 2004-2005, I was a member of the Council on Foreign Relations' Independent Task Force on United States Policy Toward Arab Reform.

7. I am the author of numerous books, including Squandered Victory: The American Occupation and the Bungled Effort to Bring Democracy to Iraq (Times Books, 2005). My recent

edited books include Islam and Democracy in the Middle East (with Marc F. Plattner and Daniel Brumberg) and Assessing the Quality of Democracy (with Leonardo Morlino).

8. My work requires me to communicate by email and occasionally by telephone with advocates of democracy in the Middle East, Asia and Africa, as well as scholars and analysts in these regions. Such advocates and researchers with whom I communicate include Saad Eddin Ibrahim, a leading advocate of democratic reform in Egypt, Professor Maye Kassem, a political scientist at the American University in Cairo, and Adel Abdellatif of the United Nations Development Program in Beirut. There also other advocates for democratic reform in other countries with whom I communicate, in Iran, the Palestinian Authority, Pakistan, China, the Philippines, Nigeria, Kenya, and Uganda.

9. To advocate for democratic reform in their countries, or to conduct their research and writing, the individuals described in paragraph 8 meet from time to time with Islamists in their respective countries, or with people close to Islamists. Some, such as Saad Eddin Ibrahim, do so because they believe in civil discourse with all members of the population. Some do so in the course of their investigations and analysis as scholars and journalists. Other pro-democracy activists meet with Islamists to assess the Islamists' strength so that the pro-democracy activists can better plan how their efforts for democratic reform may be affected by the Islamists' activities, which the Islamists often describe as a form of "jihad," and by their governments' responses to the Islamists' activities.

10. I believe that my email and telephone communications with the individuals described in paragraph 8 who reside in non-democratic Middle Eastern, African, and Asian countries are being intercepted and monitored by the National Security Agency ("NSA"). I believe this because Bush Administration officials have stated publicly that, under the secret program authorized by a presidential Executive Order (the "Program"), the NSA is intercepting and monitoring communications between individuals in the United States and individuals outside

the United States whom the NSA suspects have connections with Islamic terrorists. Because the pro-democracy advocates and researchers described in paragraph 8 meet from time to time with Islamists and discuss, among other things, the Islamists' activities, the pro-democracy advocates and researchers are likely targets of the program.

11. Some of my communications with individuals in the Middle East and Asia concern political and human rights issues that are extremely sensitive. For example, I have communicated with Sana Baloch, a Pakistani Senator, about human rights issues in Baluchistan. I believe that Senator Baloch would not have provided me with all of this information had he believed that communications with me were being intercepted and monitored by the United States government. I believe that the existence of the Program makes it less likely that individuals in Afghanistan, Pakistan, Egypt, China, and elsewhere in the Middle East and Asia will provide me with sensitive information over email or by telephone in the future.

12. I do not want to expose any confidential or sensitive information that my pro-democracy activist contacts and my contacts in government positions in the Middle East, Africa and Asia may tell me in international communications because to do so may cause their governments to retaliate against them. For that reason, I have stopped discussing such topics in my international phone calls and emails with these individuals. I will instead speak in person with these individuals when I can meet with them. I will, for example, see some of them at the World Movement for Democracy Conference in Istanbul April 2-5, 2006, and will speak with them in private in Istanbul.

13. The need to meet in-person with my contacts from the Middle East, Africa and Asia to get confidential information from them on sensitive subjects and to give them advice about how they may achieve their democratic reform agendas, instead of being able to communicate confidentially by email and telephone, interferes with my work as a scholar and advocate for democratic reform.

14. Further, because I am well-known for my writings and advocacy of democratic reform, I am occasionally contacted unsolicited by individuals who live under repressive governments and who have complaints about their governments' policies. I believe that the Program makes it substantially less likely that such individuals will contact me. I believe that this is particularly true of individuals who live under repressive governments that have close relations with the United States, such as Pakistan, Egypt, and Kazakhstan, because these individuals will reasonably fear that their communications may ultimately be provided by the Untied States to these individuals' own governments.

15. My ability to advocate and advise on democratic reform in the Middle East and Asia depends in part on the willingness of political dissidents to contact me, to consult with me, and to provide me with information about their own governments' policies. I believe that the Program inhibits the exchange of information and ideas among advocates of democratic reform, the victims of human rights abuses, and defenders of human rights, and thereby compromises my ability to study the progress of democratic reform and support those in the Middle East and Asia who advocate change.

16. Additionally, I am concerned about the implications of the Program for academic freedom. I periodically supervise undergraduate and graduate students who travel to the Middle East, Asia, and Africa to conduct research on sensitive political questions. These students and I need to communicate by email so that they can inform me about their investigations and I can help guide their research while they are in the field. To be most effective, reports by the students to me should include detailed facts so that my emailed suggestions back to them about next steps they should take can be useful. In that way, a collaborative, iterative cycle of reports, directions on next steps, and reports on those steps, etc., can develop, which will in turn allow the student to conduct the best investigation possible in the circumstances.

17. For example, in the summer of 2005, one of my Stanford undergraduate advisees, Omar Shakir, worked for me as a research assistant in Egypt interviewing opposition activists, intellectuals, and advocates of democratic change. Shakir sent weekly reports back to me and I advised him on his research by email while he was in Egypt.

18. In the future, I will direct students whom I am advising as they conduct investigations in non-democratic countries in the Middle East, Africa, and Asia not to communicate by email with me about sensitive subjects, such as discussions with Islamists or with political leaders and analysts who interact with Islamists, because the communications may be intercepted and monitored pursuant to the NSA Program.

19. For example, if a student were to report to me via email on a meeting he had with a member of the Muslim Brotherhood, or with another jihadist, solely as part of his academic research, the report could be intercepted by the NSA, the information shared with the local government, and the person contacted by the student could be retaliated against by local government authorities. Such retaliation would inevitably be noted among the local population, which would jeopardize not only future research but would threaten the safety of the student who sent the report and other students who later went to the same country. For those reasons, because of the existence of the NSA Program, I feel compelled to direct students who conduct such field work in non-democratic countries in the Middle East, Africa, and Asia not to report to me about such sensitive topics via international email.

20. The Program thus inhibits the conduct and coordination of overseas research and my supervision of student research by impairing the ability to communicate freely and

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responsibly with my students and assistants overseas, who often give their interviewees pledges of strict confidentiality.

I declare under the penalties of perjury of the laws of the United States and the State of California that the foregoing is true and correct.

Larry Diamond

Executed at Stanford, California on March 6, 2006.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION FOUNDATION; AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN; COUNCIL ON AMERICAN-ISLAMIC RELATIONS; COUNCIL ON AMERICAN-ISLAMIC RELATIONS MICHIGAN; GREENPEACE, INC.; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; JAMES BAMFORD; LARRY DIAMOND; CHRISTOPHER HITCHENS; TARA MCKELVEY; AND BARNETT R. RUBIN, Plaintiffs, v. NATIONAL SECURITY AGENCY / CENTRAL SECURITY SERVICE; and LIEUTENANT GENERAL KEITH B. ALEXANDER, in his official capacity as Director of the National Security Agency and Chief of the Central Security Service, Defendants.	DECLARATION OF NANCY HOLLANDER Case No. 2:06-cv-10204-ADT-RSW Hon. Anna Diggs Taylor and R. Steven Whalen

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I, Nancy Hollander, declare:

1. I am a New Mexico resident over the age of 18. I have personal knowledge of the facts stated in this declaration.

2. I am a member of the law firm of Freedman Boyd Daniels Hollander & Goldberg P.A., and a member and past president of plaintiff National Association of Criminal Defense Lawyers ("NACDL").

3. I have been a criminal defense attorney for approximately 28 years, first at the New Mexico State Public Defender Department (1978-1979) and, after 1979, at the above-mentioned law firm. I am admitted to practice in and have appeared before the Courts of the state of New Mexico, the United States District Courts for the District of New Mexico and for several other Districts, the United States Courts of Appeals for the Second, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth and District of Columbia Circuits, and the United States Supreme Court.

4. I have spoken and written widely on many aspects of evidence, ethics, trial practice, and a broad range of other topics. For example, I have taught in numerous trial practice programs, such as the National Criminal Defense College and Gerry Spence's Trial College, have spoken at seminars throughout the United States, in Europe, Asia and Russia, have been a guest on several nationally broadcast television shows (including The Today Show, The Oprah Winfrey Show, and The MacNeil/Lehrer News Hour), and have written many articles. I am the co-author of *Wharton's Criminal Evidence*, 15th edition (West 1997), *Wharton's Criminal Procedure*, 14th edition (West 2003) and *Everytrial Criminal Defense Resource Book* (West 1994).

5. In addition to my involvement in the NACDL, I have served as a Member of the Board of Directors of the International Criminal Defense Attorneys (2002-present), a Member of the Board of Visitors of the University of New Mexico School of Law (1996-1999), a Fellow of the American Board of Criminal Lawyers (1994-present), a Fellow of the American College of Trial Lawyers (2004-present), a Member of the Board of Directors of the Albuquerque Bar Association (1985-1988), and a board member or participant in many other professional organizations.

6. I was named one of America's Top Fifty Women Litigators by the National Law Journal in 2001 and was designated one of the Best Lawyers in America (1989-present). I received the Henrietta Pettijohn Award from the New Mexico Women's Bar Association in 2000, six President's Commendations (1985, 1988, 1989, 1992, 2004, 2005), and the Robert C. Heeney Memorial Award (1987) from the NACDL, among other professional honors.

7. I have been an active member of NACDL, a Washington, D.C.-based non-profit organization for 26 years. I served as President of the group from 1992-1993 and am currently the co-chair of its International Affairs Committee. I also coordinate the NACDL's recruitment of volunteers to represent prisoners at the United States detention facilities at Guantanamo Bay, Cuba.

8. The NACDL is comprised of over 13,000 lawyers and 28,000 affiliate members from every state in the United States. It was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence and expertise of defense lawyers in criminal cases.

9. The NACDL is concerned with the erosion of due process and of the rights of criminal defendants and suspects. It is particularly concerned about the impact of the "War on Terror" on the criminal justice system, on due process, and on the protections afforded by the Fourth, Fifth, and Sixth Amendments.

10. The NACDL has been active with respect to those issues. It has filed amicus briefs in a considerable number of cases involving the infringement of rights precipitated by the War on Terror, including in the Courts of Appeal, in the Foreign Intelligence Surveillance Court of Review, and in the Supreme Court. The NACDL has been involved as amicus in all of the cases involving the rights of prisoners held at Guantanamo Bay, Cuba, both United States citizens and others, and both in trial courts and in the Courts of Appeal.

11. The NACDL has at least three committees that address issues related to the prosecution of defendants charged with terrorism-related crimes and the detention of alleged enemy combatants: its Select Committee on Military Tribunals, its International Affairs Committee, and its Ethics Committee. The NACDL's Amicus Curiae Committee has also been intensively involved in these issues.

12. At least fifty NACDL members in the United States, including me, represent or have represented terrorism suspects. Many of these NACDL members regularly communicate with people outside the United States as part of their representation of individuals charged with terrorism-related offenses and as part of their representation of individuals held as enemy combatants. Because of the nature of these communications, the identities of the individuals with whom we communicate, and the locations of individuals with whom we communicate, NACDL members have a strong and well-founded belief that such communications are being

intercepted and monitored by the National Security Agency ("NSA") as part of the program to intercept international telephone and e-mail communications that was first described by The New York Times on December 16, 2005 (the "NSA Program"). The NSA Program interferes with communications that are necessary for NACDL members to effectively represent their clients.

13. I personally represent several organizations and individuals who have been accused by the federal government of committing crimes related to terrorism. As described below, the circumstances regarding these clients and my communications with potential witnesses in their cases are of the type that the NSA has admitted will trigger its interception and monitoring. I therefore believe that many of my international communications in these cases have been intercepted and monitored.

14. In cases in which I represent foreign-born defendants and other individuals who the United States government alleges have connections to foreign-based terrorist organizations, it is necessary for me to communicate regularly with individuals outside of the United States, including clients, fact witnesses, experts or potential experts, co-counsel, investigators and others. For example, I frequently communicate with witnesses, foreign counsel, experts, journalists, government officials, and political figures in Israel, Gaza, the West Bank, Egypt, and other countries in the Middle East and Europe, as well as in Mauritania.

15. It is necessary that many of these international communications be two-way conversations so that I can ask follow-up questions about information I am told and so that the witness, expert, or other person and I can discuss and refine next steps in our investigations. Communicating by telephone or e-mail is the most efficient way to have such two-way conversations. Postal mail is too slow and does not allow a conversation between more than two

participants; meeting face to face is time-consuming and too expensive to make it practical each time I need to have such a conversation.

16. Because of the nature of my international communications, the identities of the people with whom I communicate, and the subject matter of my on-line research, I believe that my international communications are being intercepted and monitored pursuant to the NSA Program. As a result, I have refrained from communicating with individuals outside the United States regarding confidential or privileged topics in connection with these cases by telephone or e-mail, the methods I would otherwise use for such communications. This has caused my clients, my professional contacts, and me to incur costs and to spend time to avoid discussing such subjects in international communications that I believe are intercepted and monitored.

17. I describe below a few examples of cases that I am currently working on or that I worked on in the past in which I believe my international communications were intercepted and monitored, or in which such communication would have been intercepted and monitored if I had not refrained from engaging in such communications due to the likelihood of surveillance.

18. I represent the Holy Land Foundation for Relief and Development, a Texas-based Islamic charitable organization, and its President and Chief Executive Officer (and former Executive Director), Shukri Abu Baker in connection with their prosecution for allegedly providing financial support to Hamas. I entered my appearance on behalf of the Foundation on September 30, 2004, and I was appointed to represent Mr. Baker on March 1, 2005.

19. On July 26, 2004, a federal grand jury in the United States District Court for the Northern District of Texas indicted the Holy Land Foundation, Baker, and six co-defendants on charges of providing material support to a foreign terrorist organization in the form of millions of

dollars of donations to Hamas, engaging in prohibited financial transactions with a Specially Designated Terrorist, money laundering, filing false tax returns, and multiple conspiracy changes. The case, No. 3:04-CR-240-G, is pending in the Northern District of Texas. The defendants have not yet been tried.

20. My concerns about interception of communications under the NSA Program have prevented me from having privileged or confidential conversations in international telephone calls or e-mails. Consequently, it will be necessary to travel again overseas to hold meetings with potential witnesses and other sources of information involved in the case. The trips I will take in the future will be expensive and time-consuming.

21. I also represent Mohammedou Ould Salahi, who the United States has designated an enemy combatant and has been detained at Guantanamo Bay since 2002, in connection with a pending *habeas corpus* petition and lawsuit that he filed in the United States District Court for the District of Columbia, No. 1:05-cv-569. I am representing Mr. Salahi *pro bono* and therefore my firm is incurring substantial expenses associated with his case. I entered my appearance on behalf of Mr. Salahi on April 25, 2005.

22. Mr. Salahi is a citizen of Mauritania and he was a legal resident of Canada. The United States alleges that he acted as a liaison between Osama bin Laden and a group of Islamic radicals living in Hamburg, Germany, some of whom assisted in planning the September 11 attacks.

23. To investigate facts related to the *Salahi* case and to plan to defend Mr. Salahi, I must engage in privileged communications with other attorneys, with investigators, and with other individuals in countries such as Mauritania, Germany, France and Canada. Because of the

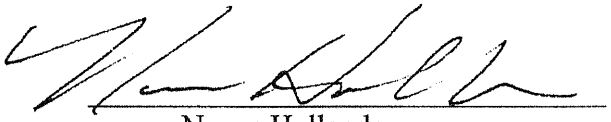
charges against Mr. Salahi and the aspects of the NSA Program Administration officials have admitted, I believe it is likely that some or all of these communications will be intercepted and monitored under the Program. I therefore must choose either to have federal officials intercept my privileged communications or to travel abroad at great expense to my law firm to hold person-to-person meetings that are not subject to eavesdropping. Because I must communicate with the non-U.S. attorneys, investigators, and other individuals to defend Mr. Salahi but may not ignore the likelihood that any international telephone calls or e-mails will be intercepted pursuant to the NSA Program, I expect to make one or more trips abroad to prepare the defense in this case.

24. I am also working with co-counsel Emmanuel Altit on the *Salahi* case. Mr. Altit is a French barrister specializing in international criminal law and humanitarian law who is affiliated with several international non-profit organizations including the *Avocats Sans Frontières.* As with the individuals discussed above, I do not believe that I can communicate with Mr. Altit, who lives and works in France, on the telephone or by e-mail without the likelihood that our communications will be intercepted and monitored. I will therefore have to spend money and time to meet with him in person to avoid having our conversations illicitly recorded.

25. In sum, the Program has interfered with my communications with clients and with other individuals in the Middle East and Europe on several occasions. It is necessary for me to have such international communications to effectively represent my clients. Since the NSA Program was disclosed, I have stopped discussing privileged or other confidential matters in international telephone calls or in international e-mails with witnesses, experts, potential experts,

and co-counsel for clients charged in terrorism-related cases because I believe it is likely that the federal government would intercept and monitor those communications. I have instead had to take expensive and time-consuming trips abroad to obtain information that, absent the NSA Program, I would have obtained simply by picking up the telephone or by logging on to my computer.

I declare under penalty of perjury under the laws of the United States and of the State of New Mexico that the foregoing is true and correct.



Nancy Hollander

Executed at Albuquerque, New Mexico, this 6th day of March, 2006.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION FOUNDATION; AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN; COUNCIL ON AMERICAN-ISLAMIC RELATIONS; COUNCIL ON AMERICAN-ISLAMIC RELATIONS MICHIGAN; GREENPEACE, INC.; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; JAMES BAMFORD; LARRY DIAMOND; CHRISTOPHER HITCHENS; TARA MCKELVEY; and BARNETT R. RUBIN, Plaintiffs, v. NATIONAL SECURITY AGENCY / CENTRAL SECURITY SERVICE; and LIEUTENANT GENERAL KEITH B. ALEXANDER, in his official capacity as Director of the National Security Agency and Chief of the Central Security Service, Defendants.	DECLARATION OF TARA MCKELVEY Case No. 2:06-cv-10204-ADT-RSW Hon. Anna Diggs Taylor and R. Steven Whalen

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I, Tara McKelvey, declare:

1. I am a resident of Washington, D.C., over the age of eighteen. I have personal knowledge of the facts stated in this declaration.

2. I am a senior editor at *The American Prospect* and a contributing editor to *Marie Claire*. My articles have appeared in those two magazines as well as in *The Nation*, *USA Today*, *Chicago Tribune*, and *The New York Times*.

3. I have written extensively about the Middle East, including articles about Iraqi detainees held in United States custody, about women's issues in Iraq, and about the United States military in Iraq. I am writing a book about United States legal efforts to fight torture and am editing an upcoming anthology about women and torture. I am also collaborating on a collection of first-hand accounts of torture and abuse from Iraqis and Afghanis, and from detainees held in United States custody.

4. I communicate from Washington, D.C. with individuals in Iraq, Jordan, and Syria by telephone and email. Such communications are a vital part of my work as a journalist.

5. For example, beginning in October 2004, to conduct research for news articles, I regularly sent emails from Washington, D.C. to individuals in Iraq and Jordan and received emails in Washington, D.C. that the individuals sent from Iraq and Jordan.

6. Similarly, as part of my research, I made frequent telephone calls from Washington, D.C. to individuals in Iraq, Jordan, and Syria in November and December 2004 and in January, November, and early December 2005.

7. My sources in the Middle East include individuals working for the United States military, Iraqi soldiers, nongovernmental agencies, bankers, school administrators, journalists, activists, human-rights workers, and others.

8. Among my many sources in the Middle East are individuals I believe are likely to have be the targets of United States government surveillance because they have been arrested or

investigated by United States or coalition forces, have been suspected of aiding insurgents, have ties to the former Iraqi regime, or are critical of the United States presence in Iraq.

9. For example, in December 2004, for an article for *The American Prospect*, I interviewed by telephone from Washington, D.C., Khadeja Yassen, who was in Baghdad. Ms. Yassen was a ranking member of the Baath Party and is the sister of former vice president Taha Yassin Ramadan, who in turn was included in the United States military's playing card deck of the 55 most wanted Iraqis. Ms. Yassen's house was raided by United States forces in 2003 and she was later arrested.

10. In December 2004, for another article in *The American Prospect*, I interviewed by telephone from Washington, D.C., Saja, an engineer in her thirties, who was at her home in Damascus, Syria. I also exchanged emails with her between Washington, D.C. and Damascus. According to an American spokesman for coalition forces in Iraq, Saja is believed to be a former mistress of Saddam Hussein.

11. As part of my journalistic research, I visit numerous websites, hosted in the Middle East, that include aggressive anti-American propaganda including Albasrah.net, Iraq Solidaridad, SOS Kinderen Irak, and CIA Launches.

12. Because of my journalistic contacts with individuals in Iraq who have been arrested or investigated by the United States or coalition forces, who have been suspected of aiding insurgents, who have ties to the former Iraqi regime, or who are critical of the United States presence in Iraq, and because of I have visited anti-American websites, I believe that my international communications with the individuals described above have been and will continue to be intercepted and monitored by the NSA pursuant to the program that was disclosed in mid-December 2005 (the "NSA Program"). Bush Administration officials have publicly admitted that the NSA Program includes the interception of communications between the United States and persons who United States intelligence agencies believe have ties to insurgents. My

international communications described above fit this profile.

13. Many of my most important sources in Iraq have spoken to me in the past only with great trepidation; they fear that other Iraqis will kill them for speaking with an American and, at the same time, they fear being arrested (in some cases re-arrested) by United States or by coalition forces who suspect them of being involved in insurgent activities. In December 2005, and on later dates, at least one of my sources in Iraq and one of my U.S.-based sources -- who is on his way to Iraq -- have expressed concern about communicating with me by international telephone calls and emails for fear that their communications may be intercepted.

14. The NSA Program substantially impairs my ability to communicate with sources in the Middle East who wish not to be identified by the United States government. Communicating confidentially with such sources is essential to my work as a journalist. My professional standing and reputation as a journalist will suffer if I am no longer able to communicate confidentially with sources who have first-hand knowledge about torture and about other facets of the United States presence in Iraq.

15. To conduct research for my upcoming articles and books, I have to talk to Iraqi civilians who have been held in United States detention at Abu Ghraib and in other detention centers in Iraq. Until mid-December 2005, I emailed and spoke on the phone from Washington, D.C., with former detainees in Iraq. I was able to promise these former detainees that I would not disclose their identities. Now I can no longer promise former detainees that their identities will be kept secret. My inability, because of the NSA Program, to assure anonymity or privacy to the individuals I need to interview, many of whom are quite frightened of the United States government and military, has prevented me from obtaining information from some of these individuals.

16. Due to my concerns about the NSA Program and the concerns of some of my sources' about the Program, I will conduct interviews with confidential sources about sensitive

subject in person rather than by international telephone calls. The Program will force me to rely on such in-person interviews when I need to obtain information in secret. I will no longer be able to rely on international telephone conversations and email exchanges as I did before the Program was disclosed.

17. For example, I am traveling to Amman, Jordon from March 8 through March 15, 2006, to meet with a group of Iraqi civilians who have been held in United States custody. The trip will cost approximately $3,500. In addition, I am now trying to raise money so that I may travel to Amman, Jordon in May 2006 to interview another group of Iraqi civilians who have been held in United States detention. This trip, which will be for one week, will also cost approximately $3,500. If not for the disclosure of the NSA Program, I would have relied more heavily on interviewing these civilians by telephone from the United States and obtained additional information from them via email between the United States and Iraq and not planned on making two trips to Amman.

I declare under the penalties of perjury of the laws of the United States and of the District of Columbia that the foregoing is true and correct.

Tara McKelvey

Executed at Washington, D.C., on March 5, 2006.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION FOUNDATION; AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN; COUNCIL ON AMERICAN-ISLAMIC RELATIONS; COUNCIL ON AMERICAN-ISLAMIC RELATIONS MICHIGAN; GREENPEACE, INC.; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; JAMES BAMFORD; LARRY DIAMOND; CHRISTOPHER HITCHENS; TARA MCKELVEY; and BARNETT R. RUBIN, Plaintiffs, v. NATIONAL SECURITY AGENCY / CENTRAL SECURITY SERVICE; and LIEUTENANT GENERAL KEITH B. ALEXANDER, in his official capacity as Director of the National Security Agency and Chief of the Central Security Service, Defendants.	DECLRARATION OF WILLIAM W. SWOR Case No. 2:06-cv-10204-ADT-RSW Hon. Anna Diggs Taylor and R. Steven Whalen

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3.8.06

I, William W. Swor, declare:

1. I am a Michigan resident over the age of eighteen. I have personal knowledge of the facts stated in this declaration.

2. I am an attorney in private practice in Detroit, Michigan and have been a member of the Michigan Bar since 1972. My practice focuses on constitutional law, immigration law, forfeiture, and defending clients charged with various crimes.

3. I received a J.D. from Wayne State University in 1972. I graduated from Oakland University in 1969 with a B.A. in Political Science.

4. I am a member of the National Association of Criminal Defense Lawyers and a member of the Board of Directors of the Criminal Defense Attorneys of Michigan. I am the recipient of the CDAM Justice for All Award for 2004, and the National Lawyers Guild Defender of Justice Award for 2005. I have been a faculty member of the faculty for Advanced Training Seminars, Criminal Defense Attorneys of Michigan since 1993.

5. I have represented, currently represent, and expect to represent in the future, individuals who have been investigated and or prosecuted under one or more of the federal terrorism-related statutes. I have recently represented or currently represent defendants in three such matters in several federal districts.

6. I represented Abdel-Ilah Elmardoudi, who was accused by the United States of providing material aid in support of terrorism. *See United States v. Koubriti*, 336 F. Supp. 2d 676 (E.D. Mich. 2004) (No. 01-80778). I represent Mahmoud Kourani, who was accused by the United States of providing material aid to Hezbollah, in Lebanon. *See United States v. Kourani*, No. 03-81030 (E.D. Mich.). I also represent Kifah Wael Jayyousi who has been accused of

providing aid to terrorists, and who was recently ordered released on bond by District Court Judge Marcia Cooke in Miami. *See United States v. Hassoun, et al.,* 04-CR-6001 (S.D. Fla.).

7. My legal practice requires that I communicate by telephone and e-mail with individuals outside of the United States, including witnesses, potential experts, other potential sources, and others who are located in the Middle East. I must communicate confidentially with such overseas witnesses to effectively represent my clients.

8. I believe that my communications from the United States with individuals in the Middle East are likely being intercepted and monitored by the U.S. government. My belief is based on public statements by members of the Bush Administration. I handle cases involving issues that fit the parameters that the government has said will trigger surveillance under the NSA Program. For example, because the United States has charged some of my clients with terrorism-related offenses, I presume from the statements of Administration officials that my communications with my clients' contacts and associates in the Middle East are being intercepted and monitored by the NSA.

9. For that reason, I will not discuss on the telephone or by e-mail with potential witnesses in the Middle East information that may or may not assist my clients. I believe I would violate my ethical obligations by discussing such information on international phone calls or in international e-mails because I cannot be certain that such communications are confidential. On the contrary, I strongly believe that they are not. Because I cannot discuss factual issues with witnesses over the phone for fear of interception, my ability to represent my clients has been compromised and my practice harmed.

10. For example, I represent and have represented individuals the U.S. government believes to be involved with terrorist groups. I receive telephone calls from my clients' family members and others who are in the Middle East. My client Mahmoud Kourani has a family member in the Middle East who shares the same first and last name, so I feel certain that communications with that family member are intercepted and monitored. Because my questions to potential witnesses have the potential to elicit confidential information regarding my clients, I consider the conversations to be subject to attorney work-product privilege.

11. Since I learned about the NSA Program, I have severely curtailed my telephone and e-mail communications with witnesses and clients' family members in the Middle East. Although I was careful in communicating with international contacts before I learned of the NSA Program, I understood that certain safeguards applied to surveillance conducted under FISA that allowed me to elicit and discuss privileged or confidential information with potential witnesses and other sources abroad. I believed that FISA had minimization requirements preventing privileged communications from being recorded, or at least used against my clients in court. I understood that FISA contained its own suppression provisions, so that privileged information could not be used as evidence against my clients. FISA requires a judge's review and, even if FISA judges generally approved surveillance, their review provided a layer of protection against the improper monitoring and use of privileged information. I believe that the FISA provisions provided a disincentive for the government to obtain and use privileged information. Now I believe that work-product privileged conversations *are* being monitored under the NSA Program, and I am unaware of any limits on how the fruits of the surveillance may be used. Thus, I no

longer discuss substantive matters with witnesses and family members. I try to limit communications about my clients' cases with individuals outside the U.S. to procedural matters.

12. For example, I need to communicate with Mr. Kourani's family members and other individuals in the Middle East to obtain information that would help me convince the prosecutor in Mr. Kourani's case to move for a sentence reduction pursuant to Fed. R. Crim. Proc. 35. When I speak to witnesses in the Middle East who are in a position to help Mr. Kourani by virtue of information to which they may have access, I do not try to elicit any factual information over the phone because I fear that our conversations are being monitored. If such communications are monitored by the government, I will not be able to offer the government any information it does not already know in order to persuade them to seek a reduced sentence for my client.

13. Because I cannot fulfill my obligation of confidentiality if I communicate with witnesses in Mr. Kourani's case over the phone, I will have to travel to the Middle East to talk with witnesses in person. I will ultimately bear this expense if Mr. Kourani cannot.

14. In Mr. Jayyousi's case, there are witnesses in the Middle East who I believe can provide substantial information in support of his defense. Since the NSA Program has been disclosed, I cannot effectively communicate with these witnesses over the telephone or by e-mail. I will need to travel to the Middle East to communicate with these witnesses to prepare the case and will ultimately bear that expense if Mr. Jayyousi cannot.

15. In the case of Mr. Elmardoudi, all terrorism-related charges against him have been dropped. He is currently facing a credit card fraud charge and his family members in the Middle East occasionally call me to check on the status of that case. Since I learned of the NSA

Program, I have been hesitant to talk with his family members over the phone about the fraud case. I do not talk with them about the facts of the case and have discouraged them from contacting me by phone. Thus, in addition to depriving my client's family of this communication, the NSA Program affects my ability to maintain relationships with my clients' family members and with potential witnesses.

16. Because I believe that the NSA is intercepting and monitoring my international communications, I do not communicate by international phone calls or e-mails with my clients' contacts and associates in the Middle East or with potential witnesses in my clients' cases who live in the Middle East about anything that they would not want disclosed to U.S. government officials or that the individuals would not want to be relayed by U.S. government officials to others. I cannot communicate sensitive or privileged information to such persons or receive such information from them. This directly affects my ability to obtain exculpatory and other helpful evidence and to defend my clients.

I declare under penalty of perjury under the laws of the United States and of the State of Michigan that the foregoing is true and correct.

William W. Swor

Executed at Detroit, Michigan this 8th day of March, 2006.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION FOUNDATION; AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN; COUNCIL ON AMERICAN-ISLAMIC RELATIONS; COUNCIL ON AMERICAN-ISLAMIC RELATIONS MICHIGAN; GREENPEACE INC.; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; JAMES BAMFORD; LARRY DIAMOND; CHRISTOPHER HITCHENS; TARA MCKELVEY; and BARNETT R. RUBIN, Plaintiffs, v. NATIONAL SECURITY AGENCY/CENTRAL SECURITY SERVICE; AND LIEUTENANT GENERAL KEITH B. ALEXANDER, in his Official capacity as Director of the National Security Agency/Central Security Service Defendants.	Case No. 2:06-CV-10204 Hon. Anna Diggs Taylor

DECLARATION OF JOHN D. NEGROPONTE,
DIRECTOR OF NATIONAL INTELLIGENCE

I, John D. Negroponte, declare as follows:

INTRODUCTION

1. I am the Director of National Intelligence (DNI) of the United States. I have held this position since April 21, 2005. From June 28, 2004, until appointed to be DNI, I served as United States Ambassador to Iraq. From September 18, 2001, until my appointment in Iraq, I

served as the United States Permanent Representative to the United Nations. I have also served as Ambassador to Honduras (1981-1985), Mexico (1989-1993), the Philippines (1993-1996), and as Deputy Assistant to the President for National Security Affairs (1987-1989).

2. In the course of my official duties, I have been advised of this lawsuit and the allegations at issue in this case. The statements made herein are based on my personal knowledge, as well as on information provided to me in my official capacity as DNI, and on my personal evaluation of that information. In personally considering this matter, I have executed a separate classified declaration dated May 26, 2006, and lodged *in camera* and *ex parte* in this case. Moreover, I have read and personally considered the information contained in the *In Camera, Ex Parte* Declaration of Major General Richard J. Quirk lodged in this case. General Quirk is the Director of Signals Intelligence at the National Security Agency ("NSA").

3. The purpose of this declaration is to formally assert, in my capacity as DNI and head of the United States Intelligence Community, the miliary and state secrets privilege (herafter "state secrets privilege"), as well as a statutory privilege under the National Security Act, *see* 50 U.S.C. § 403-1(i)(1), in order to protect intelligence information, sources and methods that are implicated by the allegations in this case. Disclosure of the information covered by these privilege assertions would cause exceptionally grave damage to the national security of the United States and, therefore, should be excluded from any use in this case. In addition, I concur with General Quirk's conclusion that the risk is great that further litigation will risk the disclosure of information harmful to the national security of the United States and, accordingly, this case should be dismissed. *See* Declaration of Maj. Gen. Richard J. Quirk, Director of Signals Intelligence, Director, National Security Agency.

BACKGROUND ON DIRECTOR OF NATIONAL INTELLIGENCE

4. The position of Director of National Intelligence was created by Congress in the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, §§ 1011(a) and 1097, 118 Stat. 3638, 3643-63, 3698-99 (2004) (amending sections 102 through 104 of the Title I of the National Security Act of 1947). Subject to the authority, direction, and control of the President, the DNI serves as the head of the U.S. Intelligence Community and as the principal advisor to the President, the National Security Council, and the Homeland Security Council, for intelligence-related matters related to national security. *See* 50 U.S.C. § 403(b)(1), (2).

5. The "United States Intelligence Community" includes the Office of the Director of National Intelligence; the Central Intelligence Agency; the National Security Agency; the Defense Intelligence Agency; the National Geospatial-Intelligence Agency; the National Reconnaissance Office; other offices within the Department of Defense for the collection of specialized national intelligence through reconnaissance programs; the intelligence elements of the military services, the Federal Bureau of Investigation, the Department of Treasury, the Department of Energy, Drug Enforcement Administration, and the Coast Guard; the Bureau of Intelligence and Research of the Department of State; the elements of the Department of Homeland Security concerned with the analysis of intelligence information; and such other elements of any other department or agency as may be designated by the President, or jointly designated by the DNI and heads of the department or agency concerned, as an element of the Intelligence Community. *See* 50 U.S.C. § 401a(4).

6. The responsibilities and authorities of the DNI are set forth in the National Security Act, as amended. *See* 50 U.S.C. § 403-1. These responsibilities include ensuring that

national intelligence is provided to the President, the heads of the departments and agencies of the Executive Branch, the Chairman of the Joint Chiefs of Staff and senior military commanders, and the Senate and House of Representatives and committees thereof. 50 U.S.C. § 403-1(a)(1). The DNI is also charged with establishing the objectives of, determining the requirements and priorities for, and managing and directing the tasking, collection, analysis, production, and dissemination of national intelligence by elements of the Intelligence Community. *Id.* § 403-1(f)(1)(A)(i) and (ii). The DNI is also responsible for developing and determining, based on proposals submitted by heads of agencies and departments within the Intelligence Community, an annual consolidated budget for the National Intelligence Program for presentation to the President, and for ensuring the effective execution of the annual budget for intelligence and intelligence-related activities, and for managing and allotting appropriations for the National Intelligence Program. *Id.* § 403-1(c)(1)-(5).

7. In addition, the National Security Act of 1947, as amended, provides that "The Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 403-1(i)(1). Consistent with this responsibility, the DNI establishes and implements guidelines for the Intelligence Community for the classification of information under applicable law, Executive Orders, or other Presidential directives and access and dissemination of intelligence. *Id.* § 403-1(i)(2)(A), (B). In particular, the DNI is responsible for the establishment of uniform standards and procedures for the grant of access to Sensitive Compartmented Information ("SCI") to any officer or employee of any agency or department of the United States, and for ensuring consistent implementation of those standards throughout such departments and agencies. *Id.* § 403-1(j)(1), (2).

8. By virtue of my position as the DNI, and unless otherwise directed by the President, I have access to all intelligence related to the national security that is collected by any department, agency, or other entity of the United States. Pursuant to Executive Order No. 12958, 3 C.F.R. § 333 (1995), as amended by Executive Order 13292 (March 25, 2003), reprinted as amended in 50 U.S.C.A. § 435 at 93 (Supp. 2004), the President has authorized me to exercise original TOP SECRET classification authority. My classified declaration, as well as the classified declaration of General Quirk on which I have relied in this case, are properly classified under § 1.3 of Executive Order 12958, as amended, because the public disclosure of the information contained in those declarations could reasonably be expected to cause serious damage to the foreign policy and national security of the United States.

ASSERTION OF THE STATE SECRETS PRIVILEGE

9. After careful and actual personal consideration of the matter, I have determined that the disclosure of certain information implicated by Plaintiffs' claims—as set forth here and described in more detail in my classified declaration and in the classified declaration of General Quirk—would cause exceptionally grave damage to the national security of the United States and, thus, must be protected from disclosure and excluded from this case. Thus, as to this information, I formally invoke and assert the state secrets privilege. In addition, it is my judgment that any attempt to proceed in the case will substantially risk the disclosure of the privileged information described briefly herein, and in more detail in the classified declarations, and will cause exceptionally grave damage to the national security of the United States.

10. Through this declaration, I also invoke and assert a statutory privilege held by the DNI under the National Security Act to protect intelligence sources and methods implicated by

this case. *See* 50 U.S.C. § 403-1(i)(1). My assertion of this statutory privilege for intelligence information and sources and methods is coextensive with my state secrets privilege assertion.

INFORMATION SUBJECT TO CLAIMS OF PRIVILEGE

11. In an effort to counter the al Qaeda threat, the President of United States authorized the NSA to utilize its signals intelligence (SIGINT) capabilities to collect certain "one-end foreign" communications where one party is associated with the al Qaeda terrorist organization for the purpose of detecting and preventing another terrorist attack on the United States. This activity is known as the Terrorist Surveillance Program ("TSP"). To disclose additional information regarding the nature of the al Qaeda threat or to discuss the TSP in any greater detail, however, would disclose classified intelligence information and reveal intelligence sources and methods, which would enable adversaries of the United States to avoid detection by the U.S. Intelligence Community and/or take measures to defeat or neutralize U.S. intelligence collection, posing a serious threat of damage to the United States' national security interests. Thus, any further elaboration on the public record concerning the al Qaeda threat or the TSP would reveal information that would cause the very harms my assertion of the state secrets privilege is intended to prevent. The classified declaration of General Quirk that I considered in making this privilege assertion, as well as my own separate classified declaration, provide a more detailed explanation of the information at issue and the harms to national security that would result from its disclosure.

12. Plaintiffs also make allegations regarding whether they have been subject to surveillance by the NSA. The United States can neither confirm nor deny allegations concerning intelligence activities, sources, methods, or targets. For example, disclosure of those who are

targeted by such activities would compromise the collection of intelligence information just as disclosure of those who do are not targeted would reveal to adversaries that certain communications channels are secure or, more broadly, would tend to reveal the methods being used to conduct surveillance. The only recourse for the Intelligence Community and, in this case, for the NSA, is to neither confirm nor deny these sorts of allegations, regardless of whether they are true or false. To say otherwise when challenged in litigation would result in routine exposure of intelligence information, sources, and methods and would severely undermine surveillance activities in general. Thus, as with the other categories of information discussed in this declaration, any further elaboration on the public record concerning these matters would reveal information that would cause the very harms my assertion of the state secrets privilege is intended to prevent. The classified declaration of General Quirk that I considered in making this privilege assertion, as well as my own separate classified declaration, provide a more detailed explanation of the information at issue, the reasons why it is implicated by Plaintiffs' claims, and the harms to national security that would result from its disclosure.

CONCLUSION

13. In sum, I formally invoke and assert the state secrets privilege, as well as a statutory privilege under the National Security Act, to prevent the disclosure of: (1) information regarding the nature of the al Qaeda threat; (2) further information regarding the Terrorist Surveillance Program; and (3) information that would confirm or deny whether individuals have been targeted for surveillance by the NSA. These matters, and the grave harm to the national security that would follow from the disclosure of information regarding them, are detailed in the two classified declarations that are available for the Court's *in camera* and *ex parte* review.

Moreover, because proceedings in this case risk disclosure of privileged and classified intelligence-related information, I join with General Quirk in respectfully requesting that the Court dismiss this case to stem the harms to the national security of the United States that will occur if it is litigated.

I declare under penalty of perjury that the foregoing is true and correct.

DATE: 5/26/06

JOHN D. NEGROPONTE
Director of National Intelligence

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION FOUNDATION; AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN; COUNCIL ON AMERICAN-ISLAMIC RELATIONS; COUNCIL ON AMERICAN-ISLAMIC RELATIONS MICHIGAN; GREENPEACE INC.; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; JAMES BAMFORD; LARRY DIAMOND; CHRISTOPHER HITCHENS; TARA MCKELVEY; and BARNETT R. RUBIN, Plaintiffs, v. NATIONAL SECURITY AGENCY/CENTRAL SECURITY SERVICE; AND LIEUTENANT GENERAL KEITH B. ALEXANDER, in his Official capacity as Director of the National Security Agency/Central Security Service Defendants.	Case No. 2:06-CV-10204 Hon. Anna Diggs Taylor

DECLARATION OF MAJOR GENERAL RICHARD J. QUIRK, SIGNALS INTELLIGENCE DIRECTOR, NATIONAL SECURITY AGENCY

I, Richard J. Quirk, declare as follows:

INTRODUCTION

1. I am the Signals Intelligence Director of the National Security Agency (NSA), an intelligence agency within the Department of Defense (DoD). The NSA SIGINT Director directs and oversees the signals intelligence (SIGINT) operations of the NSA, which include the SIGINT units of the U.S. armed forces. Under Executive Order (Exec. Order) No. 12333, 46 Fed. Reg. 59941 (1982), and orders of the NSA Director, the NSA SIGINT Director is

responsible for collecting, processing, and disseminating SIGINT information for the foreign intelligence purposes of the United States and for protecting NSA SIGINT activities, sources and methods against their unauthorized, public disclosures. The NSA SIGINT Director has been designated an original TOP SECRET classification authority under Exec. Order No. 12958 as amended.

2. The purpose of this declaration is to support the assertion of a formal claim of the military and state secrets privilege (hereafter "state secrets privilege"), as well as a statutory privilege, by the Director of National Intelligence (DNI) as the head of the intelligence community. In this declaration, I also assert a statutory privilege with respect to information about NSA activities. For the reasons described below, and in my classified declaration provided separately to the court for *in camera* and *ex parte* review, the disclosure of the information covered by these privilege assertions would cause exceptionally grave damage to the national security of the United States. The statements made herein, and in my classified declaration, are based on my personal knowledge of NSA operations and on information made available to me as Director of the NSA.

THE NATIONAL SECURITY AGENCY

3. The NSA was established by Presidential Directive in 1952 as a separately organized agency within the Department of Defense. Under Exec. Order 12333, § 1.12.(b), as amended, NSA's cryptologic mission includes three functions: (1) to collect, process, and disseminate signals intelligence ("SIGINT") information, of which communications intelligence ("COMINT") is a significant subset, for (a) national foreign intelligence purpose, (b) counterintelligence purposes, and (c) the support of military operations; (2) to conduct information security activities; and (3) to conduct operations security training for the U.S.

Government.

4. There are two primary reasons for gathering and analyzing intelligence information. The first, and most important, is to gain information required to direct U.S. resources as necessary to counter external threats. The second reason is to obtain information necessary to the formulation of the United States' foreign policy. Foreign intelligence information provided by NSA is thus relevant to a wide range of important issues, including military order of battle; threat warnings and readiness; arms proliferation; terrorism; and foreign aspects of international narcotics trafficking.

5. In the course of my official duties, I have been advised of this litigation and reviewed the allegations in Plaintiffs' Complaint. As described herein and in my separate classified declaration, information implicated by Plaintiffs' claims is subject to the state secrets privilege assertion in this case by the DNI. The disclosure of this information would cause exceptionally grave damage to the national security of the United States. In addition, it is my judgment that any attempt to proceed in the case will substantially risk disclosure of the privileged information and will cause exceptionally grave damage to the national security of the United States.

6. Through this declaration, I also hereby invoke and assert NSA's statutory privilege to protect information related to NSA activities described below and in more detail in my classified declaration. NSA's statutory privilege is set forth in section 6 of the National Security Agency Act of 1959 (NSA Act), Public Law No. 86-36 (codified as a note to 50 U.S.C. § 402). Section 6 of the NSA Act provides that "[n]othing in this Act or any other law . . . shall be construed to require the disclosure of the organization or any function of the National Security Agency [or] any information with respect to the activities thereof. . . ." By this

language, Congress expressed its determination that disclosure of any information relating to NSA activities is potentially harmful. Section 6 states unequivocally that, notwithstanding *any* other law, NSA cannot be compelled to disclose *any* information with respect to its authorities. Further, NSA is not required to demonstrate specific harm to national security when invoking this statutory privilege, but only to show that the information relates to its activities. Thus, to invoke this privilege, NSA must demonstrate only that the information to be protected falls within the scope of section 6. NSA's functions and activities are therefore protected from disclosure regardless of whether or not the information is classified.

INFORMATION SUBJECT TO CLAIMS OF PRIVILEGE

7. Following the attacks of September 11, 2001, the President of United States authorized the NSA to utilize its SIGINT capabilities to collect certain "one-end foreign" communications where one party is associated with the al Qaeda terrorist organization under the Terrorist Surveillance Program (TSP) for the purpose of detecting and preventing another terrorist attack on the United States. Any further elaboration on the public record concerning the TSP would reveal information that would cause the very harms that the DNI's assertion of the state secrets privilege is intended to prevent. My separate classified declaration provides a more detailed explanation of the information at issue and the harms to national security that would result from its disclosure.

8. Plaintiffs also make allegations regarding whether they have been subject to surveillance by the NSA. Regardless of whether these allegations are accurate or not, the United States can neither confirm nor deny alleged NSA activities or targets. To do otherwise when challenged in litigation would result in the exposure of intelligence information, sources, and methods and would severely undermine surveillance activities in general. For example, if the

United States denied allegations about intelligence targets in cases where such allegations were false, but remained silent in cases where the allegations were accurate, it would tend to reveal that the individuals in the latter cases were targets. Any further elaboration on the public record concerning these matters would reveal information that would cause the very harms that the DNI's assertion of the state secrets privilege is intended to prevent. My separate classified declaration provides a more detailed explanation of the information at issue and the harms to national security that would result from its disclosure.

CONCLUSION

9. In sum, I support the DNI's assertion of the state secrets privilege and statutory privilege to prevent the disclosure of the information detailed in my classified declaration that is available for the Court's *in camera* and *ex parte* review. I also assert a statutory privilege with respect to information about NSA activities. Moreover, because proceedings in this case risk disclosure of privileged and classified intelligence-related information, I respectfully request that the Court not only protect that information from disclosure, but also dismiss this case to stem the harms to the national security of the United States that will occur if it is litigated.

I declare under penalty of perjury that the foregoing is true and correct.

DATE: 26 May 2006

MAJ. GEN. RICHARD J. QUIRK
Signals Intelligence Director
National Security Agency

UNITED STATES DISTRICT COURT
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I, Leonard M. Niehoff, declare:

1. I have reviewed the Complaint filed in this action and the declarations of Nancy Hollander, William W. Swor, Joshua L. Dratel, and Mohammed Abdrabboh ("the attorneys"). I have no reason to doubt the factual accuracy of the allegations in the Complaint or the statements in the declarations of the attorneys, and for purposes of this declaration, have assumed them to be true. The opinions expressed in this declaration are based on the allegations in the Complaint, on the declarations of the attorneys, and on the technical and other specialized knowledge I have obtained through my experience, training, research, teaching, and education as described below. The opinions I express are my own and do not necessarily reflect those of any entity with which I am or have been affiliated.

Background

2. I am a 1981 graduate of the University of Michigan and a 1984 graduate of the University of Michigan Law School. I have also engaged in graduate study in the fields of philosophy (University of Michigan) and divinity (Garrett Evangelical Theological Seminary and Ecumenical Theological Seminary).

3. I am a shareholder in the Butzel Long law firm, where I have practiced since 1984. I am currently a member of the firm's Professional Responsibility Practice group, which advises other law firms and their attorneys with respect to malpractice, discipline, and ethical issues. For several years I also served as chair of the firm's Professional Responsibility Committee. In that capacity I advised the Butzel Long firm and its attorneys about the standards for compliance with the Michigan Rules of Professional Conduct.

4. I currently serve as an Adjunct Professor at the University of Michigan Law School, where I teach courses in Legal Ethics, Evidence, and Media Law. I have previously served as Adjunct Professor at the Wayne State University Law School, where I taught Evidence, and at the University of Detroit-Mercy Law School, where I taught Professional Responsibility, First Amendment, and Antitrust. I have lectured on issues of ethics and confidentiality at conferences conducted by a variety of professional organizations.

5. I am the author or co-author of more than one-hundred publications on a wide variety of legal issues. These include the ICLE monograph *The Attorney-Client Privilege and the Work-Product Doctrine in Michigan*, which has gone through several editions.

6. I am listed in *Who's Who in American Law*, *Who's Who in America*, *Who's Who Among Emerging Leaders in America*, *The Best Lawyers in America*, *Chambers USA: America's Leading Lawyers for Business*, and *Crain's Detroit Business "40 Under 40"* (1996). In 2004, I received the "Patriot Award" from the Washtenaw County Bar Association "for outstanding service to the bench, bar, and community."

Ethical Responsibilities

7. The allegations of the Complaint and the declarations identify attorneys practicing in Michigan, New York, and New Mexico, among other states. The professional responsibility rules of those three states differ in the precise language used, but all of them impose upon attorneys licensed in those jurisdictions duties of diligent and competent representation and of confidentiality. In at least these respects the professional responsibility rules of these three states are typical of those in place in jurisdictions across the United States.

Diligent and Competent Representation

8. Professional responsibility rules require an attorney to provide diligent and competent representation to his or her client.

9. Michigan Rule of Professional Conduct (MRPC) 1.1(b) forbids a lawyer from handling "a legal matter without preparation adequate in the circumstances." The Comment to MRPC 1.1 provides that "[c]ompetent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem . . . . It also includes adequate preparation."

10. The New York Lawyer's Code of Professional Responsibility (NYCPR) requires an attorney to provide competent and zealous representation to his or her client. DR 6-101 prohibits an attorney from handling "a legal matter without preparation adequate in the circumstances" and DR 7-101 prohibits an attorney from "fail[ing] to seek the lawful objectives of the client through reasonably available means permitted by law . . . ." *See also* Canons 6 ("a lawyer should represent a client competently") and 7 ("a lawyer should represent a client zealously within the bounds of the law").

11. The New Mexico Rules of Professional Conduct ("NMRPC") require a lawyer to provide competent representation to his or her client and to act with reasonable diligence in doing so. *See* NMRPC 16-101 and 16-103.

Confidentiality

12. Professional responsibility rules generally require an attorney to maintain as confidential information that relates to the representation of the client. This ethical obligation is expansive and is substantially broader than the attorney-client privilege. The Comment to ABA

Model Rule 1.6 underscores this difference, stating that "[t]he confidentiality rule . . . applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law." This duty fosters a relationship of trust between the lawyer and the client, prevents the indiscreet use of information learned in the course of the representation, and protects work product produced on the client's behalf. The duty is therefore central to the functioning of the attorney-client relationship and to effective representation. The Comment to ABA Model Rule 1.6 thus states that "[a] fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation."

13. MRPC 1.6(b)(1) provides that, except as otherwise specifically permitted, "a lawyer shall not knowingly . . . reveal a confidence or secret of a client." MRPC 1.6(a) defines "confidence" to include "information protected by the client-lawyer privilege." MRPC 1.6(a) defines "secret" to include any other information "gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." The NYCPR includes virtually identical provisions. *See* DR 4-101.

14. NMRPC 16-106 provides that "a lawyer shall not reveal information relating to representation of a client . . . ." This rule applies unless the client consents, the disclosure is impliedly authorized, or the disclosure falls within one of several specifically enumerated exceptions. *See* NMRPC 16-106.

Analysis and Opinions

15. In the Complaint and in their declarations, attorneys William Swor and Mohammed Abdrabboh of Michigan, Joshua Dratel of New York, and Nancy Hollander of New Mexico have indicated that they have a "well founded belief" that communications essential to their representation of their clients are being intercepted by the National Security Agency ("NSA") pursuant to a secret surveillance program ("the Interception Program").

16. In my opinion, the Interception Program imposes an immediate, substantial, and gravely serious burden upon the representation being provided by these attorneys to their clients.

17. As discussed above, the ethical rules require these attorneys to provide competent, diligent, and zealous representation to their clients and to prepare their cases adequately. As set out in the Complaint and in the declarations of the attorneys, competent, diligent and zealous representation of many of the attorneys' clients requires these attorneys to communicate with individuals who reside in other countries.

18. At the same time, however, the attorneys have a well founded belief that their electronic and telephonic communications with those overseas individuals are being intercepted under the Interception Program and, as discussed above, the ethical rules require these attorneys to maintain as confidential information relating to their representations.

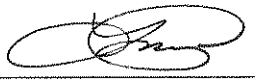
19. This combination of factors creates an overwhelming, if not insurmountable, obstacle to effective and ethical representation. On one hand, proceeding with these electronic and telephonic communications would create a substantial risk of disclosure of information deemed confidential by the ethics rules. On the other hand, failing to proceed with these communications would create a substantial risk of noncompliance with duties of diligence, competence, zealous

representation, and thorough preparation. An attorney may be able to avoid this conflict by traveling overseas and conducting in-person interviews of individuals who have relevant personal knowledge. Such an approach, however, may not always be possible, and, when possible, will burden the representation with gross inefficiencies, substantially increased costs, and significant logistical difficulties. In sum, the Interception Program requires the attorneys to cease – immediately – all electronic and telephonic communications relating to the representation that they have good faith reason to believe will be intercepted. And the Interception Program requires the attorneys to resort – immediately – to alternative means for gathering information that, at best, will work clumsily and inefficiently and, at worst, will not work at all.

20. My review of the Complaint and the declarations confirms my opinion that the Interception Program is causing substantial and ongoing harm to the attorney-client relationships and legal representations described in the attorney declarations.

21. I make these statements based upon my review of the Complaint, of the declarations of the attorneys, and upon my education, experience, training, knowledge, research, and teaching.

I declare under the penalties of perjury of the laws of the United States that the foregoing is true and correct.



Leonard M. Niehoff

Executed at New York City, New York, on June 5, 2006.

UNITED STATES DISTRICT COURT
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AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION FOUNDATION; AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN; COUNCIL ON AMERICAN-ISLAMIC RELATIONS; COUNCIL ON AMERICAN-ISLAMIC RELATIONS MICHIGAN; GREENPEACE, INC.; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; JAMES BAMFORD; LARRY DIAMOND; CHRISTOPHER HITCHENS; TARA MCKELVEY; and BARNETT R. RUBIN, Plaintiffs, v. NATIONAL SECURITY AGENCY / CENTRAL SECURITY SERVICE; and LIEUTENANT GENERAL KEITH B. ALEXANDER, in his official capacity as Director of the National Security Agency and Chief of the Central Security Service, Defendants.	DECLARATION OF BARNETT R. RUBIN Case No. 2:06-cv-10204-ADT-RSW Hon. Anna Diggs Taylor and R. Steven Whalen

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I, Barnett R. Rubin, declare:

1. I am a New York resident over the age of eighteen. I have personal knowledge of the facts stated in this declaration and, if sworn as a witness, would testify as follows.

2. I received a Ph.D. in 1982 and M.A. in 1976, both in political science from the University of Chicago. I graduated from Yale University in 1972 with a B.A in History, Honores in Historia, magna cum laude. I also received a Fulbright Fellowship to study at the École des Hautes Études en Sciences Sociales in Paris in 1977-1978.

3. I am currently the Director of Studies and Senior Fellow at the New York University Center on International Cooperation ("CIC"). I am the chair of the Conflict Prevention and Peace Forum, a program of the Social Science Research Council in New York, which provides the United Nations with confidential consultations with experts on issues related to conflict and peace around the world. I am a member of the board of Gulestan Ariana Ltd., a commercial company registered in Afghanistan to manufacture essential oils, hydrosols, and related products; Gulestan Ariana has offices and operations in Kabul and Jalalabad. I am a member of the advisory board of the Central Eurasia Program of the Open Society Institute, overseeing programs in the Caucasus, Central Asia, Afghanistan, Iran, and Pakistan; and the Advisory Board of Human Rights Watch/Asia.

4. During 1996-98 I served on the Secretary of State's Advisory Committee on Religious Freedom Abroad. During 1994-2000, I was employed as the Director of the Center for Preventive Action of the Council on Foreign Relations, of which I am now an advisory board member. I was a member of the United Nations delegation to the UN Talks on Afghanistan in Bonn, Germany in 2001; a member of the United Nations delegation to the conference on Peace and Stability in Afghanistan in Bonn Germany in 2002; I advised the United Nations in Afghanistan during the process of drafting the constitution of the Islamic Republic of Afghanistan in 2003; I advised the Oversight Committee of the cabinet of the Afghan

government during the drafting of *Afghanistan's Millennium Development Goals Report 2005* and the *Interim Afghanistan National Development Strategy* (2006); I advised the United Nations Assistance Mission in Afghanistan on the drafting of the Afghanistan Compact (2006); and I served as an advisor to the Afghanistan delegation during the London Conference on Afghanistan (2006).

5. Before joining New York University, I served as the Associate Professor of Political Science and Director of the Center for the Study of Central Asia at Columbia University from 1990 to 1996. Prior to that time, I was a Jennings Randolph Peace Fellow at the United States Institute of Peace and Assistant Professor of Political Science at Yale University.

6. I have written and edited numerous books and articles about Afghanistan and conflict prevention, including *The Fragmentation of Afghanistan* (New Haven: Yale University Press, 2002 (2d ed.), 1995 (1st ed.)); *The Search for Peace in Afghanistan* (New Haven: Yale University Press, 1995); and *Blood on the Doorstep: The Politics of Preventing Violent Conflict* (New York: The Century Foundation and the Council on Foreign Relations, 2002).

7. As a scholar who specializes in studying Afghanistan, I communicate with individuals in Afghanistan on almost a daily basis. I communicate both by e-mail and by telephone with fellow scholars, current and former members of the Afghan government, employees of non-governmental organizations, journalists, and ordinary Afghan citizens.

8. Some individuals I frequently speak with by telephone include Amrullah Saleh, the Director of the National Directorate of Security (Afghanistan's intelligence agency); Ishaq Nadiri, President Hamid Karzai's Minister Advisor of Economic Affairs; Adib Farhadi, Director of the Afghanistan Reconstruction and Development Services; Ali Ahmad Jalali, during his tenure as Afghanistan's Minister of the Interior; Dr. Ashraf Ghani, Chancellor of Kabul University and Afghanistan's former Minister of Finance; and Mohammad Eshaq, who used to be the director of Afghan Radio and Television. I also correspond by e-mail with all of the

above and several Afghan government officials who are drafting the Afghan National Development Strategy.

9. I have frequently communicated by telephone with several United Nations officials in Kabul, including Lakhdar Brahimi (former U.N. Special Representative of the Secretary General for Afghanistan (SRSG)), Jean Arnault (the current SRSG), Ameerah Haq (Deputy SRSG), Christopher Alexander (Deputy SRSG), Eckart Schwieck (executive assistant to the SRSG), and many others.

10. I also frequently communicate by telephone with many journalists, including Ahmed Rashid, who is based in Lahore, Pakistan; and Abubaker Saddique, a Pakistani journalist who worked for the International Crisis Group and the International Regional Information Network (Central Asia) of the United Nation, and who consulted for NYU's Center for International Cooperation. I communicate by telephone and e-mail with other journalists in Iran, Tajikistan, and other Central Asian countries, including Abbas Makeki, former editor of the *Hamshahri* newspaper and director of the Caspian Studies Institute; Dr. Sayed Kazem Sajjadpour, former director of the Institute for Political and International Studies; and Kian Tadjbakhsh, Senior Research fellow of the Cultural Resource Bureau; all of whom are or have been located in Iran.

11. I have traveled in connection with my work to Afghanistan, Iran, Pakistan, India, Tajikistan, Uzbekistan, Turkmenistan, Kyrgyzstan, Kazakhstan, Russia, Azerbaijan, Turkey, Israel, the Palestinian territories, Saudi Arabia, Japan, Brazil, and all countries of Western and Central Europe except Portugal.

12. I believe that, when I communicate from the United States with individuals in Afghanistan, Pakistan, and other places, my communications may be monitored by the U.S. government. My belief is based in part on facts regarding the NSA Program disclosed by The New York Times and admitted by spokesmen for the Bush Administration and in part on the

experience an Afghan-American colleague, Helena Malikyar. Ms. Malikyar, a naturalized citizen of the United States who now lives in Afghanistan, told me that, while staying with her brother in Seattle immediately after 9/11, she called contacts in Pakistan and Afghanistan, and that after she returned to Afghanistan, United States government agents visited her brother and questioned him about the calls.

13. I communicate with Ahmed Idrees Rahmani, an Afghan national, currently studying at Stanford University on a Fulbright scholarship. Mr. Rahmani is an employee on leave of USAID in Kabul Afghanistan. During the last year I have been advising him on research he is carrying out under a grant from the Open Society Institute on research regarding the role of mosques in local government in Afghanistan. This research deals with some highly sensitive topics, including effects on local governance of the drug trade and religious institutions. Following the conclusion of his Fulbright scholarship, Mr. Rahmani plans to return to Afghanistan later in 2006 to continue his research. Because of my belief that the NSA may be intercepting and monitoring my international communications, I will not communicate fully and frankly with Mr. Rahmani about details of his investigations while he is in Afghanistan, to avoid disclosing confidential information about local Afghan officials.

14. Because of my belief that the NSA may be intercepting and monitoring my international communications, I currently do not communicate by international telephone calls or e-mail with the individuals mentioned in paragraphs 8, 9, and 10, and others, about anything that they would not want disclosed to United States government officials, or that the individuals would not want to be relayed by those officials to others.

15. I am currently starting research into the political position of the group or groups that constitute the insurgency in Afghanistan, and I am seeking to establish contact with members of those groups who may be willing to talk to me. I regard such research as potentially contributing to the effort to bring peace and stability to Afghanistan. My ability to carry out such

research is likely to be seriously hindered because of the perception, held both by me and by Afghan insurgents or their supporters, that our electronic communications may be monitored by the NSA. I will likely have to conduct in person interviews with many Afghan insurgents and will be unable to conduct follow-up with them by e-mail and telephone. The effect will be that I will have to travel more internationally to complete the research or I will complete fewer research interviews or less comprehensive interviews with these individuals.

I declare under the penalties of perjury of the laws of the United States and of the State of New York that the foregoing is true and correct.

Barnett R. Rubin

Executed at New York, New York on 1 June, 2006.

UNITED STATES DISTRICT COURT
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AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION FOUNDATION; AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN; COUNCIL ON AMERICAN-ISLAMIC RELATIONS; COUNCIL ON AMERICAN-ISLAMIC RELATIONS MICHIGAN; GREENPEACE, INC.; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; JAMES BAMFORD; LARRY DIAMOND; CHRISTOPHER HITCHENS; TARA MCKELVEY; and BARNETT R. RUBIN, Plaintiffs, v. NATIONAL SECURITY AGENCY / CENTRAL SECURITY SERVICE; and LIEUTENANT GENERAL KEITH B. ALEXANDER, in his official capacity as Director of the National Security Agency and Chief of the Central Security Service, Defendants.	DECLARATION OF NAZIH HASSAN Case No. 2:06-cv-10204-ADT-RSW Hon. Anna Diggs Taylor and R. Steven Whalen

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I, Nazih Hassan, declare:

1. I am a member of the Council on Arab and Islamic Relations of Michigan ("CAIR"). I reside in Washtenaw County, Michigan. I was born in Lebanon in 1969 and became a legal permanent resident of the United States in 2001. From 2002 to 2003, I served as the president of the Muslim Community Association of Ann Arbor ("MCA"). I have served on MCA's Board of Directors from mid-2005 to the present. I work as a technology consultant. I have personal knowledge of the facts stated in this declaration.

2. I have friends and family in Lebanon, Saudi Arabia, France, Australia and Canada with whom I frequently communicate by telephone and e-mail. Among the people with whom I communicate by phone and e-mail are my friends Islam Almurabit and Rabih Haddad.

3. Mr. Haddad is a native of Lebanon who was educated in the United States and lived in Ann Arbor, Michigan for more than three years. Mr. Haddad was an active member and popular volunteer teacher at the mosque to which I belong. He co-founded Global Relief Foundation ("GRF") in 1993, a humanitarian organization that the federal government accused of providing material support to terrorists. In December 2001, Mr. Haddad was arrested for an immigration violation on the same day that the offices of GRF were raided. Mr. Haddad was held for approximately a year before he was deported to Lebanon. As one of the two media coordinators for the Free Rabih Haddad Committee, I drafted press releases, spoke to the media and organized public demonstrations against the detention of Mr. Haddad. I visit Rabih Haddad when I return to Lebanon for vacations.

4. Islam Almurabit, the former executive director of Islamic Assembly of North America ("IANA"), lived in Ann Arbor for approximately seven or eight years. In 2003, after

the IANA offices were raided in Ypsilanti, Mr. Almurabit was visited by the FBI and accused of supporting extremism. Rather than face continual harassment by the FBI, Mr. Almurabit left the United States in 2004 or 2005 and moved to Saudi Arabia.

5. Before I became aware of the NSA Program described in the Complaint is this case, I spoke on international telephone calls and communicated by e-mail with family members in Lebanon about various political topics and their opinions on current events, including Islam, the war in Iraq, Islamic fundamentalists, terrorism, Osama bin Laden, al Qaeda, the war in Afghanistan, and the riots in France and Australia. I also participated in online discussion groups or bulletin boards hosted on foreign websites about the war in Afghanistan to learn what people from other countries were writing and to voice objections to those who favored extremism.

6. Because of my activism in the United States, my friendship with Islam Almurabit and Rabih Haddad, and my frequent communications with numerous people in the Middle East and other foreign countries about topics described in paragraph five, I believe that my international communications are currently being intercepted and monitored by the NSA as part of the Program.

7. The likelihood that my international communications are being intercepted and monitored by the NSA under the Program prevents me from communicating candidly in my international calls and e-mails. Since I learned of the NSA Program in news reports in December 2005, I have refrained from talking during international telephone calls about topics such as those described in paragraph five above, which I believe will trigger interception and monitoring by the NSA pursuant to the Program. I have similarly stopped e-mailing friends and

family abroad about such topics. I have not called my friends Islam Almurabit in Saudi Arabia or Rabih Haddad in Lebanon, or engaged in e-mail communications with them about anything political because I believe such communications will be intercepted and monitored by pursuant to the NSA Program and my comments may be taken out of context or misconstrued by United States officials as supposedly showing that I support extremism when, in fact, I oppose it. Finally, I no longer visit online bulletin boards or participate in online discussion groups in which some people advocate extremism, though my purpose in visiting such websites and participating in such discussion groups in the past was to write posts that oppose extremism.

8. The NSA Program also interferes with my efforts to promote peace and justice in this country. Before I became aware of the NSA Program, I felt free to communicate with people in other countries about critical issues of the day. I gained unique insight from those communications about United States foreign policy that I could not gain from the media in this country. I used such communications in my political work in the United States to educate Americans about the consequences of United States policy abroad. Because of the Program, I no longer engage in substantive discussions with people abroad and therefore I am not able to gain these unique insights and share them with others.

I declare under penalty of perjury under the laws of the United States and of the State of Michigan that the foregoing is true and correct.

Nazih Hassan

Executed at Ypsilanti, Michigan this fourth day of June, 2006.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION FOUNDATION; AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN; COUNCIL ON AMERICAN-ISLAMIC RELATIONS; COUNCIL ON AMERICAN-ISLAMIC RELATIONS MICHIGAN; GREENPEACE, INC.; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; JAMES BAMFORD; LARRY DIAMOND; CHRISTOPHER HITCHENS; TARA MCKELVEY; and BARNETT R. RUBIN, Plaintiffs, v. NATIONAL SECURITY AGENCY / CENTRAL SECURITY SERVICE; and LIEUTENANT GENERAL KEITH B. ALEXANDER, in his official capacity as Director of the National Security Agency and Chief of the Central Security Service, Defendants.	DECLARATION OF JOSHUA L. DRATEL Case No. 2:06-cv-10204-ADT-RSW Hon. Anna Diggs Taylor and R. Steven Whalen

ANN BEESON, *Attorney of Record*
JAMEEL JAFFER
MELISSA GOODMAN (*admission pending*)
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I, Joshua L. Dratel, declare:

1. I am a New York resident over the age of eighteen. I have personal knowledge of the facts stated in this declaration and, if sworn as a witness, would testify as follows.

2. I am a criminal defense lawyer. Among other clients, I represent individuals who have been accused by the United States government of terrorism-related crimes.

3. I am a member of the Board of Directors of the National Association of Criminal Defense Lawyers ("NACDL") and a co-Chair of the NACDL Select Committee on Military Tribunals.

4. I have written numerous articles and edited a book on terrorism-related subjects, including *The Torture Papers: The Legal Road to Abu Ghraib* (Cambridge University Press: 2005).

5. Among the individuals I represent or have represented regarding terrorism-related charges is Wadih El Hage in *United States v. Usama Bin Laden*, S7 Cr. 1023 (LBS/KDT) (S.D.N.Y.), at trial and in the pending appeal (Second Circuit Docket Nos. 01-1535 & 05-6149) of his conviction in the Embassy Bombings case. I also represented the defendant in *United States v. Sami Omar Al-Hussayen*, Cr. No. 03-48-C-EJL (D. Idaho), and continue to do so in civil actions in the Southern District of New York (*see In re Terrorist Attacks of September 11, 2001*, 03 MDL 1570 (RCC) (S.D.N.Y.). In 2004, Mr. Al-Hussayen was acquitted in federal court of providing material support to terrorists. His alleged support of terrorists supposedly consisted providing technical support for web sites and Internet discussion groups on which jihadist topics were discussed. I also represent Mohammad El Mezain in *United* States *v. Holy Land Foundation*, 3:04-CR-240-G (N.D. Tex.), in which Mr. El Mezain is charged with material support to terrorists. In *United States v. David Hicks*, I represent Mr. Hicks, whom the United States government has detained as an enemy combatant at Guantanamo Bay since 2001. Mr. Hicks is being prosecuted by a United States military commission. I serve as appellate counsel

for the defendant in *United States v. Ahmed Ohmar Abu Ali*, Cr. 05-053 (GBL) (E.D. Va.), who was convicted of conspiring to kill President George H.W. Bush. Additionally, I am currently serving as an expert witness in a prosecution by the British government (in the British criminal courts), *Regina v. Waheed Mahmood*, Case No. T20047284 (Central Criminal Court), which involved alleged planning for a so-called "dirty bombing." I also represent the defendant in *United States v. Lynne Stewart*, S 02 Cr. 395 (JGK) (S.D.N.Y.). Ms. Stewart is a criminal defense lawyer who has been convicted of providing material support to terrorists.

6. In representing these and other defendants and alleged enemy combatants and to serve as an expert witness in terrorism-related cases, I communicate with potential witnesses, experts, other lawyers, journalists, scholars, and other individuals who live and work outside of the United States. The most efficient way to communicate with these individuals is through international telephone calls and e-mail messages.

7. I also use the Internet to conduct research in the course of my representation of defendants charged with terrorism-related crimes, and to prepare to testify as an expert witness, to write, and to speak on terrorism-related subjects. For example, it is often necessary for me to review terrorist-related web sites, such as those dealing with kidnapping or other terrorist attacks, to understand the facts related to certain alleged crimes. Similarly, I visit web sites to determine whether they are, in fact, jihadist web sites as is alleged in some cases. Such research is necessary to investigate the facts I need to know to defend clients charged with terrorism-related offenses, to prepare expert witness testimony, and to prepare materials that I present as an author and speaker.

8. In the course of representing clients who are charged with terrorism-related crimes and those detained as alleged enemy combatants, I have spoken to many people since December 16, 2005, including those from the Middle East, the United Kingdom and Israel, who have told me that, due to the disclosure of the National Security Administration ("NSA")

Program, they believe their communications with me are being intercepted and monitored by the United States Government. In addition, given the extremely broad scope of the NSA Program, and the vague definition of its targets – those communications that, according to the NSA, present "a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda[,]" -- *see* December 19, 2005 Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Index of Exhibits in Support of Plaintiffs' Motion for Partila Summary Judgment, Exhibit B, "Gonzales/Hayden Press Briefing," at 1) -- it is likely that some if not many of those international contacts qualify under that definition (regardless whether such characterization is accurate).

9. Because of the sensitive nature of the investigations I must conduct to represent clients alleged to have committed terrorism-related offenses and those who are allegedly enemy combatants, I have always been careful about the non-privileged communications I have engaged in over the telephone and through e-mail. Because the NSA has now admitted that it regularly intercepts and monitors, without a warrant or FISA order, telephone calls and e-mails to and from persons in this country with persons outside the United States whom the NSA suspects of having terrorist contacts, I believe I should not discuss anything that may, if learned by the NSA, be detrimental to my clients' interests. For that reason, when I communicate by telephone or by e-mail with potential sources of information overseas, with lawyers in other countries, or with anyone who may be in a position to provide information or observations that could help me represent these clients, I do not discuss substantive issues.

10. Not only do I refrain from discussing certain matters over international phone calls or by international e-mail, potential witnesses, information sources, clients, colleagues, and lawyers in other countries have told me that they are reluctant or unwilling to communicate with

me by phone or e-mail about confidential issues because they fear their communications will be intercepted. In other words, the knowledge that our international communications may be intercepted and monitored by the NSA has made both me and them unwilling to discuss confidential information over telephone or by e-mail.

11. The NSA's interception and monitoring of international communications has seriously interfered with my ability to collect information that I need to defend individuals charged with terrorist-related crimes. Before the NSA Program was disclosed, I understood that government officials had to obtain a warrant or a FISA Court order to intercept and monitor communications related to my clients. Even if the process for obtaining judicial approval for such "eavesdropping" was less rigorous than I believe it should have been, I believed that the process of having to submit an application for a warrant or FISA order provided some protection against federal agents intercepting communications that should remain confidential, such as communications protected by the attorney-client privilege or the attorney work product doctrine.

12. Surveillance conducted pursuant to the NSA Program is not subject to any such constraints. Indeed, in the context of FISA interceptions of attorney communications, former FISC Chief Judge Royce C. Lamberth, in an address broadcast April 13, 2002, on C-SPAN, entitled "The Role of The Judiciary in the War on Terrorism" (at Chapter 4, 17:00-18:30), told the audience that "[w]hen New York attorney Lynne Stewart and others involved with Sheik Omar Abdel Rahman were arrested last Tuesday after their indictment in New York on charges of helping pass unlawful messages to a terrorist group in a foreign country, it was publicly revealed that the surveillances there had all been conducted pursuant to the orders of the FISA Court. Because of sensitive attorney-client privilege questions presented in those surveillances, special minimization procedures were followed by the FBI pursuant to FISA Court orders."

13. In stark contrast, those minimization procedures applied in the FISA context are absent from the NSA Program, which involves an NSA employee, a *shift supervisor*, and not an

Article III judge (as in the FISA context), making the controlling decisions whether to eavesdrop on particular persons and communications. General Michael V. Hayden, at the December 19, 2005 press briefing, described the manner in which a decision to intercept communications is made under the NSA Program: "[t]he judgment is made by the operational work force at the National Security Agency using the information available to them at the time, and the standard that they apply – *and it's a two-person standard that must be signed off by a shift supervisor*, and carefully recorded as to what the operational imperative to cover any target, but particularly with regard to those inside the United States." Index of Exhibits in Support of Plaintiffs' Motion for Partila Summary Judgment, Exhibit B, "Gonzales/Hayden Press Briefing," at 7 (emphasis added).

14. Moreover, the NSA Program has intercepted privileged attorney-client communications, and in that regard, the NSA Program does not make any distinction. For example, in response to inquiries from Congress, the Department of Justice (hereinafter "DoJ"), in a 54-page set of answers appended to a March 24, 2006, letter from William E. Moschella, Assistant Attorney General for Legislative Affairs (available at http://www.fas.org/irp/agency/doj/fisa/doj032406.pdf) ("DoJ Response") stated that "[a]lthough the [NSA] program does not specifically target the communications of attorneys or physicians, calls involving such persons would not be categorically excluded from interception" as long as they satisfied other criteria, *i.e.*, a suspected link to al Qaeda and one party to the communication being outside the U.S. DoJ Response at 55.[1]

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[1] The DoJ Response also did not find any impediment to using the fruits of the NSA Program in criminal investigations or, in turn, as evidence in criminal prosecutions. In a

15. While the DoJ Response does not divulge whether privileged communications have, in fact, been intercepted, the government's disregard for the attorney-client privilege has already been manifested. In a federal lawsuit in Oregon, *Al-Haramain Islamic Foundation, Inc., et al. v. Bush, et al.*, CV '06 274 MO (D. Oregon), the plaintiffs alleged at ¶ 19 of their Complaint that, in March and April 2004, the NSA Program targeted and captured electronic communications between Al-Haramain, a Saudi charity (in the person of its Director, who was in Saudi Arabia), and two of its lawyers in the U.S. (who are also plaintiffs in the Al-Haramain lawsuit). The Complaint in *Al-Haramain*, at ¶¶ 20-21, also alleges that the NSA provided logs of those intercepted conversations to the U.S. Treasury Department's Office of Foreign Asset Control ("OFAC"), which in turn relied upon them in designating Al-Haramain a "specially designated global terrorist" in September 2004.

16. The Al-Haramain plaintiffs' suspicions that the lawyers' communications had been intercepted were based on documents the Treasury Department provided to Al-Haramain's lawyers in May 2004 (in connection with Al-Haramain's challenge to OFAC's February 2004 freezing of Al-Haramain's assets). Apparently, Treasury officials provided the logs of the intercepted calls, only to realize the mistake and demand return of the documents, marked "TOP SECRET," in November 2004. However, by that time the documents were also in the possession of a *Washington Post* reporter, David Ottaway, who had not written about them. Both Al-Haramain's lawyers and Mr. Ottaway complied with Treasury's demand. *See* "Paper Said to

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conclusory assertion of remarkable breadth, the DoJ Response claims that "[b]ecause collecting foreign intelligence information without a warrant does not violate the Fourth Amendment and because the Terrorist Surveillance Program is lawful, there appears to be no legal barrier against introducing this evidence in a criminal prosecution." DoJ Response, at 54.

Show NSA Spying Given to *Post* Reporter In 2004," *The Washington Post*, March 3, 2006. According to the *Post* article, "Ottaway declined to discuss the contents of the document [at the time the government sought return of the documents in 2004, he had been threatened with prosecution if he revealed their contents] other than to confirm it appeared to be a summary of one or more conversations intercepted by the government." *Id.* *See also* "Saudi Group Alleges Wiretapping By U.S.," *The Washington Post*, March 2, 2006.

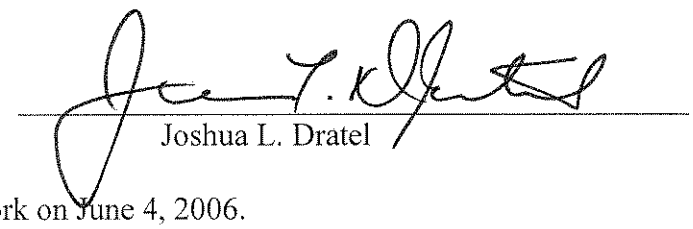
17. Having become aware of the allegations in the Al-Haramain Complaint that attorney-client communications had been intercepted and monitored under the NSA Program, the corroborating evidence of those claims in the *Washington Post* articles cited above, and the admissions in the DoJ Response that the NSA Program does not distinguish between privileged and non-privileged communications, I believe that it is my professional obligation to take steps to prevent the interception and monitoring of my own privileged communications. Many of my clients have been accused of terrorism-related offenses similar if not identical to the offenses at issue in the Al-Haramain matter. In addition, co-counsel in a case in which I have been involved were in contact with the very persons whose communications were apparently intercepted in the Al-Haramain matter.

18. Given that my communications with individuals outside the United States to assist my clients charged with terrorism-related offenses will probably be intercepted pursuant to the NSA Program, I must travel abroad to meet personally with individuals who may have pertinent information. I cannot, of course, travel to every location where someone may have information useful to my clients. Therefore, even when investigators I have hired in countries outside the United States to help me investigate cases locate potentially valuable witnesses or sources, I cannot communicate with very many of them confidentially.

19. The derogation of the attorney-client privilege in the NSA Program highlights an important distinction between that Program and FISA electronic surveillance. Before December 16, 2005, when the NSA Program was disclosed, I believed I could confidentially collect information from overseas witnesses, experts, and other sources by e-mails and telephone calls. I cannot now presume that such international telephone calls or e-mails are confidential and, as a result, I cannot as readily collect information from those sources.

20. The NSA Program interferes with my ability to represent my clients charged with terrorism-related offenses or with being enemy combatants by making it difficult and expensive, if not impossible, to get information from individuals outside of the United States. I am similarly unable to provide confidential information to attorneys outside the United States regarding cases in which their clients are charged with terrorism-related offenses in their own jurisdictions.

I declare under the penalties of perjury of the laws of the United States and of the State of New York that the foregoing is true and correct.



Joshua L. Dratel

Executed at New York, New York on June 4, 2006.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION FOUNDATION; AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN; COUNCIL ON AMERICAN-ISLAMIC RELATIONS; COUNCIL ON AMERICAN-ISLAMIC RELATIONS MICHIGAN; GREENPEACE, INC.; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; JAMES BAMFORD; LARRY DIAMOND; CHRISTOPHER HITCHENS; TARA MCKELVEY; and BARNETT R. RUBIN,

Plaintiffs,

v.

NATIONAL SECURITY AGENCY / CENTRAL SECURITY SERVICE; and LIEUTENANT GENERAL KEITH B. ALEXANDER, in his official capacity as Director of the National Security Agency and Chief of the Central Security Service,

Defendants.

DECLARATION OF MOHAMMED ABDRABBOH

Case No. 2:06-cv-10204-ADT-RSW

Hon. Anna Diggs Taylor and Steven Whalen

ANN BEESON
Attorney of Record
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DECLARATION OF MOHAMMED ABDRABBOH

I, Mohammed Abdrabboh, declare:

1. I am a member of the ACLU of Michigan and have been a member of the ACLU of Michigan's Board of Directors since 2002. I am a United States citizen and a licensed attorney in the State of Michigan, with a practice focusing on immigration, criminal defense and civil rights law, in Wayne County, Michigan. I serve as a Commissioner on the Michigan Civil Rights Commission, to which I was appointed by the Governor in May 2003. I teach a course on civil liberties and national security at the University of Michigan at Dearborn.

2. I frequently communicate by telephone and email with family in the West Bank, Gaza, and Jerusalem. After law school, I worked for Al Haq, a human rights organization in the West Bank. I frequently communicate with friends and acquaintances I met while working there. I also communicate a number of times per month by telephone and email with friends and acquaintances in Saudi Arabia.

3. Approximately 90 percent of my clientele comes from countries in the Middle East. As part of my immigration practice, I regularly represent individuals who live in the Middle East and are seeking to enter the United States, and as part of my representation I must conduct communications with them through telephone and email. The nature of my law practice requires me to communicate regularly by telephone and email with people in Lebanon, the West Bank and Gaza. My practice also requires that I occasionally communicate by telephone and email with individuals in Jordan, Afghanistan and Yemen. These communications are essential in providing effective representation to my clients.

4. As part of my criminal defense practice, I have represented, currently represent, and expect in the future to represent people the government alleges have some link to terrorism

or terrorist organizations.

5. Because of the nature of my communications and the identities and locations of people with whom I communicate, I have a well-founded belief that my communications are being intercepted by the NSA under the Program.

6. The Program has inhibited communications between me and my family and friends, because I am less candid about my political views and avoid saying things that are critical of the U.S. government over the telephone or through email.

7. The Program has inhibited both foreign and domestic communications between my clients and me, has impaired my practice, and has compromised my ability to represent my clients. Since learning of the Program, I have limited my communications about sensitive or privileged matters over the telephone and by email for fear that the government is monitoring the communication. Instead, I have tried to limit such communications to in-person meetings, which has greatly impaired my ability to quickly get information I need for the purpose of representing clients. Moreover, on multiple occasions since the exposure of the Program, clients and prospective clients have told me that they did not want to talk to me on the telephone and that we could only communicate in person.

8. Having to meet with clients and prospective clients in person is more than just an inconvenience. In some cases it makes effective representation impossible or impracticable. For example, in one instance, a client who now lives in Afghanistan refused to share information over the telephone with me that was necessary to my representation in an immigration matter, because the client feared the communication was being monitored by the government.

9. My inability to communicate with clients by telephone or e-mail necessitates traveling great distances. This was not the case prior to disclosure of the Program. For example,

I currently represent clients from the Flint area. These clients constantly require me to drive to the Flint are to meet with them, because they refuse to discuss certain issues over the telephone. I cannot maintain these individuals as clients without frequent travel from Dearborn to Flint. As another example, the family of a client who is jailed lives in Toledo, OH was adamant about not discussing anything over the telephone because of the Program and their perception that my telephone calls are monitored. As a result, I would drive to Toledo – or they would have to travel to the Detroit area – in order for us to discuss anything.

10. I am certain that I have lost prospective clients due to the well-founded fear – theirs and mine – that our communications may be monitored, and due to the cost and inconvenience of not being able to have particular discussions over the telephone. The inability to screen prospective clients by telephone, the need to meet with prospective clients "after hours," and the burden of clients having to travel great distances to just to consult with me has caused me to lose clientele.

I declare under penalty of perjury under the laws of the United States and of the State of Michigan that the foregoing is true and correct.

Mohammed Abdrabboh

Executed at Detroit, Michigan this 5th day of June, 2006.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION FOUNDATION; AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN; COUNCIL ON AMERICAN-ISLAMIC RELATIONS; COUNCIL ON AMERICAN-ISLAMIC RELATIONS MICHIGAN; GREENPEACE, INC.; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; JAMES BAMFORD; LARRY DIAMOND; CHRISTOPHER HITCHENS; TARA MCKELVEY; and BARNETT R. RUBIN,

Plaintiffs,

v.

NATIONAL SECURITY AGENCY / CENTRAL SECURITY SERVICE; and LIEUTENANT GENERAL KEITH B. ALEXANDER, in his official capacity as Director of the National Security Agency and Chief of the Central Security Service,

Defendants.

DECLARATION OF NABIH AYAD
Case No. 2:06-cv-10204-ADT-RSW

Hon. Anna Diggs Taylor and
Steven Whalen

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DECLARATION OF NABIH AYAD

I, Nabih Ayad, declare:

1. I am a Michigan resident over the age of eighteen. I have personal knowledge of the facts stated in this declaration.

2. I am an attorney in private practice in Wayne County, Michigan and have been a member of the Michigan bar since 1999. My practice includes immigration, criminal defense and civil rights cases.

3. I am a member of the ACLU of Michigan. I have served on the Lawyers Committee of the ACLU of Michigan, a committee that makes recommendations to the Board of Directors about which cases to pursue.

4. As detailed below, the National Security Agency program at issue in this case (the "Program") has inhibited communications between individuals in the Middle East and Asia and me that are necessary to provide effective legal representation to my clients. Because of the Program, I will not have certain kinds of conversations by phone or email for fear that the government might be monitoring my communications. For example, I will no longer communicate by phone or email about important strategic matters and about certain evidence in terrorist-related immigration or criminal cases. In addition, because of the Program I will even avoid discussing certain political topics with family and friends abroad for fear that such conversations will trigger monitoring.

5. In my immigration practice, I represent individuals throughout the Middle East and South Asia including individuals from Lebanon, Syria, Jordan, Egypt, United Arab Emirates, Iraq, Iran and Saudi Arabia. The United States government has attempted to deport some of my clients because of suspected ties to terrorism. For example, in *American-Arab Anti-*

Discrimination Committee v. Ashcroft (No. 03-71639, U.S. District Court, Eastern District of Michigan), I represented 130 immigrants from Lebanon and Yemen accused of visa fraud. In *United States v. Kourani* (No. 03-81030, U.S. District Court, Eastern District of Michigan), the government suspected some of my clients of supporting, or having ties to, the military wing of Hezbollah, a group that has been designated a terrorist organization by the Department of State. I have also represented individuals from Lebanon and other countries who seek political asylum in this country.

6. During the course of my work on these immigration cases, it is frequently necessary to communicate by telephone or email with individuals from foreign countries, including clients, their family members and associates, and witnesses. As mentioned above, sometimes these communications are with individuals suspected of being terrorists or being affiliated with members of terrorist groups. I therefore believe that it is likely my communications have been intercepted. Additionally, I have been unable to make other communications necessary for these cases. For instance, in *Kourani*, it was necessary to obtain information from my client's family members in Lebanon, but they were afraid to speak to me directly because they feared eavesdropping by the U.S. government under the Program. We were able to have some communications through a third party, but this limited our communications, made them more time-consuming and expensive, and often made it impossible to verify information or ask follow-up questions. This adversely affected my ability to represent Mr. Kourani effectively. The difficulties and added expenses caused by the Program consequently caused Mr. Kourani to retain different counsel for a subsequent case.

7. I have also represented criminal defendants from Middle Eastern countries, in cases that either involve terrorism-related offenses or have been identified as terrorism-related

cases. Like my immigration clients, some of my clients in my criminal cases are from the Middle East and are suspected either of being terrorists or of being affiliated with a terrorist group. Through the course of such work, it is necessary to prepare a defense by communicating with clients, clients' families, witnesses and others in the clients' home countries. I have frequently been unable to make such communications regarding privileged and confidential matters because of my fear that they will be intercepted under the Program. Thus, the Program has increased the need for traveling to meet with clients, sources, etc. in person, and has impaired my ability to represent my clients.

8. For example, I represented Omar Shishani, a Michigan resident of Jordanian descent who was arrested after flying from Indonesia to the United States with $12 million of counterfeit checks (*U.S. v. Shishani*, No. 02-80649, U.S. District Court, Eastern District of Michigan). Mr. Shishani is a Michigan resident of Jordanian descent whom the federal government suspects of having ties to the Taliban and al-Qaida. He is listed on the United States government's "watch list" as having trained with al-Qaida in Afghanistan. And the checks with which Mr. Shishani was caught were made payable to Baharuddin Masse, an individual whom the U.S. Attorney's Office in Nevada has alleged is a member of al-Qaida. For all of these reasons, I believe it is very likely that Mr. Shishani's telephone calls and emails have been and are being intercepted, and that the communications of others involved in his case, such as Mr. Masse, are also subject to surveillance. This created a significant hurdle to effective representation of Mr. Shishani. To cite one specific example, Mr. Shishani identified a number of witnesses in Indonesia and elsewhere who could give exculpatory information or serve as character witnesses. However, he was unwilling to place these contacts at risk by communicating with them by international phone calls and emails during my representation of

Mr. Shishani, to the great detriment of this representation.

9. A number of other criminal matters that I have worked on also involved terrorism charges or were identified by the government as terrorism-related cases. I represented a man from Yemen whose case was dismissed at the preliminary examination after he was wrongfully accused of attempting to blow up a federal building in Detroit. I also represented individuals from Lebanon who were accused of smuggling weapons oversees to Hezbollah. The Program has adversely affected my ability to represent these clients zealously and effectively, just as in the other cases described above.

10. In addition, I am a naturalized U.S. citizen born in Lebanon. I have family and friends in Lebanon and Germany with whom I communicate by phone and email. When speaking with friends and family in the past, I discussed current events in the Middle East including the war in Iraq and terrorism.

11. Because of the nature of my communications, the identities of some of the people with whom I communicate and the subject matter of conversations, I have a well-founded belief that my communications are being intercepted by the NSA under the Program.

I declare under penalty of perjury under the laws of the United States and of the State of Michigan that the foregoing is true and correct.

Nabih Ayad

Executed at Dearborn Heights, Michigan this 5th day of June, 2006.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION FOUNDATION; AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN; COUNCIL ON AMERICAN-ISLAMIC RELATIONS; COUNCIL ON AMERICAN ISLAMIC RELATIONS MICHIGAN; GREENPEACE, INC.; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; JAMES BAMFORD; LARRY DIAMOND; CHRISTOPHER HITCHENS; TARA MCKELVEY; and BARNETT R. RUBIN,

Plaintiffs,

v.

NATIONAL SECURITY AGENCY / CENTRAL SECURITY SERVICE; and LIEUTENANT GENERAL KEITH B. ALEXANDER, in his official capacity as Director of the National Security Agency and Chief of the Central Security Service,

Defendants.

Case No. 06-CV-10204

Hon. Anna Diggs Taylor

_____/

MEMORANDUM OPINION

I. Introduction

This is a challenge to the legality of a secret program (hereinafter "TSP") undisputedly inaugurated by the National Security Agency (hereinafter "NSA") at least by 2002 and continuing today, which intercepts without benefit of warrant or other judicial approval, prior or subsequent, the international telephone and internet communications of numerous persons and organizations

within this country. The TSP has been acknowledged by this Administration to have been authorized by the President's secret order during 2002 and reauthorized at least thirty times since.[1]

Plaintiffs are a group of persons and organizations who, according to their affidavits, are defined by the Foreign Intelligence Surveillance Act (hereinafter "FISA") as "U.S. persons."[2] They conducted regular international telephone and internet communications for various uncontestedly legitimate reasons including journalism, the practice of law, and scholarship. Many of their communications are and have been with persons in the Middle East. Each Plaintiff has alleged a "well founded belief" that he, she, or it, has been subjected to Defendants' interceptions, and that the TSP not only injures them specifically and directly, but that the TSP substantially chills and impairs their constitutionally protected communications. Persons abroad who before the program spoke with them by telephone or internet will no longer do so.

Plaintiffs have alleged that the TSP violates their free speech and associational rights, as guaranteed by the First Amendment of the United States Constitution; their privacy rights, as guaranteed by the Fourth Amendment of the United States Constitution; the principle of the Separation of Powers because the TSP has been authorized by the President in excess of his Executive Power under Article II of the United States Constitution, and that it specifically violates the statutory limitations placed upon such interceptions by the Congress in FISA because it is conducted without observation of any of the procedures required by law, either statutory or Constitutional.

Before the Court now are several motions filed by both sides. Plaintiffs have requested a

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[1]Available at http://www.white-house.gov//news/releases/2005/12/20051219-2.html

[2]Pub. L. 95-511, Title I, 92 Stat 1976 (Oct. 25, 1978), codified as amended at 50 U.S.C. §§ 1801 *et seq.*

permanent injunction, alleging that they sustain irreparable damage because of the continued existence of the TSP. Plaintiffs also request a Partial Summary Judgment holding that the TSP violates the Administrative Procedures Act ("APA"); the Separation of Powers doctrine; the First and Fourth Amendments of the United States Constitution, and the statutory law.

Defendants have moved to dismiss this lawsuit, or in the alternative for Summary Judgment, on the basis of the state secrets evidentiary privilege and Plaintiffs' lack of standing.

II. State Secrets Privilege

Defendants argue that the state secrets privilege bars Plaintiffs' claims because Plaintiffs cannot establish standing or a *prima facie* case for any of their claims without the use of state secrets. Further, Defendants argue that they cannot defend this case without revealing state secrets. For the reasons articulated below, the court rejects Defendants' argument with respect to Plaintiffs' claims challenging the TSP. The court, however, agrees with Defendants with respect to Plaintiffs' data- mining claim and grants Defendants' motion for summary judgment on that claim.

The state secrets privilege is an evidentiary rule developed to prevent the disclosure of information which may be detrimental to national security. There are two distinct lines of cases covering the privilege. In the first line of cases the doctrine is more of a rule of "non-justiciability because it deprives courts of their ability to hear suits against the Government based on covert espionage agreements." *El-Masri v. Tenet*, 2006 WL 1391390 at 7 (E.D.Va., 2006). The seminal decision in this line of cases is *Totten v. United States* 92 U.S. 105 (1875). In *Totten*, the plaintiff brought suit against the government seeking payment for espionage services he had provided during the Civil War. In affirming the dismissal of the case, Justice Field wrote:

> The secrecy which such contracts impose precludes any action for their enforcement. The publicity produced by an action would itself

> be a breach of a contract of that kind, and thus defeat a recovery. *Totten*, 92 U.S. at 107.

The Supreme Court reaffirmed *Totten* in *Tenet v. Doe,* 544 U.S. 1, (2005). In *Tenet*, the plaintiffs, who were former Cold War spies, brought estoppel and due process claims against the United States and the Director of the Central Intelligence Agency (hereinafter "CIA") for the CIA's alleged failure to provide them with the assistance it had allegedly promised in return for their espionage services. *Tenet*, 544 U.S. at 3. Relying heavily on *Totten*, the Court held that the plaintiffs claims were barred. Delivering the opinion for a unanimous Court, Chief Justice Rehnquist wrote:

> We adhere to *Totten*. The state secrets privilege and the more frequent use of *in camera* judicial proceedings simply cannot provide the absolute protection we found necessary in enunciating the *Totten* rule. The possibility that a suit may proceed and an espionage relationship may be revealed, if the state secrets privilege is found not to apply, is unacceptable: "Even a small chance that some court will order disclosure of a source's identity could well impair intelligence gathering and cause sources to 'close up like a clam.'" (citations omitted). *Tenet*, 544 U.S. at 11.

The second line of cases deals with the exclusion of evidence because of the state secrets privilege. In *United States v. Reynolds*, 345 U.S. 1 (1953), the plaintiffs were the widows of three civilians who died in the crash of a B-29 aircraft. *Id.* at 3-4. The plaintiffs brought suit under the Tort Claims Act and sought the production of the Air Force's official accident investigation report and the statements of the three surviving crew members. *Id.* The Government asserted the states secret privilege to resist the discovery of this information, because the aircraft in question and those aboard were engaged in a highly secret mission of the Air Force. *Id.* at 4. In discussing the state secrets privilege and its application, Chief Justice Vinson stated:

> The privilege belongs to the Government and must be asserted by it;

> it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect. *Reynolds,* 345 U.S. at 8.

The Chief Justice further wrote:

> In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake. *Reynolds,* 345 U.S. at 11.

The Court sustained the Government's claim of privilege, finding the plaintiffs' "necessity" for the privileged information was "greatly minimized" by the fact that the plaintiffs had an available alternative. *Reynolds,* 345 U.S. at 11. Moreover, the Court found that there was nothing to suggest that the privileged information had a "causal connection with the accident" and that the plaintiffs could "adduce the essential facts as to causation without resort to material touching upon military secrets." *Id*.

In *Halkin v. Helms,* 598 F.2d 1 (D.C.Cir.1978) (*Halkin I*), the District of Columbia Circuit Court applied the holding in *Reynolds* in a case in which the plaintiffs, Vietnam War protestors, alleged that the defendants, former and present members of the NSA, the CIA, Defense Intelligence Agency, the Federal Bureau of Investigation and the Secret Service engaged in warrantless surveillance of their international wire, cable and telephone communications with the cooperation of telecommunications providers. *Id.* at 3. The telecommunications providers were also named as defendants. *Id.* The plaintiffs specifically challenged the legality of two separate NSA surveillance

operations undertaken from 1967 to 1973 named operation MINARET and operation SHAMROCK.[3] *Id.* at 4.

The Government asserted the state secrets privilege and moved for dismissal for the following reasons: (1) discovery would "confirm the identity of individuals or organizations whose foreign communications were acquired by NSA"; (2) discovery would lead to the disclosure of "dates and contents of such communications"; or (3) discovery would "divulge the methods and techniques by which the communications were acquired." *Halkin*, 598 F.2d at 4-5. The district court held that the plaintiffs' claims against operation MINARET had to be dismissed "because the ultimate issue, the fact of acquisition, could neither be admitted nor denied." *Id.* at 5. The district court, however, denied the Government's motion to dismiss the plaintiffs' claims regarding operation SHAMROCK, because it "thought congressional committees investigating intelligence matters had revealed so much information about operation SHAMROCK that such a disclosure would pose no threat to the NSA mission." *Id*. at 10.

On appeal, the District of Columbia Circuit Court affirmed the district court's dismissal of the plaintiffs' claims with respect to operation MINARET but reversed the court's ruling with respect to operation SHAMROCK. In reversing the district court ruling regarding SHAMROCK, the circuit court stated:

> . . . we think the affidavits and testimony establish the validity of the state secrets claim with respect to both SHAMROCK and MINARET acquisitions; our reasoning applies to both. There is a "reasonable danger", (citation omitted) that confirmation or denial that a particular plaintiff's communications have been acquired would

[3]Operation MINARET was part of the NSA's regular intelligence activity in which foreign electronic signals were monitored. Operation SHAMROCK involved the processing of all telegraphic traffic leaving or entering the United States. *Hepting v. AT & T Corp* 2006 WL 2038464 (N.D.Cal.2006) quoting *Halkin*.

> disclose NSA capabilities and other valuable intelligence information to a sophisticated intelligence analyst. *Halkin,* 598 F.2d at 10.

The case was remanded to the district court and it dismissed the plaintiffs' claims against the NSA and the individuals connected with the NSA's alleged monitoring. *Halkin v. Helms,* 690 F.2d 977, 984 (D.C. Cir.1982) (*Halkin II*).

In *Halkin II,* 690 F.2d 977, the court addressed plaintiffs' remaining claims against the CIA, which the district court dismissed because of the state secrets privilege. In affirming the district court's ruling, the District of Columbia Circuit stated:

> It is self-evident that the disclosures sought here pose a "reasonable danger" to the diplomatic and military interests of the United States. Revelation of particular instances in which foreign governments assisted the CIA in conducting surveillance of dissidents could strain diplomatic relations in a number of ways-by generally embarrassing foreign governments who may wish to avoid or may even explicitly disavow allegations of CIA or United States involvements, or by rendering foreign governments or their officials subject to political or legal action by those among their own citizens who may have been subjected to surveillance in the course of dissident activity. *Halkin II,* 690 F.2d at 993.

Ellsberg v. Mitchell, 709 F.2d 51 (D.C. Cir.1983) was yet another case where the District of Columbia Circuit dealt with the state secrets privilege being raised in the defense of a claim of illegal wiretapping. In *Ellsberg,* the plaintiffs, the defendants and attorneys in the "Pentagon Papers" criminal prosecution brought suit when, during the course of that litigation, they discovered "that one or more of them had been the subject of warrantless electronic surveillance by the federal Government." *Id.* at 51. The defendants admitted to two wiretaps but refused to respond to some of the plaintiffs' interrogatories, asserting the state secrets privilege. *Id.* at 54. The plaintiffs sought an order compelling the information and the district court denied the motion, sustaining the Government's assertion of the state secrets privilege. *Id.* at 56. Further, the court dismissed the

plaintiffs' claims that pertained "to surveillance of their foreign communications." *Ellsberg v. Mitchell,* 709 F.2d at 56.

On appeal, the District of Columbia Circuit reversed the district court with respect to the plaintiffs' claims regarding the Government's admitted wiretaps, because there was no reason to "suspend the general rule that the burden is on those seeking an exemption from the Fourth Amendment warrant requirement to show the need for it." *Ellsberg,* 709 F.2d at 68. With respect to the application of the state secrets privilege, the court stated:

> When properly invoked, the state secrets privilege is absolute. No competing public or private interest can be advanced to compel disclosure of information found to be protected by a claim of privilege. However, because of the broad sweep of the privilege, the Supreme Court has made clear that "[i]t is not to be lightly invoked." Thus, the privilege may not be used to shield any material not strictly necessary to prevent injury to national security; and, whenever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter. *Ellsberg,* 709 F.2d at 56.

In *Kasza v. Browner,* 133 F.3d 1159 (9th Cir.1998), the plaintiffs, former employees at a classified United States Air Force facility, filed suit against the Air Force and the Environmental Protection Agency under the Resource Conservation and Recovery Act, alleging violations at the classified facility. *Id.* at 1162. The district court granted summary judgment against the plaintiffs, because discovery of information necessary for the proof of the plaintiffs' claims was impossible due to the state secrets privilege. *Id.* In affirming the district court's grant of summary judgment against one of the plaintiffs, the Ninth Circuit stated:

> Not only does the state secrets privilege bar [the plaintiff] from establishing her prima facie case on any of her eleven claims, but any further proceeding in this matter would jeopardize national security. No protective procedure can salvage [the plaintiff's] suit. *Kasza,* 133 F.3d at 1170.

The *Kasza* court also explained that "[t]he application of the state secrets privilege can have . . . three effects." *Kasza*, 133 F.3d at 1166. First, when the privilege is properly invoked "over particular evidence, the evidence is completely removed from the case." *Id.* The plaintiff's case, however, may proceed "based on evidence not covered by the privilege." *Id.* "If . . . the plaintiff cannot prove the *prima facie* elements of her claim with nonprivileged evidence, then the court may dismiss her claim as it would with any plaintiff who cannot prove her case." *Id.* Second, summary judgement may be granted, "if the privilege deprives the defendant of information that would otherwise give the defendant a valid defense to the claim." *Id.* Lastly, "notwithstanding the plaintiff's ability to produce nonprivileged evidence, if the 'very subject matter of the action' is a state secret, then the court should dismiss the plaintiff's action based solely on the invocation of the state secrets privilege." *Id.*

The Sixth Circuit delivered its definitive opinion regarding the states secrets privilege, in *Tenenbaum v. Simonini*, 372 F.3d 776 (6th Cir. 2004). In that case, the plaintiffs sued the United States and various employees of federal agencies, alleging that the defendants engaged in criminal espionage investigation of the plaintiff, David Tenenbaum, because he was Jewish. *Id.* at 777. The defendants moved for summary judgment, arguing that they could not defend themselves against the plaintiffs' "claims without disclosing information protected by the state secrets doctrine." *Id.* The district court granted the defendants' motion and the Sixth Circuit affirmed stating:

> We further conclude that Defendants cannot defend their conduct with respect to Tenenbaum without revealing the privileged information. Because the state secrets doctrine thus deprives Defendants of a valid defense to the Tenenbaums' claims, we find that the district court properly dismissed the claims. *Tenenbaum*, 372 F.3d at 777.

Predictably, the War on Terror of this administration has produced a vast number of cases,

in which the state secrets privilege has been invoked.[4] In May of this year, a district court in the Eastern District of Virginia addressed the state secrets privilege in *El-Masri v. Tenet*, 2006 WL 1391390, (E.D. Va. May 12, 2006). In *El Masri*, the plaintiff, a German citizen of Lebanese descent, sued the former director of the CIA and others, for their alleged involvement in a program called Extraordinary Rendition. *Id.* at 1. The court dismissed the plaintiff's claims, because they could not be fairly litigated without the disclosure of state secrets.[5] *Id.* at 6.

In *Hepting v. AT & T Corp.*, 2006 WL 2038464, (E.D. Cal. June 20, 2006), which is akin to our inquiry in the instant case, the plaintiffs brought suit, alleging that AT & T Corporation was collaborating with the NSA in a warrantless surveillance program, which illegally tracked the domestic and foreign communications and communication records of millions of Americans. *Id.* at 1. The United States intervened and moved that the case be dismissed based on the state secrets privilege. *Id.* Before applying the privilege to the plaintiffs' claims, the court first examined the information that had already been exposed to the public, which is essentially the same information that has been revealed in the instant case. District Court Judge Vaughn Walker found that the Government had admitted:

> . . . it monitors "contents of communications where * * * one party to the communication is outside the United States and the government has a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda." (citations omitted). *Hepting*, 2006 WL

[4]In *Terkel v. AT & T Corp.*, 2006 WL 2088202 (N.D. Ill. July 25, 2006), the plaintiffs alleged that AT&T provided information regarding their telephone calls and internet communications to the NSA. *Id.* at 1. District Court Judge Matthew F. Kennely dismissed the case because the state secrets privilege made it impossible for the plaintiffs to establish standing. *Id.* at 20.

[5]Further, the court was not persuaded by the plaintiff's argument that the privilege was negated because the Government had admitted that the rendition program existed because it found the Government's admissions to be without details.

2038464, at 19.

Accordingly Judge Walker reasoned that "[b]ased on these public disclosures," the court could not "conclude that the existence of a certification regarding the 'communication content' program is a state secret." *Id.*

Defendants' assertion of the privilege without any request for answers to any discovery has prompted this court to first analyze this case under *Totten/Tenet*, since it appears that Defendants are arguing that this case should not be subject to judicial review. As discussed *supra*, the *Totten/Tenet* cases provide an absolute bar to any kind of judicial review. *Tenet*, 544 U.S. at 8. This rule should not be applied in the instant case, however, since the rule applies to actions where there is a secret espionage relationship between the Plaintiff and the Government. *Id.* at 7-8. It is undisputed that Plaintiffs' do not claim to be parties to a secret espionage relationship with Defendants. Accordingly, the court finds the *Totten/Tenet* rule is not applicable to the instant case. The state secrets privilege belongs exclusively to the Executive Branch and thus, it is appropriately invoked by the head of the Executive Branch agency with control over the secrets involved. *Reynolds*, 345 U.S. at 1. In the instant case, the court is satisfied that the privilege was properly invoked. Defendants' publicly-filed affidavits from Director of National Intelligence John D. Negroponte and Signal Intelligence Director, NSA Major General Richard J. Quirk, set forth facts supporting the Government's contention that the state secrets privilege and other legal doctrines required dismissal of the case. Additionally, Defendants filed classified versions of these declarations *ex parte* and *in camera* for this court's review. Defendants also filed *ex parte* and *in camera* versions of its brief along with other classified materials, further buttressing its assertion of the privilege. Plaintiffs concede that the public declaration from Director Negroponte satisfies the

procedural requirements set forth in *Reynolds*. Therefore, this court concludes that the privilege has been appropriately invoked.

Defendants argue that Plaintiffs' claims must be dismissed because Plaintiffs cannot establish standing or a *prima facie* case for any of its claims without the disclosure of state secrets. Moreover, Defendants argue that even if Plaintiffs are able to establish a *prima facie* case without revealing protected information, Defendants would be unable to defend this case without the disclosure of such information. Plaintiffs argue that Defendants' invocation of the state secrets privilege is improper with respect to their challenges to the TSP, since no additional facts are necessary or relevant to the summary adjudication of this case. Alternatively, Plaintiffs argue, that even if the court finds that the privilege was appropriately asserted, the court should use creativity and care to devise methods which would protect the privilege but allow the case to proceed.

The "next step in the judicial inquiry into the validity of the assertion of the privilege is to determine whether the information for which the privilege is claimed qualifies as a state secret." *El Masri*, 2006 WL 1391390, at 4. Again, the court acknowledges that it has reviewed all of the materials Defendants submitted *ex parte* and *in camera*. After reviewing these materials, the court is convinced that the privilege applies "because a reasonable danger exists that disclosing the information in court proceedings would harm national security interests, or would impair national defense capabilities, disclose intelligence-gathering methods or capabilities, or disrupt diplomatic relations with foreign governments." *Tenenbaum*, 372 F.3d at 777.

Plaintiffs, however, maintain that this information is not relevant to the resolution of their claims, since their claims regarding the TSP are based solely on what Defendants have publicly admitted. Indeed, although the instant case appears factually similar to *Halkin*, in that they both

involve plaintiffs challenging the legality of warrantless wiretapping, a key distinction can be drawn. Unlike *Halkin* or any of the cases in the *Reynolds* progeny, Plaintiffs here are not seeking any additional discovery to establish their claims challenging the TSP.[6]

Like Judge Walker in *Hepting*, this court recognizes that simply because a factual statement has been made public it does not necessarily follow that it is true. *Hepting*, 2006 WL 2038464 at 12. Hence, "in determining whether a factual statement is a secret, the court considers only public admissions or denials by the [G]overnment." *Id.* at 13. It is undisputed that Defendants have publicly admitted to the following: (1) the TSP exists; (2) it operates without warrants; (3) it targets communications where one party to the communication is outside the United States, and the government has a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda. As the Government has on many occasions confirmed the veracity of these allegations, the state secrets privilege does not apply to this information.

Contrary to Defendants' arguments, the court is persuaded that Plaintiffs are able to establish a *prima facie* case based solely on Defendants' public admissions regarding the TSP. Plaintiffs' declarations establish that their communications would be monitored under the TSP.[7] Further, Plaintiffs have shown that because of the existence of the TSP, they have suffered a real and concrete harm. Plaintiffs' declarations state undisputedly that they are stifled in their ability to

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[6]In *Halkin*, the plaintiffs were requesting that the Government answer interrogatories and sought to depose the secretary of defense. *Halkin*, 598 F.2d at 6.

[7]See generally, in a Declaration, attorney Nancy Hollander stated that she frequently engages in international communications with individuals who have alleged connections with terrorist organizations. (Exh. J, Hollander). Attorney William Swor also provided a similar declaration. (Exh. L, Swor Decl.). Journalist Tara McKelvey declared that she has international communications with sources who are suspected of helping the insurgents in Iraq. (Exh. K, McKelvey Decl.).

vigorously conduct research, interact with sources, talk with clients and, in the case of the attorney Plaintiffs, uphold their oath of providing effective and ethical representation of their clients.[8] In addition, Plaintiffs have the additional injury of incurring substantial travel expenses as a result of having to travel and meet with clients and others relevant to their cases. Therefore, the court finds that Plaintiffs need no additional facts to establish a *prima facie* case for any of their claims questioning the legality of the TSP.

The court, however, is convinced that Plaintiffs cannot establish a *prima facie* case to support their data- mining claims without the use of privileged information and further litigation of this issue would force the disclosure of the very thing the privilege is designed to protect. Therefore, the court grants Defendants' motion for summary judgment with respect to this claim.

Finally, Defendants assert that they cannot defend this case without the exposure of state secrets. This court disagrees. The Bush Administration has repeatedly told the general public that there is a valid basis in law for the TSP.[9] Further, Defendants have contended that the President has the authority under the AUMF and the Constitution to authorize the continued use of the TSP. Defendants have supported these arguments without revealing or relying on any classified information. Indeed, the court has reviewed the classified information and is of the opinion that this information is not necessary to any viable defense to the TSP. Defendants have presented support

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[8]Plaintiffs' Statement of Undisputed Facts (hereinafter "SUF") SUF 15 (Exh. J, Hollander Decl. ¶¶12, 16, 25; Exh. L, Swor Decl. ¶¶9, 11-12, 14-16);Plaintiffs;' Reply Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment (hereinafter "Pl.'s Reply") (Exh. P, Dratel Decl. ¶¶9-11; Exh. Q, Abdrabboh Decl. ¶¶7-8; Exh. R. Ayad. Decl. ¶¶ 4, 6-8); (Exh. M Niehoff Decl. ¶¶ 12).

[9]On December 17, 2005, in a radio address, President Bush stated:

> In the weeks following the terrorist attacks on our nation, I authorized the National Security Agency, consistent with U.S. law and the Constitution, to intercept the international communications of people with known links to al Qaeda and related terrorist organizations.
> http://www.whitehouse.gov/news/releases/2005/12/20051217.html

for the argument that "it . . is well-established that the President may exercise his statutory and constitutional authority to gather intelligence information about foreign enemies."[10] Defendants cite to various sources to support this position. Consequently, the court finds Defendants' argument that they cannot defend this case without the use of classified information to be disingenuous and without merit.

In sum, the court holds that the state secrets privilege applies to Plaintiffs' data-mining claim and that claim is dismissed. The privilege, however, does not apply to Plaintiffs' remaining claims challenging the validity of the TSP, since Plaintiffs are not relying on or requesting any classified information to support these claims and Defendants do not need any classified information to mount a defense against these claims.[11]

III. Standing

Defendants argue that Plaintiffs do not establish their standing. They contend that Plaintiffs' claim here is merely a subjective fear of surveillance which falls short of the type of injury necessary to establish standing. They argue that Plaintiffs' alleged injuries are too tenuous to be recognized, not "distinct and palpable" nor "concrete and particularized."

Article III of the U.S. Constitution limits the federal court's jurisdiction to "cases" and "controversies". *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To have a genuine case or controversy, the plaintiff must establish standing. "[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v.*

[10]Defendants' Brief in Support of Summary Judgment pg. 33.

[11]Defendants also contend that Plaintiffs' claims are barred because they properly invoked statutory privileges under the National Security Agency Act of 1959, 50 U.S.C. § 402 and the Intelligence Reform and Terrorism Prevention Act of 2004, 50 U.S.C. § 403-(i)(1). Again, these privileges are not availing to Defendants with respect to Plaintiffs' claims challenging the TSP, for the same reasons that the state secrets privilege does not bar these claims.

Defenders of Wildlife, 504 U.S. at 560. To establish standing under Article III, a plaintiff must satisfy the following three requirements: (1) "the plaintiff must have suffered an injury in fact - an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) "there must be a causal connection between the injury and the conduct complained of", and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 560-561. The party invoking federal jurisdiction bears the burden of establishing these elements. *Id*. at 561.

"An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests it seeks to protect are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 181 (2000) (citing *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 342 (1977)).

"At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presume that general allegations embrace those specific facts that are necessary to support the claim.' " *Id*. at 561 (quoting *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990)). "In response to a motion for summary judgment, however, the plaintiff can no longer rest upon such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts' Fed.R.Civ.Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true." *Id.* This court is persuaded that Plaintiffs in this case have set forth the necessary facts to have satisfied all three of the prerequisites listed above to establish standing.

To determine whether Plaintiffs have standing to challenge the constitutionality of the TSP, we must examine the nature of the injury-in-fact which they have alleged. "The injury must be ... 'distinct and palpable,' and not 'abstract' or 'conjectural' or 'hypothetical.'" *National Rifle Association of America v. Magaw*, 132 F.3d 272, 280 (6th Cir. 1997) (citing *Allen v. Wright*, 468 U.S 737, 751 (1982)).

Plaintiffs here contend that the TSP has interfered with their ability to carry out their professional responsibilities in a variety of ways, including that the TSP has had a significant impact on their ability to talk with sources, locate witnesses, conduct scholarship, engage in advocacy and communicate with persons who are outside of the United States, including in the Middle East and Asia. Plaintiffs have submitted several declarations to that effect. For example, scholars and journalists such as plaintiffs Tara McKelvey, Larry Diamond, and Barnett Rubin indicate that they must conduct extensive research in the Middle East, Africa, and Asia, and must communicate with individuals abroad whom the United States government believes to be terrorist suspects or to be associated with terrorist organizations.[12] In addition, attorneys Nancy Hollander, William Swor, Joshua Dratel, Mohammed Abdrabboh, and Nabih Ayad indicate that they must also communicate with individuals abroad whom the United States government believes to be terrorist suspects or to be associated with terrorist organizations,[13] and must discuss confidential information over the phone and email with their international clients.[14] All of the Plaintiffs contend that the TSP has caused clients, witnesses and sources to discontinue their communications with plaintiffs out of fear that

[12]SUF 15B (Exh. I, Diamond Decl. ¶9; Exh. K, McKelvey Decl. ¶8-10).

[13]SUF 15B (Exh. J, Hollander Decl. ¶¶12-14, 17-24; Exh. L, Swor Decl. ¶¶5-7, 10);Pl.'s Reply (Exh. M, Dratel Decl. ¶¶5-6; Exh. Q, Abdrabboh Decl. ¶¶3-4; Exh. R, Ayad Decl. ¶¶ 5, 7-9).

[14]SUF 15 (Exh. J, Hollander Decl. ¶¶12, 16, 25; Exh. L, Swor Decl. ¶¶9, 11-12, 14-16); Pl.'s Reply (Exh. P, Dratel Decl. ¶¶5-6; Exh. Q, Abdrabboh Decl. ¶¶3-4; Exh. R, Ayad Decl. ¶¶ 6-7).

their communications will be intercepted.[15] They also allege injury based on the increased financial burden they incur in having to travel substantial distances to meet personally with their clients and others relevant to their cases.[16]

The ability to communicate confidentially is an indispensable part of the attorney-client relationship. As University of Michigan legal ethics professor Leonard Niehoff explains, attorney-client confidentiality is "central to the functioning of the attorney-client relationship and to effective representation."[17] He further explains that Defendants' TSP "creates an overwhelming, if not insurmountable, obstacle to effective and ethical representation" and that although Plaintiffs are resorting to other "inefficient" means for gathering information, the TSP continues to cause "substantial and ongoing harm to the attorney-client relationships and legal representations."[18] He explains that the increased risk that privileged communications will be intercepted forces attorneys to cease telephonic and electronic communications with clients to fulfill their ethical responsibilities.[19]

Defendants argue that the allegations present no more than a "chilling effect" based upon purely speculative fears that the TSP subjects the Plaintiffs to surveillance. In arguing that the injuries are not constitutionally cognizable, Defendants rely heavily on the case of *Laird v. Tatum*, 408 U.S. 1 (1972).

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[15]SUF 15 (Exh. J, Hollander Decl. ¶¶12, 16, 25; Exh. L, Swor Decl. ¶¶9, 11-12, 14-16);Pl.'s Reply (Exh. P, Dratel Decl. ¶¶9-11; Exh. Q, Abdrabboh Decl. ¶¶7-8; Exh. R. Ayad. Decl. ¶¶ 4, 6-8).

[16]SUF 15 (Exh. J, Hollander Decl. ¶¶20, 23-25; Exh. L, Swor Decl. ¶¶13-14); Pl.'s Reply (Exh. P, Dratel Decl. ¶¶9-11; Exh. Q, Abdrabboh Decl. ¶¶7-8; Exh. R, Ayad Decl. ¶¶ 6-8).

[17]Pl.'s Reply (Exh. M Niehoff Decl. ¶¶ 12)

[18]Pl.'s Reply (Exh. M Niehoff Decl. ¶¶ 19-20)

[19]Pl.'s Reply (Exh. M Niehoff Decl. ¶¶ 15-20)

In *Laird*, the plaintiffs sought declaratory and injunctive relief on their claim that their rights were being invaded by the Army's domestic surveillance of civil disturbances and "public activities that were thought to have at least some potential for civil disorder." *Id.* at 6. The plaintiffs argued that the surveillance created a chilling effect on their First Amendment rights caused by the existence and operation of the surveillance program in general. *Id*. at 3. The Supreme Court rejected the plaintiffs' efforts to rest standing upon the mere "chill" that the program cast upon their associational activities. It said that the "jurisdiction of a federal court may [not] be invoked by a complainant who alleges that the exercise of his First Amendment rights is being chilled by the mere existence, *without more*, of a governmental investigative and data-gathering activity." *Id.* (emphasis added)

Laird, however, must be distinguished here. The plaintiffs in *Laird* alleged only that they *could conceivably* become subject to the Army's domestic surveillance program. *Presbyterian Church v. United States*, 870 F.2d 518, 522 (1989) (citing *Laird v. Tatum*, 408 U.S at 13) (emphasis added). The Plaintiffs here are not merely alleging that they "could conceivably" become subject to surveillance under the TSP, but that continuation of the TSP has damaged them. The President indeed has publicly acknowledged that the types of calls Plaintiffs are making are the types of conversations that would be subject to the TSP.[20]

Although *Laird* establishes that a party's allegation that it has suffered a subjective "chill" alone does not confer Article III standing, *Laird* does not control this case. As Justice (then Judge)

[20]In December 2005, the President publicly acknowledged that the TSP intercepts the contents of certain communications as to which there are reasonable grounds to believe that (1) the communication originated or terminated outside the United States, and (2) a party to such communication is a member of al Qaeda, a member of a group affiliated with al Qaeda, or an agent of al Qaeda or its affiliates. Available at http://www.white-house.gov//news/releases/2005/12/20051219-2.html.

Breyer has observed, "[t]he problem for the government with Laird . . . lies in the key words 'without more.'" *Ozonoff v. Berzak*, 744 F.2d 224, 229 (1st Cir. 1984). This court agrees with Plaintiffs' position that "standing here does not rest on the TSP's 'mere existence, without more.'" The Plaintiffs in this case are not claiming simply that the Defendants' surveillance has "chilled" them from making international calls to sources and clients. Rather, they claim that Defendants' surveillance has chilled their sources, clients, and potential witnesses from communicating with them. The alleged effect on Plaintiffs is a concrete, actual inability to communicate with witnesses, sources, clients and others without great expense which has significantly crippled Plaintiffs, at a minimum, in their ability to report the news and competently and effectively represent their clients. See *Presbyterian Church v. United States*, 870 F.2d 518 (1989) (church suffered substantial decrease in attendance and participation of individual congregants as a result of governmental surveillance). Plaintiffs have suffered actual concrete injuries to their abilities to carry out their professional responsibilities. The direct injury and objective chill incurred by Plaintiffs are more than sufficient to place this case outside the limitations imposed by *Laird*.

The instant case is more akin to *Friends of the Earth*, in which the Court granted standing to environmental groups who sued a polluter under the Clean Water Act because environmental damage caused by the defendant had deterred members of the plaintiff organizations from using and enjoying certain lands and rivers. *Friends of the Earth*, 528 U.S. at 181-183. The Court there held that the affidavits and testimony presented by plaintiffs were sufficient to establish reasonable concerns about the effects of those discharges and were more than "general averments" and "conclusory allegations." *Friends of the Earth*, 528 U.S. at 183-184. The court distinguished the case from *Lujan*, in which the Court had held that no actual injury had been established where

plaintiffs merely indicated "'some day' intentions to visit endangered species around the world." *Friends of the Earth*, 528 U.S. at 184 (quoting *Lujan*, 504 U.S. at 564). The court found that the affiants' conditional statements that they would use the nearby river for recreation if defendant were not discharging pollutants into it was sufficient to establish a concrete injury. *Id*. at 184.

Here, Plaintiffs are not asserting speculative allegations. Instead, the declarations asserted by Plaintiffs establish that they are suffering a present concrete injury in addition to a chill of their First Amendment rights. Plaintiffs would be able to continue using the telephone and email in the execution of their professional responsibilities if the Defendants were not undisputedly and admittedly conducting warrantless wiretaps of conversations. As in *Friends of the Earth*, this damage to their interest is sufficient to establish a concrete injury.

Numerous cases have granted standing where the plaintiffs have suffered concrete profession-related injuries comparable to those suffered by Plaintiffs here. For example, the First Circuit conferred standing upon claimants who challenged an executive order which required applicants for employment with the World Health Organization to undergo a "loyalty" check that included an investigation into the applicant's associations and activities. The court there determined that such an investigation would have a chilling effect on what an applicant says or does, a sufficient injury to confer standing. *Ozonoff*, 744 F.2d at 228-229. Similarly, the District of Columbia Circuit Court of Appeals granted standing to a reshelver of books at the Library of Congress who was subjected to a full field FBI investigation which included an inquiry into his political beliefs and associations and subsequently resulted in his being denied a promotion or any additional employment opportunities; the court having determined that plaintiff had suffered a present objective harm, as well as an objective chill of his First Amendment rights and not merely a

potential subjective chill as in *Laird*. Also, the Supreme Court in *Presbyterian Church v. United States*, granted standing to a church which suffered decreased attendance and participation when the government actually entered the church to conduct surveillance. *Presbyterian Church*, 870 F.2d at 522. Lastly, in *Jabara v. Kelley*, 476 F.Supp. 561 (E.D. Mich. 1979), *vac'd on other grounds sub. nom. Jabara v. Webster*, 691 F.2d 272 (6th Cir. 1982), the court held that an attorney had standing to sue to enjoin unlawful FBI and NSA surveillance which had deterred others from associating with him and caused "injury to his reputation and legal business." *Id.* at 568.

These cases constitute acknowledgment that substantial burdens upon a plaintiff's professional activities are an injury sufficient to support standing. Defendants ignore the significant, concrete injuries which Plaintiffs continue to experience from Defendants' illegal monitoring of their telephone conversations and email communications. Plaintiffs undeniably have cited to distinct, palpable, and substantial injuries that have resulted from the TSP.

This court finds that the injuries alleged by Plaintiffs are "concrete and particularized", and not "abstract or conjectural." The TSP is not hypothetical, it is an actual surveillance program that was admittedly instituted after September 11, 2001, and has been reauthorized by the President more than thirty times since the attacks.[21] The President has, moreover, emphasized that he intends to continue to reauthorize the TSP indefinitely.[22] Further, the court need not speculate upon the kind of activity the Plaintiffs want to engage in - they want to engage in conversations with individuals abroad without fear that their First Amendment rights are being infringed upon. Therefore, this court concludes that Plaintiffs have satisfied the requirement of alleging "actual or threatened

[21]Available at http://www.white-house.gov//news/releases/2005/12/20051219-2.html

[22]*Id.*

injury" as a result of Defendants' conduct.

It must now be determined whether Plaintiffs have shown that there is a causal connection between the injury and the complained of conduct. *Lujan*, 504 U.S. at 560-561. The causal connection between the injury and the conduct complained of is fairly traceable to the challenged action of Defendants. The TSP admittedly targets communications originated or terminated outside the United States where a party to such communication is in the estimation of Defendants, a member of al Qaeda, a member of a group affiliated with al Qaeda, or an agent of al Qaeda or its affiliates.[23] The injury to the Plaintiffs stems directly from the TSP and their injuries can unequivocally be traced to the TSP.

Finally, it is likely that the injury will be redressed by the requested relief. A determination by this court that the TSP is unconstitutional and a further determination which enjoins Defendants from continued warrantless wiretapping in contravention of FISA would assure Plaintiffs and others that they could freely engage in conversations and correspond via email without concern, at least without notice, that such communications were being monitored. The requested relief would thus redress the injury to Plaintiffs caused by the TSP.

Although this court is persuaded that Plaintiffs have alleged sufficient injury to establish standing, it is important to note that if the court were to deny standing based on the unsubstantiated minor distinctions drawn by Defendants, the President's actions in warrantless wiretapping, in contravention of FISA, Title III, and the First and Fourth Amendments, would be immunized from judicial scrutiny. It was never the intent of the Framers to give the President such unfettered control, particularly where his actions blatantly disregard the parameters clearly enumerated in the Bill of

[23]Available at http://www.white-house.gov//news/releases/2005/12/20051219-2.html

Rights. The three separate branches of government were developed as a check and balance for one another. It is within the court's duty to ensure that power is never "condense[d] ... into a single branch of government." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion). We must always be mindful that "[w]hen the President takes official action, the Court has the authority to determine whether he has acted within the law." *Clinton v. Jones*, 520 U.S. 681, 703 (1997). "It remains one of the most vital functions of this Court to police with care the separation of the governing powers . . . . When structure fails, liberty is always in peril." *Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring).

Because of the very secrecy of the activity here challenged, Plaintiffs each must be and are given standing to challenge it, because each of them, is injured and chilled substantially in the exercise of First Amendment rights so long as it continues. Indeed, as the perceived need for secrecy has apparently required that no person be notified that he is aggrieved by the activity, and there have been no prosecutions, no requests for extensions or retroactive approvals of warrants, no victim in America would be given standing to challenge this or any other unconstitutional activity, according to the Government. The activity has been acknowledged, nevertheless.

Plaintiffs have sufficiently alleged that they suffered an actual, concrete injury traceable to Defendants and redressable by this court. Accordingly, this court denies Defendants' motion to dismiss for lack of standing.

IV. The History of Electronic Surveillance in America

Since the Court's 1967 decision of *Katz v. U.S.*, 389 U.S. 347 (1967), it has been understood that the search and seizure of private telephone conversations without physical trespass required

prior judicial sanction, pursuant to the Fourth Amendment. Justice Stewart there wrote for the Court that searches conducted without prior approval by a judge or magistrate were per se unreasonable, under the Fourth Amendment. *Id.* at 357.

Congress then, in 1968, enacted Title III of the Omnibus Crime Control and Safe Streets Act (hereinafter "Title III")[24] governing all wire and electronic interceptions in the fight against certain listed major crimes. The Statute defined an " aggrieved person",[25] and gave such person standing to challenge any interception allegedly made without a judicial order supported by probable cause, after requiring notice to such person of any interception made.[26]

The statute also stated content requirements for warrants and applications under oath therefor made,[27] including time, name of the target, place to be searched and proposed duration of that search, and provided that upon showing of an emergency situation, a post-interception warrant could be obtained within forty-eight hours.[28]

In 1972 the court decided *U.S. v. U.S. District Court*, 407 U.S. 297 (1972) (the *Keith* case) and held that, for lawful electronic surveillance even in domestic security matters, the Fourth Amendment requires a prior warrant.

In 1976 the Congressional "Church Committee"[29] disclosed that every President since 1946

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[24]Pub. L. 90-351, 82 Stat. 211, codified as amended at 18 U.S.C. §§ 2510 *et seq.*

[25]18 U.S.C. § 2510(11) ("aggrieved person" means a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed.)

[26]18 U.S.C. § 2518

[27]18 U.S.C. § 2518(1)

[28]18 U.S.C. § 2518(7)

[29]The "Church Committee" was the United States Committee to Study Governmental Operations with Respect to Intelligence Activities.

had engaged in warrantless wiretaps in the name of national security, and that there had been numerous political abuses[30], and in 1978 Congress enacted the FISA.[31]

Title III specifically excluded from its coverage all interceptions of international or foreign communications; and was later amended to state that "the FISA of 1978 shall be the exclusive means by which electronic surveillance of foreign intelligence communications may be conducted."[32]

The government argues that Title III's disclaimer language, at 18 U.S.C. § 2511(2)(f), that nothing therein should be construed to limit the constitutional power of the President (to make international wiretaps). In the *Keith* case, Justice Powell wrote that "Congress simply left Presidential powers where it found them", that the disclaimer was totally neutral, and not a grant of authority. *U.S. v. U.S. District Court*, 407 U.S. at 303.

The FISA defines a "United States person"[33] to include each of Plaintiffs herein and requires a prior warrant for any domestic international interception of their communications. For various exigencies, exceptions are made. That is, the government is granted fifteen days from Congressional Declaration of War within which it may conduct intercepts before application for an order.[34] It is also granted one year, on certification by the Attorney General,[35] and seventy-two hours for other

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[30]S. REP. NO. 94-755, at 332 (1976)

[31]Pub. L. 95-511, Title I, 92 Stat 1976 (Oct. 25, 1978), codified as amended at 50 U.S.C. §§ 1801 *et seq*.

[32]18 U.S.C. §2511(2)(f)

[33]50 U.S.C. § 1801(h)(4)(i)("United States person) means a citizen of the United States, an alien lawfully admitted for permanent residence, an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States which is not a foreign power.

[34]50 U.S.C. § 1811

[35]50 U.S.C. § 1802

defined exigencies.[36]

Those delay provisions clearly reflect the Congressional effort to balance executive needs against the privacy rights of United States persons, as recommended by Justice Powell in the *Keith* case when he stated that:

> Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens.. *U.S. v. U.S. District Court*, 407 U.S. at 322-323.

Also reflective of the balancing process Congress pursued in FISA is the requirement that interceptions may be for no longer than a ninety day duration, minimization is again required[37], and an aggrieved person is again (as in Title III) required to be notified of proposed use and given the opportunity to file a motion to suppress.[38] Also again, alternatives to a wiretap must be found to have been exhausted or to have been ineffective.[39]

A FISA judicial warrant, moreover, requires a finding of probable cause to believe that the target was either a foreign power or agent thereof,[40] not that a crime had been or would be committed, as Title III's more stringent standard required. Finally, a special FISA court was required to be appointed, of federal judges designated by the Chief Justice.[41] They were required to hear, *ex parte*, all applications and make all orders.[42]

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[36]50 U.S.C. § 1805(f)

[37]50 U.S.C. § 1805(e)(1)

[38]50 U.S.C. § 1806(c)

[39]50 U.S.C. § 1804(a)(7)(E)(ii), § 1805(a)(5)

[40]50 U.S.C. § 1805(b)

[41]50 U.S.C § 1803

[42]50 U.S.C § 1805

The FISA was essentially enacted to create a secure framework by which the Executive branch may conduct legitimate electronic surveillance for foreign intelligence while meeting our national commitment to the Fourth Amendment. It is fully described in *United States v. Falvey*, 540 F. Supp. 1306 (E.D.N.Y. 1982), where the court held that FISA did not intrude upon the President's undisputed right to conduct foreign affairs, but protected citizens and resident aliens within this country, as "United States persons." *Id.* at 1312.

The Act was subsequently found to meet Fourth Amendment requirements constituting a reasonable balance between Governmental needs and the protected rights of our citizens, in *United States v. Cavanagh*, 807 F.2d 787 (9th Cir. 1987), and *United States v. Duggan*,743, F.2d 59 (2d Cir. 1984).

Against this background the present program of warrantless wiretapping has been authorized by the administration and the present lawsuit filed.

V. The Fourth Amendment

The Constitutional Amendment which must first be discussed provides:

> The right the of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. Amend. IV.

This Amendment ". . . was specifically propounded and ratified with the memory of . . . *Entick v. Carrington*, 95 Eng. Rep. 807 (1765) in mind", stated Circuit Judge Skelly Wright in *Zweibon v. Mitchell*, 516 F.2d 594, 618 n.67 (D.C. Circ. 1975) (en banc) (plurality opinion). Justice Douglas, in his concurrence in the *Keith* case, also noted the significance of *Entick* in our history,

stating:

> For it was such excesses as the use of general warrants and the writs of assistance that led to the ratification of the Fourth Amendment. In *Entick v. Carrington* (citation omitted), decided in 1765, one finds a striking parallel to the executive warrants utilized here. The Secretary of State had issued general executive warrants to his messengers authorizing them to roam about and to seize libelous material and libellants of the sovereign. Entick, a critic of the Crown, was the victim of one such general search during which his seditious publications were impounded. He brought a successful damage action for trespass against the messengers. The verdict was sustained on appeal. Lord Camden wrote that if such sweeping tactics were validated, then the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel.' (citation omitted) In a related and similar proceeding, *Huckle v. Money* (citation omitted), the same judge who presided over Entick's appeal held for another victim of the same despotic practice, saying '(t)o enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition . . .' See also *Wilkes v. Wood* (citation omitted), . . . [t]he tyrannical invasions described and assailed in *Entick*, *Huckle*, and *Wilkes*, practices which also were endured by the colonists, have been recognized as the primary abuses which ensured the Warrant Clause a prominent place in our Bill of Rights. *U.S. v. U.S. District Court*, 407 U.S. at 328-329 (Douglas, J., concurring).

Justice Powell, in writing for the court in the *Keith* case also wrote that:

> Over two centuries ago, Lord Mansfield held that common-law principles prohibited warrants that ordered the arrest of unnamed individuals who the officer might conclude were guilty of seditious libel. 'It is not fit,' said Mansfield, 'that the receiving or judging of the information should be left to the discretion of the officer. The magistrate ought to judge; and should give certain directions to the officer.' (citation omitted).
>
> Lord Mansfield's formulation touches the very heart of the Fourth Amendment directive: that, where practical, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's

> private premises or conversation. Inherent in the concept of a warrant is its issuance by a 'neutral and detached magistrate.' (citations omitted) The further requirement of 'probable cause' instructs the magistrate that baseless searches shall not proceed. *U.S. v. U.S. District Court*, 407 U.S. at 316.

The Fourth Amendment, accordingly, was adopted to assure that Executive abuses of the power to search would not continue in our new nation.

Justice White wrote in 1984 in *United States v. Karo*, 468 U.S. 705 (1984), a case involving installation and monitoring of a beeper which had found its way into a home, that a private residence is a place in which society recognizes an expectation of privacy; that warrantless searches of such places are presumptively unreasonable, absent exigencies. *Id.* at 714-715. *Karo* is consistent with *Katz* where Justice Stewart held that:

> 'Over and again this Court has emphasized that the mandate of the (Fourth) Amendment requires adherence to judicial processes,' (citation omitted) and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions. *Katz,* 389 U.S. at 357.

Justice Powell's opinion in the *Keith* case also stated that:

> The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute. (citation omitted) But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech. *U.S. v. U.S. District Court*, 407 U.S. at 317.

Accordingly, the Fourth Amendment, about which much has been written, in its few words requires

reasonableness in all searches. It also requires prior warrants for any reasonable search, based upon prior-existing probable cause, as well as particularity as to persons, places, and things, and the interposition of a neutral magistrate between Executive branch enforcement officers and citizens.

In enacting FISA, Congress made numerous concessions to stated executive needs. They include delaying the applications for warrants until after surveillance has begun for several types of exigencies, reducing the probable cause requirement to a less stringent standard, provision of a single court of judicial experts, and extension of the duration of approved wiretaps from thirty days (under Title III) to a ninety day term.

All of the above Congressional concessions to Executive need and to the exigencies of our present situation as a people, however, have been futile. The wiretapping program here in litigation has undisputedly been continued for at least five years, it has undisputedly been implemented without regard to FISA and of course the more stringent standards of Title III, and obviously in violation of the Fourth Amendment.

The President of the United States is himself created by that same Constitution.

VI. The First Amendment

The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. Amend. I.

This Amendment, the very first which the American people required to be made to the new Constitution, was adopted, as was the Fourth, with *Entick v. Carrington*, and the actions of the star chamber in mind. As the Court wrote in *Marcus v. Search Warrants*, 367 U.S. 717 (1961):

> Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure. . . .
>
> * * * *
>
> This history was, of course, part of the intellectual matrix within which our own constitutional fabric was shaped. The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression. *Marcus*, 367 U.S. at 724, 729

As Justice Brennan wrote for the Court in *Dombrowski v. Pfister,* 380 U.S. 479 (1965), the appellant organizations had been subjected to repeated announcements of their subversiveness which frightened off potential members and contributors, and had been harmed irreparably, requiring injunctive relief. The Louisiana law against which they complained, moreover, had a chilling effect on protected expression because, so long as the statute was available, the threat of prosecution for protected expression remained real and substantial.

Judge Wright, in *Zweibon*, noted that the tapping of an organization's office phone will provide the membership roster of that organization, as forbidden by *Bates v. City of Little Rock,* 361 U.S. 516 (1960); thereby causing members to leave that organization, and thereby chilling the organization's First Amendment rights and causing the loss of membership. *Zweibon*, 516 F.2d at 634.

A governmental action to regulate speech may be justified only upon showing of a compelling governmental interest; and that the means chosen to further that interest are the least restrictive of freedom of belief and association that could be chosen. *Clark v. Library of Congress,* 750 F.2d 89, 94 (D.C. Cir. 1984).

It must be noted that FISA explicitly admonishes that ". . . no United States person may be

considered . . . an agent of a foreign power solely upon the basis of activities protected by the First Amendment to the Constitution of the United States." 50 U.S.C. §1805(a)(3)(A). See also *United States v. Falvey*, 540 F. Supp. at 1310.

Finally, as Justice Powell wrote for the Court in the *Keith* case*:*

> National security cases, moreover, often reflect a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech. 'Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power,' (citation omitted). History abundantly documents the tendency of Government –however benevolent and benign its motives – to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. *U.S. v. U.S. District Court*, 407 U.S. at 313-314.

The President of the United States, a creature of the same Constitution which gave us these Amendments, has undisputedly violated the Fourth in failing to procure judicial orders as required by FISA, and accordingly has violated the First Amendment Rights of these Plaintiffs as well.

VII. The Separation of Powers

The Constitution of the United States provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States. . . ."[43] It further provides that "[t]he executive Power shall be vested in a President of the United States of America."[44] And that ". . . he shall take care that the laws be faithfully executed . . . ."[45]

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[43]U.S. CONST. art. I, § 1

[44]U.S. CONST. art. II, § 1

[45]U.S. CONST. art. II, § 3

Our constitution was drafted by founders and ratified by a people who still held in vivid memory the image of King George III and his General Warrants. The concept that each form of governmental power should be separated was a well-developed one. James Madison wrote that:

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. THE FEDERALIST NO. 47, at 301 (James Madison).

The seminal American case in this area, and one on which the government appears to rely, is that of *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952) in which Justice Black, for the court, held that the Presidential order in question, to seize steel mills, was not within the constitutional powers of the chief executive. Justice Black wrote that:

> The founders of this Nation entrusted the law-making power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand. *Youngstown*, 343 U.S. at 589.

Justice Jackson's concurring opinion in that case has become historic. He wrote that, although the Constitution had diffused powers the better to secure liberty, the powers of the President are not fixed, but fluctuate, depending upon their junctures with the actions of Congress. Thus, if the President acted pursuant to an express or implied authorization by Congress, his power was at it maximum, or zenith. If he acted in absence of Congressional action, he was in a zone of twilight reliant upon only his own independent powers. *Youngstown*, 343 U.S. at 636-638. But "when the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for he can rely only upon his own Constitutional powers minus any Constitutional powers of Congress over the matter." *Youngstown*, 343 U.S. at 637 (Jackson, J.,

concurring).

In that case, he wrote that it had been conceded that no congressional authorization existed for the Presidential seizure. Indeed, Congress had several times covered the area with statutory enactments inconsistent with the seizure. He further wrote of the President's powers that:

> The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image. Continental European examples were no more appealing. And if we seek instruction from our own times, we can match it only from the executive powers in those governments we disparagingly describe as totalitarian. I cannot accept the view that this clause is a grant in bulk of all conceivable executive power but regard it as an allocation to the presidential office of the generic powers thereafter stated. *Id.* at 641.

After analyzing the more recent experiences of Weimar, Germany, the French Republic, and Great Britain, he wrote that:

> This contemporary foreign experience may be inconclusive as to the wisdom of lodging emergency powers somewhere in a modern government. But it suggests that emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them. That is the safeguard that would be nullified by our adoption of the 'inherent powers' formula. Nothing in my experience convinces me that such risks are warranted by any real necessity, although such powers would, of course, be an executive convenience. *Id.* at 652.

Justice Jackson concluded that:

> 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. *Youngstown*, 343 U.S. at 655 (Jackson, J., concurring).

Accordingly, Jackson concurred, the President had acted unlawfully.

In this case, the President has acted, undisputedly, as FISA forbids. FISA is the expressed statutory policy of our Congress. The presidential power, therefore, was exercised at its lowest ebb and cannot be sustained.

In *United States v. Moussaoui*, 365 F.3d 292 (4th Cir. 2004) a prosecution in which production of enemy combatant witnesses had been refused by the government and the doctrine of Separation of Powers raised, the court, citing *Mistretta v. United States*, 488 U.S. 361 (1989), noted that it:

> "[C]onsistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *United States v. Moussaoui*, 365 F.3d at 305 citing *Mistretta v. United States*, 488 U.S. 361, 380 (1989)

Finally, in the case of *Clinton v. Jones*, 520 U.S. 681 (1997), the separation of powers doctrine is again discussed and, again, some overlap of the authorities of two branches is permitted. In that case, although Article III jurisdiction of the federal courts is found intrusive and burdensome to the Chief Executive it did not follow, the court held, that separation of powers principles would be violated by allowing a lawsuit against the Chief Executive to proceed. *Id.* at 701. Mere burdensomeness or inconvenience did not rise to the level of superceding the doctrine of separation of powers. *Id.* at 703.

In this case, if the teachings of *Youngstown* are law, the separation of powers doctrine has been violated. The President, undisputedly, has violated the provisions of FISA for a five-year period. Justice Black wrote, in *Youngstown*:

> Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President.

> In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who make laws which the President is to execute. The first section of the first article says that 'All legislative powers herein granted shall be vested in a Congress of the United States * * *'
>
> The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress – it directs that a presidential policy be executed in a manner prescribed by the President. . . . The Constitution did not subject this law-making power of Congress to presidential or military supervision or control. *Youngstown*, 343 U.S. at 587-588.

These secret authorization orders must, like the executive order in that case, fall. They violate the Separation of Powers ordained by the very Constitution of which this President is a creature.

VIII. The Authorization for Use of Military Force

After the terrorist attack on this Country of September 11, 2001, the Congress jointly enacted the Authorization for Use of Military Force (hereinafter "AUMF") which states:

> That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[46]

The Government argues here that it was given authority by that resolution to conduct the TSP in violation of both FISA and the Constitution.

First, this court must note that the AUMF says nothing whatsoever of intelligence or

[46]Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (Sept. 18, 2001) (reported as a note to 50 U.S.C.A. § 1541)

surveillance. The government argues that such authority must be implied. Next it must be noted that FISA and Title III, are together by their terms denominated by Congress as the exclusive means by which electronic surveillance may be conducted. Both statutes have made abundantly clear that prior warrants must be obtained from the FISA court for such surveillance, with limited exceptions, none of which are here even raised as applicable. Indeed, the government here claims that the AUMF has by implication granted its TSP authority for more than five years, although FISA's longest exception, for the Declaration of War by Congress, is only fifteen days from date of such a Declaration.[47]

FISA's history and content, detailed above, are highly specific in their requirements, and the AUMF, if construed to apply at all to intelligence is utterly general. In *Morales v. TWA, Inc.*, 504 U.S. 374 (1992), the Supreme Court taught us that "it is a commonplace of statutory construction that the specific governs the general." *Id.* at 384. The implication argued by Defendants, therefore, cannot be made by this court.

The case of *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) in which the Supreme Court held that a United States citizen may be held as an enemy combatant, but is required by the U.S. Constitution to be given due process of law, must also be examined. Justice O'Connor wrote for the court that:

> [D]etention of individuals . . . for the duration of the particular conflict in which they are captured is so fundamental and accepted an incident to war as to be an exercise of the "necessary and appropriate force" Congress has authorized the President to use. *Hamdi*, 542 U.S. at 518.

She wrote that the entire object of capture is to prevent the captured combatant from returning to his same enemy force, and that a prisoner would most certainly return to those forces

[47] 50 U.S.C. § 1811

if set free. Congress had, therefore, clearly authorized detention by the Force Resolution. *Id*. at 518-519.

However, she continued, indefinite detention for purposes of interrogation was certainly not authorized and it raised the question of what process is constitutionally due to a citizen who disputes the enemy combatant status assigned him. *Hamdi*, 542 U.S. at 521, 524.

Justice O'Connor concluded that such a citizen must be given Fifth Amendment rights to contest his classification, including notice and the opportunity to be heard by a neutral decisionmaker. *Hamdi*, 542 U.S. at 533 (citing *Cleveland Board of Education v. Laudermill*, 470 U.S. 532 (1985)). Accordingly, her holding was that the Bill of Rights of the United States Constitution must be applied despite authority granted by the AUMF.

She stated that:

> It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.
>
> * * * *
>
> Any process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short. *Hamdi*, 542 U.S. at 532, 537.

Under *Hamdi*, accordingly, the Constitution of the United States must be followed.

The AUMF resolution, if indeed it is construed as replacing FISA, gives no support to Defendants here. Even if that Resolution superceded all other statutory law, Defendants have violated the Constitutional rights of their citizens including the First Amendment, Fourth Amendment, and the Separation of Powers doctrine.

IX. Inherent Power

Article II of the United States Constitution provides that any citizen of appropriate birth, age and residency may be elected to the Office of President of the United States and be vested with the executive power of this nation.[48]

The duties and powers of the Chief Executive are carefully listed, including the duty to be Commander in Chief of the Army and Navy of the United States,[49] and the Presidential Oath of Office is set forth in the Constitution and requires him to swear or affirm that he "will, to the best of my ability, preserve, protect and defend the Constitution of the United States."[50]

The Government appears to argue here that, pursuant to the penumbra of Constitutional language in Article II, and particularly because the President is designated Commander in Chief of the Army and Navy, he has been granted the inherent power to violate not only the laws of the Congress but the First and Fourth Amendments of the Constitution, itself.

We must first note that the Office of the Chief Executive has itself been created, with its powers, by the Constitution. There are no hereditary Kings in America and no powers not created by the Constitution. So all "inherent powers" must derive from that Constitution.

We have seen in *Hamdi* that the Fifth Amendment of the United States Constitution is fully applicable to the Executive branch's actions and therefore it can only follow that the First and Fourth Amendments must be applicable as well.[51] In the *Youngstown* case the same "inherent powers" argument was raised and the Court noted that the President had been created Commander in Chief

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[48]U.S. CONST. art. II, § 5

[49]U.S. CONST. art. II, § 2[1]

[50]U.S. CONST. art. II, § 1[8]

[51]See generally *Hamdi*, 542 U.S. 507 (2004)

of only the military, and not of all the people, even in time of war.[52] Indeed, since *Ex Parte Milligan*, we have been taught that the "Constitution of the United States is a law for rulers and people, equally in war and in peace. . . ." *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 120 (1866). Again, in *Home Building & Loan Ass'n v. Blaisdell*, we were taught that no emergency can create power.[53]

Finally, although the Defendants have suggested the unconstitutionality of FISA, it appears to this court that that question is here irrelevant. Not only FISA, but the Constitution itself has been violated by the Executive's TSP. As the court states in *Falvey*, even where statutes are not explicit, the requirements of the Fourth Amendment must still be met.[54] And of course, the *Zweibon* opinion of Judge Skelly Wright plainly states that although many cases hold that the President's power to obtain foreign intelligence information is vast, none suggest that he is immune from Constitutional requirements.[55]

The argument that inherent powers justify the program here in litigation must fail.

X. Practical Justifications for Exemption

First, it must be remembered that both Title III and FISA permit delayed applications for warrants, after surveillance has begun. Also, the case law has long permitted law enforcement action to proceed in cases in which the lives of officers or others are threatened in cases of "hot pursuit", border searches, school locker searches, or where emergency situations exist. See generally *Warden v. Hayden*, 387 U.S. 294 (1967); *Veronia School District v. Acton*, 515 U.S. 646

[52]See generally *Youngstown*, 343 U.S. 579 (1952)

[53]See generally *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934)

[54]See generally *Falvey*, 540 F. Supp. 1306 (E.D.N.Y. 1982)

[55]See generally *Zweibon*, 516 F.2d 594 (D.C. Circ. 1975)

(1995); and *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990).

Indeed, in *Zweibon*, Judge Wright enumerates a number of Defendants' practical arguments here (including judicial competence, danger of security leaks, less likelihood of criminal prosecution, delay, and the burden placed upon both the courts and the Executive branch by compliance) and finds, after long and careful analysis, that none constitutes adequate justification for exemption from the requirements of either FISA or the Fourth Amendment. *Zweibon*, 516 F.2d at 641. It is noteworthy, in this regard, that Defendants here have sought no Congressional amendments which would remedy practical difficulty.

As long ago as the *Youngstown* case, the Truman administration argued that the cumbersome procedures required to obtain warrants made the process unworkable.[56] The *Youngstown* court made short shift of that argument and, it appears, the present Defendants' need for speed and agility is equally weightless. The Supreme Court in the *Keith*[57], as well as the *Hamdi*[58] cases, has attempted to offer helpful solutions to the delay problem, all to no avail.

XI. Conclusion

For all of the reasons outlined above, this court is constrained to grant to Plaintiffs the Partial Summary Judgment requested, and holds that the TSP violates the APA; the Separation of Powers doctrine; the First and Fourth Amendments of the United States Constitution; and the statutory law.

Defendants' Motion to Dismiss the final claim of data-mining is granted, because litigation of that claim would require violation of Defendants' state secrets privilege.

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[56]See generally *Youngstown*, 343 U.S. 579 (1952)

[57]See generally *U.S. v. U.S. District Court*, 407 U.S. 297 (1972)

[58]See generally *Hamdi*, 542 U.S. 507 (2004)

The Permanent Injunction of the TSP requested by Plaintiffs is granted inasmuch as each of the factors required to be met to sustain such an injunction have undisputedly been met.[59] The irreparable injury necessary to warrant injunctive relief is clear, as the First and Fourth Amendment rights of Plaintiffs are violated by the TSP. See *Dombrowski v. Pfister*, 380 U.S. 479 (1965). The irreparable injury conversely sustained by Defendants under this injunction may be rectified by compliance with our Constitution and/or statutory law, as amended if necessary. Plaintiffs have prevailed, and the public interest is clear, in this matter. It is the upholding of our Constitution.

As Justice Warren wrote in *U.S. v. Robel*, 389 U.S. 258 (1967):

> Implicit in the term 'national defense' is the notion of defending those values and ideas which set this Nation apart. . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of . . . those liberties . . . which makes the defense of the Nation worthwhile. *Id.* at 264.

IT IS SO ORDERED.

Date: August 17, 2006
Detroit, Michigan

s/Anna Diggs Taylor
ANNA DIGGS TAYLOR
UNITED STATES DISTRICT JUDGE

[59]It is well-settled that a plaintiff seeking a permanent injunction must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. *eBay Inc. v. MercExchange, L.L.C.* 126 S.Ct. 1837, 1839 (2006). Further, "[a] party is entitled to a permanent injunction if it can establish that it suffered a constitutional violation and will suffer "continuing irreparable injury" for which there is no adequate remedy at law." *Women's Medical Professional Corp. v. Baird*, 438 F.3d 595, 602 (6th Cir. 2006).

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing *Memorandum Order* was served upon counsel of record via the Court's ECF System to their respective email addresses or First Class U.S. mail disclosed on the Notice of Electronic Filing on **August 17, 2006**.

s/Johnetta M. Curry-Williams
Case Manager

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 07a0253p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

AMERICAN CIVIL LIBERTIES UNION, *et al.*,
Plaintiffs-Appellees/ Cross-Appellants,

v.

NATIONAL SECURITY AGENCY, *et al.*,
Defendants-Appellants/ Cross-Appellees.

Nos. 06-2095/2140

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 06-10204—Anna Diggs Taylor, District Judge.

Argued: January 31, 2007

Decided and Filed: July 6, 2007

Before: BATCHELDER, GILMAN, and GIBBONS, Circuit Judges.

COUNSEL

ARGUED: Gregory G. Garre, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellants. Ann Beeson, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York, for Appellees. **ON BRIEF:** Gregory G. Garre, Thomas M. Bondy, Douglas N. Letter, Anthony A. Yang, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellants. Ann Beeson, Jameel Jaffer, Melissa Goodman, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York, Michael J. Steinberg, Kary L. Moss, AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN, Detroit, Michigan, Randal L. Gainer, DAVIS WRIGHT TREMAINE LLP, Seattle, Washington, for Appellees. Andrew G. McBride, WILEY REIN LLP, Washington, D.C., Paul D. Kamenar, WASHINGTON LEGAL FOUNDATION, Washington, D.C., Paul J. Orfanedes, Meredith L. DiLiberto, JUDICIAL WATCH, INC., Washington, D.C., John C. Eastman, CHAPMAN UNIVERSITY SCHOOL OF LAW, Orange, California, Jay A. Sekulow, AMERICAN CENTER FOR LAW AND JUSTICE, Washington, D.C., Larry J. Saylor, Saul A. Green, MILLER, CANFIELD, PADDOCK & STONE, Detroit, Michigan, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, Donald B. Verrilli Jr., JENNER & BLOCK, Washington, D.C., Kathleen M. Sullivan, STANFORD LAW SCHOOL, Stanford, California, Lucy A. Dalglish, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, Arlington, Virginia, Richard M. Corn, New York, New York, for Amici Curiae.

BATCHELDER, J., delivered the judgment of the court. GIBBONS, J. (pp. 36-40), delivered a separate opinion concurring in the judgment only. GILMAN, J. (pp. 41-64), delivered a separate dissenting opinion.

OPINION

ALICE M. BATCHELDER, Circuit Judge. The United States National Security Agency ("NSA") appeals from the decision of the District Court for the Eastern District of Michigan that granted summary judgment against the NSA and imposed a permanent injunction. The plaintiffs are a collection of associations and individuals led by the American Civil Liberties Union, and they cross-appeal. Because we cannot find that any of the plaintiffs have standing for any of their claims, we must vacate the district court's order and remand for dismissal of the entire action.

I.

Sometime after the September 11, 2001, terrorist attacks, President Bush authorized the NSA to begin a counter-terrorism operation that has come to be known as the Terrorist Surveillance Program ("TSP"). Although the specifics remain undisclosed, it has been publicly acknowledged that the TSP includes the interception (i.e., wiretapping), without warrants, of telephone and email communications where one party to the communication is located outside the United States and the NSA has "a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda." *See* Press Briefing by Att'y Gen. Alberto Gonzales and Gen. Michael Hayden, Principal Deputy Dir. for Nat'l Intelligence (Dec. 19, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/12/print/20051219-1.html (last visited July 2, 2007).[1]

[1] In *Hepting v. AT&T Corp.*, the District Court for the Northern District of California collected and documented certain publicly available information, which provides some background and context for the present case:

"The *New York Times* disclosed the [TSP] on December 16, 2005. (James Risen and Eric Lichthlau, *Bush Lets U.S. Spy on Callers Without Courts*, The New York Times (Dec 16, 2005)). The following day, President George W Bush confirmed the existence of a 'terrorist surveillance program' in his weekly radio address:

> 'In the weeks following the [September 11, 2001] terrorist attacks on our Nation, I authorized the National Security Agency, consistent with U.S. law and the Constitution, to intercept the international communications of people with known links to Al Qaeda and related terrorist organizations. Before we intercept these communications, the Government must have information that establishes a clear link to these terrorist networks.'

"[Transcript] *available at* http://www.whitehouse.gov/news/releases/2005/12/print/20051217.html (last visited July 19, 2006). The President also described the mechanism by which the program is authorized and reviewed:

> 'The activities I authorized are reviewed approximately every 45 days. Each review is based on a fresh intelligence assessment of terrorist threats to the continuity of our Government and the threat of catastrophic damage to our homeland. During each assessment, previous activities under the authorization are reviewed. The review includes approval by our Nation's top legal officials, including the Attorney General and the Counsel to the President. I have reauthorized this program more than 30 times since the September the 11th attacks, and I intend to do so for as long as our Nation faces a continuing threat from Al Qaeda and related groups.
>
> 'The NSA's activities under this authorization are throughly reviewed by the Justice Department and NSA's top legal officials, including NSA's General Counsel and Inspector General. Leaders in Congress have been briefed more than a dozen times on this authorization and the activities conducted under it. Intelligence officials involved in this activity also receive extensive training to ensure they perform their duties consistent with the letter and intent of the authorization.'

"*Id.*

"Attorney General Alberto Gonzales subsequently confirmed that this program intercepts 'contents of communications where . . . one party to the communication is outside the United States' and the government has 'a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda.' [Press Briefing] *available at* http://www.

The plaintiffs in this action include journalists, academics, and lawyers who regularly communicate with individuals located overseas, who the plaintiffs believe are the types of people the NSA suspects of being al Qaeda terrorists, affiliates, or supporters, and are therefore likely to be monitored under the TSP. From this suspicion, and the limited factual foundation in this case, the plaintiffs allege that they have a "well founded belief" that their communications are being tapped. According to the plaintiffs, the NSA's operation of the TSP — and the possibility of warrantless surveillance — subjects them to conditions that constitute an irreparable harm.

The plaintiffs filed suit in the Eastern District of Michigan, seeking a permanent injunction against the NSA's continuation of the TSP and a declaration that two particular aspects of the TSP — warrantless wiretapping and data mining — violate the First and Fourth Amendments, the Separation of Powers Doctrine, the Administrative Procedures Act ("APA"), Title III of the Omnibus Crime Control and Safe Streets Act ("Title III"), and the Foreign Intelligence Surveillance Act ("FISA"). Both sides moved for summary judgment. The district court dismissed the data mining aspect of the plaintiffs' claim, but granted judgment to the plaintiffs regarding the warrantless wiretapping. *See ACLU v. NSA*, 438 F. Supp. 2d 754, 782 (E.D. Mich. 2006).

The NSA had invoked the State Secrets Doctrine[2] to bar the discovery or admission of evidence that would "expose [confidential] matters which, in the interest of national security, should not be divulged." *See United States v. Reynolds*, 345 U.S. 1, 10 (1953). The NSA argued that, without the privileged information, none of the named plaintiffs could establish standing. The district court applied the state secrets privilege, but rejected the NSA's argument, holding instead that three publicly acknowledged facts about the TSP — (1) it eavesdrops, (2) without warrants, (3) on international telephone and email communications in which at least one of the parties is a suspected al Qaeda affiliate — were sufficient to establish standing.[3] Moreover, the district court

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whitehouse.gov/news/releases/2005/12/print/20051219-1.html (last visited July 19, 2005). The Attorney General also noted, 'This [program] is not about wiretapping everyone. This is a very concentrated, very limited program focused at gaining information about our enemy.' *Id*. at 5. The President has also made a public statement, of which the court takes judicial notice, that the government's 'international activities strictly target al Qaeda and their known affiliates,' 'the government does not listen to domestic phone calls without court approval' and the government is 'not mining or trolling through the personal lives of millions of innocent Americans.' The White House, President Bush Discusses NSA Surveillance Program (May 11, 2006), [*available at*] http://www.whitehouse.gov/news/releases/2006/05/20060511-1.html (last visited July 19, 2005)."

Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 986-87 (N.D. Cal. 2006) (certain citation forms altered).

[2] The State Secrets Doctrine has two applications: a rule of evidentiary privilege, *see United States v. Reynolds*, 345 U.S. 1, 10 (1953), and a rule of non-justiciability, *see Tenet v. Doe*, 544 U.S. 1, 9 (2005). The present case implicates only the rule of state secrets evidentiary privilege. The rule of non-justiciability applies when the subject matter of the lawsuit is itself a state secret, so the claim cannot survive. *See id.* (espionage contract); *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 146-47 (1981) (storage of nuclear weapons); *Totten v. United States*, 92 U.S. 105, 107 (1875) (espionage contract). If litigation would necessitate admission or disclosure of even the existence of the secret, then the case is non-justiciable and must be dismissed on the pleadings. Because the government has already acknowledged the existence of the warrantless wiretapping in this case, there is no risk of such disclosure and the rule of non-justiciability does not apply. The alleged data mining, which has not been publicly acknowledged, might fall within this rule. But, under the present analysis, a decision on this matter is unnecessary.

[3] The plaintiffs have not challenged on appeal either the invocation or the grant of the state secrets privilege and that issue is not before the court. At oral argument, Judge Gilman asked the plaintiffs' counsel if the court should remand for further fact-finding in support of standing. Counsel asserted that the plaintiffs' injuries were clear and undisputed in the record and there was no need to remand for a hearing or admission of additional evidence on this issue. To be sure, the parties dispute the *implications* of the privilege (i.e., whether the publicly available information about the TSP is sufficient to establish their claims), but it would not be appropriate to inquire, *sua sponte*, into the propriety of the NSA's invocation of the privilege, the district court's grant of the privilege, or the scope of the privilege granted.

The government provided the district court an opportunity to review certain, secret documents, in camera and under seal, as support for the invocation of the state secrets privilege. The government provided each member of this

found these three facts sufficient to grant summary judgment to the plaintiffs on the merits of their claims, resulting in a declaratory judgment and the imposition of an injunction. These three facts constitute all the evidence in the record relating to the NSA's conduct under the TSP.

In deciding the merits, the district court construed the Fourth Amendment as an absolute rule that "requires prior warrants for any reasonable search," *ACLU v. NSA*, 438 F. Supp. 2d at 775, and announced that "searches conducted without prior approval by a judge or magistrate were per se unreasonable," *id*. at 771. Having found that the NSA was operating without warrants, the district court concluded without further explanation that President Bush had "undisputedly violated the Fourth [Amendment] . . . and accordingly ha[d] violated the First Amendment Rights of these Plaintiffs as well." *Id*. at 776. Proceeding from this conclusion, the court deemed the TSP unconstitutional and issued an order enjoining its further operation entirely:

> IT IS HEREBY ORDERED that Defendants [i.e., NSA], its agents, employees, representatives, and any other persons or entities in active concert or participation with Defendants, are permanently enjoined from directly or indirectly utilizing the Terrorist Surveillance Program (hereinafter 'TSP') in any way, including, but not limited to, conducting warrantless wiretaps of telephone and internet communications, in contravention of the Foreign Intelligence Surveillance Act (hereinafter 'FISA') and Title III;
>
> IT IS FURTHER ORDERED AND DECLARED that the TSP violates the Separation of Powers doctrine, the Administrative Procedures Act, the First and Fourth Amendments to the United States Constitution, the FISA and Title III[.]

ACLU v. NSA, E.D. Mich. Dist. Court, No. 2:06-CV-10204, "Judgment and Permanent Injunction Order" (Aug. 17, 2006). The NSA moved for a stay of the injunction pending appeal, which the district court denied. Meanwhile, the NSA appealed, arguing that the plaintiffs lacked standing and that the State Secrets Doctrine prevented adjudication on the merits. This court stayed the injunction pending the outcome of this appeal. *See ACLU v. NSA*, 467 F.3d 590, 591 (6th Cir. 2006).[4]

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panel with an opportunity to review those same documents, also in camera and under seal, in order to provide a complete district-court record on appeal. Finally, the government provided each member of this panel an opportunity to review, in camera and under seal, certain additional, privileged documents as support for the government's contention that the appeal had been rendered moot. *See* fn. 4, *infra*. At the behest of the government, I reviewed these privileged documents, but their contents — being privileged — are excluded from our consideration and I have not relied on any of that information in this opinion. The state secrets privilege granted by the district court has been maintained on appeal and this opinion is decided solely on the publicly available information that was admitted by the district court and made a part of its record.

[4] On January 10, 2007, "a Judge of the Foreign Intelligence Surveillance Court issued orders authorizing the government to target for collection international communications into or out of the United States where there is probable cause to believe that one of the communicants is a member or agent of al Qaeda or an associated terrorist organization." Letter from Att'y Gen. Alberto Gonzales to Chair. of the Comm. on the Judiciary Patrick Leahy (Jan. 17, 2007), *available at* http://graphics8.nytimes.com/packages/pdf/politics/20060117gonzales_Letter.pdf (last visited July 2, 2007). According to a letter written by the Attorney General,"any electronic surveillance that was occurring as part of the [TSP] will now be conducted subject to the approval of the Foreign Intelligence Surveillance Court." *Id.* The NSA filed a submission with this court, discussing the implication of the intervening FISA Court order and contending that the case should be dismissed as moot. The plaintiffs filed a response, disputing any notion that this appeal had been rendered moot by the FISA Court order. Based on the analysis presented herein, it is unnecessary to reach the issue of intervening mootness. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180 (2000).

II.

This appeal presents a number of serious issues,[5] none of which can be addressed until a determination is made that these plaintiffs have standing to litigate them. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998) (stating that there is no "doctrine of hypothetical jurisdiction"). "Every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even [if] the parties are prepared to concede it . . . . When the lower federal court lacks jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *Id*. at 95 (quotation marks, citations, and edits omitted).

Standing is an aspect of justiciability, *Warth v. Selden*, 422 U.S. 490, 498 (1975), and "a plaintiff must demonstrate standing for each claim he seeks to press," *DaimlerChrysler Corp. v. Cuno*, 547 U.S. --, 126 S. Ct. 1854, 1867 (2006); *accord Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Mich. Gaming Control Bd.*, 172 F.3d 397, 407 (6th Cir. 1999) (requiring proof of standing for each individual claim). "[T]he standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the *particular plaintiff* is entitled to an adjudication of the *particular claims* asserted." *Allen v. Wright*, 468 U.S. 737, 752 (1984) (emphasis added).

The "particular plaintiffs" to this action are a diverse group of associations and individuals, and it would require a rigorous undertaking to assure that each has standing to litigate. However, for purposes of the asserted declaratory judgment — though not necessarily for the requested injunction[6] — it is only necessary that one plaintiff has standing. *See Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (deciding a challenge to the constitutionality of a statute because at least one plaintiff had standing).[7] The injunction in this case is predicated on the declaratory judgment (i.e., a determination that the NSA's conduct is unlawful), so it follows that if the plaintiffs lack standing to litigate their declaratory judgment claim, they must also lack standing to pursue an injunction. The question is whether *any* plaintiff has standing to litigate the declaratory judgment claim.

As for the "particular claims," the plaintiffs have asserted six separate claims or causes of action — three constitutional (First Amendment, Fourth Amendment, and Separation of Powers) and three statutory (APA, Title III, and FISA)[8] — and the plaintiffs must establish that at least one

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[5] On the merits of this appeal, this court is presented with a cascade of serious questions. Has the NSA violated the United States Constitution — the First Amendment, the Fourth Amendment, or the Separation of Powers Doctrine? Or, has the NSA violated federal statute — the APA, FISA, or Title III? If the NSA has violated a federal statute, is that statute constitutional when applied to the NSA in this manner? If the NSA has violated either the Constitution or a valid federal statute, is an injunction justified? And, if an injunction is justified, what is its proper scope? The district court answered all of the questions in the affirmative and imposed an injunction of the broadest possible scope.

[6] "[A] plaintiff must demonstrate standing separately for each form of relief sought." *Laidlaw*, 528 U.S. at 185 (*citing City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983) (notwithstanding that the plaintiff had standing to pursue damages, he lacked standing to pursue injunctive relief)).

[7] After argument on this appeal, the plaintiffs filed a citation to supplemental authority, urging us to rely on the Supreme Court's recent decision in *Massachusetts v. EPA*, 549 U.S. -- , 127 S. Ct. 1438, 1453 (2007) ("Only one of the petitioners needs to have standing to permit us to consider the petition for review."). That case, however, offers no direct legal support for the plaintiffs' claim of standing because it involves a "petition for review," a particular cause of action under 42 U.S.C. § 7607(b)(1), *see id.* at 1451 n.16, which has no applicability in the present case.

[8] The plaintiffs, in the plain language of their complaint, actually assert only one statutory cause of action, predicated on the APA, 5 U.S.C. § 702 (2000). They claim that the NSA violated the "substantive provisions" of FISA and Title III, and contend that this establishes standing for an APA cause of action even if they cannot establish standing to litigate a cause of action under either FISA's or Title III's civil suit provisions (i.e., under the relevant statutes). Because the APA itself has no applicability in the present circumstances, *see* Section IV.B.1, the plaintiffs' references

plaintiff has standing for each. *See Bowsher*, 478 U.S. at 721; *Cuno*, 126 S. Ct. at 1867. Because a cause of action is intertwined with an injury, the injuries being alleged must be described as precisely and unambiguously as possible. A particularized analysis is therefore necessary.

The conduct giving rise to the alleged injuries is undisputed: the NSA (1) eavesdrops, (2) without warrants, (3) on international telephone and email communications in which at least one of the parties is reasonably suspected of al Qaeda ties. The plaintiffs' objection to this conduct is also undisputed, and they demand that the NSA discontinue it. The plaintiffs do not contend — nor could they — that the mere practice of wiretapping (i.e., eavesdropping) is, by itself, unconstitutional, illegal, or even improper. Rather, the plaintiffs object to the NSA's eavesdropping without warrants, specifically FISA warrants with their associated limitations and minimization requirements. *See* 50 U.S.C. §§ 1804-06. According to the plaintiffs, it is the absence of these warrants that renders the NSA's conduct illegal and unconstitutional. But the plaintiffs do not — and because of the State Secrets Doctrine cannot — produce any evidence that any of their own communications have ever been intercepted by the NSA, under the TSP, or without warrants. Instead, they assert a mere belief, which they contend is reasonable and which they label a "well founded belief," that: their overseas contacts are the types of people targeted by the NSA; the plaintiffs are consequently subjected to the NSA's eavesdropping; the eavesdropping leads the NSA to discover (and possibly disclose) private or privileged information; and the mere possibility of such discovery (or disclosure) has injured them in three particular ways.

Notably, the plaintiffs do *not* allege as injury that they personally, either as individuals or associations, anticipate or fear any form of direct reprisal by the government (e.g., the NSA, the Justice Department, the Department of Homeland Security, etc.), such as criminal prosecution, deportation, administrative inquiry, civil litigation, or even public exposure. The injuries that these plaintiffs allege are not so direct; they are more amorphous and necessitate a pointed description.

The plaintiffs' primary alleged injury — the first of three — is their inability to communicate with their overseas contacts by telephone or email due to their self-governing ethical obligations.[9] Under this claim, the *immediate* injury results directly from the plaintiffs' own actions and decisions, based on (1) their subjective belief that the NSA might be intercepting their communications, and (2) the ethical requirements governing such circumstances, as dictated by their respective professional organizations or affiliations. Relying on the district court's three facts, the plaintiffs allege their "well founded belief" that the NSA is intercepting their communications with overseas contacts, to the perceived detriment of those overseas contacts. The plaintiffs explain that they have an ethical duty to keep their communications confidential, which, under the circumstances, requires that they refrain from communicating with the overseas contacts by telephone or email, lest they violate that duty.[10] The possibility that private communications may be revealed burdens the

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to FISA and Title III are construed liberally in this opinion, as assertions of independent causes of action under each, to consider whether the plaintiffs had standing to litigate their case despite the possible inartfulness of their pleading.

[9] This injury, as alleged, actually appears to implicate the Fifth or Sixth Amendments, *see, e.g.*, *United States v. Robel*, 389 U.S. 258, 270 (1967) (Brennan, J., concurring) (*quoting Greene v. McElroy*, 360 U.S. 474, 492 (1959)) (stating that "the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment"); *Sinclair v. Schriber*, 916 F.2d 1109, 1112-13 (6th Cir. 1990) (describing "a violation of the Sixth Amendment right to counsel ensuing from government surveillance"); *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144, 161-62 (D.D.C. 1976) (considering an alleged violation of the Sixth Amendment due to "electronic surveillance of conversations between his attorney and a consultant"), but the plaintiffs have not asserted these causes of action.

[10] Some plaintiffs appear to describe this injury as an untenable choice, in which they must decide between their "professional duty" (i.e., completing the job) and complying with their ethical duties. Even accepting, *arguendo*, that these plaintiffs are bound by these duties, this description is incorrect. While these circumstances demand that the

plaintiffs' pursuit of their chosen professions or organizational objectives — i.e., in order to comply with their ethical duties, the plaintiffs must refrain from communicating by telephone or email, and are instead required either to travel overseas to meet with these contacts in person or else refrain from communicating with them altogether. The injury manifests itself in both a quantifiable way (as the added time and expense of traveling overseas) and a non-quantifiable way (as the incomplete or substandard performance of their professional responsibilities and obligations). The plaintiffs alleged this injury in their complaint and again on appeal, even though it went unaddressed by the district court.

The second alleged injury — and the only one expressly addressed by the district court — is the "chilling effect" on the overseas contacts' willingness to communicate with the plaintiffs by telephone or email. Under this claim, the *immediate* injury results directly from the actions of the overseas contacts who, the plaintiffs contend, fear that the NSA's discovery of otherwise private or privileged information (being communicated by telephone or email) will lead to some direct reprisal by the United States government, their own governments, or others. This fear causes the overseas contacts to refuse to communicate with the plaintiffs by telephone or email, and this refusal to communicate burdens the plaintiffs in the performance of their jobs or other lawful objectives, because, in order to pursue their chosen professions or organizational objectives, the plaintiffs must travel overseas to meet with these contacts in person. This injury manifests itself as both an added expense and an added burden.

The plaintiffs' third alleged injury is the NSA's violation of their legitimate expectation of privacy in their overseas telephone and email communications. Under this claim, the *immediate* injury comes directly from the actions of the NSA. The plaintiffs assert that the Fourth Amendment, Title III, and FISA limit the occasions and circumstances in which, and the manner by which, the government can lawfully intercept overseas electronic communications, giving rise to a legitimate expectation that their overseas communications will be intercepted only in accordance with these limits. The plaintiffs conclude that, because the NSA has conducted foreign electronic surveillance without obtaining FISA warrants (and presumably, without strict adherence to FISA's minimization requirements), the NSA has breached their legitimate expectation of privacy, thereby causing them injury. The plaintiffs alleged a violation of their privacy rights in their complaint, but the district court did not mention it and they have not pressed it on appeal.[11]

This third kind of injury, unlike the other two, is direct and personal; under this theory, the NSA has directly invaded the plaintiffs' interest and proof of such invasion is all that is necessary to establish standing. If, for instance, a plaintiff could demonstrate that her privacy had actually been breached (i.e., that her communications had actually been wiretapped), then she would have standing to assert a Fourth Amendment cause of action for breach of privacy.[12] In the present case, the plaintiffs concede that there is no single plaintiff who can show that he or she has actually been wiretapped. Moreover, due to the State Secrets Doctrine, the proof needed either to make or negate

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plaintiffs comply with both obligations, this dual compliance is "tenable"; compliance with both obligations will simply be more costly, time consuming, and burdensome. The obligations are not conflicting or mutually exclusive. The *choice* is actually between paying the cost of this dual compliance or not completing the job, and therefore, the "injury" is the added cost of completing the job, in compliance with the ethical duties, under the present circumstances.

[11] At oral argument, the plaintiffs' counsel conceded that it would be unprecedented for a court to find standing for a person to litigate a Fourth Amendment cause of action without any evidence that the defendant (i.e., government) had actually subjected that particular person to an illegal search or seizure. The plaintiffs' briefs are not to the contrary.

[12] As will be discussed in Section IV.A.1, however, she could not — under this scenario — establish standing to litigate a *First Amendment* cause of action. *See Laird v. Tatum*, 408 U.S. 1, 10 (1972) (holding that standing is not satisfied "by a complainant who alleges that the exercise of his First Amendment rights is being chilled by the mere existence, without more, of a governmental investigative and data-gathering activity").

such a showing is privileged, and therefore withheld from discovery or disclosure. *See Tenenbaum v. Simonini*, 372 F.3d 776, 777 (6th Cir. 2004) (upholding dismissal because the defendants "cannot defend their conduct . . . without revealing the privileged information [so] the state secrets doctrine thus deprives [the d]efendants of a valid defense to the [plaintiff]s' claims"). This injury is not concrete or imminent under these circumstances, and this opinion focuses on the plaintiffs' two other alleged injuries.

One other issue demands attention, namely, that the plaintiffs' failure to subject themselves to actual harm does not, by itself, prevent a finding that they have standing — specifically, it does not deprive them of the right to seek declaratory judgment. *See* 28 U.S.C. § 2201(a) (empowering courts to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought"). Implicit in each of the plaintiffs' alleged injuries is the underlying *possibility* — which the plaintiffs label a "well founded belief" and seek to treat as a probability or even a certainty — that the NSA is presently intercepting, or will eventually intercept, communications to or from one or more of these particular plaintiffs, and that such interception would be detrimental to the plaintiffs' clients, sources, or overseas contacts. This is the premise upon which the plaintiffs' entire theory is built. But even though the plaintiffs' beliefs — based on their superior knowledge of their contacts' activities — may be reasonable,[13] the alternative possibility remains that the NSA might *not* be intercepting, and might *never* actually intercept, any communication by any of the plaintiffs named in this lawsuit.

A plaintiff's refusal to engage in potentially harmful activities is the typical substance of a declaratory judgment action and does not, by itself, preclude a finding that the plaintiff has standing. *See MedImmune, Inc. v. Genetech, Inc.*, 549 U.S. -- , 127 S. Ct. 764, 772-73 (2007). But it is important to distinguish the two harms that surround a declaratory judgment action. The anticipated harm that *causes* one to refrain from the activities may satisfy the "injury-in-fact" element of standing if it is sufficiently imminent and concrete. For reasons that will be made clear in the analysis, the other harm — the harm that *results* from refraining from the potentially harmful activities — is another matter. In the present case, the plaintiffs anticipate that the NSA's interception of telephone and email communications might be detrimental to their overseas contacts, and this perceived harm *causes* the plaintiffs to refrain from that communication (i.e., potentially harmful activity). Because there is no evidence that any plaintiff's communications have ever been intercepted, and the state secrets privilege prevents discovery of such evidence, *see Reynolds*, 345 U.S. at 10, there is no proof that interception would be detrimental to the plaintiffs' contacts, and the anticipated harm is neither imminent nor concrete — it is hypothetical, conjectural, or speculative. Therefore, this harm cannot satisfy the "injury in fact" requirement of standing. Because the plaintiffs cannot avoid this shortcoming, they do not propose this harm — the harm that *causes* their refusal to communicate — as an "injury" that warrants redress. Instead, they propose the injuries that *result* from their refusal to communicate and those injuries do appear imminent and concrete.

Thus, in crafting their declaratory judgment action, the plaintiffs have attempted (unsuccessfully) to navigate the obstacles to stating a justiciable claim. By refraining from communications (i.e., the potentially harmful conduct), the plaintiffs have negated any possibility that the NSA will ever actually intercept their communications and thereby avoided the anticipated harm — this is typical of declaratory judgment and perfectly permissible. *See MedImmune*, 127 S. Ct. at 772-73. But, by proposing only injuries that *result* from this refusal to engage in communications (e.g., the inability to conduct their professions without added burden and expense),

[13] Note that a legal determination of objective reasonableness would require additional specific information about the mechanics of the TSP, such as the number of communications being intercepted, the percentage of the total that number represents, the actual selection and screening process, the actual retention, dissemination, and disclosure policy, etc. This information is unavailable due to the State Secrets Doctrine. *See Reynolds*, 345 U.S. at 10.

they attempt to supplant[14] an insufficient, speculative injury with an injury that appears sufficiently imminent and concrete, but is only incidental to the alleged wrong (i.e., the NSA's conduct) — this is atypical and, as will be discussed, impermissible.

Therefore, the injury that would support a declaratory judgment action (i.e., the anticipated interception of communications resulting in harm to the contacts) is too speculative, and the injury that is imminent and concrete (i.e., the burden on professional performance) does not support a declaratory judgment action. This general proposition — the doctrine of standing — is explained more fully in the sections of the analysis regarding each, individual cause of action.

III.

By claiming six causes of action, the plaintiffs have actually engaged in a thinly veiled, though perfectly acceptable, ruse. To call a spade a spade, the plaintiffs have only one claim, namely, breach of privacy, based on a purported violation of the Fourth Amendment or FISA — i.e., the plaintiffs do not want the NSA listening to their phone calls or reading their emails. That is really all there is to it. On a straightforward reading, this claim does not implicate the First Amendment.[15] The problem with asserting only a breach-of-privacy claim is that, because the plaintiffs cannot show that they have been or will be subjected to surveillance personally, they clearly cannot establish standing under the Fourth Amendment or FISA.[16] The plaintiffs concede as much.[17] In an attempt to avoid this problem, the plaintiffs have recast their injuries as a matter of free speech and association, characterized their claim as a violation of the First Amendment, and

[14] To clarify: If the plaintiffs and their overseas contacts were to proceed with the telephone and email communications, in disregard of the TSP (thereby incurring no additional cost, burden, or diminution of professional performance), and none of their communications were ever actually intercepted by the NSA, then there would be no injury to these plaintiffs due to the NSA's conduct. Under this scenario, even if the NSA, unbeknownst to the plaintiffs, did intercept a communication, there would be no tangible injury until the NSA disclosed the information (presumably in a manner demonstrating a direct injury to the plaintiffs or their contacts). Therefore, it is only by refraining from the communications that the plaintiffs can transmute a speculative future injury into an actual present injury.

[15] *See Gordon v. Warren Consol. Bd. of Educ.*, 706 F.2d 778, 781 n.3 (6th Cir. 1983) (explaining that surveillance, which falls under the Fourth Amendment, "does not violate First Amendment rights, even though it may be directed at communicative or associative activities"). The First Amendment protects public speech and the free exchange of ideas, *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992), while the Fourth Amendment protects citizens from unwanted intrusion into their personal lives and effects, *Katz v. United States*, 389 U.S. 347, 361 (1967). Otherwise stated, the First Amendment protects one's right to associate and be heard, while the Fourth Amendment protects the right to remain unheard. The First Amendment protects one's posting of a sign in her front yard, while the Fourth Amendment protects her hiding of the same sign in her basement.

[16] *See* Section IV.A.2 (*citing Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978) ("Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.")) *and* Section IV.B.3 (*citing* H.R. Rep. No. 95-1283, at 66 (1978) (Report by the Permanent Select Comm. on Intel., in support of the proposed FISA bill and amendments) ("[T]he term [aggrieved person] is intended to be coextensive [with], but no broader than, those persons who have standing to raise claims under the Fourth Amendment with respect to electronic surveillance.")).

[17] At oral argument, the plaintiffs' counsel conceded that it would be unprecedented for a court to find standing for a person to litigate a Fourth Amendment cause of action without any evidence that the defendant (i.e., government) had actually subjected that particular person to an illegal search or seizure. The plaintiffs' briefs are not to the contrary.

engaged the First Amendment's relaxed rules on standing.[18] This argument is not novel, but neither is it frivolous; it warrants consideration, analysis, and an a full explanation by this court.

At this point, it becomes apparent that my analysis of whether the plaintiffs have standing diverges at a fundamental level from that of the concurring and dissenting opinions. They each employ a single, broad, all-encompassing analysis, with which they attempt to account for all of the plaintiffs' alleged injuries, requested remedies, and legal claims. As much as I would prefer that resolution of this question were so simple, I believe the law demands a particularized analysis of the plaintiffs' three alleged injuries, six asserted legal claims, and two requested forms of relief. *See Cuno*, 126 S. Ct. at 1867 ("[A] plaintiff must demonstrate standing for each claim he seeks to press."); *Laidlaw*, 528 U.S. at 185 ("[A] plaintiff must demonstrate standing separately for each form of relief sought."). Therefore, I believe the complexity of this case calls for a far more specific and comprehensive analysis than that offered by my colleagues.

A comprehensive analysis of all six claims in a single opinion, however, invites some overlap of legal doctrine, precedent, and reasoning. Such overlap similarly invites ambiguity, confusion, and misapplication. To avoid this pitfall, I define the plaintiffs' alleged injuries precisely, confine each cause of action to its own section, and take special care to ensure that I do not improperly carry precedent or legal doctrine from one cause of action to another. The benefit of precision will, I hope, outweigh any annoyance created by strict compartmentalization or redundancy.

IV.

The analytical approach to the determination of standing for constitutional claims differs from the approach to statutory claims. *See Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972).

> Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue. Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a personal stake in the outcome of the controversy, as to ensure that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. Where, however, Congress has authorized public officials to perform certain functions according to law, and has provided by statute for judicial review of those actions under certain circumstances, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff.

Id. (quotation marks and citations omitted). The Court clarified:

> Congress may not confer jurisdiction on Art. III federal courts to render advisory opinions, or to entertain 'friendly' suits, or to resolve 'political questions,' because suits of this character are inconsistent with the judicial function under Art. III. But where a dispute is otherwise justiciable, the question whether the litigant is a 'proper

[18] *See, e.g.*, *Eisenstadt v. Baird*, 405 U.S. 438, 445 n.5 (1972) ("Indeed, in First Amendment cases we have relaxed our rules of standing without regard to the relationship between the litigant and those whose rights he seeks to assert precisely because application of those rules would have an intolerable, inhibitory effect on freedom of speech."); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 546-47 (1981) ("The most important exception to this standing doctrine permits some litigants to challenge on First Amendment grounds laws that may validly be applied against them but which may, because of their unnecessarily broad reach, inhibit the protected speech of third parties.").

> party to request an adjudication of a particular issue,' is one within the power of Congress to determine.

Id. at 732 n.3 (citations omitted).[19] Therefore, this analysis is separated into two sections — constitutional claims and statutory claims — and, by happenstance, the six causes of action are equally divided, with three in each section.

A. Constitutional Claims

"The irreducible constitutional minimum of standing contains three requirements": "[1] injury in fact, [2] causation, and [3] redressability." *Steel Co.*, 523 U.S. at 102-03 (citations and footnotes omitted). "Injury in fact" is a harm suffered by the plaintiff that is "concrete and actual or imminent, not conjectural or hypothetical." *Id*. at 103 (quotation marks omitted) (*citing Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). "Causation" is "a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant." *Id*. (*citing Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). "Redressability" is "a likelihood that the requested relief will redress the alleged injury." *Id*. (*citing Warth*, 422 U.S. at 505). This "irreducible constitutional minimum" applies to every claim sought to be litigated in federal court.

1. First Amendment

The plaintiffs allege that the NSA has, by conducting the warrantless wiretaps, violated the free speech and free association clauses of the First Amendment. The district court assumed that the plaintiffs had engaged in certain "protected expression," apparently referring to the telephone and email communications. Although the plaintiffs' painstaking efforts to keep these communications confidential belies the contention that this case involves *expression*,[20] I nonetheless assume this is a viable First Amendment cause of action. Standing to litigate this claim requires a showing of three elements: (1) injury in fact, (2) causation, and (3) redressability. *Steel Co.*, 523 U.S. at 102-03.

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[19] *Sierra Club* twice acknowledges that courts reach this analysis only where it is determined that the controversy at issue is "otherwise justiciable." *Sierra Club*, 405 U.S. at 731-32. Justiciability, of course, includes numerous doctrines, including mootness, standing, the prohibition on advisory opinions, and the political question doctrine. *See Flast v. Cohen*, 392 U.S. 83, 95 (1968). *Sierra Club*'s use of the term "otherwise justiciable" thus refers to the doctrines of justiciability "other" than standing. Assuming that these other justiciability doctrines are satisfied, *Sierra Club* distinguishes between standing analysis for statutory and non-statutory claims. For non-statutory claims, which include the constitutional claims at issue here, *Sierra Club* requires the plaintiffs to show that they have a "personal stake in the outcome of the controversy." *Sierra Club*, 405 U.S. at 732. The Court used this "personal stake in the outcome" language to define Article III standing prior to its adoption of the three-part test in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). But the standing analysis is different for statutory claims. *Sierra Club* instructs courts that "the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff." *Sierra Club*, 405 U.S. at 732. This instruction to begin standing analysis with the statutory language makes perfect sense in light of the well-established legal principle that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973); *see also Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41 n.22 (1976), (recognizing "Congress' power to create new interests the invasion of which will confer standing"). Thus the analysis of whether the plaintiffs have standing to bring a statutory claim necessarily requires a determination of whether the plaintiffs were injured under the relevant statute.

[20] There is, in fact, a certain view that this is not a First Amendment issue at all. *See Gordon v. Warren Consol. Bd. of Educ.*, 706 F.2d 778, 781 n.3 (6th Cir. 1983) (noting that surveillance, which falls under the Fourth Amendment, "does not violate First Amendment rights, even though it may be directed at communicative or associative activities"). Ultimately, however, this distinction is a merits issue that I need not — and indeed cannot — address at this stage.

Injury in Fact

"Art. III requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Valley Forge Christian Coll. v. Ams. United for Sep. of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (quotation marks omitted). "Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm[.]" *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972). The Supreme Court's "clear precedent requir[es] that the allegations of future injury be particular and concrete." *Steel Co.*, 523 U.S. at 109.

The Supreme Court framed the question in *Laird*, 408 U.S. at 10, as "whether the jurisdiction of a federal court may be invoked by a complainant who alleges that the exercise of his First Amendment rights[21] is being chilled by the mere existence, without more, of a governmental investigative and data-gathering activity." The Court held that its plaintiffs, subjects of secret United States Army surveillance, may have suffered a "subjective chill," but did not allege a sufficiently concrete, actual, and imminent injury to entitle them to standing. *Id*. at 15. Something "more" was necessary, and in a passage that is peculiarly applicable to the present case, the Court explained:

> In recent years [we have] found in a number of cases that constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights. In none of these cases, however, did the chilling effect arise merely from the individual's knowledge that a governmental agency was engaged in certain activities or from the individual's concomitant fear that, armed with the fruits of those activities, the agency might in the future take some other and additional action detrimental to that individual. Rather, in each of these cases, the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature, *and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging*.

Id. at 11 (citations omitted; emphasis added); *accord Sinclair*, 916 F.2d at 1114-15 (finding surveillance alone insufficient for standing); *United Presb. Church v. Reagan*, 738 F.2d 1375, 1380 (D.C. Cir. 1984) (finding no injury in fact because "no part of the challenged [surveillance] imposes or even relates to any direct governmental constraint upon the plaintiffs").

I cannot subscribe to a view that the reason the injury in *Laird* was insufficient was because the plaintiffs alleged "only" chilled speech and that, by something "more," the *Laird* Court meant more subjective injury or other injuries that derive from the chilled speech. The plaintiffs in *Laird* were political activists and the speech being chilled was political speech. *Laird*, 408 U.S. at 2. In First Amendment jurisprudence, political speech is the most valued type of speech. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring) ("Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position. . . ."). To say that there could be more injury in other circumstances is to suggest that political speech is not valuable in and of itself and that no consequences flow from the chilling of political speech if such consequences are not easily articulable. Certain plaintiffs in the present case contend that the "professional injuries" that flow from the chilling of their "professional" speech is enough to satisfy *Laird*'s requirement of something "more." Under such reasoning, if the *Laird* plaintiffs had alleged a chilling of some

[21] *Laird* involved a First Amendment claim. I do not assert or imply that *Laird*'s holding, which I narrowly construe as regarding only a subjective chill *on First Amendment rights*, extends to any other causes of action.

commercial speech, they would have had standing because the lost sales would constitute easily articulable injuries resulting from the chilling, which would — under this view — constitute something "more." This is nonsense, as it would effectively value commercial speech above political speech and protect the former but not the latter. It is also at odds with the remainder of the *Laird* opinion and First Amendment doctrine in general. Consequently, it is not the value of the speech that determines the injury but the level of restraint, and "chilling" is not sufficient restraint no matter how valuable the speech.

Therefore, to allege a sufficient injury under the First Amendment, a plaintiff must establish that he or she is regulated, constrained, or compelled directly by the government's actions, instead of by his or her own subjective chill. *Laird*, 408 U.S. at 11; *Reagan*, 738 F.2d at 1378. The D.C. Circuit's decision in *Reagan*, 738 F.2d at 1380, involved a plaintiff's First Amendment challenge to alleged government surveillance. The *Reagan* court clarified why mere subjective chill deriving from government surveillance is insufficient to establish a concrete injury, stating:

> The harm of 'chilling effect' is to be distinguished from the immediate threat of concrete, harmful action. The former consists of present deterrence [of the plaintiff, by the government,] from First Amendment conduct because of the difficulty [that plaintiff has in] determining the application of a [government practice] to that conduct, and will not by itself support standing.

Id. "'Chilling effect' is cited as the *reason* why the governmental imposition is invalid [under the First Amendment] rather than as the *harm* which entitles the plaintiffs to challenge it." *Id*. at 1378. In an attempt to establish harm, the *Reagan* plaintiffs claimed that they were "especially likely to be targets of the unlawful [surveillance] authorized by the order," but the court explained:

> Even if it were conceded that . . . the plaintiffs [were] at greater risk than the public at large, that would still fall far short of the 'genuine threat' required to support this theory of standing, as opposed to mere 'speculative' harm. It must be borne in mind that this order does not *direct* intelligence-gathering activities against all persons who could conceivably come within its scope, but merely *authorizes* them.

Id. at 1380 (citations omitted). The *Reagan* court therefore held that the plaintiffs failed to satisfy the injury-in-fact requirement because they did not allege that "any direct governmental constraint" was "threatened or even contemplated against them." *Id*. The present case is no different.

The plaintiffs here contend that the NSA has inflicted First Amendment injury in two ways, both of which prevent them from performing their jobs or pursuing other lawful objectives. The first injury, which went unaddressed by the district court, involves the plaintiffs' own unwillingness to communicate with their overseas contacts by telephone or email. The plaintiffs fear that the NSA may intercept their communications, and therefore, their ethical obligations require them to forgo the communications in order to avoid interception. The injurious consequence of the NSA's conduct, the plaintiffs contend, is that they must either suffer diminished performance in their jobs for lack of communication, or else bear the cost of traveling overseas to meet with these contacts in person.

Even accepting this as a good faith assertion and assuming the factual statements are true, the plaintiffs' first injury still involves two purely speculative fears: (1) that the NSA will actually intercept the plaintiffs' particular communications, and (2) that armed with the fruit of those interceptions, the NSA will take action detrimental to the contacts. If, on the other hand, the plaintiffs could be assured that the NSA would not intercept their communications, or, if interception occurs, that no harm would befall the overseas contacts, then the NSA could continue the TSP

wiretapping without harm to the plaintiffs.[22] It is not the mere existence of the TSP, but the possibility that the plaintiffs' overseas contacts will be subjected to it, that ultimately results in the alleged harm. Even assuming these fears are imminent rather than speculative, this is still a tenuous basis for proving a *concrete* and *actual* injury. That is, even if it were certain that the NSA would intercept these particular plaintiffs' overseas communications, if the overseas contacts were nonetheless willing to communicate with the plaintiffs by telephone or email in spite of the impending interception, then it is doubtful that the plaintiffs (journalists, academics, lawyers, or organizations), who have themselves alleged no personal fear of our government (or basis for fear of our government), would still be unwilling or unable to communicate. The plaintiffs' unwillingness comes not from any anticipated harm to themselves, but from their apprehension for and duty to their overseas contacts.[23]

Moreover, even if their allegations are true, the plaintiffs still allege only a subjective apprehension and a personal (self-imposed) unwillingness to communicate, which fall squarely within *Laird*, 408 U.S. at 13-14. In fact, this injury is even *less* concrete, actual, or immediate than the injury in *Laird.* In *Laird*, the Army was conducting "massive and comprehensive" surveillance of civilians, secretly and (apparently) without warrants. The *Laird* plaintiffs alleged that the Army surveillance program caused a chilling effect on their First Amendment rights in that they and others were reluctant to associate or communicate for fear of reprisal, stemming from their fear that the government would discover or had discovered them (and their activities) by way of the secret surveillance. The harm alleged in the present case is no more substantial; the plaintiffs allege a similar chilling effect on their First Amendment rights, in that they are bound by professional and ethical obligations to refrain from communicating with their overseas contacts due to their fear that the TSP surveillance will lead to discovery, exposure, and ultimately reprisal against those contacts or others. But unlike the *Laird* plaintiffs, the plaintiffs here do not assert that they personally anticipate or fear any direct reprisal by the United States government, or that the TSP data is being widely circulated or misused. Indeed, the district court stated that, to date, no one has been exposed or prosecuted based on information collected under the TSP. *ACLU v. NSA*, 438 F. Supp. 2d at 771.

The plaintiffs attempt to distinguish *Laird*. They first contend that they have alleged a chilling of their own communications, whereas the *Laird* plaintiffs did not. But the *Laird* plaintiffs alleged the same amount (or lack) of personalized surveillance as the present plaintiffs claim, and both alleged a chilling of their own communications. Even if this distinction were accurate, it would not alter *Laird*'s holding that federal courts lack jurisdiction over cases in which the plaintiff "alleges that the exercise of his First Amendment rights is being chilled by the mere existence, without more, of a governmental investigative and data-gathering activity." *Laird*, 408 U.S. at 10. The plaintiffs next argue that they have alleged a present injury, namely, an inability to engage in the communication necessary to perform their professional duties, whereas the plaintiffs in *Laird* alleged only a speculative future harm. But the injury alleged here is just as attenuated as the future

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[22] As discussed in Section II, this scenario could result in a breach of the plaintiffs' privacy under the Fourth Amendment, but the present analysis concerns only the First Amendment cause of action. The Fourth Amendment, and harms attributable to a defendant's breach of its protections, necessitate a different analysis. *See* Section IV.A.2.

[23] The plaintiffs who are lawyers take this argument one step further, alleging that their concerns render them incapable of communicating with their clients and others, which their duty of zealous representation to these clients demands. Because they assume with their "well founded belief" that their communications will be intercepted, they assert that knowingly engaging in such communications would breach their duty to keep those communications confidential. Therefore, they argue, their professionally imposed ethical obligations make the alleged effects more acute. As a lawyer, I am certainly mindful of these concerns, but I cannot escape the fact that they are premised on the plaintiffs' duties to their clients, and not on a personal harm to themselves. A client, after all, can waive such confidentiality, and if a fully informed overseas client who does not fear the NSA chooses to communicate with full awareness that the NSA might be listening, then the lawyer would not breach any duty by engaging in such communication.

harm in *Laird*; the present injury derives solely from the fear of secret government surveillance, not from some other form of direct government regulation, prescription, or compulsion. *Id*. at 11. Finally, the plaintiffs argue that the *Laird* plaintiffs' reactions to the surveillance were unreasonable because there was no illegal conduct alleged in that case. *Laird*, however, did not discuss the reasonableness of its plaintiffs' response; it held that the mere subjective chill arising from the government's investigative activity — reasonable or not — is insufficient to establish First Amendment standing. *Id*. at 15-16; *see also Reagan*, 738 F.2d at 1378 (rejecting an identical attempt to distinguish *Laird*). I find these attempts to distinguish *Laird* unpersuasive.

The plaintiffs have directed us to several other decisions as support for their assertion that their professional injuries constitute something "more" than subjective chill. *See, e.g.*, *Meese v. Keene*, 481 U.S. 465 (1987); *Ozonoff v. Berzak*, 744 F.2d 224 (1st Cir. 1984); *Paton v. LaPrade*, 524 F.2d 862 (3d Cir. 1975). I reiterate that the something "more" required by *Laird* is not merely more subjective injury, but is the exercise of governmental power that is regulatory, proscriptive, or compulsory in nature, and that directly regulates, proscribes, or compels the plaintiffs. And these three cases involve plaintiffs who can show direct injury because the government *did* directly regulate, order, or constrain them. These cases certainly do not help the present plaintiffs, who are not subject to any direct government regulation, order, or constraint. Rather, to the extent the plaintiffs claim that they are prevented, required, compelled, or coerced in their actions, it is due not to any direct and immediate order or regulation by the government, but to circumstances stemming from the plaintiffs' own subjective apprehension that (1) their communications will be intercepted by the NSA and (2) that interception will be detrimental to their overseas contacts. This is not a concrete, actual, and imminent injury for purposes of establishing standing. *See Laird*, 408 U.S. at 11; *Reagan*, 738 F.2d at 1378-80.

In *Meese v. Keene*, 481 U.S. at 465, the plaintiff, Mr. Keene, a lawyer and a member of the state legislature, wanted to exhibit certain films that a federal statute required be labeled as "political propaganda." *Id.* at 469-70. The Court found that the harm to Mr. Keene's personal, political, and professional reputation, that would result from his exhibiting films labeled "propaganda," constituted injury in fact. *Id.* at 472. It is evident from even a cursory reading of the case, however, that Mr. Keene was subject to a *regulatory* statute that directly and expressly *ordered* the labeling of the films in the manner that would cause the harm. *Id.* at 472-74. The plaintiffs in the present case are not regulated by the NSA's operation of the TSP in any way, nor are they directly ordered to do or refrain from doing anything. *Meese* offers no support for the plaintiffs' position.

In *Ozonoff v. Berzak*, 744 F.2d at 224, the plaintiff, Dr. Ozonoff, sought employment with the World Health Organization, and the government ordered him to submit to a loyalty investigation as a condition of seeking the job. *Id.* at 225. The First Circuit found that this requirement created a speech- and association-related qualification for the WHO job, which effectively punished Dr. Ozonoff for joining certain organizations or expressing certain views. The court held that this requirement created a concrete injury, satisfying the injury-in-fact element. *Id.* at 229. In contrast, the NSA's operation of the TSP does not directly *order* or *require* the plaintiffs to do anything; instead, it is the plaintiffs' subjective apprehension (that the NSA might intercept their communication) that compels, coerces, or motivates the plaintiffs to alter their behavior. As with *Meese*, *Ozonoff* offers no support for the plaintiffs' position under the present circumstances.

Finally, in *Paton v. LaPrade*, 524 F.2d at 862, Ms. Paton challenged the government's retention of an FBI file on her alleged involvement with the Socialist Workers Party because the existence of that file "endanger[ed] her future educational and employment opportunities." *Id.* at 868. The Third Circuit found a sufficiently concrete future injury deriving from the existence of that file. *Id.* Ms. Paton was not only subject to government regulation, she *knew and could prove* that the government had intercepted *her* specific mail (not just mail of a like kind) and was maintaining an FBI file on *her* particular activities (not just activities of a like kind). In stark contrast, the

plaintiffs in the present case allege only their suspicion and fear (i.e., their "well founded belief") that their contacts are likely targets of the TSP or that their communications are likely to be intercepted. As documented in the present record, the plaintiffs have not demonstrated and cannot demonstrate that the NSA is monitoring their particular personal activities.

I find no basis — either factual or legal — upon which to distinguish *Laird* from the First Amendment claim raised by the plaintiffs here, and I conclude that *Laird* controls this claim. But let me reemphasize, just to be perfectly clear, that I do not contend that *Laird* controls this entire case — it does not. *Laird* controls the First Amendment *claim*, based on the first type of injury. The plaintiffs' first alleged injury, arising from a personal subjective chill, is no more concrete, actual, or imminent than the injury alleged in *Laird*. The injury in *Laird* was insufficient to establish standing for a First Amendment cause of action; the plaintiffs' first injury is less than or, at best, equal to that in *Laird*; and the plaintiffs' first injury is likewise insufficient to establish standing.

The plaintiffs' second injury is the unwillingness of their overseas contacts, clients, witnesses, and sources to communicate by telephone or email, due to their fear that the NSA will intercept the communications. The district court, in its standing analysis, framed the issue this way:

> The Plaintiffs in this case are not claiming simply that the [NSA]'s surveillance has 'chilled' them from making international calls to sources and clients.[24] *Rather, they claim that Defendants' surveillance has chilled their sources, clients, and potential witnesses from communicating with them.* The alleged effect on Plaintiffs is a concrete, actual inability to communicate with witnesses, sources, clients and others without great expense which has significantly crippled Plaintiffs, at a minimum, in their ability to report the news and competently and effectively represent their clients.

ACLU v. NSA, 438 F. Supp. 2d at 769 (emphasis added). Under this view, the plaintiffs claim that their contacts have been chilled, which prevents them from communicating with these contacts.[25]

In *Presbyterian Church v. United States*, 870 F.2d 518, 520 (9th Cir. 1989), the Ninth Circuit considered a claim by plaintiff churches that "INS agents entered the churches wearing 'body bugs' and surreptitiously recorded church services" in violation of the First and Fourth Amendments. The district court had dismissed the claims for lack of standing, based on the plaintiffs' failure to show injury in fact, opining that the protections of the First Amendment extend not to corporations but to individuals, because "churches don't go to heaven." *Id.* at 521. On appeal, the Ninth Circuit reversed, finding that the plaintiff churches had pled a sufficient injury:

> When congregants are chilled from participating in worship activities [and] refuse to attend church services because they fear the government is spying on them and taping their every utterance, all as alleged in the complaint, we think a church suffers *organizational injury* because its ability to carry out its ministries has been impaired.

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[24] In fact, the plaintiffs *are* claiming that the NSA's surveillance (coupled with their own ethical obligations) has chilled them from making international calls to sources and clients, as has been discussed throughout this opinion thus far. The district court simply misunderstood the extent of the plaintiffs' claims.

[25] In finding an injury on this theory — the unwillingness of the plaintiffs' overseas contacts to communicate due to their fear that the NSA is eavesdropping — the district court relied on affidavits submitted by several of the individual plaintiffs. None of the overseas contacts provided an affidavit or testimony of their alleged fear; the theory is based solely on the plaintiffs' own testimony, which is self-serving and may be inadmissible as hearsay. Ultimately, however, the questionable character of this evidence has no bearing on this injury-in-fact analysis, because the outcome is the same even if I assume it to be true.

Id. at 522 (emphasis added). The Ninth Circuit then distinguished *Laird*:

> Although *Laird* establishes that a litigant's allegation that it has suffered a subjective 'chill' does not necessarily confer Article III standing, *Laird* does not control this case. The churches in this case are not claiming simply that the INS surveillance has 'chilled' them from holding worship services. Rather, they claim that the INS surveillance has chilled individual congregants from attending worship services, and that this effect on the congregants has in turn interfered with the churches' ability to carry out their ministries. The alleged effect on the churches is not a mere subjective chill on their worship activities; it is a concrete, demonstrable decrease in attendance at those worship activities. The injury to the churches is 'distinct and palpable.' *Laird* has no application here.

Id. (citations omitted).

In one sense, the Ninth Circuit's decision could be read as concluding that the churches suffered injury based on the actions of third parties (i.e., individual parishioners) — a reading that supports the plaintiffs' arguments in favor of standing.[26] In another sense, however, the Ninth Circuit's decision may be confined to the unique idea of "organizational injury"; a church is, after all, an organization comprising a congregation of parishioners, and these congregants are properly viewed as intrinsic to the church organization, rather than as separate third parties. This reading of *Presbyterian Church* would weaken its application to the present context because the overseas third-party clients, contacts, and sources in this case are not affiliated with the plaintiffs in the same intrinsic manner as are parishioners with a church.[27] None of the plaintiffs have alleged any "organizational injury" in the present context.[28]

Having acknowledged these alternative interpretations of *Presbyterian Church*, it is unnecessary to resolve that issue definitively on this record. Injury in fact is but one of the criteria necessary to establish standing, and ultimately, it is not determinative of this case. Either of the other two criteria — causation or redressability — might ultimately defeat the plaintiffs' claim of standing, even if the plaintiffs' alleged injury is deemed adequate to state an injury in fact.

Causation

"[F]ederal plaintiffs must allege some threatened or actual injury *resulting from the putatively illegal action* before a federal court may assume jurisdiction." *Simon*, 426 U.S. at 41 (citations and footnotes omitted; emphasis added). "In other words, . . . a federal court [may] act only to redress injury that fairly can be traced to the challenged action of the defendant, and *not injury that results from the independent action of some third party not before the court*." *Id*. at 41-42 (emphasis added). Causation "depends considerably upon whether the plaintiff is himself an object of the action . . . at issue." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). When causation hinges on independent third parties, the plaintiff has the burden of showing that the third

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[26] But see the discussion of the causation element in this First Amendment analysis, *infra*, regarding the difficulties of obtaining standing based on the conduct of third-party actors.

[27] The plaintiffs have not claimed membership in any overriding "organization" that would include the plaintiffs *and* the overseas contacts. There has been no suggestion that the plaintiff journalists, academics, or lawyers are members of al Qaeda, or that their overseas contacts — presumably suspected by the NSA of being al Qaeda operatives or affiliates — are (or desire to be) members of some organization of American journalists, academics, or lawyers.

[28] Certain plaintiffs are organizations (American Civil Liberties Union, Council on American Islamic Relations, Greenpeace) and it is therefore possible that these plaintiffs, on a different record, might assert organizational injury.

parties' choices "have been or will be made in such a manner as to produce causation and permit redressability of injury." *Id.* at 562.

In the present case, the "putatively illegal action" is the NSA's interception of overseas communications without warrants (specifically FISA warrants), and the "threatened or actual injury" is the added cost of in-person communication with the overseas contacts (or correspondingly, the diminished performance resulting from the inability to communicate). Therefore, to show causation, the plaintiffs must show that, but for the lack of warrants (or FISA compliance), they would not incur this added cost. There are two causal pathways based on the two types of alleged injury. In the first: (1) the NSA's warrantless wiretapping, (2) creates in the plaintiffs a "well founded belief" that their overseas telephone and email communications are being intercepted, which (3) requires the plaintiffs to refrain from these communications (i.e., chills communication), and (4) compels the plaintiffs to travel overseas to meet personally with these contacts in order to satisfy their professional responsibilities, thereby (5) causing the plaintiffs to incur additional costs. In the second: (1) the NSA's warrantless wiretapping (2) causes the "well founded belief," which (3) compels the overseas contacts to refuse to communicate by telephone or email (i.e., chills communication), thereby (4) requiring in-person communication, with its (5) associated additional costs. The district court attempted to articulate this relationship: "All of the Plaintiffs contend that the TSP has caused clients, witnesses and sources to discontinue their communications with plaintiffs out of fear that their communications will be intercepted." *ACLU v. NSA*, 438 F. Supp. 2d at 767 (footnote omitted). From this, the district court theorized: "Plaintiffs would be able to continue using the telephone and email in the execution of their professional responsibilities if the Defendants were not undisputedly and admittedly conducting warrantless wiretaps of conversations." *Id*. at 769. In considering these causal pathways, I question the second step (whether the "well founded belief" is actually founded on the warrantless wiretapping) and refute the third step (whether the unwillingness to communicate is actually caused by the warrantless character of the wiretaps).

The underpinning of the second step is questionable. The plaintiffs allege that they have a "well founded belief" that their overseas contacts are likely targets of the NSA and that their conversations are being intercepted. The plaintiffs have no evidence, however, that the NSA has actually intercepted (or will actually intercept) any of their conversations. No matter what the plaintiffs and others might find "reasonable," the evidence establishes only a *possibility* — not a probability or certainty — that these calls might be intercepted, that the information might be disclosed or disseminated, or that this might lead to some harm to the overseas contacts. While this lack of evidence is not, by itself, enough to *disprove* causation, the absence of this evidence makes the plaintiffs' showing of causation less certain and the likelihood of causation more speculative.

The third step is unsupportable. In this step, the plaintiffs allege, and the district court found, that it is *the absence of a warrant* (and all that goes with it[29]) that has chilled the plaintiffs and their overseas contacts from communicating by telephone or email. *See ACLU v. NSA*, 438 F. Supp. 2d at 769 ("Plaintiffs would be able to continue using the telephone and email in the execution of their professional responsibilities if the Defendants were not undisputedly and admittedly conducting

[29] The well-known Fourth Amendment warrant requirement involves interjection of a neutral and detached magistrate, demonstration of probable cause, and description of the things to be seized or the place to be searched. *See Dalia v. United States*, 441 U.S. 238, 255 (1979); *United States v. U.S. Dist. Ct.* (*Keith*), 407 U.S. 297, 316 (1972). The more obscure FISA warrant requirement involves a petition by a federal official, with the approval of the Attorney General, 50 U.S.C. § 1804(a), to a special FISA Court, § 1803(a), for an order approving the electronic surveillance for foreign intelligence purposes, § 1805, based upon "probable cause to believe that the target of the electronic surveillance is a foreign power or the agent of a foreign power," § 1805(a)(3)(A). The FISA petition and order must include, among other things, provisions to limit the duration, §§ 1805(a)(10), -(c)(1)(E), -(e), and content, §§ 1804(a)(6), 1805(c)(1)(C), 1806(i), of the surveillance, and provisions to ensure the minimization of the acquisition, retention, and dissemination of the information, §§ 1804(a)(5), 1805(a)(4), -(c)(2(A), 1806, 1801(h).

warrantless wiretaps of conversations."). This allegation does not stand up under scrutiny, however, and it is not clear whether the chill can fairly be traced to the absence of a warrant, or if the chill would still exist without regard to the presence or absence of a warrant. The insufficiency of this step leads to a breakdown in the causal pathway. *See Simon*, 426 U.S. at 42-43; *Laird*, 408 U.S. at 14 n.7 ("Not only have respondents left somewhat unclear the precise connection between the mere existence of the challenged system and their own alleged chill, but they have also cast considerable doubt on whether they themselves are in fact suffering from any such chill.").

A wiretap is always "secret" — that is its very purpose — and because of this secrecy, neither the plaintiffs nor their overseas contacts would know, with or without a warrant, whether their communications were being tapped. Therefore, the NSA's secret possession of a warrant would have no more effect on the subjective willingness or unwillingness of these parties to "freely engage in conversations and correspond via email," *see ACLU v. NSA*, 438 F. Supp. 2d at 770, than would the secret absence of that warrant. The plaintiffs have neither asserted nor proven any basis upon which to justifiably conclude that the mere absence of a warrant — rather than some other reason, such as the prosecution of the War on Terror, in general, or the NSA's targeting of communications involving suspected al Qaeda terrorists, affiliates, and supporters, in particular — is the cause of the plaintiffs' (and their overseas contacts') reluctance to communicate by telephone or email.

The plaintiffs have argued that if the NSA were to conduct its surveillance in compliance with FISA, they would no longer feel compelled to cease their international telephone and email communications.[30] But again, even if the NSA had (secretly) obtained FISA warrants for each of the overseas contacts, who the plaintiffs themselves assert are likely to be monitored, the plaintiffs would still not have known their communications were being intercepted, still faced the same fear of harm to their contacts, still incurred the same self-imposed (or contact-imposed) burden on communications and, therefore, still suffered the same alleged injury. The plaintiffs' theory relies on their contention that their ethical obligations require them to cease telephone or email communications any time they believe the private or privileged information in those communications might be discovered or disclosed to the detriment of their clients, sources, or contacts. Assuming that this contention is true, it must also be true that this ethical obligation would arise whenever, and continue so long as, the plaintiffs believe their contacts to be the types of people likely to be monitored by the NSA.

The imposition of FISA requirements into this scenario would not change the likelihood that these overseas contacts are the types of people who the plaintiffs believe would be monitored. Nor would it change the plaintiffs' "well founded belief" that the NSA is intercepting their communications with these individuals, the plaintiffs' ethical obligations, or the overseas contacts' subjective fears. Even under the plaintiffs' depiction, it would merely assure the plaintiffs and their contacts that — while their international telephone and email communications with al Qaeda affiliates are still just as likely to be intercepted — the NSA will obtain FISA Court orders, which will presumably limit the duration and content of the acquisition and the use and dissemination of the acquired information. The plaintiffs, however, have not asserted, explained, or proven how a change in the duration or content of the NSA's interceptions — purely hypothetical changes that are unknown and unknowable based on the established record and the State Secrets Doctrine — would alleviate their fears. Specifically, the plaintiffs have not proffered any types or topics of communication, from which they are currently refraining, but about which — upon the imposition

[30] FISA's applicability (i.e., the plaintiffs' standing to bring a cause of action under FISA) is addressed separately in Section IV.B.3, *infra*. The present discussion, which concerns only the plaintiffs' assertion that their First Amendment injuries are caused by the NSA's failure to comply with FISA (or would be redressed by imposing FISA's requirements), assumes FISA's applicability and does not address standing *vis a vis* a FISA cause of action.

of FISA's limitations and protections — they would thereafter "freely engage in conversations and correspond[ence] via email." *See ACLU v. NSA*, 438 F. Supp. 2d at 770.

Some plaintiffs (especially those who are lawyers) assert that the imposition of FISA minimization — to limit the use and dissemination of the information acquired — would relieve their fears sufficiently to satisfy their ethical obligations because it would ensure that those communications would remain confidential and privileged in the event of a subsequent criminal prosecution, removal proceeding, military tribunal, etc. Therefore, they argue, imposition of FISA requirements would alter the type and content of their communications. This theory, however, is predicated on the assumption that their current fears and apprehensions are justified — and there is no support for this assumption. First, there is no evidence in the current record from which to presume that the information collected by the NSA via warrantless wiretapping will be used or disclosed for any purpose other than national security. Next, there is no evidence in the record from which to presume that the NSA is not complying with, or even exceeding, FISA's restrictions on the acquisition, retention, use, or disclosure of this information (i.e., FISA's minimization techniques). Finally, there is no basis to presume that traditional *post-hoc* remedies, such as the Exclusionary Rule or FISA's civil suit provision, 50 U.S.C. § 1810, would not adequately deter the use or dissemination of this information. Consequently, this disconnect in the plaintiffs' theory is unavoidable, and the plaintiffs' injury is not fairly traceable to the mere absence of FISA compliance.

Under the plaintiffs' second form of injury (i.e., the refusal by the overseas contacts to communicate by telephone or email), this third step in the causal pathway is further disrupted by the independent decisions of the third-party overseas contacts. In *Simon*, the Supreme Court held that, due to the independence of third-party actors, its plaintiffs could not prove a causal connection between the defendant's misconduct and the alleged injury:

> The complaint here alleged only that [the government], by the adoption of Revenue Ruling 69-545, had 'encouraged' [the third-party] hospitals to deny services to [the indigent plaintiffs]. . . . [But, it] is purely speculative whether the denials of service [i.e., the alleged harm] specified in the complaint fairly can be traced to [the government's] 'encouragement' or instead result from decisions made by the [third-party] hospitals without regard to the tax implications [i.e., government conduct].

Simon, 462 U.S. at 42-43. In the present case, as in *Simon*, it is possible that the overseas contacts' refusal to communicate with the plaintiffs has no relation to the putatively illegal government action of wiretapping without FISA compliance. The mere fact that the United States government is aggressively prosecuting a worldwide War on Terror — in which, by the plaintiffs' own "well founded belief," these contacts are likely suspects — would appear sufficient to chill these overseas contacts regardless of the absence of FISA protections. Notably, the record contains no testimony, by affidavit or otherwise, from any of the overseas contacts themselves as to the cause of their refusal to communicate; it contains only the plaintiffs' self-serving assertions and affidavits.

The plaintiffs have not shown a sufficient causal connection between the complained-of conduct (i.e., the absence of a warrant or FISA protection) and the alleged harm (i.e., the inability to communicate). This inadequacy is further exemplified in the analysis of redressability.

Redressability

"Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co.*, 523 U.S. at 107. Redressability thus requires "that prospective relief will remove the harm," *Warth*, 422 U.S. at 505, and the plaintiff must show "that he personally would benefit in a tangible way from the court's intervention," *id*. at 508 (footnote omitted). In the prototypical redressability case, *Linda R.S. v.*

Richard D., 410 U.S. 614, 615 (1973), a single mother sought to compel the State to enforce a criminal statute against the father of her illegitimate child and imprison him for his failure to pay child support. The Supreme Court acknowledged that the mother had "no doubt suffered an injury stemming from the failure of her child's father to contribute support payments." *Id*. at 618. The Court reasoned, however, that even if she "were granted the requested relief, it would result only in the jailing of the child's father," and not remedy the harm caused by his failure to pay child support. *Id*. The Court thus held that "the 'direct' relationship between the alleged injury and the claim sought to be adjudicated, which . . . is a prerequisite of standing," was absent in that case. *Id*.

In the present case, the plaintiffs requested a declaratory judgment and an injunction. They theorize that their injury (i.e., deficient professional performance or the additional cost of in-person communication) will be redressed by a declaration that the NSA's practice of warrantless wiretapping is unlawful, because it naturally follows that the unlawful conduct will be prohibited. The declaratory judgment thus forms the basis for an injunction prohibiting interception of communications without FISA compliance. The district court agreed, declaring the NSA's conduct illegal and imposing an injunction, on the belief that its injunction would redress the plaintiffs' injury by assuring them "that they could freely engage in conversations and correspond via email without concern, at least without notice, that such communications were being monitored." *ACLU v. NSA*, 438 F. Supp. 2d at 770-71. This theory of redressability rests on the premise that the NSA's compliance with FISA's warrant requirements will entice the plaintiffs and their contacts to "freely engage in conversations and correspond via email without concern." The likelihood of this outcome, however, "can, at best, be termed only speculative," *see Linda R.S.*, 410 U.S. at 618; it is just as likely (if not more likely) that, even with the imposition of a warrant requirement, the plaintiffs' current situation will not change — their fears will not be abated.

The TSP is designed and operated for the prevention of terrorism, and the NSA is interested only in telephone and email communications in which one party to the communication is located outside the United States and the NSA has a "reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda." It is reasonable to assume that the FISA Court would authorize the interception of this type of communication, *see* 50 U.S.C. § 1805, and keeping this likelihood in mind, the issuance of FISA warrants would not relieve any of the plaintiffs' fears of being overheard; it would relieve them only of the fear that the information might be disseminated or used against them. *See* 50 U.S.C. §§ 1804(a)(5); 1801(b)(1)-(4); 1806(a) & (h) (minimization requirements).[31] Recall, however, that the NSA has not disclosed or disseminated any of the information obtained via this warrantless wiretapping. This "remedy" would therefore not alter the plaintiffs' current situation and, accordingly, would not redress the injuries alleged.

[31] FISA does not necessarily prohibit even the interception of attorney-client communications. Because FISA states that "[n]o otherwise privileged communication obtained in accordance with [FISA] shall lose its privileged character," 50 U.S.C. § 1806(a), it therefore follows that FISA, at least in some instances, authorizes the interception of privileged communications, which presumably includes communications between attorney and client. For example, FISA might not prohibit the interception of attorney-client communications under circumstances where the NSA adheres to a policy of complete non-disclosure. Due to the State Secrets Doctrine, the plaintiffs do not (and cannot) know whether the NSA actually adheres to a policy of complete non-disclosure, but based on the record evidence, it certainly remains possible. The plaintiffs have never alleged, nor is there evidence in the present record to suggest, that the information collected by the NSA under the TSP has been disclosed to anyone for any purpose. *See ACLU v. NSA*, 438 F. Supp. 2d at 771 ("the perceived need for secrecy has apparently required that no person be notified that he is aggrieved by the activity, and there have been no prosecutions, no requests for extensions or retroactive approvals of warrants"). In any event, FISA's general requirement that electronic surveillance may proceed only upon issuance of a FISA Court warrant is not absolute, as FISA provides for instances in which a prior warrant may be unnecessary, at least for a short period of time. *See, e.g.*, 50 U.S.C. § 1805(f) (emergency situations).

Neither will the requested injunctive relief increase the likelihood that the plaintiffs and their overseas contacts will resume telephone or email communications. As discussed previously, "warrantless" and "secret" are unrelated things. All wiretaps are secret, and the plaintiffs are not challenging the *secret* nature, but only the *warrantless* nature, of the TSP. Because all wiretaps are secret, neither the plaintiffs nor their overseas contacts would know — with or without warrants — whether their communications were being tapped, and the secret possession of a warrant would have no more effect on the subjective willingness or unwillingness of these parties to "freely engage in conversations and correspond via email" than would the secret absence of that warrant. Thus, as a practical matter, the mere issuance of a warrant would not alleviate either the plaintiffs' or the contacts' fears of interception, and consequently, would not redress the alleged injury. Even if the wiretaps were not secret — that is, if the overseas contacts and the plaintiffs were actually notified beforehand that the NSA was tapping their communication — this knowledge would not redress the alleged injury. It is patently unreasonable to think that those who are reluctant to speak when they *suspect* the NSA of listening would be willing to speak once they *know* the NSA is listening.

The district court's injunction is also insufficient to relieve the plaintiffs' fear of reprisal against their contacts. A warrant requirement will not protect the overseas contacts from prosecution in all circumstances, *see In re Sealed Case*, 310 F.3d. 717, 731 (F.I.S.C.R. 2002), which leaves some doubt whether this will allay their fears enough to entice them to resume unreserved communications with the plaintiffs. Ironically, the *absence* of a warrant would be more likely to prohibit the government from using the intercepted information in a subsequent prosecution, due to the probability that the Exclusionary Rule would bar the admission of information obtained without a warrant. *See Mapp v. Ohio*, 367 U.S. 643, 655 (1961). The warrant requirement does many things; it does not, however, remedy the injuries alleged by the plaintiffs in this case.

Similarly, to the extent the plaintiffs or their contacts fear some misconduct by the NSA (in the discovery, disclosure, or dissemination of the information), the mere requirement of a warrant, FISA or otherwise, will not guarantee the prevention of that misconduct, and therefore fails to satisfy the redressability element. In *Leeke v. Timmerman*, 454 U.S. 83, 84-85 (1981), federal prison inmates, who had filed criminal charges against prison guards for a beating that occurred during a prison uprising, filed suit in federal court to facilitate the issuance of arrest warrants for the guards. On review, the Supreme Court found that the issuance of an arrest warrant "is simply a prelude to actual prosecution," because "the decision to prosecute is solely within the discretion of the prosecutor [and] issuance of the arrest warrant in this case would not necessarily lead to a subsequent prosecution." *Id*. at 86-87. The Court held that the inmates lacked standing because there was "no guarantee that issuance of the arrest warrant[s] would remedy claimed past misconduct of guards or prevent future misconduct." *Id*. at 86. Any such guarantee (i.e, that the issuance of a FISA warrant will prevent future FISA misconduct) is similarly lacking in the present case.

Consequently, the district court's declaration against *warrantless* wiretaps is insufficient to redress the plaintiffs' alleged injury because the plaintiffs' self-imposed burden on communications would survive the issuance of FISA warrants. The only way to redress the injury would be to enjoin *all* wiretaps, even those for which warrants are issued and for which full prior notice is given to the parties being tapped. Only then would the plaintiffs be relieved of their fear that their contacts are likely under surveillance, the contacts be relieved of their fear of surveillance, and the parties be able to "freely engage in conversations and correspond via email without concern." Because such a broad remedy is unavailable, the plaintiffs' requested relief, which is much narrower, would not redress their alleged injury.

For the foregoing reasons, the plaintiffs in the present action have no standing to pursue their First Amendment claim. Even if they could demonstrate injury, they cannot establish causation, and their alleged injury is not redressable by the remedy they seek.

2. Fourth Amendment

The plaintiffs allege that the NSA has, by conducting the warrantless wiretaps, violated the "plaintiffs' privacy rights guaranteed by the Fourth Amendment." The district court — asserting a heretofore unprecedented, *absolute* rule that the Fourth Amendment "requires prior warrants for *any* reasonable search," *ACLU v. NSA*, 438 F. Supp. 2d at 775 — agreed and granted the plaintiffs' motion for summary judgment on this theory, *id.* at 782.

However, the Supreme Court has made clear that Fourth Amendment rights are "personal rights" which, unlike First Amendment rights, may not be asserted vicariously. *See Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978). The Court explained in *Rakas*:

> Under petitioners' target theory, a court could determine that a defendant had standing [] without having to inquire into the substantive question of whether the challenged search or seizure violated the Fourth Amendment rights of that particular defendant. However, having rejected petitioners' target theory and reaffirmed the principle that *the rights assured by the Fourth Amendment are personal rights, which may be enforced [] only at the instance of one whose own protection was infringed by the search and seizure*, the question necessarily arises whether it serves any useful analytical purpose to consider this principle a matter of standing, distinct from the merits of a defendant's Fourth Amendment claim. . . . Rigorous application of the principle that the rights secured by this Amendment are personal, in place of a notion of 'standing,' will produce no additional situations in which evidence must be excluded. The inquiry under either approach is the same. But we think the better analysis forth-rightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing.

Id. at 138-39 (quotation marks, citations, footnotes, and edits omitted; emphasis added); *see also Ellsberg v. Mitchell*, 709 F.2d 51, 65 (D.C. Cir. 1983) ("An essential element of each plaintiff's case is proof that he himself has been injured. Membership in a group of people, 'one or more' members of which were exposed to surveillance, is insufficient to satisfy that requirement.").

The plaintiffs do not, and cannot,[32] assert that any of their own communications have ever been intercepted. Instead, they allege only a belief that their communications are being intercepted, based on their own assessment of their overseas contacts as people who are likely to fall within the NSA's broad, public description of its targets. As acknowledged by plaintiffs' counsel at oral argument, it would be unprecedented for this court to find standing for plaintiffs to litigate a Fourth Amendment cause of action without any evidence that the plaintiffs themselves have been subjected to an illegal search or seizure. *See Rakas*, 439 U.S. at 133-34.

3. Separation of Powers

The plaintiffs allege that the NSA has, by conducting the warrantless wiretaps, "violat[ed] the principle of the separation of powers because [the NSA's conduct] was authorized by President Bush in excess of his Executive authority under Article II of the United States Constitution and is contrary to limits imposed by Congress." This two-part accusation — that President Bush (1) exceeded his presidential authority under the Constitution, and (2) violated a statutory limit imposed upon that authority by Congress — presupposes that the Constitution gives Congress the authority to impose limits on the President's powers under the present circumstances. The district

[32] The plaintiffs' prospective inability to assert that any of their personal communications have been intercepted is due to the State Secrets Doctrine. *See Reynolds*, 345 U.S. at 10.

court agreed with the plaintiffs' allegation *in toto*, and declared the NSA's conduct a violation of the Separation of Powers Doctrine. *See ACLU v. NSA*, 438 F. Supp. 2d at 779-79.

A plaintiff asserting a claim under the Separation of Powers Doctrine must, like all other plaintiffs seeking to bring a claim in federal court, demonstrate injury in fact, causation, and redressability. *INS v. Chadha*, 462 U.S. 919, 936 (1983) (requiring an "injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury"); *see also Buckley v. Valeo*, 424 U.S. 1, 117 (1976) (stating that "litigants with sufficient concrete interests at stake may have standing to raise constitutional questions of separation of powers"). Here, the plaintiffs contend that the executive branch (i.e., the NSA at the direction of the President) has, by instituting the TSP's practice of warrantless wiretapping, acted in excess of its constitutional or statutory limitations, thereby encroaching upon the powers expressly reserved to another branch (i.e., Congress). The NSA's violation of the Separation of Powers Doctrine, the plaintiffs say, has caused them to fear that the NSA might intercept their communications with their overseas contacts, preventing them from performing their jobs or pursuing other lawful objectives without incurring additional burden and expense.

To prove causation, the plaintiffs must connect the alleged separation-of-powers violation ("the putatively illegal action") to the burden on the performance of their professional obligations (the alleged injury). *See Simon*, 426 U.S. at 41. Six steps separate the putatively illegal conduct from the alleged injury: (1) the President allegedly exceeded his allotted authority by authorizing the NSA to conduct warrantless wiretapping as part of its enhanced national security (i.e., counter-terrorism) operations and the worldwide War on Terror, causing (2) the NSA to institute its practice of warrantless wiretapping under the TSP, causing (3) the plaintiffs' "well founded belief" that the NSA is intercepting their telephone and email communications, causing (4) either the plaintiffs themselves or the overseas contacts to refrain from these communications, causing (5) the plaintiffs either to underperform in their professional capacities or to travel to meet personally with these contacts, causing (6) the additional burden on performance of the plaintiffs' professional duties.

This record simply does not permit the kind of particularized analysis that is required to determine causation. Ignoring for a moment the first two steps in the analysis, it is clear that the third and fourth are problematic. The plaintiffs have presented no evidence to support their alleged "well founded belief" that their conversations are being intercepted. The evidence establishes only a *possibility* — not a probability or certainty — that these communications might be intercepted, disclosed, or disseminated. Furthermore, the *reasonableness* of this possibility is indeterminable, due to the limited record before us and the State Secrets Doctrine. Unlike each of the cases in which the Supreme Court has found standing for a Separation of Powers claim, the plaintiffs in this case do not, and cannot,[33] assert that they themselves have actually been subjected to the conduct alleged to violate the Separation of Powers. *See, e.g.*, *Chadha*, 462 U.S. at 923, 930, 935-36 (reviewing whether one "House of Congress" could order the plaintiff deported); *Buckley*, 424 U.S. at 117 (reviewing whether the Federal Election Commission could make rulings regarding the plaintiff); *Palmore v. United States*, 411 U.S. 389, 390 (1973) (reviewing whether the plaintiff could be tried before non-Article III courts); *Glidden Co. v. Zdanok*, 370 U.S. 530, 532-33 (1962) (reviewing whether the plaintiffs' cases could be adjudicated by judges designated from non-Article III courts). The Supreme Court has been clear that the injury must be "distinct and palpable, and not abstract or conjectural," so as to avoid "generalized grievances more appropriately addressed in the representative branches" and the electoral process. *Allen*, 468 U.S. at 751 (citations omitted).

[33] The plaintiffs' prospective inability to assert that any of their personal communications have been intercepted is due to the State Secrets Doctrine. *See Reynolds*, 345 U.S. at 10.

It is also unclear from the record whether the plaintiffs' or their contacts' refusal to communicate can fairly be traced to the President's authorization of an ambiguous warrantless wiretapping program, or if that same refusal would exist regardless of the authorization of the TSP. And any wiretap would be merely one component of counter-terrorist or military intelligence surveillance. Those such as the present plaintiffs, who choose to communicate with individuals located overseas who are by the plaintiffs' own reckoning individuals reasonably suspected to be al Qaeda terrorists, affiliates, or supporters, should expect that those communications will be subject to heightened monitoring and surveillance for national security or military purposes. Therefore, the plaintiffs have no evidence to support a conclusion that the President's authorization of the TSP would have any more effect on the parties' respective apprehensions than would the broader circumstances of the War on Terror and heightened national security.

Because the plaintiffs cannot demonstrate that the alleged violation of the Separation of Powers has caused their injury, they lack standing to litigate their separation-of-powers claim. It is therefore not necessary to address redressability, the third element of standing.

Finally, I note that the district court stated that, unless it found standing for these plaintiffs, the President's action would be insulated from judicial review. This idea, however, is neither novel nor persuasive. "The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974). Nevertheless, the district court editorialized that, if it "were to deny standing based on the unsubstantiated minor distinctions drawn by Defendants, the President's actions in warrantless wiretapping, in contravention of FISA, Title III, and the First and Fourth Amendments, would be immunized from judicial scrutiny. It was never the intent of the Framers to give the President such unfettered control . . . ." *ACLU v. NSA*, 438 F. Supp. 2d at 771.

The Supreme Court has confronted this suggestion and expressly rejected it, explaining its reasoning at some length:

> It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts. The Constitution created a *representative* Government with the representatives directly responsible to their constituents at stated periods of two, four, and six years; that the Constitution does not afford a judicial remedy does not, of course, completely disable the citizen who is not satisfied with the 'ground rules' established by the Congress for reporting expenditures of the Executive Branch. Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert his views in the political forum or at the polls. Slow, cumbersome, and unresponsive though the traditional electoral process may be thought at times, our system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them.

United States v. Richardson, 418 U.S. 166, 179 (1974). The Court noted in *Laird*: "there is nothing in our Nation's history or in this Court's decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the [executive branch] would go unnoticed or unremedied." *Laird*, 408 U.S. at 16.

The plaintiffs allege that the President, as an actor in our tripartite system of government, exceeds his constitutional authority by authorizing the NSA to engage in warrantless wiretaps of overseas communications under the TSP. But this court, not unlike the President, has constitutional limits of its own and, despite the important national interests at stake, cannot exceed its allotted authority. *See Steel Co.*, 523 U.S. at 125 n.20 ("[O]ur standing doctrine is rooted in separation-of-powers concerns."); *Flast*, 392 U.S. at 97 (stating that Article III standing limitations "confine federal courts to a role consistent with a system of separated powers"). It would ill behoove us to exceed our authority in order to condemn the President or Congress for exceeding theirs.

B. Statutory Claims

In addition to their three constitutional claims, the plaintiffs present statutory claims under the APA, Title III, and FISA (or a combination thereof). The first step is to consider whether any of these statutes "authorize[] review at the behest of the plaintiff[s]" — i.e., whether these statutes (1) govern the NSA's challenged conduct and (2) provide the plaintiffs a means of judicial review. *See Sierra Club*, 405 U.S. at 732. The availability of a statutory claim, however, does not relieve the plaintiffs of the need to establish constitutional standing to litigate that claim. *See Raines*, 521 U.S. at 820 n.3 ("It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.").[34]

This standing analysis includes consideration of both constitutional and prudential principles. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11-12 (2004). The irreducible constitutional minimum of standing contains three requirements: (1) injury in fact, (2) causation, and (3) redressability. *Steel Co.*, 523 U.S. at 102-03. The prudential standing doctrine embodies "judicially self-imposed limits on the exercise of federal jurisdiction." *Bennett v. Spear*, 520 U.S. 154, 161 (1997). Because these prudential principles are "limits" on standing, they do not themselves create jurisdiction; they exist only to remove jurisdiction where the Article III standing requirements are otherwise satisfied. A prudential standing principle of particular relevance to statutory causes of action is the "zone-of-interest" test, which "limits . . . the exercise of federal jurisdiction" where a plaintiff's claim falls outside "the zone of interest protected by the law invoked." *Allen*, 468 U.S. at 751.[35] The APA, Title III, and FISA are each addressed separately, followed by consideration of a cause of action which, the plaintiffs theorize, arises from the interaction of Title III and FISA.

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[34] *Raines* stands for the proposition that Congress cannot enact a statute that directly grants standing to a plaintiff who otherwise does not satisfy the Article III requirements. But *Raines* does not indicate that Congress cannot provide standing indirectly by enacting a statute that creates a new legal interest, "the invasion of which will confer standing." *See Simon*, 426 U.S. at 41 n.22. Analysis of the plaintiffs' statutory claims thus requires a detailed consideration of the statute at issue, to discern whether Congress "create[d] a statutory right or entitlement the alleged deprivation of which can confer standing to sue." *See Warth*, 422 U.S. at 514. Thus, in my opinion, the mere fact that these plaintiffs cannot show they were subject to surveillance under the TSP — while sufficient to demonstrate lack of standing for their constitutional claims — does not foreclose them from bringing their statutory claims. Assessment of whether the plaintiffs have standing to litigate their statutory claims requires more — an analysis of the rights and interests protected therein.

[35] The Supreme Court first announced the zone-of-interest test in a case involving the APA, stating that "[t]he question of standing . . . concerns . . . whether the interest sought to be protected by the complainant is arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question." *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970). Although this original formulation implied that the zone-of-interest test may be a means of establishing standing, the Supreme Court has since made it clear that the zone-of-interest test is a prudential *limitation*, not an affirmative means of establishing standing. *See Allen*, 468 U.S. at 751; *Valley Forge*, 454 U.S. at 474-75. The Court also has distinguished various instances in which the zone-of-interest test applies. Suits brought under the APA are the most prevalent cases employing that test, *see Camp*, 397 U.S. at 153, and in those cases the zone of interest is broader because of the "generous review provisions" enumerated in the APA, *Bennett*, 520 U.S. at 163. The test also has been listed among the generally applicable prudential limitations of standing, *see Allen*, 468 U.S. at 751, where the zone of interest, depending upon the statute at issue, is often narrower than under the APA, *see Bennett*, 520 U.S. at 163.

1. Administrative Procedures Act

The Administrative Procedures Act ("APA"), 5 U.S.C. §§ 101-913, governs the conduct of federal administrative agencies, which presumably includes the NSA, *see* 5 U.S.C. § 701(b)(1). The APA provides that "[a] person suffering legal wrong because of any *agency action*, or adversely affected or aggrieved by *such action* within the meaning of any relevant statute, shall be entitled to judicial review thereof." 5 U.S.C. § 702 (emphasis added). The APA authorizes judicial review for "[*a*]*gency action* made reviewable by statute and *final agency action* for which there is no other adequate remedy in a court." 5 U.S.C. § 704 (emphasis added).[36] Thus, to bring a cause of action under the APA, the plaintiffs, first and foremost, must complain of "agency action."

"Agency action" is defined in the APA as "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). This definition is divided into three parts "begin[ning] with a list of five categories of decisions made or outcomes implemented by an agency — agency rule, order, license, sanction[, or] relief." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004) (quotation marks omitted).

> All of those categories involve *circumscribed, discrete agency actions*, as their definitions make clear: [1] 'an agency statement of . . . future effect designed to implement, interpret, or prescribe law or policy' (rule); [2] 'a final disposition . . . in a matter other than rule making' (order); [3] a 'permit . . . or other form of permission' (license); [4] a 'prohibition . . . or taking [of] other compulsory or restrictive action' (sanction); or [5] a 'grant of money, assistance, license, authority,' etc., or 'recognition of a claim, right, immunity,' etc., or 'taking of other action on the application or petition of, and beneficial to, a person' (relief).

Id. (*quoting* 5 U.S.C. §§ 551(4), (6), (8), (10), (11)) (emphasis added). The second part of the "agency action" definition — "the equivalent or denial thereof" — must be a discrete action or the denial of a discrete action, otherwise it would not be *equivalent* to the five listed categories. *Id.* And the final part of the definition — a "failure to act" — is "properly understood as a failure to take an agency action." *Id.* Under Supreme Court precedent, classic examples of "agency action" include the issuance of an agency opinion, *see Bennett*, 520 U.S. at 157, or a declaratory ruling, *see Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 977-78 (2005).

Here, however, the plaintiffs are not complaining of "agency action" as defined in the APA, and the record contains no evidence that would support such a finding. The plaintiffs challenge the NSA's warrantless interception of overseas communications, the NSA's failure to comply with FISA's warrant requirements, and the NSA's presumed failure to comply with FISA's minimization procedures. This is conduct, not "agency action." Furthermore, there is no authority to support the invocation of the APA to challenge generalized conduct.

Looking at the "five categories" of enumerated "agency action," the NSA's surveillance activities, as described by the three facts of record, do not constitute, nor are they conducted pursuant to, any agency rule, order, license, sanction, or relief. Although the plaintiffs labeled the NSA's surveillance activities as "the Program," and the district court labeled it the "TSP," the NSA's wiretapping is actually just general conduct given a label for purposes of abbreviated reference. The plaintiffs do not complain of any NSA rule or order, but merely the generalized practice, which — so far as has been admitted or disclosed — was not formally enacted pursuant

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[36] Admittedly, this provision is seldom considered from the present viewpoint, and is generally considered as merely the means by which Congress waived sovereign immunity in actions seeking relief other than money damages. *See Presbyterian Church*, 870 F.2d at 524.

to the strictures of the APA, but merely authorized by the President (albeit repeatedly, and possibly informally). Nor do the plaintiffs challenge any license, sanction, or relief issued by the NSA.

The plaintiffs do not complain of anything *equivalent to* agency action, which also requires some discrete action by the NSA. *See Norton*, 542 U.S. at 62. The plaintiffs are not challenging any sort of "circumscribed, discrete" action on the part of the NSA, but are seeking to invalidate or alter the NSA's generalized practice of wiretapping certain overseas communications without warrants. *See id.* at 64 ("[t]he limitation to discrete agency action precludes [a] broad programmatic attack"). Similarly, the plaintiffs have not alleged that the NSA *failed to perform* a *discrete* agency action. When challenging an agency's failure to perform, the APA "empowers a court only to compel an agency to perform a ministerial or non-discretionary act." *Id.* The plaintiffs contest the NSA's failure to adhere to FISA's warrant requirement and minimization procedures. Even assuming, *arguendo*, that the warrant requirement and minimization procedures are discrete agency actions, those procedures are replete with discretionary considerations, *see* 50 U.S.C. § 1801(h), thus disqualifying them from this definition of agency action under the APA.

No matter how the plaintiffs' claims are characterized, they do not challenge *agency action* as it is defined in the APA. Accordingly, the plaintiffs have not asserted a viable cause of action under the APA.[37]

2. Title III

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"), 18 U.S.C. §§ 2510-22, generally regulates the government's interception of wire, oral, and electronic communications. *See United States v. Ojeda Rios*, 495 U.S. 257, 259 (1990); 18 U.S.C. § 2516. The first relevant question is whether Title III applies to the type of surveillance conducted by the NSA under the TSP, considering Title III's express limitations:

> Nothing contained in this [statute (i.e.,Title III)] . . . shall be deemed to affect [1] the acquisition by the United States Government of foreign intelligence information from international or foreign communications, or [2] foreign intelligence activities conducted in accordance with otherwise applicable Federal law involving a foreign electronic communications system, utilizing a means other than electronic surveillance as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, and [3] procedures in this [statute (i.e.,Title III)] . . . and the Foreign Intelligence Surveillance Act of 1978 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). When this statutory language is parsed into its three individual clauses, its limitations become clear. The first clause disclaims Title III applicability generally — acknowledging that Title III does not apply to "the acquisition by the United States Government of foreign intelligence information from international or foreign communications." The second clause

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[37] It is noteworthy that the plaintiffs' APA claim fails for an additional reason. To the extent the plaintiffs rely on the APA provision allowing judicial review for "*final agency action* for which there is no other adequate remedy in a court," *see* 5 U.S.C. § 704 (emphasis added), they must demonstrate that the alleged agency action is "final." "As a general matter, two conditions must be satisfied for agency action to be 'final.'" *Bennett*, 520 U.S. at 177. "First, the action must mark the 'consummation' of the agency's decisionmaking process." *Id.* at 177-78. "And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* at 178 (quotation marks omitted). Because the NSA's surveillance activities do not constitute "agency action," the analysis of whether they are final agency action is strained and awkward. It nevertheless is clear that the NSA's wiretapping does not consummate any sort of agency decisionmaking process nor does it purport to determine the rights or obligations of others. For this additional reason, the plaintiffs cannot assert a claim for judicial review under the APA.

disclaims Title III applicability specifically — recognizing that Title III does not govern "foreign intelligence activities conducted in accordance with otherwise applicable Federal law involving a foreign electronic communications system, utilizing a means other than electronic surveillance as defined in [FISA]." The final clause, which is known as the "exclusivity provision," recognizes the respective roles of Title III and FISA, by stating that the "procedures in [Title III] and [FISA] shall be the exclusive means by which electronic surveillance, as defined in section 101 of [FISA], and the interception of domestic wire, oral, and electronic communications may be conducted."[38]

The first clause of § 2511(2)(f) — stating that Title III does not govern the acquisition of "foreign intelligence information from international or foreign communications" — expressly disclaims application of Title III to surveillance activities of the type at issue in the present case. The NSA monitors international communications for the purpose of acquiring foreign intelligence about terrorist organizations; this type of surveillance falls squarely under the disclaimer found in the first clause of § 2511(2)(f). By its own terms, then, Title III does not apply to the conduct of which the plaintiffs complain.[39] *Cf. United States v. U.S. Dist. Ct.* (*Keith*), 407 U.S. 297, 306 (1972) (finding "the conclusion inescapable," as to the pre-FISA version of Title III, "that Congress only intended to make clear that [Title III] simply did not legislate with respect to national security surveillances").

Because the first clause of § 2511(2)(f) expressly disclaims Title III's application to this case, it is unnecessary to construe the second and third clauses. But, it is worth acknowledging that these two clauses raise complex legal issues which cannot be resolved on the present record. The second clause explains that Title III does not apply if four factors are all satisfied: (1) the defendant is engaged in "foreign intelligence activities"; (2) the defendant is acting "in accordance with otherwise applicable Federal law"; (3) the defendant's surveillance involves a "foreign electronic communications system"; and (4) the defendant utilizes "a means other than electronic surveillance" as defined in FISA. These factors raise a host of intricate issues, such as whether the NSA's wiretapping actually involves "electronic surveillance" as defined in FISA, and whether the NSA is acting in accordance with federal law, such as the Authorization for Use of Military Force ("AUMF"), Pub. L. 107-40, § 2, 115 Stat. 224 (2001). Some of these issues involve sophisticated legal questions or complex factual questions. But, resolving these issues is unnecessary because the first clause of § 2511(2)(f) conclusively disclaims Title III's application.

It is likewise unnecessary, at this point, to delve into the numerous issues raised by the third clause, i.e., the exclusivity provision. The exclusivity provision differs from the first two clauses of § 2511(2)(f), in that it does not merely disclaim Title III's application. Instead, it states that Title III and FISA shall be the "exclusive means" by which particular types of surveillance may occur, thus prescribing the separate roles of Title III and FISA, rather than the application of Title III alone. The plaintiffs assert a statutory cause of action for the NSA's alleged violation of the exclusivity

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[38] This third clause is discussed in further detail in Section IV.B.4, *infra*, titled "The Exclusivity Provision."

[39] Even assuming, *arguendo*, that Title III applies to the NSA's internationally focused surveillance activities, the plaintiffs cannot maintain the action for relief brought in this case. Title III prescribes equitable relief in only a few instances, none of which applies here. Two provisions in Title III authorize injunctive relief for claims brought by the government. *See, e.g.*, 18 U.S.C. § 2521 ("the Attorney General may initiate a civil action . . . to enjoin" a violation of Title III); § 2511(5)(a)(ii)(A) ("the Federal Government shall be entitled to appropriate injunctive relief" when a "person" violates 18 U.S.C. § 2511(5)). Because the plaintiffs are not representatives of or otherwise affiliated with the federal government, neither of these provisions permits injunctive relief in this case. Another Title III provision authorizes "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of [Title III]" to recover declaratory or equitable relief from a "person or entity, *other than the United States*, which engaged in that violation." 18 U.S.C. § 2520(a) (emphasis added). This provision does not help the plaintiffs because under these provisions neither declaratory nor injunctive relief is available against the United States government and the plaintiffs cannot prove interception.

provision, which I address separately in Section IV.B.4, *infra*. It is, therefore, unnecessary to dissect the exclusivity provision at this point in the analysis.

Because the first clause of § 2511(2)(f) states that Title III does not apply to the internationally focused surveillance activities challenged in this case, the plaintiffs have not asserted a viable cause of action under Title III.

3. FISA

The Foreign Intelligence Surveillance Act of 1978 ("FISA"), 50 U.S.C. § 1801 *et seq.*, — as the separate and distinct counterpart to Title III — governs the interception of electronic communications involving foreign intelligence information. *See* 50 U.S.C. § 1802(a)(1). FISA is fraught with detailed statutory definitions and is expressly limited, by its own terms, to situations in which the President has authorized "electronic surveillance," as defined in 50 U.S.C. § 1801(f), for the purposes of acquiring "foreign intelligence information," as defined in 50 U.S.C. § 1801(e).

First, the surveillance in question must acquire "foreign intelligence information," which includes "information that relates to . . . the ability of the United States to protect against . . . international terrorism." 50 U.S.C. § 1801(e)(1)(B). In the present case, the NSA intercepts communications in which it has a "*reasonable basis* to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda." *See* Press Briefing by Att'y Gen. Alberto Gonzales and Gen. Michael Hayden, Principal Deputy Dir. for Nat'l Intelligence (Dec. 19, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/12/print/20051219-1. html (last visited July 2, 2007) (emphasis added). The proclaimed purpose is to prevent future terrorist attacks, *see id.* ("This is a very concentrated, very limited program focused at gaining information about our enemy."), and thus the NSA's conduct satisfies this statutory requirement.

Next, the interception must occur by "electronic surveillance." According to the plaintiffs, the government's admission that it intercepts telephone and email communications — which involve electronic media and are generally considered, in common parlance, forms of electronic communications — is tantamount to admitting that the NSA engaged in "electronic surveillance" for purposes of FISA. This argument fails upon recognition that "electronic surveillance" has a very particular, detailed meaning under FISA — a legal definition that requires careful consideration of numerous factors such as the types of communications acquired, the location of the parties to the acquired communications, the location where the acquisition occurred, the location of any surveillance device, and the reasonableness of the parties' expectation of privacy. *See* 50 U.S.C. § 1801(f).[40] The plaintiffs have not shown, and cannot show, that the NSA's surveillance activities

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[40] FISA defines "electronic surveillance" in exactly four ways:

> (1) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire or radio communication sent by or intended to be received by a particular, known United States person who is in the United States, if the contents are acquired by intentionally targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes;
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> (2) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States, but does not include the acquisition of those communications of computer trespassers that would be permissible under section 2511(2)(i) of title 18, United States Code;
>
> (3) the intentional acquisition by an electronic, mechanical, or other surveillance device of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all

include the sort of conduct that would satisfy FISA's definition of "electronic surveillance," and the present record does not demonstrate that the NSA's conduct falls within FISA's definitions.

Finally, even assuming, *arguendo*, that FISA applies to the NSA's warrantless wiretapping, the plaintiffs cannot sustain a claim under FISA. FISA's civil suit provision permits an "aggrieved person" to bring a cause of action for a violation of that statute:

> An *aggrieved person*, other than a foreign power or an agent of a foreign power, as defined in [50 U.S.C. § 1801(a) or (b)(1)(A)], respectively, who has been subjected to an *electronic surveillance* or about whom information obtained by *electronic surveillance* of such person has been disclosed or used in violation of [50 U.S.C. § 1809] shall have a cause of action against any person who committed such violation and shall be entitled to recover --
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> (a) actual damages, but not less than liquidated damages of $ 1,000 or $ 100 per day for each day of violation, whichever is greater;
>
> (b) punitive damages; and
>
> (c) reasonable attorney's fees and other investigation and litigation costs reasonably incurred.

50 U.S.C. § 1810 (emphasis added). There are at least three reasons why the plaintiffs cannot maintain their claims under FISA's statutory authorization. First, the plaintiffs have not alleged, and the record does not contain sufficient facts from which to conclude, that they are "aggrieved persons." FISA defines an "aggrieved person" as "a person who is the target of an electronic surveillance or any other person whose communications or activities were subject to electronic surveillance." 50 U.S.C. § 1801(k). "[T]he term [aggrieved person] is intended to be coextensive [with], but no broader than, those persons who have standing to raise claims under the Fourth Amendment with respect to electronic surveillance." H.R. Rep. No. 95-1283, at 66 (1978) (*citing Alderman v. United States*, 394 U.S. 165 (1969)) (Report by the Permanent Select Committee on Intelligence, in support of the proposed FISA bill and amendments). The plaintiffs have not shown that they were actually the target of, or subject to, the NSA's surveillance; thus — for the same reason they could not maintain their Fourth Amendment claim — they cannot establish that they are "aggrieved persons" under FISA's statutory scheme. Second, as previously discussed, the plaintiffs have not demonstrated that the NSA's wiretapping satisfies the statutory definition of "electronic surveillance," which is also required by FISA's liability provision. Third, FISA does not authorize the declaratory or injunctive relief sought by the plaintiffs, but allows only for the recovery of money damages. No matter how these claims are characterized, the plaintiffs have not asserted a viable FISA cause of action.

> intended recipients are located within the United States; or
>
> (4) the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.

50 U.S.C. § 1801(f). The present record, which contains three facts regarding the TSP, offers no indication as to where the interception may occur or where any surveillance device is located. Nor does it offer any basis to conclude that particular people located in the United States are being targeted.

4. The Exclusivity Provision

The plaintiffs attempt to bring an ambiguous statutory cause of action under Title III and FISA jointly, based on their allegation that the TSP violates the "exclusivity provision" of § 2511(2)(f). The exclusivity provision states that Title III and FISA "shall be the exclusive means by which electronic surveillance, as defined in section 101 of [FISA], and the interception of domestic wire, oral, and electronic communications may be conducted." 18 U.S.C. § 2511(2)(f). This provision contains two separate and independent, albeit parallel, statements: (1) Title III "shall be the exclusive means by which . . . the interception of domestic wire, oral, and electronic communications may be conducted," and (2) FISA "shall be the exclusive means by which electronic surveillance, as defined in section 101 of [FISA] . . . may be conducted." This provision does not foreclose the possibility that the government may engage in certain surveillance activities that are outside of the strictures of both Title III and FISA.

The plaintiffs cannot assert a viable cause of action under this provision. It is undisputed that the NSA intercepts international, rather than domestic, communications, so, as already explained, Title III does not apply. Moreover, because the plaintiffs have not shown, and cannot show, that the NSA engages in activities satisfying the statutory definition of "electronic surveillance," the plaintiffs cannot demonstrate that FISA does apply. Consequently, this entire provision is inapplicable to the present circumstances.

The plaintiffs, however, read this provision as stating that Title III and FISA are together the "exclusive means" by which the NSA can intercept *any* communication, and that these two statutes collectively govern *every* interception (i.e., if not FISA then Title III, and if not Title III then FISA — there are no other options). Specifically, the plaintiffs contend that the NSA cannot lawfully conduct any wiretapping (under the TSP or otherwise) in a manner that is outside *both* the Title III and the FISA frameworks; the NSA's conduct *must* fall within the governance of one statute or the other. Based on this reading, the plaintiffs believe that they need not demonstrate the specific applicability of either statute — that is, they need not demonstrate *either* that the NSA is engaging in "electronic surveillance," in order to place it under FISA,[41] *or* that the NSA is engaging in domestic surveillance, in order to place it under Title III.

The plaintiffs' theory is premised on the assertion that FISA and Title III, collectively, require warrants for the legal interception of any and all communications, and appears to be that because the NSA has publicly admitted to intercepting certain overseas communications without warrants, one must infer that the NSA has violated one or the other of these two statutes. The consequence of this inference — the plaintiffs would have us find — is a violation of § 2511(2)(f), which is not a violation of either Title III or FISA individually, but instead a violation of the collective application of the two. Thus, according to the plaintiffs, the NSA has violated the "exclusivity provision" of § 2511(2)(f), and based on this (presumed) violation, the plaintiffs have standing to bring a cause of action under this statutory provision.

The intended inferential "logic" of the plaintiffs' theory falls apart upon recognition of their faulty premise. As previously explained, "electronic surveillance" under FISA does not cover all types of foreign surveillance, but instead has a very particular and detailed definition. The plaintiffs point to no provision in FISA, Title III, or any other statute that states that the four definitions "electronic surveillance" listed in FISA are the only kind of "electronic surveillance" that could ever be conducted. And the fact that the "exclusivity provision" is expressly limited to electronic surveillance "as defined in section 101 of [FISA]" leaves room to infer that other electronic

[41] This, of course, begs the question of why Congress would define "electronic surveillance" — in four explicit ways — if, as the plaintiffs contend, a demonstration that the interception is "electronic surveillance" is unnecessary.

surveillance is possible. Therefore, the plaintiffs cannot prove that FISA applies. More importantly, this inability to prove that the interceptions are "electronic surveillance" does not, as the plaintiffs theorize, lead to an inescapable conclusion that Title III applies. It simply means that FISA does not apply. On the other hand, it is irrefutable under the first clause of § 2511(2)(f) that Title III does *not* apply to this case because the NSA's wiretapping activities are focused on *international*, rather than domestic, communications. To read this entire statute in the way that the plaintiffs suggest is to create an internal contradiction, which courts are loath to do. Rather, the unavailability of the evidence necessary to prove (or disprove) that the NSA is engaging in "electronic surveillance" compels a conclusion that the plaintiffs cannot demonstrate that either statute applies.

But even assuming, *arguendo*, that the plaintiffs have posited a proper reading of the exclusivity provision, and that the NSA's warrantless wiretapping violates that provision, "the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 688 (1979). The question of whether a statute implicitly creates a cause of action "is basically a matter of statutory construction." *Transam. Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15 (1979). "The ultimate question is one of congressional intent, not one of whether this [c]ourt thinks that it can improve upon the statutory scheme that Congress enacted into law." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979).

The exclusivity provision does not appear to create such an implied cause of action. In cases where a court implies a cause of action, "the statute in question at least prohibit[s] certain conduct or create[s] federal rights in favor of private parties." *Id.* at 569. This "exclusivity provision," however, does not proscribe conduct as unlawful or confer rights on private parties. Moreover, the structure of Title III — the statute in which the exclusivity provision is found — suggests that Congress did not intend to create a private cause of action. Title III expressly states that the "remedies and sanctions described in this chapter . . . are the only judicial remedies and sanctions for nonconstitutional violations of [Title III]." 18 U.S.C. § 2518(10)(c). Thus, Title III explicitly lists the only available remedies and means of statutory relief. Because it is unreasonable to assume that Congress implicitly (i.e., silently) intended to create a third avenue of statutory relief with the exclusivity provision (in addition to the express causes of action contained in Title III and FISA themselves), the provision does not provide any basis for a cause of action.

When considering statutory claims, "the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff." *Sierra Club*, 405 U.S. at 732. The plaintiffs asserted three statutory bases — the APA, Title III, and FISA — and none of these three statutes, individually or collectively, provides an express or implied cause of action that "authorizes review" of the plaintiffs claims. *See id*. Therefore, the plaintiffs cannot establish standing to litigate their statutory claims, and further explanation is unnecessary. The plaintiffs have, however, raised certain other arguments that warrant mention.

C. Additional Considerations

Having proceeded methodically through the standing analysis, I address the plaintiffs' only remaining arguments, which defy classification under a compartmentalized approach. Under the first of these arguments, the plaintiffs rely heavily on the Supreme Court's decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167 (2000), as support for their allegation of injury in fact. In *Laidlaw*, the Court considered whether the plaintiffs had Article III standing to bring a claim under the citizen-suit provision of the Clean Water Act, 33 U.S.C. § 1365(a). Therefore, *Laidlaw* is immediately distinguishable with regard to the constitutional claims. *See Sierra Club*, 405 U.S. at 732 (noting the difference in the standing analysis, as between constitutional and statutory claims). If *Laidlaw* is to offer the plaintiffs any support at all, it is only with respect to their statutory claims.

Laidlaw is a case involving particular statutory claims and well-defined environmental injuries, however, and differs significantly from the present context, which involves dramatically different statutory claims and far less palpable alleged injuries. In this sense, it is noteworthy that the *Laidlaw* Court explicitly confined its injury-in-fact reasoning to environmental cases, stating: "*environmental plaintiffs* adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." *Laidlaw*, 528 U.S. at 183 (quotation marks omitted; emphasis added). Because the injuries and claims in *Laidlaw* differ in a significant way from those alleged by the plaintiffs in the present case, *Laidlaw* offers only minimal support for the plaintiffs' position.

Setting aside the fact that *Laidlaw* is an environmental case involving a particular, statutorily-created claim, the Court's analysis in *Laidlaw* remains unpersuasive in the present context. The *Laidlaw* Court found that the plaintiffs had standing to challenge Laidlaw's discharge of pollutants into a river because the discharge "curtail[ed] their recreational use of that waterway and would subject them to other economic and aesthetic harms." *Id*. at 184. In its standing analysis, the Court distinguished *City of Los Angeles v. Lyons*, 461 U.S. 95, 107 n.7 (1983), which had held that a plaintiff lacked standing to seek an injunction against the enforcement of a police choke-hold policy because he could not credibly allege that he faced a realistic threat from the policy. The *Lyons* Court had noted that "'[t]he reasonableness of Lyons' fear is dependent upon the likelihood of a recurrence of the allegedly unlawful conduct,' and his 'subjective apprehensions' that such a recurrence would even take place were not enough to support standing." *Laidlaw*, 528 U.S. at 184 (quoting *Lyons*, 461 U.S. at 108 n.8). In contrast, the *Laidlaw* Court found a concrete, actual injury based on the plaintiffs' showing that the defendant's unlawful discharge of pollutants into a particular river was ongoing and may reasonably have caused nearby residents to curtail their use of that waterway. The facts of the present case are more analogous to *Lyons* than *Laidlaw*. Unlike the plaintiffs in *Laidlaw*, the present plaintiffs have curtailed their communications despite the absence of any evidence that the government has intercepted their particular communications — or by analogy to *Laidlaw*, without any evidence that the defendant has polluted their particular river. Rather, like the plaintiffs in *Lyons*, the present plaintiffs claim a threat from the government's policy and are chilled by their subjective apprehension that the government is intercepting their communications. This conclusion is therefore consistent with the holding and reasoning of *Laidlaw*.[42]

The plaintiffs' assertion that numerous other district courts have found standing to challenge the TSP is also unpersuasive. Other cases involving non-similarly situated plaintiffs are typically irrelevant to the issue of standing because standing reflects whether "a particular person is a proper party to maintain the action." *Flast*, 392 U.S. at 100; *see also Raines*, 521 U.S. at 819 ("We have consistently stressed that a plaintiff's complaint must establish that he has a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to him."). In any event, the existing district court decisions regarding this TSP reveal a wholly different picture from that presented by the plaintiffs. Neither of the two district courts to address claims against the NSA's operation of the TSP found that their plaintiffs had standing. In *Al-Haramain Islamic Foundation, Inc. v. Bush*, 451 F. Supp. 2d 1215, 1226 (D. Or. 2006), unlike the present case, the plaintiffs purported to have evidence proving that their own communications had actually been intercepted.

[42] Even assuming, *arguendo*, that *Laidlaw* assists in establishing a cognizable and concrete injury, the obstacles to causation and redressability present here were absent there. Moreover, *Laidlaw*'s redressability analysis is entirely inapplicable to the present case. The redressability analysis in *Laidlaw* considered whether civil penalties paid to the government, rather than the plaintiffs, could redress the plaintiffs' alleged injuries. *Laidlaw*, 528 U.S. at 185. The Court determined that "the civil penalties sought by [the plaintiffs] carried with them a deterrent effect that made it likely, as opposed to merely speculative, that the penalties would redress [the plaintiffs'] injuries by abating current violations and preventing future ones." *Id.* at 187. This analysis, as to the deterrent effect of civil damages, does not apply in the present case, which does not involve any claims for damages but only for injunctive and declaratory relief.

Based in part on that evidence, the district court found that the "plaintiffs should have an opportunity to establish standing and make a *prima facie* case, even if they must do so *in camera*." *Id.* The court did not, however, definitively decide the standing issue at that stage of its proceeding. In *Tooley v. Bush*, No. 06-306, 2006 U.S. Dist. Lexis 92274, 2006 WL 3783142, at *24 (D.D.C. Dec. 21, 2006), the district court found that the plaintiff lacked standing because he did not provide "any factual basis for his conclusion that he ha[d] been the subject of illegal wiretaps." Two other cases challenged a telecommunications provider's (rather than the NSA's) participation in the TSP. In *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899, 919-20 (N.D. Ill. 2006), the district court found that the plaintiffs were unable to establish standing against AT&T because they could not show that AT&T had disclosed their records to the government. In *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 999-1000 (N.D. Cal. 2006), the district court found that the plaintiffs had standing against AT&T, but refused to consider the government's actions in its standing inquiry. Consequently, these cases provide no support for the plaintiffs' position in the present case.

Based on the evidence in the record, as applied in the foregoing analysis, none of the plaintiffs in the present case is able to establish standing for any of the asserted claims. At oral argument, we asked the plaintiffs' counsel if we should remand for further proceedings on the issue of standing. Counsel asserted that the plaintiffs' injuries were clear and undisputed in the record and there was no need to remand for a hearing or admission of additional evidence on this issue. But even to the extent that additional evidence may exist, which might establish standing for one or more of the plaintiffs on one or more of their claims, discovery of such evidence would, under the circumstances of this case, be prevented by the State Secrets Doctrine. *See, e.g.*, *Reynolds*, 345 U.S. at 10-11; *Tenenbaum*, 372 F.3d at 777; *Halkin v. Helms*, 690 F.2d 977, 981 (D.C. Cir. 1982).

V.

The district court dismissed the data mining aspect of the plaintiffs' claim, finding that the plaintiffs could not establish a *prima facie* case without resorting to privileged information. *ACLU v. NSA*, 438 F. Supp. 2d at 765. The plaintiffs press this issue as a cross-appeal.

A thorough review of the complaint, the district court opinion, and the arguments presented on appeal, makes it clear that the plaintiffs allege no separate injury in connection with the alleged data-mining aspect of the TSP. Therefore, this standing analysis applies equally, and the plaintiffs' cross-appeal must be dismissed for lack of jurisdiction. *See Steel Co.*, 523 U.S. at 109-10.

VI.

We hold that the plaintiffs do not have standing to assert their claims in federal court. Accordingly, we **VACATE** the order of the district court and **REMAND** this case to the district court with instructions to **DISMISS** for lack of jurisdiction.

CONCURRING IN THE JUDGMENT

JULIA SMITH GIBBONS, Circuit Judge, concurring. The disposition of all of the plaintiffs' claims depends upon the single fact that the plaintiffs have failed to provide evidence that they are personally subject to the TSP. Without this evidence, on a motion for summary judgment, the plaintiffs cannot establish standing for any of their claims, constitutional or statutory.[1] For this reason, I do not reach the myriad other standing and merits issues, the complexity of which is ably demonstrated by Judge Batchelder's and Judge Gilman's very thoughtful opinions, and I therefore concur in the judgment only.

The case or controversy requirement in Article III of the Constitution determines the power of the federal courts to entertain a suit, establishing an "irreducible constitutional minimum of standing" that is required for both constitutional and statutory claims. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *O'Shea v. Littleton*, 414 U.S. 488, 493 n.2 (1974). The Constitution "requires the party who invokes the court's authority to show that he *personally* has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (quotation marks omitted) (emphasis added). This personal injury must be "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual and imminent, not conjectural or hypothetical." *Defenders of Wildlife*, 504 U.S. at 560 (citations and quotation marks omitted); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (noting that the relevant showing is the injury to the plaintiff, not the environment). In order for a plaintiff to show that the injury from a government policy is actual and imminent, a plaintiff must demonstrate that he personally would be subject to the future application of that policy. *City of Los Angeles v. Lyons*, 461 U.S. 95, 106 n.7 (1983); *see Laidlaw*, 528 U.S. at 184; *Davis v. Scherer*, 468 U.S. 183, 189 n.7 (1984). A plaintiff's fear that he will be subject to the policy is insufficient; "[i]t is the reality of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions."[2] *Lyons*, 461 U.S. at 107 n.8; *see Laidlaw*, 528 U.S. at 184.

Judge Gilman's opinion arrives at the opposite conclusion, relying exclusively on its reading of *Laidlaw*. It concludes that the attorney-plaintiffs need not show that they have ever been or will

[1] Although Judge Batchelder clearly disagrees about the depth of treatment required, at least with respect to the plaintiffs' constitutional claims and FISA claim, she appears to agree that the plaintiffs' failure to demonstrate that they have been subject to the TSP is fatal to their constitutional standing. (*See* Batchelder Op. 9-10 (discussing all the claims generally and FISA specifically); *id.* at 13-14, 18 (First Amendment); *id.* at 23 (Fourth Amendment); *id.* at 24 (Separation of Powers).) We may differ, however, with respect to the plaintiffs' other statutory claims because Judge Batchelder determines that the statutes do not apply without reaching the issue of constitutional standing. My reading of Supreme Court precedent suggests that we must reach the constitutional standing issue first with respect to all the claims. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89, 92-93 (1998) (warning that a court must determine constitutional standing before addressing the "existence of a cause of action"); *see also Sierra Club v. Morton*, 405 U.S. 727, 732 & n.3 (1972) (noting that the inquiry as to "whether the statute in question authorizes review at the behest of the plaintiff" occurs where a dispute is "otherwise justiciable" because Article III jurisdiction is present). Because in my view the plaintiffs have no constitutional standing to raise any of their claims, I find it unnecessary to discuss the applicability of the other statutes.

[2] This is not to say that a plaintiff lacks standing until a defendant has acted. A "genuine threat" of enforcement of a policy against a plaintiff who is demonstrably subject to that policy supports standing. *See Steffel v. Thompson*, 415 U.S. 452, 475 (1974). But that case differs from one in which a plaintiff cannot establish that he is subject to the policy but merely fears that he is subject to the policy that may be enforced, which cannot support standing. *See, e.g., United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375, 1380 (D.C. Cir. 1984).

ever be actual subjects of surveillance but rather only the "reasonableness of their fear" that they will be subjects of surveillance. (Gilman Op. 44, 50.) In doing so, Judge Gilman transforms the holding in *Laidlaw*, under which the plaintiffs who were *in fact subject to defendant's conduct* had standing because they reasonably feared harm from that conduct, into a much broader proposition, under which plaintiffs may establish standing by showing merely that they possess a reasonable *fear of being subject to defendant's allegedly harmful conduct*. This distinction is critical to "[t]he relevant showing for purposes of Article III standing, . . . injury to the plaintiff," *Laidlaw*, 528 U.S. at 181, as the Supreme Court made clear in distinguishing *Laidlaw* from *Lyons*. In *Laidlaw*, the Court noted that in *Lyons*, a policy of chokehold use existed, but the plaintiff's "'subjective apprehensions' that such a recurrence [of the unlawful conduct] would even *take place* were not enough to support standing." *Laidlaw*, 528 U.S. at 184. The plaintiff's fear of being subject to conduct of the defendant under the chokehold policy was insufficient to support standing. The Supreme Court further explained that standing was present in *Laidlaw* because "in contrast, it is undisputed that Laidlaw's unlawful conduct . . . was occurring . . . . [T]hen, the only 'subjective' issue here is 'the reasonableness of the fear' that led the affiants to respond to that concededly ongoing conduct" by refraining from use of the polluted areas. *Id.* (brackets omitted). The Court noted that it differed from the dissent in seeing nothing "'improbable' about the proposition that a company's continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms." *Id*. Thus, in *Laidlaw*, the plaintiff's *fear of harm* from the defendant's undisputed conduct—conduct that would also undisputably affect plaintiffs personally if they undertook their desired activities—was sufficient to support standing. *Id.* at 184-85. In summary, I read *Laidlaw* to require that plaintiffs demonstrate that they (1) are in fact subject to the defendant's conduct, in the past or future, and (2) have at least a reasonable fear of harm from that conduct.

The *Laidlaw* majority's discussion of *Lyons* and its observations about the *Laidlaw* plaintiffs explain exactly why plaintiffs here are like the plaintiff in *Lyons*, who lacked standing, and unlike those in *Laidlaw*, who had standing. Like the plaintiffs in *Laidlaw* and *Lyons*, the plaintiffs in the present case may have a reasonable fear of harm from the defendants' conduct. *See id.* at 184-85 (finding plaintiffs' fear of "economic and aesthetic harms" from "illegal discharges of pollutants" to be "entirely reasonable"); *Lyons*, 461 U.S. at 100 (describing the deaths of those who were subject to chokeholds). But *Laidlaw* and *Lyons* differ in outcome based on whether the plaintiffs have established that they are in fact subject to the conduct of the defendants. Here, plaintiffs fear being subject to a government policy of surveillance and have alleged that they and those with whom they communicate have ceased their normal communication. If they instead continued their normal activities, they would still be fearful, but whether they would actually be subject to surveillance is purely speculative. They are like the *Lyons* plaintiff who can show nothing more than a fear of the use of a chokehold. *See Laidlaw*, 528 U.S. at 184 (discussing the "'subjective apprehensions' that such a recurrence would even *take place*" in *Lyons*). By contrast, if the *Laidlaw* plaintiffs had resumed their abandoned activities, they would definitely have been subject to the defendant's conduct—illegal discharges into the river. *See id.* (contrasting Laidlaw's "concededly ongoing conduct" of "continuous and pervasive illegal discharges of pollutants into a river . . . nearby").

Judge Gilman's attempt to distinguish *Lyons* from the case at bar is directly contrary to the Supreme Court's own reading of that case. It is immaterial that the likelihood that Lyons would be subject to the chokehold policy may be far more remote than the likelihood that the attorney-plaintiffs in this case may be subject to the warrantless surveillance policy. (*See* Gilman Op. 45-46.) As *Laidlaw* makes clear, a plaintiff must be actually subject to the defendant's conduct, not simply afraid of being subject to it, regardless of how reasonable that fear may be. The Supreme Court's distinction between *Laidlaw* and *Lyons* was one of kind, not degree. *See Laidlaw*, 528 U.S. at 184 (distinguishing between the "subjective apprehensions that such a recurrence would even *take place*" in *Lyons* and the "subjective issue [of] the reasonableness of the fear" that pollutants would cause "economic and aesthetic harms" in *Laidlaw*) (internal quotation marks and brackets omitted). Here,

the attorney-plaintiffs lack standing because they have failed to present evidence that they are personally subject to the warrantless surveillance policy; that is, the attorney-plaintiffs have failed to present evidence as to whether, in the government's view, "there are reasonable grounds to believe that a party to the [attorney-plaintiffs'] communication[s] is affiliated with al Qaeda."

Judge Gilman attempts to distinguish *United Presbyterian Church* on its facts by confounding the different injuries alleged in that case. The plaintiffs in that case alleged three different kinds of injuries: (1) "the 'chilling' of constitutionally protected activities," *United Presbyterian Church*, 738 F.2d at 1377; (2) "the immediate threat of being targeted for surveillance," *id.*; and (3) direct injury from surveillance taken against them, *id.* at 1380 & n.2. As the plaintiffs in this case have no evidence that they have ever been subject to the TSP, Judge Gilman correctly distinguishes the D.C. Circuit's reasoning on the third alleged injury. (Gilman Op. 46 (discussing the "direct injury" and quoting in part *United Presbyterian Church*, 738 F.3d at 1380-81 ("The third kind of harm [the plaintiffs] allege is . . . too generalized and nonspecific to support a complaint. . . . There is no allegation or even suggestion that any unlawful action to which the [plaintiffs] have been subjected in the past was the consequence of the presidential action they seek to challenge.")).) Judge Gilman ignores the D.C. Circuit's reasoning on the second alleged injury, for which it found that the plaintiffs lacked standing based upon the same distinction made by the Supreme Court in *Laidlaw*. The D.C. Circuit noted that the plaintiffs would have standing if they were subject to an "immediate threat of concrete, harmful action." *United Presbyterian Church*, 738 F.2d at 1380. However, it concluded that the plaintiffs' allegations that "their activities are such that they are especially likely to be targets of the [surveillance] authorized by the order" were insufficient to support standing because those allegations only "place[d] the plaintiffs at greater risk" of being subject to surveillance. *Id.* There is no relevant factual difference between the *United Presbyterian Church* plaintiffs, whose activities the D.C. Circuit conceded made them more likely to be subject to surveillance, *id.*, and the attorney-plaintiffs in this case, whose representation of "exactly the types of clients" targeted by the TSP makes them more likely to be targeted by the TSP, (Gilman Op. 47).

Unlike the plaintiffs in *United Presbyterian Church* and this case, in every case cited by Judge Gilman in which standing was found, the plaintiff was clearly subject to conduct of the defendant about which the plaintiff complained. *See Meese v. Keene*, 481 U.S. 465, 473 (1987) (noting that the three films the plaintiff sought to show were identified as "political propaganda"); *Steffel*, 415 U.S. at 459 (noting that the plaintiff's fear of prosecution was not speculative because he had been personally threatened with prosecution); *Ozonoff v. Berzak*, 744 F.2d 224, 228 (1st Cir. 1984) (noting that "[a]s one who has worked for the WHO in the past and who has filed an employment application again seeking work," the plaintiff felt constrained by the loyalty standards); *Paton v. La Prade*, 524 F.2d 862, 865, 870-71, 873 (3d Cir. 1975) (noting that "Paton's name and address were ascertained as a result of the mail cover" and concluding the plaintiff had standing because "she may have sustained or be immediately in danger of sustaining a direct injury as a result" of the FBI investigation directed against her, which resulted from the mail cover).

In applying any understanding of constitutional standing, it is important to recognize the burden of proof required. "The party invoking federal jurisdiction bears the burden of establishing the[] elements" of standing. *Defenders of Wildlife*, 504 U.S. at 561. "[E]ach element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.* As this case was decided on the government's motion for summary judgment, the plaintiffs "must 'set forth' by affidavit or other evidence 'specific facts,' which for purposes of the summary judgment motion will be taken to be true." *Id.* (quoting Fed. R. Civ. P. 56(e)). Applying my formulation of the standing requirements, the plaintiffs have failed to meet this burden because there is no evidence in the record that any of the plaintiffs are personally subject to the TSP. Judge Gilman frequently refers to the attorney-plaintiffs' allegations, (Gilman Op. 44, 47, 48), and concludes that the "attorney-plaintiffs have alleged a[] . . . concrete and particularized injury," (Gilman Op. 47). On

summary judgment, however, the plaintiffs' mere allegations are insufficient, and although the publicly admitted information about the TSP "supports" them, (Gilman Op. 48), it does not satisfy the plaintiffs' burden. In applying his formulation of the standing requirement, the reasonableness of plaintiffs' fear, Judge Gilman concludes that "[t]he likelihood that [the plaintiff in *Lyons*] would again find himself in a chokehold by the Los Angeles police seems to me far more remote than the ongoing concern of the attorney-plaintiffs here that their telephone or email communications will be intercepted by the TSP." (Gilman Op. 45-46.) Unfortunately for the plaintiffs' position, besides Judge Gilman's subjective assessment, there is no evidence as to the likelihood the plaintiffs will be surveilled for this court to consider on summary judgment.

Under any understanding of constitutional standing, the plaintiffs are ultimately prevented from establishing standing because of the state secrets privilege.[3] As Judge Batchelder notes, plaintiffs have not challenged the government's invocation of the privilege or its application. All three members of the panel have reviewed the documents filed by the government under seal that arguably are protected by the privilege. The state secrets privilege operates as a bar to the admission of evidence to which the privilege attaches, and the plaintiff must proceed without the benefit of such evidence. *See United States v. Reynolds*, 345 U.S. 1, 11 (1953); *see also Ellsberg v. Mitchell*, 709 F.2d 51, 65 (D.C. Cir. 1983). Where the privilege prevents the plaintiff from producing sufficient evidence to establish his or her *prima facie* case, the court must dismiss the claim. *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998). In this way, the state secrets privilege has prevented the plaintiffs from conducting discovery that might allow them to establish that they are personally subject to the TSP, as I believe constitutional standing requires. However, where the privilege deprives the government of a valid defense to the plaintiff's claim, the court must also dismiss the claim. *Tenenbaum v. Simonini*, 372 F.3d 776, 777 (6th Cir. 2004); *Kasza*, 133 F.3d at 1166. Even applying Judge Gilman's formulation of the standing requirement, the court cannot avoid the state secrets privilege.[4] Evidence arguably protected by the state secrets privilege may well be relevant to the reasonableness of the plaintiffs' fear. Whether that evidence is favorable to plaintiffs or defendants, its unavailability requires dismissal. That it may be unsatisfying that facts pertinent to the standing inquiry are unavailable can have no bearing on the disposition of this case. If the state secrets privilege prevents the plaintiffs from presenting adequate evidence of their

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[3] Judge Batchelder's decision does not discuss the implications of the state secrets privilege because, under her reading of *Laird v. Tatum*, 408 U.S. 1 (1972), the plaintiffs can establish standing only if they are "regulated, constrained, or compelled directly by the government's actions," (Batchelder Op. at 13), not if their injury "aris[es] from a personal subjective chill" caused by the existence of government surveillance, (Batchelder Op. 16; *see* Batchelder Op. 14-15). The implication of this reasoning is that even if the plaintiffs had evidence that they were personally subject to the TSP, they would not have standing if the government was only conducting surveillance.

It is not clear to me that *Laird* must be read this way. The language in *Laird* about regulation, proscription, and compulsion to me seems merely descriptive of the facts in prior cases in which the Supreme Court had found standing. *Laird* could be read as holding that when the *only* harm alleged is chilled speech, then the exercise of governmental power must be regulatory, proscriptive, or compulsory in nature. *See Laird*, 408 U.S. at 11, 13-14. Here, the plaintiffs' professional injuries are arguably a harm beyond chilled speech. Furthermore, because the plaintiffs in *Laird* alleged only chilled speech, *Laird* does not directly address whether other injuries that derive from the chilled speech must be discounted. *See id.* at 13-14. Given this ambiguity, I see no need to express an opinion as to the extent of *Laird*'s holding and whether the plaintiffs could establish standing were they to provide evidence that they were personally subject to surveillance.

In any event, even under Judge Batchelder's reasoning, the state secrets privilege plays a prominent role that must be acknowledged. Because of the state secrets privilege, the plaintiffs are unable to conduct discovery to determine if information from the TSP is used in such a way as to satisfy the requirements that Judge Batchelder finds in *Laird*.

[4] Judge Gilman's opinion does not dispute the majority opinion's contention that the plaintiffs' standing would be undermined if the NSA hypothetically adhered to a policy of complete nondisclosure, but rather criticizes the analysis as speculation. (Gilman Op. 51.) It correctly notes that we cannot know whether such a policy exists "[a]bsent a public revelation from the NSA." (Gilman Op. 51.) However, it misapprehends the impact of this observation. The plaintiffs' claims fail not because of the majority's speculation that such a policy exists but rather because the state secrets privilege precludes the NSA from disclosing whether it exists.

standing, we must dismiss their claims. If the state secrets privilege prevents the government from presenting evidence that might refute the plaintiffs' allegations that they are likely to be surveilled and undercut the reasonableness of their asserted fear, we must also dismiss the plaintiffs' claims.

DISSENT

RONALD LEE GILMAN, Circuit Judge, dissenting. My colleagues conclude that the plaintiffs have not established standing to bring their challenge to the Bush Administration's so-called Terrorist Surveillance Program (TSP). A fundamental disagreement exists between the two of them and myself on what is required to show standing and whether any of the plaintiffs have met that requirement. Because of that disagreement, I respectfully dissent. Moreover, I would affirm the judgment of the district court because I am persuaded that the TSP as originally implemented violated the Foreign Intelligence Surveillance Act of 1978 (FISA).

I. ANALYSIS

A. Procedural posture

This case comes to us in a relatively unique procedural posture. In the district court, the plaintiffs moved for partial summary judgment. They filed a statement of undisputed facts in support of that motion. The government then filed its own motion to dismiss or, in the alternative, a motion for summary judgment. In this motion, the government asserted that the plaintiffs could not establish standing and that the state-secrets privilege barred their claims. But the government did not contest the plaintiffs' statement of undisputed facts or provide its own statement of undisputed facts. The district court was therefore bound by the requirements of Rule 56(e) of the Federal Rules of Civil Procedure, which provides as follows:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

After reviewing the affidavits and related supporting material submitted in support of the plaintiffs' motion, the district court found that they had set forth the necessary facts to meet the prerequisites for standing. The court then considered the plaintiffs' claims on the merits and granted their motion as to all but their datamining claim.

Despite this procedural posture, the lead opinion asserts that the record presently before us contains only "three publicly acknowledged facts about the TSP—(1) it eavesdrops, (2) without warrants, (3) on international telephone and email communications in which at least one of the parties is a suspected al Qaeda affiliate." Lead Op. at 3. For the reasons both stated above and set forth below, I believe that this description significantly understates the material in the record presently before us.

B. Standing

1. Injury in fact

Article III of the U.S. Constitution "requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (quotation marks omitted). This is sometimes referred to as the "direct injury" or the "distinct and palpable injury" requirement. *Laird v. Tatum*,

408 U.S. 1, 13 (1972); *Valley Forge*, 454 U.S. at 475. The Supreme Court has defined "injury in fact" as "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual and imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations and quotation marks omitted). An association has standing to sue on behalf of its members when "its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (citation omitted).

Moreover, as the lead opinion acknowledges, only one plaintiff need establish standing to satisfy Article III's case-or-controversy requirement. *Mass. v. Envtl. Prot. Agency*, 127 S. Ct. 1438, 1453 (2007) ("Only one of the petitioners needs to have standing to permit us to consider the petition for review."); *see also Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (finding the Article III requirement satisfied where at least one plaintiff could establish standing). The position of the attorney-plaintiffs, in my opinion, is the strongest for the purpose of the standing analysis. This is not to say that the journalists and the scholars do not have standing. They might. But because only one plaintiff need establish standing, I will focus my discussion on the attorney-plaintiffs.

The lead opinion criticizes the attorney-plaintiffs for asserting multiple causes of action despite "hav[ing] one claim," but this is hardly a "ruse," whether "perfectly acceptable" or not as the lead opinion would have it. Lead Op. at 9. The Supreme Court's recent decision in *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1868 n.5 (2006), indeed reiterates that a litigant cannot "by virtue of his standing to challenge one government action, challenge other governmental actions that did not injure him." In the present case, however, the plaintiffs seek to challenge the only action that has injured them—the NSA's implementation of the TSP—and they do so by "identifying all grounds" against that action. *Id*. at 1868 n.5. Thus, I do not believe that this case requires "a particularized analysis of the plaintiffs' three alleged injuries, six asserted legal claims, and two requested forms of relief." Lead Op. at 10.

I now return to the first element of the standing analysis. Despite the willingness of the lead opinion to assume that the attorney-plaintiffs' asserted injuries could be "deemed adequate to state an injury in fact," Lead Op. at 17, its analysis suggests the opposite. I have accordingly set forth below the reasons why I conclude that the attorney-plaintiffs have demonstrated that no such assumption is needed because they have actually stated an injury in fact.

The attorney-plaintiffs assert a claim for the injuries flowing from the failure of the TSP to comply with FISA's requirements that "minimization procedures" be utilized to protect privileged communications—such as between attorneys and their clients—from interception or, if intercepted, from subsequent disclosure. Contrary to the lead opinion's characterization of the attorney-plaintiffs' assertions, the harm alleged here in fact "causes the plaintiffs to refrain from" potentially harmful conduct. Lead Op. at 8. I find that the distinction the lead opinion attempts to draw between a harm that *causes* an injury and a harm that *results* from an injury is ultimately unpersuasive. To my mind, the attorney-plaintiffs have articulated an actual or imminent harm flowing from the TSP.

The lead opinion's contrary view is largely based on its reading of the D.C. Circuit's interpretation of *Laird*; namely, that "a plaintiff must establish that he or she is regulated, constrained, or compelled directly by the government's actions, instead of by his or her own subjective chill." Lead Op. at 13 (citing *Laird*, 408 U.S. at 11, and *United Presbyterian Church v. Reagan*, 738 F.2d 1375, 1378 (D.C. Cir. 1984)). In fact, the lead opinion says that *Laird* controls, and that the injury alleged here is at best no more concrete than that in *Laird*. Lead Op. at 16. The lead opinion then analogizes the injury to the attorney-plaintiffs' ability to perform their professional duties as a chill on "commercial speech." Drawing on this commercial-speech analogy—an

argument never raised by the government—the lead opinion rejects the plaintiffs' contention of having suffered an injury in fact because, as so characterized by the lead opinion, the consequence "would effectively value commercial speech above political speech." Lead Op. at 13. But there is no legal support offered for the lead opinion's contention that the plaintiffs' inability to perform their jobs is nothing more than the equivalent of a chill on commercial speech. Lead Op. at 12-13. In addition, the lead opinion's commentary on the relative value of different forms of speech is not a point raised by either of the parties or, to my mind, in any way relevant to the resolution of this case. For this reason, I find the lead opinion's discussion ranking the value of political speech over commercial speech puzzling. I instead believe that *Laird* is distinguishable because the attorney-plaintiffs have in fact alleged a concrete, imminent, and particularized harm flowing from the TSP.

On appeal, the government contends that any litigation about the TSP must be premised on the three general facts that the government has publicly disclosed: (1) the TSP exists, (2) it operates without warrants, and (3) it intercepts "only communications that originate or conclude in a foreign country, and only if there are reasonable grounds to believe that a party to the communication is affiliated with al Qaeda." According to the government, the plaintiffs cannot demonstrate that they were actually targets of the TSP and thus cannot show more than a "subjective chill" on their activities. The government asserts that the plaintiffs cannot establish standing because the state-secrets privilege prevents us from testing the plaintiffs' allegations that they have been or likely will be subject to surveillance under the TSP. Moreover, the government argues that the plaintiffs improperly seek to assert the rights of third parties, such as their overseas contacts, clients, and sources, who are not presently before the court.

The attorney-plaintiffs respond that they have suffered concrete, particularized injuries as a result of the TSP. Specifically, they contend that the TSP puts them in the position of abrogating their duties under applicable professional-responsibility rules if they communicate with clients and contacts via telephone or email. The TSP, in short, allegedly prevents them from doing their jobs. Specifically, the attorney-plaintiffs contend that they have had to travel internationally for face-to-face meetings at a significant expense in terms of time and money. They claim that their ability to conduct research and factfinding has been limited, if not entirely thwarted, as a result.

The attorney-plaintiffs, as part of their representation of clients accused of being enemy combatants or of providing aid to organizations designated as terrorist groups, declare that they have conducted internet research on terrorism, religion, politics, and human-rights issues in parts of the Middle East and South Asia. They further state that they have reviewed web sites where topics including jihad, kidnapping, and other terrorist acts are discussed. As part of their work on behalf of their clients, these attorneys have communicated with potential witnesses, experts, lawyers, and other individuals who live and work outside the United States about subjects such as terrorism, jihad, and al-Qaeda. The attorney-plaintiffs contend that because of the TSP, they have ceased telephone or email communications about substantive issues with their overseas contacts. This is because the TSP, unlike FISA, provides no minimization procedures to protect attorney-client communications.

Under FISA, an application for an order authorizing surveillance must include a description of the minimization procedures that will be utilized to protect privileged communications. 50 U.S.C. § 1804(a)(5). "Minimization procedures" are "specific procedures . . . that are reasonably designed . . . to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons." 50 U.S.C. § 1801(h)(1); *see also* 50 U.S.C. §§1801(h)(2)-(4) (providing a further definition of the term). Privileged communications remain such under FISA. 50 U.S.C. § 1806(a) ("No otherwise privileged communication obtained in accordance with, or in violation of, the provisions of this subchapter shall lose its privileged character."); *id.* § 1806(h).

As noted above, the lead opinion finds that *Laird* controls this case. Lead Op. at 16. Although the lead opinion then asserts that it limits its application of *Laird* to only the attorney-plaintiffs' First Amendment claim, its analysis suggests otherwise. *Laird* addressed the question of "whether the jurisdiction of a federal court properly may be invoked by a complainant who alleges that the exercise of his First Amendment rights is being chilled by the *mere existence, without more*, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose." 408 U.S. at 10 (emphasis added). The case stands for the proposition that "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Id*. at 13-14. In *Laird*, the Court found that the U.S. Army, in its capacity as a domestic peacekeeping body, had collected information on "public activities that were thought to have at least some potential for civil disorder." *Id*. at 6. "The information itself was collected by a variety of means, but it is significant that the principal sources of information were the news media and publications in general circulation." *Id*.

I believe that the attorney-plaintiffs here allege a distinct set of facts that is legally distinguishable from those set forth in *Laird*. Unlike in the present case, the *Laird* plaintiffs simply articulated "speculative apprehensiveness that the Army may at some future date misuse the information in some way that would cause direct harm to [them]." 408 U.S. at 13-14. The Court stated that the plaintiffs "freely admit that they complain of no specific action of the Army against them . . . . There is no evidence of illegal or unlawful surveillance activities." *Id*. at 9.

In contrast to *Laird*, the attorney-plaintiffs here complain of specific present harms, not simply of some generalized fear of the future misuse of intercepted communications. The TSP forces them to decide between breaching their duty of confidentiality to their clients and breaching their duty to provide zealous representation. Neither position is tenable. The attorney-plaintiffs must travel to meet in person with clients and sources in order to avoid the risk of TSP surveillance. Unlike the situation in *Laird*, the attorney-plaintiffs in the present case allege that the government is listening in on private person-to-person communications that are not open to the public. These are communications that any reasonable person would understand to be private. The attorney-plaintiffs have thus identified concrete harms to themselves flowing from their reasonable fear that the TSP will intercept privileged communications between themselves and their clients.

To survive the government's standing-to-sue challenge, the attorney-plaintiffs do not have to demonstrate that their past communications have in fact been intercepted by the TSP. In *Laidlaw*, for example, the Supreme Court found that environmental groups had standing to sue a polluter where their members declared "that they would use the nearby North Tyger River for recreation if Laidlaw were not discharging pollutants into it." 528 U.S. at 184. The Court did not require the plaintiffs to show that the pollutants had actually harmed the environment, instead finding that their members' "reasonable concerns about the effects of [Laidlaw's] discharges directly affected those affiants' recreational, aesthetic, and economic interests," and that these concerns "present[ed] dispositively more than the mere general averments and conclusory allegations found inadequate" in prior cases. *Id*. at 183-84 (citation and quotation marks omitted).

A similar conclusion was reached by the Fourth Circuit in *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149 (4th Cir. 2000). In *Gaston Copper*, the court found that the plaintiff had standing based on his assertion that he used the affected lake less than he would have otherwise as a result of the ongoing pollution, despite the lack of evidence showing an objective environmental change in the lake. *Id*. at 156, 159.

Both the *Laidlaw* and the *Gaston Copper* plaintiffs asserted more than "a mere academic or philosophical interest," *Gaston Copper*, 204 F.3d at 159, or "an ingenious academic exercise in the conceivable." *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412

U.S. 669, 688 (1973). The attorney-plaintiffs in the case before us likewise have alleged a harm far beyond the academic in their challenge to the TSP.

In reaching the opposite conclusion, the lead opinion attempts to distinguish *Laidlaw* by noting that the plaintiffs there brought their complaint under the citizen-suit provision of the Clean Water Act, a fact that the lead opinion asserts "offers only minimal support" for the plaintiffs in the present case. Lead Op. at 34. Although the plaintiffs in that case did indeed base their cause of action on an environmental statute, the Supreme Court still analyzed whether they satisfied the constitutional standing requirements of Article III. *See Laidlaw*, 528 U.S. at 180-89. The fact that the Clean Water Act contained a citizen-suit provision did not absolve the courts of examining the constitutional standing of the particular plaintiffs before them. I therefore find the lead opinion's treatment of *Laidlaw* unpersuasive. As in *Laidlaw*, I have analyzed the attorney-plaintiffs' assertions of Article III standing and have concluded that they satisfy those requirements.

The concurring opinion also criticizes my interpretation of *Laidlaw*, describing it as "transform[ing] the holding" in that case. Concurring Op. at 37. I do not believe that this characterization holds up under scrutiny. In discussing the case, the concurring opinion describes the *Laidlaw* plaintiffs as "in fact subject to defendant's conduct" of discharging pollutants in excess of permitted amounts into the North Tyger River. *Id*. (emphasis omitted). The Supreme Court, to be sure, noted that "it is undisputed that Laidlaw's unlawful conduct . . . was occurring," but nonetheless found nothing "improbable about the proposition that a company's continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms." *Laidlaw*, 528 U.S. at 184 (citation and quotation marks omitted).

The concurring opinion then argues, in reference to the *Laidlaw* plaintiffs, that their "*fear of harm* from the defendant's undisputed conduct—conduct that would also undisputably affect plaintiffs personally if they undertook their desired activities—was sufficient to support standing." Concurring Op. at 37 (emphasis in original). Similarly, the concurring opinion acknowledges that "the plaintiffs in the present case may have a reasonable fear of harm from the defendants' conduct." *Id*. It goes on to state, however, that the attorney-plaintiffs lack standing because they "must be actually subject to the defendant's conduct, not simply afraid of being subject to it." *Id*. Because I believe that the plaintiffs in the present case *are* "actually subject to the defendant's conduct" within the meaning of *Laidlaw*, I respectfully disagree with my colleague's conclusion.

To my mind, the concurring opinion describes, rather than distinguishes, the situation of the attorney-plaintiffs. The concurring opinion would hold that the attorney-plaintiffs must demonstrate that they have personally been subject to surveillance under the TSP in order to have standing to sue. This is akin to Laidlaw's argument that the plaintiffs should have been required to demonstrate that Laidlaw's mercury discharge violations caused them to "sustain[] or face[] the threat of any 'injury in fact' from Laidlaw's activities." *Laidlaw*, 528 U.S. at 181. But the Supreme Court rejected such an argument, stating that the plaintiffs need only show "the reasonableness of the fear that led the affiants to respond to that concededly ongoing conduct . . . ." *Id*. at 184 (brackets and quotation marks omitted).

Both the lead and concurring opinions proceed to analogize the present case to two cases that I find distinguishable. One is *Los Angeles v. Lyons*, 461 U.S. 95 (1983), where the Supreme Court denied standing for injunctive relief to a Los Angeles motorist who had been subjected to a chokehold by the police during a routine traffic stop. *Id*. at 100. The Court reasoned in part that the plaintiff's "subjective apprehensions" that "a recurrence of the allegedly unlawful conduct" would occur were insufficient to support standing. *Id*. at 107 n.8. But the likelihood that Lyons would again find himself in a chokehold by the Los Angeles police seems to me far more remote than the ongoing concern of the attorney-plaintiffs here that their telephone or email communications will

be intercepted by the TSP. Based upon the principles set forth in *Laidlaw*, the "reasonableness of the fear" of the attorney-plaintiffs in the present case strikes me as being well beyond what is needed to establish standing to sue. *See Laidlaw*, 528 U.S. at 184.

Pushing the lead opinion's reasoning still further, the concurring opinion argues that the attorney-plaintiffs "can show nothing more than a fear" of "being subject to a government policy of surveillance." Concurring Op. at 37. "By contrast, if the *Laidlaw* plaintiffs had resumed their abandoned activities, they would definitely have been subject to the defendant's conduct—illegal discharge into the river." *Id*. The concurring opinion then asserts that "[t]he Supreme Court's distinction between *Laidlaw* and *Lyons* was one of kind, not degree." *Id*. But I find no support for this assertion, and my colleague's reliance on a quotation from *Laidlaw* for this point strikes me as unpersuasive.

In fact, the *Laidlaw* plaintiffs were personally affected by the defendant's conduct whether they used the waterway or not. Nothing in *Laidlaw* required that the plaintiffs demonstrate that they were all equally likely to be affected by the pollutants, that the pollutants were evenly dispersed through the waterway, or that a plaintiff swimming in the river was more likely than a plaintiff canoeing on the river to be injured. All that was required was that they demonstrate that, given Laidlaw's undisputed conduct, they possessed a reasonable fear of harm. This holds equally true for the attorney-plaintiffs in the present case. The existence of the TSP is undisputed and these plaintiffs are personally affected by the TSP whether they engage in targeted communications or not. In sum, I believe that the distinction between *Laidlaw* and *Lyons* is in fact one of degree, and that the attorney-plaintiffs here occupy a position far closer to the former than to the latter.

The other case to which the lead opinion analogizes the present suit is *United Presbyterian Church v. Reagan*, 738 F.2d 1375 (D.C. Cir. 1984). In *United Presbyterian Church*, a group of religious and political organizations, academics, journalists, and a member of Congress challenged the constitutionality of an Executive Order that "specif[ied] the organization, procedures and limitations applicable to the foreign intelligence and counterintelligence activities of the Executive Branch." *Id*. at 1377. The *United Presbyterian Church* plaintiffs sought a declaratory judgment that this Executive Order violated the First, Fourth, and Fifth Amendments to the Constitution, the separation-of-powers doctrine, and the National Security Act of 1947. *Id*. Unlike the attorney-plaintiffs in the present case, however, the *United Presbyterian Church* plaintiffs "fail[ed] to allege that any plaintiff has suffered any injury in fact under the Order." *Id*. (discussing the district court opinion). The D.C. Circuit therefore affirmed the district court's dismissal of the complaint for lack of standing to sue, but that fact-driven result has no bearing on the present case with its dramatically different facts.

In dismissing the complaint, the D.C. Circuit followed *Laird* in concluding that the plaintiffs had alleged no more than a subjective chill. *Id*. at 1378-81. The facts in the present case are substantially different, however, with even the concurring opinion acknowledging that "[h]ere the plaintiffs' professional injuries are arguably a harm beyond chilled speech." Concurring Op. at 39 n.3. To be sure, several of the groups in *United Presbyterian Church* claimed that they had experienced direct injury, such as interception of their mail, disruption of their events, and infiltration of their meetings. *United Presbyterian Church*, 738 F.3d at 1381 n.2. But these allegations were deemed "too generalized" and insufficient because "[t]here is no allegation or even suggestion that any unlawful action to which the appellants have been subjected in the past was the consequence of the presidential action they seek to challenge here." *Id*. at 1380-81. The D.C. Circuit thus concluded that, "[w]ithout such connection, standing to pursue the present suit does not exist." *Id*. at 1381.

Here, in contrast, the attorney-plaintiffs have provided a connection between their injury and the TSP. Specifically, officials in the Bush Administration have publicly stated that the TSP

involves "intercepts" of "international calls" and "communications" where the government "ha[s] a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda." Press Briefing by Alberto Gonzales, Att'y Gen., and Gen. Michael Hayden, Principal Deputy Dir. for Nat'l Intelligence (Dec. 19, 2005), http://www.whitehouse.gov/news/releases/2005/12/print/20051219-1.html. These are exactly the types of clients that the attorney-plaintiffs represent. The TSP therefore constitutes a "genuine threat" of harm to the attorney-plaintiffs, *see Steffel v. Thompson*, 415 U.S. 452, 475 (1974), the absence of which doomed the *United Presbyterian Church* plaintiffs' action.

A number of cases have distinguished *Laird* in situations such as this where the plaintiffs have suffered professional injuries. In *Meese v. Keene*, 481 U.S. 465 (1987), for example, a state legislator wished to publicly screen three Canadian-made films about the effects of acid rain and nuclear winter. Under a federal statute, the films would have had to be designated as "political propaganda" in order to be shown in this country. Keene sued for injunctive relief, contending that the statute violated his First Amendment rights. The Supreme Court held that Keene had standing to raise a First Amendment claim on the ground that identifying the films as "political propaganda" threatened to cause him cognizable professional injury. *Id*. at 473. Keene had not in fact shown the films, but alleged that he had standing based on his anticipated harm. The Court agreed, convinced that voters would be less likely to support a candidate associated with propaganda. *Id*. at 475.

Another example is *Ozonoff v. Berzak*, 744 F.2d 224 (1st Cir. 1984), where the First Circuit found standing for a physician who wished to work for the World Health Organization (WHO). An Executive Order required that a U.S. citizen undergo a loyalty check before the WHO could extend an offer of employment to that person, notwithstanding the fact that the WHO was not an entity of the U.S. government. The First Circuit distinguished *Laird* because Ozonoff was alleging more than "the mere existence" of a governmental investigative and data-gathering activity. *Id*. at 229-30. Instead, Ozonoff's alleged injury was that the loyalty check would deter him from joining certain organizations or expressing certain views. Because of the Executive Order, Ozonoff had chosen to limit his organizational affiliations, much as the existence of the TSP has caused the attorney-plaintiffs to limit their telephone and email communications. Unlike Ozonoff, however, the attorney-plaintiffs are stymied in their efforts to do their jobs by the need to limit their communications. I thus believe that the attorney-plaintiffs have alleged an even more concrete and particularized injury than Ozonoff alleged.

A final example comes from the Third Circuit case of *Paton v. LaPrade*, 524 F.2d 862 (3d Cir. 1975), where the court found standing for high-school student Lori Paton, who alleged that the existence of an FBI investigative file about her could impair her future educational and professional opportunities. *Id*. at 868. As part of a high school social studies class on "the contemporary political spectrum," Paton had requested information from the Socialist Workers Party (SWP). *Id*. at 865. The FBI was monitoring mail received and sent by the SWP, resulting in Paton's name and address being recorded and placed in an FBI investigative file. This "mail cover" was in fact directed at the SWP. Like the TSP, the mail cover did not directly compel, proscribe, or regulate Paton. But its effect, like that of the TSP, was to injure her. Paton learned of the file after an FBI agent visited her high school to inquire about her. On these facts, the Third Circuit found that she had standing to challenge the postal regulation authorizing the recording of information about mail going to or from an organization such as the SWP because "she may have sustained or be immediately in danger of sustaining a direct injury" to her present and future educational or professional activities as a result. *Id*. at 871-73.

The lead opinion attempts to distinguish these cases and others like them on the basis that they challenged the "regulatory, proscriptive, or compulsory" exercise of governmental power to which the complainants were presently or prospectively subject. Lead Op. at 12 (quoting *United*

Presbyterian Church, 738 F.2d at 1378). But that type of government power is precisely what is being challenged here. The attorney-plaintiffs have made credible allegations that the operation of the TSP has compelled them to cease telephone and email communication about sensitive topics with their clients and contacts. Publicly admitted information about the TSP supports them.

What I believe distinguishes *Meese*, *Ozonoff*, *Paton*, and the like from *Laird* is that the plaintiffs in the first-named cases successfully explained the "precise connection between the mere existence of the challenged system and their alleged chill." *Laird*, 408 U.S. at 13, n.7. Unlike the *Laird* plaintiffs who conceded that they themselves were not suffering from any chill, the attorney-plaintiffs here have established a reasonable fear that has generated "actual," "imminent," "concrete," and "particularized" harm resulting from the operation of the TSP, a program that lacks any minimization procedures to protect their privileged communications. *See Lujan*, 504 U.S. at 560.

Finally, the concurring opinion would find that the state-secrets privilege prevents the attorney-plaintiffs from establishing an injury in fact. Concurring Op. at 39 ("[T]he state secrets privilege has prevented the plaintiffs from conducting discovery that might allow them to establish that they are personally subject to the TSP, as I believe constitutional standing requires."). But this reading expands the reach of the privilege in ways that the caselaw does not support. Because the state-secrets privilege "operates to foreclose relief for violations of rights that may well have occurred by foreclosing the discovery of evidence that they did occur, it is a privilege not to be lightly invoked." *Halkin v. Helms*, 690 F.2d 977, 990 (D.C. Cir. 1982) (citation and quotation marks omitted); *see also Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983) ("[T]he privilege may not be used to shield any material not strictly necessary to prevent injury to national security; and, whenever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter.").

The privilege is typically invoked with respect to specific requests for discovery. *See, e.g.*, *Jabara v. Kelley*, 75 F.R.D. 475, 478-79 (E.D. Mich. 1977). If, however, the state-secrets privilege "deprives the [d]efendants of a valid defense to the [plaintiffs'] claims," then summary judgment may be granted to the defendant. *Tenenbaum v. Simonini*, 372 F.3d 776, 777-78 (6th Cir. 2004).

But unlike in *Jabara* or *Tenenbaum*, the attorney-plaintiffs here seek no additional discovery from the defendants. Instead, the attorney-plaintiffs argue that they have established standing based on the facts in the public record. This issue highlights what I believe to be the key difference between the lead and concurring opinions on the one hand and my opinion on the other. My colleagues believe that the attorney-plaintiffs must establish that they were actually subject to surveillance under the TSP, whereas I conclude that a demonstration of a reasonable, well-founded fear that has resulted in actual and particularized injury suffices. My reading of the caselaw leads me to conclude that the state-secrets privilege is not so broad as to bar the attorney-plaintiffs from making such a showing.

In short, the critical question in this case is not whether the attorney-plaintiffs have actually been surveilled—because, as the lead opinion aptly notes, a wiretap by its nature is meant to be unknown to its targets—but whether the "reasonableness of the fear" of such surveillance is sufficient to establish that they have suffered actual, imminent, concrete, or particularized harm from the government's alleged unlawful action. *See Laidlaw*, 528 U.S. at 184. For the reasons discussed above, I believe that the plaintiffs have established such an injury in fact. I therefore turn to the remaining factors in the Article III constitutional-standing analysis.

2. Causation

The plaintiffs must next demonstrate a causal connection between the injury asserted and the government's alleged conduct. This means that "a federal court [can] act only to redress injury that

fairly can be traced to the challenged action of the defendant, and not . . . that results from the independent action of some third party not before the court." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). The "fairly traceable" standard, however, does not require that the defendant's conduct be the sole cause of the plaintiff's injury. *See, e.g.*, *Am. Canoe Ass'n, Inc. v. City of Louisa Water & Sewer Comm'n*, 389 F.3d 536, 543 (6th Cir. 2004) (finding the causation prong satisfied despite the absence of evidence proving "to a scientific certainty" that the defendant's pollution caused the plaintiff's injury).

In the present case, the lead opinion finds that the attorney-plaintiffs have failed to establish causation due to its characterization of their "two causal pathways based on the two types of alleged injury." Lead Op. at 18. These two pathways are then described as (1) the plaintiffs' decision to cease certain communications as a result of the TSP, and (2) the decision by overseas contacts of the plaintiffs to cease certain communications as a result of the TSP. *Id.* The lead opinion concludes that the plaintiffs "have no evidence . . . that the NSA has actually intercepted (or will actually intercept) any of their conversations." *Id.* Rather, the lead opinion characterizes the evidence in the record as establishing "only a *possibility* — not a probability or certainty — that these calls might be intercepted, that the information might be disclosed or disseminated, or that this might lead to some harm to the [plaintiffs'] overseas contacts." *Id.* (emphasis in original). This "possibility" is too indeterminate, according to the lead opinion, and thus renders "the plaintiffs' showing of causation less certain and the likelihood of causation more speculative." *Id.* The lead opinion also concludes that the absence of a warrant for the alleged surveillance is insufficient to establish causation because "it is not clear whether the chill can fairly be traced to the absence of a warrant, or if the chill would still exist without regard to the presence or absence of a warrant." Lead Op. at 19.

Based upon my reading of the complaint and the subsequent motion for partial summary judgment, I believe that the lead opinion has mischaracterized the attorney-plaintiffs' allegations. What the attorney-plaintiffs themselves allege, in fact, is that the existence of the TSP outside of FISA's minimization procedures has prevented them from communicating by telephone and by email with their clients, contacts, and sources, thus either compelling them to violate their ethical obligations, or requiring them to undertake costly overseas trips; in short, the TSP has prevented them from doing their jobs. In response, the lead opinion asserts that "there is no evidence in the record from which to presume that the NSA is not complying with, or even exceeding, FISA's restrictions on the acquisition, retention, use, or disclosure of [the information acquired] (i.e., FISA's minimization techniques)." Lead Op. at 20.

This unsupported assertion is belied by statements on the public record from Executive Branch officials. With respect to the acquisition of information, the TSP has been described as having a "softer trigger" than FISA, Press Briefing by Alberto Gonzales, Att'y Gen., and Gen. Michael Hayden, Principal Dep'y Dir. for Nat'l Intel. (Dec. 19, 2005), http://www.whitehouse.gov/news/releases/2005/12/print/20051219-1.html, and one that uses a "reasonable belief" standard rather than FISA's probable cause standard for surveillance. *See* Remarks by Gen. Michael V. Hayden, Principal Dep'y Dir. of Nat'l Intel., Address to the Nat'l Press Club, Jan. 23, 2006, http://www.dni.gov/speeches/20060123_speech.htm. A senior official in the Department of Justice further informed Congress in 2006 that, "[a]lthough the [TSP] does not specifically target the communications of attorneys or physicians, calls involving such persons would not be categorically excluded from interception . . . ." Letter from William E. Moschella, Assistant Att'y Gen., to the Honorable F. James Sensenbrenner, Jr. (Mar. 24, 2006), at 55, http://www.fas.org/irp/agency/doj/fisa/doj032406.pdf.

To be sure, the Bush Administration has also asserted that "procedures are in place to protect U.S. privacy rights, including applicable procedures required by Executive Order 12333 and approved by the Attorney General, that govern acquisition, retention, and dissemination of

information relating to U.S. persons." *Id*. A review of this Executive Order, however, reveals that it makes no mention of protecting privileged communications. *See* Exec. Order No. 12,333, 46 Fed. Reg. 59, 941 (Dec. 4, 1981). Furthermore, the Administration has claimed that "[b]ecause collecting foreign intelligence information without a warrant does not violate the Fourth Amendment and because the [TSP] is lawful, there appears to be no legal barrier against introducing this evidence in a criminal prosecution." Letter from William E. Moschella, Assistant Att'y Gen., to the Honorable F. James Sensenbrenner, Jr. (Mar. 24, 2006), at 54, http://www.fas.org/irp/agency/doj/fisa/doj032406.pdf.

Which characterization of injury one accepts will largely determine the causation prong (as well as the redressability prong discussed below) of the standing analysis. As one distinguished commentator has noted,

> [t]he central problem in the causation cases is not whether there is a causal nexus among injury, remedy, and illegality; it is how to characterize the relevant injury. Whether the injury is due to the defendant's conduct, or likely to be remedied by a decree in his favor, depends on how the injury is described.

Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 Colum. L. Rev. 1432, 1464 (1988).

The lead opinion focuses primarily on the lack of evidence that "the NSA has actually intercepted (or will actually intercept) any of [the plaintiffs'] conversations," and on the "the absence of a warrant (and all that goes with it)." Lead Op. at 18 (footnote and emphasis omitted). But as I discussed earlier in Part I.A.1., the attorney-plaintiffs need show only the reasonableness of their fear, not that their fear has in fact been realized. *See, e.g.*, *Laidlaw*, 528 U.S. at 184; *Meese*, 481 U.S. at 475. I thus find the attorney-plaintiffs' characterization of their injury the more persuasive.

Since learning of the existence and operation of the TSP, the attorney-plaintiffs contend that they have ceased communicating by telephone or email about sensitive subjects with their clients and contacts. Whether the potential surveillance is conducted pursuant to a warrant is not the gravamen of their complaint. Their concern is directed at the impact of the TSP on their ability to perform their jobs. The causation requirement does not demand that the government's conduct be the "sole cause" of the attorney-plaintiffs' injury, only that the injury be "fairly traceable" to that conduct. *See Simon*, 426 U.S. at 41; *Am. Canoe Ass'n*, 389 F.3d at 543. If the TSP did not exist, the attorney-plaintiffs would be protected by FISA's minimization procedures and would have no reason to cease telephone or email communication with their international clients and contacts. I therefore conclude that the attorney-plaintiffs have demonstrated a causal connection between their asserted injury and the government's alleged actions.

3. Redressability

This leaves the issue of whether the attorney-plaintiffs' injury "will be redressed by a favorable decision." *Laidlaw*, 528 U.S. at 181. The lead opinion's redressability analysis appears to make two basic points. First, the lead opinion cites 50 U.S.C. § 1806(a) for the proposition that "the issuance of FISA warrants would not relieve any of the plaintiffs' fears of being overheard; it would relieve them only of the fear that the information might be disseminated or used against them." Lead Op. at 21. The lead opinion also asserts that

> FISA might not prohibit the interception of attorney-client communications under circumstances where the NSA adheres to a policy of complete non-disclosure. Due to the State Secrets Doctrine, the plaintiffs do not (and cannot) know whether the

> NSA actually adheres to a policy of complete non-disclosure, but based on the record evidence, it certainly remains possible.

Lead Op. at 21 n.31. That proposition, however, is itself speculation, as the lead opinion concedes. Absent a public revelation from the NSA, the attorney-plaintiffs (or anyone else, for that matter) will simply never know whether a nondisclosure policy in fact exists.

In the face of this uncertainty, the attorney-plaintiffs must presume the absence of such a policy. Their ethical obligations require them to do so, lest they run the risk of revealing confidential and possibly incriminating information directly to the government. The reasonable concern about the possibility of disclosure—not the disclosure itself—triggers those obligations. Similarly, the simple assertion that

> [t]he TSP is designed and operated for the prevention of terrorism, and the NSA is interested only in telephone and email communications in which one party to the communication is located outside the United States and the NSA has a 'reasonable basis to conclude that one party to the communication is a member of[, affiliated with,] or working in support of al Qaeda,'

Lead Op. at 21, does not mean that the TSP is not and could not be used to facilitate criminal investigation. *Cf. In re Sealed Case*, 310 F.3d 717, 727 (For. Intel. Surv. Ct. Rev. 2002) (stating that FISA does not "preclude or limit the government's use or proposed use of foreign intelligence information . . . in a criminal prosecution.").

The lead opinion contends that there is a lack of "evidence in the present record to suggest[] that the information collected by the NSA under the TSP has been disclosed to anyone for any purpose." Lead Op. at 21 n.31. *But see Al-Haramain Islamic Found. v. Bush*, 451 F. Supp. 2d 1215, 1223-25, 1228-30 (D. Or. 2006) (discussing the effect of the government's inadvertent disclosure of a sealed document that arguably described surveillance of the plaintiffs under the TSP). Notwithstanding the lead opinion's contention, a plain reading of the FISA statute provides no support for the speculative assertion that a "policy of complete non-disclosure" exists within the NSA. FISA's explicit provisions regarding minimization procedures and privileged communications in fact strongly support the opposite conclusion.

The lead opinion's second point is premised on 50 U.S.C. § 1805(f), which sets forth the emergency-based exceptions to the normal FISA procedures. It cites this subsection for the proposition that "FISA's general requirement that electronic surveillance may proceed only upon issuance of a FISA Court warrant is not absolute, as FISA provides for instances in which a prior warrant may be unnecessary, at least for a short period of time." Lead Op. at 21 n.31. I agree that FISA's warrant requirement is "not absolute." But the "warrant requirement" is besides the point. Instead, FISA's minimization procedures regarding the use of wiretapped information are the only FISA protections that ultimately bear on the redressability prong of the standing analysis in the present case. The point is that these minimization procedures *are* "absolute" even though the warrant requirement is not. *See* 50 U.S.C. § 1805(f) ("If the Attorney General authorizes such emergency employment of electronic surveillance, he *shall* require that the minimization procedures required by this subchapter for the issuance of a judicial order be followed.") (emphasis added).

Admittedly, the Supreme Court has furnished little guidance regarding the scope of the redressability inquiry beyond requiring a "'direct' relationship between the alleged injury and the claim sought to be adjudicated." *Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973). But I believe that the present case clearly demonstrates such a direct link between the attorney-plaintiffs' injury and their claim. The attorney-plaintiffs' redressability arguments revolve around their very real ongoing ethical obligations to their clients, to their profession, and to themselves. These obligations,

as noted above, exist independently of whether the attorney-plaintiffs' communications with their clients have actually been wiretapped through the TSP, independently of whether the NSA actually adheres to a "policy of complete non-disclosure" for all TSP-wiretapped information, and independently of whether a judicially authorized warrant has actually been procured in advance of the alleged wiretapping. This is where the Supreme Court's 2000 decision in *Laidlaw* again comes directly into play.

The Court in *Laidlaw* found that the plaintiffs had satisfied the redressability prong even though the defendant, during the course of the appeal, had voluntarily ceased the conduct that had initially given rise to the lawsuit. 528 U.S. at 188-89. Here, too, the NSA has allegedly ceased conducting the TSP independently of the FISA court, as discussed in greater depth in Part I.D. below. But as the government's counsel conceded at oral argument, the Executive Branch views itself as free to unilaterally "opt out" of the FISA court's oversight at any time. The civil penalties imposed on the defendant in *Laidlaw*, the Supreme Court held, redressed the plaintiffs' alleged injuries from the prior unauthorized pollutant discharges because those injuries were ongoing and the penalties would generally deter not only that particular defendant, but also others similarly situated to it, from engaging in similar conduct in the future. *See id.* at 187.

Deterrence, in short, is an especially appropriate consideration where, as here, the alleged harm is not "wholly past" but, as publicly acknowledged by the government, instead "ongoing at the time of the complaint and . . . could continue into the future." *Laidlaw*, 528 U.S. at 188 (distinguishing the holding in *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 108 (1998)). The Court's holding in *Laidlaw* could not be more applicable than it is to the present case: "It can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress." *Id.* at 185-86.

The facts alleged by the attorney-plaintiffs here fit this language to a "T." Each of them "faces the threat" that the TSP will harm them in the future, the TSP was undisputedly ongoing at the time that the attorney-plaintiffs filed their lawsuit, and the district court's injunction "effectively abates" the TSP and "prevents its recurrence." The lead opinion's parting assertion that "[t]he only way to redress the injury would be to enjoin *all* wiretaps, even those for which warrants are issued and for which full prior notice is given to the parties being tapped," Lead Op. at 22, provides rhetorical flourish but significantly overstates the attorney-plaintiffs' allegations. Simply requiring that the Executive Branch conform its surveillance-gathering activities to governing law, including the requirements of FISA, will redress the attorney-plaintiffs' injury. More is not needed. I therefore conclude that the attorney-plaintiffs have satisfied the redressability prong of the standing analysis.

4. Prudential requirements

The attorney-plaintiffs must satisfy the requirements of prudential standing in addition to satisfying the Article III constitutional requirements. Specifically, they must demonstrate that they are asserting their own interests rather than those of a third party, *see Allen v. Wright*, 468 U.S. 737, 751 (1984), and that they are asserting a personalized claim rather than a generalized grievance. *See Fed. Election Comm'n v. Akins*, 524 U.S. 11, 23-25 (1998). Other prudential-standing requirements exist that are not universally applied in all cases. One such requirement is the so-called zone-of-interests test. *See Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 400 n.16 (1987) (noting that the zone-of-interests test "is most usefully understood as a gloss on the meaning of § 702" of the Administrative Procedures Act). This test requires plaintiffs to show that they are "within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." *Bennett v. Spear*, 520 U.S. 154, 162 (1997).

a. Generalized grievance and personal interest

Prudential-standing requirements preclude litigation in federal court "when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all of a large class of citizens," or where a plaintiff seeks to "rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). The fact that a harm is widely shared, however, will not by itself preclude standing if the harm is also concrete and particularized. *Mass. v. Envtl. Protection Agency*, 127 S. Ct. 1438, 1456 (2007) ("[W]here a harm is concrete, though widely shared, the Court has found 'injury in fact.'") (quoting *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 24 (1998))).

In the present case, the attorney-plaintiffs have alleged specific and concrete injuries to themselves and to their ability to engage in their professional work due to the operation of the TSP. They allege that they are unable to engage in telephone and email communications with clients and contacts because the identity of those clients and contacts, some of whom have been charged with links to terrorism or terrorist organizations, fall within the ambit of the TSP. Because the government has admitted that the TSP has operated outside of FISA and does not distinguish attorneys from any other person whose telephone or email communications might be under electronic surveillance, the attorney-plaintiffs have been unable, consistent with their ethical responsibilities to their clients and to the bar, to engage in privileged communications. They must instead incur the significant financial and professional burden of traveling to meet in person with clients and contacts.

The TSP has thus injured the attorney-plaintiffs both personally and professionally. For these reasons and for the reasons previously discussed in my analysis of injury in fact in Part I.B.1. above, I conclude that the attorney-plaintiffs are asserting personalized, individual harms rather than generalized grievances or the rights of a third party.

b. Zone of interests

The zone-of-interests test is the other prudential standing requirement that the attorney-plaintiffs must satisfy. They must show that they are arguably within the zone of interests of "a relevant statute." 5 U.S.C. § 702; *Clarke*, 479 U.S. at 396. The Supreme Court has clarified "that the breadth of the zone of interests varies according to the provisions of law at issue, so that what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the generous review provisions of the APA may not do so for other purposes." *Id*. at 163 (quotation marks omitted).

In the present case, the attorney-plaintiffs do not raise a cause of action under FISA or under Title III; instead, their cause of action arises under the APA. Under § 702 of the APA, "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. A plaintiff must therefore "identify some agency action that affects him in the specified fashion." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990) (quotation marks omitted). Second, the plaintiff must show that he has suffered a "legal wrong" because of that agency action or that he is "adversely affected or aggrieved by that action within the meaning of a relevant statute." *Id*. at 883 (quotation marks omitted).

The Supreme Court said in *Lujan* "that to be adversely affected or aggrieved . . . within the meaning of a statute, the plaintiff must establish that the injury he complains of . . . falls within the zone of interests sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Id*. (quotation marks omitted). "In determining whether the petitioners have standing under the zone-of-interests test to bring their APA claims, we look not to the terms of the [relevant statute's] citizen-suit provision, but to the substantive provisions of the [statute], the alleged violations of which serve as the gravamen of the complaint." *Bennett*, 520 U.S. at 175. The

attorney-plaintiffs here maintain that the TSP violates FISA and Title III by functioning as an electronic surveillance program outside the "exclusive means" of those statutes.

FISA includes a civil-liability provision, which states that

> [a]n aggrieved person, other than a foreign power or an agent of a foreign power, as defined in section 1801(a) or (b)(1)(A) of this title, respectively, who has been subjected to an electronic surveillance or about whom information obtained by electronic surveillance of such person has been disclosed or used in violation of section 1809 of this title shall have a cause of action against any person who committed such violation and shall be entitled to recover [actual and punitive damages and reasonable attorney fees and costs].

50 U.S.C. § 1810. The lead opinion asserts that the attorney-plaintiffs cannot establish that they have a right to sue because they are not "aggrieved persons" under FISA. An "aggrieved person" is defined as "a person who is the target of an electronic surveillance or any other person whose communications or activities were subject to electronic surveillance." 50 U.S.C. § 1801(k). According to the lead opinion, because the plaintiffs "have not shown that they were actually the target of, or subject to, the NSA's surveillance," they cannot establish a cause of action under FISA. Lead Op. at 32.

The attorney-plaintiffs' challenge, however, is precisely that the TSP has operated *outside* of FISA despite the fact that Congress has declared FISA to be the "exclusive means" for the government to engage in electronic surveillance for foreign intelligence purposes in this country. 18 U.S.C. § 2511(2)(f). They rely on provisions of FISA and of Title III of the Omnibus Crime Control and Safe Streets Act, which criminalizes the interception and/or disclosure of wire, oral, or electronic communications other than pursuant to those statutes. *See* 50 U.S.C. § 1809(a); 18 U.S.C. § 2511(2)(f).

The lead opinion contends that Title III cannot support standing because the statute provides that "[n]othing contained in this chapter or chapter 121 or 206 of this title, or section 705 of the Communications Act of 1934, shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications." 18 U.S.C. § 2511(2)(f). Lead Op. at 29. But this reading of the statute ignores the remainder of the sentence. In full, section (2)(f) states as follows:

> Nothing contained in this chapter or chapter 121 or 206 of this title, or section 705 of the Communications Act of 1934, shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications, or foreign intelligence activities conducted in accordance with otherwise applicable Federal law involving a foreign electronic communications system, utilizing a means other than electronic surveillance as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, *and procedures in this chapter or chapter 121 and the Foreign Intelligence Surveillance Act of 1978 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.*

(Emphasis added.) In light of the fact that Title III deals only with domestic wiretaps to obtain intelligence information relating to certain specified offenses, *see* 18 U.S.C. § 2516, the above-quoted subsection makes quite clear that FISA "shall be the *exclusive means* by which electronic surveillance [for foreign intelligence purposes] . . . may be conducted." *Id*. (emphasis added).

The lead opinion contends, however, that the "exclusive means" provision of Title III and FISA should be read "as two separate and independent, albeit parallel, statements." Lead Op. at 32. Accordingly, the lead opinion asserts, "[t]his provision does not foreclose the possibility that the government may engage in certain surveillance activities that are outside of the strictures of both Title III and FISA." *Id*. But the lead opinion provides no legal support for this novel statutory interpretation and none is apparent to me. This, in my opinion, flies directly in the face of the plain language of FISA and its legislative history. I note, moreover, that the government announced in January of this year that the TSP would henceforth be conducted under the aegis of the FISA Court of Review.

The language of both the FISA statute and its legislative history is explicit: FISA was specifically drafted "to curb the practice by which the Executive [B]ranch may conduct warrantless electronic surveillance on its own unilateral determination that national security justifies it." S. Rep. No. 95-604, pt. I, at 8, *reprinted at* 1978 U.S.C.C.A.N. 3904, 3910; *see also id.* at 3908. When debating FISA, Congress made clear that it intended to prevent the Executive Branch from engaging in electronic surveillance in the United States without judicial oversight, even during times of war. *See* S. Rep. No. 95-701, at 47, *reprinted at* 1978 U.S.C.C.A.N. 3973, 4016 ("This bill will establish the exclusive United States law governing electronic surveillance in the United States for foreign intelligence purposes.").

Congress explicitly refuted the "inherent authority" argument on which the government seeks to justify the TSP's existence:

> Finally, S. 1566 spells out that the Executive cannot engage in electronic surveillance within the United States without a prior judicial warrant. This is accomplished by repealing the so-called executive "inherent power" disclaimer clause currently found in section 2511 (3) of Title 18, United States Code. S. 1566 provides instead that its statutory procedures (and those found in chapter 119 of title 18) "shall be the exclusive means" for conducting electronic surveillance, as defined in the legislation, in the United States. The highly controversial disclaimer has often been cited as evidence of a congressional ratification of the President's inherent constitutional power to engage in electronic surveillance in order to obtain foreign intelligence information essential to the national security. Despite the admonition of the Supreme Court that the language of the disclaimer was "neutral" and did not reflect any such congressional recognition of inherent power, the section has been a major source of controversy. By repealing section 2511(3) and expressly stating that the statutory warrant procedures spelled out in the law must be followed in conducting electronic surveillance in the United States, this legislation ends the eight-year debate over the meaning and scope of the inherent power disclaimer clause.

S. Rep. No. 95-604, pt. I, at 6-7, *reprinted at* 1978 U.S.C.C.A.N. 3904, 3908. In fact, Congress rejected language that would have made FISA and Title III the "exclusive *statutory* means" under which electronic surveillance could be conducted, instead adopting language that made those statutes simply the "*exclusive means*" governing such surveillance. *See* H.R. Conf. Rep. No. 95-1720, at 35, *reprinted at* 1978 U.S.C.C.A.N. 4048, 4064 (emphasis added).

More to the point, the government has publicly admitted that the TSP has operated outside of the FISA and Title III statutory framework, and that the TSP engages in "electronic surveillance." Press Briefing by Alberto Gonzales, Att'y Gen., and Gen. Michael Hayden, Principal Deputy Dir. for Nat'l Intelligence (Dec. 19, 2005), http://www.whitehouse.gov/news/releases/2005/12/print/20051219-1.html (General Hayden: "I can say unequivocally that we have used this program in lieu of [the FISA processes] and this program has been successful."). In January of 2007, in fact, the Bush Administration announced that it had

reached a secret agreement with the Foreign Intelligence Surveillance Court (FISC) whereby the TSP would comply with FISA, a further acknowledgment that the TSP had previously been operating without FISA approval. *See* Letter from Alberto Gonzales, Att'y Gen., to the Honorable Patrick Leahy & the Honorable Arlen Specter (Jan. 17, 2007), at 1 ("[A]ny electronic surveillance that was occurring as part of the Terrorist Surveillance Program will now be conducted subject to the approval of the Foreign Intelligence Surveillance Court."), http://leahy.senate.gov/press/200701/1-17-07%20AG%20to%20PJL%20Re%20FISA%20Court.pdf; *see also* Dan Eggen, *Spy Court's Orders Stir Debate on Hill*, Wash. Post, Jan. 19, 2007, at A06 (reporting on the reaction to the Bush administration's announcement "that it will dismantle the controversial counterterrorism surveillance program run by the National Security Agency and instead conduct the eavesdropping under the authority of the secret Foreign Intelligence Surveillance Court, which issues warrants in spy and terrorism cases").

The lead opinion, however, repeats the government's assertion that none of the plaintiffs have shown "that the NSA's surveillance activities include the sort of conduct that would satisfy FISA's definition of 'electronic surveillance,'" and declares that "the present record does not demonstrate that the NSA's conduct falls within FISA's definitions." Lead Op. at 31. As an initial matter, this argument has been waived because the government failed to raise it before the district court. *See, e.g.*, *United States v. Abdi*, 463 F.3d 547, 563 (6th Cir. 2006) ("It is fundamental, and firmly established by Supreme Court precedent, that appellate courts generally are not to consider an issue brought for the first time on appeal.").

Moreover, the government's contention lacks merit. The Attorney General has publicly acknowledged that FISA "requires a court order before engaging in *this kind of surveillance* . . . unless otherwise authorized by Congress." Press Briefing by Alberto Gonzales, Att'y Gen., and Gen. Michael Hayden, Principal Dep'y Dir. for Nat'l Intel. (Dec. 19, 2005), http://www.whitehouse.gov/news/releases/2005/12/print/20051219-1.html. (Emphasis added.) Other Administration officials have similarly characterized the TSP as being used "in lieu of" FISA. *Id*. These statements indicate that the TSP in fact captures electronic surveillance as defined by FISA, despite the belated effort of Executive Branch officials to disavow this acknowledgment.

There is no doubt in my mind that the attorney-plaintiffs have established that the injury complained of falls within the zone of interests sought to be protected by these statutes. Accordingly, I conclude that they have satisfied the prudential-standing requirements.

5. Standing summary

For all of the reasons discussed above, I believe that the attorney-plaintiffs have satisfied both the constitutional and prudential requirements for standing to sue. I therefore conclude that the attorney-plaintiffs are entitled to proceed with their claims against the government for the injuries allegedly flowing from the operation of the TSP.

C. Mootness

The last procedural hurdle that the plaintiffs must overcome is the question of mootness. Article III of the Constitution limits the jurisdiction of the federal courts to "actual, ongoing controversies." *Honig v. Doe*, 484 U.S. 305, 317 (1988). Federal courts have "neither the power to render advisory opinions nor to decide questions that cannot affect the rights of litigants in the case before them." *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (quotation marks omitted). Mootness became an issue in this case in January of 2007, when the government publicly announced that a judge of the Foreign Intelligence Surveillance Court had issued orders authorizing the government to conduct electronic surveillance of "international communications into or out of the United States where there is probable cause to believe" that one party to the communication is "a member or agent

of al Qaeda or an associated terrorist organization." Letter from Alberto Gonzales, Att'y Gen., previously cited on p. 56, at 1.

As a result of these orders, electronic surveillance that had been occurring under the TSP "will now be conducted subject to the approval" of the FISC, and "the President has determined not to reauthorize" the TSP. *Id*. at 1-2. The government, in short, decided to voluntarily cease electronic surveillance of international communications in this country outside of FISA. On the ground that such surveillance would henceforth be FISA-compliant, the government argues that we should dismiss this case as moot and vacate the judgment below. To be sure, if we could be satisfied that the TSP would never be reinstituted, then the government's argument would have merit. We must therefore determine whether the present situation fits into the voluntary-cessation exception to the mootness doctrine.

Under well-established Supreme Court precedent, the "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot," *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953), because "courts would be compelled to leave the defendant . . . free to return to his old ways." *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968) (quotation marks omitted). The test is demanding: "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," *Concentrated Phosphate*, 393 U.S. at 203, and if "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979). Moreover, the "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Laidlaw*, 528 U.S. at 189 (brackets and quotation marks omitted). The government urges us to find that there is "no longer any live genuine controversy to adjudicate" because the TSP ceased to exist when the President's last authorization for it expired, thus resolving and mooting the plaintiffs' claims.

But the government continues to assert that the TSP did not violate the Constitution or any federal statute prior to the January 2007 FISC orders. Instead, it contends that "[a]n independent judicial body—the FISA court—has now acted to provide additional and wholly sufficient legal authority for the activity in question." The government accordingly argues that it "has in no sense terminated its conduct in response to plaintiffs' suit," but rather that the FISC orders "provide[] legal authority that plaintiffs claimed was absent." Both in its briefs and at oral argument, the government insisted that the FISC orders represent an independent "intervening act of a coordinate branch of government" that suffices to render the voluntary-cessation exception inapplicable.

But the government acknowledged at oral argument that the President maintains that he has the authority to "opt out" of the FISA framework at any time and to reauthorize the TSP or a similar program. The government also conceded that the FISC orders were actively sought by the Executive Branch, and that the President decided that he would comply with the orders only "after determining that the [FISC] order[s] provide[d] the necessary speed and agility" for TSP-style surveillance. Most recently, the Director of National Intelligence stated during a congressional hearing that the government continued to believe that the President has the authority under Article II of the Constitution to order the NSA to conduct warrantless electronic surveillance. James Risen, *Administration Pulls Back on Surveillance Agreement*, N.Y. Times, May 2, 2007, at A18. These facts do not support a conclusion that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Concentrated Phosphate*, 393 U.S. at 203. Indeed, the government's insistence that the TSP was perfectly lawful and the reservation of its ability to opt out of the FISC orders at any time lend credence to the opposite position.

I therefore conclude that the government has failed to meet its heavy burden of showing that the challenged conduct cannot reasonably be expected to start up again. Accordingly, I conclude that this case is not moot and that this court may properly continue to exercise jurisdiction over it.

D. Merits

Without expressing an opinion concerning the analysis of the district court, I would affirm its judgment because I conclude that the TSP violates FISA and Title III and that the President does not have the inherent authority to act in disregard of those statutes. The clearest ground for deciding the merits of this appeal is the plaintiffs' statutory claim, just as the clearest argument for standing is presented by the attorney-plaintiffs. This is not to say that the plaintiffs' other causes of action lack merit, but simply that this case can, and therefore should, be decided on the narrowest grounds possible. *See, e.g.*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 457 (1985) ("When a lower court correctly decides a case, albeit on what this Court concludes are unnecessary constitutional grounds, our usual custom is . . . to affirm on the narrower, dispositive ground available.") (quotation marks omitted).

1. The TSP violated FISA and Title III

The government contends that "it would be imprudent . . . to address plaintiffs' FISA claim without a district court decision addressing the predicate questions necessary to the resolution of that claim in the first instance." This argument overlooks the fact that an appellate court possessed of proper jurisdiction can affirm on any ground fairly supported by the record. *See In re Cleveland Tankers, Inc.*, 67 F.3d 1200, 1205 (6th Cir. 1995). Moreover, as the following analysis indicates, no predicate findings from the district court are needed to resolve the plaintiffs' statutory argument.

Both FISA and Title III expressly prohibit electronic surveillance outside of their statutory frameworks, as set forth in Part I.B.4.b. above. The language used is unequivocal. In enacting FISA, Congress directed that electronic surveillance conducted inside the United States for foreign intelligence purposes was to be undertaken only as authorized by specific federal statutory authority. *See* 50 U.S.C. § 1809. Title III criminalizes the interception and disclosure of wire, oral, and electronic communications except under certain specified exceptions. *See* 18 U.S.C. § 2511(2)(f). The statute clearly states that chapter 119 and FISA "shall be the *exclusive means* by which electronic surveillance . . . and the interception of domestic wire, oral, and electronic communications may be conducted." *Id*. (emphasis added).

In construing statutory language, we assume that "Congress said what it meant." *United States v. LaBonte*, 520 U.S. 751, 757 (1997). Where the text of a statute is clear, "we need not assess the legislative history of the . . . provision." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001). I nonetheless reiterate that the legislative history of FISA clearly reinforces the conclusion that FISA and Title III constitute the sole means by which electronic surveillance may lawfully be conducted. During a conference session on the FISA legislation, members of Congress rejected language that would have described FISA and Title III as the "exclusive *statutory* means" by which electronic surveillance was permitted, preferring instead the broader construction, "exclusive means." H.R. Conf. Rep. No. 95-1720, at 35 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4048, 4064.

Congress has thus unequivocally declared that FISA and Title III are the exclusive means by which electronic surveillance is permitted. No other authorization can comply with the law. Congress further emphasized this point by criminalizing the undertaking of electronic surveillance not authorized by statute in two separate places in the U.S. Code. *See* 50 U.S.C. § 1809; 18 U.S.C. § 2511(1) & (2)(e). The government, however, contends that Congress authorized the TSP in the aftermath of the September 11, 2001 attacks by enacting the Authorization for Use of Military Force

(AUMF), Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001). In addition, the government notes that "foreign intelligence gathering is . . . vital to the successful prosecution of war."

But FISA itself expressly and specifically restricts the President's authority even in times of war. The statute provides that "[n]otwithstanding any other law, the President, through the Attorney General, may authorize electronic surveillance without a court order under this subchapter to acquire foreign intelligence information for a period not to exceed fifteen calendar days following a declaration of war by the Congress." 50 U.S.C. § 1811. FISA thus limits warrantless electronic surveillance to the first 15 days following a declaration of war, a more formal action than even the enactment of an authorization for the use of force. This 15-day period of warrantless surveillance was enacted to permit "consideration of any amendment to this Act that may be appropriate during a wartime emergency." H.R. Conf. Rep. 95-1720, at 34, *reprinted at* 1978 U.S.C.C.A.N. 4048, 4063.

To be sure, Congress in 1978 likely did not contemplate a situation such as the one that arose with the attacks of September 11, 2001. But in the aftermath of those attacks, Congress has shown itself both willing and able to consider appropriate amendments to FISA. Congress has in fact amended FISA multiple times since September 11, 2001, increasing the President's authority by permitting "roving" wiretaps and expanding the permissible use of pen-register devices. *See* USA PATRIOT Act of 2001, Pub. L. No. 107-56 §§ 206, 214, *as amended by* Pub. L. No. 109-177, §§ 108, 128 (codified as amended at 50 U.S.C. § 1805 and 18 U.S.C. § 1842).

But Congress has never suspended FISA's application nor altered the 15-day limit on warrantless electronic surveillance. *Id*. The Attorney General has in fact acknowledged that the Bush Administration has never sought an amendment to FISA that might have provided authorization for the TSP or a similar program because certain members of Congress allegedly informed the Administration that such an amendment would be "difficult, if not impossible" to obtain. Press Briefing by Alberto Gonzales, Att'y Gen., http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html.

Yet the TSP is precisely the type of program that FISA was enacted to oversee. A senior Department of Justice official has conceded that the TSP involved warrantless electronic surveillance of communications into and out of the United States. Letter from William Moschella, Assistant Att'y Gen., to the Honorable Pat Roberts, the Honorable John D. Rockefeller, IV, the Honorable Peter Hoekstra, & the Honorable Jane Harman (Dec. 22, 2005), at 1-3, http://www.nationalreview.com/pdf/12%2022%2005%20NSA%20letter.pdf. The TSP, in addition, operated without a court order. Press Briefing by Alberto Gonzales, Att'y Gen., http://www.whitehouse.gov/news/releases/2005/12/print/20051219-1.html.

In arguing that the TSP did not violate FISA, the government contends that Congress authorized such warrantless electronic surveillance when it passed the AUMF. The AUMF states in pertinent part

> [t]hat the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001).

According to the government, the AUMF provides the authorization necessary to satisfy FISA's prohibition on electronic surveillance "except as authorized by statute." *See* 50 U.S.C.

§ 1809(a). No reference to surveillance, however, is found in the AUMF. Instead, the government's argument rests on a general inference to be drawn from the AUMF; in other words, that the phrase "all necessary and appropriate force" encompasses electronic surveillance by implication. But this interpretation of the AUMF directly conflicts with the specific statutory language of both FISA and Title III.

In particular, the government's argument requires us to accept that the AUMF has implicitly repealed the "exclusive means" provision of Title III. *See* 18 U.S.C. § 2511(2)(f). The problem with this position is that neither the caselaw nor the rules of statutory construction support the government's argument. Certainly the express language of the AUMF cannot sustain such an interpretation because, as noted above, it says nothing about electronic surveillance. In 18 U.S.C. § 2511, Congress criminalized the undertaking of electronic surveillance except as "specifically provided in this chapter" or as authorized by FISA. The AUMF is neither "in this chapter" nor designated as an amendment to FISA. In order to give the government's argument effect then, the AUMF must either repeal the "exclusive means" provision of the original FISA legislation as codified in Title III or work in conjunction with FISA.

"Repeals by implication are not favored," *Ex parte Yerger*, 75 U.S. 85, 105 (1868), and are appropriate only when established by "overwhelming evidence" that Congress intended the repeal and "when the earlier and later statutes are irreconcilable." *J.E.M. Ag. Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 137, 141-42 (2001). In the present situation, the statutes are easily reconciled: FISA places limits on the means by which the President may fulfill his duties under the AUMF. The President is free to engage in surveillance without a warrant up to the limits set by Congress when it enacted FISA, which is in keeping with Congress's stated purpose "to curb the practice by which the Executive Branch may conduct warrantless electronic surveillance on its own unilateral determination that national security justifies it." S. Rep. No. 95-604, pt. I, at 8, *reprinted at* 1978 U.S.C.C.A.N. 3904, 3910.

FISA, as noted previously, includes explicit provisions for wartime usage. The government argues that if the AUMF has not implicitly repealed the exclusive-means provision, then the AUMF and FISA must be in conflict, and that the AUMF should trump FISA. This disregards the fact that shortly after enacting the AUMF, Congress amended certain provisions of FISA through its enactment of the USA PATRIOT Act, as described above. Congress thus saw no conflict between FISA and the AUMF. *Cf. al-Marri v. Wright*, No. 06-7427, — F.3d — , —, 2007 WL 1663712, at *22 (4th Cir. Jun. 11, 2007) (concluding that Congress's enactment of the USA PATRIOT Act, with specific provisions relating to the detention of "terrorist aliens" such as the plaintiff, "provides still another reason why we cannot assume that Congress silently empowered the President in the AUMF to order the indefinite military detention without any criminal process of civilian 'terrorist aliens' as 'enemy combatants'").

In addition, the government's argument completely ignores two fundamental principles of statutory construction. The first relevant principle is that when interpreting potentially conflicting statutes, "a more specific statute will be given precedence over a more general one, regardless of their temporal sequence." *Busic v. United States*, 446 U.S. 398, 406 (1980); *see also Morales v. TWA, Inc.*, 504 U.S. 374, 384-85 (1992) (noting that a specific and "carefully drawn" statute prevails over a more general one). FISA's provisions regarding wartime electronic surveillance are detailed and specific. The AUMF, in contrast, sweeps broadly, making no reference at all to electronic surveillance.

To read the statutes as the government suggests would render FISA's provisions relating to wartime usage mere surplusage. Such a reading would run counter to the second relevant principle of statutory construction that requires courts to "give effect, if possible, to every clause and word of a statute." *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883); *see also United States v. Perry*, 360

F.3d 519, 538 (6th Cir. 2004) (discussing the rule against surplusage in statutory construction). Thus, FISA prevails over the AUMF with respect to electronic surveillance in the context of this case.

In addition, the government's reading of the phrase "except as authorized by statute" strains the legislative record. *See* Elizabeth B. Bazan & Jennifer K. Elsea, Cong. Research Serv., *Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information*, at 40 (Jan. 5, 2006), http://www.fas.org/sgp/crs/intel/m010506.pdf (noting that "the legislative history appears to reflect an intention that the phrase 'authorized by statute' was a reference to chapter 119 of Title 18 of the U.S. Code (Title III) and to FISA itself, rather than having a broader meaning"). I accordingly believe that the legislative history does not support the government's reading.

The government also contends that the AUMF can be read as a more specific statute than FISA based on recent Supreme Court jurisprudence. In *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004), a plurality of the Court concluded that "[b]ecause detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of 'necessary and appropriate force,' Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here." The plurality then reached the conclusion that "the AUMF is explicit congressional authorization for the detention of individuals in the narrow category we describe," namely individuals who were "part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there." *Hamdi*, 542 U.S. at 516-17 (plurality) (quotation marks omitted). Despite the stated narrowness of this holding, the government argues that *Hamdi* allows us to read the AUMF as authorizing "signals intelligence" gathering on al-Qaeda and other suspected terrorists, and to construe such signals intelligence as including electronic surveillance targeting U.S. persons inside this country.

But FISA's wartime provision distinguishes the present situation from that raised in *Hamdi*. Congress had not enacted a law at the time of the *Hamdi* decision that specifically authorized the unlimited detention of American citizens during wartime, and the effect of that legislative omission was the subject of the analysis in the *Hamdi* decision. 542 U.S. at 516-25. In contrast, Congress has enacted a law (FISA) that specifically authorizes electronic surveillance within the U.S. for foreign intelligence purposes, and has specifically included a provision dealing with times of war. 50 U.S.C. § 1811. What was thus found to be a reasonable exercise of authority where Congress had been silent becomes an unreasonable exercise where Congress has plainly spoken. *See also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring) (discussing the authority of the President and how it relates to congressional enactments).

Finally, the Supreme Court's more recent decision in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), clearly rejected the government's theory of the AUMF. The Court in *Hamdan* declined to read the AUMF as implicitly authorizing the President to override a provision in the Uniform Code of Military Justice (UCMJ) that sets forth the conditions for convening military commissions in lieu of courts-martial. "[T]here is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ." *Hamdan*, 126 S. Ct. at 2775.

The same observation holds true in the present case. Nothing in the AUMF suggests that Congress intended to "expand or alter the authorization" set forth in FISA. Moreover, the text and the legislative history of FISA and Title III make quite clear that the TSP or a similar program can be authorized only through those two statutes. The TSP plainly violated FISA and Title III and, unless there exists some authority for the President to supersede this statutory authority, was therefore unlawful.

2. Inherent authority

The government's final defense is that the Constitution grants the President the "inherent authority" to "intercept the international communications of those affiliated with al Qaeda." A contrary position would, according to the government, "present a grave constitutional question of the highest order." For that reason, the government contends that we should follow the canon of constitutional avoidance and construe FISA and the AUMF to avoid any constitutional conflict. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (discussing the canon of constitutional avoidance).

But the canon of constitutional avoidance "is not a method of adjudicating constitutional questions by other means." *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (discussing the role played by the canon of constitutional avoidance in statutory interpretation). Instead, its purpose is to allow courts to construe a statute so as to avoid serious constitutional problems, "*unless such construction is plainly contrary to the intent of Congress*." *DeBartolo*, 485 U.S. at 575 (emphasis added).

The Constitution divides the nation's war powers between the Executive and the Legislative Branches. *See* U.S. Const. art. I, § 8 (setting forth the powers of Congress) & art. II, § 2 (setting forth the powers of the President); *see also Youngstown*, 343 U.S. at 635 (Jackson, J., concurring) (noting that the powers of the President "depend[] upon their disjunction or conjunction with those of Congress"). In contrast to the government's suggestion, the President does not have *exclusive* war powers. U.S. Const. art. I, § 8 (setting forth the affirmative powers of the Congress, including the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers").

The Constitution expressly grants Congress the power to make laws in the context of national defense. *Id*. Moreover, the Constitution requires the President to conform to duly enacted laws. U.S. Const. art. II, § 3 ("[H]e shall take Care that the Laws be faithfully executed."). This requirement endures even in times of war. In *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177-78 (1804), for example, the Supreme Court held that during the "Quasi War" with France, the President could not give instructions that ran counter to a validly enacted statute, despite the fact that the President's construction seemed to give the law better effect. The Supreme Court reiterated this principle in *Ex Parte Milligan*, 71 U.S. (4 Wall) 2 (1866), holding that the Habeas Corpus Act of 1863 barred the President from denying habeas corpus rights to a detainee who was captured outside the area of battle. More recently, the Court held in *Hamdan* that the President "may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers." *Hamdan*, 126 S. Ct. at 2774 n. 23 (citing *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)).

The Supreme Court fully addressed the question of the inherent authority of the President in *Youngstown*. There, the Court struck down President Truman's executive order to seize domestic steel-production facilities during the Korean war. In his famous concurring opinion, Justice Jackson described our tripartite system as one of "separateness but interdependence, autonomy but reciprocity." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring). "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." *Id*. He then laid out the three so-called zones of presidential power as follows:

> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . .
>
> 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. . . .

> 3. When 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.

Id. at 635-37.

When the President acts in Zone 3, "[c]ourts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Id*. at 637-38 (footnote omitted).

We must thus determine into which zone the TSP fits. From that determination, the program will stand or fall. The government argues that the TSP fits into Zone 1, where the President's authority is at its zenith. But this argument ignores Congress's clear directive that FISA and Title III constitute the exclusive means for undertaking electronic surveillance within the United States for foreign intelligence purposes. The result might not be what the President would prefer, but that does not give him license to "disregard limitations" that Congress has "placed on his powers." *Hamdan*, 126 S. Ct. at 2774 n.23. In light of FISA and Title III, I have no doubt that the TSP falls into Zone 3, where the President's authority is at its lowest ebb.

The government, however, turns to a case from the Foreign Intelligence Surveillance Court of Review as support for its argument that the President has "inherent constitutional authority to conduct warrantless foreign intelligence surveillance." *See In re Sealed Case*, 310 F.3d 717, 746 (For. Intel. Surv. Ct. Rev. 2002) (per curiam). To be sure, the *Sealed Case* court stated in dicta that "[w]e take for granted that the President does have" the "inherent authority to conduct warrantless searches to obtain foreign intelligence information." *Id*. at 742. This dicta, however, is unpersuasive because the *Sealed Case* court relied on a Fourth Circuit decision from 1980 that dealt with a challenge to pre-FISA surveillance. *Id*. (discussing *United States v. Truong Dinh Hung*, 629 F.2d 908, 914 n.4 (4th Cir. 1980)).

The *Sealed Case* court discussed *Truong* for the purpose of determining whether the Fourth Circuit had articulated the proper constitutional standard for evaluating a Fourth Amendment challenge to FISA. *Id*. at 742-44. Finding that *Truong* did set forth the proper standard, the *Sealed Case* court applied the same standard to uphold the post-PATRIOT Act version of FISA against a Fourth Amendment challenge. *Id*. at 742. In sum, the dicta in *Sealed Case* cannot overcome the fact that Congress has unequivocally acted within its constitutional power to limit the President's authority over warrantless electronic surveillance within this country.

Finally, all of the courts to have considered the question of whether FISA was constitutional before the statute was amended by the USA PATRIOT Act of 2001 have in fact upheld the statute. *See United States v. Nicholson*, 955 F. Supp. 588, 590 n.3 (E.D. Va. 1997) (collecting cases upholding FISA against various constitutional challenges). Those courts that have considered the constitutionality of FISA since it was amended by the USA PATRIOT Act have likewise upheld the statute against constitutional challenges. *See United States v. Ning Wen*, 477 F.3d 896, 898-99 (7th Cir. 2007) (finding no conflict with the Fourth Amendment where evidence obtained pursuant to a FISA court order was used in a criminal prosecution); *United States v. Damrah*, 412 F.3d 618, 625 (6th Cir. 2005) (noting that "FISA has uniformly been held to be consistent with the Fourth Amendment"); *In re Sealed Case*, 310 F.3d at 746. In light of these persuasive authorities, I find no merit to the government's "inherent authority" argument.

E. Plaintiffs' datamining cross-appeal

The plaintiffs raise a cross-appeal from the district court's grant of summary judgment to the government on the plaintiffs' datamining claim. After a careful review of the record, I conclude that the district court's analysis of this issue and of the preclusive effect of the state-secrets privilege is persuasive. I would therefore not disturb the district court's judgment on the plaintiffs' datamining claim.

II. CONCLUSION

The closest question in this case, in my opinion, is whether the plaintiffs have the standing to sue. Once past that hurdle, however, the rest gets progressively easier. Mootness is not a problem because of the government's position that it retains the right to opt out of the FISA regime whenever it chooses. Its AUMF and inherent-authority arguments are weak in light of existing precedent and the rules of statutory construction. Finally, when faced with the clear wording of FISA and Title III that these statutes provide the "exclusive means" for the government to engage in electronic surveillance within the United States for foreign intelligence purposes, the conclusion becomes inescapable that the TSP was unlawful. I would therefore affirm the judgment of the district court.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 06-2095; 06-2140

AMERICAN CIVIL LIBERTIES UNION, *et al*.,

Plaintiffs - Appellees/Cross-Appellants,

v.

NATIONAL SECURITY AGENCY, *et al*.,

Defendants - Appellants/Cross-Appellees.

Filed: July 6, 2007

Before: BATCHELDER, GILMAN, and GIBBONS, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the order of the district court is VACATED and the case is REMANDED with instructions to DISMISS the case for lack of jurisdiction.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Clerk