PUBLIC UNCLASSIFIED BRIEF

Nos. 06-2095, 06-2140

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMERICAN CIVIL LIBERTIES UNION, et al.,
Plaintiffs - Appellees/Cross-Appellants,

v.

NATIONAL SECURITY AGENCY, et al.,
Defendants - Appellants/Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

APPELLANTS' REPLY BRIEF AND CROSS-APPELLEES' RESPONSIVE BRIEF

PAUL D. CLEMENT
Solicitor General

GREGORY G. GARRE
Deputy Solicitor General

DARYL JOSEFFER
Assistant to the Solicitor General

PETER D. KEISLER
Assistant Attorney General

DOUGLAS N. LETTER
THOMAS M. BONDY
ANTHONY A. YANG
Attorneys, Appellate Staff
Civil Division, Room 7513
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530
Telephone: (202) 514-3602

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

U.S. Constitution:

Statutes:

Legislative Materials:

Miscellaneous:

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 06-2095, 06-2140

AMERICAN CIVIL LIBERTIES UNION, et al.,
Plaintiffs - Appellees/Cross-Appellants,

v.

NATIONAL SECURITY AGENCY, et al.,
Defendants - Appellants/Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

APPELLANTS' REPLY BRIEF AND CROSS-APPELLEES' RESPONSIVE BRIEF

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs do not dispute the district court's conclusions that the Government "appropriately invoked" the state secrets privilege, and that "the privilege applies 'because a reasonable danger exists that disclosing the information in court proceedings would harm'" the national security of the United States. Op. 12 (quoting *Tenenbaum v. Simonini*, 372 F.3d 776, 777 (6th Cir. 2004)). As explained in the classified materials provided to the judges of this Court *ex parte/in camera*, disclosure of highly classified information concerning the Terrorist Surveillance

Program ("TSP") would cause grave damage to national security by jeopardizing the effectiveness of a foreign intelligence-gathering program that the President and his top national security advisors deem vital to prosecuting an ongoing war.

Like the district court's decision, plaintiffs' contention that this case may nonetheless be litigated based on a few general facts the Government has publicly disclosed rests on a fundamental misinterpretation of settled legal principles. When those principles are properly applied, it is clear that this litigation cannot proceed without impermissibly jeopardizing vital state secrets.

At the outset, plaintiffs cannot prove their standing, and the Government cannot refute it, because facts concerning whether plaintiffs' communications have been or likely will be intercepted fall squarely within the state secrets privilege. Instead, plaintiffs argue that, based on *conjecture* that their communications are being intercepted, plaintiffs and others have refrained from communicating. It is settled that allegations of such a subjective chilling effect from the possibility of surveillance are insufficient to establish standing. Plaintiffs' inability to establish an injury-in-fact without disclosure of the central fact of whether they are subject to surveillance under the TSP alone compels dismissal of this action.

Even if subjective chill were a cognizable injury, plaintiffs still could not establish any likelihood that this injury would be redressed by enjoining the TSP. As plaintiffs allegedly desire to communicate with suspected terrorists overseas whose

communications may well be intercepted under the Foreign Intelligence Surveillance Act ("FISA"), by means other than "electronic surveillance," or by foreign governments, plaintiffs cannot satisfy the redressability requirement for standing.

Adjudicating the merits of plaintiffs' claims would likewise require state secrets. While plaintiffs do not defend the district court's holding that the Fourth Amendment *always* requires a warrant for a search, they assert broad and artificial limitations on the Fourth Amendment's reasonableness requirement in an effort to avoid consideration of the facts. Those contentions lack merit. The touchstone of the Fourth Amendment is reasonableness, and the overarching rule in this context is that reasonableness is determined in light of the "totality of the circumstances" by weighing the degree to which a search intrudes on an individual's privacy against the degree to which the search is needed for legitimate governmental purposes. Without highly classified and specific facts concerning the contours and application of the TSP, including the targets of surveillance, no such balancing can be undertaken.

Just as plaintiffs do not defend the district court's holding that the Fourth Amendment always requires a warrant, they make no attempt to defend its holding that the First Amendment is violated merely because the Fourth Amendment is violated. Plaintiffs' contention that judicial warrants are nonetheless required to protect First Amendment interests is not only unsupported by law, it is legally

indefensible because it would effectively erect the *per se* warrant requirement that the Supreme Court has repeatedly rejected in the Fourth Amendment context.

Plaintiffs rest primarily on their contention that the TSP violates FISA, and therefore the separation-of-powers doctrine. That claim—which was not fully resolved by the district court—is no more susceptible to sweeping rules than plaintiffs' Fourth and First Amendment claims. At the outset, plaintiffs cannot show that any relevant surveillance activity is "electronic surveillance" governed by FISA without disclosing state secrets. Even if they could, Congress's Authorization for Use of Military Force would authorize the interception of al Qaeda's international communications because such surveillance of the enemy in wartime is a time-honored incident of warfare. Moreover, plaintiffs could prevail only by showing not only that Congress purported to prevent the President as Commander-in-Chief from conducting surveillance of the international communications of the enemy during wartime outside of the FISA framework, but that such a serious incursion on the President's ability to defend and protect the Nation is constitutional. Any reasoned consideration of that grave constitutional question would require careful consideration of the facts surrounding the TSP, which are protected by the state secrets privilege.

Finally, plaintiffs' cross-appeal is meritless. Plaintiffs allege that the Government is not only intercepting al Qaeda's international communications, but is also undertaking a broad "datamining" program. The district court correctly

dismissed that claim because the Government has never admitted, described, or denied any datamining. As such, the very subject matter of plaintiffs' claim is a state secret, and plaintiffs cannot establish a *prima facie* case consistent with the state secrets privilege because they cannot even show that the allegedly unlawful activity is occurring. Plaintiffs' contrary contentions rest on pure speculation based on news reports that do not undermine the Government's invocation of state secrets privilege.

REPLY BRIEF FOR APPELLANTS

I. THIS CASE MUST BE DISMISSED BECAUSE IT CANNOT BE LITIGATED WITHOUT DISCLOSING STATE SECRETS.

Plaintiffs do not dispute the district court's conclusion that the Government "appropriately invoked" the state secrets privilege, and that "the privilege applies 'because a reasonable danger exists that disclosing the information in court proceedings would harm national security interests, or would impair national defense capabilities, disclose intelligence-gathering methods or capabilities, or disrupt diplomatic relations with foreign governments.'" Op. 12 (quoting *Tenenbaum*, 372 F.3d at 777). Thus, plaintiffs effectively concede that disclosing the relevant information would endanger national security.

[REDACTED TEXT—PUBLIC TEXT CONTINUES ON PAGE 6]

Plaintiffs suggest (Br. 55, 56) that the state secrets privilege "is usually invoked and evaluated in response to particular discovery requests, not as the basis for dismissal of legal claims." But as plaintiffs ultimately concede, "dismissal on the basis of the state secrets privilege is proper" if the "very subject matter" of the suit is a state secret, or if plaintiffs "cannot present a *prima facie* case, or th[e] defendant cannot present a valid defense, without resort to privileged evidence." Br. 56-57. Both bases for dismissal are present here.

A. This suit must be dismissed because its very subject matter is a state secret and litigation would inevitably result in disclosing state secrets. See, *e.g.*, *Tenet v. Doe*, 544 U.S. 1, 8 (2005); *Totten v. United States*, 92 U.S. 105, 107 (1875). Although plaintiffs argue (Br. 57 n.52) that the *Totten* doctrine is confined to cases involving asserted espionage agreements, the Supreme Court has applied *Totten* outside that specific context. For example, in *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139, 146-47 (1981)—which the Court cited in *Tenet*, 544 U.S. at 9—the Court invoked *Totten* in dismissing a challenge under the National Environmental Protection Act ("NEPA"), where the determination whether the Navy complied with NEPA would "'inevitably lead to the disclosure of matters which the law itself regards as confidential.'" 454 U.S. at 147 (quoting *Totten*, 92 U.S. at 107). Nor is there any principled reason to constrain the doctrine to cases involving espionage agreements.

While plaintiffs contend that the TSP itself is not a state secret, their own pleadings have repeatedly recognized that they "challeng[e] the legality of a *secret* government program." Pls.' Opp. to Mot. for Stay Pending Appeal at 1 (filed Oct. 2, 2006) (emphasis added). See also, *e.g.*, R.4 Mem. in Supp. of Pls.' Mot. for Partial Summ. J. at 1 (same). Moreover, plaintiffs do not dispute that, while the Government has publicly disclosed the *existence* of the TSP, the methods and means of the Program's operation remain highly classified. In that regard, this case is directly analogous to *Totten* and *Tenet*.

In *Tenet*, for example, not only was the Government's use of spies during the Cold War publicly known, but the existence of the program—"PL 110"—pursuant to which plaintiffs allegedly were brought to the United States was also publicly known. 544 U.S. at 4 n.2. The Court nonetheless held that the plaintiffs' claims were subject to dismissal because spies' identities and assignments—*i.e.*, the specific contours of the espionage program at issue—were state secrets. As the Court explained, the litigation could not proceed because "the fact that was central to the suit"—*i.e.*, the existence of a specific espionage relationship—was a state secret. *Id.* at 9. So too here, the identities of the targets and the specifics of the TSP remain highly classified, and a fact that is "central to the suit" (*ibid.*)—*i.e.*, whether plaintiffs have been or are likely to be surveilled under the Program—remains a state secret.

Plaintiffs claim (Br. 58) that invocation of the state secrets privilege does not require dismissal because "Government officials have publicly promoted and defended the legality, scope, and basis for the program." Beyond acknowledging that the TSP intercepts without warrants at least some international communications to or from individuals the Government has reasonable grounds to believe are associated with al Qaeda, the Government has not revealed any information regarding the Program, including its methods and means. To the contrary, as explained in the classified declarations, the Government has vigorously sought to prevent disclosure of the Program's operational details.[1/]

Plaintiffs contend (Br. 59-60) that "[t]he mere fact that this suit concerns foreign intelligence gathering is * * * insufficient to transform the subject matter into a state secret." But that grossly mischaracterizes the Government's position. The Director of National Intelligence and the NSA's Signals Intelligence Director formally invoked the state secrets privilege, and explained that "[t]o disclose additional information regarding the nature of the al Qaeda threat or to discuss the

---

[1/] Similarly, the Justice Department's "White Paper" (available at http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf) discusses the legality of the TSP only in broad generalities without reference to evidence protected by the state secrets privilege, and does not remotely suggest that the legality of the TSP could properly be the subject of courtroom litigation. See *id.* at 34 n.18 (noting that "a full explanation of the basis for" the Program "cannot be given in an unclassified document").

TSP in any greater detail * * * would disclose classified intelligence information and reveal intelligence sources and methods, which would enable adversaries of the United States to avoid detection by the U.S. Intelligence Community and/or take measures to defeat or neutralize U.S. intelligence collection." R.37 Negroponte Decl. ¶11; see R.38 Quirk Decl. ¶7. Litigation of most cases involving intelligence operations or other national security programs does not pose the same risk, in part because most of those cases do not involve challenges to clandestine programs. But in the rare case, such as this, where a plaintiff challenges the legality of a secret surveillance program, a different situation is presented.

B. Plaintiffs' contention (Br. 61) that "[s]tate secrets are not necessary or relevant to proving plaintiffs' claims or any valid defense to those claims" is incorrect. As discussed below, that contention rests on fundamentally mistaken views of the legal principles that govern plaintiffs' standing and the merits of their claims.

II. PLAINTIFFS CANNOT ESTABLISH THEIR STANDING TO SUE WITHOUT DISCLOSING STATE SECRETS.

Plaintiffs cannot establish standing because, in light of the state secrets doctrine, they cannot show, and the Government cannot dispute, that the Government has intercepted or likely will intercept their communications. Plaintiffs struggle to overcome that obstacle to suit by alleging that they have elected not to communicate with various people, who in turn have chosen not to communicate with them. Under

settled law, any such subjective chilling effect does not support standing. And even if a chilling effect could establish plaintiffs' standing to assert their *First Amendment* claim, they would still lack prudential standing to pursue their other claims.

A. Plaintiffs' Allegations Of Subjective Chill Are Insufficient To Establish Article III Standing.

1. Plaintiffs' standing to challenge TSP surveillance hinges on their ability to prove injury caused by the TSP's current or imminent interception of their communications. As the D.C. Circuit found in analogous circumstances in *Halkin v. Helms*, 690 F.2d 977 (D.C. Cir. 1982) ("*Halkin II*"), and *Ellsberg v. Mitchell*, 709 F.2d 51, 65 (D.C. Cir. 1983), the state secrets privilege precludes plaintiffs from establishing such an injury in fact. See Gov. Br. 22-23.

Plaintiffs' efforts to distinguish *Halkin II* fall short. While plaintiffs note (Br. 61) that one claim in *Halkin* involved money damages, the relevant standing analysis in *Halkin II* involved "claims for injunctive and declaratory relief," *Halkin II*, 690 F.2d at 997-98, just as plaintiffs here seek equitable relief.

Nor can plaintiffs successfully distinguish *Halkin II* on the ground that the plaintiffs there merely sought to "stop surveillance of particular individuals," whereas the "plaintiffs here seek to invalidate a surveillance program * * * on its face" (Br. 62). *Halkin II*, like this case, involved an effort to "broadly enjoin the conduct of vital governmental functions" extending beyond the particular plaintiffs. See *Halkin*

II, 690 F.2d at 1005; see also *Halkin v. Helms*, 1980 WL 570314, at *1 & n.2 (D.D.C. June 5, 1980), aff'd, *Halkin II*, *supra*. More fundamentally, plaintiffs have it backwards in asserting that standing burdens are *lower* when plaintiffs seek to invalidate a program across the board, instead of only as applied to themselves. If anything, plaintiffs should face a *greater* standing burden in challenging the application of a program to other individuals not before this Court. "[T]he 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992).

Plaintiffs likewise cannot ground their standing on their assertion that it is "reasonable for plaintiffs to *assume* that their communications are being intercepted" under the TSP because they believe that their international "calls and emails are precisely the kinds of communications the government has conceded are targeted under the Program." Br. 10, 13 (emphasis added). Such speculation regarding a ""conjectural' or 'hypothetical'" injury cannot give rise to Article III standing. See *Lujan*, 504 U.S. at 560. As the D.C. Circuit explained, the "fact that an individual is more likely than a member of the population at large to suffer a hypothesized injury" makes "the injury no less hypothetical." *Halkin II*, 690 F.2d at 1006; accord *Ellsberg*, 709 F.2d at 65.

Here, the state secrets privilege protects a host of facts needed to evaluate whether plaintiffs' communications are likely to be intercepted by the TSP, including facts concerning: the criteria governing whether the Government has reasonable grounds to believe that a person is a member of or affiliated with al Qaeda or an affiliated terrorist organization; how the Program defines al Qaeda and affiliated terrorist organizations; whether the TSP targets the communications of all or just a subset of those persons who satisfy the relevant criteria; whether the Program attempts to intercept all or only a fraction of the international communications of targeted persons originating or terminating in the United States; and the Program's success rate when interception attempts are made.[2/] As the facts needed to evaluate plaintiffs' "assumption" that the TSP intercepts their communications are protected by the state secrets privilege, plaintiffs cannot meet their burden of establishing that they suffer an injury from such surveillance supporting standing to sue.

[REDACTED TEXT—PUBLIC TEXT CONTINUES ON PAGE 13]

[2/] Plaintiffs' allegation (Br. 12) that the TSP has intercepted the communications of plaintiffs in a different case does not support standing here. The *Al-Haramain* district court ruled that the plaintiffs there *might* be able to prove that their communications were intercepted because a classified document allegedly concerning their surveillance had been inadvertently disclosed. See *Al-Haramain Islamic Found. v. Bush*, 451 F. Supp. 2d 1215, 1225, 1233 (D. Or. 2006), petition for interlocutory appeal pending, No. 06-80134 (9th Cir.). Whether the *Al-Haramain* plaintiffs were surveilled has no bearing on whether plaintiffs here can prove *they* were surveilled.

2. Unable to establish that their communications are or imminently will be intercepted, plaintiffs contend (Br. 10-14) that they and others have elected to curtail their communications out of concern that their communications are intercepted by the TSP. That is nothing more than a "subjective chill." Under *Laird v. Tatum*, 408 U.S. 1 (1972), and *Sinclair v. Schriber*, 916 F.2d 1109 (6th Cir. 1990), such an alleged chilling effect is not an injury in fact fairly traceable to the Government's challenged conduct. See Gov. Br. 25-30.[3/]

a. Plaintiffs' assertion (Br. 18) that *Laird*'s standing analysis does not apply "where the intelligence gathering itself is unlawful" is patently incorrect. As the Supreme Court has stressed, standing is a "threshold inquiry" that "'in no way depends on the merits of the [plaintiff's] contention that particular conduct is illegal.'" *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). Plaintiffs therefore cannot establish standing by seeking to litigate the merits and, in any event, as

---

[3/] Even the evidentiary foundation for plaintiffs' claimed injury is insufficient. See Gov. Br. 29 n.4. Plaintiffs do not dispute that they seek to rely on hearsay to establish that unidentified overseas persons will not communicate with them because they fear TSP surveillance. While plaintiffs claim (Br. 17 n.28) that hearsay is admissible to establish "the state of mind of the declarant" and the "effect on the listener," those are not the purposes for which plaintiffs seek to use the hearsay here. Instead, they impermissibly seek to use hearsay (and only hearsay) to establish the truth of the matter asserted—that the TSP caused third parties to refuse to communicate with them.

discussed below, plaintiffs' claims on the merits cannot be adjudicated without disclosing state secrets.

b. While plaintiffs contend (Br. 14-15, 18) that "specific professional or job-related injuries" alleged here distinguish this case from *Laird* and *Sinclair*, their alleged injuries derive solely from the fact that they have chosen not to communicate with others, and others have chosen not to communicate with them. That is precisely the "subjective chill" that, under *Laird*, is not sufficient to establish standing. Instead, to establish standing, a plaintiff must identify "specific instances of misconduct *beyond [the unlawful] surveillance*" giving rise to "a 'specific present objective harm or a threat of specific future harm'" caused by Government action. *Sinclair*, 916 F.2d at 1115 (emphasis added). A plaintiff's decision to cease expressive activity simply does not establish standing. *Ibid.*; accord *United Presbyterian Church v. Reagan*, 738 F.2d 1375, 1378 (D.C. Cir. 1984) (Scalia, J.); *Fifth Avenue Peace Parade Comm. v. Gray*, 480 F.2d 326, 331-32 (2d Cir. 1973).

Plaintiffs' claimed injury is even more tenuous than that rejected in *Laird* and *Sinclair* because plaintiffs attempt to base their standing on injury caused by the independent "decisions of *third parties* to cease communicating with" them in light of the alleged chilling effect. Br. 16-17 (emphasis added). As previously discussed, a plaintiff's injury must be caused by Government action (or inaction) as to the parties, not by the independent decisions of third parties. See Gov. Br. 28-29 (citing

Lujan, 504 U.S. at 562; *Bennett v. Spear*, 520 U.S. 154, 168-69 (1997)). Thus, a chilling effect on *third parties* is an even less appropriate basis for standing than a chilling effect on the plaintiffs themselves.

Plaintiffs do not attempt to distinguish either *Lujan* or *Bennett*, but instead rely (Br. 17) on Justice Marshall's non-precedential, in-chambers decision in *Socialist Workers Party v. Attorney General*, 419 U.S. 1314 (1974).[4/] Not only do plaintiffs misrepresent Justice Marshall's in-chambers decision as a Supreme Court ruling, but they have mischaracterized its facts. The plaintiffs in that case did not rely on injuries caused by actions of third parties. Although the discussion by Justice Marshall (who dissented in *Laird*) is abbreviated, he apparently found that the Socialist Worker's Party and its youth organization had associational standing to challenge government surveillance based in part on potential employment-based injuries to the associations' members that would have been directly caused by Government surveillance—not injuries caused by the decisions of separate third parties. See *id.* at 1319.

CAMP Legal Defense Fund, Inc. v. City of Atlanta, 451 F.3d 1257 (11th Cir. 2006), likewise has no bearing on injuries caused by third parties. *CAMP* simply

---

[4/] The decision of a Justice writing in chambers has no precedential effect. See *Joyner v. Mofford*, 706 F.2d 1523, 1530 (9th Cir. 1983). Such decisions are issued under the authority of a single Justice to grant applications for interim relief—a circumscribed authority that does not permit resolution of the merits of a dispute. See, *e.g.*, *Blodgett v. Campbell*, 508 U.S. 1301, 1303-04 (1993) (O'Connor, J., in chambers).

holds that an organization can challenge an ordinance as a "prior restraint[] on speech" if it establishes that "the provision of the ordinance applies to" its activities. See *id.* at 1276. Cf. *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1090 (10th Cir. 2006) (en banc) (organization had standing to challenge law where it was "certain" that the law would be "enforce[d]" against future ballot initiatives like those sought by plaintiffs), *petition for cert. filed*, 75 U.S.L.W. 3220 (U.S. Oct. 13, 2006) (No. 06-534).

c. Plaintiffs' reliance on cases involving "professional injuries resulting from government investigations or surveillance programs" is misplaced. Br. 14. In those cases, the Government *targeted* and subjected the plaintiffs to surveillance; it was not mere conjecture whether the plaintiffs were surveilled. Moreover, those cases involved *reputational* injury. As in suits involving libel and slander, a reputational injury can be directly caused by the Government's action and, if the reputational harm is sufficiently concrete to impact the plaintiffs' business or employment, the injury can establish standing.[5/] These decisions do not assist plaintiffs here because—quite

---

[5/] See *Meese v. Keene*, 481 U.S. 465, 473-74 & n.8, 476 (1987) (reputational injury from "enforcement of a statute that employs the term 'political propaganda,'" where evidence showed that term would have "'stigmatiz[ing]'" impact on target's reputation); *Presbyterian Church v. United States*, 870 F.2d 518, 522-23 (9th Cir. 1989) (surveillance targeting churches caused harm "analogous to the 'reputational' or 'professional' harm that was present in [*Meese v.*] *Keene*"); *Clark v. Library of Congress*, 750 F.2d 89, 93 (D.C. Cir. 1984) ("targeted investigation of [plaintiff] * * * resulting in concrete harms to his reputation and employment opportunities");

unlike the plaintiffs in the cases on which they rely—plaintiffs here can neither establish that they have been *targeted* for TSP surveillance nor identify any concrete harm to their reputations caused directly by such surveillance. Indeed, the highly classified nature of TSP surveillance renders any claim to concrete reputational harm implausible.

Moreover, in many of those cases the plaintiff did not claim to be injured by the mere fact of surveillance (as here), but instead by harms stemming from the Government's potential use of the surveillance, such as adverse employment decisions based on the investigation. See, *e.g.*, *Ozonoff*, 744 F.2d at 229-30; *Paton*, 524 F.2d at 868. Here, plaintiffs do not allege that the Government has used or will use the results of surveillance against them; instead, they challenge only the mere fact of surveillance (not necessarily directed at them), and an alleged resulting chilling effect. That is precisely the situation governed by *Laird* and *Sinclair*.

Ozonoff v. Berzak, 744 F.2d 224, 226, 229-30 (1st Cir. 1984) (Executive Order authorizing FBI's targeted investigation of job applicant under "loyalty screening" program risked applicant's job opportunity if investigation informed potential employer that applicant was "a 'disloyal' American"); *Paton v. La Prade*, 524 F.2d 862, 866, 868, 870-71 (3d Cir. 1975) (targeted investigation of student that "became well known," "affected [her] standing" in the community, and "endanger[ed] her future educational and employment opportunities"); *Jabara v. Kelley*, 476 F. Supp. 561, 568 (E.D. Mich. 1979) ("injury to [plaintiff's] reputation and legal business as the result of publicity surrounding the FBI investigation of him"), *vacated on other grounds sub nom. Jabara v. Webster*, 691 F.2d 272 (6th Cir. 1982).

Plaintiffs' reliance on environmental law cases (Br. 15-16) is particularly inapposite. This case involves an alleged chilling effect on speech, not the use of polluted areas. Because "the 'injury required by Article III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing,'" a litigant's standing under environmental legislation is governed by the statutory goal of protecting public health, the environment, and recreational use of the outdoors. See *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 156 (4th Cir. 2000) (en banc); see also *Interfaith Community Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 257 (3d Cir. 2005). Thus, "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000); see also *Gaston Copper*, 204 F.3d at 154, 156-57. In other words, a litigant's decision to avoid using polluted areas may constitute an injury in fact where environmental legislation specifically recognizes harms to "an individual's aesthetic or recreational interests" (*id.* at 154) as cognizable injuries for standing purposes. That point is wholly irrelevant to plaintiffs' claim of a subjective First Amendment chilling effect, which is governed by *Laird*.

3. Even if plaintiffs could establish a cognizable injury for standing purposes, they have not shown that enjoining the TSP would redress their injury. Under

plaintiffs' own theory, the overseas persons with whom they wish to communicate are suspected terrorists whose communications may well be targeted for FISA-authorized surveillance, surveillance outside FISA's definition of "electronic surveillance," or surveillance conducted by foreign governments. See Gov. Br. 29. Redressability is made no less speculative by plaintiffs' contention (Br. 19-20) that they need not show that every one of their injuries would be redressed by enjoining the TSP. As plaintiffs *only* allege injuries flowing from the chilling of their communications based on subjective perceptions of the risk of surveillance, they fail to proffer a non-speculative basis for satisfying the redressability prong of Article III standing.

[REDACTED TEXT—PUBLIC TEXT CONTINUES ON PAGE 20]

4. Plaintiffs contend (Br. 9) that, if they do not have standing, no one does. That assertion is legally irrelevant and, in any event, speculative. "Our system of government leaves many crucial decisions to the political processes." *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 227 (1974). Thus, even if "no one would have standing" to challenge the TSP, that "is not a reason to find standing." *Ibid.*; accord *United States v. Richardson*, 418 U.S. 166, 179 (1974). Moreover, if the Government sought to use the results of TSP surveillance, the target might be able to prove standing based on the Government's disclosure of the surveillance and any injury caused by the attempted use. That possibility, which is more closely analogous to the cases relied on by plaintiffs, only underscores the absence of standing here.

B. Plaintiffs Cannot Establish Prudential Standing To Assert Fourth Amendment And FISA Claims.

Even if a subjective chill could establish plaintiffs' Article III standing to pursue their First Amendment claim, plaintiffs would nevertheless lack prudential standing to press their other claims because they cannot establish that their own communications are or likely will be intercepted by the Program. Gov. Br. 25 & n.3.

1. Plaintiffs' primary response—that they need not "show standing separately for each of their claims" once they have shown an Article III injury in fact (Br. 10 n.11)—is incorrect. A litigant must establish not only Article III standing, but also

prudential standing, which addresses "whether the litigant is entitled to have the court decide the merits * * * of particular issues," a question that turns on whether "the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." See *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975). Thus, the "source of the plaintiff's claim to relief" "assumes critical importance with respect to the prudential rules of standing" (see *id.* at 498, 500), under which a plaintiff must "demonstrate standing for *each claim* he seeks to press." *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1867 (2006) (emphasis added); see also *Lac Vieux Desert Band v. Michigan Gaming Control Bd.*, 172 F.3d 397, 403 (6th Cir. 1999).

Thus, this Court in *Lac Vieux* held that it was "necessary" to evaluate a plaintiff's standing to bring its First Amendment challenge to an ordinance "separately" from its standing to challenge the ordinance on equal protection grounds. See *Lac Vieux*, 172 F.3d at 407. This Court in *Sinclair* similarly held that the plaintiffs there lacked standing to challenge the interception of their communications on First Amendment grounds, while simultaneously exercising jurisdiction to resolve the merits of their Sixth Amendment challenge to the same surveillance. See *Sinclair*, 916 F.2d at 1112-15. The cases cited by plaintiffs on this point (see Br. 10 n.11) do not even address the question whether prudential, as opposed to Article III, standing

must be separately proven for each claim. See *Sierra Club v. Morton*, 405 U.S. 727, 733 & n.5 (1972); *Sierra Club v. Adams*, 578 F.2d 389, 391 n.12 (D.C. Cir. 1978).

2. Plaintiffs have not established prudential standing for their Fourth Amendment claim. Significantly, plaintiffs have not even disputed that only parties to overheard conversations have standing to challenge the interceptions under the Fourth Amendment. See Gov. Br. 22 (citing *Rakas v. Illinois*, 439 U.S. 128, 136 (1978)). Thus, plaintiffs' inability to establish whether the TSP actually intercepts their communications is fatal to their prudential standing to challenge the TSP on Fourth Amendment grounds.

3. The same conclusion governs plaintiffs' FISA and separation-of-powers challenge. Plaintiffs' contention that they need not prove prudential standing for this claim because their "case does not involve a challenge to surveillance conducted under FISA" (Br. 19 n.30) misses the point. Because plaintiffs contend that the Government violated FISA by not complying with that statute's requirements, their challenge is indistinguishable from any other FISA challenge.

Moreover, plaintiffs brought suit under the Administrative Procedure Act ("APA"), and "[f]or a plaintiff to have prudential standing under the APA, 'the interest sought to be protected by the complainant must be arguably within the zone of interests to be protected or regulated by the statute in question.'" *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488 (1998) (brackets

and ellipsis omitted); accord *Bennett*, 520 U.S. at 163, 176; *Air Courier Conf. v. American Postal Workers Union*, 498 U.S. 517, 529 (1991). Here, the "zone of interests" is established by FISA's general prohibition on "electronic surveillance" except as authorized by statute, 50 U.S.C. 1809(a).

FISA generally limits its definition of "electronic surveillance" to those "circumstances in which a person has a reasonable expectation of privacy" and the Government acquires the contents of communications "without the consent of any party thereto." See 50 U.S.C. 1801(f). FISA thus protects the privacy interests of those who are parties to, and targets of, intercepted communications. Indeed, Congress underscored this point by limiting FISA's own review provisions to "those persons who have standing to raise claims under the Fourth Amendment with respect to electronic surveillance." H.R. Rep. No. 95-1283, at 66 (1978); see Gov. Br. 23. Because plaintiffs are unable to establish that their own communications are intercepted by the TSP, they cannot establish that they have suffered an injury to a privacy interest arguably falling within the "zone of interests" protected by FISA.

III. FACTS PROTECTED BY THE STATE SECRETS PRIVILEGE ARE NECESSARY TO THE RESOLUTION OF THE MERITS.

Just as plaintiffs may not establish standing, and the Government may not refute it, without relying on state secrets, so too the merits of plaintiffs' claims may not be properly adjudicated without consideration of highly classified information.

A. Plaintiffs' Fourth Amendment Claim Cannot Be Adjudicated Without Disclosing State Secrets.

The touchstone of the Fourth Amendment is reasonableness. The overarching rule is that Fourth Amendment reasonableness is determined in light of the "'totality of the circumstances'" by weighing the degree to which a search intrudes on an individual's privacy against the degree to which the search is needed for legitimate governmental purposes. *Samson v. California*, 126 S. Ct. 2193, 2197 (2006). That analysis is highly fact intensive. Plaintiffs suggest (Br. 44, 50) that it is a "purely legal" question whether the Constitution requires warrants in the circumstances of this case, because "*no* facts could make reasonable a program of warrantless surveillance inside the nation's borders" (emphasis added). That sweeping assertion is not only wrong, but it would even invalidate FISA's authorization to conduct surveillance in specified circumstances without a court order (50 U.S.C. 1802(a)(1)). Under the foreign intelligence and special needs doctrines, warrantless searches are permissible in some circumstances. Thus, privileged facts are necessary to any proper adjudication of whether the TSP conducts "reasonable" searches.

1. The Foreign Intelligence Doctrine

a. Every court of appeals that has decided whether the President has constitutional authority to authorize warrantless foreign intelligence surveillance has held that warrants are *not* required in this special Fourth Amendment context. See Gov. Br. 35 (citing cases). Each of these decisions confronted and resolved the question left open by the Supreme Court's 1972 decision in *Keith*, which declined to address the "scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country," *United States v. U.S. District Court*, 407 U.S. 297, 308 (1972) ("*Keith*"); see also *id.* at 321-22 & n.20. Plaintiffs attempt to trivialize that entrenched line of precedent, arguing (Br. 47) that "virtually all" of these decisions were decided before FISA's 1978 enactment, and that FISA altered the *constitutional* standards for foreign intelligence surveillance. That effort is unavailing. As discussed below, plaintiffs cannot establish any violation of FISA. More fundamentally, however, nothing in FISA's *statutory* provisions altered the Fourth Amendment's *constitutional* requirements (or the President's inherent power).

While plaintiffs argue (Br. 46) that FISA reflects a "'legislative judgment'" that judicial warrants are needed to ensure that electronic surveillance in the United States conforms to the "'fundamental principles of the Fourth Amendment,'" Congress's policy judgment that the Executive should normally be required to obtain court orders for such surveillance simply does not address whether the Constitution requires

warrants in all foreign intelligence contexts. Cf. 50 U.S.C. 1802(a)(1) (authorizing warrantless surveillance of foreign powers in specific circumstances). Indeed, in enacting FISA, Congress recognized that "the weight of the case law suggests that a judicial warrant may not be required in certain cases," acknowledged that the Supreme Court had "taken pains not to address this [Fourth Amendment] issue," and predicted that FISA would largely displace "the debate over the existence or non-existence" of the President's constitutional power to authorize warrantless surveillance. See H.R. Rep. No. 95-1283, at 24-25.[6/]

b. While warrants are not constitutionally required, TSP surveillance must nevertheless be "reasonable" under the Fourth Amendment. Adjudicating the question of reasonableness requires precisely the sort of factual inquiries precluded by the state secrets privilege here. See Gov. Br. 36. As the D.C. Circuit has explained, the "notion of deciding [the] constitutional question[s]" of "whether a warrant is required in certain foreign intelligence surveillances, and if not, whether certain activities are 'reasonable'" when the "record [is] devoid of any details that

---

[6/] Some courts have looked to federal wiretapping statutes, including FISA, in formulating concrete guidance for judges implementing the constitutional mandate that "no Warrants shall issue" except for probable cause and with a "particular[] descri[ption]" of the place to be searched (U.S. Const. amend. IV, cl. 2). See, *e.g.*, *United States v. Mesa-Rincon*, 911 F.2d 1433, 1436 (10th Cir. 1990); *United States v. Biasucci*, 786 F.2d 504, 510 (2d Cir. 1986). Those cases recognize, however, that "surveillance should not be strictly judged by all of the other procedures and requisites of" these statutes. *Biasucci*, *supra*; accord *Mesa-Rincon*, 911 F.2d at 1438.

might serve even to identify the alleged victim of a violation" is not only "impossible," but "ludicrous." *Halkin II*, 690 F.2d at 1000, 1003 n.96. Here, the relevant facts protected by the state secrets privilege include information concerning the TSP's activities, sources, methods, and targets. Gov. Br. 36.

Plaintiffs' attempts to circumvent the facts with bright-line legal rules are unavailing. While plaintiffs suggest (Br. 51) that TSP surveillance is unreasonable as a matter of law because it is not supported by probable cause, probable cause is not an absolute requirement for warrantless searches or seizures, see, *e.g.*, *Terry v. Ohio*, 392 U.S. 1 (1968) (reasonable suspicion standard for investigative stops). Rather, as discussed, "the ultimate measure of the constitutionality of a government search is 'reasonableness.'" *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995). In any event, the Attorney General has publicly stated that the TSP's "reasonable grounds to believe" standard is a "probable cause" standard. See R.4 Ex. H at 7.

Plaintiffs also assert (Br. 51-52) incorrectly that no TSP surveillance is reasonable unless each instance of surveillance is personally authorized by the President or Attorney General. The Constitution does not generally limit the President's ability to delegate authority—an ability necessary for him to govern effectively. Plaintiffs rely on *United States v. Ehrlichman*, 546 F.2d 910 (D.C. Cir. 1976), but in that case the President never "mention[ed] the possibility of surreptitious wiretaps or other 'national security' searches let alone g[a]ve any

specific authorization for such activity." *Id.* at 927. Consequently, the court properly rejected the claim that the President's authorization was implicit in his general instructions to stop security leaks and investigate a disclosure of classified information. *Ibid.* Here, in contrast, the President expressly authorized the TSP, and has expressly re-authorized it approximately every 45 days since its inception. See R.4 Ex. A at 3; R.4 Ex. F at 3. That repeated Presidential consideration more than satisfies any requirement for the President's personal involvement. Cf. *Katz v. United States*, 389 U.S. 347, 364 (1967) (White, J., concurring) (concluding that the President or Attorney General must "consider[] the requirements of national security and authorize[] electronic surveillance as reasonable").

2. The Special Needs Doctrine

The reasonableness of TSP surveillance under the Fourth Amendment's "special needs" doctrine likewise cannot be adjudicated because the requisite facts are protected by the state secrets privilege. Plaintiffs do not dispute that the Government's legitimate and compelling need to detect and prevent further terrorist attacks qualifies as a "special need" beyond the normal need for law enforcement. Nor do they dispute, at least explicitly, that the doctrine requires a "fact-specific balancing" of the governmental interests underlying a search against the associated intrusion into privacy interests, and that such a balancing in this case would require recourse to state secrets. See *Board of Educ. v. Earls*, 536 U.S. 822, 830 (2002); see

also, *e.g.*, *International Union v. Winters*, 385 F.3d 1003, 1009 (6th Cir. 2004). Instead, they argue (Br. 47-50) that the special needs doctrine's fact-specific balancing is constrained by three artificial rules that prevent its application here as a matter of law. Plaintiffs are wrong.

Plaintiffs' assertion (Br. 48) that the special needs doctrine applies only when minimal privacy interests are implicated was recently rejected by the Second Circuit. See *MacWade v. Kelly*, 460 F.3d 260, 269-70 (2d Cir. 2006) (upholding warrantless bag searches in New York City subway system). As *MacWade* explains, the "Supreme Court never has implied—much less actually held—that a reduced privacy expectation is a *sine qua non* of special needs analysis." See *ibid.* Instead, the affected privacy interest and the degree to which a challenged search intrudes upon it must be "balanced against other fact-specific considerations." *Id.* at 269; see also, *e.g.*, *Earls*, 536 U.S. at 830-38.

Nor are plaintiffs correct that the special needs doctrine applies only to random searches and not to searches that are targeted based on individualized suspicion (Br. 48-49). One of the earliest Supreme Court decisions to apply the special needs doctrine upheld a warrantless search where officials had "'reasonable grounds' to believe the presence of contraband." See *Griffin v. Wisconsin*, 483 U.S. 868, 870-71, 876 (1987). *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), likewise applied the special needs doctrine to analyze the reasonableness of a drug testing program that

targeted "maternity patients who were suspected of using cocaine," *id.* at 70. While the Supreme Court found the program there unconstitutional because its purpose did not constitute a special need distinguishable from a general interest in crime control (*id.* at 79-83), the Court gave no indication that—where a proper purpose was present—initiating a search based on individualized suspicion would make the doctrine inapplicable. Rigidly limiting the special needs doctrine in the manner suggested by plaintiffs would perversely require the Government to conduct untargeted searches that unnecessarily invade privacy interests when more focused and, thus, less intrusive searches would more effectively advance the special need justifying a search.

Finally, plaintiffs' view (Br. 49) that the special needs doctrine does not apply to TSP surveillance because FISA "makes clear" that warrants are "workable" leaps over the question whether warrants are, in fact, impracticable in the context of the foreign intelligence surveillance conducted by the TSP. FISA remains an important tool in the ongoing war on terror, and the Government continues to rely on FISA orders to authorize foreign intelligence surveillance. However, the President and his top national security officials have determined that the TSP is necessary to secure essential intelligence information necessary to prosecute the war. The operational details surrounding the TSP cannot, however, be disclosed without causing grave

harm to national security. Accordingly, the state secrets privilege protects the facts needed to adjudicate the special needs doctrine's application to this case.

[REDACTED TEXT—PUBLIC TEXT CONTINUES ON PAGE 32]

B. Plaintiffs' First Amendment Claim Cannot Be Adjudicated Without Disclosing State Secrets.

Plaintiffs devote a scant page and a half of their brief to a half-hearted defense of the district court's holding that the TSP violates the First Amendment. Br. 52-53. While the district court held that the TSP violates the First Amendment because it violates the Fourth Amendment (Op. 33), plaintiffs argue (Br. 53) that the Government must secure a "'judicial determination'" before conducting any foreign intelligence surveillance. Such a sweeping rule would render superfluous the more careful Fourth Amendment balancing discussed above, and it is therefore not surprising that plaintiffs can provide no relevant authority to support their novel reading of the First Amendment. See *Gordon v. Warren Consol. Bd. of Educ.*, 706 F.2d 778, 781 & n.3 (6th Cir. 1983) (surveillance of expressive activity consistent with Fourth Amendment does not violate First Amendment); *Jabara*, 476 F. Supp. at 570-72, *vacated on other grounds*, 691 F.2d 272.

Instead, plaintiffs cite cases concerning attempts to impose sanctions to compel organizations to disclose their membership lists,[7] as well as cases involving government censorship and suppression of expression through affirmative restraints

---

[7] See *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963); *Marshall v. Bramer*, 828 F.2d 355, 359 (6th Cir. 1987).

on speech.[8] Such affirmative applications of governmental power to burden or restrain speech are fundamentally different from the alleged surveillance at issue here. None of plaintiffs' cases articulates any general First Amendment requirements applicable in the surveillance context.

C. Plaintiffs' FISA And Separation-Of-Powers Claim Cannot Properly Be Litigated In Light Of The State Secrets Privilege.

Plaintiffs argue that the TSP violates FISA, and derivatively violates the separation of powers doctrine because the President lacks authority to override FISA. Although the district court discussed that claim, it ultimately declined fully to resolve it, and instead fell back on its Fourth and First Amendment holdings. See Op. 41.

Plaintiffs' claim, which raises very delicate constitutional concerns, cannot proceed without consideration of the facts protected by the state secrets privilege. FISA prohibits "electronic surveillance" under color of law "except as authorized by statute." 50 U.S.C. 1809(a). As discussed in the Government's opening brief (at 40), plaintiffs' FISA claim is dependent on at least three separate propositions: first, that the conduct (if any) that plaintiffs have standing to challenge qualifies as "electronic

---

[8] See *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965) (banning of film under state censorship laws); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 769-72 (1988) (ordinance giving mayor "unbridled discretion" to deny publishers permits to place newsracks on public property); *Marcus v. Search Warrants of Property*, 367 U.S. 717, 731-33 (1961) (mass seizure of allegedly obscene publications).

surveillance;" second, that Congress's Authorization for Use of Military Force (AUMF) does not provide statutory authorization for TSP surveillance; and, third, that FISA would be constitutional if it were read, as plaintiffs suggest, to curtail significantly the President's constitutional authority to conduct foreign intelligence surveillance to protect the Nation in a time of armed conflict. Plaintiffs' response only confirms that they cannot make those showings and the state secrets privilege requires dismissal.

1. Plaintiffs assert (Br. 26) that the Government has publicly admitted that the interception of communications under the TSP is "electronic surveillance" within the meaning of FISA (see 50 U.S.C. 1801(f)), and that the Government waived any contrary argument by not raising it below. Plaintiffs are mistaken. The public statements to which plaintiffs allude nowhere confirm that activities under the TSP meet FISA's definition of "electronic surveillance." For example, the Department of Justice "White Paper" discussed above (at 8 n.1) emphasizes that, "[t]o avoid revealing details about the operation of the program, it is *assumed* for purposes of this paper that the activities described by the President constitute 'electronic surveillance,' as defined by FISA." White Paper, *supra*, at 17 n.5 (emphasis added). The other statements cited by plaintiffs are to the same effect.[9/] At the very most, some

---

[9/] Plaintiffs stress, for example, the Attorney General's press briefing of December 19, 2005. See Br. 25 nn.41-42. As the Attorney General took pains to

statements might suggest that *some* TSP surveillance is "electronic surveillance" for purposes of FISA. But plaintiffs do not, and cannot, attempt to show that any TSP interceptions—let alone any TSP interceptions they have standing to challenge—are "electronic surveillance." That question could not meaningfully be resolved without considering the methods and means of the TSP, which are protected by the state secrets privilege.

[REDACTED TEXT—PUBLIC TEXT CONTINUES ON PAGE 36]

---

emphasize, however, "there are many operational aspects of the program that have still not been disclosed," and "I'm only going to be talking about the legal underpinnings for what has been disclosed by the President." See Press Briefing, *available at* http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html.

2. In any event, Congress authorized the TSP when it enacted the AUMF in the aftermath of the September 11, 2001 terrorist attacks. The AUMF provides that acts of terrorism "continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States;" that "such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad;" that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States;" and that "*the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 * * * in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.*" AUMF, Pub. L. No. 107-40, pmbl., § 2(a), 115 Stat. 224 (2001) (emphasis added).

Although plaintiffs argue that the AUMF "does not mention electronic surveillance" (Br. 26), the Supreme Court rejected a similar argument in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). In *Hamdi*, the Court held that the AUMF authorized the President to undertake any and all activities that are "fundamental incident[s] of waging war," even if the AUMF does not use "specific language" to enumerate those activities. See *Hamdi*, 542 U.S. at 518-19 (plurality opinion); accord *id.* at 587

(Thomas, J., dissenting). Significantly, plaintiffs make no effort to refute the Government's showing that the "interception of enemy messages, wireless and other," is an accepted and customary means of wartime surveillance, and that the "laws of war recognize and sanction this aspect of warfare." See Morris Greenspan, *The Modern Law of Land Warfare* 325-26 (1959); see also Gov. Br. 43 (citing authority).

Plaintiffs attempt (Br. 29-30) to distinguish *Hamdi* by noting that it involved detention of enemy combatants captured on the battlefield, whereas this case involves foreign intelligence gathering. But foreign intelligence gathering is just as vital to the successful prosecution of war as the detention of captured enemy combatants, and the key point is that foreign intelligence gathering, like the detention of captured combatants, is indisputably a fundamental incident of waging war. Plaintiffs' suggestion (Br. 29-30) that the AUMF does not apply to any domestic actions is equally baseless. Hamdi was detained in the United States. *Hamdi*, 542 U.S. at 510. In addition, because the AUMF—enacted in response to terrorist attacks on American soil—finds it "necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens *both at home and abroad*" "in order to prevent any future acts of international terrorism against *the United States*." AUMF pmbl., § 2(a) (emphases added). The nature of the al Qaeda threat—an enemy that has made known in the deadliest foreign attacks ever on American soil its intent

to attack us at home as well as abroad—makes it more, not less, essential to intercept the enemy's communications that originate or end in this country.

[REDACTED TEXT—PUBLIC TEXT CONTINUES ON PAGE 39]

Plaintiffs' contentions that specific statutes ordinarily trump general ones, and that repeals by implication are disfavored, do not support their position. Plaintiffs rely heavily (Br. 22-23) on sections of FISA providing that FISA and Title III were the "exclusive means" by which electronic surveillance could be conducted (18 U.S.C. 2511(2)(f)), and providing for special procedures in "emergency situation[s]" (50 U.S.C. 1805(f)) or "during time of war" (50 U.S.C. 1811). Plaintiffs give short shrift, however, to an equally explicit section of FISA (50 U.S.C. 1809(a)) providing that electronic surveillance otherwise not in conformity with FISA is unlawful "except as authorized by statute." FISA itself thus makes clear that a further Congressional enactment, promulgated subsequent to FISA, may authorize electronic surveillance that would otherwise be proscribed by FISA. That would be true in any event, because one Congress cannot bind a subsequent Congress. See, *e.g.*, *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810); *Reichelderfer v. Quinn*, 287 U.S. 315, 318 (1932). Accordingly, the AUMF did not repeal FISA; it merely supplemented it, as contemplated by FISA's "except as authorized by statute" proviso.

Moreover, the canon that specific statutes ordinarily trump general ones supports the Government's, not plaintiffs', reading of the AUMF. In contrast to FISA, which was enacted many years ago to address electronic surveillance generally, the AUMF was enacted more recently to authorize the President to use all necessary force against al Qaeda. Thus, in the context here—surveillance of al Qaeda during

this time of war—it is the AUMF, not FISA, that is the more "specific" provision. *Hamdi* confirms that point. In *Hamdi*, the Court held that, even though the AUMF does not specifically refer to detention of enemy combatants, it satisfies the statutory requirement that no United States citizen be detained "except pursuant to an Act of Congress," 18 U.S.C. 4001(a). See *Hamdi*, 542 U.S. at 517 (plurality opinion). So too here, even though the AUMF does not specifically mention foreign intelligence gathering, it satisfies FISA's analogous "except as authorized by statute" proviso.

Plaintiffs are wide of the mark in suggesting (Br. 28) that amendments to FISA after September 11, 2001, show that Congress did not contemplate electronic surveillance outside the parameters of FISA. Many of the amendments either made technical corrections or removed longstanding impediments to FISA's effectiveness that had contributed to the maintenance of an unnecessary "wall" (see *In re Sealed Case*, 310 F.3d 717, 725-30 (FIS Ct. of Rev. 2002)) between foreign intelligence gathering and criminal law enforcement. While those amendments made important corrections in FISA's general application, they did not specifically address the interception of al Qaeda's communications during a time of war between that international terrorist organization and the United States.

Any further assessment of whether the AUMF authorizes the particular activities undertaken as part of the TSP—*i.e.*, whether the TSP is appropriately targeted to intercepting the enemy's communications—would turn on the precise

nature and scope of the surveillance. As discussed above, however, the facts relevant to that inquiry are protected from disclosure by the state secrets privilege.

[REDACTED TEXT—PUBLIC TEXT CONTINUES ON PAGE 42]

3. Even if the Court believed that the AUMF were ambiguous on this point, the Court should construe it to authorize the TSP in order to avoid the grave constitutional question that would result if FISA precluded the TSP—namely, whether Congress can prevent the President, as Commander-in-Chief, from engaging in international surveillance of the enemy during wartime that he determines to be essential to national security. See Gov. Br. 39-47. The constitutional avoidance canon is particularly important in the national security area, where "courts traditionally have been reluctant to intrude upon the authority of the Executive." *Department of Navy v. Egan*, 484 U.S. 518, 530 (1988). Invalidating a foreign intelligence-gathering program deemed essential by the President and his national security advisors during a time of war is not a step to be taken lightly.

Plaintiffs attempt to dismiss the grave constitutional question by repeatedly stating that the President must follow "duly" or "proper[ly]" or "permissibly" or "validly" enacted laws. *E.g.*, Br. 30, 31, 40. 63. Those statements simply beg the question whether FISA would be constitutional—*i.e.*, whether it would have been duly or properly or permissibly or validly enacted—if it purported to bar the President from undertaking international surveillance of the enemy during wartime that he believes to be essential to the national security. While Congress and the President have concurrent authority over some war powers, Congress may not "impede the President's ability to perform his constitutional duty." *Morrison v. Olson*, 487 U.S.

654, 691 (1988); see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring) (discussing limits on Congress's constitutional powers to bind the Executive). This Court should not reach that delicate constitutional question, both because it is unnecessary and inappropriate to do so under the constitutional avoidance canon, and because the facts relevant to the constitutional analysis are protected by the state secrets privilege. But if the Court were to reach that question, FISA, as construed by plaintiffs, would be unconstitutional.

a. Plaintiffs grossly understate the President's inherent authority, claiming that when it comes to war powers the most that may be said is that "the President possesses authority in some of these fields." Br. 33. In fact, the Constitution names the President as the Commander-in-Chief, U.S. Const., art. II, § 2, and "the object of the [Commander-in-Chief Clause] is evidently to vest in the [P]resident * * * such supreme and undivided command as would be necessary to the prosecution of a *successful* war." *United States v. Sweeny*, 157 U.S. 281, 284 (1895) (emphasis added). Because the "President alone" is "constitutionally invested with the entire charge of hostile operations," *Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73, 87 (1874), Congress may not "interfere[] with the command of the forces and the conduct of campaigns." *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring).

Indeed, the President's most basic constitutional duty is to protect the Nation against armed attack. In such circumstances, the President is "bound to resist force by force," he "must determine what degree of force the crisis demands," and he need not await Congressional sanction to defend the Nation. *The Prize Cases*, 67 U.S. (2 Black) 635, 668, 670 (1862). Thus, Congress specifically acknowledged in the AUMF that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." AUMF, pmbl.

The President's Commander-in-Chief powers include secretly gathering intelligence information about foreign enemies. See, *e.g.*, *Totten*, 92 U.S. at 106; *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). Thus, every federal appellate court to address the issue has concluded that, even in peacetime, the President has constitutional authority to conduct warrantless searches for foreign intelligence purposes. See *In re Sealed Case*, 310 F.3d at 742; *United States v. Butenko*, 494 F.2d 593, 602-06 (3d Cir. 1974) (en banc); *United States v. Truong*, 629 F.2d 908, 912-17 (4th Cir. 1980); *United States v. Brown*, 484 F.2d 418, 425-26 (5th Cir. 1973); *United States v. Buck*, 548 F.2d 871, 875-76 (9th Cir. 1977). As the FISA appellate court recently explained, "all the other courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information. * * * * We take for granted that

the President does have that authority and, assuming that is so, *FISA could not encroach on the President's constitutional power.*" *In re Sealed Case*, 310 F.3d at 742 (emphasis added).

b. To be clear, the point is not, as plaintiffs contend (Br. 37), that the President believes that FISA (as construed by plaintiffs) is unwise; it is that compliance with plaintiffs' understanding of FISA procedures would impermissibly impede the President's ability to discharge his constitutional duties in the context of the current conflict with al Qaeda—a foreign enemy that has already savagely attacked the United States, and against which Congress has authorized the use of all necessary force. The President and his top advisors have determined that the current threat to the United States demands that signals intelligence be carried out with a speed and methodology that cannot be achieved by seeking judicial approval through the traditional FISA process. While plaintiffs may take issue with the President's assessment, his judgment is well supported by the facts, including facts concerning the nature of the al Qaeda threat, the activities the President has directed, and the superiority of those activities to traditional FISA-authorized surveillance. See Gov. Br. 46-47; pp. 30-31, *supra*. At a minimum, adjudication of the constitutional issue would require careful consideration of the facts. But because those facts are protected by the state secrets privilege, that privilege requires dismissal of this litigation.

c. Plaintiffs attempt to avoid that conclusion by pointing to a handful of inapposite cases holding that distinguishable statutes were constitutional. Those rulings are not dispositive here because they do not erect broad legal rules that make the facts of this case irrelevant. Nor was the state secrets privilege applicable in those cases, because the underlying government programs, unlike the TSP, were not secret.

In *Youngstown*, the President responded to a threatened strike by seizing and running domestic steel mills in order to support a war effort. 343 U.S. at 582. That action bore a far less direct connection to the prosecution of war than the foreign intelligence gathering at issue here, which directly targets the enemy. Thus, it hardly follows from *Youngstown* that FISA is necessarily constitutional regardless of the extent to which it prevents the President from defending the country. To the contrary, Justice Jackson's concurrence in *Youngstown* emphasized that, although the President lacked power to intervene in "a lawful economic struggle between industry and labor," he would "indulge the widest latitude of interpretation to sustain [the President's] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society." *Id.* at 645. That is precisely what the President is doing here—defending the Nation from an international terrorist organization against which Congress has authorized the use of all necessary force.

Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804), involved the seizure of an American merchant ship sailing *from* France during the Quasi War with that country. Congress had authorized only the seizure of such ships sailing *to* France, and this Court held that the military lacked authority to seize such ships sailing *from* France. *See id.* at 176-77. Because the statute at issue there did not involve enemy forces, and directly regulated only the commerce of American merchant ships, it has little relevance here. Moreover, as discussed above, quite unlike *Barreme*, the pertinent statute passed by Congress during the armed conflict—the AUMF—directly supports the exercise of the war powers at issue here.

Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006), is also inapposite. In *Hamdan*, the Supreme Court stated that there was no dispute that Congress's enactment of Article 21 of the Uniform Code of Military Justice (UCMJ) could constitutionally govern the convening of military commissions to try captured enemy combatants. See 126 S. Ct. at 2773, 2774 n.23. The relevant constitutional provisions in *Hamdan* expressly vested Congress with specific authority to "make Rules concerning Captures on Land and Water" and to "define and punish * * * Offenses against the Law of Nations." U.S. Const. art. I, § 8, cl. 10-11. No similarly specific constitutional provision exists here, and plaintiffs' reading of FISA would impermissibly curtail the President's core Commander-in-Chief powers.

Moreover, FISA—unlike Article 21 of the UCMJ—contains an escape clause

("except as authorized by statute"). FISA is thus analogous to the statute at issue in *Hamdi*, which barred the detention of American citizens "except pursuant to an Act of Congress," 18 U.S.C. 4001(a). If anything, therefore, *Hamdi*, not *Hamdan*, provides the pertinent parallel to this case.

As a practical matter, plaintiffs' position boils down to the proposition that the Constitution imposes no limits on Congress's ability to direct the President's discharge of his Article II duties as Commander-in-Chief in a time of active armed conflict. It is therefore plaintiffs, not the Government, who urge this Court to depart from well-settled constitutional norms—a departure that would, ironically, erode the separation of powers in the name of protecting them.

IV. THE DISTRICT COURT'S INJUNCTION IS OVERBROAD.

The district court's injunction is overbroad because it enjoins the TSP as a whole, not only as applied to plaintiffs, and is therefore "more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Sharpe v. Cureton*, 319 F.3d 259, 273 (6th Cir. 2003). Gov. Br. 47-48. While plaintiffs cite cases in which courts entered injunctions affecting non-parties (Br. 65 n.60), they make no effort to show that such a course was necessary to afford complete relief to the plaintiffs in *this* case. For that reason as well, this Court should vacate the district court's permanent injunction against an intelligence-gathering program the President has deemed essential to protecting the Nation against al Qaeda.

RESPONSIVE BRIEF FOR CROSS-APPELLEES

A. Plaintiffs' cross-appeal of the district court's dismissal of their datamining claims is without merit. Plaintiffs allege that "the NSA engages in wholesale datamining of domestic and international communications" by using "artificial intelligence aids to search for keywords and analyze patterns in millions of communications at any given time." R.1 Complaint, ¶53. The district court correctly held that the state secrets privilege requires dismissal because "Plaintiffs cannot establish a *prima facie* case to support their data-mining claims without the use of privileged information and further litigation of this issue would force the disclosure of the very thing the privilege is designed to protect." Op. 14.

Although the Government has publicly acknowledged some general facts about the TSP's interception of international communications, it has never confirmed, described, or denied any *datamining*. As the record makes clear, disclosure of any information concerning any alleged datamining would threaten exceptionally grave harm to national security. See Negroponte Decl. ¶¶9-13; Quirk Decl. ¶¶5-9. Such disclosures "could give adversaries of this country valuable insight into the government's intelligence activities." *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899, 917 (N.D. Ill. 2006).

Plaintiffs' datamining claims must be dismissed for at least two reasons. First, the very subject matter of those claims is a state secret. See *Tenet*, 544 U.S. at 8;

Totten, 92 U.S. at 107. Indeed, the *Totten* bar applies with even greater force in this case than in *Totten* and *Tenet*. In those cases, it was publicly known that the Government employed spies. Here, however, there has never been any public acknowledgment of any asserted Government datamining of communications. Second, plaintiffs cannot establish a *prima facie* case because the state secrets privilege prevents them even from proving whether the activity they allege is occurring. See *Tenenbaum*, 372 F.3d at 777.

Plaintiffs urge that "the 'very subject matter' of the Datamining Program is no state secret," because "the media have widely reported that the NSA is sifting through millions of Americans' communications records." Br. 66. Media speculation, however, does not undo the state secrets privilege. Otherwise, private citizens could force the disclosure of highly classified state secrets merely by speculating about them in the media. Thus, in the *Hepting* case upon which plaintiffs rely, the district court correctly decided *not* to consider media reports in determining whether a matter was covered by the privilege, but instead to take into account only facts that the Government or a similarly situated party had publicly revealed. See *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 990-91 (N.D. Cal. 2006), appeal pending, Nos. 06-17132/17137 (9th Cir.); *Terkel*, 441 F. Supp. 2d at 913-15.

Plaintiffs argue that "[t]he Director of the Department of Homeland Security has publicly defended the NSA's Datamining Program." Br. 66. Yet plaintiffs rely

only on a news report stating that, "[w]hile refusing to discuss how the highly classified program works, [Secretary] Chertoff made it pretty clear that it involves 'data-mining.'" See http://www.reporter-times.com/?module=displaystory&story_id=30032&format=html. That statement simply reflects media speculation, not a Government confirmation or denial.

Plaintiffs contend that "[t]he district court should have permitted plaintiffs to try to prove their datamining claims with non-privileged evidence." Br. 68. As discussed above, however, all evidence concerning even the possible existence of the alleged program is privileged, making it impossible for the plaintiffs to prove a *prima facie* case or for the Government to defend against plaintiffs' claims.

Plaintiffs rely (Br. 70) on the *Hepting* court's refusal to dismiss similar claims on the theory that facts might be inadvertently or intentionally disclosed in the course of litigation concerning other claims. See *Hepting*, 439 F. Supp. 2d at 997-98. Here, there were no other claims proceeding in the district court following that court's judgment on the TSP claims. Far more important, "[c]ourts are not required to play with fire and chance further disclosure—inadvertent, mistaken, or even intentional—that would defeat the very purpose for which the privilege exists." *Sterling v. Tenet*, 416 F.3d 338, 344 (4th Cir. 2005). The state secrets privilege requires dismissal in order to protect state secrets; it does not sanction efforts to

encourage accidental disclosures of such secrets and the resulting harm to national security.

Plaintiffs' view (Br. 70) that the district court should have conducted an *ex parte/in camera* adjudication of the merits of their claims is likewise inconsistent with the state secrets privilege. When the Government has properly asserted the privilege, "the court should not jeopardize the security which the privilege is meant to protect by insisting on an examination of the evidence, even by the judge alone, in chambers." *United States v. Reynolds*, 345 U.S. 1, 10 (1953); accord *Sterling*, 416 F.3d at 343-44. Once the privilege is properly invoked, it is "designed not merely to defeat the asserted claims, but to preclude judicial inquiry" into matters implicating state secrets. See *Tenet*, 544 U.S. at 6 n.4.[10/]

B. [REDACTED TEXT—PUBLIC TEXT CONTINUES ON PAGE 53]

[10/] Neither *Molerio v. FBI*, 749 F.2d 815 (D.C. Cir. 1984), nor *Ellsberg v. Mitchell*, *supra*, supports plaintiffs' novel view that courts may secretly adjudicate the merits of their claim. In both cases, the D.C. Circuit ruled that a plaintiff's claims may be *dismissed* on the basis of materials supporting the Government's assertion of the privilege—materials that do not provide a complete showing for full merits adjudication—if those materials reveal a defense to the plaintiff's claims. Neither decision addresses whether a case could proceed to judgment for the plaintiff based on a secret adjudication.

CONCLUSION

The district court's judgment should be vacated and the case dismissed.

Respectfully submitted,

PAUL D. CLEMENT
Solicitor General

GREGORY G. GARRE
Deputy Solicitor General

DARYL JOSEFFER
Assistant to the Solicitor General

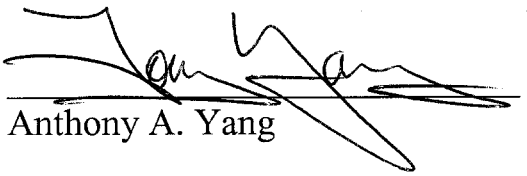
PETER D. KEISLER
Assistant Attorney General

DOUGLAS N. LETTER
THOMAS M. BONDY
ANTHONY A. YANG
Attorneys, Appellate Staff
Civil Division, Room 7513
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530
Telephone: (202) 514-3602

DECEMBER 2006

CERTIFICATE OF COMPLIANCE

I certify that this brief is in compliance with Rule 32(a)(7) of the Federal Rules of Appellate Procedure. The brief contains no more than 14,000 words, and was prepared in 14-point Times New Roman font using Corel WordPerfect 12.0.

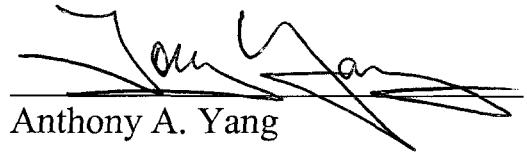


Anthony A. Yang

CERTIFICATE OF SERVICE

I certify that on this 4th day of December, 2006, I served two copies of the unclassified version of the foregoing brief upon the following counsel by FedEx next-day courier:

Ann Beeson, Esq.
Jameel Jaffer, Esq.
American Civil Liberties Union Foundation
Legal Department
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500



Anthony A. Yang