No.

In the Supreme Court of the United States

CENTER FOR CONSTITUTIONAL RIGHTS, ET AL.,
PETITIONERS
v.
BARACK OBAMA, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

For a period of years starting in 2001, the National Security Agency (NSA) engaged in a widespread program of warrantless surveillance in violation of the Foreign Intelligence Surveillance Act (FISA) and the United States Constitution. Petitioners, a legal organization and legal staff actively engaged in challenging the federal government's national security policies, were forced to alter their conduct and incur additional costs in response to the substantial risk that their attorney-client communications would be monitored, and sued the NSA to challenge its patently unlawful surveillance program. Their suit was dismissed by the Court of Appeals, based on this Court's decision in *Clapper v. Amnesty Int'l USA*, 568 U.S. ___, 133 S. Ct. 1138 (2013), which had considered too "speculative" the standing claims of individuals challenging a later-enacted, Congressionally-approved scheme of surveillance involving review by the judges of the Foreign Intelligence Surveillance Court? The question presented is:

Do attorneys who present credible chilling-effect injuries arising out of a substantial risk that their communications are being monitored by a surveillance program lacking any judicial oversight or statutory authorization, have standing to challenge the legality of the program?

PARTIES TO THE PROCEEDINGS

The following parties were plaintiffs in the district court and appellants in the court of appeals, and are petitioners in this Court: The Center for Constitutional Rights, a New Jersey corporation, and five individuals, Tina M. Foster, Gitanjali S. Gutierrez, Seema Ahmad, Maria LaHood, and Rachel Meeropol.

There is no parent or publicly held company owning any of the Center for Constitutional Rights' stock.

The following governmental agencies were defendants in the district court and appellees in the court of appeals, and are respondents in this Court: the National Security Agency, the Defense Intelligence Agency, the Central Intelligence Agency, the Department of Homeland Security, and the Federal Bureau of Investigation. The following individual officers of the federal government are respondents in this Court and they (or their predecessors in office) were defendants in their official capacities in the district court and appellees in the court of appeals: Barack Obama, President of the United States, Ltg. Keith B. Alexander, Director of the National Security Agency, Ltg. Michael T. Flynn, Director of the Defense Intelligence Agency, John O. Brennan, Director of the Central Intelligence Agency, Jeh Johnson, Secretary of Homeland Security, James B. Comey, Jr., Director of the Federal Bureau Of Investigation, and James R. Clapper, Jr., Director of National Intelligence.

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JURISDICTION

The decision of the court of appeals was entered on June 3, 2013 and its denial of rehearing and rehearing *en banc* was entered on October 3, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Foreign Intelligence Surveillance Act of 1978 ("FISA"), Pub. L. 95-511, Title I, 92 Stat. 1796 (Oct. 25, 1978), *codified at* 50 U.S.C. § 1801-62 (2006), provided a comprehensive statutory scheme for conducting electronic surveillance for foreign intelligence or national security purposes. FISA, as it stood as of the initiation of this lawsuit in January 2006, allowed for court authorization of such surveillance upon individualized showings that the targets are agents of foreign powers or foreign terrorist groups,

id. §§ 1801, 1804. Upon its creation, Congress decreed that FISA and specified provisions of the criminal code were 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) (2006) (emphasis added), and that conducting electronic surveillance without such statutory authorization was a crime, 50 U.S.C. § 1809 (2006). The relevant statutory provisions are reprinted in the Appendix (App. 27a-35a).

STATEMENT

Petitioners are the Center for Constitutional Rights (CCR) and several of its present and former legal staff members. On January 17, 2006, they filed a complaint in the Southern District of New York (App. 36a-53a) alleging that the National Security Agency's (NSA's) operation of a program of warrantless electronic surveillance cast a chilling effect over their communications practices and thereby damaged their ability to engage in public interest litigation.

Factual Background

On December 15, 2005, the *New York Times* revealed that for more than four years the NSA, with the approval of the President, had engaged in a widespread program of warrantless electronic surveillance in violation of the Foreign Intelligence Surveillance Act (FISA), the post-Watergate statute subjecting electronic surveillance for national security purposes to a judicial warrant process (hereinafter the "NSA Program"). Rather than seeking to

amend the statute, the President simply violated it by authorizing warrantless wiretapping of calls and emails where the NSA believed one party had some link to terrorism and was located outside the United States, without any oversight by the judiciary. Remarkably, instead of denying the story or hiding behind assertions of secrecy, the President, Attorney General and other administration officials acknowledged many operational details of the Program in a vigorous public defense of their actions.

Based on these public admissions about the nature of the NSA Program, petitioners—the Center for Constitutional Rights and several of its legal staff members—initiated this suit. CCR is a national nonprofit public interest law firm that has litigated several of the leading cases challenging post-9/11 detention, interrogation and rendition practices that violate fundamental rights, including the Guantánamo litigation, the class action on behalf of "special interest" domestic immigration detainees, and the notorious rendition case of Canadian citizen Maher Arar. In the course of that litigation and related work, CCR lawyers and legal staff had communicated regularly by telephone and email with persons outside the United States who Defendants asserted were associated with al Qaeda or associated groups.

Petitioners perceived that these communications fit precisely within the category that had been, and would be, potentially subject to warrantless surveillance under the NSA Program. Their reasonable fears led petitioners to avoid engaging in some communications, and to take costly countermeasures to protect others; in some circumstances, fears of such surveillance caused third parties refused to communicate with petitioners. Accordingly petitioners sought declaratory and injunctive relief against the

Program—specifically, an order that the administration cease the surveillance, disclose the nature of any past surveillance of petitioners' communications, and destroy any such records remaining in the government's possession. *See* Complaint (App. 52a-53a).

FISA

In 1978, after the disclosure of widespread spying on American citizens by various federal law enforcement and intelligence agencies, including the NSA, and extensive investigations of these abuses by the Church Committee, Congress enacted the Foreign Intelligence Surveillance Act. FISA provides a comprehensive statutory scheme for conducting electronic surveillance for foreign intelligence or national security purposes. FISA requires (with narrow exceptions not applicable here[1]) that *all* such surveillance be conducted pursuant to orders from the statutorily-created Foreign Intelligence Surveillance Court (FISC). In enacting this statute, Congress provided that it and specified provisions of the criminal code governing wiretaps for criminal investigations were 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).

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[1] For instance, FISA expressly authorizes warrantless foreign intelligence wiretapping only for the first fifteen days of a war; the legislative history making it clear that that period of time was chosen as being sufficient to allow the President to request and obtain additional surveillance powers from Congress if necessary. *See* 50 U.S.C. § 1811.

In subjecting foreign intelligence electronic surveillance to strict statutory limits, FISA marked a substantial change in the law. Prior to FISA's enactment, Congress had chosen not to regulate foreign intelligence surveillance, expressly stating as much in the 1968 Wiretap Act. *See* 18 U.S.C. § 2511(3) (1968). When Congress enacted FISA, however, it repealed that provision, and substituted the language quoted above providing that FISA and Title III were the "exclusive means" for engaging in electronic surveillance and that any such surveillance conducted outside the authority of those statutes was not only prohibited, but a crime. *See* 50 U.S.C. § 1809 (making it a felony to "engage[] in electronic surveillance under color of law except as authorized by statute" or "disclose[] or use[]" such information knowing it "was obtained through electronic surveillance not authorized by statute").

In practice, the original version of FISA appeared to be extraordinarily permissive: there were only 5 rejections out of the first 22,987 applications made to the FISC from its inception thru 2006, belying any claims that the system was too restrictive to be practical. Like Title III, the statute also provided authority for emergency executive authorizations when timely resort to the court was impractical.[2]

The NSA Program

In the fall of 2001, shortly after the terrorist attacks of September 11, the NSA launched a secret program to engage in warrantless electronic surveil-

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[2] 50 U.S.C. § 1805(f) (2006) (App. 33a-34a) (allowing retroactive approval within 72 hours, later extended by amendment).

lance.[3] Administration officials admitted that the Program intercepted communications that were subject to the requirements of FISA. The Attorney General, for example, specifically admitted that the Program engaged in electronic surveillance governed by FISA.[4] Nonetheless, the Program was used "in lieu of" the procedures specified under FISA.[5] The NSA intercepted communications under the Program

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[3] President Bush, Radio Address (Dec. 17, 2005), transcript available at: http://www.whitehouse.gov/news/ releases/2005/12/20051217.html; James Taranta, *The Weekend Interview with Dick Cheney*, Wall Street Journal, Jan. 28-29, 2006, at A8 ("interception of communications, one end of which is outside the United States, and one end of which is, either outside the United States or inside."); Michael Hayden, *Remarks at the National Press Club on NSA Domestic Surveillance* (Jan. 23, 2006) (hereinafter *Hayden Press Club*); Alberto Gonzales, *Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence*, Dec. 19, 2005 (hereinafter *Gonzales/Hayden Press Briefing*) ("The President has authorized a program to engage in electronic surveillance").

[4] Alberto Gonzales, *Gonzales/Hayden Press Briefing* ("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 … otherwise authorized by statute or by Congress.").

[5] Michael Hayden, *Gonzales/Hayden Press Briefing*; *see also Hayden Press Club*.

without obtaining a warrant or any other type of judicial authorization. Nor did the President or the Attorney General authorize specific interceptions. Instead, an NSA "shift supervisor" was authorized to approve the selection of targets or of communications to be intercepted whenever they determined there is "reasonable basis to conclude" that a party "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."[6] In the words of General Michael Hayden, the Principal Deputy Director for National Intelligence, "this is a more ... 'aggressive' program than would be traditionally available under FISA."[7]

The Program primarily was directed at "one-end international" phone calls and emails between a person located outside of the United States and a person located within the United States where the government believed that one of the communicants fit the targeting criteria set forth above. Attorney General Gonzales refused to specify the number of Americans whose communications had been or were being intercepted under the Program.[8] However, as early as the very first media report on the Program, government officials were cited as admitting that thousands of

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[6] Michael Hayden, *Gonzales/Hayden Press Briefing*.

[7] Michael Hayden, *Gonzales/Hayden Press Briefing*; *see also Wartime Executive Power and the NSA's Surveillance Authority Before the Senate Judiciary Committee*, 109th Congress (Feb. 6, 2006); *Hayden Press Club* ("trigger … quicker and a bit softer than … for a FISA warrant.")

[8] Alberto Gonzales, *Gonzales/Hayden Press Briefing*.

individuals inside the U.S. and thousands outside the U.S. were targets.[9]

Despite the clear intent of Congress that the President seek an amendment to FISA to authorize extraordinary surveillance during wartime,[10] the President did not seek such an amendment, and instead acted unilaterally and in secret. President Bush reauthorized the Program, again in secret, more than thirty times.[11] The administration considered asking Congress to amend FISA to permit the NSA spying program, but elected not to do so. Attorney General Gonzales acknowledged that administration officials consulted various members of Congress about seeking legislation to authorize the Program but ultimately chose not to do so because they were advised that it would be "difficult if not impossible" to obtain.[12]

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[9] *See* James Risen and Eric Lichtblau, *Bush Secretly Lifted Some Limits on Spying in U.S. After 9/11, Officials Say*, N.Y. Times (Dec. 15, 2005).

[10] *See supra* note 1.

[11] *Press Conference of President Bush*, December 19, 2005, *available at* http://www.whitehouse.gov/news/ releases/2005/12/20051219-2.html.

[12] Attorney General Gonzales stated, "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." *Gonzales/Hayden Press Briefing*.

Surveillance of attorneys

After the *Times*' December 2005 story was published, additional evidence emerged suggesting that the NSA Program, lacking any judicial supervision (or, *a fortiori*, judicially-supervised minimization standards[13]), was used to intrude on attorney-client communications. The complaint filed in a case in the district of Oregon claimed that a document inadvertently given to those plaintiffs by the government, while still labeled "TOP SECRET," contained summaries of phone calls between two American attorneys based in Washington, D.C. and officers of their client, a Saudi charity, demonstrating that attorney-client conversations had been intercepted and recorded. *See Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190 (9th Cir. 2007). Although executive agencies have consistently refused to officially confirm (or deny) whether they have actually eavesdropped on lawyers, federal courts have adverted to the possibility. *See, e.g.*, *id.* at 1193.

The executive acknowledged in a formal submission to Congress that "[a]lthough the program does not specifically target the communications of attorneys or physicians, calls involving such persons would not be categorically excluded from interception." Assistant Attorney General William E. Moschella, Responses to Joint Questions from House Judiciary Committee Minority Members (Mar. 24, 2006) at 15, ¶45, *available at*

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[13] Both FISA and Title III codify the constitutional requirement that judicially-supervised minimization standards be applied to minimize inadvertent interception of privileged communications. *See infra* note 31.

http://www.fas.org/irp/agency/doj/fisa/doj032406.pdf. Ac-cording to *The New York Times*, "[t]he Justice Department does not deny that the government has monitored phone calls and e-mail exchanges between lawyers and their clients as part of its terrorism investigations in the United States and overseas," and the *Times* further reported that "[t]wo senior Justice Department officials" admitted that "they knew of ... a handful of terrorism cases ... in which the government might have monitored lawyer-client conversations. Philip Shenon, *Lawyers Fear Monitoring in Cases on Terrorism*, N.Y. Times, Apr. 28, 2008, at A14. Defendants conceded below that it would be a "reasonable inference" to conclude from these statements of government officials "that some attorney-client communications may have been surveilled under" the Program. Defs. Reply Br., Dkt. 49 (N.D. Cal. Sep. 14, 2010) at 4.

Procedural Background

Within weeks of filing their complaint, petitioners moved for partial summary judgment based on the admissions about the Program summarized above: that the Program engaged in "electronic surveillance" otherwise subject to FISA's strictures, that it took place without obtaining the court orders required by FISA, and that it primarily targeted exactly the sorts of privileged phone calls and emails regularly engaged in by petitioners in the course of their work with clients, family members of clients, witnesses, and co-counsel located overseas.

Petitioners asserted that the threat that their communications were being subjected to warrantless monitoring caused direct injury to their ability to fulfill their professional responsibilities as attorneys

and to the exercise of their right to engage in public interest litigation. Because they could not assure the various litigation participants with whom they need to communicate that their conversations were confidential, petitioners were forced to forego some international communications altogether and to pursue more costly and less efficient means (such as travel for in-person visits) for others. In addition, persons with whom petitioners sought to communicate have been deterred from speaking to petitioners as a result of the knowledge that their communications may be monitored. The resulting injuries to petitioners' professional work as public interest attorneys formed the basis for their assertion of standing.

The government responded to petitioners' summary judgment motion by filing a motion to dismiss (or, in the alternative, for summary judgment), seeking to dispose of their claims on the grounds that they lacked standing or, alternatively, that further litigation was barred by the state secrets privilege. Both sides' dispositive motions were fully briefed by the end of August 2006, and Judge Gerard Lynch heard oral argument on these motions on September 5, 2006, but never ruled on them. Instead, the government moved before the Judicial Panel on Multidistrict Litigation to transfer the case to the Northern District of California, to be coordinated with a large number of other actions primarily directed against telecommunications companies, on the grounds that the classified information submitted *ex parte* with its motions to dismiss might be better protected from accidental disclosure if held by one district court, and based on the supposed dangers posed by different district courts issuing "inconsistent rulings" in these cases. The MDL Panel issued its transfer order on December 15, 2006.

In the meantime, a similar suit, filed in Detroit by the ACLU on the same day as this case was filed, resulted in a ruling that the Program was in violation of law, and granting a permanent injunction. *ACLU v. NSA*, 438 F. Supp. 2d. 754 (E.D. Mich. Aug. 17, 2006). That ruling was stayed pending expedited appeal to the Sixth Circuit.

Putative termination of the NSA Program

Notwithstanding earlier claims that it was not "possible to conduct this program under the old law,"[14] on January 17, 2007, two weeks[15] before scheduled oral argument in the Sixth Circuit in the ACLU case—the first challenge to the NSA pro-

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[14] *See* http://www.whitehouse.gov/news/releases/ 2006/ 01/20060126.html.

[15] While the government sought to deflect the perception of manipulation to evade judicial review by claiming it sought to develop the new approach as far back as "the Spring of 2005—well before the first press account disclosing" the Program's existence, it nowhere indicates precisely when application was made to the FISA court. Letter from Attorney General Alberto Gonzales to Senators Leahy and Specter, Jan. 17, 2007 ("Gonzales Letter"), available at http://graphics8.nytimes.com/ packages/pdf/ politics/ 20060117gonzales_Letter.pdf, at ¶ 2. There is no evidence to support the government's implication that two years were consumed in the application and approval of the orders, making it possible that the applications were submitted shortly before their approval.

gram's legality to reach the Courts of Appeals[16]—the administration announced that a single FISC Judge had issued a number of 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. As a result of these orders, any electronic surveillance that was occurring as a part of the Terrorist Surveillance Program will now be conducted subject to the approval of the Foreign Intelligence Surveillance Court.

(Gonzales Letter at ¶ 1). Accordingly, the "President has determined not to reauthorize the Terrorist Surveillance Program when the current authorization expires." In essence, the government claimed the surveillance program continued, but under unspecified forms of oversight and limiting regulations imposed by the Foreign Intelligence Surveillance Court. For instance, White House Press Secretary Tony

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[16] The case was in fact argued on January 31, 2007, despite the government's suggestion of mootness in light of its January 17th announcement. On July 6, 2007, the Sixth Circuit panel, in two separate majority opinions with one dissent, reversed the district court on standing grounds (and did not reach the issue of "intervening mootness"). *ACLU v. NSA*, 493 F.3d 644, 651 n.4 (6th Cir. 2007), *cert. denied*, 552 U.S. 1179 (2008).

Snow announced that "the program pretty much continues, … but it continues under the rules that have been laid out by the court." Tony Snow, White House Press Briefing, Jan. 17, 2007 (available at http://www.
whitehouse.gov/news/releases/2007/01/print/20070117-5. html). It remains a mystery how such an order—essentially a single warrant justifying an entire program of surveillance—fit within the particularity requirements of the FISA statute, which then required that applications and orders specify "the target" and "the facilities or places at which the electronic surveillance is directed is being used" and identify minimization procedures. 50 U.S.C. §§ 1804, 1805 (2006).

Throughout the period that this order was in effect—and afterwards—the executive branch never renounced its claims that the original, non-judicially supervised NSA Program was lawful; far from it. Just after the January 17, 2007 announcement, Attorney General Gonzales testified before Congress that "[w]e believed, and believe today, that what the President is doing is lawful" and that his "belief is ... that the actions taken by this administration, by this President, were lawful in the past." Hearing before the Senate Judiciary Committee on Department of Justice Oversight (Jan. 18, 2007) (available on LEXIS) at 25, 29. Instead, the government asserted the right to carry out surveillance under the terms of the Program challenged by petitioners *at any time*. *See* Gov't Reply Br. in Support of Supplemental Submissions, *ACLU v. NSA*, Nos. 06-2095, 06-2140 (6th Cir. Jan. 30, 2007) at 5 ("the president has not disavowed his authority to reauthorize the TSP in the event that the FISA court orders are not renewed.").

In short order, it appears, the Foreign Intelligence Surveillance Court reversed the decision of the judge who had initially allowed the January 2007 orders. Orders from the Court typically last only for a maximum of 90 days, after which the government must return to the court for renewal. However, those applications typically are rotated to different judges on the eleven-member court. The original orders were issued by a single judge on January 10, 2007. According to media reports, one or more other FISA judges rejected the "innovative" January 10th orders when they came up for renewal per the terms of the FISA statute. *See, e.g.*, Greg Miller, *New Limits Put on Overseas Surveillance*, L.A. Times, Aug. 2, 2007, at A16 (reporting that second FISA judge rejected "basket warrants," allowing surveillance without particularized suspicion, that had been previously approved by first judge); *id*. (Apparently, "[o]ne FISA judge approved this, and then a second one didn't.").

Amendments to FISA

Provoked by an histrionic response to the Foreign Intelligence Surveillance Court's apparent refusal to renew the January 2007 orders,[17] Congress passed the Protect America Act in August 2007 (PAA). The amendments provided that "surveillance directed at a person reasonably believed to be located outside of the United States" is excluded from the definition of "electronic surveillance" that may be authorized exclusively by FISA. Instead, such surveillance could go forward under the PAA once the

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[17] *See* Ellen Nakashima & Joby Warrick, *House Approves Wiretap Measure*, Wash. Post (Aug. 5, 2007).

Director of National Intelligence and the Attorney General "determine" that the surveillance is "directed at a person reasonably believed to be outside the United States" (or otherwise does not constitute "electronic surveillance" under FISA), that "a significant purpose of the acquisition is to obtain foreign intelligence information," and establish what they "determine" to be "reasonable procedures" to ensure that such acquisition "concerns persons reasonably believed to be located outside the United States." 50 U.S.C. §§ 1805B(a), 1805A (2007). This "determination" is reduced to a written certification, supported by affidavit of "appropriate officials in the national security field," but is "not required to identify any specific facilities, places, premises, or property at which the acquisition of foreign intelligence information will be directed." 50 U.S.C. § 1805B(a),(b) (2007). The DNI and the AG need not find probable cause that the target of the surveillance is a "foreign agent" as defined in FISA or is involved in any criminal activities whatsoever. A copy of this certification is transmitted to the Foreign Intelligence Surveillance Court, where it remains pending any subsequent need to investigate the legality of the "determinations."[18]

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[18] Oral argument was held before Judge Walker on the parties' first round of cross-dispositive motions on August 9, 2007. That argument coincidentally fell just days after Congress passed the Protect America Act. Plaintiffs moved for leave to amend their complaint to challenge the new statute on the day after the oral argument, August 10, 2007, but Judge Walker did not rule on that motion until after the Protect America Act had expired. *See* Order, Dkt. 27 (N.D. Cal. Mar. 31, 2008) (denying motion).

The Protect America Act was subject to a six-month sunset provision. Several months after it expired, Congress passed a new statute, the FISA Amendments Act of 2008 (FAA), which was designed to both codify authority for the sort of surveillance carried out under the NSA Program, and to immunize such surveillance from future challenges in litigation like those petitioners. "The FAA, in contrast to the preexisting FISA scheme, does not require the government to submit an individualized application to the FISC identifying the particular targets or facilities to be monitored. Instead, the Attorney General ('AG') and Director of National Intelligence ('DNI') apply for a mass surveillance authorization [approving an entire program of surveillance]." *Amnesty Int'l USA v. Clapper*, 638 F.3d 118, 124 (2d Cir. 2011). The DNI and AG submit to the FISC a written certification and supporting affidavits attesting generally that the "acquisition" targets persons "reasonably believed to be located outside the United States." As this Court described it, the FAA requires the FISC judges to ensure that the proposed "targeting and minimization procedures are consistent with the statute and the Fourth Amendment," *Clapper v. Amnesty Int'l USA*, 133 S. Ct. at 1145, 1145 n.3. The day the FAA was signed into law, the ACLU filed the complaint in *Amnesty*, primarily challenging whether the surveillance authorized by the FAA exceeded limitations set by the Fourth Amendment.

The new administration's position on the legality of the original NSA Program

A number of cases involving the NSA Program have been litigated during the Obama administration, both in the district courts and the Courts of Ap-

peals. In none of the other cases has the current administration offered any defense of the legality of the Program. In fact, the Justice Department specifically declined to do so in a FOIA case involving some of the present petitioners, *Wilner v. NSA*, 592 F.3d 60 (2d Cir. 2009). At oral argument before the Second Circuit on October 9, 2009, the Government refused to make any argument in defense of the legality of the NSA Program, instead stating "[w]e take no position on the merits of the [legality of the] TSP." The new administration's briefs below also failed to take any position on the question.[19]

Renewed dispositive motions

In March 2010, the parties submitted a joint status report to Judge Walker setting forth a proposal for further proceedings necessary to resolve the case; per that plan, the parties submitted and briefed cross-dispositive motions. In their 2006 summary judgment briefing petitioners had primarily focused on their request that the court order defendants to "cease conducting their program of warrantless surveillance." In their renewed motion in 2010, they primarily sought destruction of any records in the government's possession resulting from such surveillance of petitioners.[20]

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[19] *See* Renewed Motion to Dismiss or for Summary Judgment, Dkt. 39 (N.D. Cal. May 27, 2010); Reply, Dkt. 49 (N.D. Cal. Sep. 14, 2010); Brief for Appellees, Dkt. 17 (9th Cir. Oct. 28, 2011).

[20] *See* Proposed Order, Dkt. 46 (N.D. Cal. July 29, 2010) (App. 54a-55a). Plaintiffs additionally proposed *in camera* disclosure of any such records to the judge and possibly to plaintiffs' security-cleared counsel as

The district court held that plaintiffs could only establish standing by proving that they had been actually subjected to surveillance under the NSA Program, and granted the government's motion on January 31, 2011, dismissing the case. App. 6a-26a.

Plaintiffs appealed. Ten days before the scheduled hearing date, the Court of Appeals postponed oral argument[21] in light of the grant of certiorari[22] in *Clapper v. Amnesty Int'l USA*, No. 11-1025. After the February 26th decision in *Amnesty*, 568 U.S. ___, 133 S. Ct. 1138 (2013), the panel received supplemental briefs on the effect of that decision and decided the case without argument, App. 1a-3a, relying entirely on this Court's opinion in *Amnesty*. On July 25, 2013, appellants moved for rehearing, or in the alternative rehearing *en banc*, both of which were denied in a decision dated October 3, 2013. App. 4a-5a.

REASONS FOR GRANTING THE PETITION

The ten months since this Court decided *Amnesty* have amply illustrated both the importance of the issues at stake in that case and the failure of the judiciary to adequately address and serve as an outlet for the interests at stake in this case. The *Amnesty* decision was not intended to work a sea-change in

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well. Finally, because the government refused to disavow authority to revive the NSA Program (should the FISC or Congress revoke its authority to continue the surveillance under a different legal rationalization), plaintiffs also sought an order prohibiting the government from engaging in such warrantless surveillance in the future.

[21] *See* Order, Dkt. 36 (9th Cir. May 22, 2012).

[22] *See* 132 S. Ct. 2431 (May 21, 2012).

the law of standing, allowing dismissal of suits, like this one, directed at utterly lawless surveillance carried out in the face of express Congressional prohibitions without any oversight by the judiciary. The Court of Appeals erred in concluding as a matter of law that "CCR's claim of injury is largely factually indistinguishable from, and at least as speculative as, the claim rejected in *Amnesty*" (App. 3a), and in doing so effectively fashioned a rule demanding that chilling-effect plaintiffs have absolute certainty they were surveilled before they may challenge even such egregiously illegal surveillance. This case also presents an opportunity for this Court to reconsider its decision in *Amnesty* in light of the many factual assumptions underlying the decision which the intervening months have proved false.

1. The Court of Appeals incorrectly read *Amnesty* to substantially alter Article III standing principles.

In upholding the dismissal of claims in the instant case, the panel relied entirely on this Court's Feb. 26 decision in *Clapper v. Amnesty Int'l. Amnesty* involved a facial challenge to the FISA Amendments Act of 2008 (FAA), the last in a series of Congressional responses to the litigation challenging the NSA Program. The FAA, in essence, modified FISA to enable judicial approval not for individualized targeting but rather for whole programs of surveillance (so long as those programs did not intentionally target U.S. persons). Under the FAA, the government submits to the Foreign Intelligence Surveillance Court a certification describing the program of surveillance contemplated, the targeting procedures for such surveillance, and the minimization procedures

that will be applied. *Amnesty*, 133 S. Ct. at 1145. As this Court described it, the FAA requires the FISC judges to ensure that the proposed "targeting and minimization procedures are consistent with the statute and the Fourth Amendment," *id.* at 1145, 1145 n.3. Fourth Amendment-compliant minimization procedures would protect against the interception and retention of (*inter alia*) legally-privileged communications.[23]

The plaintiffs in *Amnesty* based their claim to standing on two distinct theories. The first, less relevant here but taking up the majority of this Court's opinion, was that there was a "reasonable likelihood" that their communications would actually be acquired by FAA surveillance in the future, thus constituting "imminent" future harm. *Id.* at 1143. Their second, alternative theory of standing is more relevant to the instant case: they "maintain[ed] that the risk of surveillance under [the FAA] is so substantial that they have been forced to take costly and burdensome measures to protect the confidentiality of their international communications; in their view, the costs they have incurred constitute present injury that is fairly traceable to [the FAA]." *Id.* at 1146.

This Court rejected both theories on the grounds that "the harm [the *Amnesty* plaintiffs] seek to avoid is not certainly impending." However, this Court cautioned that "[o]ur cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about. In some instances, we have found standing based on a 'substantial risk' that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm. ... But to the extent that

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[23] *See infra* note 31 (citing cases).

the 'substantial risk' standard is relevant and is distinct from the 'clearly impending' requirement, respondents fall short of even that standard, in light of the attenuated chain of inferences necessary to find harm here"[24]—namely, that the FISC would approve of surveillance under the FAA that targeted only foreigners, complied with the Fourth Amendment, and implemented minimization safeguards, but still nonetheless ensnared the plaintiffs' communications. (Moreover, all of this had to happen in a manner that violated plaintiffs' rights under the selfsame Fourth Amendment—as the central claim in the *Amnesty* complaint was a Fourth Amendment cause of action).

This Court did not purport in *Amnesty* to be refashioning existing standing requirements, but rather providing a gloss[25] on the "concededly … somewhat elastic" concept of "imminence"[26] in cases where the claims relate to the always-contingent risk of future injuries. The question this Court asked was one of degree—"substantial risk" rather than "*possible* future injury"; "certainly impending" rather than "fanciful," "paranoid," or "irrational"—an abundance of formulations all working towards a concept of imminence that "'ensure[s] that the alleged injury is not too speculative for Article III purposes.'" *Id*. at 1147 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 565 (1992)).

The likelihood of harm to the *Amnesty* plaintiffs from the FAA was more "speculative" and far "less substantial" than the likelihood of the harms asserted in the present case. One initial difference between

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[24] *Id*. at 1150 n.5.

[25] *Cf. Amnesty*, 133 S. Ct. at 1160-61 (Breyer, J., dissenting).

[26] 133 S. Ct. at 1147 (quoting *Lujan*).

the cases is obvious. In *Amnesty* this Court took pains to stress that it had been especially vigilant about not relaxing standing requirements in cases where the judiciary was asked to pass judgment against a power exercised by the other two "political branches," 133 S. Ct. at 1146-47. In this case, petitioners challenged a program of surveillance carried out in secret by the executive in blatant violation of a Congressional criminal prohibition that had been in place for over two decades.[27]

The federal courts have regularly given great weight to the illegality of government conduct in determining that contingent fears of future harm from that conduct were sufficient to support standing.[28] The reasons this should be so are obvious: *criminal* executive surveillance operates outside of restraint

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[27] *See* 50 U.S.C. § 1809 (making it a felony to "engage[] in electronic surveillance under color of law except as authorized by statute" or knowingly "disclose[] or use[]" such information).

[28] *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144, 147, 150-51 (D.D.C. 1976) (holding "numerous acts of warrantless electronic surveillance" justiciable: "retention of information... collected in a legal manner, cannot be challenged, [but] *illegal* electronic surveillance [is] subject to challenge") (emphasis added); *see also Jabara v. Kelley*, 476 F. Supp. 561, 568 (E.D. Mich. 1979) ("system of independently unlawful intrusions" establishes injury, causation and standing), *vacated on other grounds sub nom. Jabara v. Webster*, 691 F.2d 272 (6th Cir. 1982); *Riggs v. Albuquerque*, 916 F.2d 582, 586 (10th Cir. 1990); *Philadelphia Yearly Meeting of the Religious Soc'y of Friends v. Tate*, 519 F.2d 1335, 1338 (3d Cir. 1975).

by either Congress or *ex ante* judicial review, is presumptively more likely to trench where independent Article III judges would not have, and naturally raises questions about why existing (typically quite workable[29]) legal authorities for surveillance were circumvented. In contrast, in *Amnesty*, the surveillance being challenged was notionally legal (in the sense of being authorized by statute) and required some judicial involvement and a minimization process. In this Court's evaluation, all of this diminished the chances of interception of the *Amnesty* plaintiffs' communications. *See* 133 S. Ct. at 1148, 1150 (noting that scenario under which plaintiffs would be at risk of surveillance depended on Article III judges of the FISC determining that FAA surveillance touching plaintiffs' communications nonetheless somehow comported with Fourth Amendment[30]).

Perhaps the most important difference between the cases is the fact that there were no judicially-supervised minimization standards applied under the NSA Program to protect legally-privileged communications from interception and retention. Under the original version of FISA, attorneys could trust that their privileged communications would remain confidential (and so assure their clients) because any information intercepted under FISA authorization would be subject to *judicially-supervised* minimization standards designed to protect (*inter alia*) legally privileged information. Statutory minimization pro-

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[29] *Cf. supra* note 2, and accompanying text (noting that "[i]n practice FISA appeared to be extraordinarily permissive").

[30] This is the third in the list of five factors that this Court held to render the *Amnesty* plaintiffs' fears overly speculative. *See* 133 S. Ct. at 1148.

visions institute the constitutional particularity requirement for wiretapping warrants.[31] But no such safeguards existed under the NSA Program.

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[31] *See United States v. Daly,* 535 F.2d 434, 440 (8th Cir. 1976) (Title III minimization provision "was passed by Congress in order to comply with the constitutional mandate … that wiretapping must be conducted with particularity."); *see also United States v. Scott*, 436 U.S. 128, 135-39 (1978) (conflating Fourth Amendment and statutory standards for minimization); *Berger v. New York*, 388 U.S. 41, 57-60, 63-64 (1967) (first suggesting such a constitutional requirement to minimize scope of wire intercepts). The government has conceded before the Foreign Intelligence Surveillance Court of Review that courts have constitutionalized the minimization requirement. *See* Supplemental Brief of the United States, Appendix A: Comparison of FISA and Title III, *In re Sealed Case*, No. 02-001 (FIS Ct. of Review filed Sep. 25, 2002) at 1 n.1.

Courts have interpreted minimization requirements to include, at a minimum, a duty to institute procedures to protect the confidentiality of privileged communications. *See, e.g.*, *United States v. Chavez*, 533 F.2d 491, 494 (9th Cir. 1976) (approving minimization limited to attorney-client and priest-penitent calls); *United States v. Turner*, 528 F.2d 143, 157 (9th Cir. 1975) (approving minimization, even in light of broad scope of monitoring, where privileged calls were excluded); *Kilgore v. Mitchell*, 623 F.2d 631, 635 (9th Cir. 1980) (noting that even prior to *Scott*, DOJ Title III policy mandated minimization of privileged calls); *United States v. Rizzo*, 491 F.2d 215, 217 (2d Cir. 1974) (minimization requirement met where officers instructed not to—and did not—

That stands in sharp contrast to the FAA, which the *Amnesty* majority interpreted to mandate FISC judge review of minimization procedures. 133 S. Ct. at 1145. The individual petitioners in the instant case were all either attorneys or legal staff of CCR, so the vast majority of their communications would have been covered by legal privilege (work product, attorney-client, or joint litigation privilege). In contrast, in *Amnesty* the plaintiffs included both attorneys and legal groups, on the one hand, and on the other "human rights, labor, … and media organizations" whose members were primarily not attorneys and whose communications were therefore only "sometimes" legally privileged.[32] *Id.* at 1145. Moreover, even as to the attorney plaintiffs in *Amnesty*, this Court noted that—"critically," in its view—the FAA mandated that the FISC "assess whether the Government's targeting and minimization procedures comport with the Fourth Amendment." *Id.* at 1150. Because of this, the Court felt the likelihood that the *Amnesty* attorney plaintiffs—all of whom were U.S. persons[33]—would be subject to incidental

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monitor, record or spot-check privileged conversations).

[32] Non-attorney plaintiffs might well fear incidental surveillance even under other statutes requiring minimization, such as Title III or pre-FAA FISA provisions—the second of the majority's five factors.

[33] All the individual plaintiffs in *Amnesty* (and all the plaintiffs' declarants in the cross-summary judgment motions) were United States persons. There were U.S.-based organizations included among the plaintiffs, and obviously some of their membership or staff may have been non-U.S. persons.

surveillance when their foreign contacts were targeted was minimal.[34]

By all appearances the FAA was carefully designed to allow some amount of judicial examination of minimization procedures and to contain other key features that would undermine fundamental elements of standing claims like those deployed in the CCR and ACLU challenges to the NSA Program. Indeed, the FAA's provisions seem intentionally structured so as to undercut the strongest potential chilling effect standing claims that would otherwise exist: those of attorneys engaged in national security litigation against the government. The fact that the FAA lies at the tail end of a series of Bush Administration responses to the present litigation, adding a number of standing-undermining features to the initial round of FISA amendments Congress enacted in 2007,[35] simply reinforces that impression. If one goal of the FAA's drafters was to avoid ever exposing ac-

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[34] The first, fourth and fifth speculative factors the majority listed were (1) that the government would choose to target and (4) intercept the communications of the foreign contacts of the *Amnesty* plaintiffs, and (5) that the *Amnesty* plaintiffs' communications would be *incidentally* intercepted as a result. *See* 133 S. Ct. at 1148. (Since they were U.S. persons, the plaintiffs' communications could not have been targeted *directly* under the FAA.)

[35] The Protect America Act of 2007 (PAA) is described *supra* at 14-16. Among its other differences from the FAA, the PAA did not provide for judicial review of minimization procedures, or indeed for *any* routine, *ex ante* judicial review of these programs of surveillance. *See* § 105B, Protect America Act, Pub. L. 110-55, 110 Stat. 552, 553 (Aug. 5, 2007).

tual surveillance practices under the FAA to litigation, this Court's *Amnesty* decision is a sign that they succeeded,[36] but this should serve to reinforce how important it is that those carefully-placed features of the FAA were entirely absent from the NSA Program.

The panel acknowledged the force of these arguments, noting that plaintiff-appellants "might have a slightly stronger basis for fearing interception" because of the lack of any judicial review under the NSA Program. App. 3a. However, the panel claimed that, "[l]ike the *Amnesty Int'l* plaintiffs, the CCR plaintiffs 'have no actual knowledge of the government's … targeting practices.'" *Id.* That is simply untrue: public statements of executive branch officials described the NSA Program as narrowly targeted at *exactly* the type of communications CCR and its legal staff routinely engaged in in their work, namely, one-end international calls and emails where the government believed one party to the communication had some link to terrorism.[37] So, even assuming that the FAA allows for surveillance as broad as that described by the *Amnesty* plaintiffs,[38] this Court found

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[36] Except in those rare instances where the government chose to introduce FAA surveillance (and admitted it was acquired under FAA) in a criminal case against a defendant. *Cf. Amnesty*, 133 S. Ct. at 1154; *but see infra* 32-33 (describing misrepresentations at oral argument).

[37] *See supra* at 6-7 (detailing government's *admitted* criteria for interception).

[38] They claimed, for example, that a single FAA authorization could cover "[a]ll telephone and e-mail communications to and from countries of foreign policy interest—for example, Russia, Venezuela, or Isra-

that the many safeguards the statute put in place—judicial review ensuring that "targeting and minimization procedures comport with the Fourth Amendment"[39]—rendered it unlikely that the plaintiffs, all U.S. based individuals or organizations, would be injured by surveillance that complied with the FAA's statutory requirements (which included that the surveillance could not intentionally target U.S persons, even when outside the U.S.).[40] In contrast, here the government circumvented resort to the courts entirely, and the NSA was admittedly directing the Program's surveillance at the communications of the small universe of people suspected of links to terrorism with the equally small universe of U.S. persons who speak to them. It hardly requires a "highly attenuated chain" of "speculative … possibilities"[41] for petitioners' contingent harms to be realized.

Finally, the panel erred in concluding that here "the asserted injury relies on a different uncertainty not present in *Amnesty Int'l*, namely, that the government retained 'records' from any past surveillance it conducted under the [NSA Program]." App. 3a. As petitioners made clear to the Court of Appeals, "there is ample evidence in the record that the

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el—including communications made to and from U.S. citizens and residents." *Amnesty*, 638 F.3d at 126 (quoting from plaintiffs' pleadings). Subsequent disclosures make it plausible that NSA surveillance under FAA authorizations ranges at least this broadly, if not more so. *See infra* note 45.

[39] *Amnesty*, 133 S. Ct. at 1150.

[40] *See Amnesty*, 133 S. Ct. at 1142 n.1 (citing 50 U.S.C. § 1881a).

[41] *Amnesty*, 133 S. Ct. at 1148, 1150; panel opinion at App. 3a (quoting same).

NSA Program, in general, involved retention of records,"[42] including a statement from a press conference in which Deputy DNI Michael Hayden described the process for redacting and passing on to other agencies records collected by the Program.[43]

2. This Court should clarify its holding in *Amnesty*

Granting certiorari in this case would allow this Court to offer the lower courts guidance making explicit that absolute certainty that a plaintiff's communications were intercepted is not a necessity for establishing chilling-effect injury in surveillance cases. Parties seeking to challenge unlawful government surveillance programs currently face a Catch-22: Where there is direct proof of illegal surveillance, the government will assert that the proof is secret and therefore inadmissible in litigation (even where it was released through government negligence).[44]

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[42] *See* Reply Br., Dkt. 24 (9th Cir. Nov. 27, 2011).

[43] *See Gonzales/Hayden Press Briefing*; *see also* Walter Pincus, *NSA Gave Other U.S. Agencies Information from Surveillance*, Wash. Post. (Jan. 1, 2006) at A08 (detailing admissions that NSA created reports of surveillance and shared records with FBI, DIA, CIA and DHS).

[44] *See, e.g.*, *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190 (9th Cir. 2007) (upholding state secret assertion with respect to inadvertently disclosed document).

It should be noted that secrecy is not implicated by the relief petitioners seek, primarily consisting of an order of expungement mandating that the government destroy any records of petitioners' commu-

Where there is no direct proof that individuals have been subjected to actual surveillance, no chilling-effect injury will be deemed sufficient to maintain standing under the Ninth Circuit's holding in this case. It matters not how sensitive those individuals' communications are (attorneys with clients, human rights investigators with victims, journalists with sources), whether those communications are legally privileged, or whether the program of surveillance in question is nominally lawful (having been approved by Congress and reviewed by an Article III court, as with the FAA surveillance at issue in *Amnesty*) or patently lawless and lacking any judicial supervision or judicially-supervised minimization to protect those privileged communications (as with the NSA Program at issue here).

That is illustrated by the panel decision here, which, like the district court decision, effectively demanded that the chilling effect asserted here was motivated by petitioners' certainty that they were surveillance targets. Yet this Court's opinion in *Amnesty* goes out of its way to note that it does not disturb settled law and was not premised on the fact that the *Amnesty* plaintiffs fell short of demonstrating with absolute certainty that they would be surveilled under the FAA. *See* 133 S. Ct. at 1150 n.5

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nications that were acquired through the NSA Program, and certify to the district court that it has in fact destroyed *any such records as may exist*. (*See* Proposed Order, ¶ 2, App. 54a; *see also supra* note 20.) That relief is extremely plaintiff-specific (especially in comparison to the broad injunctive relief sought in *Amnesty*), does not threaten the exposure of any secrets (either directly or indirectly), and would grant petitioners significant redress.

(standing does not always require "that it is literally certain" that plaintiff is subject to surveillance). Without further clarification by this Court, public interest attorneys' seeking to play their role in our constitutional system will have no practical ability to challenge unlawful surveillance that severely burdens their ability to develop and litigate challenges to other unlawful behavior of the executive branch.

* * *

There are also ample grounds for this Court to revisit its decision in *Amnesty*, which appeared to be premised on assumptions that government surveillance was far more narrow in scope than subsequent events have disclosed, on misrepresentations about the government's practice of disclosing that evidence was derived from FAA surveillance in criminal cases, and possibly also on this Court's presumption that minimization practices applied to FAA surveillance were more restrictive than the policies the government has applied in practice.

The immense breadth of the actual surveillance being conducted under the auspices of the FAA statute[45] shows that the *Amnesty* plaintiffs had better reason to believe their international communications would be intercepted than even they understood at the time, and casts doubt on this Court's judgment that their fears of interception were based on speculative assumptions (and were, implicitly, statistically unlikely to come to pass). *See* 133 S. Ct. at 1148-50. Yet the fact that the NSA now has direct access to

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[45] *See* Glenn Greenwald & Ewan MacAskill, *NSA Prism program taps in to user data of Apple, Google and others*, The Guardian (Jun. 6, 2013) (describing vast scope of PRISM program, implementing surveillance under Section 702 of FAA).

the servers of Microsoft, Google, Apple, and other major communication service providers such that it is able to "'watch your ideas form as you type,'"[46] or that the federal government records and stores a complete log of the phone calls of nearly all Americans,[47] might well be irrelevant under the panel's reading of the law, as even the fears of attorneys engaged in national security litigation of international scope against the federal government may be found too "speculative" to generate avoidance costs that could underlie standing. App. 3a.

Since this Court's decision in *Amnesty*, the *Guardian* has reported that attorney-client communications intercepted under Section 702 of the FAA will be segregated under minimization procedures only when the "communication is between a person who is known to be under criminal indictment in the United States and an attorney who represents that individual in the matter under indictment," and that the information will not be destroyed but rather "appropriate procedures established to protect [them] from review or use in any criminal prosecution, while preserving foreign intelligence information contained therein."[48] The FAA's statutory mandate that mini-

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[46] Barton Gellman & Laura Poitras, *U.S., British intelligence mining data from nine U.S. Internet companies in broad secret program*, Wash. Post (Jun. 6, 2013).

[47] Glenn Greenwald, *NSA collecting phone records of millions of Verizon customers daily*, The Guardian (June 5, 2013).

[48] *See* Glenn Greenwald and James Ball, *The top secret rules that allow NSA to use US data without a warrant*, The Guardian (Jun. 20, 2013), *available at* http://

mization procedures be implemented was deemed a "critical[]" factor in favor of declining to recognize standing by the majority in *Amnesty*. 133 S. Ct. at 1150; *see also id*. 1145; 1145 n.3; 1149 n.4 (noting "puzzling" suggestion from bench at oral argument that court review minimization procedures *in camera*). Yet it is now clear that the government has been applying[49] a remarkably cramped version of minimization that would not exempt from interception conversations privileged as attorney work product, or attorney client conversations for as-yet unindicted individuals overseas (including, for example, conversations taking place during calls and meetings

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www.theguardian.com/world/2013/jun/20/fisa-court-nsa-without-warrant; Eric Holder, *Minimization Procedures Used by the National Security Agency in Connection with Acquisitions of Foreign Intelligence Information Pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978, as Amended* (Oct. 31, 2011), https://www.aclu.org/files/assets/minimization_procedures_used_by_nsa_in_connection_with_fisa_sect_702.pdf (declassified version, officially released Aug. 21, 2013).

[49] Of course, this assumes the government has been correctly applying its own cramped principles, which is also not clear in light of recently-declassified information. *See* Ellen Nakashima & Greg Miller, *Official releasing what appears to be original court file authorizing NSA to conduct sweeps*, Wash. Post (Nov. 18, 2013), available at http://goo.gl/zsxu3X (NSA reported to Congress FISA Court's "grave concern over the lack of apparent NSA compliance with the Court ordered minimization procedures").

with foreign-national clients detained at Guantánamo).

Finally, the government sought to reassure this Court in *Amnesty* that refusing standing to the plaintiffs would not foreclose all review of the constitutionality of FAA surveillance outside of the Foreign Intelligence Surveillance Court, for eventually "if the Government were to prosecute one of [the plaintiff]-attorney's foreign clients" with "information obtained or derived from" FAA surveillance, the attorney might be able to challenge the constitutionality of the initial FAA surveillance in that context. 133 S. Ct. at 1154. It has since come to light that the government's representation that "it must provide advance notice of its intent" to use "information obtained or derived from"[50] FAA surveillance has not extended to situations where it uses FAA surveillance in applications to acquire traditional FISA surveillance orders. According to the *New York Times*, only some four months after this Court decided *Amnesty* did the Solicitor General learn that his representations to this Court were in error, and only after lengthy debate over the summer did the Justice Department reverse its longstanding position and approve in theory of informing defendants that the fruits of FAA surveillance were used against them.[51]

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Eight years after the initial disclosures that spawned this litigation, the seeming futility of attempts to debate the legality of broad surveillance in

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[50] *See* Petition for a Writ of Certiorari, *Clapper v. Amnesty Int'l USA*, No. 11-1025 (Feb. 17, 2012) at 6.

[51] Charlie Savage, *Door May Open for Challenge to Secret Wiretaps*, N.Y. Times (Oct. 16, 2013).

the courts[52] has led to that debate being removed to the only remaining open forum available—the press—through the intervention of whistleblowers. The current vitality of that debate demonstrates the exceptional importance of the questions before this Court.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 2, 2014

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[52] Notwithstanding the high bar the *Amnesty* decision set for chilling-effect *content* surveillance plaintiffs, the very ubiquity of NSA *metadata* surveillance (as disclosed by Edward Snowden's revelations) has allowed some litigation challenging it to proceed in the district courts. *See Klayman v. Obama*, 2013 WL 6571596 (D.D.C. Dec. 16, 2013), *ACLU v. Clapper*, ___ F. Supp. 2d ___, No. 13-cv-3994 (S.D.N.Y. Dec. 27, 2013) (both finding standing exists).

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 11-15956

CENTER FOR CONSTITUTIONAL RIGHTS; TINA M. FOSTER; GITANJALI S. GUTIERREZ; SEEMA AHMAD; MARIA LAHOOD; RACHEL MEEROPOL,

Plaintiffs - Appellants,

v.

BARACK OBAMA, President of the United States; NATIONAL SECURITY AGENCY, Ltg. Keith B. Alexander, Director; DEFENSE INTELLIGENCE AGENCY, Ltg. Ronald L. Burgess, Jr., Director; CENTRAL INTELLIGENCE AGENCY, Leon Panetta, Director; DEPARTMENT OF HOMELAND SECURITY, Janet Napolitano, Secretary; FEDERAL BUREAU OF INVESTIGATION, Robert S. Mueller III, Director; JAMES R. CLAPPER, Director of National Intelligence,

Defendants - Appellees.

D.C. No. 3:06-md-01791-VRW
Northern District of California,

San Francisco

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Vaughn R. Walker, District Judge, Presiding

Submitted June 3, 2013**
San Francisco, California

Before: PREGERSON, HAWKINS, and McKEOWN, Circuit Judges.

The Center for Constitutional Rights (CCR) appeals the district court's dismissal on standing grounds of its suit challenging the National Security Agency's program of warrantless surveillance, referred to as the Terrorist Surveillance Program (TSP), which ended in 2007. We have jurisdiction under 28 U.S.C. § 1291 and, reviewing de novo, we affirm.

The Supreme Court in *Clapper v. Amnesty Int'l*, 133 S. Ct. 1138 (2013), addressed a substantially similar challenge to surveillance conducted under the Foreign Intelligence Surveillance Act Amendments Act of 2008, 50 U.S.C. § 1881a. The Court held the plaintiffs lacked standing because they could not

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

demonstrate that they were injured by the Act. Of the five steps that the Court identified in the "highly attenuated chain" of alleged injury there, *Amnesty Int'l*, 133 S. Ct. at 1148, four of them apply to CCR's challenge. The plaintiffs here "fear that: (1) the Government [decided] to target the communications of non-U.S. persons with whom they communicate; (2) in doing so, the Government [chose] to [utilize the TSP] rather than utilizing another method of surveillance . . . (4) the Government [succeeded] in intercepting the communications of [their] contacts; and (5) [plaintiffs were] parties to the particular communications that the Government intercept[ed]." *Id.* Like the *Amnesty Int'l* plaintiffs, the CCR plaintiffs "have no actual knowledge of the Government's . . . targeting practices." *Id.*

One link in the speculative chain is inapplicable here: the fear that "(3) the Article III judges who serve on the Foreign Intelligence Surveillance Court [FISC] will conclude that the Government's proposed surveillance procedures satisfy § 1881a's many safeguards and are consistent with the Fourth Amendment." *Id.* Although CCR might have a slightly stronger basis for fearing interception because of the lack of FISC involvement, CCR's asserted injury relies on a different uncertainty not present in *Amnesty Int'l*, namely, that the government retained "records" from any past surveillance it conducted under the now-defunct TSP. In sum, CCR's claim of injury is largely factually indistinguishable from, and at least as speculative as, the claim rejected in *Amnesty Int'l*.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 11-15956

CENTER FOR CONSTITUTIONAL RIGHTS; TINA M. FOSTER; GITANJALI S. GUTIERREZ; SEEMA AHMAD; MARIA LAHOOD; RACHEL MEEROPOL,

Plaintiffs - Appellants,

v.

BARACK OBAMA, President of the United States; NATIONAL SECURITY AGENCY, Ltg. Keith B. Alexander, Director; DEFENSE INTELLIGENCE AGENCY, Ltg. Ronald L. Burgess, Jr., Director; CENTRAL INTELLIGENCE AGENCY, Leon Panetta, Director; DEPARTMENT OF HOMELAND SECURITY, Janet Napolitano, Secretary; FEDERAL BUREAU OF INVESTIGATION, Robert S. Mueller III, Director; JAMES R. CLAPPER, Director of National Intelligence,

Defendants - Appellees.

D.C. No. 3:06-md-01791-VRW
Northern District of California,
San Francisco

ORDER

Before: PREGERSON, HAWKINS, and McKEOWN, Circuit Judges.

The panel votes to deny the petition for rehearing.

The full court has been advised of the petition for rehearing and rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

[stamped: **FILED** Oct. 3, 2013, Molly C. Dwyer, Clerk, U.S. Court of Appeals]

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

IN RE:

NATIONAL SECURITY AGENCY
TELECOMMUNICATIONS RECORDS
LITIGATION

This order pertains to:

CENTER FOR CONSTITUTIONAL RIGHTS, a New York Nonprofit Law Firm; TINA M FOSTER, GITANJALI S GUTIERREZ, SEEMA AHMAD, MARIA LAHOOD and RACHEL MEEROPOL, United States Citizens and Attorneys at Law,

Plaintiffs,

v

BARACK H OBAMA, President of the United States; NATIONAL SECURITY AGENCY and KEITH B ALEXANDER, its Director; DEFENSE INTELLIGENCE AGENCY and MICHAEL D MAPLES, its Director; CENTRAL INTELLIGENCE AGENCY and PORTER J GOSS, its Director; DEPARTMENT OF HOMELAND SECURITY and MICHAEL CHERTOFF, its Secretary; FEDERAL BRUEAU OF INVESTIGATION and ROBERT S MUELLER III, its Director; JOHN D NEGROPONTE, Director of National Intelligence,

Defendants.

MDL Docket No 06-1791 VRW
Case No C 07-1115 VRW

ORDER [*CM/ECF Document 51, filed 1/31/2011*]

This case is part of multi-district litigation stemming from the Terrorist Surveillance Program ("TSP"), a warrantless surveillance program carried out by the federal government from 2001 to 2007. On May 27, 2010, defendants — certain high-ranking government officials and associated government agencies — filed a renewed motion to dismiss or, in the alternative, for summary judgment based in part on plaintiffs' failure to establish standing. Doc #731/39.[1] On July 29, 2010, plaintiffs filed a renewed motion for summary judgment and opposition to defendants' motion for summary judgment. Doc ##742/46, 743/47. For the reasons discussed below, the court GRANTS defendants' motion for summary judgment and DENIES plaintiffs' motion for summary judgment.

I

On January 17, 2006, plaintiffs filed an action in the United States District Court for the Southern District of New York. Doc #333-1/16-1. Plaintiffs alleged that defendants engaged in electronic surveillance without court order and thereby violated the

[1] Documents will be cited both to the MDL docket number (No M 06-1791) and to the individual docket number (No C 07-1115) in the following format: Doc #(MDL)/(individual).

Foreign Intelligence Surveillance Act ("FISA"), the Separation of Powers Doctrine and the First and Fourth Amendments. *Id* at 2. Plaintiffs based these allegations primarily upon statements by President George W Bush and other officials in December 2005 admitting that the National Security Agency ("NSA") had monitored, without a warrant, communications between the United States and a foreign country where one of the parties was believed to be a member or affiliate of al-Qa'ida. Id at 8.

The complaint alleges that plaintiff Center for Constitutional Rights ("CCR") represented, and continues to represent, clients who are suspected by the United States government of having some link to al-Qa'ida or other terrorist organizations. Doc #333-1/16-1 at 2-3. These clients include Muslim foreign nationals detained after the September 11 terrorist attacks as persons "of interest" and others detained as "enemy combatants" at Guantanamo Bay. Id. Plaintiffs — CCR and five of its attorneys who represent such clients — "believe that their conversations and emails with [CCR clients], and with other persons abroad with whom they have communicated in connection with these cases, have been subject to surveillance pursuant to the [TSP]." Id at 3. Plaintiffs further allege that "[i]t is likely that [p]laintiffs' privileged attorney-client communications were and continue to be intercepted by Defendants." Id.

Plaintiffs claim that they were harmed by the government's surveillance program in various ways. Plaintiffs allege that, after they became aware of the program, they were compelled to "institute protective measures to reduce the potential impact of such surveillance on their representation of their clients." Doc #333-1/16-1 at 12. Plaintiffs allege that they

were forced to stop "communicating with certain individuals at all by phone or mail," "avoid[] subjects central to the attorney-client relationship and work product in electronic communications with others" and "undertake international travel to avoid the risk of jeopardizing the confidentiality of privileged communications." Id at 12-13. In addition to the expenses these measures imposed on plaintiffs, plaintiffs claim that they have suffered "irreparable harm to their ability to advocate vigorously on their clients' behalf." Id at 13.

Plaintiffs also allege that, because the government's surveillance program "permits the surveillance of conversations of people for whom the government would not be able to establish probable cause that the subject of surveillance is an agent of a foreign power," it has "negatively affected [p]laintiffs' ability to communicate with clients, co-counsel, witnesses, and other relevant individuals in the course of carrying out their role as advocates for their clients and others." Doc #333-1/16-1 at 13. That is, "[k]nowledge that their conversations may be overheard chills persons outside the United States who are not agents of foreign powers from contacting the [p]laintiffs through electronic means to seek their legal advice and/or to provide information in connection with legal matters." Id. Plaintiffs allege that this has caused "irreparable harm to their ability to effectively advocate for [their clients], and will continue to inflict such harm until it is stopped." Id.

Plaintiffs' complaint requests various forms of equitable relief. Plaintiffs request that the court: (1) "[d]eclare that [d]efendants' program of warrantless surveillance is unlawful, and enjoin any further such warrantless surveillance"; (2) "[o]rder that

[d]efendants disclose to [p]laintiffs all unlawful surveillance of [p]laintiffs' communications carried out pursuant to the program"; (3) "[o]rder that all [d]efendants turn over to [p]laintiffs all information and records in their possession relating to [p]laintiffs that were acquired through the warrantless surveillance program or were the fruit of surveillance under the program, and subsequently destroy any such information and records in [d]efendants' possession"; (4) "[a]ward costs, including an award of attorneys' fees under the Equal Access to Justice Act, 28 [USC] § 2412(d)(1)(A)" and (5) "[a]ward such other relief as the Court may deem just and proper." Doc #333-1/16-1 at 15.

On March 9, 2006, plaintiffs moved for partial summary judgment. Doc ##333-2/16-2, 333-3/16-3. On May 26, 2006, defendants moved to dismiss plaintiffs' action or, alternatively, for summary judgment. Doc ##327-1/12-1, 327-3/12-3. Both plaintiffs and defendants received amicus briefs in support of their motions.

On February 23, 2007, this case was consolidated with the *In re National Security Agency Telecommunications Records Litigation* multi-district litigation, Case Number 06-md-1791, and transferred to the undersigned sitting in the Northern District of California. See Doc #179/xxx.[2] Judge Lynch in the Southern District of New York did not rule on the outstanding motions to dismiss and for summary judgment before the case was transferred. The parties agreed to file supplemental briefs and have oral ar-

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[2] Documents contained in the MDL docket but not in the docket for this particular case are listed with "xxx" rather than an individual docket number.

gument on the outstanding motions. Doc #289/2. On June 8, 2007, defendants filed a supplemental brief in support of their original motion. Doc #308/3. Defendants also submitted, for ex parte in camera review, a classified memorandum and a classified declaration. Doc ##309/4 & 310/5. On July 10, 2007, plaintiffs filed a supplemental memorandum in support of their original motion for summary judgment and in opposition to defendants' motion. Doc #328/13.

On August 9, 2007, the court held oral arguments on the parties' motions. Doc #348/20. On August 10, 2007, plaintiffs moved for leave to file a supplemental complaint challenging the Protect America Act of 2007, which temporarily amended FISA, as unconstitutional under the First and Fourth Amendments. Doc #347/19. Defendants opposed. Doc #381/22. On January 28, 2009, the court denied plaintiffs' motion as moot on the grounds that the Protect America Act had expired in February 2008 and had not been reauthorized. Doc #555/29.

In response to the court's request on January 20, 2010, Doc #702/31, the parties submitted a joint status report on March 19, 2010 explaining the status of the case and the proceedings necessary to resolve it. Doc #716/35. Among the issues addressed by the parties was the fact that the TSP had been discontinued in early 2007. Id. Plaintiffs stated that "[e]ven if the NSA Program challenged in [p]laintiffs' original summary judgment papers is no longer in active operation with respect to the continuing interception of communications," plaintiffs' request for an order requiring defendant to disclose all unlawful surveillance of plaintiffs, turn over all information pertaining to plaintiffs that was acquired through the TSP and destroy any such information in defendants' pos-

session was still "necessary to remedy the harms set forth in [p]laintiffs' summary judgment papers." Id at 3. Defendants continued to argue that plaintiffs' claims should be dismissed or summary judgment granted because plaintiffs lack standing. Id at 4-7. The court ordered the parties to renew their cross-motions and file new oppositions and replies. Doc #720/36.

On May 27, 2010, defendants filed a renewed motion to dismiss or for summary judgment. Doc #731/39. On July 29, 2010, plaintiffs filed a renewed motion for summary judgment and an opposition to defendants' motion. Doc ##742/46, 743/47. On September 14, 2010, defendants filed an opposition to plaintiffs summary judgment motion and in reply to plaintiffs' opposition. Doc #749/49. On October 5, 2010, plaintiffs filed a reply to defendants' opposition. Doc #750/50.

II

The following is a statement of the relevant facts of the case, drawn largely from plaintiffs' declarations and included documents, and construed most favorably to plaintiffs.

On December 17, 2005, President Bush gave a radio address stating that shortly after September 11, 2001 he authorized the NSA to intercept "the international communications of people with known links to [al-Qa'ida] and related terrorist organizations." Doc #333-4/16-4 at 39-40. In a December 19, 2005 press conference, Attorney General Alberto Gonzales explained that the program involved surveillance of communications between a party in the United States and a party outside of the United States where there is "a reasonable basis to conclude

that one party to the communication is a member of [al-Qa'ida], affiliated with [al- Qa'ida], or a member of an organization affiliated with [al- Qa'ida], or working in support of [al-Qa'ida]." Doc #333-4/16-4 at 62. In a speech on January 23, 2006, Deputy Director of National Intelligence (and former NSA Director) Michael Hayden confirmed that under the program this "reasonable basis" determination was made by a NSA intelligence expert without court involvement. Doc #333-4/16-4 at 90-91. This program has been referred to by the government and others as the Terrorist Surveillance Program ("TSP"). See, for example, Doc #308/3 at 5.

On January 17, 2007, Attorney General Gonzales sent a letter regarding the TSP to various members of Congress. Doc #127/xxx. In the letter, Gonzales explained that a Foreign Intelligence Surveillance Court judge had 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-Qa'ida] or an associated terrorist organization." Doc #127-1/xxx at 1. "As a result of these orders, 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" — that is, in compliance with FISA. See id. Gonzales stated that "under these circumstances, the President has determined not to reauthorize the [TSP] when the current authorization expires." Id at 1-2.

Plaintiffs have "served as counsel in many cases alleging violations of constitutional and human rights as a result of the detention and interrogation practices of the [Bush] administration in connection

with anti-terrorism policies and practices." Doc #333-4/16-4 at 3. Most of plaintiffs' clients are represented pro bono, with no expectation that they will ever pay any expenses related to their representation. Id at 3. CCR "is committed to the use of law as a positive force for social change" and "considers litigation to be not merely a tool for advancing precedent but also a fulcrum around which to organize mass movements for political change and a means of giving voice to the aspirations of oppressed peoples." Id at 2-3.

The individual attorney plaintiffs regularly communicate with individuals who "fit within the criteria articulated by Attorney General Gonzales for targets of the [TSP] * * * or are reasonably likely to be viewed by the United States as fitting within those criteria." Doc #333-4/16-4 at 4. Specifically, plaintiffs Gutierrez, Foster and Ahmad work on habeas corpus petitions for designated "enemy combatants" held at Guantanamo Bay. Id at 3-5. They regularly communicate with family members of detainees, "former detainees who have been released and returned to their home countries," and various witnesses, lawyers and other individuals who reside in foreign countries, including persons who have been designated by the United States as "enemy combatants." Id. Plaintiff LaHood represents Maher Arar, who resides in Canada and has been declared by the United States to be a member of al- Qa'ida, in a civil suit and regularly communicates with him by phone and email. Id at 5. Plaintiff Meeropol is the lead attorney in the *Turkmen v Ashcroft* civil class action on behalf of Muslim non-citizens detained shortly after September 11, 2001 and declared to be "of interest" to the September 11 terrorism investigation. Id at 5-6. Meeropol regularly communicates with these actual

and potential class members, all of whom reside outside the United States. Id at 5-6.

Plaintiffs did not produce, in response to defendants' motion for summary judgment, any evidence that they were actually surveilled under the TSP. Instead, plaintiffs limited their evidence and argument to the claim that their constitutional rights were "chilled" by the mere risk that they were surveilled under the TSP. Plaintiffs claim that this risk forced them to review past communications that may have been intercepted by the TSP, take corrective action and implement measures to prevent future communications from being intercepted by the government. See Doc #333-4/16-4 at 6-10. Plaintiffs have attempted to avoid electronic communication concerning sensitive matters with overseas contacts and have traveled internationally to discuss such matters in person. Id at 7-9.

In January 2006, CCR and its staff submitted requests to various agencies under the Freedom of Information Act seeking all records obtained through warrantless electronic surveillance, which required "[s]ubstantial expenditures of staff time and effort." Id at 7. Plaintiffs also drafted interrogatories in *Turkmen v Ashcroft* seeking to discover any attorney-client communications that were monitored or intercepted, and CCR attorneys have been instructed by CCR's director to move for such disclosure in other cases where surveillance is suspected. Id at 6, 9. Plaintiffs allege that this "divert[s] staff time and organizational resources away from core mission tasks," which "hurts [their] organization by reducing the number of cases [they] can bring, and undermin[ing their] ability to litigate [their] existing cases in the most effective manner." Id at 9-10.

Plaintiffs also claim to have suffered less quantifiable harm since learning about the existence of the TSP. Plaintiffs believe that given their knowledge of the existence and nature of the TSP they are ethically required to avoid international electronic communications involving sensitive information. See Doc ##333-7/16-7 at 2-5, 333-8/16-8 at 3-6, 333-9/16-9 at 2-3. Plaintiffs submitted a declaration from Professor Stephen Gillers, a specialist in legal ethics, stating that "[i]n light of what is now known about the [TSP] and given the nature of CCR's work as detailed in submissions to the Court, CCR attorneys and their support persons have substantial reason to fear that telephonic, fax, and e-mail communications * * * that they may have or have had with CCR clients, or with third persons or each other in the course of representing clients, have been or will be intercepted by the United States. Doc #333-6/16-6 at 4. As a result, "CCR attorneys may not ethically use * * * these electronic means of communication in exchanging or collecting * * * [n]early all communications with or about clients." Id at 4-5. Because international travel is not an effective substitute for easy electronic communications, plaintiffs have not been able to communicate with overseas clients and contacts as much as desired and believe that the quality of their litigation has been undermined.

Plaintiffs have also deemed it necessary to inform persons communicating with them via electronic means that their conversation may be subject to government surveillance. See, for example, Doc ##333-7/16-7 at 3, 333-8/16-8 at 5. William Goodman, the director of CCR, states that "it is difficult to imagine a worse thing to have to say at the onset of a relationship with a client, witness, or other person with whom one wishes to work closely" because it "inevi-

tably [makes] the CCR staffer appear to be in some fashion an agent of the United States government, or [makes] our organization appear suspect due to the fact that communications with us are subject to government surveillance." Doc #333-7/16-7 at 3. Plaintiffs imply that the lack of trust thereby created has negatively impacted the quality of their litigation activities.

III

Summary judgment is proper where the pleadings, discovery and affidavits show that there is "no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." FRCP 56(c). A court will grant summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial * * * since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp v Catrett*, 477 US 317, 322-23 (1986).

"It goes without saying that those who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy." *City of Los Angeles v Lyons*, 461 US 95, 101 (1983). Standing is a jurisdictional requirement grounded in Article III of the Constitution. *Lujan v Defenders of Wildlife*, 504 US 555, 559 (1992). To establish Article III standing, a plaintiff must establish: (1) it suffered an "injuryin- fact," which is both "concrete and particularized" and "actual or imminent;" (2) a causal connection between the injury and the conduct complained of and (3) that it is likely

that the injury will be "redressed by a favorable decision." Id at 560-61. The party invoking federal jurisdiction bears the burden of establishing these elements, and each element must be supported with the manner and degree of evidence required at the successive stages of the litigation. Id at 561. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice * * *. In response to a summary judgment motion, however, the plaintiff can no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts'[]." Id. An affidavit that contains "only conclusory allegations, not backed up by statements of fact, * * * cannot defeat a motion for summary judgment." *Shane v Greyhound Lines, Inc*, 868 F2d 1057, 1061 (9th Cir 1989).

IV

The court first turns to whether plaintiffs have introduced sufficient evidence to establish standing for their claim under the First Amendment. Defendants contend that "[p]laintiffs' allegations of a subjective chill coupled with an unwillingness to communicate are insufficient to establish injury-in-fact." Doc #731/39 at 16. According to defendants, "where the challenged conduct has unquestionably ceased, as here, plaintiffs' allegations of a subjective chill * * * are insufficient to confer standing for their First Amendment claim." Id at 21.

Plaintiffs maintain that they continue to suffer harm to their "First Amendment interest in litigating against the government." Doc #743/47 at 12. Plaintiffs argue that "any responsible attorney would have to conform their behavior to account for the possibility that potential clients and witnesses might be tainted by the possibility of past government in-

terception," meaning that "CCR will have to exercise caution going forward in using such individuals in litigation." Id at 12- 13. This "need for caution interferes with [CCR's] ability to construct a case under the ordinary assumptions of confidentiality that underpin our adversary system of justice." Id at 13.

Plaintiffs also argue that "third parties might sensibly be hesitant to communicate freely with CCR staffers even absent a risk of current unlawful interception," creating "a current risk that third parties who communicated with [CCR] previously will now be less willing to do so, knowing that the government may have been listening in on those earlier calls." Doc #743/47 at 11.

Other than references to "possibilities" and "risks," plaintiffs do not argue and have presented no evidence that they were unlawfully surveilled. Instead, plaintiffs characterize the uncertainty about whether they were surveilled, the possible existence of records of that surveillance and the purportedly reasonable actions taken in response to it as the harm, alleging that it exerts a "chilling effect" on the exercise of their First Amendment rights. Doc #743/47 at 21-22.

The question, then, is whether such chilling effects — where there is no evidence that plaintiffs were actually surveilled under the TSP — are sufficient to establish the "concrete and particularized" injury required for Article III standing. *Lujan*, 504 US at 560.

A

In *Laird v Tatum*, 408 US 1 (1972), the Supreme Court considered whether the chilling of First Amendment rights by the existence of an allegedly

unlawful government surveillance program presented a justiciable controversy. The Court recognized 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." Id at 11. The Court, however, found no case that involved a "chilling effect aris[ing] 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." Id at 11. The Court emphasized 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 14-15.

Plaintiffs attempt to distinguish *Laird* by relying heavily on *Presbyterian Church (USA) v United States*, 870 F2d 518 (9th Cir 1989). In *Presbyterian Church*, the plaintiff churches claimed that their First and Fourth Amendment rights were violated when "INS agents entered the churches wearing 'body bugs' and surreptitiously recorded church services." Id at 520. The plaintiffs alleged that their right to free exercise of religion and association was abridged and that "as a result of the surveillance of worship services, members have withdrawn from active participation in the churches." Id at 520-22. The court ruled that the plaintiffs had established standing because "[w]hen congregants are chilled from participating in worship services * * * because they fear the government is spying on them and taping their every utterance, * * * a church suffers organizational injury because its ability to carry out its ministries has been impaired." Id at 522. The court

distinguished *Laird* as involving a chilling effect "caused, not by any specific action of the Army directed against the plaintiffs, but only by 'the existence and operation' of the surveillance program in general." Id. That is, the plaintiffs in Laird did not allege that they were actually surveilled, but "only that they could conceivably become subject to the Army's domestic surveillance program." Id.

In this case, the fear that plaintiffs describe as chilling the exercise of their First Amendment rights is far closer to *Laird* than *Presbyterian Church*. The alleged injury here is, in fact, more speculative than in *Laird* given that (unlike *Laird*) the government has ceased the activities that gave rise to the lawsuit. Instead, there is only a fear that plaintiffs may have been subject to unlawful surveillance in the past combined with a fear that some "agency might in the future take some other and additional action detrimental to [them]." *Laird*, 408 US at 11. Moreover, at least some of the ongoing burdens described by plaintiff cannot fairly be traced to the TSP itself. Plaintiffs' declarations describe at length the disruption to their operations resulting from their inability to use quick and efficient electronic communications. Even assuming (without deciding) that such fears and measures were reasonable and that such an injury is sufficiently concrete to confer standing, the TSP cannot provide a justification for continuing to incur such costs. The TSP ended in 2007. Doc #127/xxx. With no reason to believe that they or their clients are being illegally monitored, there is no imperative (ethical or otherwise) to avoid the use of electronic communications.

The facts of this case are simply not analogous to *Presbyterian Church*, in which the chilling effect was

caused by actual, substantiated unlawful surveillance of four churches lasting almost a year. 870 F2d at 520. That set of facts demonstrated "specific present objective harm or a threat of specific future harm" in a way that plaintiffs here cannot. See *Laird*, 408 US at 15; *Presbyterian Church*, 870 F2d at 522. In short, there is no "specific action * * * directed against the plaintiffs," only a fear that plaintiffs may have been unlawfully surveilled, may conceivably suffer an unfair disadvantage in litigation at some point in the future and that some third parties may be unwilling to communicate or cooperate with plaintiffs based on their uncertainty about the details of the TSP. That is insufficient to establish injury in fact for purposes of Article III standing.

B

Even if the possibility of harm in this case were sufficiently concrete to constitute injury in fact, the injury claimed by plaintiffs is not itself cognizable under the First Amendment. Although litigation is unquestionably protected by the First Amendment when it is used as a means of political expression and advocacy, the First Amendment does not protect against every conceivable burden or difficulty that may arise during litigation. Plaintiffs rely upon *NAACP v Button*, 371 US 415 (1963), to support their First Amendment claim, arguing that "[w]hat was true of the NAACP in the 1960's is certainly true of CCR today" and "the [TSP] intrudes on plaintiffs' right to 'petition for redress of grievances," * * * and on their 'political expression.'" Doc #333- 3/16-3 at 47.

In *NAACP*, the NAACP and its Legal Defense and Education Fund frequently sought out aggrieved persons, informed them of their legal rights and of-

fered to represent them without charge in school desegregation and other such cases. *NAACP*, 371 US at 419- 22. Typically, the NAACP did so at meetings of parents and children at which its representatives would explain the steps necessary to achieve school desegregation and offer legal representation. Id at 421. Litigation was just one strategy used to promote the ultimate goal of the NAACP, "to secure the elimination of all racial barriers which deprive Negro citizens of the privileges and burdens of equal citizenship rights in the United States." Id at 419. In 1956, the state of Virginia enacted a statute making it a criminal violation to solicit legal business through the use of "an agent for an individual or organization which retains a lawyer in connection with an action to which it is not a party and in which it has no pecuniary right or liability." Id at 424. The Virginia Supreme Court of Appeals held that the NAACP, its members and its attorneys had practiced criminal solicitation as defined in the statute. Id at 433-34. On appeal, the United States Supreme Court read the Virginia statute as "proscribing any arrangement by which prospective litigants are advised to seek the assistance of particular attorneys." Id at 433. The court held that the statute "unduly inhibit[s] protected freedoms of expression and association" and posed "the gravest danger of smothering all discussion looking to the eventual institution of litigation on behalf of the rights of members of an unpopular minority." Id at 434, 437.

Unlike the plaintiffs in *NAACP*, whose legal activities on behalf of minorities were criminalized by an exceedingly broad state law, plaintiffs in the present case claim to be harmed because there is a risk "that the government may have access to aspects of CCR's litigation strategy" as well as a risk "that

third parties who communicated with [CCR] previously will now be less willing to do so." Doc #743/47 at 11. Plaintiffs also claim to be harmed by the need to take steps to assess the scope of any past surveillance and to ensure that no confidential communications are disclosed in the future. Id at 10, 13. Although plaintiffs appear to have established that their litigation activities have become more costly due to their concern about the TSP, plaintiffs remain free to pursue their political goals by litigating against the government, and continue to do so vigorously. Plaintiffs have not provided any precedent for the notion that the First Amendment protects against a "risk * * * that the government may have access to aspects of [a plaintiff's] litigation strategy" where there is no proof that any surveillance in fact occurred. Id at 11. Nor have plaintiffs provided precedent for a protected First Amendment right "to litigate * * * cases in the most effective manner." Doc #333-4/16-4 at 9-10.

In short, plaintiffs have not shown that they "personally ha[ve] suffered some actual or threatened injury as a result of the putatively illegal conduct," *Valley Forge Christian College v Americans United for Separation of Church and State, Inc*, 454 US 464, 472 (1982), especially in light of the "clear precedent requiring that the allegations of future injury be particular and concrete." *Steel Co v Citizens for a Better Environment*, 523 US 83, 109 (1998). Plaintiffs have therefore failed to establish standing for their First Amendment claim.

V

In their renewed motion for summary judgment and opposition to defendants' motion for summary judgment, plaintiffs make little attempt to establish

standing for their remaining claims under FISA, the Fourth Amendment and the separation of powers doctrine. Nevertheless, the court will briefly examine whether plaintiffs have established standing for these other claims.

FISA establishes a cause of action for an "aggrieved person * * * 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." 50 USC § 1810. As discussed at length by this court in the related case *Al-Haramain Islamic Foundation v Obama*, Case No C 07- 0109, only by presenting evidence of actual surveillance can a plaintiff establish the "aggrieved person" status necessary to proceed with a FISA claim. See *In re NSA Telecoms Records Litigation*, 564 F Supp 2d 1109, 1131-35 (ND Cal 2008). Because plaintiffs have presented no evidence of such surveillance, they have failed to establish standing for their FISA claim.

The same is true of plaintiffs' Fourth Amendment claim. "[T]he 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." *Rakas v Illinois*, 439 US 128, 133-38 (1978) (quotation omitted). Plaintiffs therefore cannot establish Fourth Amendment standing without showing that they were in fact subject to unreasonable search or seizure. Plaintiffs have not done so.

Finally, plaintiffs' claim based on the separation of powers doctrine also fails. Plaintiffs have failed to establish that they were subjected to the unlawful program at issue: the TSP. Plaintiffs cannot establish, therefore, that the government's alleged viola-

tion of separation of powers principles by implementing the TSP caused plaintiffs any "actual injury redressable by the court." *United States v Hoyt*, 879 F2d 505, 514 (9th Cir 1989) (ruling that a defendant not subject to the statute at issue did not have standing to challenge it); see also *Immigration and Naturalization Service v Chadha*, 462 US 919, 935-36 (1983) (claims asserted under the separation of powers doctrine are subject to the traditional Article III standing requirements). Unlike other cases in which standing to bring a separation of powers claim was found, plaintiffs cannot establish that they were actually subjected to the conduct alleged to have violated the separation of powers. See, for example, *Chadha*, 462 US at 923, 935-36 (reviewing whether one house of Congress could order the plaintiff deported); *Buckley v Valeo*, 424 US 1, 117 (1976) (reviewing whether the Federal Election Commission could make rulings regarding the plaintiff); *Glidden Co v Zdanok*, 370 US 530, 532-33 (1962) (reviewing whether the plaintiffs' cases could be adjudicated by judges from non-Article III courts).

Accordingly, plaintiffs have failed to establish standing for any of their claims and summary judgment in favor of defendants is appropriate.

VI

For the reasons stated above, defendants' motion for summary judgment is GRANTED. Doc #39. Plaintiffs' motion for summary judgment is DENIED. Doc #47. Defendants are ordered to submit and serve a proposed form of judgment in accordance with this order no later than February 7, 2011; plaintiffs shall submit and serve any objections to defendants' form of judgment not later than February 14, 2011.

Upon entry of judgment, the clerk is directed to terminate all motions and close the file for *Center For Constitutional Rights v Obama*, Case Number 07-cv-1115. The clerk is further directed upon entry of judgment herein to terminate all motions and close the file for the multi-district litigation *In re National Security Agency Telecommunications Records Litigation*, Docket No MDL-1791.

IT IS SO ORDERED.

VAUGHN R WALKER

United States District Judge

APPENDIX D

The version of the Foreign Intelligence Surveillance Act in effect as of the time of the filing of this lawsuit, 50 U.S.C. §§ 1801-62 (2006) provided, in pertinent part, as follows:

§ 1801. Definitions

As used in this title:

(a) "Foreign power" means--

(1) a foreign government or any component thereof whether or not recognized by the United States;

(2) a faction of a foreign nation or nations, not substantially composed of United States persons;

(3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments;

(4) a group engaged in international terrorism or activities in preparation therefor;

(5) a foreign-based political organization, not substantially composed of United States persons; or

(6) an entity that is directed and controlled by a foreign government or governments.

(b) "Agent of a foreign power" means--

(1) any person other than a United States person, who--

(A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4);

(B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities

in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or

(C) engages in international terrorism or activities in preparation therefore; or

(2) any person who--

(A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States;

(B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statues of the United States;

(C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, for or on behalf of a foreign power;

(D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or

(E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C) or knowingly conspires with any person to engage in activities described in subparagraph (A), (B), or (C).

* * *

(e) "Foreign intelligence information" means--

(1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against--

(A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

(B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or

(C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or

(2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to--

(A) the national defense or the security of the United States; or

(B) the conduct of the foreign affairs of the United States.

(f) "Electronic surveillance" means--

(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;

(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 communica-

tions 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 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.

* * *

(h) "Minimization procedures", with respect to electronic surveillance, means--

(1) specific procedures, which shall be adopted by the Attorney General, that are reasonably designed in light of the purpose and technique of the particular surveillance, to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information;

(2) procedures that require that nonpublicly available information, which is not foreign intelligence information, as defined in subsection (e)(1), shall not be disseminated in a manner that identifies any United States person, without such person's consent, unless such person's identity is necessary to

understand foreign intelligence information or assess its importance;

(3) notwithstanding paragraphs (1) and (2), procedures that allow for the retention and dissemination of information that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes; and

(4) notwithstanding paragraphs (1), (2), and (3), with respect to any electronic surveillance approved pursuant to section 102(a) [*50 USCS § 1802(a)*], procedures that require that no contents of any communication to which a United States person is a party shall be disclosed, disseminated, or used for any purpose or retained for longer than 72 hours unless a court order under section 105 [*50 USCS § 1805*] is obtained or unless the Attorney General determines that the information indicates a threat of death or serious bodily harm to any person.

* * *

§ 1804. Applications for court orders

(a) Submission by Federal officer; approval of Attorney General; contents. Each application for an order approving electronic surveillance under this title *[50 USCS §§ 1801* et seq.] shall be made by a Federal officer in writing upon oath or affirmation to a judge having jurisdiction under section 103 [*50 USCS § 1803*]. Each application shall require the approval of the Attorney General based upon his finding that it satisfies the criteria and requirements of such application as set forth in this title *[50 USCS § § 1801* et seq.]. It shall include--

(1) the identity of the Federal officer making the application;

(2) the authority conferred on the Attorney General by the President of the United States and the approval of the Attorney General to make the application;

(3) the identity, if known, or a description of the target of the electronic surveillance;

(4) a statement of the facts and circumstances relied upon by the applicant to justify his belief that--

(A) the target of the electronic surveillance is a foreign power or an agent of a foreign power; and

(B) 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;

(5) a statement of the proposed minimization procedures;

(6) a detailed description of the nature of the information sought and the type of communications or activities to be subjected to the surveillance;

(7) a certification or certifications by the Assistant to the President for National Security Affairs or an executive branch official or officials designated by the President from among those executive officers employed in the area of national security or defense and appointed by the President with the advice and consent of the Senate--

(A) that the certifying official deems the information sought to be foreign intelligence information;

(B) that a significant purpose of the surveillance is to obtain foreign intelligence information;

(C) that such information cannot reasonably be obtained by normal investigative techniques;

(D) that designates the type of foreign intelligence information being sought according to the categories described in section 101(e) [*50 USCS § 1801(e)*]; and

(E) including a statement of the basis for the certification that--

(i) the information sought is the type of foreign intelligence information designated; and

(ii) such information cannot reasonably be obtained by normal investigative techniques;

(8) a statement of the means by which the surveillance will be effected and a statement whether physical entry is required to effect the surveillance;

(9) a statement of the facts concerning all previous applications that have been made to any judge under this title *[50 USCS §§ 1801* et seq.] involving any of the persons, facilities, or places specified in the application, and the action taken on each previous application;

(10) a statement of the period of time for which the electronic surveillance is required to be maintained, and if the nature of the intelligence gathering is such that the approval of the use of electronic surveillance under this title *[50 USCS §§ 1801* et seq.] should not automatically terminate when the described type of information has first been obtained, a description of facts supporting the belief that additional information of the same type will be obtained thereafter; and

(11) whenever more than one electronic, mechanical or other surveillance device is to be used with respect to a particular proposed electronic surveillance, the coverage of the devices involved and what minimization procedures apply to information acquired by each device. ...

* * *

§ 1805. Issuance of order

* * *

(f) Emergency orders. Notwithstanding any other provision of this title *[50 USCS §§ 1801* et seq.],

when the Attorney General reasonably determines that--

> (1) an emergency situation exists with respect to the employment of electronic surveillance to obtain foreign intelligence information before an order authorizing such surveillance can with due diligence be obtained; and
>
> (2) the factual basis for issuance of an order under this *title [50 USCS §§ 1801* et seq.] to approve such surveillance exists;

he may authorize the emergency employment of electronic surveillance if a judge having jurisdiction under section 103 [*50 USCS § 1803*] 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 title *[50 USCS §§ 1801* et seq.] is made to that judge as soon as practicable, but no more than 72 hours after the Attorney General authorizes such surveillance. If the Attorney General authorizes such emergency employment of electronic surveillance, he shall require that the minimization procedures required by this title *[50 USCS §§ 1801* et seq.] for the issuance of a judicial order be followed. In the absence of a judicial order approving such electronic surveillance, the surveillance shall terminate when the information sought is obtained, when the application for the order is denied, or after the expiration of 72 hours from the time of authorization by the Attorney General, whichever is earliest.

* * *

§ 1809. Criminal sanctions

(a) Prohibited activities. A person is guilty of an offense if he intentionally--

(1) engages in electronic surveillance under color of law except as authorized by statute; or

(2) discloses or uses information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized by statute.

(b) Defense. It is a defense to a prosecution under subsection (a) that the defendant was a law enforcement or investigative officer engaged in the course of his official duties and the electronic surveillance was authorized by and conducted pursuant to a search warrant or court order of a court of competent jurisdiction.

(c) Penalties. An offense described in this section is punishable by a fine of not more than $ 10,000 or imprisonment for not more than five years, or both.

(d) Federal jurisdiction. There is Federal jurisdiction over an offense under this section if the person committing the offense was an officer or employee of the United States at the time the offense was committed.

* * *

§ 1811. Authorization during time of war

Notwithstanding any other law, the President, through the Attorney General, may authorize electronic surveillance without a court order under this title *[50 USCS §§ 1801* et seq.] to acquire foreign intelligence information for a period not to exceed fifteen calendar days following a declaration of war by the Congress.

The version of 18 USC 2511(2)(f) (2006) in effect as of the time of the filing of this lawsuit provided, in pertinent part, as follows:

§ 2511. Interception and disclosure of wire, oral, or electronic communications prohibited

* * *

(f) * * * [Title III of the Wiretap Act of 1968, as amended, The Stored Communications Act of 1986, as amended, and] the Foreign Intelligence Surveillance Act of 1978 [50 U.S.C. §§ 1801 *et seq*.] shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act [50 U.S.C. § 1801], and the interception of domestic wire, oral, and electronic communications may be conducted.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CENTER FOR CONSTITUTIONAL RIGHTS,
TINA M. FOSTER, GITANJALI S. GUTIERREZ,
SEEMA AHMAD, MARIA LAHOOD,
RACHEL MEEROPOL,

Plaintiffs,

v.

GEORGE W. BUSH,
President of the United States;
NATIONAL SECURITY AGENCY,
LTG Keith B. Alexander, Director;
DEFENSE INTELLIGENCE AGENCY,
LTG Michael D. Maples, Director;
CENTRAL INTELLIGENCE AGENCY,
Porter J. Goss, Director;
DEPARTMENT OF HOMELAND SECURITY,
Michael Chertoff, Secretary;
FEDERAL BUREAU OF INVESTIGATION,
Robert S. Mueller III, Director;
JOHN D. NEGROPONTE,
Director of National Intelligence,

Defendants.

COMPLAINT

INTRODUCTION

1. This is an action for injunctive relief, seeking an order that would require President George W. Bush and his agents to halt an illegal and unconstitutional program of electronic surveillance of American citizens and other residents of this country. The President recently admitted to the nation that, pursuant to a secretly issued executive order, the National Security Agency (NSA) has for over four years engaged in a program of widespread electronic surveillance of telephone calls and emails, without warrants from any court, in some cases targeting persons within the United States and/or obtaining the contents of communications of persons within the United States (hereinafter, "NSA Surveillance Program").

2. Defendants' electronic surveillance without court orders is contrary to clear statutory mandates provided in the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. § 1801-62. Indeed, because the NSA Surveillance Program conducts electronic surveillance without statutory authorization, it constitutes a series of criminal acts under FISA. *See* 50 U.S.C. § 1809. The NSA Surveillance Program also violates the separation of powers, as it exceeds the constitutional powers of the President under Article II of the Constitution, and violates the First and Fourth Amendments to the Constitution. To the extent that electronic surveillance is essential to protect the national security of this country, Congress has provided a comprehensive set of procedures for such surveillance in FISA, which allows for court authorization of such surveillance upon individualized showings that the targets are agents of foreign powers or foreign terrorist groups. FISA includes provi-

sions for short-term emergency surveillance while an application for a court order is being prepared, and for warrantless surveillance during the first fifteen days of a war. Congress has provided that FISA and specified provisions of the criminal code are 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). Yet the President declined to pursue these "exclusive means," and instead unilaterally and secretly authorized electronic surveillance without judicial approval or Congressional authorization.

3. The Center for Constitutional Rights represents many persons whose rights have been violated by detention and intelligence gathering practices instituted in the wake of the terrorist attacks of September 11, 2001. Lawyers at the Center represent, among others: representatives of a potential class of hundreds of Muslim foreign nationals detained in the wake of September 11 and labeled "of interest" to the investigation of the attacks; hundreds of men detained without charge as "enemy combatants" at the Guantánamo Bay Naval Station; and a Canadian citizen stopped while changing planes at JFK Airport in New York while on his way home to Canada, and sent to Syria, where he was tortured and detained without charges for nearly a year.

4. The vast majority of these clients are individuals whom the government has at some time suspected of a link, however attenuated and unsubstantiated, to al Qaeda, groups supportive of al Qaeda, or to terrorist activity generally. For this reason, Plaintiffs' clients are within the class of people the gov-

ernment has described as the targets of the warrantless NSA surveillance program challenged here.

5. Plaintiffs believe that their conversations and emails with these clients, and with other persons abroad with whom they have communicated in connection with these cases, have been subject to surveillance pursuant to the NSA Surveillance Program. It is likely that Plaintiffs' privileged attorney-client communications were and continue to be intercepted by Defendants.

6. The secretive nature of the NSA Surveillance Program, combined with Defendants' admission that it is targeted at persons alleged to have some connection to al Qaeda or groups that support it, has inhibited Plaintiffs' ability to represent their clients vigorously.

PARTIES

7. Plaintiff the Center for Constitutional Rights, Inc. ("the Center" or "CCR") is a non-profit law firm maintaining its only office within this district at 666 Broadway, 7th Floor, New York, New York 10012. It sues in its own capacity and on behalf of its lawyers and legal staff.

8. Plaintiffs Tina M. Foster, Gitanjali S. Gutierrez, Maria LaHood, and Rachel Meeropol are attorneys at the Center for Constitutional Rights. Plaintiff Seema Ahmad is a legal worker at the Center. Plaintiff Foster resides in Queens, New York. Plaintiff Gutierrez resides in Ithaca, New York. Plaintiffs LaHood and Meeropol reside in Brooklyn, New York. Plaintiff Ahmad resides in Manhattan,

New York. All work primarily out of the Center's Manhattan office, and all are United States citizens.

9. George W. Bush is President of the United States. He personally authorized the NSA Surveillance Program through a secret executive order after September 11, 2001, and has continued to reauthorize it since its inception. He is sued in his official capacity only.

10. Defendant National Security Agency (NSA) is an agency under the direction and control of the Department of Defense that collects, processes and disseminates foreign signals intelligence. It is responsible for carrying out the NSA Surveillance Program challenged herein.

11. Defendant Lieutenant General Keith B. Alexander is Director of the NSA and Chief of the Central Security Service. He is responsible for supervising the NSA Surveillance Program. He is sued only in his official capacity.

12. Defendant Defense Intelligence Agency (DIA), a branch of the Department of Defense headquartered at the Pentagon, provides military intelligence to the armed forces, defense policymakers and force planners, in both the Department of Defense and the intelligence community, in support of U.S. military planning and operations and weapon systems acquisition. Upon information and belief, intelligence information obtained from the NSA Surveillance Program was shared with the DIA.

13. Defendant Lieutenant General Michael D. Maples is the Director of the DIA, and is responsible for overseeing its activities, including its use and dissemination of information obtained from the NSA

Surveillance Program. He is sued in his official capacity only.

14. Defendant Central Intelligence Agency (CIA) is an agency responsible for the collection and dissemination of intelligence concerning (primarily) foreign governments, individuals, and corporations. Upon information and belief, intelligence information obtained from the NSA Surveillance Program was shared with the CIA.

15. Defendant Porter J. Goss is Director of the CIA, and is responsible for overseeing its activities in connection with obtaining, using, and disseminating intelligence information from the NSA. He is sued in his official capacity only.

16. Defendant Department of Homeland Security (DHS) is a cabinet-level agency of the federal government responsible for prevention of threats to the homeland and response to domestic emergencies. Upon information and belief, intelligence information obtained from the NSA Surveillance Program was shared with the DHS.

17. Defendant Michael Chertoff is Secretary of DHS, and is responsible for overseeing its activities in connection with obtaining, using and disseminating intelligence information from the NSA. He is sued in his official capacity only.

18. Defendant Federal Bureau of Investigation (FBI) is a federal police and intelligence agency. The FBI is a division of the Department of Justice. Upon information and belief, intelligence information obtained from the NSA Surveillance Program was shared with the FBI.

19. Defendant Robert S. Mueller III is Director of the FBI, and is responsible for overseeing its activities in connection with obtaining, using and disseminating intelligence information from the NSA. He is sued in his official capacity only.

20. Defendant John D. Negroponte is Director of National Intelligence, the cabinet-level official coordinating all components of the federal intelligence community, and as such is the principal intelligence adviser to the President and the statutory intelligence advisor to the National Security Council. Upon information and belief, he has access to the intelligence information obtained from the NSA Surveillance Program, and is responsible for coordinating its use and dissemination. He is sued in his official capacity only.

JURISDICTION AND VENUE

21. This court has jurisdiction under 28 U.S.C. § 1331.

22. The United States District Court for the Southern District of New York is a proper venue of this action pursuant to 28 U.S.C. § 1391(e) because defendants are officers and employees of the United States or its agencies operating under color of law, no real property is involved in this action, and a plaintiff resides in this district. In addition, Defendants' actions caused injury to Plaintiffs in this district, where their law office is located and from which they engaged in international communications.

STATEMENT OF FACTS

STATUTORY BACKGROUND

23. In 1978, after the disclosure of widespread spying on American citizens by various federal law

enforcement and intelligence agencies, including the NSA, Congress enacted the Foreign Intelligence Surveillance Act of 1978 ("FISA"), Pub. L. 95-511, Title I, 92 Stat. 1796 (Oct. 25, 1978), *codified at* 50 U.S.C. § 1801-62, as amended. FISA provides a comprehensive statutory scheme for conducting electronic surveillance for foreign intelligence or national security purposes. FISA requires that such surveillance be conducted pursuant to orders from the statutorily created Foreign Intelligence Surveillance Court, with narrow exceptions that would not authorize the surveillance that is the subject of this lawsuit. In enacting this statute, Congress provided that it and specified provisions of the criminal code are 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). Congress further established that conducting electronic surveillance without such statutory authorization is a crime. 50 U.S.C. § 1809 (making it a crime to "(1) engage[] in electronic surveillance under color of law except as authorized by statute; or (2) disclose[] or use[] information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized by statute").

24. FISA specifically addresses the issue of domestic electronic surveillance during wartime. In a provision entitled "Authorization during time of war," FISA dictates 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 (emphasis added). The FISA Conference Report states that "this [15-day] period will allow time for consideration of any amendment to this act that may be appropriate during a wartime emergency. ... The conferees expect that such amendment would be reported with recommendations within 7 days and that each House would vote on the amendment within 7 days thereafter." H.R. Conf. Rep. No. 95-1720, at 34 (1978).

25. Thus, existing law provides that the President may conduct electronic surveillance only pursuant to FISA and specified provisions of the criminal code, and that doing so outside of these "exclusive means" is a crime.

THE NSA SURVEILLANCE PROGRAM

26. Since as early as September 2001, the National Security Agency, under authorization from President George W. Bush, has engaged in a systematic program of warrantless eavesdropping upon phone and email communications of thousands of individuals, including American citizens and permanent legal residents, both within and outside of the United States.

27. The government claims that the NSA Surveillance Program targets communications between a party outside the United States and a party inside the United States when one of the parties of the communication is believed to be "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." Attorney General Alberto Gonzales, *Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal*

Deputy Director for National Intelligence (Dec. 19, 2005).

28. The decision that a person fits these criteria may be made by an operations staffer with approval of a shift supervisor within NSA. There is no review of the decision by other executive agencies prior to implementing the electronic surveillance. There is no review of the decision at any point by a court or by Congress.

29. The NSA Surveillance Program has intercepted both phone and email communications where both parties to the communications were located with the United States.

30. Defendants claim the NSA Surveillance Program is subjected to an internal review within the executive branch approximately every 45 days, and that the President has reauthorized the program over thirty times to date.

31. Upon information and belief, at some point between its inception and the present, the NSA Surveillance Program was suspended for several months due to concerns about its illegality. Nonetheless, Defendants have defended the legality of the NSA Surveillance Program since its existence became public knowledge on or about December 15, 2005, and the President has stated that he intends to reauthorize the program "for as long as our nation faces a continuing threat from al Qaeda and related groups."

32. Upon information and belief, the NSA Surveillance Program collects not only the identities of persons communicating with targets of surveillance, but also the contents of those communications (*e.g.* recordings or transcripts of a phone call or the text of an email).

33. Upon information and belief, other government agencies and officials, including Defendants DIA, CIA, DHS, FBI, and Defendant Negroponte, have received from the NSA information obtained through the NSA Surveillance Program, without court approval or statutory authorization.

34. Upon information and belief, Defendant DIA has used information obtained from the NSA Surveillance Program as the basis for carrying out further surveillance of persons within the United States.

THE EFFECT OF THE UNLAWFUL NSA SURVEILLANCE SCHEME ON PLAINTIFFS' COMMUNICATIONS WITH CLIENTS AND OTHERS

35. Plaintiff the Center for Constitutional Rights is a non-profit legal and educational organization dedicated to protecting and advancing the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. CCR uses litigation proactively to advance the law in a positive direction, to empower oppressed communities, to guarantee the rights of those with the fewest protections and least access to legal resources, and to strengthen the broader international movement for constitutional rights and human rights under international law. CCR and its attorneys consider their legal advocacy and public education work to be modes of political expression and association.

36. Plaintiffs Tina Foster and Gitanjali Gutierrez are attorneys at the Center whose primary job responsibilities involve managing the litigation of habeas petitions filed on behalf of foreign nationals de-

tained at Guantánamo Bay Naval Station, Cuba, often through "next friends"—typically relatives of the detained—located overseas. The Center is lead counsel on some of these cases; on most, the Center serves as co-counsel with lead counsel outside the Center, who include lawyers at transnational law firms, located throughout the United States and overseas. In this capacity Plaintiffs Foster and Gutierrez communicate regularly with family members of the detainees, potential witnesses in the habeas cases, officials of foreign governments located in the detainees' home countries, former detainees who have been released and returned to their home countries, and cooperating counsel, located both inside and outside of the United States, who are litigating individual cases. Plaintiff Foster also routinely is required to communicate with translators and interpreters located overseas in the course of her work on these cases. Some of the people Plaintiffs Foster and Gutierrez communicate with in connection with their legal work either have officially been deemed by the United States as "enemy combatants," and therefore fit within the criteria articulated by Attorney General Gonzales, or are reasonably likely to be viewed by the United States as fitting within those criteria.

37. Plaintiff Seema Ahmad is a legal worker at the Center whose primary job responsibilities also involve coordination of the habeas petitions for Guantánamo detainees. Plaintiff Ahmad communicates regularly with family members of the detainees, cooperating counsel, human rights lawyers located overseas, former detainees, and other individuals in relation to these cases. Some of the people she communicates with in connection with her legal team duties either have officially been deemed by the United States as "enemy combatants," and therefore

fit within the criteria articulated by Attorney General Gonzales for targets of the NSA Surveillance Program, or are reasonably likely to be viewed by the United States as fitting within those criteria.

38. Plaintiffs Gutierrez, Foster and Ahmad participate in frequent training and joint strategy sessions with other counsel on the Guantánamo cases. These meetings generally involve some lawyers attending in person, and others conferencing in via videoconference technology or telephonic conference calls. Co-counsel or other participants frequently use such means to call into these meetings from overseas. Counsel on the Guantánamo cases also rely heavily on an email listserv and a private extranet site (accessible via the Internet) to coordinate their efforts in the cases.

39. Plaintiff Maria LaHood is a staff attorney at the Center for Constitutional Rights responsible for litigating a number of cases in CCR's International Human Rights docket, including *Arar v. Ashcroft*, 04-CV-0249 (E.D.N.Y.), a case on behalf of a Syrian-born Canadian citizen detained in New York while changing flights at JFK Airport and sent by United States officials to Syria to be tortured. In the course of her work on that case she communicates frequently by phone and e-mail with the plaintiff, Maher Arar, who lives in Canada, as well as with others abroad. The United States government continues to assert, incorrectly, that Mr. Arar is a member of al Qaeda, and therefore Mr. Arar fits within the criteria for targets of the NSA Surveillance Program described by Attorney General Gonzales.

40. Plaintiff Rachel Meeropol is a staff attorney at the Center for Constitutional Rights responsible for litigating cases in the Center's prisoners' rights

docket, and serves as lead counsel in *Turkmen v. Ashcroft*, 02-CV-2307 (E.D.N.Y.). The *Turkmen* case involves the detention and abuse of so-called "special interest" immigration detainees swept up in the immediate aftermath of 9/11 and held long after their final deportation orders so that they could be investigated for links to terrorism. In her capacity as an attorney at the Center, Ms. Meeropol routinely discusses matters by telephone or email with potential clients overseas. In the course of her work on the *Turkmen* case she communicates with the named plaintiffs and potential class members, all of whom now live overseas, via both e-mail and telephone calls. Some of the individuals outside the United States Ms. Meeropol communicates with are likely to be viewed by the United States as fitting within the broad criteria for NSA surveillance outlined by Attorney General Gonzales.

41. All of the individual Plaintiffs above have traveled internationally in the course of their work with the Center. During these trips, other attorneys and employees of the Center routinely need to communicate with these Plaintiffs concerning work-related matters via email or telephone.

42. The revelation that the government has been carrying on widespread warrantless interception of electronic communications, especially of international communications, has impaired Plaintiffs' ability to communicate via telephone and email with their overseas clients, witnesses, and other persons, out of fear that their privileged communications are being and will be overheard by the NSA Surveillance Program. As a matter of professional ethics in their role as attorneys, Plaintiffs are obligated to take reasonable and appropriate measures to reduce the risk of

disclosure of certain client confidences, once they have been apprised that a program of unlawful electronic surveillance by the government exists. The risk that their conversations are being overheard has forced Plaintiffs to institute protective measures to reduce the potential impact of such surveillance on their representation of their clients, including not communicating with certain individuals at all by phone or email, and avoiding subjects central to the attorney-client relationship and work product in electronic communications with others. Plaintiffs are compelled to undertake international travel to avoid the risk of jeopardizing the confidentiality of privileged communications. As a result, Plaintiffs are suffering irreparable harm to their ability to advocate vigorously on their clients' behalf.

43. Upon information and belief, Plaintiffs' communications, including attorney-client privileged communications and attorney work product, have been and continue to be intercepted by the NSA Surveillance Program.

44. The NSA Surveillance Program permits the surveillance of conversations of people for whom the government would not be able to establish probable cause that the subject of the surveillance is an agent of a foreign power. Knowledge that their conversations may be overheard chills persons outside the United States who are not agents of foreign powers from contacting the Plaintiffs through electronic means to seek their legal advice and/or to provide information in connection with legal matters pursued by Plaintiffs. The unlawful NSA Surveillance Program has negatively affected Plaintiffs' ability to communicate with clients, co-counsel, witnesses, and other relevant individuals in the course of carrying

out their role as advocates for their clients and others, and has thus done irreparable harm to their ability to effectively advocate for these individuals, and will continue to inflict such harm until it is stopped.

FIRST CLAIM FOR RELIEF

(Administrative Procedure Act and Foreign Intelligence Surveillance Act)

45. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

46. The NSA Surveillance Program is not authorized by the statutes that Congress has mandated 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), namely FISA, 50 U.S.C. § 1801-62, and the specific criminal code provisions listed in 18 U.S.C. § 2511(2)(f). FISA makes it a crime to obtain electronic surveillance without statutory authorization, and also makes it a crime to disclose or use information obtained through such surveillance. 50 U.S.C. § 1809. Defendants engaged in electronic surveillance, and disclosed and used information obtained therefrom, without statutory authorization. Defendants' actions are therefore contrary to law and subject to judicial review under the Administrative Procedure Act, 5 U.S.C. § 702.

SECOND CLAIM FOR RELIEF

(Separation of Powers)

47. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

48. Defendants, by carrying out their program of unlawful warrantless surveillance, have acted in excess of the President's Article II authority by failing to take care to execute the laws, and instead violating those laws, and by acting in contravention of clear statutory dictates in an area in which Congress has Article I authority to regulate, and where Congress has specifically prohibited the President from engaging in the conduct at issue here.

THIRD CLAIM FOR RELIEF

(Fourth Amendment violations)

49. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

50. Defendants have carried out unreasonable surveillance of Plaintiffs' private telephone and email communications without probable cause or warrants, in violation of the Fourth Amendment of the United States Constitution.

FOURTH CLAIM FOR RELIEF

(First Amendment Violations)

51. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

52. Defendants, by carrying out and/or asserting the right to carry out their program of unlawful warrantless surveillance, have impaired Plaintiffs' ability to freely provide legal advice, to join together in an association for the purpose of legal advocacy, to freely form attorney-client relationships, to vigorously advocate for clients and to petition the government for redress of grievances all of which are modes of expression and association protected under the First Amendment to the United States Constitution.

PRAYER FOR RELIEF

Plaintiffs respectfully request that the Court:

(a.) Declare that Defendants' program of warrantless surveillance is unlawful, and enjoin any further such warrantless surveillance;

(b.) Order that Defendants disclose to Plaintiffs all unlawful surveillance of Plaintiffs' communications carried out pursuant to the program;

(c.) Order that all Defendants turn over to Plaintiffs all information and records in their possession relating to Plaintiffs that were acquired through the warrantless surveillance program or were the fruit of surveillance under the program, and subsequently destroy any such information and records in Defendants' possession;

(d.) Award costs, including an award of attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A);

(e.) Award such other relief as the Court may deem just and proper.

Respectfully submitted,

[signed]
William Goodman [WG-1241]
Shayana Kadidal [SK-1278]
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counsel for Plaintiffs

[dated Jan 17 2006]

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN RE NATIONAL SECURITY AGENCY
TELECOMMUNICATIONS RECORDS
LITIGATION

This Document Relates Only to:
Center for Constitutional Rights v. Obama,
(Case No. 07-cv-1115-VRW)

[PROPOSED] ORDER

Upon consideration of the cross-motions for Summary Judgment, it is hereby ordered that Plaintiffs' Motion for Summary Judgment shall be and hereby is GRANTED, and

(1) Defendants will certify to this Court within 30 days that they will not in the future operate the warrantless surveillance program that is the subject of this action;

(2) Defendants will certify to this Court within 30 days that they have effectively quarantined from access all information and records in their possession relating to Plaintiffs that were acquired through the warrantless surveillance program that is the subject of this action, or were the fruit of such surveillance, pending further order from this Court regarding the destruction or permanent quarantining of those materials;

(3) Defendants shall within 30 days provide a plan for disclosure to the Court in camera of all in-

formation and records in their possession relating to Plaintiffs that were acquired through the warrantless surveillance program that is the subject of this action, or were the fruit of such surveillance, together with the position of the government regarding access for appropriately cleared counsel for Plaintiffs to have access to the same in future in camera proceedings.

IT IS SO ORDERED,
[blank signature line]
Chief Judge Vaughn R. Walker