STANDING IN THE WAKE OF THE TERRORIST SURVEILLANCE PROGRAM: A MODIFIED STANDARD FOR CHALLENGES TO SECRET GOVERNMENT SURVEILLANCE

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I. INTRODUCTION

Shortly after the terrorist attacks of September 11, 2001, President Bush secretly authorized the National Security Agency (NSA) to conduct a warrantless wiretapping program known as the Terrorist Surveillance Program (TSP). Disclosed to the public by the *New York Times* in December of 2005, the TSP was designed to intercept international telephone calls and e-mail messages coming into and leaving the United States without court oversight.[1] A political firestorm ensued as critics claimed the program violated the Fourth Amendment, the Foreign Intelligence Surveillance Act (FISA), and other statutes and constitutional provisions.[2]

Legal challenges followed shortly thereafter, but the unique circumstances surrounding the TSP have severely limited the ability of plaintiffs to have a court review the merits of their claims. Since the program was made public, the Bush administration continuously acknowledged its existence and confirmed the general outline of the program, but refused to give further details in the interest of national security.[3] These factual circumstances created two threshold

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1. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1. The *New York Times* delayed publication of the story for a year, after Bush administration officials voiced concerns that it could hurt national security. *Id.*

2. *See infra* Part III.B.

3. *See infra* Part III. Bowing to political pressure, the administration now conducts the TSP with FISA court oversight. *See* Eric Lichtblau & David Johnston, *Court to Oversee U.S. Wiretapping in Terror Cases*, N.Y. TIMES, Jan. 18, 2007, at A1; Letter from Alberto R. Gonzales, U.S. Att'y Gen., to Patrick Leahy, Chairman, Comm. on the Judiciary, U.S. Senate and Arlen Specter, Ranking Minority Member, Comm.

issues facing every case challenging the TSP: whether the state secrets privilege required that the case be dismissed and whether the plaintiffs could establish standing.

Courts have universally accepted the state secrets privilege to deny plaintiffs' demands for further discovery on the details of the TSP, such as whether they were personally surveilled under the program. This has forced plaintiffs to base their claims solely on information confirmed by the government and telecommunications companies. The government's successful invocation of the state secrets privilege significantly impairs plaintiffs' ability to establish standing. Plaintiffs have found it nearly impossible to satisfy the standing requirement, which requires that a plaintiff allege he or she suffered an actual, particularized injury, without evidence of being personally subject to surveillance, evidence denied to them by the application of the state secrets privilege.

Through these two judicially created barriers—the state secrets privilege and standing—the courts have removed themselves from the constitutional debate and have denied individuals the possibility of redress for statutory and constitutional violations. In an inter-branch power struggle affecting individuals' rights, the traditional role of the judiciary is to be the guardian of such rights and the Constitution.

This Note calls on the courts to reassert their place in the constitutional order by applying a broader, more relaxed standing analysis in challenges to secret government surveillance programs such as the TSP. Part II lays out the contours of standing—the purpose the doctrine serves in the constitutional scheme, its current manifestation, and its historical development. It also provides a brief introduction to the state secrets privilege. Part III provides background for the cases challenging the TSP, including the known history of the program and the legal issues it raises. Part IV delves into the individual cases challenging the TSP, focusing on the standing analysis in each. Part V then analyzes standing doctrine as applied in these cases, and presents a modified method for standing analysis in future cases involving claims against secret government surveillance.

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on the Judiciary, U.S. Senate (Jan. 17, 2007), http://graphics8.nytimes.com/packages/pdf/politics/20060117gonzales_letter.pdf. While the Bush administration argues that its voluntary compliance with FISA renders challenges to the TSP moot, the only judge to reach the issue found that the administration's statements that the President maintains the authority to reauthorize a warrantless wiretapping program at any time did not fall under the voluntary cessation exception to the mootness doctrine. ACLU v. Nat'l Sec. Agency, 493 F.3d 644, 711-13 (6th Cir. 2007) (Gilman, J., dissenting), *cert. denied*, 128 S. Ct. 1334 (2008).

II. STANDING DOCTRINE

A. *Standing Defined*

Standing is essentially a question of who may bring a case before a federal court.[4] The doctrine is applied to ensure that a plaintiff has a sufficient personal interest in the outcome of a case.[5] The stated purposes of standing include ensuring that litigation is both adverse and effective,[6] guaranteeing that only those most directly affected are able to raise the issues in question,[7] and promoting separation of powers by limiting the federal judiciary's ability to usurp policy decisions of the elected branches.[8]

Derived from its interpretation of the "case or controversy" requirement of Article III,[9] the Supreme Court has developed an "irreducible constitutional minimum" of three requirements to establish standing in every case.[10] Succinctly stated, a plaintiff must show "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."[11]

Thus, a plaintiff must first allege to "have suffered an 'injury in fact,'" which the Court describes as "an invasion of a legally protected interest which is . . . concrete and particularized, [and] . . . 'actual or imminent, not conjectural or hypothetical.'"[12] A plaintiff seeking prospective relief in the form of an injunction or declaratory judgment has the further burden of showing a substantial likelihood

4. Baker v. Carr, 369 U.S. 186, 204 (1962).

5. *See* Warth v. Seldin, 422 U.S. 490, 498 (1975) ("In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.").

6. *See Baker*, 369 U.S. at 204 (observing that the gist of standing is whether "the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions").

7. *See* Singleton v. Wulff, 428 U.S. 106, 113-14 (1976); Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 306-10 (1979).

8. *See* Allen v. Wright, 468 U.S. 737, 752 (1984) ("[S]tanding is built on a single basic idea—the idea of separation of powers."); *Warth*, 422 U.S. at 498 ("[Standing] is founded in concern about the proper—and properly limited—role of the courts in a democratic society."); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

9. *See* U.S. CONST. art. III, § 2, cl. 1. Ripeness, mootness, and the prohibition against advisory opinions are also rooted in the "case or controversy" requirement.

10. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

11. *Allen*, 468 U.S. at 751.

12. *Lujan*, 504 U.S. at 560 (citation omitted).

of future harm to satisfy an injury in fact.[13] Second, a plaintiff must show causation, that is, that the injury is "fairly . . . trace[able]" to the defendant's conduct and not to the action of a third party.[14] Third, a plaintiff must show that it is "'likely,' as opposed to merely 'speculative,'" that a favorable court decision will redress the injury.[15] These constitutional requirements—injury in fact, causation, and redressability—are well established and must be present in every case brought before a federal court.[16]

In addition to the constitutional requirements of standing, the Court has fashioned three prudential principles that bear on the standing inquiry.[17] These prudential requirements are not rooted in the "case or controversy" requirement of Article III, but are judicially self-imposed and may be overridden by Congress.[18] One such prudential requirement is the limitation on third-party standing, which requires a plaintiff to assert his or her own claim rather than the claim of another.[19] Standing can also be denied where a plaintiff asserts a "generalized grievance[]," an injury "pervasively shared and most appropriately addressed in the representative branches."[20]

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13. City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983) (holding that plaintiff subjected to a police chokehold in the past did not have standing to enjoin further police use of chokeholds because he failed to demonstrate a likelihood that he would be subjected to a police chokehold in the future).

14. *Lujan*, 504 U.S. at 560 (alteration in original) (citing Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976)).

15. *Id.* at 561 (citing *Simon*, 426 U.S. at 38, 43).

16. *See* cases cited *supra* notes 10-15.

17. Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 400 n.16 (1987); Warth v. Seldin, 422 U.S. 490, 499 (1975).

18. *See, e.g.*, *Warth*, 422 U.S. at 501 ("Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules."); Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973) ("Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute.").

19. *See Warth*, 422 U.S. at 499 ("[T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."); *see also* United Food and Commercial Workers Union Local 751 v. Brown Group, 517 U.S. 544, 557 (1996) (explaining that the general prohibition on third-party standing is judicially self-imposed and prudential in nature rather than constitutionally mandated); Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 99-100 (1979) (noting that prudential principles permit the denial of standing to a plaintiff who asserts the legal interests of third parties rather than his own); Singleton v. Wulff, 428 U.S. 106, 113-14 (1976) (explaining the rationale behind the limitation on third-party standing).

20. Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, 454 U.S. 464, 475 (1982); *see also Warth*, 422 U.S. at 499 (stating that the Court will deny standing "when the asserted harm is a 'generalized grievance' shared in a substantially equal measure by all or a large class of citizens"). The rule against generalized grievances is applied when a plaintiff asserts standing as a citizen or

Finally, the "zone of interests" test, applied principally in challenges to agency conduct under the Administrative Procedures Act,[21] mandates that the plaintiff be within a class of people whose interests are protected by the relevant statute.[22] Taken together, these strands of prudential standing doctrine closely mirror the constitutional requirements of standing and serve similar purposes.[23] Their import can be significant and, in some circumstances, can result in the denial of standing even where plaintiffs otherwise satisfy Article III requirements.[24]

B. Origins and Development of Standing

For a constitutional doctrine that is often relied upon and repeated, the law of standing is a relatively recent development.[25] The Constitution makes no explicit reference to "standing" or "injury in fact"; it only provides that "[t]he judicial Power shall extend to" several types of "[c]ases" and "[c]ontroversies."[26] The Framers had little to say about the case and controversy language of Article III

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taxpayer to challenge government conduct. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216-17 (1974). In a more recent opinion, the Court indicated that the bar against citizen standing is constitutionally based and cannot be overridden by a congressional statute. *Lujan*, 504 U.S. at 576. In holding the citizen-suit provision of the Endangered Species Act of 1973 did not confer standing on plaintiffs who failed to allege a cognizable injury, Justice Scalia, relying on separation of powers principles, reasoned that the rule against general grievances was based on the case or controversy requirement of Article III. *Id.* at 576-78.

21. *Clarke*, 479 U.S. at 400 n.16.

22. *See, e.g.*, Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970) ("[Standing] concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."). The test is "not meant to be especially demanding," *Clarke*, 479 U.S. at 399, but it has been used to deny standing. *See* Air Courier Conference v. Am. Postal Workers Union, 498 U.S. 517 (1991) (denying standing to postal employees challenging the United States Postal Service's suspension of the Private Express Statutes, and finding that these provisions were meant to ensure postal service to the public and not to protect employment of postal workers).

23. *See Warth*, 422 U.S. at 500 (stating that prudential limitations are "closely related to Art. III concerns").

24. *Id.*

25. For a thorough yet concise history of standing, see Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 168-97 (1992). Professor Sunstein traces the doctrine from its antecedents in early English and American practice to its current formulation as a distinct body of law. He relies heavily on three sources: Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1269-82 (1961); Stephen L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1394-425 (1988).

26. U.S. CONST. art. III, § 2, cl. 1.

during the constitutional debates.[27] Prior to the early twentieth century, courts applied the doctrine of *damnum absque injuria* as a limitation on who could bring a suit; this required the plaintiff to have a cause of action created by the legislature or rooted in the common law or equity.[28] The birth of standing doctrine is identified as the reasoning in the Supreme Court's decision of *Frothingham v. Mellon,* decided with *Massachusetts v. Mellon*[29] in 1923, and the Court did not refer to the term "standing" as an Article III limitation on judicial review until 1944.[30]

The initial development of standing doctrine was an outcome of the constitutional battles over the emergence of the administrative state in the 1930s.[31] Justices Brandeis and Frankfurter, seen as the principal architects of the modern standing doctrine, invoked several justiciability doctrines as a means to prevent an activist Supreme Court from holding New Deal regulatory legislation unconstitutional and thwarting democratic processes.[32] In a number of opinions,[33] they laid down the foundations upon which modern standing is based,[34] and helped formulate the "legal interest" test for determining standing: a plaintiff must demonstrate the invasion of a "legal right" based in common law or statutory law.[35]

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27. *See* James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, the Injury-in-Fact Rule, and the Framers' Plan for Federal Courts of Limited Jurisdiction*, 54 RUTGERS L. REV. 1, 38-39 (2001); Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1763-64 (1999); Sunstein, *supra* note 25, at 173.

28. Pierce, *supra* note 27, at 1764-66; Sunstein, *supra* note 25, at 169-71. The term is defined as "[l]oss or harm that is incurred from something other than a wrongful act and occasions no legal remedy." BLACK'S LAW DICTIONARY 420-21 (8th ed. 2004).

29. 262 U.S. 447 (1923); *see also* Pierce, *supra* note 27, at 1765, 1768; William M. Wiecek, *The Debut of Modern Constitutional Procedure*, 26 REV. LITIG. 641, 659 (2007).

30. Stark v. Wickard, 321 U.S. 288 (1944); *see* Leonard & Brant, *supra* note 27, at 7; Pierce, *supra* note 27, at 1765; Sunstein, *supra* note 25, at 169.

31. Pierce, *supra* note 27, at 1767; Sunstein, *supra* note 25, at 179-80.

32. Pierce, *supra* note 27, at 1767-68; Sunstein, *supra* note 25, at 179-80.

33. *E.g.,* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 154-55 (1951) (Frankfurter, J., concurring); Coleman v. Miller, 307 U.S. 433, 460-70 (1939) (Frankfurter, J., concurring); Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 341-48 (1936) (Brandeis, J., concurring); Fairchild v. Hughes, 258 U.S. 126, 129-30 (1922).

34. *See* Leonard & Brant, *supra* note 27, at 9-13; Sunstein, *supra* note 25, at 179-81; Wiecek, *supra* note 29, at 658-63.

35. *See, e.g.,* Tenn. Power Co. v. Tenn. Valley Auth., 306 U.S. 118, 137 (1939) ("[O]ne threatened with direct and special injury . . . which . . . would be a violation of his legal rights, may challenge the validity of the [action]. The principle is without application unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."); *see also* Leonard & Brant, *supra* note 27, at 8-9, 15-17 (explaining that claims proceed if defendant affects plaintiff's rights); Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 306

As the administrative state continued its regulatory reach and the public rights model of American law took hold, the Warren Court began to expand the legal interest test to grant standing to beneficiaries of regulatory programs in challenges to government action.[36] Prior to this development, the "legal interest" test, based on a private rights model of litigation, allowed standing only to objects of regulation.[37] This view became less tenable because of fears of agency "capture" and the belief that suits by beneficiaries would ensure agency fidelity to legislative regulation.[38] The Warren Court's trend toward liberalizing the standing requirement to allow more litigants to challenge government decisions ultimately led to the overthrow of the "legal interest" test and the adoption of the "injury-in-fact" requirement in the 1970 decision of *Association of Data Processing Service Organizations, Inc. v. Camp*.[39] In an opinion written by Justice Douglas, the Court concluded that the test for standing "is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise,"[40] and that "[t]he 'legal interest' test goes to the merits. The question of standing is different."[41] By making the question of standing turn on facts rather than law and distancing the standing issue from the merits of the claim, Justice Douglas and his liberal colleagues sought to simplify the standing inquiry and open the federal courts to a vast number of plaintiffs who previously would have been denied access.[42]

This liberalized formulation of standing did not last long. In the 1970s, the Burger Court began a trend of constricting standing doctrine due to fear of the potential flood of litigation[43] and, more importantly, to minimize the effect of activist courts intervening in

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(2002) (claiming that the Court was limiting the "complexity of standing" by only asking for a "demonstration of layman's injury").

36. *See* Leonard & Brant, *supra* note 27, at 16-18; Nichol, *supra* note 35, at 305-06; Sunstein, *supra* note 25, at 183-84.

37. *See* Leonard & Brant, *supra* note 27, at 8-9, 16-18; Nichol, *supra* note 35, at 305-06; Sunstein, *supra* note 25, at 183-84.

38. *See* Leonard & Brant, *supra* note 27, at 17-18; Sunstein, *supra* note 25, at 183-84.

39. 397 U.S. 150, 152-53 (1970). The case also introduced the zone-of-interests test. *See supra* note 22 and accompanying text.

40. *Ass'n of Data Processing*, 397 U.S. at 152.

41. *Id.* at 153.

42. *See* Leonard & Brant, *supra* note 27, at 19; Nichol, *supra* note 35, at 306.

43. *E.g.*, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 222-23 (1974) (denying citizen standing to plaintiffs challenging the ability of members of Congress to serve in the military reserve under the Incompatibility Clause); United States v. Richardson, 418 U.S. 166, 170 (1974) (denying taxpayer standing to plaintiffs challenging the secrecy of the CIA budget under the Accounts Clause); *see* Nichol, *supra* note 35, at 306.

the domain of the democratically elected branches of government.[44] The Burger Court narrowed the scope of harm that would satisfy injury in fact,[45] added the requirements of causation and redressability,[46] and made each of the three requirements constitutional by grounding them in Article III.[47]

The Rehnquist Court continued to tighten the standing inquiry, though its exclusive rationale for doing so was separation of powers.[48] Prior to *Allen v. Wright*,[49] the Court invoked separation of powers reasoning to avoid conflicts with the democratically elected branches.[50] *Allen* marked the Court's first clear expression of standing as a doctrine that subordinates the judiciary to the legislative and executive branches,[51] concluding that "standing is built on a single basic idea—the idea of separation of powers."[52]

The influence on the Court of Justice Scalia's conception of standing and its relation to separation of powers is undeniable. In a law review article written in 1983, Antonin Scalia, then a sitting judge of the U.S. Court of Appeals for the D.C. Circuit, argued that "standing is a crucial and inseparable element of [separation of powers], whose disregard will inevitably produce . . . an overjudicialization of the processes of self-governance."[53] Scalia went on to describe the relationship between the justiciability doctrine and separation of powers: "[S]tanding roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and excludes them from the even more undemocratic role of prescribing how the other two branches

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44. *See* Leonard & Brant, *supra* note 27, at 20-23; Pierce, *supra* note 27, at 1768-69.

45. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 498-99 (1975). The Court stated a more robust version of injury: "[T]he plaintiff . . . must allege a *distinct* and *palpable* injury to himself." *Id.* at 501 (emphasis added).

46. *See, e.g.*, Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976) ("[W]hen a plaintiff's standing is brought into issue the relevant inquiry is whether . . . the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation."); Linda R.S. v. Richard D. 410 U.S. 614, 617 (1973) ("[P]laintiffs must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction.").

47. *See, e.g., Simon*, 426 U.S. at 38; *Warth*, 422 U.S. at 498-99.

48. Leonard & Brant, *supra* note 27, at 23.

49. 468 U.S. 737 (1984).

50. Leonard & Brant, *supra* note 27, at 24.

51. *Id.* at 25.

52. *Allen*, 468 U.S. at 752.

53. Scalia, *supra* note 8, at 881.

should function in order to serve the interest *of the majority itself*."[54] Such reasoning was applied by Justice Scalia in a number of Supreme Court standing decisions, none more significant than the landmark decision of *Lujan v. Defenders of Wildlife*.[55]

In *Lujan*, members of environmental organizations challenged a rule promulgated by the Secretary of the Interior that rendered the Endangered Species Act of 1973 (ESA) inapplicable to geographic areas outside the United States and the high seas.[56] The Court held that plaintiffs' intentions to observe allegedly threatened species in foreign territories, with no concrete future plans to do so, was not an imminent harm that satisfies an injury in fact.[57] More significantly, the Court held that the citizen-suit provision of the ESA, which conferred standing on "any person" to challenge government violation of the Act, was an impermissible congressional attempt to convert a public interest right into an individual right cognizable by the courts.[58] Justice Scalia, in language reminiscent of his 1983 article, reasoned that allowing Congress to supersede the "concrete injury requirement" of Article III by passing citizen-suit provisions would permit the transfer of the President's duty to faithfully execute the laws to the courts; he concluded that this vision of the Court's role has always been rejected.[59]

The formulation of standing expressed in *Lujan* remains the current statement of the doctrine.[60] Some subsequent decisions seem to indicate the Court's desire to back away from complying fully with *Lujan*'s strict standing requirements,[61] and no case has gone beyond the limits of *Lujan*. Yet in its most recent standing decision, the Court denied taxpayer standing to an Establishment Clause challenge to President Bush's Faith-Based and Community Initiatives program.[62] The case marked a further limitation to the

54. *Id.* at 894.

55. 504 U.S. 555 (1992).

56. *Id.* at 557-58.

57. *Id.* at 564.

58. *Id.* at 571-78.

59. *Id.* at 576-78.

60. *See* Leonard & Brant, *supra* note 27, at 25-33.

61. *See, e.g.*, Massachusetts v. EPA, 127 S. Ct. 1438 (2007) (holding that the risk of harm to State from the EPA's refusal to regulate greenhouse emissions is a sufficient injury for standing); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000) (holding that pollutant discharges into river affecting plaintiffs' recreational, aesthetic, and economic interests is a sufficient injury for standing); FEC v. Akins, 524 U.S. 11 (1998) (holding that voters' deprivation of information regarding political committee's campaign contributions is a sufficient injury for standing).

62. Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553 (2007).

Warren Court's signature case representing the liberalization of standing, *Flast v. Cohen*.[63]

C. The State Secrets Privilege

The state secrets privilege is a common law evidentiary doctrine that protects disclosure of information which could jeopardize national security.[64] Assertion of the privilege can only be made by the head of an executive agency who personally determines that the information is a state secret.[65] The court must then determine if the privilege applies using a "reasonable danger" standard: whether there is a reasonable danger that state secrets will be revealed.[66]

A determination that the privilege applies has significant implications and can affect the case in three different ways.[67] First, the privilege can bar the admission of evidence, forcing the plaintiff to establish a prima facie case without potentially crucial evidence, and thus creating a significant risk that the case will be dismissed.[68] Second, a case can be subject to summary judgment in favor of the defendant if the privilege bars the admission of evidence that would provide the defendant with a valid defense.[69] Finally, "'notwithstanding the plaintiff's ability to produce nonprivileged evidence, if the 'very subject matter of the action' is a state secret, then the court should dismiss the plaintiff's action based solely on the invocation of the state secrets privilege.'"[70]

III. THE TERRORIST SURVEILLANCE PROGRAM

A. Background

On December 16, 2005, the *New York Times* revealed that shortly after the terrorist attacks of September 11, 2001, President Bush signed an order secretly authorizing the NSA to eavesdrop,

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63. 392 U.S. 83 (1968) (holding that taxpayers have standing to challenge congressional action made pursuant to the Taxing and Spending Clause under constitutional provisions that act as a limit on the taxing and spending power, such as the Establishment Clause).

64. Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1935-36 (2007). The state secrets privilege was first recognized in *United States v. Reynolds*, 345 U.S. 1 (1953). Frost, *supra*, at 1936.

65. *Reynolds*, 345 U.S. at 7-8.

66. *Id.* at 10 ("It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.").

67. *See* Frost, *supra* note 64, at 1937.

68. *Id.*

69. *Id.*

70. *Id.* (quoting Kasza v. Browner, 133 F.3d 1159, 1166 (9th Cir. 1998)).

without judicially-approved warrants, on the international telephone calls and e-mails of potentially thousands of people inside the United States.[71] This prompted a number of public statements from the Bush administration acknowledging the program's existence while providing few details regarding the contours of the program. On the day after the *New York Times* article was published, President Bush confirmed the existence of the TSP, acknowledging he authorized the NSA "to intercept the international communications of people with known links to al Qaeda and related terrorist organizations," and that he reauthorized the TSP more than thirty times.[72]

At a later press briefing, then-Attorney General Alberto Gonzales disclosed that the TSP (1) intercepts the contents of communications (2) between a person in the United States and a person located outside the United States, (3) one of whom the NSA reasonably believes is affiliated with al Qaeda.[73] The press briefing also revealed that the surveillance was done without any judicial oversight or pursuant to a court ordered warrant.[74] Instead, oversight of the program was left to officials in the NSA and the Justice Department, and NSA shift supervisors made decisions on which communications to intercept.[75]

Disclosure of the program stirred a storm of political controversy, with backlash coming from both sides of the aisle.[76] Just days after the revelation, a judge serving on the Foreign Intelligence Surveillance Court (FISC) resigned in protest of President Bush's authorization of the TSP.[77] Republican Senator Arlen Specter,

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71. Risen & Lichtblau, *supra* note 1. President Bush first authorized the NSA to conduct such warrantless wiretapping in October 2001, after passage of the Authorization for Use of Military Force, but before passage of the Patriot Act. Letter from Alberto R. Gonzales, U.S. Att'y Gen., to Arlen Specter, Chairman, Comm. on the Judiciary, U.S. Senate (Feb. 28, 2006), http://www.cdt.org/security/nsa/20060228gonzalez.pdf.

72. George W. Bush, President's Radio Address (Dec. 17, 2005), http://www.whitehouse.gov/news/releases/2005/12/20051217.html.

73. Alberto R. Gonzales, U.S. Att'y Gen. & General Michael Hayden, Principal Deputy Dir. for Nat'l Intelligence, Press Briefing (Dec. 19, 2005) [hereinafter Press Briefing], http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html. Attorney General Gonzales stated that the program intercepts communications where "we 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." *Id.*

74. *Id.*

75. *Id.*

76. *See* Dan Eggen & Charles Lane, *On Hill, Anger and Calls for Hearings Greet News of Stateside Surveillance*, WASH. POST, Dec. 17, 2005, at A1; *see also* Douglas Jehl, *Specter Vows a Close Look at Spy Program*, N.Y. TIMES, Jan. 16, 2006, at A11.

77. Carol D. Leonnig & Dafna Linzer, *Spy Court Judge Quits in Protest*, WASH. POST, Dec. 21, 2005, at A1.

Chairman of the Judiciary Committee, called for committee hearings on the TSP, saying that Senate Republicans would not give the President "a blank check" when determining the program's legality.[78] The Senate Judiciary Committee held hearings on the legality of the TSP beginning on February 6, 2006, where Attorney General Gonzales received pointed questioning from several Republican Senators.[79] The political fallout continued with the debate between Congress and the President over granting legal immunity to telecom companies who cooperated with the NSA in conducting the TSP.[80]

On May 11, 2006, *USA Today* reported the existence of a second portion of the NSA's surveillance program in which several major telecommunications companies allegedly provided the government access to telephone calling records without a court order or warrant.[81] These records were then used to amass a database consisting of billions of domestic telephone calls that the NSA used "to analyze calling patterns in an effort to detect terrorist activity."[82] Unlike the warrantless wiretapping program, the data-mining program did not capture the contents of telephone conversations, dealt exclusively with domestic communications,[83] and has been neither officially confirmed nor denied by either the government or the telecom companies.[84]

Prior to the implementation of the TSP, the Foreign Intelligence Surveillance Act of 1978 (FISA) provided the sole legal framework for the President to conduct domestic surveillance for foreign intelligence gathering.[85] FISA provides "the exclusive means by which [foreign intelligence] electronic surveillance . . . and the interception of domestic wire and oral communications may be

78. Jehl, *supra* note 76.

79. *Wartime Executive Power and the National Security Agency's Surveillance Authority: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006), http://judiciary.senate.gov/hearing.cfm?id=1727; Sheryl Gay Stolberg, *Balancing Act by Democrats at Hearing*, N.Y. TIMES, Feb. 7, 2006, at A17.

80. Eric Lichtblau, *House Steers Its Own Path on Wiretaps*, N.Y. TIMES, Mar. 11, 2008, at A17.

81. Leslie Cauley, *NSA Has Massive Database of Americans' Phone Calls*, USA TODAY, May 11, 2006, at A1.

82. *Id.*

83. *Id.*

84. Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 989 (N.D. Cal. 2006).

85. 50 U.S.C. §§ 1801-1871 (2006), *amended by* Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552. FISA was amended in August 2007 to allow the government to conduct warrantless surveillance of the international communications of people inside the United States so long as there is reasonable belief the target of the surveillance is overseas. James Risen, *Bush Signs Law to Widen Reach for Wiretapping*, N.Y. TIMES, Aug. 6, 2007, at A1. The new law sunset in February 2008. *Id.*

conducted."[86] Passed by Congress in response to the executive surveillance abuses of the Kennedy, Johnson, and Nixon administrations,[87] the Act sought to balance the need for executive discretion in national security matters with the need to preserve individuals' privacy interests.[88]

FISA created the FISC, a special court consisting of federal district court judges appointed by the Chief Justice of the U.S. Supreme Court, to review applications for intelligence surveillance.[89] These applications require a federal official to certify that "a significant purpose of the surveillance is to obtain foreign intelligence information."[90] To approve the surveillance, the FISC must find that "there is probable cause to believe that . . . the target of the electronic surveillance is a foreign power or agent of a foreign power."[91] The TSP was specifically authorized to forego these procedures in conducting its intelligence surveillance.[92]

FISA also contains provisions that permit federal agencies to conduct surveillance without obtaining a warrant. Section 1802 authorizes warrantless electronic surveillance that is solely directed at communications "between or among foreign powers,"[93] or at technical intelligence from property under the control of a foreign power, and "there is no substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person is a party."[94]

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86. 18 U.S.C. § 2511(2)(f) (2006). This statute, known as Title III of the Omnibus Crime Control and Safe Streets Act of 1968, is the domestic counterpart to FISA and governs all domestic electronic surveillance unrelated to foreign intelligence. *Id.* §§ 2510-2522 (as amended by FISA).

87. *See* Fletcher N. Baldwin, Jr. & Robert B. Shaw, *Down to the Wire: Assessing the Constitutionality of the National Security Agency's Warrantless Wiretapping Program: Exit the Rule of Law,* 17 U. FLA. J.L. & PUB. POL'Y 429, 443-45 (2006); Adam Burton, *Fixing FISA for Long War: Regulating Warrantless Surveillance in the Age of Terrorism*, 4 PIERCE L. REV. 381, 385-87 (2006). For a history of judicial and congressional responses to executive wiretapping, see Baldwin & Shaw, *supra*, at 435-49.

88. *See* Baldwin & Shaw, *supra* note 87, at 444-46; Burton, *supra* note 87, at 387.

89. 50 U.S.C. § 1803(a) (2006).

90. *Id.* § 1804(a)(7)(B). FISA originally required that "'the purpose' of the surveillance was to acquire foreign intelligence." Burton, *supra* note 87, at 389-90. In 2002, Congress amended FISA through the Patriot Act to lower the standard from "the purpose" to "a significant purpose" in order to break down the "wall" that prevented communication between law enforcement and intelligence gathering agencies that some critics say contributed to intelligence failures in preventing the terrorist attacks on September 11. *Id.*

91. § 1805(a)(3)(A).

92. *See* Press Briefing, *supra* note 73.

93. § 1802(a)(1)(A)(i).

94. *Id.* § 1802(a)(1)(B).

Section 1805 authorizes emergency employment of surveillance if the Attorney General reasonably determines that there is insufficient time to obtain a FISC order authorizing the surveillance and that a factual basis for such an order exists.[95] This authorization requires the Attorney General to seek and obtain a FISC warrant within seventy-two hours after the employment of electronic surveillance.[96] Finally, § 1811 permits the Attorney General to authorize warrantless electronic surveillance for up to fifteen days following a congressional declaration of war.[97] None of these FISA exceptions for warrantless surveillance apply to the TSP, and defenders of the program have not invoked them as legal justifications.[98]

B. Legal Issues Raised by the TSP

The media's disclosure of the TSP's existence initiated a political firestorm as critics and supporters of the Bush administration armed themselves with arguments on the legality of the program. These arguments present important statutory and constitutional questions centered on FISA, the separation of powers between Congress and the executive in war and foreign affairs, and the Fourth Amendment.

1. The TSP and FISA

Although it is clear that the TSP does not comport with FISA's warrant procedures or the warrantless exceptions for conducting electronic surveillance, defenders of the program claim Congress provided a statutory exception to FISA requirements by passing the Authorization for Use of Military Force (AUMF) on September 18, 2001.[99] The AUMF authorized the President

> to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[100]

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95. *See* § 1805(f).

96. *Id.*

97. § 1811.

98. *See, e.g.*, U.S. Department of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President (Jan. 19, 2006) [hereinafter DOJ White Paper], http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/nsa/dojnsa11906wp.pdf; Press Briefing, *supra* note 73.

99. Authorization For Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) [hereinafter AUMF] (codified at 50 U.S.C. § 1541 (2001)).

100. *Id.* § 2(a).

Under FISA's criminal sanctions, § 1809(a)(1) provides: "A person is guilty of an offense if he intentionally engages in electronic surveillance under color of law *except as authorized by statute.*"[101] The Bush administration argues that the "all necessary and appropriate force" clause of the AUMF grants authorization to conduct warrantless electronic surveillance, and thus provides statutory authorization to ignore FISA procedures.[102] Relying on *Hamdi v. Rumsfeld,* which construed the AUMF as authorizing detention of American citizens as enemy combatants,[103] the Bush administration argues that the general grant to use force likewise includes the power to conduct the TSP.[104] This broad reading of the AUMF is based on the Bush administration's belief that warrantless surveillance of an enemy during an armed conflict, like the detention of enemy combatants, is a "fundamental incident of the use of military force" that is within the President's discretion when given the authorization to use force.[105]

Critics of the program reject the argument that the AUMF supersedes FISA and authorizes warrantless domestic wiretapping.[106] They point out that FISA deals specifically with warrantless surveillance during wartime, providing the President with a fifteen day exception, and argue that this should be interpreted as Congress's will regarding the subject, not the AUMF, which is silent as to surveillance.[107] Critics also contend that the exclusivity provision of FISA, establishing that the act will be the "exclusive means by which electronic surveillance" is conducted, confirms Congress intended FISA to govern any executive wiretapping programs.[108] Distinguishing *Hamdi,* critics argue that Congress did not specifically speak to the issue of detention of citizens in wartime,[109] that surveillance of citizens is not a

101. 50 U.S.C. § 1809(a)(1) (2006) (emphasis added).

102. DOJ White Paper, *supra* note 98, at 2-3; *see also* John Yoo, *The Terrorist Surveillance Program and the Constitution,* 14 GEO. MASON L. REV. 565, 591-92 (2007).

103. 542 U.S. 507, 517 (2004).

104. DOJ White Paper, *supra* note 98, at 2-3; Yoo, *supra* note 102, at 591-92.

105. DOJ White Paper, *supra* note 98, at 2-3.

106. *See, e.g.,* Baldwin & Shaw, *supra* note 87, at 450-56; Curtis A. Bradley et al., *February 2, 2006 Letter from Scholars and Former Government Officials to Congressional Leadership in Response to Justice Department Whitepaper of January 19, 2006,* 81 IND. L.J. 1415, 1416-18 (2006); Burton, *supra* note 87, at 395-96; Evan Tsen Lee, *The Legality of the NSA Wiretapping Program,* 12 TEX. J. C.L. & C.R. 1, 5-11 (2006).

107. Baldwin & Shaw, *supra* note 87, at 454-55; Bradley et al., *supra* note 106, at 1416; Lee, *supra* note 106, at 11.

108. Baldwin & Shaw, *supra* note 87, at 454-56; Bradley et al., *supra* note 106, at 1417.

109. Bradley et al., *supra* note 106, at 1416.

fundamental incident of war,[110] and that the later case of *Hamdan v. Rumsfeld*[111] undermines the argument that the AUMF overrides FISA.[112]

2. The TSP and Separation of Powers

Even if the AUMF does not override FISA and authorize the TSP, the Bush administration claims that the President, vested with the executive power and the authority to act as Commander in Chief under Article II,[113] has the inherent authority to conduct warrantless surveillance for purposes of foreign intelligence gathering within the United States.[114] As evidence, the Bush administration cites several examples of other Presidents who engaged in domestic electronic surveillance of an enemy during wartime, and notes several federal appellate court cases holding that the President has such inherent authority, even in peacetime.[115] The Bush administration also cites a Supreme Court decision, *United States v. United States District Court (Keith)*,[116] which concludes that the warrant requirement of the Fourth Amendment applies to domestic surveillance, while expressly reserving the question as to the scope of the President's authority to conduct foreign intelligence surveillance.[117] The *Keith* case, the Bush administration points out, was expressly relied on by the federal

110. Baldwin & Shaw, *supra* note 87, at 452-53. Professor Baldwin and Shaw argue that *Hamdi* applies only to battlefield tactics, not actions involving American civilians. *Id.*

111. 126 S. Ct. 2749, 2759 (2006) (holding that the AUMF does not override the Uniform Code of Military Justice with respect to trials by military commission).

112. Lee, *supra* note 106, at 10-11. Professor Lee also argues that "force" under the AUMF should not be interpreted to include wiretapping. *Id.* at 5-7.

113. *See* U.S. CONST. art. II, §§ 1, 2.

114. DOJ White Paper, *supra* note 98, at 6-10; *see also* Yoo, *supra* note 106, at 586-87 (arguing that the President's constitutional authority to use force in response to an attack includes "any powers necessary and proper to that end," including intelligence gathering).

115. DOJ White Paper, *supra* note 98, at 8 (citing United States v. Truong Dinh Hung, 629 F.2d 908 (4th Cir. 1980); United States v. Butenko, 494 F.2d 593 (3d Cir. 1974) (en banc); and United States v. Brown, 484 F.2d 418 (5th Cir. 1973)). The U.S. Department of Justice also relies on a FISA Court of Review decision that, in dicta, assumed the President has inherent authority to conduct wireless surveillance for foreign intelligence gathering and that FISA could not impede this power. *Id.* at 8 (citing *In re* Sealed Case, 310 F.3d 717, 742 (FISA Ct. Rev. 2002) ("We take for granted that the President does have [inherent authority to conduct warrantless foreign intelligence surveillance] and, assuming that is so, FISA could not encroach on the President's constitutional power.")).

116. 407 U.S. 297 (1972).

117. DOJ White Paper, *supra* note 98, at 8.

appellate court cases that recognized the inherent authority of the President to conduct warrantless foreign surveillance.[118]

Discretion to conduct foreign intelligence surveillance during a time of armed conflict, the Bush administration contends, is an aspect of the President's basic constitutional responsibility to protect the nation from attack, and he "need not await congressional sanction" to determine the methods used to that end.[119] To the extent that FISA attempts to regulate this inherent executive authority, the Bush administration argues that FISA is unconstitutional for impermissibly impeding the President's Commander-in-Chief responsibilities given the current armed conflict context, and suggests that, even during peacetime, FISA would be unconstitutionally impermissible for impeding the President's foreign affairs powers.[120]

Critics agree that the President has the inherent constitutional authority to conduct warrantless surveillance for gathering foreign intelligence,[121] but only in the absence of congressional action to the contrary.[122] Because the Constitution divides war-making and foreign affairs powers between the legislative and executive branches, critics argue that this inherent presidential power is subject to congressional regulation, and FISA represents a valid exercise of congressional authority.[123] Using the three-prong framework which Justice Jackson devised for determining the scope of presidential power relative to congressional power,[124] critics argue that the President's power to conduct the TSP is at its lowest ebb because it is in direct conflict with a congressional act, that is, FISA.[125] Critics contend that because FISA is a valid exercise of

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118. *Id.* at 8-9.

119. *Id.* at 9-10.

120. *Id.* at 29-36.

121. *See* Bradley et al., *supra* note 106, at 1418 (finding authority "accurate but largely irrelevant"); Lee, *supra* note 106, at 12-20 (arguing that it would be "astounding" to conclude that the President did not possess this inherent authority).

122. Bradley et al., *supra* note 106, at 1418-19; Burton, *supra* note 87, at 393-95; *see also* Lee, *supra* note 106, at 20-40.

123. Burton, *supra* note 87, at 394-95; Lee, *supra* note 106, at 20-27, 36-40.

124. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*) 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, then his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.").

125. Baldwin & Shaw, *supra* note 87, at 457; *see also* Bradley et al., *supra* note 106, at 1418-19 ("Congress has not only disapproved of the action the President has taken,

congressional power, the President can claim no inherent authority to conduct warrantless foreign surveillance in contravention of congressional will, and the TSP is thus illegal.[126]

3. The TSP and the Fourth Amendment

The Fourth Amendment protects against "unreasonable searches and seizures" and requires warrants for searches and seizures based on "probable cause."[127] The Bush administration argues that the TSP falls within the "special needs" exception that permits searches without the usual requirements of warrants and probable cause.[128] The "special needs" doctrine permits warrantless searches where "special needs, beyond the normal need for law enforcement" renders the warrant requirement impracticable.[129] The Bush administration contends that the collection of foreign intelligence is a "special need," and that the standard for evaluating such government action is reasonableness, that is, a balancing of the search's intrusiveness on individuals' privacy against the government's interest.[130] Under this analysis, the administration argues, the TSP is reasonable because the government's interest in defending the country from attacks by al Qaeda outweighs individuals' privacy interests at stake.[131]

Although critics of the TSP concede that foreign intelligence gathering qualifies as a "special need" exception to ordinary law enforcement, they have attacked the Bush administration's

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but made it a crime."); Burton, *supra* note 87, at 393-95; Lee, *supra* note 106, at 24-27 (confirming Congressional power over regulation).

126. Bradley et al., *supra* note 106, at 1418; Burton, *supra* note 87, at 395; Lee, *supra* note 106, at 36-40. Professor Baldwin and Shaw place the TSP in Justice Jackson's lowest ebb category for presidential power and argue that the President lacks the inherent authority to conduct the program because it does not comport with the Fourth Amendment. Baldwin & Shaw, *supra* note 87, at 456-61.

127. U.S. CONST. amend. IV. The full text of the Fourth Amendment reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

128. DOJ White Paper, *supra* note 98, at 37.

129. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995) (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)).

130. DOJ White Paper, *supra* note 98, at 37 (citing United States v. Knights, 534 U.S. 112, 118-19 (2001)).

131. *Id.*

reasonableness analysis.[132] Critics argue that the Court looks at a number of different factors in determining the reasonableness of a search, "including the extent of the intrusion, whether the program is standardized or allows for discretionary targeting, and whether there is a demonstrated need to dispense with the warrant and probable cause requirements," and that these factors weigh against the reasonableness of the TSP.[133] They point out that the TSP lacks the safeguards that were present in all the other "special needs" line of cases.[134] Critics also note that the Court has never upheld domestic warrantless wiretapping in any context, even for foreign intelligence surveillance.[135]

IV. CASES CHALLENGING THE TSP

Shortly after the Bush administration confirmed the existence of the TSP, suits were filed throughout the country challenging its constitutionality and legality under FISA. Plaintiffs bringing these suits represent a wide range of interests and include journalists, academics, lawyers,[136] customers of telecommunications companies,[137] and non-profit organizations.[138] Suits have sought

132. Bradley et al., *supra* note 106, at 1422-23; Burton, *supra* note 87, at 397-98 (arguing that the reasonableness of such guidelines are unknown because of the Bush administration's secrecy).

133. Bradley et al., *supra* note 106, at 1422-23. The scholars and former government officials contrast the TSP with the searches upheld under the "special needs" doctrine in *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990), and *Vernonia School District 47J v. Acton*, 515 U.S. 646, 653 (1995). *See* Bradley et al., *supra* note 106, at 1422-23. In *Sitz*, the Court upheld drunk driving checkpoints, which are standardized, minimally intrusive, and brief, reasoning that requiring a warrant and probable cause would destroy the checkpoints usefulness in stopping drunk driving. *See id.* at 1422-23. In *Vernonia*, the Court upheld school drug testing programs because they are standardized, because students' expectation of privacy is diminished in school, and because the test is limited to students participating in extracurricular activities, giving students the option to avoid the testing. *Id.* at 1423. In comparison, the TSP is not minimally intrusive, but encroaches on private communications; it is not standardized, but subject to a secret discretionary standard; it gives no option or notice to surveillance targets; and FISA's warrant and probable cause requirements for foreign intelligence surveillance, in existence for thirty years, demonstrate there is no need to dispense with the requirements. *Id.*

134. Bradley et al., *supra* note 106, at 1423; Burton, *supra* note 87, at 397-98.

135. Bradley et al., *supra* note 106, at 1422; *see also* Baldwin & Shaw, *supra* note 87, at 458 ("The U.S. Supreme Court has expressly declined to consider whether the Fourth Amendment allows the executive branch to conduct warrantless surveillance against American citizens for security from foreign threats.").

136. ACLU v. Nat'l Sec. Agency, 438 F. Supp. 2d 754, 758 (E.D. Mich. 2006), *vacated*, 493 F.3d 644 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 1334 (2008).

137. Terkel v. AT&T Corp., 441 F. Supp. 2d 899, 901 (N.D. Ill. 2006); Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 978 (N.D. Cal. 2006).

injunctive relief, declaratory relief, and damages against the government and telecommunications companies that allegedly collaborated with the NSA in conducting the TSP.[139] All these suits faced two threshold issues before a court could rule on the merits of the TSP: whether the state secrets privilege required dismissal of the case and whether the plaintiffs had standing to bring the case.

A. The State Secrets Privilege and the TSP

In all cases challenging the NSA program, the Bush administration, either as defendant or intervenor, has invoked the state secrets privilege in an attempt to dismiss the case. Although the Bush administration's invocation of the privilege has met with varying degrees of success, the deference given by the courts to the executive branch in applying the privilege demonstrates its troubling power as a tool of executive secrecy.[140] In the cases where the issue has been reached, the courts denied applying the privilege only to information regarding the TSP that the government or telecommunications companies publicly confirmed, but upheld it against all other information, including claims related to the data-mining aspects of the program.[141]

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138. Al-Haramain Islamic Found., Inc. v. Bush, 451 F. Supp. 2d 1215, 1217 (D. Or. 2006), *rev'd*, 507 F.3d 1190 (9th Cir. 2007).

139. *ACLU*, 438 F. Supp. 2d at 758 (seeking injunction and declaratory judgment); *Terkel*, 441 F. Supp. 2d at 900 (seeking injunction and declaratory judgment); *Hepting*, 439 F. Supp. 2d at 979 (seeking statutory and punitive damages, restitution, disgorgement, injunction, and declaratory relief).

140. *See, e.g.*, Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190 (9th Cir. 2007); *infra* pages 1061-61.

141. This suggests that had the Bush administration refused to confirm or deny the existence of the TSP after the *New York Times* article was published, the state secrets privilege could have effectively dismissed *all* litigation challenging the program. It is also significant to note that AT&T is the telecom company named as a defendant in these cases more often than any other company. The *USA Today* article that first reported the data-mining portion of the TSP alleged that three companies, AT&T, BellSouth, and Verizon, had cooperated with the NSA and one company, Qwest, refused to cooperate. Cauley, *supra* note 81. In response to these allegations, BellSouth and Verizon issued statements denying any involvement in the TSP. *Hepting*, 439 F. Supp. 2d at 988-89. Qwest issued a statement confirming the company was approached by the government in an attempt to gain access to its telephone records and refused to comply with the request on the belief that to do so without a warrant would violate privacy requirements. *Id.* at 988. In contrast, AT&T neither denied nor confirmed participation in the program, but did make statements indicating that it "lawfully and dutifully assists the government in classified matters when asked." *Id.* at 992-93. These statements made by AT&T where enough for the court in *Hepting* to conclude that the state secrets privilege did not apply to AT&T's alleged participation in the TSP. *Id.* at 994. This suggests that had AT&T also offered blanket denials such as those offered by BellSouth and Verizon, the privilege would attach and lead to dismissal of all TSP-related litigation involving AT&T.

The court in *Terkel v. AT&T Corp.*, at the request of intervenor government, applied the state secrets privilege to bar plaintiffs from obtaining information regarding AT&T's alleged turnover of customer information to the NSA.[142] There was no public disclosure of AT&T's alleged turnover of its records to the government that was sufficient to overcome the privilege.[143]

In *Hepting v. AT&T Corp.*, the court declined to dismiss the case based on the government's invocation of the privilege, concluding that the subject matter of the case was not a state secret because of public disclosures by AT&T and the government regarding the interception of the content of communications.[144] The court allowed discovery on the case to continue, saying it was "premature to conclude that the privilege will bar evidence necessary for plaintiffs' prima facie case or AT&T's defense."[145]

Likewise, in *ACLU v. National Security Agency*, the district court rejected the government's motion to dismiss plaintiffs' claims regarding the warrantless wiretapping aspect of the TSP because the government had publicly confirmed the contours of the program, making this information immune to the privilege.[146] The court determined that plaintiffs could "establish a prima facie case based solely on [the government's] public admissions regarding the TSP."[147] However, the court dismissed the plaintiffs' data-mining claims, concluding that a prima facie case could not be made without use of

142. 441 F. Supp. 2d at 901.

143. *Id.*

144. 439 F. Supp. 2d at 994. In *Terkel*, the court noted that the difference between that case and *Hepting* was that the plaintiffs challenged only the illegal disclosure of records in *Terkel*, while the *Hepting* plaintiffs also alleged the illegal interception of the contents of communications. *Terkel*, 441 F. Supp. 2d at 916-17. Because the government had publicly admitted that it intercepted the contents of communications, but had not admitted collecting call records from telecom companies, the state secrets privilege did not apply to the interception of content claim in *Hepting*, but it did apply to the disclosure of records claim in *Terkel*. *Id.*

145. *Hepting*, 439 F. Supp. 2d at 994. Judge Walker certified his order denying dismissal for interlocutory appeal given that "there is a substantial ground for difference of opinion" regarding the "state secrets issues." *Id.* at 1011. The case was subsequently appealed and the Ninth Circuit Court of Appeals heard arguments on August 15, 2007. Adam Liptak, *U.S. Defends Surveillance Before 3 Skeptical Judges*, N.Y. TIMES, Aug. 16, 2007, at A1.

146. 438 F. Supp. 2d 754, 765-66 (E.D. Mich. 2006), *vacated*, 493 F.3d 644 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 1334 (2008). After determining the state secrets privilege and standing issues did not require dismissal of the TSP claims, the court found the TSP unconstitutional and issued an order enjoining the program. *Id.* at 782. On appeal, the Sixth Circuit Court of Appeals vacated the district court's order and remanded with instructions for dismissal after holding the plaintiffs did not establish standing. ACLU v. Nat'l Sec. Agency, 493 F.3d 644, 687-88 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 1334 (2008); *see infra* Part IV.B.

147. *ACLU*, 438 F. Supp. 2d at 765.

information protected by the privilege and "further litigation of this issue would force the disclosure of the very thing the privilege is designed to protect."[148]

The unique circumstances of *Al-Haramain Islamic Foundation, Inc. v. Bush* present an interesting example of the potency of the state secrets privilege.[149] Plaintiff, a nonprofit organization designated a global terrorist, was inadvertently given a classified document by the government during an asset-freezing proceeding in 2004 that indicated the organization had been subject to surveillance under the TSP.[150] The district court first determined that the subject matter of the case was not a state secret due to government disclosures regarding the TSP, and thus the privilege did not require dismissal.[151] However, the district court held that both the classified document and the information that it contained were protected by the state secrets privilege despite plaintiff's knowledge of the contents of the document.[152] After denying evidentiary access to the document, the district court permitted the plaintiff to submit in camera affidavits "attesting to the contents of the document from their memories" to establish standing and a prima facie case.[153] On appeal, the Ninth Circuit reversed the district court's attempt at compromise, holding that the privilege is absolute, and barred completely the document and its contents from further disclosure.[154] Thus, the state secrets privilege was used to deny admitting information into evidence that was known to both parties in the litigation.[155] In a Kafkaesque denouement, the information that the privilege sought to keep secret has become publicly known through publication in court reporters.

As these cases demonstrate, the courts' application of the state secrets privilege to challenges against the TSP has severely restricted the types of claims that will not be thrown out of court.

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148. *Id.*

149. 451 F. Supp. 2d 1215 (D. Or. 2006), *rev'd*, 507 F.3d 1190 (9th Cir. 2007).

150. Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1194-95 (9th Cir. 2007).

151. *Al-Haramain*, 451 F. Supp. 2d at 1225.

152. *Id.* at 1228-29. The court reasoned that:

> because the government has not officially confirmed or denied whether plaintiffs were subject to surveillance, even if plaintiffs know they were, this information remains secret. Furthermore, while plaintiffs know the contents of the Sealed Document, it too remains secret. . . . [T]he government did not waive its state secrets privilege by its inadvertent disclosure of the document.

Id. at 1223.

153. *Id.* at 1229.

154. *Al-Haramain*, 507 F.3d at 1204-05.

155. *See id.* at 1206.

Potential plaintiffs are forced to base their claims solely on information that the government and telecommunications companies have publicly confirmed. Claims based on information made public but not confirmed by the government or telecoms will be dismissed, no matter how respectable the source.[156] For those plaintiffs who survive this initial threshold, invocation of the privilege denies them the opportunity to obtain proof that they were surveilled by the TSP. This has severe consequences for their chances to meet standing requirements.

B. Standing and the TSP

In considering standing in cases challenging the TSP, it is instructive to begin with a case where a plaintiff clearly lacked standing. The plaintiff in *Tooley v. Bush* brought a suit against government officials, asserting violations of the First and Fourth Amendments and his constitutional right to privacy.[157] Tooley submitted a complaint containing the following factual allegations: First, in 2002, while on the phone purchasing tickets with Southwest Airlines, he indicated that "he would like '100 percent of everything that goes into the airplane, including cargo, to be fully screened'" due to the threat of a bomb being put on a plane by those wishing to harm Americans.[158] Second, he experienced "problematic phone connections," including clicking noises, more than a year after his phone conversation with the airline.[159] Third, the Bush administration has acknowledged that the TSP did not follow domestic surveillance laws.[160]

Tooley's complaint also included a number of allegations made "'upon information and belief'": that his phone problems were caused by unlawful wiretaps, instituted as a result of comments made during his phone conversation with Southwest Airlines; that he was subjected to roving wiretaps; and that these wiretaps are part of the TSP.[161]

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156. In *Hepting v. AT&T Corp.*, the court only considered "public admissions or denials by the government, AT&T and other telecommunications companies" in determining what factual information is a secret for purposes of the privilege. 439 F. Supp. 2d 974, 990 (N.D. Cal. 2006). The court refused to rely on the declaration of a former AT&T technician who asserted that he observed the telecom company assisting the NSA or media reports about the TSP. *Id.* at 990-91.

157. Tooley v. Bush, No. 06-306, 2006 U.S. Dist. LEXIS 92274, at *1 (D.D.C. Dec. 21, 2006).

158. *Id.* at *72-73.

159. *Id.* at *73.

160. *Id.*

161. *Id.* at *73-74.

The court had little trouble concluding that the plaintiff did not satisfy any of the three standing requirements.[162] Acknowledging the "insurmountable disconnect" between plaintiff's allegations and conclusions, the court concluded that he "presented nothing to substantiate his claim that his alleged wiretapping is in any way connected to the TSP."[163] In short order, the court concluded that plaintiff's alleged injuries were "entirely hypothetical and conjectural" for lack of any factual basis to establish injury in fact, the lack of factual basis connecting the TSP to his wiretapping allegations did not demonstrate "an injury fairly traceable to [the d]efendants," and an injunction against the TSP would not necessarily redress his alleged injuries.[164]

The severe effect of a court's application of the state secrets privilege on a plaintiff's standing is demonstrated by the dismissal in *Terkel v. AT&T Corp.*[165] The plaintiffs, customers of AT&T challenging the company's release of customer records to the NSA in violation of the Electronic Communications Privacy Act,[166] were first found to have satisfied standing requirements in regard to defendant AT&T's motion to dismiss.[167] But the intervening government's successful invocation of the state secrets privilege barred any discovery of information that would allow plaintiffs to establish standing.[168]

Relying on *City of Los Angeles v. Lyons*,[169] the court required the plaintiffs to show that they suffered ongoing harm or would suffer future harm due to AT&T's disclosure of records because they sought prospective relief only.[170] Because the state secrets privilege prevented discovery of information that could show ongoing or future harm, such as whether AT&T had illegally disclosed records in the past or whether it currently was disclosing its records, the plaintiffs could not establish a personally suffered injury sufficient for

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162. *Id.* at *78-81.

163. *Id.* at *75-77.

164. *Id.* at *80. In a footnote, the court compared the plaintiff's allegations with those made by plaintiffs who were found to have standing in *ACLU v. National Security Agency*, 438 F. Supp. 2d 754 (E.D. Mich. 2006), *vacated,* 493 F.3d 644 (6th Cir. 2007), *cert. denied,* 128 S. Ct. 1334 (2008), stating the cases were "readily distinguishable." *Tooley*, 2006 U.S. Dist. LEXIS 92274, at *78 n.13.

165. 441 F. Supp. 2d 899 (N.D. Ill. 2006).

166. *Id.* at 901.

167. *Id.* at 904.

168. *Id.* at 920.

169. 461 U.S. 95, 102 (1983) (holding that a plaintiff seeking to enjoin the city police department from using chokeholds on suspects must show a "real and immediate" likelihood of future personal harm from such action).

170. *Terkel*, 441 F. Supp. 2d at 919-20.

standing, requiring the court to dismiss their claim.[171] Although the court expressed its aversion to dismissing cases in which plaintiffs claim that their rights are violated, the court concluded that to render a decision in this case would have been akin to issuing an advisory opinion, and urged plaintiffs to seek redress for their complaint through the political process.[172]

Similarly, the application of the state secrets privilege in *Al-Haramain Islamic Foundation, Inc. v. Bush* to protect the classified document that indicated the plaintiff had been subject to the TSP made it impossible for the plaintiff to establish standing.[173] The plaintiff conceded that its ability to show injury in fact rested entirely on the privileged document.[174] Once the court concluded that neither the document itself nor the parties' memories of its contents could be admitted into evidence, the plaintiff could not establish standing.[175]

Hepting v. AT&T Corp. provides a counterexample to the plaintiffs' failures to establish standing in *Terkel* and *Al-Haramian*. After determining that the state secrets privilege did not require a dismissal in *Hepting*, the court concluded that a dismissal for lack of

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171. *Id.*

172. *Id.* at 920.

173. 507 F.3d 1190, 1205 (9th Cir. 2007).

174. *Id.*

175. *Id.* The court remanded the case to the district court to consider the plaintiff's alternative argument that FISA preempts the state secrets privilege. *Id.* at 1205-06. Section 1806(f) of FISA provides that a district court, upon a discovery request of an aggrieved person, may "review in camera and ex parte" documents and materials "as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted" if the government files an affidavit claiming disclosure of such information would harm national security. 50 U.S.C. § 1806(f) (2006). The court may then disclose portions of the materials using "appropriate security procedures and protective orders" to the aggrieved person where "necessary to make an accurate determination of the legality of the surveillance." *Id.* Initially, the district court in *Al-Haramain* refrained from ruling on whether this FISA provision preempts the state secrets privilege. *Al-Haramain*, 507 F.3d at 1205. On remand, Judge Walker concluded that:

> (1) FISA preempts the state secrets privilege in connection with electronic surveillance for intelligence purposes and would appear to displace the state secrets privilege for purposes of plaintiffs' claims; and (2) FISA nonetheless does not appear to provide plaintiffs a viable remedy unless they can show that they are "aggrieved persons" within the meaning of FISA. The lack of precedents interpreting the remedial provisions of FISA, the failure of the parties to consider the import of FISA preemption and the undeveloped factual record in this case warrant allowing plaintiffs to attempt to make that showing and, therefore, support dismissal of the FISA claim with leave to amend.

In re Nat'l Sec. Agency Telecomms. Records Litig., No. 06-1791 VRW, 2008 U.S. Dist. LEXIS 51074, at *3-4 (N.D. Cal. July 2, 2008).

standing was also improper.[176] According to the court, plaintiff customers, seeking both statutory damages and prospective relief, sufficiently stated "facts to allege injury-in-fact for all their claims,"[177] which included violations of the First and Fourth Amendments and FISA for illegal surveillance.[178] Unlike the plaintiffs in *United Presbyterian Church v. Reagan*, whose allegations of illegal surveillance were too generalized to establish standing,[179] plaintiffs here described more specific injuries allegedly caused by defendant's illegal conduct.[180] Because the gravamen of the complaint was that plaintiffs were subject to a dragnet created to collect the content and records of AT&T customers' communications, the plaintiffs did not need to allege facts demonstrating they were themselves subject to surveillance.[181] Plaintiffs alleged a sufficiently concrete injury so long as they were AT&T customers during the time period the dragnet was in place.[182]

Among the cases challenging the TSP, the decision that deals most directly with standing is the Sixth Circuit's decision in *ACLU*.[183] Plaintiffs, a group of journalists, academics, and lawyers, regularly communicated with foreign individuals who they believed were the type of people the NSA would link to al Qaeda, and were thus likely to be surveilled by the TSP.[184] Based on these suspicions, the plaintiffs claimed a violation of their First Amendment rights in the form of a chilling effect.[185] This chilling effect prevented them from fulfilling their professional duty to keep communications with individuals located overseas confidential and caused overseas

176. 439 F. Supp. 2d 974, 1001 (N.D. Cal. 2006).

177. *Id.* at 999.

178. *Id.* at 978.

179. 738 F.2d 1375, 1381 (D.C. Cir. 1984).

180. *Hepting*, 439 F. Supp. 2d at 1000. *Compare id.* ("('On information and belief, AT&T Corp has provided the government with direct access to the contents of the Hawkeye, Aurora and/or other databases that it manages using Daytona . . . by providing the government with copies of the information in the databases . . . enabling the government agents to search the databases' contents.')"), *and id.* ("('On information and belief, AT&T Corp has opened its key telecommunications facilities and databases to direct access by the NSA . . . intercepting and disclosing to the government the contents of its customers' communications as well as detailed communications records about millions of its customers, including plaintiffs . . . .')"), *with United Presbyterian Church*, 738 F.2d at 1380 n.2 ("[A]ppellant . . . alleges that it 'has reason to believe that, for a long time, its officers, employees, and persons associated with it have been subjected to government surveillance, infiltration and disruption.'").

181. *Hepting*, 439 F. Supp. 2d at 1000.

182. *Id.*

183. ACLU v. Nat'l Sec. Agency, 493 F.3d 644, 711-13 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 1334 (2008).

184. *Id.* at 648-49.

185. *Id.* at 654.

contacts to discontinue communications, further burdening their job performances by forcing them to travel overseas to talk with their contacts.[186] The plaintiffs also claimed that the NSA violated "their legitimate expectation of privacy" protected by the Fourth Amendment and FISA.[187] They sought injunctive and declaratory relief, claiming that the warrantless wiretapping and data-mining aspects of the TSP violated the First and Fourth Amendments, the separation of powers doctrine, and three statutes, the most relevant of which was FISA.[188]

The district court concluded that the state secrets privilege required dismissal of the plaintiffs' data-mining claims but not their warrantless wiretapping claims.[189] Finding that the plaintiffs established standing for their warrantless wiretapping claims,[190] the district court granted summary judgment in favor of plaintiffs, holding the TSP unconstitutional and enjoining the warrantless wiretapping aspects of the program.[191]

The Sixth Circuit, in a 2-1 decision that produced three separate opinions, vacated the district court's order and remanded the case for dismissal after holding that the plaintiffs lacked standing to bring their claims.[192] Judge Batchelder, who delivered the judgment of the court, took a methodical, particularized approach to the standing analysis, and found that none of the plaintiffs could establish standing for any claim.[193]

According to Judge Batchelder, the plaintiffs could not establish standing for their Fourth Amendment and FISA breach of privacy claims because they could not show that they had been personally subjected to surveillance under the TSP, that is, they could not show injury in fact.[194] Relying on *Rakas v. Illinois*,[195] Judge Batchelder

186. *Id.* at 653-54.

187. *Id.* at 654-55.

188. *Id.* at 649-50.

189. ACLU v. Nat'l Sec. Agency, 438 F. Supp. 2d 754, 756 (E.D. Mich. 2006), *vacated*, 493 F.3d 644 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 1334 (2008).

190. *Id.* at 766-71. The court found that the plaintiffs "suffered actual concrete injuries to their abilities to carry out their professional responsibilities," their injuries were fairly traceable to the defendants' actions, and it was likely that these injuries would be redressed by injunctive relief. *Id.* at 769-70.

191. *Id.* at 782.

192. ACLU v. Nat'l Sec. Agency, 493 F.3d 644, 687-88 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 1334 (2008).

193. *See id.* at 687.

194. *Id.* at 657. The plaintiffs were prevented from obtaining any evidence of being personally subjected to surveillance under the TSP due to the state secrets privilege. *Id.* at 655.

concluded, and the plaintiffs conceded, that "it would be unprecedented for [a] court to find standing for plaintiffs to litigate a Fourth Amendment cause of action without any evidence that the plaintiffs themselves have been subjected to an illegal search or seizure."[196]

Recognizing that standing rules are more relaxed for First Amendment claims, Judge Batchelder suggested that the plaintiffs actually had only one real claim–breach of privacy–and that they had "recast their injuries as a matter of free speech and association" in an attempt to avoid stricter Fourth Amendment standing requirements.[197] After assuming the plaintiffs' asserted chilled speech injuries were "adequate to state an injury in fact,"[198] she nonetheless dispatched with the plaintiffs' chilled speech claims for lack of causation and redressability.[199]

Concurring in the judgment, Judge Gibbons concluded that without any evidence showing plaintiffs were personally subjected to the TSP, they could not establish standing for any of their claims.[200] Citing *City of Los Angeles v. Lyons*,[201] Judge Gibbons stated that a plaintiff attempting to show an actual and imminent injury from a government policy "must demonstrate that he personally would be subject to the future application of that policy," and a fear of being subjected to the policy is insufficient.[202]

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195. 439 U.S. 128, 133-34 (1978) ("'Fourth Amendment rights are personal rights which . . . may not be vicariously asserted.'" (quoting Alderman v. United States, 394 U.S. 165, 174 (1969)).

196. *ACLU*, 493 F.3d at 673-74.

197. *Id.* at 657.

198. *Id.* at 666. As Judge Gilman notes in his dissent, the lead opinion's analysis suggests that the plaintiffs' alleged injuries do not satisfy an injury in fact. *Id.* at 694-95 (Gilman, J., dissenting). According to Judge Batchelder's reading of *Laird v. Tatum*, 408 U.S. 1 (1972), "to allege a sufficient injury under the First Amendment, a plaintiff must establish that he or she is regulated, constrained, or compelled directly by the government's actions, instead of by his or her own subjective chill." *ACLU*, 493 F.3d at 661 (majority opinion). Under this reading, proof of government surveillance would not be enough to establish injury in fact because the government is not directly regulating, constraining, or compelling a surveilled plaintiff. *See id.* at 692 n.3 (Gibbons, J., concurring). In concurrence, Judge Gibbons disagreed with this reading of *Laird*, *see id.*, as did Judge Gilman in dissent, *see id.* at 695-98 (Gilman, J., dissenting).

199. *ACLU*, 493 F.3d at 673 (majority opinion). According to Judge Batchelder, the plaintiffs failed to show that it was the absence of a warrant rather than their subjective unwillingness to communicate that caused their injuries, since surveillance conducted pursuant to a FISA warrant would still chill their communications. *Id.* at 667-69. Similarly, requiring a warrant for the NSA's surveillance would not redress plaintiffs' injuries; only enjoining all wiretaps would relieve plaintiffs' fear that their communications with overseas contacts are subjected to surveillance. *Id.* at 671-73.

200. *Id.* at 688 (Gibbons, J., concurring).

201. 461 U.S. 95 (1983).

202. *ACLU*, 493 F.3d 688-89.

In dissent, Judge Gilman felt that the attorney-plaintiffs were not required to show they were personally subjected to the TSP's surveillance to allege an injury that established standing.[203] Based on his reading of *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, in which the Supreme Court found that the plaintiffs' reasonable fear of harm to their recreational, aesthetic, and economic interests due to a company's discharge of pollutants was a sufficient injury in fact,[204] Judge Gilman concluded that the plaintiffs' reasonable fear of surveillance under the TSP resulted in actual and imminent injury sufficient for standing.[205] After determining that the plaintiffs had established standing, Judge Gilman turned to the merits of the case and concluded that the TSP violated FISA.[206]

V. STANDING AND SECRET GOVERNMENT SURVEILLANCE

Together, these cases reveal the main difficulty that plaintiffs face in establishing standing in challenges to secret government surveillance, such as that conducted under the TSP, is demonstrating a sufficient injury in fact. With the state secrets privilege preventing the discovery of evidence proving personal surveillance under such programs, potential plaintiffs will find it nearly impossible to allege a concrete and particularized, actual or imminent harm under a strict application of the injury-in-fact analysis.

Looking at the individual cases, it seems fairly obvious that the plaintiff in *Tooley* had no legitimate claim to challenge the legality of the TSP in court. There, standing did what it was intended to do: deny a claimant who lacks a sufficient personal interest in the outcome of the case an opportunity to challenge government action and prevent the courts from reviewing the policy decision of an elected branch in the absence of an actual case or controversy between two parties. But in other cases challenging the TSP, the claims present far more legitimate legal injuries than those of the plaintiff in *Tooley*.

Comparing the plaintiffs' claims in *Terkel*, *Al-Haramain*, and *Hepting* to those of the plaintiff in *Tooley*, the alleged personal injuries suffered and their connection to the defendants' actions are more in line with injuries that courts will recognize as legitimate legal claims that can be redressed in a judicial proceeding. The

203. *Id.* at 702-03 (Gilman, J., dissenting).

204. 528 U.S. 167, 183-84 (2000).

205. *ACLU*, 493 F.3d at 697-702. The district court also relied on *Laidlaw*, 528 U.S. 167, in finding that the plaintiffs had demonstrated a sufficient injury in fact. ACLU v. Nat'l Sec. Agency, 438 F. Supp. 2d 754, 769-70 (E.D. Mich. 2006), *vacated,* 493 F.3d 644 (6th Cir. 2007), *cert. denied,* 128 S. Ct. 1334 (2008).

206. *ACLU*, 493 F.3d at 713.

factual basis for alleging that the government or telecom company has violated the plaintiffs' rights in these cases is stronger and more easily traceable to the TSP than the speculative claims of *Tooley*, which were so lacking in factual allegations that they verged on paranoia.[207] The plaintiffs in *Al-Haramain* based their claim on information that was provided to them by the government, and the customer plaintiffs in *Terkel* and *Hepting* based their claims on a belief that AT&T colluded with the NSA—claims which were made reasonable by media reports and AT&T's refusal to deny its participation with the NSA.

Yet, the successful invocation of the state secrets privilege was fatal to the *Al-Haramain* and *Terkel* plaintiffs' efforts to establish standing.[208] The *Hepting* plaintiffs' ability to establish standing was due primarily to the court's plaintiff-friendly application of the state secrets privilege, determining that the privilege did not apply to AT&T's alleged participation in the TSP based on its vague public statements that it lawfully assists the government when asked.[209]

The plaintiffs in *ACLU* attempted to avoid a fatal application of the state secrets privilege by basing their claim solely on public admissions of the government.[210] While this initially prevented a dismissal of their case, they could not avoid the restrictive effect the privilege has on the ability to establish standing.[211] As the lead opinion in the Sixth Circuit recognized, the plaintiffs characterized their claim as both a free speech injury under the First Amendment and a breach of privacy injury under FISA and the Fourth Amendment in an unsuccessful attempt to avoid the strict injury requirement for Fourth Amendment claims—that plaintiffs demonstrate "that they have been or will be subjected to surveillance personally."[212]

If the effect of the state secrets privilege is to deny potential challengers of government surveillance violations their day in court by making it impossible to establish standing, then a different, less

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207. *See* Tooley v. Bush, No. 06-306, 2006 U.S. Dist. LEXIS 92274, at *4-5 (D.C.C. Dec. 21, 2006). In response to a request from Southwest Airlines for comments or suggestions, the plaintiff stated he wanted everything that goes into the airplane to be fully screened. *Id.* at *4. When asked why this was necessary, the plaintiff responded that the public "'was less safe due to the potential that those who wish to harm American citizens could put a bomb on a plane.'" *Id.* at *4-5 (quoting plaintiff's affidavit and complaint). It was these comments that the plaintiff believed led to the alleged wiretaps on his phones under the TSP. *Id.* at *5.

208. *See supra* text accompanying notes 155-56, 165-68.

209. *See* Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 991-94 (N.D. Cal. 2006).

210. *ACLU*, 438 F. Supp. 2d at 758.

211. *ACLU*, 493 F.3d at 648.

212. *Id.* at 657.

strict approach to standing is needed in this context. When considering current Fourth Amendment standing doctrine, it is clear that the requirement that plaintiffs show that they have been personally subjected to surveillance to establish standing was developed to address a different set of circumstances that are not analogous to challenges to secret surveillance programs.

Supreme Court decisions dealing with standing in the Fourth Amendment context concern criminal defendants seeking to exclude evidence obtained in a search or seizure that violated another person's rights but not those of the defendant.[213] In *Rakas v. Illinois*,[214] the leading Fourth Amendment standing case cited in the lead opinion in *ACLU*,[215] passengers in a car searched by police sought to suppress a rifle and shells seized during the search on the ground that the search violated the Fourth Amendment.[216] The passengers claimed that they had standing to challenge the search despite neither being the owner of the car nor claiming to own the seized items.[217] In determining that the defendants did not have standing to challenge the search because they had no legitimate expectation of privacy in the searched car or seized items, the Court emphasized that Fourth Amendment rights are personal rights which cannot be asserted by an individual "whose own protection" was not "infringed by the search or seizure."[218]

Rakas and other Court decisions concerning standing in the Fourth Amendment context are decidedly different from cases challenging the TSP. The former cases involve challenges to a specific search or seizure that has undoubtedly been aimed at one or more known persons. The latter cases involve challenges to a general search and seizure program targeted at unidentified individuals suspected of having ties with terrorists. These distinctions call for a broader, more relaxed standing requirement in challenges to secret government surveillance programs, one that does not require the plaintiff to show that he or she has personally been subjected to surveillance, given that evidence of such surveillance will most likely be impossible to produce.

A modified, more relaxed standard for Fourth Amendment standing to challenge secret government surveillance can be

213. *See, e.g.*, Minnesota v. Carter, 525 U.S. 83 (1998) (standing denied to challenge search of apartment where defendants had only spent two hours); Minnesota v. Olson, 495 U.S. 91 (1990) (standing granted to challenge arrest of overnight guest); Rawlings v. Kentucky, 448 U.S. 98 (1980) (standing denied to challenge search of friend's purse).

214. 439 U.S. 128 (1978).

215. *ACLU*, 493 F.3d at 673-74.

216. *Rakas*, 439 U.S. at 129-30.

217. *Id.*

218. *Id.* at 138 (quoting Simmons v. United States, 390 U.S. 377, 389 (1968)).

fashioned by applying the standard for injury in fact used by the Court in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*,—a reasonable fear of harm from undisputed conduct standard.[219] There, the Court found that plaintiffs seeking injunctive relief had standing to challenge the defendant's undisputed discharge of pollutants into a nearby river by asserting that their "reasonable concerns about the effects of [the] discharges, directly affected [the plaintiffs'] recreational, aesthetic, and economic interests."[220] The Court rejected the defendant's argument that the plaintiffs were required to show that they "had sustained or faced the threat of any 'injury-in-fact' from [defendant's] activities,"[221] and instead found the plaintiffs' fear of the ongoing discharge of pollutants causing them to refrain from using the river was reasonable and, therefore, sufficient for injury in fact.[222]

Laidlaw's more relaxed requirement for showing injury in fact can be readily applied in challenges to the TSP. The inquiry would be whether the plaintiffs seeking prospective relief have a reasonable fear of surveillance due to the acknowledged activities of the NSA. In the case of the *ACLU* plaintiffs, the reasonableness of their fear of being surveilled would depend on the likelihood of their overseas contacts fitting the profile of a TSP target. If their fear is found to be reasonable, their standing could be established, and a court could rule on the merits of their claim without sacrificing national security interests protected by the state secrets privilege through disclosure of details of the program.

Of course, the main reason this more relaxed standing requirement can work for challenges to the TSP is that the government's confirmation of its existence makes the surveillance undisputed. It is possible that future media reports of secret surveillance programs could be met with denials from the government, making the ongoing activity disputed. But given the political uproar caused by the disclosure of the TSP,[223] it is hard to imagine the Bush administration could have simply denied its

219. 528 U.S. 167 (2000). A case comment analyzing *ACLU*, 493 F.3d 644, also suggests a relaxed standing requirement in this context. Recent Case, *Sixth Circuit Denies Standing to Challenge Terrorist Surveillance Program*, 121 HARV. L. REV. 922 (2008). The comment suggests a lower "probability-based approach" to standing based on *Pennell v. City of San Jose*, 485 U.S. 1 (1988), and *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978). Recent Case, *supra*, at 926-27.

220. *Laidlaw*, 528 U.S. at 183-84. The Court distinguished the plaintiffs' assertions from the "speculative 'some day intentions' to visit endangered species halfway around the world" of the plaintiffs in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992), that were held insufficient to establish injury in fact. *Laidlaw*, 528 U.S. at 184.

221. *Laidlaw*, 528 U.S. at 181.

222. *See id.* at 184-85.

223. *See supra* Part III.A.

existence, and the ability of future administrations to deny all media reports exposing surveillance is similarly improbable because of the political sensitivity of the topic.[224]

Thus, this broader standing analysis, whether the plaintiffs have a reasonable fear of harm due to undisputed government activity, can be applied to future acknowledged surveillance programs. The standard allows courts to maintain their role in the constitutional order: deciding cases and controversies while upholding the rights guaranteed by the Constitution and rights created by statutes. It will permit the state secrets privilege to protect national security interests without effectively immunizing possible executive constitutional and statutory violations from judicial review.[225] This solution is undeniably within the purview of the Supreme Court to fashion—it falls within its own precedent[226] and it deals with a judicially created doctrine with a history of vacillating standards.[227]

A functioning constitutional order, consisting of three separate branches acting as checks and balances against one another, does not envision a judiciary that ties its own hands as another branch claims absolute authority to ignore the law. The minor modification in standing doctrine suggested here offers a way for the courts to reassert their proper place within the constitutional scheme.

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224. *See, e.g.*, Siobhan Gorman, *NSA's Domestic Spying Grows as Agency Sweeps up Data*, WALL ST. J., Mar. 10, 2008, at A1 (discussing congressional debate on domestic spying and the NSA's expanding role in domestic data gathering).

225. As Judge Taylor notes, given the need for government secrecy regarding the TSP, "no victim in America would be given standing to challenge this or any other unconstitutional activity," even those acknowledged by the government. ACLU v. Nat'l Sec. Agency, 438 F. Supp. 2d 754, 771 (E.D. Mich. 2006), *vacated*, 493 F.3d 644 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 1334 (2008).

226. *See Laidlaw*, 528 U.S. at 167.

227. *See supra* Part II.B; *see also* Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, 454 U.S. 464, 475 (1982) ("We need not mince words when we say that the concept of 'Art. III standing' has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it. . . ."); JOSEPH VINING, LEGAL IDENTITY: THE COMING AGE OF PUBLIC LAW 1 (1978) ("One cannot read [standing] cases . . . without coming away with a sense of intellectual crisis. Judicial behavior is erratic, even bizarre. The opinions and justifications do not illuminate."); Nichol, *supra* note 35, at 303-04 ("It is one thing to say what Article III law is, but it is quite another to determine who can trigger the power of the federal courts, and why.").

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