US Domestic Surveillance after 9/11: An Analysis of the Chilling Effect on First Amendment Rights in Cases Filed against the Terrorist Surveillance Program

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After it was publicly disclosed in 2005 that the US government was conducting warrantless surveillance under the Terrorist Surveillance Program, dozens of lawsuits were filed against the government and cooperating telecommunication carriers on behalf of citizens who were illegally wiretapped as part of mass domestic warrantless surveillance programs. Although many of these cases claimed Fourth Amendment privacy violations, several cases are notable because they claimed that the government violated First Amendment rights protecting expression, assembly, religion, press, and petition. The plaintiffs asked the Court for relief from government surveillance that posed a prior restraint on their communications and associations due to their individual fears that their actions might result in future punishment, fine, or civil liability. When government action restrains communication through fear of retribution, it is known as a "chilling effect." Although the chilling effect is well established as a general principle of law, its application to surveillance cases is novel because it departs from the traditional physical claim of privacy invasion under the Fourth Amendment, instead focusing on the intellectual claim of freedoms of communication and association under the First Amendment.

Although there is a rich history of case law relating to government surveillance—claims that ultimately led to the government passing the Foreign Intelligence Surveillance Act in the late seventies—claims have not historically addressed the First Amendment implications of surveillance. It is impractical to consider the cases filed against the Terrorist Surveillance Program as a whole as they are very different: some make claims against the government, some make claims against cooperating telecommunication carriers, and some make claims against both parties. Also, the nature of the claims varies from state privacy act claims, to federal statutory claims, to constitutional claims of privacy and free speech violations. Although the First Amendment claims were made in conjunction with other claims, it is important to look at the First Amendment claims as unique from related claims against the Terrorist Surveillance Program as they represent a new thread of jurisprudence in the constitutionality of mass government surveillance.

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Three model cases have been selected here for review based on the involvement of plaintiffs who sued for violation of their First Amendment rights. In each case, plaintiffs either overtly or implicitly suggest that government surveillance and/or carrier complicity creates a chilling effect on their First Amendment expressions. These cases were all filed shortly after the existence of the Terrorist Surveillance Program was revealed, representing the initial body of lawsuits making claims based on First Amendment protections. In *Hepting v AT&T*, the plaintiffs filed suit claiming AT&T partnered with the government in its surveillance programs, violating free expression and privacy. In *Center for Constitutional Rights v President George W. Bush* and *American Civil Liberties Union v National Security Agency*, the defendants filed suit against the government and claimed the Terrorist Surveillance Program violated their rights to free expression under the First Amendment and their rights to privacy under the Fourth Amendment. The District Court found for the plaintiffs in the *ACLU* case, but the decision was overturned at the Appellate level. The *Hepting* and *CCR* cases are pending review in the Ninth Circuit Court of Appeals.

In order to fully develop the legal precedent for a First Amendment chilling effect caused by surveillance, this article first explores the relevant academic literature and case law. Theories relating to the chilling effect, whether directly or indirectly related to surveillance, are examined for applicability to the plaintiffs' claims in the model cases. Cases are examined that establish precedent for proving legal standing based on the plaintiffs' perceptions of a chilling effect on First Amendment activities caused by government surveillance. The three model cases are reviewed for First Amendment claims against the government or telecommunication carriers involved in the Terrorist Surveillance Program. This review not only familiarizes the reader with the current status of each case, but also offers a First Amendment perspective on the claims made by the plaintiffs. It also provides an opportunity to review the impact of state secrets privilege on jurisprudence and the resulting chill created by the government's classification and ongoing secrecy surrounding these mass surveillance activities. This article concludes by exploring future outcomes for the model cases. In addition, future research ideas that could concretely establish a chilling effect of surveillance are developed in response to the pending status and current court outcomes of the model cases.

The Chilling Effect

People need "breathing space" in associational privacy and communication, as even the perception of government monitoring can chill "the exercise of protected expressive activities."[1] If a participant in a phone conversation believes that everything they say is monitored by the government, then their participation in the marketplace of ideas could be chilled due to their perception

[1] William C. Banks and M.E. Bowman, "Executive Authority For National Security Surveillance," *American University Law Review* 50 (2000), 7.

that they could be punished for exploring politically unpopular or illegal viewpoints. This would, in theory, contradict Milton's evaluation of the importance of free speech in a democratic society—"let her [truth] and falsehood grapple; who ever knew Truth put to the worse in a free and open encounter?"[2] Surveillance and subsequent punishment of ideas explored over telephone wires is legally grounded in US punishment of political advocacy that incites violence in the public sphere. Although government monitoring of public speech can help promote the greater public good by preventing violence, there is the potential for domestic surveillance to act as a prior restraint on private conversations constitutionally protected through the First Amendment's guarantee of associational privacy. As we increasingly depend on electronic communication, the domain of the marketplace of ideas has expanded from a physical forum for public discourse, to an electronic sphere of information where people around the world share information over wired and wireless paths.

A "chilling effect" occurs when government action deters conduct or speech that might have "genuine social utility" to promote the rational exploration of political ideas.[3] For the purposes of this discussion, the chilling effect refers to government surveillance of phone conversations that might "chill" free speech and open dialogue.[4] The chilling effect need not indicate government prohibition of communication, but merely actions that might deter it.[5] This is an application of the Hawthorne Effect—a psychological term referring to the result of 1920s research on Chicago factory workers showing that when workers knew they were being watched, their work output improved—to surveillance in order to argue that government surveillance can change speakers' communications.[6] The chilling effect can further be defined as "the stifling effect that vague or overbroad laws may have on legitimate speech and activity typically protected by the First Amendment."[7] To put it most simply, people who believe their communications are monitored by the government often "think twice" before engaging in political dissent.[8]

The chilling effect relies on two legal principles that reveal flaws in the legal system. First, the legal process involves "people-made rules," resulting

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2 John Milton, *Areopagitica* (Oxford: Clarendon Press, 1882), 51–52.

3 See generally Paul A. Freund, "The Supreme Court and Civil Liberties," *Vanderbilt Law Review* 533 (1951), 4.

4 See generally Frederick Schauer, "Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect'," *Boston University Law Review* 58 (1978), 685.

5 Michael N. Dolich, "Alleging a First Amendment 'Chilling Effect' to Create a Plaintiff's Standing: A Practical Approach," *Drake Law Review* 43 (1994), 175–76.

6 Mayo Elton, *Hawthorne and the Western Electric Company: The Social Problems of an Industrial Civilisation* (London: Routledge & Kegan Paul, 1975). See generally Dolich, "Alleging a First Amendment 'Chilling Effect'"; D. Michael Risinger et al., "The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion," *California Law Review* 90 (2002), 1.

7 Laurie Burkhart, Michael Haubert, and Damon Thorley, *The Effect of Government Surveillance on Social Progress* (Boulder, CO: Ethica Publishing, 2004), http://www.ethicapublishing.com/5CH1.htm.

8 Geoffrey R. Stone, "Chilling Effect," *Huffington Post* (February 16, 2007), http://www.huffingtonpost.com/geoffrey-r-stone/chilling-effect_b_41430.html.

in a low degree of confidence in predicting outcomes.[9] Second, the legal system is fraught with errors, which, in the context of free speech, poses greater comparative harm to an individual and the legal process.[10] In this context, government surveillance poses a restriction that creates "invidious" as opposed to "benign deterrence" of protected activities.[11] The "fear of punishment" discourages activities protected constitutionally by the First Amendment.[12] Constitutionally protected activities are recognized as having a positive social value that promotes the public exchange of ideas and information.[13] In this recognition of the positive social value of communication, the chilling effect is triggered not only by altering specific behaviours, but also when a citizen considers whether their expression is too close to prohibitive speech.[14] The Supreme Court recognized this subjective chill in *Meese v Keene*[15] by granting standing to California State Senator Barry Keene, who claimed he was deterred from showing foreign films because of a Foreign Agents Registration Act provision that characterized the films as "political propaganda." The Court said *Keene* demonstrated a "subjective chill" as well as evidence of "specific present objective harm or a threat of specific future harm" by illustrating how his characterization, personal, political, and professional reputations would suffer, affecting his ability to be re-elected.

More recently, in *Amnesty International v Clapper (formerly Amnesty v Blair, Amnesty et al v McConnell),*[16] a federal appeals court granted standing to journalists and attorneys involved in defending terrorism suspects, reversing a district court decision. The plaintiffs filed suit in response to the 2008 FISA Amendments Act[17] based on their "fear that the government will intercept their sensitive international communications" and cause "professional and economic injury." As attorneys, journalists, and labour, legal, and human-rights organizations claiming government surveillance, their *fear* of surveillance, and financial measures taken to evade it, gives them standing to challenge the surveillance program. Article III of the Constitution has been interpreted to require three elements to establish standing: (1) injury in fact-invasion of a legally protected interest that is concrete and particularized, (2) a causal relationship between the injury and the challenged conduct, and (3) likelihood that the injury will be redressed by a favourable decision. Furthermore, the court said the plaintiff had standing because their fear

9 Schauer, "Fear, Risk and the First Amendment."
10 Ibid.
11 Ibid.
12 Ibid., 689.
13 Ibid., 691.
14 See generally ibid.; Raymond Shih Ray Ku, "The Founders' Privacy: The Fourth Amendment and the Power of Technological Surveillance," *Minnesota Law Review* 86 (2002); Christopher Slobogin, "Peeping Techno-Toms and the Fourth Amendment: Seeing Through Kyllo's Rules Governing Technological Surveillance," *Minnesota Law Review* 86 (2002).
15 *Meese v Keene,* 481 US 465 (1987).
16 *Amnesty International v Clapper,* 638 F.3d 118 (2d Cir, March 21, 2011).
17 *Foreign Intelligence Surveillance Act* of 1978 *Amendments Act* of 2008, HR 6304, enacted July 10, 2008.

seemed reasonable and was based on a "realistic understanding of the world." The ruling said that the plaintiff's fears could be traced to the 2008 FISA Amendments Act,[18] and their "legitimate professions make it quite likely that their communications will be intercepted if the government—as seems inevitable—exercises the authority granted by the FISA Amendment." The Court clarified that a reasonable fear of being monitored is enough. In September 2011, the US Court of Appeals for the Second Circuit refused a government request to rehear the case.

In the lower courts, plaintiffs have successfully established standing by demonstrating that they had to implement new communication "safeguards" to ensure privacy for First Amendment activities. In *Presbyterian Church (USA) v United States,*[19] church members established standing by showing that they suffered objective harms after Immigration and Naturalization Service (INS) agents wore listening devices to church activities to monitor the Sanctuary movement. The members of the Presbyterian Church demonstrated that members withdrew from church participation, cancelled Bible studies, withdrew financial support, and were "less open in prayers and confessions."

In the digital age, the government can use pin-traces on phone communications and surveillance of Internet activity to monitor target communications and associations. This "relational surveillance" of non-content communication data also has the potential to chill free expression, communication, and association.[20] For example, the government frequently mines databases for information about Internet search patterns.[21] This data can reveal citizen's "exploratory activities" in forming "expressive associations."[22] Mass warrantless surveillance has the potential to stifle public discourse, an important element in the democratic process.

Government surveillance can chill political participation, but it can also introduce ethical violations as the government attempts to curtail social and political opposition to its policies.[23] For example, surveillance can be used in preemptive policing to monitor and disrupt legitimate political protests and demonstrations. Surveillance might also violate the duty-based perspective to treat all people in an impartial way since government surveillance is often targeted at specific minority or radical groups.[24]. Finally, under rights-based theory, surveillance can contradict guaranteed rights and freedoms of speech, assembly, and protection from illegal searches.

While some scholars and courts have recognized the chilling effect of surveillance, others have expressed doubt regarding its application and

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18 *Foreign Intelligence Surveillance Act* of 1978 *Amendments Act* of 2008, HR 6304, enacted July 10, 2008, Pub L No 110-261.
19 *Presbyterian Church (USA) v United States,* 870 F.2d 518 (9th Cir, 1989).
20 Strandburg, Kathryn, "Freedom of Association in a Networked World: First Amendment Regulation of Relational Surveillance," *BC Law Review* 49 (2008), 819–20.
21 Ibid.
22 Ibid., 819–20.
23 Burkhart et al., *The Effect of Government Surveillance,* 1–2.
24 Ibid.

functionality. Arguing that the First Amendment should protect against government surveillance of citizens' First Amendment activities if there is a "discernible" chill on constitutionally protect activities, Daniel Solove suggested that it is difficult to establish an actual chilling effect because it is "impossible"—beyond a plaintiff's own assertions—to determine what activities a citizen might engage in if there were not government monitoring.[25] This is nearly impossible to evaluate as it requires a "hypothetical assessment of what might have existed under circumstances that did not transpire."[26] Katherine Sabbeth says this hypothetical assessment includes "the facts and witnesses never discovered, the creative theories never developed, and the cases never accepted."[27]

Furthermore, in court, a plaintiff would need to show that the "chill resulted from actual government surveillance, not just perceived potential surveillance."[28] Geoffrey Stone has summed this up as a flawed legal doctrine where "chilling is not enough" because the mere act of fear is not a "legally cognizable" term.[29] This reasoning was recognized by the 10th Circuit Court in *Riggs v Albuquerque*[30] when it reversed a dismissal, based on standing, where plaintiffs brought suit without being certain that they were the targets of surveillance.

Another concern in plaintiffs establishing standing for the legitimacy of the chilling effect is that in order for plaintiffs to successfully establish standing, they must show they were afraid to speak out against the government for fear of punishment—a claim that is invalidated if a claim is made in court.[31] Legal claims are complicated by courts' reluctance to allow individual challenges to government surveillance if the collected information is not used to do anything "improper to anyone."[32] The US Court of Appeals for the District of Columbia, in *Halkin v Helms*,[33] held that government agencies sharing watch list information about Vietnam War activists (obtained through warrantless wiretapping of communications) did not constitute a Fourth Amendment violation since there was no proof of illegal activity after the information was shared.

Under contemporary laws, it is nearly impossible for plaintiffs to gain standing when challenging the constitutionality of government surveillance because the state secrets privilege is used to seal information relating to mass warrantless domestic surveillance programs. Commonly, government

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25 Daniel J. Solove, "The First Amendment as Criminal Procedure," *NYU Law Review* 82 (2007), 154–55.

26 Kathryn A. Sabbeth, "Towards an Understanding of Litigation as Expression: Lessons from Guantanamo," *UC Davis Law Review* 44 (2011), 1520.

27 Ibid.

28 See generally Matthew Lynch, "Closing the Orwellian Loophole: The Present Constitutionality of Big Brother and the Potential for a First Amendment Cure," *First Amendment Law Review* 5 (2007).

29 Stone, "Chilling Effect."

30 *Riggs v Albuquerque*, 916 F.2d 582 (10th Cir, 1990).

31 Lynch, "Closing the Orwellian Loophole."

32 Stone, "Chilling Effect."

33 *Halkin v Helms*, 690 F.2d 977 (DC Cir, 1982).

employs private businesses to compile and produce records, with the specifics of their agreements sealed by non-disclosure requirements (CRS Report). Unable to obtain evidence from the government or its business partners, plaintiffs cannot concretely establish that they are targets of government surveillance. To compound the difficulty of establishing standing in surveillance cases, it can be hard for plaintiffs to prove to the courts that surveillance harmed their First Amendment rights. In *Laird v Tatum,*[34] the Court concluded that "allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." The Supreme Court dismissed the case on standing grounds because the plaintiffs, who were involved in public political meetings and protests infiltrated by army intelligence agents who kept notes on their observations, failed to show "any cognizable interest" harmed by possible future use of the data. The Court found that the mere existence of data gathering did not trigger a First Amendment chill, and rather, the plaintiffs would need to show some injury. However, the Court also recognized chilling effects that supported standing, including regulatory, proscriptive, or compulsory government actions.[35] As Scott Michelman observed in his analysis of who can sue over government surveillance,

> The difficulty these plaintiffs encounter is not in demonstrating that such consequences occur as a matter of fact; it is in convincing courts to recognize these consequences as constitutionally cognizable injuries-in-fact that give rise to justifiable controversies as a matter of law. Unlike the loss of privacy that accompanies actual wiretapping, the chilling effect that stems from potential wiretapping is not always recognized as an injury.[36]

Michelman concludes that "Chilling effects, though derivative in nature, are real harms that affect peoples' personal associations, reputations, and ability to do their jobs."[37] Nonetheless, courts often find that subjective chills perceived by plaintiffs are "too ephemeral or idiosyncratic to constitute an injury."[38] This highlights the difficulty of First and Fourth Amendment claims against government surveillance. A Fourth Amendment claim of invasion of privacy is obviously an injury to the plaintiff, but proof of spying is difficult to establish; whereas a First Amendment claim of chill is very easy to establish, but it is much more difficult to demonstrate the injury.[39]

Chilling Effect Analysis

The chilling effect is analogous with change to First Amendment protected activities motivated by fear of unreasonable government surveillance. The

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34 *Laird v Tatum,* 408 US 1 (1972).
35 See generally Scott Michelman, "Who Can Sue Over Government Surveillance," *UCLA Law Review* 57 (2009).
36 Ibid., 81.
37 Ibid., 110.
38 Ibid., generally.
39 Ibid.

fear of mass surveillance might be spurred by uncertainty about government activities created by limited government accountability. It might also be cultivated out of uncertainty about existing government surveillance technologies and programs. For the purposes of this article, the chilling effect will be broken down into several components that will be used to analyze the model cases for standing: government action, chilled activities, fear, and harm.

First, the chilling effect is triggered by government action that has the potential to limit a citizen's perceived freedom in the exercise of their First Amendment rights. This can include vague or overbroad laws and programs that authorize surveillance of speech, expression, and associational activities. The chilling action can include monitoring, analysis, and storing of communication content, as well as relational surveillance of communication and social networks. The chilling effect can also be triggered, or amplified, by the use of state secrets privilege to classify information related to the programs. Second, the activities chilled by government action must have some genuine social utility. This includes the rational exploration of political ideas, expressive associations, or public discourse, as well as private communications that support the development and nurturing of these activities for subsequent participation in the democratic process.

Third, the government action creates fear of punishment in citizens, manifested through deterrence from First Amendment activities, but also through consideration of alternative means of communication. In order for the chilling effect to be viable, the fear must be both reasonable and realistic. In order to demonstrate harm and establish standing, a plaintiff must show how the government action created an objective, rather than *subjective,* harm to the free exercise of their First Amendment activities. Although fear is an important element in the chilling effect, it is not in itself sufficient to establish standing in the courts. The final element in establishing standing based on the chilling effect is harm, which must be specific and can include damage to personal, political, or professional reputation; economic injury; loss of organization membership; decreased or altered communication; or the creation of new communication safeguards.

In the courts, Article III standing is established by demonstrating particularized, concrete injury that is caused by the government's challenged conduct, which can be remedied by a favourable court decision for the plaintiffs. To meet these criteria for standing, there must be evidence of the existence of the government surveillance program that created the chill, and the plaintiffs must demonstrate that they were indeed the target of that surveillance. The state secrets privilege can then be seen as a further government action that chills First Amendment rights because it chills the plaintiffs' ability to seek legal redress in the courts.

Model Cases

On October 26, 2001, Congress passed the USA PATRIOT Act,[40] modifying the Foreign Intelligence Surveillance Act and expanding the government's wiretapping powers to target US citizens in foreign intelligence surveillance, as long as they were not engaged in First Amendment activities.[41] In 2002, using the expanded presidential powers, President Bush issued a secret order authorizing the Terrorist Surveillance Program as a tool to fight the War on Terror. This order sidestepped a long-standing requirement of FISA[42] that federal authorities obtain a warrant when wiretapping a US citizen. The Terrorist Surveillance Program (hereinafter TSP), a domestic wiretapping program managed by the National Security Agency (NSA), was created to detect conspiratory communications between US citizens and individuals with terrorist connections in other countries. The Bush Administration presented the TSP as a means to address emergent national security concerns and issues related to terrorism. After much public and political controversy, the TSP program was not renewed in 2007 and consequently ended. The US Congress subsequently passed the FISA Amendments Act (FISAAA) of 2008, granting retroactive immunity to the telecommunications companies who collaborated with the government program.[43]

ACLU v NSA

On January 17, 2006, the American Civil Liberties Union (ACLU) filed, in the US District Court for the Eastern US District Court of Michigan, Southern Division, a complaint for declaratory and injunctive action against the NSA. The suit, filed on behalf of journalists, scholars, attorneys, and national nonprofit organizations, challenged the constitutionality of "a secret government program to intercept vast quantities of the international telephone and Internet communications of innocent Americans without court approval."[44] The plaintiffs claimed that the TSP violated their First Amendment rights to free speech and association under the US Constitution by disrupting their ability to "talk with sources, locate witnesses, conduct scholarship, and engage in advocacy."[45]

On August 17, 2006, eight months after the ACLU filed suit, Judge Anna Diggs Taylor ruled the TSP was unconstitutional on First and Fourth

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40 *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act* of 2001, (USA PATRIOT Act), Pub L No 107-56 (October 12, 2001).

41 Ibid.

42 *FISA Amendments Act* of 2008, Pub L No 95-511.

43 *FISA Amendments Act* of 2008, s 108.

44 Complaint for declaratory and injunctive relief, *American Civil Liberties Union v National Security Agency,* No 2:06-CV-10204 (ED Mich, filed January 17, 2006), Complaint for declaratory and injunctive relief, http://www.aclu.org/pdfs/safefree/nsacomplaint.011706.pdf at para 1.

45 Ibid. at para 1.

Amendment grounds based on the public interest in upholding the Constitution.[46] Judge Taylor concluded her opinion with a quote from *US v Robel*,[47] by Justice Warren in 1967:

> Implicit in the term 'national defense' is the notion of defending those values and ideas which set this Nation apart. . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of . . . those liberties . . . which makes the defense of the Nation worthwhile.

In the decision, Judge Taylor relied upon the reasoning in *Marcus v Search Warrants*,[48] to highlight the "intellectual matrix within which our own constitutional fabric was shaped." She said the Bill of Rights was created with a historical knowledge of free speech struggles in England. Those struggles were linked to search and seizure. Unrestricted powers of search and seizure can be instruments for "stifling liberty of expression." As precedent, Judge Taylor relied on the reasoning of the court in the 1965 *Dombrowski v Pfister* case,[49] where the Supreme Court struck down a Louisiana statute mandating that members of communist organizations register with the government. In *Dombrowski*, the Court held that intrusive government surveillance could chill free expression.

In *ACLU v NSA*, Judge Taylor said that FISA prohibits surveillance based solely on First Amendment protected activities like free expression. She then said national security cases were of a "special nature" because they involve a convergence of First and Fourth Amendment values. She said this convergence posed a greater risk to constitutionally protected speech and ruled that President Bush, in authorizing the TSP, violated the Constitution in failing to provide Fourth Amendment privacy protection for First Amendment protected speech that challenged administrative policies through unorthodox political beliefs. Bush's authorization of the TSP was an intrusive government action that chilled the defendant's right to free expression.

The defendants had relied on the 1971 case of *Laird v Tatum* to argue a "chilling effect" of First Amendment rights based on "speculative fears" of the TSP. In *Laird*, the plaintiffs had claimed that the existence of an Army domestic surveillance program of civil disturbances chilled their associational rights. Judge Taylor distinguished the *ACLU* issue from *Laird* because, she said, plaintiffs were not arguing a chilling effect based on the notion that they "could conceivably" become subject to surveillance under the TSP, but that continuation of the TSP has chilled their activities, such as making international and national calls and carrying out professional responsibilities. Taylor said the distinction was that the TSP actually chilled the ACLU

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[46] Ibid., Memorandum Opinion (Doc No 70) (ED Mich, filed August 17, 2006), http://www.aclu.org/pdfs/safefree/nsamemo.opinion.judge.taylor.081706.pdf at 43.
[47] *US v Robel*, 389 US 258 (1967).
[48] *Marcus v Search Warrants*, 367 US 717 (1961).
[49] *Dombrowski v Pfister*, 380 US 479 (1965).

plaintiffs' First Amendment expressions, whereas in *Laird*, the chilling effect was purely speculative.

Plaintiffs would be able to continue using the telephone and email in the execution of their professional responsibilities if the defendants were not undisputedly and admittedly conducting warrantless wiretaps of conversations.

Examples of the types of concrete injuries alleged in the case can be found in the original complaint filed by the plaintiffs, who believe their communications are being intercepted illegally under the TSP: Taylor found that the plaintiffs suffered "distinct, palpable, and substantial injuries" as a result of the TSP. She said the injuries are "concrete and particularized" and not "abstract or conjectural." The following are examples of complaints considered by Judge Taylor:

- James Bamford, a journalist, author, and expert on US intelligence, said his ability to research and write about the NSA, intelligence, and the War on Terror is "seriously compromised" by the TSP because sources are less likely to communicate with him for fear of government surveillance.
- Larry Diamond, a Stanford University Professor and co-editor of the *Journal of Democracy*, said his ability to "advocate and advise on democratic reform in the Middle East and Asia" is inhibited by the TSP because political dissidents are less willing to contact him for fear of government monitoring.
- Christopher Hitchens, a reporter and author, said that the TSP is a "detriment to his effectiveness as an investigative journalist" on Middle Eastern politics because individuals are "less forthcoming in their conversations with him" due to the likelihood their communications are being monitored.
- Barnett R. Rubin, Senior Fellow at the New York University Center on International Cooperation, believed the TSP interfered with his work as a scholar in exchanging controversial information and sensitive ideas with people in the Middle East.
- The members of the ACLU of Michigan argued that international calls to the Middle East were being intercepted and that this surveillance inhibited members from "communicating freely and candidly" in their personal and professional communications.
- Nazih Hassan, a member of CAIR-Michigan and a Lebanese immigrant, said being aware of the TSP has caused him to stop talking to family members about political topics and current events, including "Islam and the war in Iraq, Islamic fundamentalists, terrorism, Osama bin Laden, al Qaeda, the war in Afghanistan and the riots in France and Australia." Hassan said the TSP interferes with his ability to promote "peace and justice" in the United States through free and open communication. He is also unable to gain insight from people abroad on current events because he fears conversations on certain topics will trigger monitoring.
- Nancy Hollander, a criminal defence lawyer in New Mexico and a leader in recruiting volunteers to represent prisoners at Guantanamo, said the

program has inhibited her communications with individuals in the Middle East for fear that the government might be monitoring her communications. She has decided to cease using phone communications to plan strategic or privileged aspects of her terrorism-related cases.

The government appealed the *ACLU* decision to the Sixth Circuit Court of Appeals, which, on July 6, 2007, overturned the original ruling on the basis that the plaintiffs lacked standing to bring the suit against the government.[50] Judge Alice M. Batchelder, in the majority opinion, said that the plaintiffs only alleged possible injuries from the government program. She said that although there was a possibility that the NSA was intercepting the plaintiffs' communications, there was also a possibility that the agency was not intercepting the communications. Judge Batchelder said that the district court erroneously assumed the plaintiffs' telephone and email communications were "protected expressions" chilled by government surveillance. The appeals court found that the plaintiffs could only establish a "subjective chill." The appeals court said that in order to establish a chilling effect, the plaintiffs would have to show evidence beyond their knowledge of the government surveillance program. Judge Batchelder said due to the state secrets privilege, the plaintiffs could not prove that they were the targets of the TSP. Judge Batchelder, in the majority opinion, said,

> the plaintiffs do not—and because of the State Secrets Doctrine cannot—produce any evidence that any of their own communications have ever been intercepted by the NSA, under the TSP, or without warrants. Instead, they assert a mere belief, which they contend is reasonable and which they label a "well founded belief."

Judge Batchelder, in the majority opinion, also said that the plaintiffs in the case who were attorneys said that surveillance interfered with their duty to keep attorney-client conversations confidential; she used this statement to say that the plaintiffs' claim of harm was based on perceived harm to their clients, not themselves, and therefore invalidated the First Amendment claim. Judge Batchelder said District Court Judge Taylor wrongly interpreted the "chilling effect" precedent in the *Laird* case. She said the *Laird* plaintiffs alleged an actual personal fear of reprisal by the government, but the *ACLU* plaintiffs did not make this same claim.

In October 2007 the ACLU appealed the case to the US Supreme Court. The Supreme Court turned down the appeal on February 19, 2008, without comment. In 2009, the ACLU filed a Freedom of Information Act request for information on interpretation and implementation of the FISA Amendments Act. In late 2010, the government released the redacted documents. The documents show a pattern of recurring violations of the FISA Amendments Act, including misspellings, technical errors, "positive hit marked negative," and "search approved before [redacted] complete." The

[50] *Am Civil Liberties Union v Nat'l Sec Agency*, 493 F.3d 644 (6th Cir. 2007), http://fl1.findlaw.com/news.findlaw.com/nytimes/docs/nsa/aclunsa70607opn.pdf.

document, even in its redacted form, has the potential to more fully inform citizens and reveal details about domestic surveillance.

CCR v Bush

In *Center for Constitutional Rights et al v George W Bush et al*, filed January 17, 2006, the Center for Constitutional Rights (hereinafter CCR) filed a lawsuit against President George W. Bush on behalf of plaintiffs Tina M. Foster, Gitanjali S. Gutierrez, Seema Ahmad, Maria Lahood, and Rachel Meeropol.[51] The plaintiffs, filing in the US District Court for the Southern District of New York, claimed they are "within the class of people" described by the government as targets of the TSP. The *CCR* complaint said the TSP created a "chilling effect" on the defendants' First Amendment right to free speech. The plaintiffs claimed their conversations with clients and other people "abroad" had been intercepted and chilled through the TSP, violating attorney–client privilege and inhibiting them from representing their clients "vigorously."

The *CCR* case claimed the government obstructed their "modes" of expression and association under the First Amendment. This includes the ability to (1) provide free legal advice, (2) join together in association for legal advocacy, (3) freely form attorney–client relationships, (4) vigorously advocate for clients, and (5) petition the government for redress of grievances. Rachel Meeropol and Maria Lahood made two of the claims of individual harm.

In her statement, Rachel Meeropol, an attorney at CCR, said she communicates with witnesses and other people in the Middle East and she has become more cautious of what she says in telephone conversations since learning of the TSP. As a result she has reevaluated her communication practices as she felt she could not "safely or ethically" discuss matters with clients via phone. Meeropol said that having to meet in person delays meetings or forces her to use inefficient postal message delivery. She concluded her statement by saying that it is "frightening" and "outrageous" that the interception of her attorney–client communications is not subject to judicial oversight.

Maria Lahood, an attorney for the CCR, said in her statement that she has become "extremely cautious" of her phone conversations with clients since becoming aware of the TSP. She said she is "constantly monitoring" her conversations with a particular client who might be a target of the TSP. Lahood said these conversations are often "deferred" until she can meet with her client in person, and that often includes flying out of the country.

The *CCR* case was transferred to the San Francisco District Court under Judge Vaughn Walker on December 15, 2006, and consolidated with the NSA Telecommunications Records Legislation on February 23, 2007.[52] On August 9, 2007, attorneys for the *CCR* asked Judge Walker to find the

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[51] *Center for Constitutional Rights v Bush*, No 06-CV-00313 (SDNY 2006). The Center for Constitutional Rights, including its lawyers and legal staff, are the plaintiffs in the case.

[52] Transfer Order, Docket No. 1791, CA No 1:06-cv-00313, *Center for Constitutional Rights et al v Bush et al* (Judicial Panel on Multidistrict Litigation, filed December 19, 2006), http://ccrjustice.org/files/CCR_NSA_MDLfinaltransferorder_12_06.pdf.

NSA's program of warrantless surveillance unconstitutional and strike it down based on the chilling effect to the plaintiff's constitutionally protected activities.[53] Due to the election of President Barack Obama, this case is now known as *Center for Constitution Rights et al v Obama et al.*

On January 31, 2011, Judge Walker issued an order dismissing all plaintiffs' claims on the basis that there were insufficient claims to establish a chill as standing for the First Amendment claim.[54] Walker's opinion says that short of "possibilities" and "risks," the plaintiffs did not present evidence that they were unlawfully surveilled. Walker said that the chilling effect—absent evidence of actual surveillance under the TSP—was insufficient to establish concrete and particularized injury required for Article III standing. Walker says that the claims of a First Amendment chill (unlike the plaintiff's supporting case in *Laird*) were speculative since the government had ceased the activities that led to the lawsuit. Furthermore, the termination of the TSP program in 2007 meant that the plaintiffs had no reasonable belief that they were still being illegally monitored—thus there was not an "imperative (ethical or otherwise) to avoid the use of electronic communications."[55] Walker clarified there were no "specific actions" directed against the plaintiffs, only "fear" of unlawful surveillance. In regards to the claim that the state secrets privilege could prevent a First Amendment redress of grievances through litigation, Walker concluded that, while allowing for litigation 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."[56]

The CCR filed a notice of appeal on April 14, 2011. In the opening brief, August 29, 2011, the plaintiffs reemphasized their international electronic communications with "persons who Defendants have asserted are associated with Al Qaeda, affiliated organizations, or terrorism generally."[57] The plaintiffs claim that presumed surveillance of their communications with clients who are subject to electronic surveillance without judicial oversight make it impossible to conduct privileged confidential communications by phone or email. The plaintiffs claim not only that they had to seek other "less-efficient"

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53 Transcript of Proceedings, National Security Agency Telecommunication Record Litigation, *CCR v Bush*, MDL No. 06-1791 (ND Cal, filed August 9, 2007), http://ccrjustice.org/files/MDL%20oral%20argument%20on%20dispositive%20motions,%20August%209%202007.pdf.

54 Order, National Security Agency Telecommunications Records Litigation, *CCR v Obama*, Docket 51, 3:07-cv-01115-VRW (ND Cal, filed January 31, 2011), http://ccrjustice.org/files/MDL%20oral%20argument%20on%20dispositive%20motions,%20August%209%202007.pdf.

55 Order, National Security Agency Telecommunications Records Litigation, *CCR v Obama*, Docket 51, 3:07-cv-01115-VRW (ND Cal, filed January 31, 2011), http://ccrjustice.org/files/MDL%20oral%20argument%20on%20dispositive%20motions,%20August%209%202007.pdf.

56 Order, National Security Agency Telecommunications Records Litigation, *CCR v Obama*, Docket 51, 3:07-cv-01115-VRW (ND Cal, filed January 31, 2011), http://ccrjustice.org/files/MDL%20oral%20argument%20on%20dispositive%20motions,%20August%209%202007.pdf.

57 Brief for Plaintiff Appellants, No. 11-15956, *CCR v Bush* (9th Cir, filed August 29, 2011), http://ccrjustice.org/files/Plaintiff-Appellants%27%20Opening%20Brief%20-%20FINAL_2.pdf.

means of communication, but also that some third parties have been deterred from talking to them. The plaintiffs claim that the NSA's "program of warrantless electronic surveillance cast a chilling effect over their communications practices and thereby their ability to engage in public interest litigation."[58] The plaintiffs claim this is more than a "subjective chill," and the establishment of "injury-in-fact" does not require government prohibition of rights because deterring or chilling of First Amendments rights does amount to a constitutional violation. The plaintiffs' brief also suggests a two-part test for standing analysis: (1) The fear causing plaintiffs to act or be deterred from acting should be objectively reasonable, and (2) the harm asserted should be something tangible or concrete. As an example, professional harm would be an objective harm. The *CCR* is not included in the multi-district litigation in the Ninth Circuit Court because the *CCR* case makes claims solely against the government and not against any telecommunication carriers granted immunity by the 2008 FISAAA.

Hepting v AT&T

The Electronic Frontier Foundation (EFF) also filed a class action lawsuit in January 2006 in the US District Court for the Northern District of California alleging that the AT&T Corporation acted as an agent of the government in intercepting private phone communications without a warrant through the TSP.[59] The plaintiffs claim, in *Hepting v AT&T*, that AT&T's involvement in warrantless government surveillance restricts their First Amendment rights to express themselves without fear of government retribution. The EFF said that AT&T, in an "illegal collaboration," opened its facilities and databases to "direct" access and data mining by government agencies, including the NSA. The lawsuit also claims that AT&T used "trap and trace" and pen register devices to capture dialing, routing, addressing, and/or signalling information that was then made available to the government through remote or local access.

The complaint states that this surveillance violates plaintiffs' First Amendment rights to speak and receive speech anonymously and associate privately. The EFF suggests that the actions of AT&T and telephone companies involved in the TSP represent "a credible threat of immediate future harm."[60] One of the individual plaintiffs, Carolyn Jewel, explained the actual harm she suffered, saying she has been concerned about the privacy of her communications since learning about the TSP. She cited her limited responses to an Indonesian Muslim acquaintance's inquiries into her understanding of Balinese Islamic practice. She also has avoided discussing US action in Iraq with him. She says she would have limited her communications even sooner had she known of the TSP.

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58 Brief for Plaintiff Appellants, No. 11-15956, *CCR v Bush* (9th Cir, filed August 29, 2011), http://ccrjustice.org/files/Plaintiff-Appellants%27%20Opening%20Brief%20-%20FINAL_2.pdf.

59 *Hepting v AT&T Corp*, Nos C-06-0672-JCS and 3:06-cv-00672-VRW (ND Cal 2006).

60 *Hepting v AT&T Corp*, Nos C-06-0672-JCS and 3:06-cv-00672-VRW (ND Cal 2006).

The *Hepting* case, beyond the constitutional protections afforded to private phone communications, has raised the issue of state secrets because details of the government surveillance programs used to monitor communications are classified. A major obstacle for the plaintiffs in a case of this nature is establishing the existence of the TSP and, by extension, carrier involvement in the program. In a 2006 court declaration, former AT&T technician Mark Klein revealed details of the program, but the statement was sealed under the state secrets privilege at the request of the government.[61] On April 28, 2006, three weeks after the media released Klein's statement, the US government filed a statement of interest in the *Hepting* case asserting state secrets privilege, a motion to intervene, and a motion to dismiss the case by May 12, 2006.[62] The government asked the court to suspend discovery until the motions were filed. On May 13, 2006, John Negroponte, the director of National Intelligence, filed a declaration invoking the military and state secrets privilege under the National Security Act.[63] Negroponte's statement says that disclosure of evidence contained in the testimony of Mark Klein would cause "exceptionally grave damage" to US national security. Keith B. Alexander, the director of the NSA, also filed a declaration on May 13, supporting Negroponte's assertion of state secrets privilege.[64] Alexander asked the judge to dismiss the case in the interest of preventing "harms" to US national security that would occur if it were litigated. On July 20, 2006, Judge Walker issued an order denying the defendant's motion to dismiss the case.[65] The government and AT&T appealed this decision to the Ninth Circuit Court of Appeal on the basis of the existence of state secrets and asked for the case to be dismissed.[66] In a separate petition filed on the same date, the United States sought review of denial to dismiss on state secrets grounds. The Ninth Circuit Court heard arguments on July 31, 2006, and granted the appeal on November 7, 2006.[67]

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61 Declaration of Mark Klein in Support of Plaintiff's Motion for Preliminary Injunction, *Hepting v AT&T Corp*, No C-06-0672-VRW (ND Cal, filed under seal, March 28, 2006; redacted version released June 8, 2006), https://www.eff.org/files/filenode/att/Mark%20Klein%20Unredacted%20Decl-Including%20Exhibits.PDF.

62 First Statement of Interest of the United States (Doc No 82-1), *Hepting v AT&T Corp*, No C-06-0672-JCS (ND Cal, filed April 28, 2006), http://www.eff.org/legal/cases/att/USA_statement_of_interest.pdf.

63 Declaration of John D. Negroponte, Director of National Intelligence (Doc No 124-2), *Hepting v AT&T Corp*, No 3:06-cv-00672-VRW (ND Cal, filed May 13, 2006), https://www.eff.org/files/filenode/att/DeclofJohnNegroponte.pdf, at para 9.

64 Declaration of Lieutenant General Keith B. Alexander, Director, National Security Agency (Doc 124-3), ibid., https://www.eff.org/files/filenode/att/DeclKeithAlexander.pdf, at para 9.

65 Order on motions to dismiss (Doc No 308), ibid., (ND Cal, filed July 20, 2006), https://www.eff.org/files/filenode/att/308_order_on_mtns_to_dismiss.pdf.

66 Petition by intervenor United States for interlocutory appeal under 28 USC §1292(b), *Hepting v AT&T Corp*, No C-06-672-VRW (9th Cir, filed July 31, 2006), https://www.eff.org/sites/default/files/filenode/att/1292b_petition.pdf. See also Petition for permission to appeal, ibid., https://www.eff.org/sites/default/files/filenode/att/Petition.PDF.

67 Order granting petition to appeal, *Hepting v AT&T Corp*, DC No CV-06-00672-VRW (9th Cir, filed November 7, 2006), https://www.eff.org/sites/default/files/filenode/att/appealgranted.pdf.

On August 9, 2006, the Judicial Panel on Multidistrict Litigation consolidated all cases arising from the NSA's warrantless wiretapping program and transferred the cases to the Northern District of California under Judge Vaughn Walker.[68] On August 15, 2007, the Ninth Circuit Court of Appeals heard arguments in the consolidated civil lawsuits, including *Hepting*.[69] Judges Harry Pregorson, Michael Daly Hawkins, and M. Margaret McKeown presided over arguments from attorneys representing the US government, AT&T, and the EFF. The appeal hearing took place in San Francisco, and the court looked at two issues related to the surveillance program: (1) Do the plaintiffs have standing to sue based on actual injury by the government program? and (2) Do national security concerns justify dismissing of the case under state secrets privilege? In that hearing, the government attorney argued that the litigation "could result in exceptionally grave harm to the national security of the United States" because it would reveal three central facts implicating state secrets, including (1) whether a relationship exists between AT&T and the government, (2) whether "alleged surveillance activities" took place, and (3) whether "particular communications" had been intercepted. The government argued that the litigation of those facts would compromise "sources, methods and operational details" of the government's intelligence-gathering capabilities. To protect the revelation of these facts, Congress enacted the FISAAA, which granted immunity to telecommunications carrier companies involved in the program on July 7, 2008. In light of the new statutory immunity, the Ninth Circuit Court remanded the case to the district court on September 19, 2008, the same date that the government filed a motion in the original district court to dismiss the consolidated complaints, excluding those cases filed solely against the government, like CCR, as well as those cases filed against state attorney generals, which are not granted immunity under the federal statute.[70]

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[68] *In re Nat'l Sec. Agency Telecommunications Records Litigation*, 444 F Supp 2d 1332 (JPML, August 9, 2006) (No MDL-1791). The consolidated cases include *Conner v AT&T Corp*, No 1:06-632 (ED Cal 2006); *Souder v AT&T Corp*, No 3:06-1058 (SD Cal 2006); *Schwarz v AT&T Corp*, No 1:06-2680 (ND Cal 2006); *Terkel v AT&T Inc*, No 1:06-2837 (ND Cal 2006); *Herron v Verizon Global Networks*, No 2:06-2491 (ED La 2006); *Fuller v Verizon Communications*, No 9:06-77 (D Mont 2006); *Dolberg v AT&T Corp*, No 9:06-78 (D Mont 2006); *Marck v Verizon Communications*, No 2:06-2455 (EDNY 2006); *Mayer v Verizon Communications*, No 1:06-3650 (SDNY 2006); *Hines v Verizon Networks*, No 3:06-694 (D Or 2006); *Bissit v Verizon Communications*, No 1:06-220 (DRI 2006); *Mahoney v AT&T Communications*, No 1:06-223 (D RI 2006); *Mahoney v Verizon Communications*, No 1:06-224 (D RI 2006); *Potter v BellSouth Corp*, No 3:06-469 (MD Tenn 2006); *Trevino v AT&T Corp*, No 2:06-209 (SD Tex 2006); *Harrington v AT&T*, No 1:06-374 (WD Tex 2006).

[69] Electronic Frontier Foundation, unofficial transcript of 9th Cir hearing in *Hepting v AT&T* (August 15, 2007), https://www.eff.org/files/filenode/att/hepting_9th_circuit_hearing_transcript_08152007.pdf. See also Adam Liptak,"U.S. Defends Surveillance to 3 Skeptical Judges," *New York Times* (August 16, 2007), http://www.nytimes.com/2007/08/16/washington/16nsa.html?_r=1&oref=login&pagewanted=print.

[70] Order for remand (Doc 377), *Hepting v AT&T*, No 3:06-cv-00672-VRW (9th Cir, filed September 17, 2008), https://www.eff.org/sites/default/files/filenode/att/uscaorder_917.pdf. See also United States' notice of motion to dismiss or, in the alternative, for summary judgment, *Hepting v AT&T*, No. M:06-cv-01791-VRW (ND Cal, filed September 21, 2008), https://www.eff.org/sites/default/files/filenode//802-MTD.pdf.

The district court granted the motion for dismissal on June 3, 2009, reasoning that FISAAA Section 802 did grant focused immunity for private parties acting with the government, and the plaintiffs still had a path for redress of grievances.[71] The Court said that the immunity statute was within Congress's delegation authority in law making. The Court also said the plaintiffs did not have a valid due process claim because, citing *Navy v Egan*,[72] there was no First Amendment right to "receive or disclose classified information" that was classified under express Congressional authorization.

The plaintiffs filed an appeal with the Ninth Circuit Court on December 8, 2009, asking for an injunction to reverse the district court decision and remand the action for further proceedings.[73] The plaintiffs' claims in the appellate case did not include the original First Amendment claims based on the chilling effect of surveillance. On August 31, 2011, the Ninth Circuit Court of Appeals heard arguments from plaintiff attorneys seeking to revive *Hepting* and the other 32 consolidated cases in multidistrict legislation against telecommunication carriers and/or the government involvement in the NSA's mass warrantless domestic surveillance program.[74] In the hearings, there is a distinct departure from the original First Amendment claims made by plaintiffs in the examined model cases. Instead, the plaintiffs' attorneys make constitutional and statutory challenges to section 802 of the FISA Amendments Act of 2008. In another of the cases, a plaintiff's attorney argues that the district court erred in dismissing a case because it was against the government and not affected by the granting of telecommunication immunity. Although the appellate court hearings raised several important issues involving the legality of the TSP, it is important to note that they did not mention First Amendment rights or any legal arguments introduced to support previous claims of this nature.

In the hearing for the cases consolidated with *Hepting*, EFF Attorney Cindy Cohen argued that the district court failed to address the plaintiffs' arguments against the constitutionality of the FISA Amendment Act of 2008 section 802 granting telecommunication carriers immunity from prosecution for involvement in the TSP. She claimed that section 802 bypassed the constitutional system for checks and balances under Article I Section 7 of the constitution by giving the attorney general the power to decide which laws were applicable to plaintiff claims. She argued that in the construction of 802, Congress did not give the attorney general an "intelligible principle" for when immunity should be granted and therefore yielded too much power to the executive branch.

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71 Order for dismissal (MDL Docket No 06-1791 VRW), *Hepting v AT&T* (ND Cal, filed June 3, 2009), https://www.eff.org/sites/default/files/filenode/att/orderhepting6309.pdf.

72 *Navy v Egan*, 484 US 518 (1988).

73 Joint appellants' opening brief of all plaintiffs-appellants except no 09-16683, *Hepting v AT&T*, MDL No 06-1791-VRW (ND Cal, filed December 8, 2009), https://www.eff.org/sites/default/files/filenode/att/Hepting_9th_opening_brief.pdf.

74 Hearing, *Hepting v AT&T*, MDL No 06-1791-VRW (9th Cir, August 31, 2011), https://www.eff.org/files/hepting.wav.mp3.

Cohen argued that Section 802 also violated the non-delegation doctrine in that Congress ceded too much power to the attorney general in allowing him to certify the cases that were dismissed. She also argued that it violated the due process clause by allowing the government to submit secret evidence to court that could not be disputed by adversarial plaintiffs. This in effect prevents the court from acting as a neutral adjudicator in the first review of the case and removes the court's power to adjudicate claims. The plaintiffs also claimed this created a "shadowbox" court in which plaintiffs could not even know what the government alleged. There is a hint of the chilling effect in this last claim, as the First Amendment provides for a redress of grievances against the government.

Harvey Grossman, an attorney for the ACLU of Northern Michigan in the *Terkel v AT&T* case, argued that section 802 violated the separation of powers, as well as due process, by eliminating any form of constitutional claims against the carriers collaborating with the government under the surveillance program. An attorney in the case of *Anderson v Verizon*[75] argued that Judge Walker erroneously dismissed allegations against government defendants, although 802 applied only to cooperating carriers and not to the government. Furthermore, in the Anderson case, the plaintiffs filed complaints against surveillance programs existing before 9/11, and section 802 applied only to surveillance activities after September 11, 2001, and before the program was terminated by the attorney general.

The attorney representing the government, Mike Kellogg, argued for the constitutionality of section 802, stating that it is not unusual for Congress to pass statutes allowing executive determination in fact finding. The government argued that the role of the attorney general was narrowly defined in the statute, allowing him only to certify whether one of five factual preconditions exist. When the panel of judges asked Kellogg about which factual precondition was checked in these cases, he said that—in addition to if anyone was surveilled or if the government did or did not have a relationship with the carriers—was "completely classified." He went on to say that Congress delegated this role to the attorney general because the nature of the information involving national security investigations was often not even available for review by Congress. The judges responded by saying this created unilateral litigation leaving no role for the plaintiffs.

When the judges noted that much of the information certified under the program was in the public domain due to media reports, the government attorney responded by saying that "who was or was not surveilled" was not in the public domain. The government attorney said that if the plaintiffs were allowed to participate in the case, they could bring "nothing" to the table because the information about the program was classified. Although the plaintiffs, at the district court level, were precluded from introducing

[75] *Ray Anderson et al v Verizon Communications et al*, Case No 09-16720. Decided with *Hepting v AT&T* on August 31, 2011, in the Northern District of California US District Court.

public information as evidence, the government attorney said they could submit this information, but it would be "totally and utterly irrelevant" because the details of the program were classified by FISA court order. The judge then suggested that the FISA court orders might be a "rubber stamp" since the majority of requests by the government for surveillance orders were granted.

The government attorney stated that claims against the government were preserved intact under section 802 but that the state secrets privilege and sovereign immunity would bar the successful litigation of these remaining claims. The plaintiffs' attorney also said that the government had claimed they were not doing a content dragnet to perform keyword searches, with Verizon adding that it does not count as interception if the government receives copies of all emails and phone calls but only uses computer programs to examine them. Cohen argued that the court should be able to review this legal argument if computer monitoring of header information —and not content— was interception under the law. The *Anderson* attorney concluded by saying that Bell South had begun working on a call centre to give the NSA access to call data over the AT&T network on February 1, 2001, predating the presidential surveillance program and the post-9/11 limits of Section 802 immunity. He said that under Congress's own definitions in the exemption statute, claims should be allowed against this time period. Furthermore, he added that telecommunication consumers expected protection from the type of surveillance program in question because under FISA, Congress had protected consumer privacy in response to court cases that found it didn't exist constitutionally under the Fourth Amendment.

The EFF had filed another class action lawsuit in the Northern District of California on September 2008, challenging the legality of the NSA's mass surveillance of Americans' phone calls. This case, *Jewel v NSA*[76] is notable because it was filed against the government, not telecommunication carriers, negating the 2008 Telecomm Immunity granted by Congress and making it closer to the nature of the *ACLU* and *CCR* cases. The suit sought injunctive relief and damages for five individual plaintiffs. The claims filed by the *Jewel* plaintiffs included violation of their First and Fourth Amendment rights. US District Court Chief Judge Vaughn Walker dismissed the case on January 21, 2010, on the basis that the spying was a "generalized grievance"[77]—nearly all US citizens have phone or Internet service.

In a hearing to revive the *Jewel* case in the Ninth Circuit Court on August 31, 2011, Kevin Bankston, the lead EFF attorney in *Jewel,* argued that the FISA Amendments Act of 2008 violated the constitutional separation of powers and due process. The plaintiffs had made a complaint based on

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[76] Declaration of Carolyn Jewel in Support of Motion for Preliminary Injunction (Doc No 18), *Hepting v AT&T Corp*, No 3:06-cv-00672-VRW (ND Cal, filed March 31, 2006), https://www.eff.org/files/filenode/att/JewelDecl.pdf, at 2–3, paras 8–10.

[77] Declaration of Carolyn Jewel in Support of Motion for Preliminary Injunction (Doc No 18), *Hepting v AT&T Corp*, No 3:06-cv-00672-VRW (ND Cal, filed March 31, 2006), https://www.eff.org/files/filenode/att/JewelDecl.pdf, at 2–3, paras 8–10.

"voluminous evidence" in the public record showing concrete injuries to statutory and constitutional rights. He said the district court erred in finding that these "widespread but concrete injuries" were generalized grievances. As an example, he cited the claim by plaintiff Carolyn Jewel that the government-carrier interception of emails was not abstract. He also said that Section 1806F of FISA displaced the government's claim of state secrets privilege, but even if it did not, the Court had not been presented "sufficient record" to conclude that the privilege would dismiss all claims. He said Congress drafted 1806F to provide for in camera and ex parte review of secret surveillance and that the government's claim of state secrets privilege in certifying carrier immunity violated this statute. Bankston argued that the lower court decision set the precedent that "so long as everyone is being surveilled, no one has standing to sue." When the government argued national security concerns prevented disclosing information about the surveillance programs, Judge McKeown responded that the argument, if accepted, would infuse "national security concerns" into the standing doctrine, preventing plaintiffs from ever pursuing a claim.[78]

Conclusion

Each of the three model cases stems from surveillance under the TSP, a warrantless mass surveillance program made possible by the expansion of executive powers under the Patriot Act. The lawsuits were filed against either the government, or a telecommunications carrier collaborating with the government by facilitating the collection of data. Each case claims that plaintiffs suffered a chilling effect on communication in response to the government's TSP. A major obstacle in litigating these claims is that the government has claimed state secrets privilege to prevent plaintiffs from introducing evidence about the surveillance program in court. Although details of these programs and corporate collaborations are classified as state secrets, popular media accounts have legitimized plaintiffs' claims about the TSP.

A December 2005 *New York Times* article reported cooperation between telecommunications corporations and the government, but it did not specifically name companies that had participated in the TSP.[79] A 2006 survey of telecommunications providers conducted by CNET, an Internet publisher of computer and technology news and information, asked major telecommunications companies if they had been involved in the TSP.[80] Of the companies polled, 15 said they had not been part of the program. Twelve companies chose not to reply, some citing "national security" as the reason. According to a February 2006 report by *USA Today*, seven telecommunications executives anonymously admitted that the government had eavesdropped on

[78] All quotations in this paragraph ibid.
[79] James Risen and Eric Lichtblau, "Bush Lets U.S. Spy on Callers Without Courts," *New York Times* (December 16, 2005), 1, 22.
[80] Declan McCullagh and Anne Broache, "Some Companies Helped the NSA, but Which?" *CNET News.com* (February 6, 2006).

international calls by suspected terrorists without warrants.[81] After he made a court declaration in the *Hepting* case, former AT&T Technician Mark Klein, in a public statement, revealed the existence of a room in the AT&T Folsom Street Headquarters in San Francisco where fibre optic cables split off portions of communications for routing through a semantic traffic analyzer.

Even government officials have acknowledged details of the program in their defenses to the December 2005 *New York Times* article, which revealed the TSP's existence. In a radio address on December 17, 2005, Bush acknowledged the existence of the orders he signed authorizing the "highly classified" program and emphasized how the government worked to establish a "clear link" between people that it monitored and terrorist agents.[82] Two days after Bush's radio address, then Attorney General Alberto Gonzales appeared at a press conference to assure Americans that the President was justified in his use of the program by his "inherent Presidential powers" and the 2001 Congressional Authorization to Use Military Force in the War on Terror.[83] Gonzales highlighted the "special needs" created by terrorism in regards to warrant requirements, upholding the constitutionality of the TSP. Gonzalez argued that the program was reasonable under the Fourth Amendment, then went on to say that the "significant privacy interest" in protecting communications was safeguarded by the temporary nature of the warrantless surveillance authorization. In the same press conference, Principal Deputy Director for National Intelligence Michael Hayden said the program was "more aggressive" than what was traditionally available under FISA, but it only dealt with international calls for short periods of time.

On February 6, 2006, Attorney General Gonzales defended the constitutionality of the TSP to the Senate Judiciary Committee, describing the program as an early warning system for the twenty-first century. Gonzales described al Qaeda as an unconventional enemy with sophisticated communications, requiring the US government to rely on its technological strengths to prevail in the War on Terrorism. He also stated that the current program has a stronger focus than past presidential surveillance initiatives and is necessary to protect cherished civil liberties. Although the details revealed in media accounts have limited applicability in litigating the cases against the TSP, the public statements by government officials seem to lend credibility to the plaintiffs' claims against the government. This is especially true for the *CCR* plaintiffs who, in their currently active appeal, reemphasized their relationships with al Qaeda and other people the government identified as targets of the program.

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81 Leslie Cauley and John Diamond, "Telecoms Let NSA Spy on Calls," *USA Today* (February 6, 2006), http://www.usatoday.com/news/washington/2006-02-05-nsa-telecoms_x.htm?POE=NEWISVA; "Our Story," http://www.cnetnetworks.com/company/ (last accessed June 22, 2008).

82 "President's Radio Address," *Weekly Compilation of Presidential Documents* 41 (December 17, 2005).

83 White House, "Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence" (December 19, 2005), http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html.

Hepting raised the case of state secrets privilege, in itself a government action that could potentially trigger the chilling effect by preventing the release of information related to surveillance targets. Although the government claims that there are national security concerns that merit dismissing the case, the coverage of the TSP by the mass media has led to widespread public awareness and knowledge of the program. Furthermore, the Bush Administration's acknowledgement and discussion of the program in public statements has more than established that the program exists and that it exists to intercept communications between Americans and international terrorism suspects. The Ninth Circuit appellate judge's acknowledgement of the problematic nature of the government using national security concerns to prevent plaintiffs from establishing standing is a significant development in advancing this class of lawsuits. Whether or not this line of reasoning will ultimately undermine the government's claims about protecting the program through secrecy is currently undecided by the courts. Furthermore, the classification of details about the TSP, years after it was suspended, seems to suggest that there are ongoing surveillance programs that would be jeopardized by publicly disclosing the government's strategies and technologies used during the program. Meanwhile, Freedom of Information Act claims against the government—such as the one that the ACLU used to obtain information on the FISA Amendments Act—kindle the possibility that details of the program will ultimately be revealed.

The only action in favour of the plaintiffs in any of the model lawsuits was the ruling by District Court Judge Anna Diggs Taylor, a decision that was overruled by Judge Batchelder of the Sixth Circuit Court of Appeals. Although Judge Taylor found that the TSP chilled free expression, Judge Batchelder overruled the decision, saying that since the details of the TSP were sealed by the state secrets privilege, it was impossible for the plaintiffs to show evidence that they were targets of warrantless surveillance. It is, however, a positive indicator that the District Court for the Northern District of California—the original court in the *Hepting* case—awarded $2.5 million in damages and attorney's fees to plaintiffs in the *Al-Haramain Islamic Foundation v Obama*[84] case for government evasion and violation of FISA by the use of state secrets privilege. The original claims of First Amendment violations in the case were dismissed at the plaintiffs' request in April of 2010.

There are other issues raised in these cases that are complicated by the government's state secrets claims. In *Hepting*, the district court dismissed the cases, in part, because the plaintiffs' claims were seen as generalized grievances. This is significant because it raises the issue that mass surveillance of an entire population negates individual claims based on First Amendment activities. While surveillance of an entire population is impartial, it is a weak response to the *Hepting* plaintiffs' individual claims within the class

[84] *Al Haramain Islamic Foundation v Obama*, 690 F(3d) 1089 (2012).

action lawsuit. The chilling effect is triggered by an individual's perception of government surveillance of his or her individual communications, as made by the named plaintiffs in *Hepting*. Judge Walker also dismissed the plaintiffs' claims in *CCR* because the plaintiffs did not present evidence of unlawful surveillance. Judge Walker said that the government had ended the TSP and therefore plaintiffs were no longer possible targets of surveillance. This seems unlikely since it would require an admission by the government that terrorist communications were no longer being monitored, a direct contradiction to national policy.

Plaintiffs in all three of the model cases claim violation of First Amendment rights through chill of First Amendment activities. In *Hepting*, the plaintiffs claim their rights to speak and receive anonymous speech and engage in anonymous association are violated, limiting their private political communication. In response, the plaintiffs say they have self-censored their communications due to fear of government retribution. In *CCR*, plaintiffs also claim that they have changed how they engage in sending and receiving communication, including postponing or avoiding meetings that were formerly conducted over telecommunication networks. This includes speech conducted in their role as journalists, scholars, and advocates. In *CCR*, Judge Walker dismissed the plaintiffs' claims, in part because he ruled that "fear" of unlawful surveillance was not sufficient to establish standing. In *ACLU*, plaintiffs claim that their political speech has been limited, including their right to receive speech from people who are targeted in Middle Eastern minority groups. The plaintiffs repeatedly cited fear of government monitoring leading to decreased communication, although the appellate court took issue that the plaintiffs did not claim personal fear of government retribution. Although judges have downplayed fear as a factor in these surveillance cases, it is a major component in the chilling effect of government surveillance. When people are afraid of their government, they diminish their participation in democratic activities and disengage from the marketplace of ideas.

In *Hepting*, the plaintiffs claim that the TSP posed a "credible threat of immediate future harm" and gave examples of actual harm, including limited responses from Muslim acquaintances. In *CCR*, the plaintiffs made claims of individual harm, including the need to replace meetings previously conducted over carrier networks with meetings conducted in person or by mail. In *ACLU*, the plaintiffs claimed injuries, including isolation from controversial political and intellectual groups, and limited insight on non-mainstream viewpoints. They also claimed that the monitoring harmed clients they were representing in legal cases. In the appellate opinion for *ACLU*, the court found that these harms—made on behalf of clients instead of the plaintiffs themselves—negated the First Amendment claim; however, this ignores the plaintiffs' own claims of harm in their altered communications. Government action that restricts communication has been recognized historically as a prior restrain on free speech. The abstract nature of the chilling effect and the psychological processes that lead to the claim cloud the causal relationship between secret mass warrantless surveillance and the

subsequent feeling of mistrust against government created in citizens. However, the causal relationship between the surveillance of political minorities and government punishment is well established, even through the government's own reporting of activities related to the war on terror.

At the district court level, and to a degree at the appellate level, there have been significant differences in the outcomes of these similar model cases. While some of these differences are explained by the individuality of claims made by the plaintiffs, some of the resulting opinions seem to create more uncertainty about pursuing claims against government surveillance. The Sixth Circuit Court of Appeals upheld the legality of government surveillance, rejecting the plaintiff's First Amendment claims in the *ACLU* case. The decision by the Ninth Circuit Court of Appeals in the consolidated surveillance cases will significantly affect the ability of citizens to sue the government for warrantless, mass surveillance. If the Ninth Circuit Court rules for the government, then there will be some consensus at the appellate level. If the Court rules for the plaintiffs, it will create uncertainty in the law based on the conflicting appellate court decisions and possibly lead to a petition for the US Supreme Court to take up the issue.

In the meantime, the issue of state secrets privilege remains a major stumbling block in advancing these cases. FOIA requests for information on the TSP (and subsequent government surveillance programs) have had limited results, but there is the potential for future requests to reveal concrete evidence establishing the policies and resulting data obtained through secret government surveillance programs. If information of this type were released in a manner that can be used as evidence in courts, plaintiffs would be able to establish standing and overcome many legal obstacles they currently face.

Until there is progress on these cases, research would be most helpful that focused on quantitative and qualitative studies to establish a causal relationship between government surveillance and chilling First Amendment activities. These studies might take the form of longitudinal surveys of public perception of surveillance, interviews with marginalized groups that are likely targets of surveillance, or psychological experiments to study how surveillance affects psychological processes linked to the First Amendment. Already, there have been several excellent studies, including Kathryn Sabbeth's case study of 23 lawyers involved in litigating cases against Guantanamo detainees and Dawinder Sidhu's survey of Muslim Americans gauging changes in Internet usage patterns since 9/11.[85]

When the government monitors citizens' communications on a society-wide scale, citizens' fear of retribution might lead them to change their behaviours, engage in comparative analysis, limit risky social and political associations and communications, change communication patterns, alter expression, or simply "fear" what punishment their activities might trigger. In a post-9/

[85] Sabbeth, "Towards an Understanding," 1487; Dawinder S. Sidhu, "The Chilling Effect of Government Surveillance Programs on the Use of the Internet By Muslim-Americans," *University of Maryland Law Journal of Race, Religion, Gender and Class* 7 (2007).

11 climate that values national security over individual rights, this fear can trigger legal claims based on not just privacy rights, but also human rights, ethical considerations, and free expression. When citizens alter behaviours protected by the First Amendment due to actual (or even perceived) government surveillance, the important safety valve in the marketplace of ideas is undermined, and citizens might resort to subversion, lose faith in the Democratic process, or decrease their level of political participation. Even in private communications, breathing space is necessary to allow citizens the mental discourse to develop fundamental political principles. Although historically, First Amendment claims against government surveillance have been usurped by more tangible Fourth Amendment claims, the recognition of the significance of intellectual freedoms indicates an important shift in societal values and a return to a more liberal era of dissenting political dialogue during times of turmoil.

Although social contract theory asks us to give up some individual rights to secure greater good for society, the right to engage in political dissent in private communication is a long-recognized and valued right. Anecdotally, Americans might tell you they do not mind government surveillance because they have nothing to hide, but this attitude seems to reflect the false choice of security of body over security of mind.

Abstract

After the disclosure of the US Government's Terrorist Surveillance Program, there were a series of class-action lawsuits filed by non-profits on behalf of plaintiffs who claimed mass domestic surveillance chilled their civil liberties. Most of these cases focused on Fourth Amendment privacy concerns, but three particular suits were filed with claims that the plaintiffs' First Amendment rights—to free speech, assembly, and/or press—were violated. Although the First Amendment claims in these cases received little media attention, they represent an important issue in surveillance jurisprudence: Can mass domestic surveillance create a chilling effect, which operates as a prior restraint on First Amendment rights and activities? This article examines three specific cases: (1) *Hepting v AT&T*, (2) *Center for Constitutional Rights v President George W. Bush*; and (3) *American Civil Liberties Union v National Security Agency*. By looking at the First Amendment issues, plaintiffs' statements, and final outcomes of these cases, this article explores the Terrorist Surveillance Program's chilling effect on speech traditionally protected by the First Amendment—including during the time period the program was in operation, as well as the lasting effects that the program might have on citizens' perceptions of freedom, behaviors, and legal rights.

Keywords: civil liberties, surveillance, chill, privacy, Fourth Amendment

Résumé

Suite à la révélation du Programme de surveillance terroriste du gouvernement des États-Unis, une série de poursuites en recours collectif ont été intentées par des

organisations communautaires pour le compte de plaignants qui affirmaient qu'une surveillance domestique de masse était venue entraver leurs libertés civiles. La plupart des cas étaient relatifs au quatrième amendement, c'est-à-dire à la vie privée. Néanmoins, trois plaintes particulières avançaient des allégations selon lesquelles les droits protégés par le premier amendement, soit le droit à la liberté d'expression, d'association et/ou de presse, avaient été atteints. Quoique ces allégations ont reçu peu d'attention médiatique, elles demeurent importantes pour la jurisprudence des organes de surveillance: Est-ce qu'une surveillance domestique de masse peut créer un effet paralysant, fonctionnant comme des mesures restrictives sur les droits et les activités contenus dans le premier amendementCet article examine trois cas spécifiques : 1) *Hepting v. AT&T*, 2) *Center for Constitutional Rights v. President George W. Bush* et 3) *American Civil Liberties Union v. National Security Agency*. En se penchant sur le premier amendement, les déclarations des plaignants ainsi que le résultat final de ces affaires, cet article explore l'effet paralysant du Programme de surveillance terroriste sur la liberté d'expression, droit protégé traditionnellement par le premier amendement, durant la période de mise en oeuvre du programme. Ainsi, il est possible d'examiner les effets durables de ce programme sur la perception des citoyens en ce qui a trait à la liberté, aux comportements ainsi qu'aux droits légaux.

Mots clés: libertés civiles, surveillance, effet paralysant, vie privée, quatrième amendement

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