

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

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

Plaintiffs,

v.

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

Defendants.

Case No. 2:06cv10204

Hon. Anna Diggs Taylor

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

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1. In the fall of 2001, the President authorized the NSA to launch a secret electronic surveillance program (the “Program”).
 - A. President Bush has stated: “In the weeks following the terrorist attacks on our Nation, I authorized the National Security Agency, consistent with U.S. law and the Constitution, to intercept the international communications of people with known links to Al Qaida and related terrorist organizations.” Exh. A at 1881.
 - B. Attorney General Gonzales has stated: “The President has authorized a program to engage in electronic surveillance” Exh. B.
2. Under the Program, the NSA intercepts electronic communications.
 - A. General Michael Hayden, Principal Deputy Director for National Intelligence, has acknowledged that international calls are intercepted under the Program. Exh. C.
 - B. President Bush has noted that calls are intercepted. Exh. D at 1889.
 - C. Assistant Attorney General William E. Moschella has said: “As described by the President, the NSA intercepts certain international communications” Exh. F.
3. Under the Program, the NSA intercepts communications of people inside the United States.
 - A. Vice President Cheney has described the Program as follows: “It is the interception of communications, one end of which is outside the United States, and one end of which, either outside the United States or inside, we have reason to believe is al-Qaeda-connected.” Exh. E.
 - B. Assistant Attorney General William E. Moschella has said: “As described by the President, the NSA intercepts certain international communications into and out of the United States” Exh. F.
 - C. In describing surveillance under the Program, Attorney General Alberto Gonzales has said: “To the extent that there is a moderate and heavy communication involving an American citizen, it would be a communication where the other end of the call is outside the United States and where we believe that either the American citizen or the person outside the United States is somehow affiliated with al Qaeda.” Exh. B.
4. President Bush has reauthorized the Program more than thirty times. He has stated: “I’ve reauthorized this program more than 30 times since the September the 11th attacks” Exh. D at 1885.

5. President Bush intends to continue reauthorizing the Program. He has stated: “I intend to [reauthorize the Program] for so long as our Nation is – for so long as the Nation faces the continuing threat of an enemy that wants to kill American citizens.” Exh. D at 1885.
6. Under the Program, the NSA intercepts electronic communications without probable cause.
 - A. General Hayden has stated that the NSA targets for interception “calls . . . [the government has] a reasonable basis to believe involve al Qaeda or one of its affiliates.” Exh. C.
 - B. President Bush has said: “I authorized the interception of international communications of people with known links to Al Qaida and related terrorist organizations.” Exh. D at 1885.
 - C. President Bush has said: “Before we intercept these communications, the government must have information that establishes a clear link to these terrorist networks.” Exh. A at 1881.
 - D. Vice President Cheney has said: “It is the interception of communications, . . . one end of which . . . we have reason to believe is al-Qaeda-connected.” Exh. E.
 - E. Assistant Attorney General William E. Moschella has said: “As described by the President, the NSA intercepts certain international communications into and out of the United States of people linked to al Qaeda or an affiliated terrorist organization.” Exh. F.
 - F. Attorney General Gonzales has stated that the NSA intercepts “international communications involving someone we reasonably believe is associated with al Qaeda” Exh. G.
 - G. Attorney General Gonzales has stated that the NSA intercepts communications where “we have to have a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda.” Exh. B.
 - H. General Hayden has said: “We are going after very specific communications that our professional judgment tells us we have reason to believe are those associated with people who want to kill Americans.” Exh. C.
 - I. General Hayden has stated that the NSA intercepts calls that “we have a reasonable basis to believe involve al Qaeda or one of its affiliates.” Exh. C.

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

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

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

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

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

Exh. B.

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

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

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

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

- B. General Hayden has stated: “If FISA worked just as well, why wouldn't I use FISA? To save typing? No. There is an operational impact here, and I have two paths in front of me, both of them lawful, one FISA, one the presidential -- the president's authorization. And we go down this path because our operational judgment is it is much more effective. So we do it for that reason.” Exh. C.
 - C. General Hayden has said: “[T]his is a more . . . ‘aggressive’ program than would be traditionally available under FISA.” Exh. B.
 - D. General Hayden has said, “[t]he trigger [to intercept communications] is quicker and a bit softer than it is for a FISA warrant” Exh. C.
 - E. General Hayden has said in response to a question about the Program: “What you're asking me is, can we do this program as efficiently using the one avenue provided to us by the FISA Act, as opposed to the avenue provided to us by subsequent legislation and the President's authorization. Our operational judgment, given the threat to the nation that the difference in the operational efficiencies between those two sets of authorities are such that we can provide greater protection for the nation operating under this authorization.” Exh. B.
 - F. General Hayden has said: “In the instances where this program applies, FISA does not give us the operational effect that the authorities that the president has given us give us.” Exh. C.
 - G. Assistant Attorney General William E. Moschella has said: “[T]he President determined that it was necessary following September 11 to create an early warning detection system. FISA could not have provided the speed and agility required for the early warning detection system.” Exh. F.
11. Under the Program, the NSA intercepts communications without obtaining a warrant or any other type of judicial authorization.
- A. Attorney General Gonzales has stated: “[T]he program is triggered [by] a career professional at the NSA.” Exh. H
 - B. General Hayden has stated that “[t]he period of time in which we do this [i.e. intercept a communication] is, in most cases, far less than that which would be gained by getting a court order.” Exh. B.
 - C. During a press briefing by General Hayden, the following exchange occurred:
 - QUESTION: . . . Just to clarify sort of what's been said, from what I've heard you say today and an earlier press conference, *the change from going around the FISA law was to -- one of them was to lower the standard from what they call for, which is basically probable cause to a reasonable basis; and then to take it away from a federal court judge, the FISA court judge, and hand it*

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

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

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

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

Exh. C (emphasis added).

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

12. Under the Program, neither the President nor the Attorney General authorizes specific instances of surveillance. General Hayden has said of the communications intercepted under the Program: "These are communications that we have reason to believe are Al Qaeda communications: a judgment made by American intelligence professionals, not folks like me or political appointees" Exh. C.
13. Under the Program, an NSA "shift supervisor" is authorized to approve interceptions of communications.
 - A. General Hayden has stated that the judgment to target a communication "is made by the operational work force at the National Security Agency using the information available to them at the time, and the standard that they apply -- and it's a two-person standard that must be signed off by a shift supervisor, and

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

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

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

SCHUMER: OK. Good. Now, here's the next question I have: Has the government done this? Has the government searched someone's home, an American citizen, or office, without a warrant since 9/11, let's say?

GONZALES: To my knowledge, that has not happened under the terrorist surveillance program, and I'm not going to go beyond that.

SCHUMER: I don't know what that -- what does that mean, under the terrorist surveillance program? The terrorist surveillance program is about wiretaps. This is about searching someone's home. It's different. So it wouldn't be done under the surveillance program. I'm asking you if it has been done, period.

GONZALES: But now you're asking me questions about operations or possible operations, and I'm not going to get into that, Senator.

Exh. G.

- 15. The Program has irreparably harmed the First Amendment rights of Plaintiffs and others.
 - A. Plaintiffs are a group of prominent journalists, scholars, attorneys, and national nonprofit organizations who frequently communicate by telephone and email with people outside the United States, including in the Middle East and Asia. Exh. I, Diamond Decl. ¶¶2-8; Exh. J, Hollander Decl. ¶¶2-12, 14-15; Exh. K, McKelvey Decl. ¶¶2-7; Exh. L, Swor Decl. ¶¶2, 4, 7, 10.
 - B. Some of the plaintiffs, in connection with scholarship, journalism, or legal representation, communicate with people whom the United States government believes or believed to be terrorist suspects or to be associated with terrorist organizations. Exh. I, Diamond Decl. ¶9; Exh. J, Hollander Decl. ¶¶12-14, 17-24; Exh. K, McKelvey Decl. ¶8-10; Exh. L, Swor Decl. ¶¶5-7, 10.
 - C. Because of the nature of their calls and emails, and the identities and locations of those with whom they communicate, plaintiffs have a well-founded belief that

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

- D. Plaintiffs have ceased engaging in certain conversations on the phone and by email. Exh. I, Diamond Decl. ¶12; Exh. J, Hollander Decl. ¶¶16, 20, 23-25; Exh. K, McKelvey Decl. ¶16; Exh. L, Swor Decl. ¶¶9, 11-16.
- E. The Program is disrupting the ability of the plaintiffs to talk with sources, locate witnesses, conduct scholarship, engage in advocacy, and engage in other activity protected by the First Amendment. Exh. I, Diamond Decl. ¶¶11, 13-15; Exh. J, Hollander Decl. ¶¶12, 16, 25; Exh. K, McKelvey Decl. ¶14-15; Exh. L, Swor Decl. ¶¶9, 11-12, 14-16.
- F. The Program has exacted a financial cost from plaintiffs as well. Because the Program inhibits their ability to speak by telephone with sources, clients and others essential to their work, several of the plaintiffs now must travel long distances to meet personally with these individuals. Exh. I, McKelvey Decl. ¶¶16-17; Exh. J, Hollander Decl. ¶¶20, 23-25; Exh. L, Swor Decl. ¶¶13-14.

Respectfully submitted,

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