No. 11-1025

In the Supreme Court of the United States

JAMES R. CLAPPER, JR., DIRECTOR OF NATIONAL INTELLIGENCE, ET AL., PETITIONERS
v.
AMNESTY INTERNATIONAL USA, ET AL., RESPONDENTS.

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

BRIEF OF AMICI CURIAE THE CENTER FOR CONSTITUTIONAL RIGHTS AND ATTORNEYS INVOLVED IN NATIONAL SECURITY LITIGATION, SUPPORTING RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici are four individual attorneys and a non-profit law firm[2] actively engaged in litigation representing foreign nationals located abroad in cases implicating national security and/or allegations of terrorist activity. As a result, like the plaintiffs in this case, they too have reasonable fears that their privileged communications are at risk of interception under surveillance authorized by the FISA Amendments Act of 2008 ("FAA"), and have been forced to take costly and burdensome countermeasures to minimize that risk.

SUMMARY OF ARGUMENT

While the government failed to challenge the factual averments of injury by plaintiffs below, it now attempts to do so on appeal, and several Second Circuit judges cast doubt on them in dissenting from denial of *en banc* review. Amici therefore make this primarily empirical submission to demonstrate that plaintiffs' fears are both widespread among the small group of lawyers engaged in litigation against the government in national security cases, and reasonable. So, too, are the countermeasures plaintiffs have adopted to protect against the risk of surveillance—indeed, for attorneys they are mandatory. The need to protect against the potential harm from surveillance under the FAA is particularly great given the

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[1] Counsel for amici affirms that no counsel for a party authored this brief in whole or in part, and that no person other than amici and their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties have consented to the filing of this brief. The parties' consent letters have been filed with the Clerk's office.

[2] A list and additional biographical/historical information are in the Appendix.

absence of any judicially-supervised minimization that might otherwise protect plaintiffs' legally privileged communications. That is sufficient to satisfy the existing law of standing, which demands only that avoidance injuries be a consequence of objectively reasonable fears of concrete, objective harm—dual requirements which in tandem will more than adequately protect against judicial overreach in chilling-effect cases.

ARGUMENT

In his opinion dissenting from the Second Circuit's denial of *en banc* review of the panel opinion below, Judge Jacobs stated that "the plaintiffs suffered no injury," *Amnesty Int'l USA v. Clapper*, 667 F.3d 163, 203 (2d Cir. 2011), complaining that the "panel's analysis … simply credits as sufficient certain averments by the plaintiffs that seem to me inadequate, implausible, and illusory," *id.* at 200. As he neatly characterized the asserted injuries:

> Their claim is that the FAA lowers the standards for obtaining warrants to surveil foreign persons abroad, which has caused the plaintiffs, who are not foreigners, to develop a reasonable fear of being surveilled when communicating with foreigners around the world who are their journalistic sources, clients, human rights victims, witnesses and so on—all of whom are, in plaintiffs' estimation, potential objects of surveillance. The plaintiffs contend that this fear compels them to communicate with their clients or foreign contacts only in person, at such trouble and expense as to constitute injury that supports standing.

Id. at 201. He further stated that in support of the "otherwise-mysterious" assertions of injury-in-fact and causation, "the panel opinion relies entirely (even credulously) on affidavits submitted by the plaintiffs, describing their supposed anxieties." *Id.* at 201. After complaining that only some of the declarants were attorneys active in litigation, *id.*, that they merely anticipated measures to avoid surveillance that would be adopted in "the conveniently unknown future,"[3] *id.* at 202, and that the asserted countermeasures were merely "what every good lawyer does—on every matter," *id.*, he concluded:

> At the risk of being obvious, the purpose of this lawsuit is litigation for its own sake—for these lawyers to claim a role in policy-making for which they were not appointed or elected, for which they are not fitted by experience, and for which they are not accountable. As best I can see, the only purpose of this litigation is for counsel and plaintiffs to act out their fantasy of persecution, to validate their pretensions to policy expertise, to make themselves consequential rather than marginal, and to raise funds for self-sustaining litigation. In short, counsel's and plaintiffs' only perceptible interest is to carve out for themselves an influence over government policy—an interest that the law of standing forecloses.

Id. at 203. Amici submit this brief first and foremost to show that, as an empirical matter, this tendentious account is willfully blind to the practical consequences of the FAA for attorneys litigating national security cases

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[3] The present lawsuit was filed on the day the challenged statute was signed into law.

against the government. The concerns voiced by the handful of plaintiff declarants are in fact broadly shared among the limited set of attorneys working on terrorism cases.

It goes without saying that the primary reason this is so is the vital role maintaining confidentiality plays to the work of attorneys—to protect both the secrecy of strategic discussions, and the very idea of confidence so vital to building and maintaining client trust. Both are values shared by the journalist plaintiffs in this case. But the attorney plaintiffs, and the attorney amici whose practices are described in this brief, also have an obligation to protect the legal privilege of their communications with clients and others with whom they develop work product (witnesses, experts, foreign co-counsel, and so forth). For attorneys, that obligation is mandatory as a matter of legal ethics and professional responsibility.

The law of surveillance recognizes this unique interest by mandating that, even when surveillance is authorized pursuant to a warrant, the confidentiality of legally privileged communications must be protected by the implementation of minimization procedures, compliance with which will be supervised on an ongoing basis by the judicial authority issuing the warrant. Following the suggestion of this Court in *Berger v. New York* that the uniquely broad intrusion occasioned by tapping a phone line required heightened safeguards for any extension of the warrant process to such electronic surveillance,[4] the

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[4] *Berger v. New York*, 388 U.S. 41, 56-60, 63-64 (1967) ("The need for particularity and evidence of reliability in the showing required when judicial authorization of a search is sought is especially great in the case of eavesdropping. By its very nature eavesdropping involves an intrusion on privacy that is broad in scope."). *Berger* was decided six months before *Katz v. United States*, 389 U.S. 347 (1967) extended the warrant requirement to wiretaps.

courts have always viewed minimization to protect privileged conversations as a constitutional requirement. While in the past the overwhelming majority of statutorily-authorized surveillance by our government would have been subject to judicially-supervised minimization procedures, after the FAA that is no longer the case.

* * *

As set forth below, the individual amici are all attorneys engaged in litigation representing foreign nationals located abroad in cases implicating national security and/or allegations of terrorist activity. Like the plaintiffs, the passage of the FAA has caused them to implement countermeasures to surveillance that have imposed expense and unwanted burdens on their practice of law—which consists primarily in suing the very adversary that the FAA allows to intrude on their privileged communications. The statute has also rendered various third parties vital to their litigation practices less willing to communicate with them. All of this harms their legally-protected interest in engaging in public-interest litigation, the "political and expressive nature" of which this Court has "long … recognized." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 528 (1991) (citing *NAACP v. Button*, 371 U.S. 415, 429 (1963)).

Tina Foster

Tina Monshipour Foster is a New York-based human and civil rights attorney. She is the founder and Executive Director of the International Justice Network ("IJN"), a not-for-profit organization which helps victims of human rights abuses and their communities access legal assistance through a global network of leading human rights attorneys, academics, advocates, NGOs, and grassroots organizations. The majority of her clients are indigent Arab and Muslims who she represents on a *pro*

bono basis. A large number of these individuals are current or former prisoners held without charge in United States custody overseas, at Guantánamo Bay, Cuba or Bagram Airfield in Afghanistan.

Ms. Foster's organization, IJN, does not have a physical office. Instead, IJN attorneys and staff utilize internet technology to collaborate with one another in a "virtual office," which is a secure password-protected site hosted on its website at www.ijnetwork.org. Ms. Foster and her colleagues rely on email, live chat, mobile telephones and blackberries to communicate with each other as well as with clients, co-counsel, investigators, journalists, experts, and witnesses or others who may assist with their work in dozens of countries around the world.

As part of her legal representation of current or former Bagram and Guantánamo detainees, Ms. Foster is frequently in touch with individuals and legal or human rights organizations in Afghanistan, Yemen, Pakistan, Turkey, Kuwait, Qatar, Bahrain, and the U.A.E., including the family members of individuals who are believed to be detained by the United States military at known and secret prisons run by the U.S. military. She also routinely needs to be in contact with colleagues in several other countries in Europe, Asia and Africa, as well as witnesses, experts, and cooperating counsel abroad. Absent the threat of surveillance, her preferred means of communication with these widely-strewn parties would be telephone, email, live chat, Google Talk, Skype, and other online collaboration tools, and she uses one or more of these media for certain confidential communications almost every day. However, for obvious reasons, monitoring of her communications would be particularly destructive for her legal work. It might also result in the intentional or unintentional monitoring of the communications of her colleagues or others.

Many clients, witnesses, lawyers and advocates with whom Ms. Foster works on the Guantánamo, Bagram and other cases face very real threats from repressive governments or criminal groups in their own countries. In addition to cultural differences, the fact that she is an American citizen also makes it a challenge to establish a rapport with individuals who have suffered greatly as a result of actions taken by our government. In light of the natural mistrust that potential clients and witnesses must overcome in order to collaborate with U.S. lawyers on these cases, it is even more important that these individuals feel that the information they provide be held in strictest confidence. Indeed, confidentiality is essential in order to ensure not only that witnesses and other key individuals are willing to cooperate, but it is also required in order to ensure the safety of all parties, including the clients' families, lawyers, advocates, and others who courageously come forward to expose human rights abuses and other illegal conduct.

Ms. Foster has often had to counsel such individuals of the possibility that their conversations could be surveilled by the U.S. government. As a result, they are reluctant to provide her private information, and sometimes refuse to be contacted directly at all, via telephone or internet. Consequently, she has had to spend a great deal of time and money in order to have in-person meetings with clients, witnesses, experts, investigators, and others because of concerns about the confidentiality of their electronic communications. In addition, she also has had to travel to areas in which there is ongoing political instability or armed conflict in order to have these meetings—often times at the risk of her own safety.

The availability of low cost internet technology and mobile telephones globally has made it possible for victims of human rights abuses and their advocates in remote areas to access information and assistance from

abroad. Ironically, in less-developed areas of the world, what we view as high-tech electronic means of communications are in fact often the *only* available means of communicating over distances: Older methods of communications, such as government postal systems, private mail carriers, and traditional telephone land-lines are still not available to many of Ms. Foster's clients, either because they live in areas where such services do not exist, or because such services are prohibitively expensive. In short, absent the use of internet-based electronic means of communication, it is often not possible for Ms. Foster to speak with her many clients in Afghanistan and Yemen at all without scheduling a face-to-face meeting.

In order to protect privileged attorney-client communications and other confidential information, Ms. Foster has had to physically travel as far as Afghanistan, Pakistan, Yemen, the United Arab Emirates, Bahrain, Germany, France, and the United Kingdom for the sole purpose of having in person meetings with key witnesses, client representatives, experts, investigators, and co-counsel. Many of these individuals are not in any way suspected of links to terrorism or "foreign powers" under FISA's original definition. Instead, they are witnesses and victims, political dissidents and local activists, local experts (including staff of human rights organizations) and local journalists. Yet the vast scope of the FAA makes them all vulnerable to surveillance.

As a consequence, she now spends, on average, about one-third of her working hours traveling away from home, solely to be able to communicate with relevant litigation participants at in-person meetings. In addition to the amount of time spent away from her home and family, this travel takes a toll on already scarce IJN financial and administrative resources. Such costs, which would not have been necessary had it not been for the

threat of U.S. government surveillance, severely limit the number of clients and matters in which Ms. Foster can provide assistance, and she has had to turn away many potential clients desperately in need of legal assistance to address gross violations of their fundamental human rights.

The most recent of these trips is taking place as this brief is being submitted: a trip to Pakistan and Afghanistan to meet with clients so that privileged communications that can only go forward in person can take place. During these trips she frequently travels back and forth to various locations to deliver USB drives to clients, witnesses and attorneys with whom she works on national security cases because they do not want to discuss matters on email or by telephone. Ms. Foster also recently purchased a secondary laptop computer because of the fear of connecting her primary laptop, on which she keeps sensitive files stored, to the internet and thereby exposing it to the potential for compromise through government spyware. Between her travel and technological countermeasures, Ms. Foster has spent tens of thousands of dollars on avoiding surveillance just to be able to do work in this field.

In sum, the threat of government surveillance has cost Ms. Foster and her clients an enormous amount of concern, time, and expense. It has also severely limited her ability to effectively represent her clients and IJN's constituency because it is impossible to arrange in-person meetings as often as needed to protect privileged and confidential information.

Ramzi Kassem

Ramzi Kassem is Associate Professor of Law at the City University of New York School of Law. Before joining the CUNY faculty in 2009, he held teaching positions

at Yale and Fordham Law Schools. He directs the Immigrant & Non-Citizen Rights Clinic. Through that program, with his students, Professor Kassem represents prisoners of various nationalities presently or formerly held at American facilities at Guantánamo Bay, Cuba, at Bagram Air Base, Afghanistan, at so-called "Black Sites," and at other detention sites worldwide.

Professor Kassem and his law students represent a number of individual clients and parties in extraterritorial cases and domestically. Many of his clients stand accused of either engaging in terrorism or supporting groups deemed by the United States government to be terrorist organizations, or are thought by the government to have associations with members of such organizations. Some are already charged or face likely indictment, either in Article III courts or before military commissions. Many are detainees held at Guantánamo and Bagram. In representing these clients, he must communicate with potential witnesses in their cases as well as family members, human rights investigators and advocates overseas, and other lawyers and co-counsel abroad.

The surveillance authorities contained in the FAA have greatly increased Professor Kassem's reluctance to engage in such communications over cell phones, land lines, and email—all mediums which would otherwise be the most convenient and conducive to his work as an advocate. In order to avoid the prospect of confidential and privileged communications being compromised by surveillance under the FAA, he, his clients, and witnesses often travel to meet each other in person to share information rather than using electronic means of communication. Since the passage of the FAA in 2008, he has traveled long distances to meet clients and other litigation participants (witnesses, investigators, family mem-

bers, and fellow counsel) in cases having an international dimension.

The assumption that all electronic means of communication are subject to surveillance has become so pervasive that individuals will often pull batteries out of cell phones before these in person meetings with Professor Kassem—even people not charged with any crime—on the assumption that law enforcement is capable of remotely and surreptitiously turning on the microphones on such devices and transmitting the resulting signal so long as the devices are connected to their power source.[5]

Even means of communication that were previously trusted for international communication—such as Skype, which uses a 256 bit symmetric-key Advanced Encryption Standard—are no longer viewed as safe by the individuals Professor Kassem generally communicates with overseas. In general, standard electronic communication mechanisms have since 2008 not been very beneficial to his litigation and advocacy efforts.

The need to travel overseas in order to meet with clients and other litigation participants located abroad creates another set of concerns. In addition to being guarded about his use of electronic communications, Professor Kassem retains information technology consultants who advise him on data protections technologies such as encryption for his computers and other storage devices. Because he must travel to meet individuals he needs to speak to regarding his cases, he sometimes needs to carry sensitive data with him—both information relevant to the cases they are involved with, and also information relevant to other cases for which Professor Kassem has ongoing responsibilities that may require

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[5] *See United States v. Tomero*, 462 F. Supp. 2d 565, 567 (S.D.N.Y. 2006) (describing such capacity used in mafia investigation).

attention while he is traveling abroad. Ironically, his ethical obligations to clients in these other cases sometimes require him to travel with sensitive, privileged information in his possession, but also require him to take whatever reasonable steps he can to protect their confidentiality. Doing so imposes both a great burden in terms of time and attention, and also some degree of expense.

Many times conversations necessary to litigation and advocacy efforts have been postponed because of the fear of electronic surveillance if the phone or email were used. Oftentimes this discomfort is mutual—the individuals abroad are uncomfortable communicating with Professor Kassem because of the fear of electronic surveillance of those communications by the United States government. Often as a result, conversations with such individuals are either postponed or never held.

Professor Kassem was well-versed in the state of surveillance authorities prior to the passage of the FAA. While both he and the individuals he communicated with routinely in his work bore a certain degree of concern about government surveillance, those concerns were somewhat tempered in degree by the fact that nearly all surveillance of international communications had to take place under judicial supervision,[6] including, for pre-2008 FISA surveillance, a requirement that a judge find probable cause that an individual targeted for such surveillance be an agent of a foreign power. That element of individualized suspicion, as confirmed by a showing to a judge, is no longer present with the new statutory authorities. Moreover, and of special importance to attorneys like Professor Kassem, surveillance under the old

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[6] This excludes, of course, surveillance under the extralegal NSA Program and the short-lived Protect America Act of 2007.

FISA was subject to minimization procedures that were also supervised by judges on a continuing basis.

Candace Gorman

H. Candace Gorman is the principal in her own law firm, located in Chicago, Illinois. She comes from a family of attorneys and has herself been an attorney for thirty years. Her firm deals mostly with civil rights and human rights cases. She argued and won a unanimous decision before this Court in *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004) (applying four-year federal statute of limitations to Section 1981 cases).

She has also represented two detainees at Guantánamo in habeas corpus proceedings, Abdul Hamid Al-Ghizzawi and Abdal Razak Ali. The Declaration of Stephen Abraham, received by this Court between the initial denial of certiorari in *Boumediene* in April of 2008 and the reversal of that decision on reconsideration later that summer,[7] described her client Al Ghizzawi's initial CSRT victory, which was followed by a second CSRT proceeding held in order to reverse the initial decision.

From the moment the *New York Times* disclosed the existence of the Bush administration's NSA warrantless surveillance program in December 2005 ("NSA Program"),[8] Ms. Gorman has been concerned that her privileged communications with her clients and others she must speak to in the course of her practice (including family members of clients, witnesses or potential witnesses, foreign government officials, foreign attorneys, non-governmental organizations, translators and inves-

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[7] *Boumediene v. Bush*, 549 U.S. 1328 (Apr. 2, 2007) (denying cert.), *vacated on reh'g*, 551 U.S. 1060 (Jun. 29, 2007) (granting cert.).

[8] James Risen & Eric Lichtblau, Bush Lets U.S. Spy on Callers Without Courts, N.Y. Times (Dec. 15, 2005).

tigators, media outlets, and others) fit the descriptions of communications subject to targeting under the NSA Program and thus would be subject to surveillance without judicial supervision. Those concerns continue today with the codification in the 2008 FAA of authorities effectively permitting the government to conduct another NSA Program with only the most minimal of judicial oversight.

Like the other amici described herein, Ms. Gorman struggled with finding a way to conduct communications while respecting her ethical obligations to protect client confidences and legal privilege. She found meeting face-to-face to be very time consuming and prohibitively expensive to be used for all communications. Mail was also too slow and does not easily allow more than two people to participate. Although she did on occasion use postal mail and courier services, those did not offer sure protection from intrusion, but only a greater likelihood of discovering that confidence had been breached. Moreover, most putative substitutes for the telephone and email were unsatisfactory because they could not allow for the two way dialogue—the give-and-take between lawyer and client, witness and interviewer—that is so essential to thorough factual development, allowing the lawyer to elicit extra details, or probe an account for weaknesses. Moreover, in human rights cases stretching across geographic and cultural borders, the lack of give-and-take makes it difficult to build trust with the person being spoken to—and whatever trust is built up will be destroyed and never regained if the confidentiality of the communications is broken.

Ms. Gorman eventually stopped taking on new cases because she felt she could no longer ensure that communications with her clients and others were confidential because her work on the two Guantánamo detainee cases described above meant all her communications were like-

ly to be intercepted. For the same reason she felt she was putting the communications of other attorneys who practiced in the same physical location as her at risk. Although the government announced that the NSA Program was terminated in January 2007—to be replaced by a short-lived continuation of the program in all but name under a series of orders from a single FISA judge, and then later by the 2007 Protect America Act—Ms. Gorman arranged to wrap up the remainder of her practice outside the Guantánamo cases, first declining to renew her lease on her office, and then arranging to leave the United States for almost two full years, taking up an appointment as a Visiting Professional at the International Criminal Court at the Hague in January 2008.

Even through 2009, and to the present day, she has not recovered the level of comfort with representing clients—particularly foreign clients—in U.S. courts that she had prior to the December 2005 disclosure and official acknowledgment of the NSA warrantless surveillance program and its effective codification in the 2008 FAA. Ms. Gorman did not take any new U.S. cases until 2010. Since her return to the United States, Ms. Gorman has taken on only two new cases—both involving clients local to the Chicago area where she lives and practices.

One of Ms. Gorman's Guantánamo detainee clients, Mr. Al-Ghizzawi, a Libyan national who had been detained in Afghanistan where he was living as a refugee from the Qaddafi regime, was released and resettled in the Republic of Georgia in March 2010. She visited him in person after his resettlement, in part because she assumed their electronic communications would be monitored; the FBI came to visit Al-Ghizzawi after his resettlement, confirming our government's continued interest in him as a source of information.

Ultimately, the existence of the surveillance authorities contained in the FAA has irremediably eroded Ms.

Gorman's confidence that she can communicate with clients in a confidential manner, and that they can trust that what they say will go no farther than their personal exchange. As she has put it, "I no longer have that trust; I no longer even have the ability to earn that trust."

Thomas H. Nelson

Thomas H. Nelson is an attorney based in Welches, Oregon. In March 2004 he represented a local attorney and Muslim, Brandon Mayfield, who was falsely accused of participation in the Madrid train bombing of that year. As a result of the national attention given to that case, Mr. Nelson was contacted by attorneys for the Al-Haramain Islamic Foundation of Ashland, Oregon and asked to represent the charity in a number of matters stemming from the freezing of its assets in Oregon by the Department of the Treasury. Since that time he has been the primary attorney for the Oregon charity and the main liaison both to its personnel in Riyadh, Saudi Arabia and its attorneys in the United States.

In that role Mr. Nelson initiated litigation on behalf of the charity in a case seeking damages for unlawful surveillance of the communications of officials of the charity with its attorneys. As the Ninth Circuit characterized the facts, Al-Haramain was designated as a "Specially Designated Global Terrorist" "due to the organization's alleged ties to Al Qaeda. ... [D]uring Al-Haramain's civil designation proceeding," Treasury officials inadvertently turned over to the organization's counsel a document labeled "top secret." "[A]fter *The New York Times*' story broke in December 2005, [Al-Haramain] realized that the … [d]ocument was proof that it had been subjected to warrantless surveillance in March and April of 2004." *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190, 1194-95 (9th Cir. 2007).

More specifically, published accounts state that this document provided evidence that the NSA had intercepted communications between an official of Al-Haramain and the charity's American lawyers, Wendell Belew and Asim Ghafoor,[9] whose practices are located in the Washington D.C. area—the sort of surveillance retention of which would surely never be approved of by a federal judge supervising a wiretapping order under the original FISA statute or Title III (absent an active role in some criminal conspiracy by the attorneys on the line).

After years of litigation, the Ninth Circuit found the document protected by the state secrets privilege notwithstanding its accidental disclosure, and thus unavailable to the Plaintiffs. After further proceedings, the lower court nonetheless found that plaintiffs had established a prima facie case of unlawful surveillance based on circumstantial evidence effectively uncontested by the government, and awarded damages and attorneys' fees, but that ruling was overturned on sovereign immunity grounds by the Ninth Circuit. *Al-Haramain*, 2012 U.S. App. LEXIS 16379 (9th Cir. Aug. 7, 2012).

Once the *New York Times* story was published and Mr. Nelson drew the connection between it and surveillance of counsel for Al-Haramain, he sought ethical advice from Mark Fucile, an Oregon attorney whose practice focuses on ethical and professional responsibility issues that arise in the legal profession, and who has regularly published articles in the journals of the Oregon, Washington, and Idaho bar associations on the rules of professional responsibility in those states. Mr. Nelson retained Mr. Fucile to advise him on the obligations an attorney who has a reasonable suspicion that his com-

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[9] *See* Patrick Radden Keefe, State Secrets: A Government Misstep in a Wiretapping Case, The New Yorker (Apr. 28, 2008); Jon B. Eisenberg, Suing George W. Bush: A bizarre and troubling tale, Salon.com (Jul. 9, 2008).

munications with and/or affecting his client are being intercepted bears to protect his communications from interception, and what steps the attorney should take to protect the client's confidences in such a situation. The advice he received was categorical: such communications could not take place by electronic means if the lawyer has a reasonable suspicion that his electronic communications are being monitored.

Nearly all of Mr. Nelson's caseload today involves national security cases, with clients under either criminal or Department of Commerce investigation. Following the formal counsel he has received from Mr. Fucile, Mr. Nelson believes that his ethical responsibilities mandate that anytime he has a real suspicion that the government may be surveilling his communications with his clients—even on non-criminal commercial matters—he has an obligation not to use electronic means of communication for privileged conversations. Moreover, that obligation to avoid electronic communications is not a conditional one—it is categorical.[10]

As a result, Mr. Nelson has made more than fifty trips overseas to meet clients face to face, in countries including Saudi Arabia, Iran, Sweden, and Algeria, since the December 2005 *New York Times* story was published. Every time Mr. Nelson needs to have a confidential communication with his clients in these countries, he gets on an airplane and visits them in person to do so. Frequently he spends a day traveling each way for as little as four hours of time advising the client, as will likely be the case during a trip he is taking as this brief is being filed: A client of Mr. Nelson's in Saudi Arabia needs to have a full and frank strategic discussion re-

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[10] Mr. Nelson does not trust that available encryption systems for communications are sufficient to protect the confidentiality of his communications from the surveillance capacities of the U.S. government.

garding his case that could easily take place over the phone but for the threat of electronic surveillance by our government outside of judicial supervision and minimization. Even so, further safeguards are often necessary—for instance, the documented risk of surreptitious, remote activation of cell phone microphones[11] means he and his clients often remove the batteries from their mobile devices when meeting in person.

Many of Mr. Nelson's clients are unable to travel to the United States, including most of his Iranian clients. It is also difficult and burdensome for Mr. Nelson to travel to meet them. He is currently struggling to obtain a visa to visit Iran, having held several meetings with Iranian clients in a free trade zone on the Iranian resort Island of Kish, which is more accessible to foreigners (who can generally receive 14 day visas to enter the zone at the airport). His Swedish client cannot visit him because that client is on the international no-transport list (the "no-fly" list). Similarly, Mr. Nelson represented two U.S. citizens stranded in Tunisia because they were not permitted to board airplanes (unless they submitted to interviews with the FBI, *sans* counsel); he was therefore forced to visit them in Tunisia in order to have privileged conversations with them.

The Center for Constitutional Rights

CCR is a nonprofit public-interest law firm that has since 9/11 been extensively engaged in litigation challenging detention, interrogation and rendition practices of the federal government. When the *New York Times* broke the story of the original NSA warrantless surveillance program in December of 2005, CCR's legal staff perceived that many of their international communica-

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[11] *See supra* note 5.

tions in the course of their litigation and related work had been, and would be, subject to government surveillance entirely outside of judicial supervision. As a result CCR's management consulted with a number of ethics experts, and sought and received formal ethical advice from NYU Law School Professor Stephen Gillers. That advice stated: "The decision [to avoid using electronic means of communications for client secrets or confidences in light of the existence of the NSA Program] is not discretionary. It is obligatory."[12]

The threat posed by this surveillance forced CCR staffers to change their international communications practices—preventing some communications entirely, delaying others, and sometimes requiring costly international travel to replace calls and emails. It imposed costly burdens to investigate and take stock of potential past breaches of confidences. It also dissuaded third parties from communicating with and working with CCR because of the fear that their communications with us might be intercepted under the Program—reactions that were entirely independent of our voluntary actions. All of this was documented in sworn, uncontested declarations in the litigation CCR commenced to try to enjoin that program.[13] Moreover, the threat that the government has stored records from that surveillance continues to this day.

Like the plaintiffs and all of the amici described above, CCR and its staffers continue to be injured in the same ways from the threat of similarly broad surveillance under the FAA. If anything, the FAA allows for broader surveillance than the patently illegal surveillance acknowledged by the government in the wake of

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[12] Affirmation of Stephen Gillers, Dkt. 16-6, *CCR v. Bush*, No. 07-1115 (N.D. Cal.), ¶ 9.

[13] *See* Dkt. Nos. 16-4, 16-7, 16-8, 16-9, *CCR v. Bush*, No. 07-1115 (N.D. Cal.).

the *New York Times* story. Like the Congressionally-unauthorized NSA program, the FAA provides for only the thinnest veneer of judicial supervision. As the Second Circuit panel characterized it:

> Prior to the FAA, surveillance orders could only authorize the government to monitor specific individuals or facilities. Under the FAA, by contrast, the plaintiffs allege that an acquisition order could seek, for example, "[a]ll telephone and e-mail communications to and from countries of foreign policy interest—for example, Russia, Venezuela, or Israel—including communications made to and from U.S. citizens and residents." Moreover, the specific showing of probable cause previously required, and the requirement of judicial review of that showing, have been eliminated. The government has not directly challenged this characterization.

Amnesty Int'l USA v. Clapper, 638 F.3d 118, 126 (2d Cir. 2011). This is especially significant for CCR because, for most of our clients, the government has conspicuously failed to produce any evidence substantiating links between them and terrorism or other criminal activity. Moreover,

> [t]he preexisting FISA scheme allowed ongoing judicial review by the [Foreign Intelligence Surveillance Court.] But under the FAA, the judiciary may not monitor compliance on an ongoing basis[. Instead,] the FISC may review the minimization procedures only prospectively, when the government seeks its initial surveillance authorization. Rather, the executive—namely the AG and DNI—bears the responsibility of moni-

> toring ongoing compliance, and although the FISC receives the executive's reports, it cannot rely on them to alter or revoke its previous surveillance authorizations.

Id. This lack of judicially supervised minimization is of special concern for attorneys. Previously, under any regime of statutorily-authorized surveillance, attorneys could rest assured that a judge had ensured that procedures designed to minimize the interception and retention of privileged conversations[14] had been implemented with the initial surveillance order, and that the implementation of these minimization procedures would be supervised on a continuing basis by judges over the life of the Title III or FISA order. These statutory minimization provisions institute the constitutional particularity requirement for wiretapping warrants;[15] the mere fact of

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[14] Or indeed of any conversations outside of the scope of the warrant, as specified with constitutionally-required particularity.

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

Courts have interpreted minimization requirements to include, at a minimum, a duty to institute procedures to protect the confidentiality of privileged communications. *See, e.g.*, *United States v. Chavez*, 533 F.2d 491, 494 (9th Cir. 1976) (approving minimization limited to attorney-client and priest-penitent calls); *United States v. Turner*, 528 F.2d 143, 157 (9th Cir. 1975) (approving minimization,

ongoing, individualized judicial supervision provided additional reassurance that the government would not become privy to legally-privileged conversations. Surveillance under the FAA lacks all these safeguards, and thus, as with surveillance under the NSA Program, the risk it poses to attorneys' privileged communications is different in both degree and kind from what came before.

Finally, the FAA allows for retention and dissemination of information deemed by the executive to fit the definition of "foreign intelligence information." Current technology permits near-infinite storage of material sucked up in the vacuum cleaner authorizations permitted by the FAA, meaning almost any privileged communication might end up stored indefinitely for future misuse.[16] Whether such information is ever used *in court* to a client's detriment is irrelevant from an ethical standpoint. As Professor Gillers advised in his declaration for CCR: "It is no answer to say that suppression is available as a remedy for any improperly intercepted communication. … Intercepted communications may be exploited to the disadvantage of clients with no one the wiser. … It is disclosure itself that is the evil against which

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even in light of broad scope of monitoring, where privileged calls were excluded); *Kilgore v. Mitchell*, 623 F.2d 631, 635 (9th Cir. 1980) (noting that even prior to *Scott*, DOJ Title III policy mandated minimization of privileged calls); *United States v. Rizzo*, 491 F.2d 215, 217 (2d Cir. 1974) (minimization requirement met where officers instructed not to—and did not—monitor, record or spot-check privileged conversations).

[16] *See generally* James Bamford, Inside the Matrix: The NSA Is Building the Country's Biggest Spy Center, Wired (Mar. 15, 2012) (noting "'stuff we've already stored'" at NSA may be cracked by future decryption technology), *available at* http://www.wired.com/threatlevel/2012/03/ff_nsadatacenter/all/.

lawyers must protect clients, regardless of any additional consequences of the disclosure."[17]

It is clear that the government's eavesdropping over the last decade has not excluded attorneys from surveillance. In addition to the cautionary example presented by the *Al-Haramain* case, the executive has acknowledged in a formal submission to Congress that, "[a]lthough the [NSA] program does not specifically target the communications of attorneys or physicians, calls involving such persons would not be categorically excluded from interception."[18] According to the *New York Times*, "[t]he Justice Department does not deny that the government has monitored phone calls and e-mail exchanges between lawyers and their clients as part of its terrorism investigations in the United States and overseas," and the *Times* further reported that "[t]wo senior Justice Department officials" admitted that "they knew of … a handful of terrorism cases … in which the government might have monitored lawyer-client conversations.[19] In CCR's own litigation challenging the NSA program, the government conceded before the district court that it would be a "reasonable inference" to conclude from these statements of government officials "that some attorney-client communications may have been surveilled under" the Program.[20]

Accordingly, like the other amici, CCR staffers have reacted to the FAA in much the same way they did to the

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[17] Gillers Aff., *supra* note 12, ¶ 11.

[18] Assistant Attorney General William E. Moschella, Responses to Joint Questions from House Judiciary Committee Minority Members (Mar. 24, 2006) at 15, ¶45, *available at* http://www.fas.org/irp/agency/doj/fisa/doj032406.pdf (last visited Sep. 20, 2012).

[19] Philip Shenon, *Lawyers Fear Monitoring in Cases on Terrorism*, N.Y. Times (Apr. 28, 2008), at A14.

[20] *See* Defs. Reply Br., Dkt. 49, *CCR v. Bush*, No. 07-1115 (N.D. Cal.) at 4.

announcement of the NSA Program's existence: avoiding engaging in some communications, taking costly measures to protect others. Important conversations have been delayed until in-person meetings could be scheduled, sometimes taking months before international travel could take place. The mails and international courier services have been used on the premise that one can at least tell whether physical correspondence has been opened. Undersigned counsel has frequently done both in the years since the FAA became law, as well as attempting to implement more secure electronic communications mechanisms including encrypted chat.

While the obligation to protect the most sensitive communications is ethically obligatory, precautions like those described in this brief always involve application of judgment.[21] Similarly, the extent to which more caution has been used in the wake of the FAA is a question of kind and degree. Attorneys have always used discretion and basic common-sense precautions against the risk of governmental interception or accidental disclosure. The FAA's novelty is that nearly every international communication now requires some degree of vigilance, given the breadth of surveillance possible under the statute. Whereas previously, confidential communications with parties lacking any colorable connection to terrorism in the government's view—an expert, an innocent witness to violence—would not have triggered worries of government surveillance (even under the standard of the

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[21] For example, Professor Gillers stated in his declaration in CCR's case that "[s]ome communications … may, in an attorney's professional opinion, be sufficiently innocuous that … they may be transmitted electronically or by telephone. …[T]he attorney must balance the urgency of the communication need, the substance of the communication," and, most significantly, whether disclosure would "in the attorney's considered judgment harm the client's cause." Gillers Aff. ¶11, *supra* note 12; *cf.* Resp. Br. at 20.

NSA Program), now that is no longer the case. The risks presented should our government share intercepted "foreign intelligence information" about such parties with foreign governments hostile to them are easy to imagine.

Finally, while it is true that interceptions by foreign governments or interceptions otherwise not subject to statutory regulation[22] have always been theoretically possible, the risk they presented has always been in CCR's estimation far less than the risk of U.S. government surveillance (which would largely have been judicially supervised under FISA).[23] Many of the foreign governments amici must contend with are far less technologically capable than the United States. (Undersigned counsel has frequently sought advice about technological capacities of foreign governments from experts—for instance, deciding last year after such a consultation that a former Soviet Central Asian republic was likely incapable of breaking encryption on a popular, free communications package we used to discuss a now-fully-resolved matter with a client.) Likewise every indication is that the U.S. government carries out the bulk of its non-wireless-telephone interceptions of international communications by intercepting terrestrial fiber-optic signals in a fashion that should have been subject to close judicial oversight under the pre-FAA version of FISA.[24]

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[22] *See* Pet. Br. at 32-33 (noting categories of surveillance exempted by 95th Congress from FISA).

[23] FISA has always defined "electronic surveillance" to include "acquisition occur[ing] in the United States," 50 U.S.C. § 1801(f)(2). Combined with the fact that most intercepts, even of fully international calls, happen inside the U.S. (*see* footnote 24, *infra*), this meant amici could rationally assume (prior to the NSA Program's disclosure) that most (non-cellphone) surveillance by the U.S. was judicially regulated.

[24] *See, e.g.*, Resp. Br. at 9-10 (citing to treatise by former AAG of National Security Division of DOJ, David S. Kris, whose view is that

The very fact that the government chose to implement an NSA Program—which was acknowledged and conceded by Attorney General Gonzales to constitute "electronic surveillance" as defined in and governed by FISA[25]—is another sign that the most convenient means of interception are those subject to regulation under FISA. Consistent with this, the government has never chosen to vigorously press in district court the claim that plaintiffs should have already been equally fearful of the possibility of other, unregulated forms of interception in any detail, in this or any of the other similar litigation over the last six years.[26]

FAA surveillance is directed at "gateway" switches); JAMES RISEN, STATE OF WAR 48-49 (2006) (NSA Program accessed "large telecommunications switches" "physically based in the United States" that make it possible to monitor even fully international calls (e.g. from Asia to the Middle East) while they are digitally "transiting" these U.S.-based switches); *id.* at 51 (U.S. government has successfully been "quietly encouraging" telecom industry to route most international telecom traffic "through American-based switches"); JAMES BAMFORD, BODY OF SECRETS 207-11 (2008) (same, quoting NSA Director Alexander: "a vast portion of the world's communications infrastructure [is] located in our own nation"); Bamford, Inside the Matrix, *supra* note 16 (quoting named NSA official as voicing preference for now tapping into U.S.-based switching "junction points" over previously favored U.S.-based "cable landings" where international undersea cables enter U.S.).

[25] *See* Alberto Gonzales, *Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence* (Dec. 19, 2005).

[26] *See, e.g.*, *CCR v. Bush*, No. 07-1115 (N.D. Cal.), and *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007), the CCR and ACLU lawsuits against the NSA program.

Injuries such as those suffered by plaintiffs and amici are legally sufficient to underlie standing

Even the brief survey of amici above shows that the injuries asserted by plaintiffs were broadly shared by the admittedly small group of public interest lawyers who routinely litigate terrorism cases. The commonsense nature of the injury is surely why the government did not contest the averments of injury at all below—neither in this case nor in the several other similar standing cases arising out of the NSA Program before it.

Laird and subsequent chilling effect cases show a concern about the "objectivity" of two elements of the standing analysis: first, that the fear causing plaintiffs to act or be deterred from acting should be *objectively reasonable*; and second, that the harm asserted be something tangible—what is referred to as "concrete harm" in the many post-*Laird* pronouncements from this Court on standing—and therefore *objective* in that sense. Where either the fear or the harm are overly subjective (as in *Laird*, where plaintiffs had no more than half-hearted assertions regarding psychological anxieties provoked by the army's lawful monitoring), standing will not be found. But where plaintiffs can produce evidence of the objective reasonableness of their fears resulting from government action,[27] and can also point to consequent objective harm (such as the "professional" harm asserted here, and relied on by this Court in *Meese v. Keene*, 481 U.S. 465, 473 (1987)), they have established a sufficient basis for standing.

Laird's dictum that "allegations of a subjective 'chill'," without more, cannot by themselves underlie

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[27] The uncontested expert opinion of Professor Gillers that certain responsive measures are obligatory for attorneys as a matter of professional responsibility surely places the objectivity of plaintiffs' concerns beyond doubt.

standing[28] does not mean that standing is absent in every case where plaintiffs' fear of government conduct motivates them to elect to take actions that proximately cause their own injuries. Instead (to restate the standard in positive terms), courts have demanded that plaintiffs in chilling effect cases must have a reasonable (*i.e.* non-subjective) fear that causes them to incur a concrete, objective harm (*i.e.* something going beyond mere subjective anxiety[29]).

The *Laird* plaintiffs failed the first prong—they lacked an objectively reasonable *cause* to be afraid of government monitoring that "was 'nothing more than a good newspaper reporter would be able to gather by attendance at [their] public meetings,'" *Laird*, 408 U.S. at 9—and the second prong (concrete, objective harm) as well. *See id.* at 14 n.7 (plaintiffs "have also cast considerable doubt on whether they themselves are in fact suffering [any injury]… before the District Court, counsel … admitted that his clients were 'not people, obviously, who are cowed and chilled'…. But, counsel argued, [they] must 'represent millions of Americans not nearly as forward [and] courageous' as themselves."); *Tatum v. Laird*, 444 F.2d 947, 959 (D.C. Cir. 1971) (MacKinnon, J., concurring in part) (same).

In the instant case, both prongs are satisfied: the fears are objectively reasonable (indeed, they are ethically mandated), and the expenses and professional harms incurred are clearly tangible.[30]

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[28] *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972).

[29] In contrast, in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), the injury claimed to underlie standing for prospective relief was only a subjective fear of being subjected to a similar chokehold in the future. *See id.* at 98, 107 n.8.

[30] The government relies on a CCR case, *United Presbyterian Church v. Reagan*, 738 F.2d 1375 (D.C. Cir. 1984) (Scalia, J.) (*UPC*), for the notion that chilling-effect surveillance plaintiffs must prove

they will actually be subject to surveillance. Pet. Br. at 40-41 ("non-conjectural … imminent interception" required). *UPC* was a challenge to a 1981 executive order that set forth procedures for the division of labor between the FBI and other foreign intelligence agencies in carrying out surveillance. The order is reproduced in then-Judge Scalia's opinion; although it makes no mention of the authority for such surveillance, it seems on its face that most of the order related to operational procedures for agencies seeking FISA warrants. Nowhere does the order set forth any warrantless wiretapping procedures, and in fact it was ostensibly designed to *eliminate* illegal surveillance (in the wake of the Church Committee investigations, *see, e.g.*, 738 F.2d at 1382 n.3). While plaintiffs claimed they experienced chilling effects from the fact that the order might govern the process for making them targets under FISA, they made absolutely no claim against FISA itself. The only allegations of illegality they made related to government actions *prior* to the order that their claims were directed at, as the District Court opinion makes clear. *See United Presbyterian Church v. Reagan*, 557 F. Supp. 61, 63 (D.D.C. 1982) ("Nor do [plaintiffs] make any allegations to support the assumption that any intelligence-gathering activities that may take place pursuant to the Order in the future will be illegal. Plaintiff has conceded at oral argument that much of the activity authorized by the Order is well within the strictures of the Constitution and laws of the United States."). Plaintiffs' failure in *UPC* was not that they did not show they were *actual targets* of an illegal program. Rather, they failed to make *any plausible claim of illegality*, no less any other showing of being affected by the practices at issue. Like the *Laird* plaintiffs, the *UPC* plaintiffs were worried about how a lawful system might be put to unlawful uses against them in the future.

Nor were the *UPC* plaintiffs a group especially vulnerable to warrantless surveillance because of the risk of legally-recognized communications privileges being violated, as in the instant case. The *UPC* plaintiffs claimed only that they were political and religious activists, journalists, and academics. The original complaint, which undersigned counsel located in the National Archives, does not indicate that there were any attorneys in the group; although apparently one individual plaintiff (Severina Rivera) was in fact an attorney, the complaint makes absolutely no mention of that fact. *See* Complaint, *United Presbyterian Church v. Reagan*, Civil Action No. 82-1824 (D.D.C. Jun. 30, 1982), at ¶¶ 60-61.

CONCLUSION

Plaintiffs have documented harms that parallel those amici have experienced in their own practices. They clearly have standing under existing law. The government argues that challenges to surveillance programs should meet a unique, heightened standing threshold. If anything, the opposite should be true: surveillance policies that hamstring those few attorneys engaged in the task of ensuring executive accountability by bringing claims before the judiciary are worthy of more thorough scrutiny from the federal courts, not less. Closing the courthouse doors to such claims risks a systemic harm: a corrosion of the ability of the judiciary to confront *other* unlawful behavior of the executive.

There is nothing formulaic about standing analysis. Rather, courts have decided cases by asking if the injury is real, looking beyond algebraic formulas and rough analogies to cases past to ask whether the policies underlying the standing requirement are being served. Those policies include preserving the separation of powers—by avoiding advisory opinions, on the one hand, but also by not refraining from preventing overreach by the political branches when only the courts are in a position to do so, and by preserving the rights of individuals against the state. That is particularly important when the courts are called on to ensure the continuing vitality of public-interest litigation of constitutional issues, which is the very interest the attorney plaintiffs claim injury to. Moreover there is no risk that recognizing standing here would open a floodgate of litigation: lawyers routinely litigating international terrorism cases have very specific claims of vulnerability to surveillance that is not subject to judicially-supervised minimization, and belong to a very narrow class of persons capable of making such claims.

While courts are rightly concerned to ensure zealous advocacy by only hearing genuinely adverse controversies, it would be ironic to conclude that the government's failure to factually contest the claims of injury below should be held against plaintiffs trying to preserve the very confidentiality of privileged communications that underpins our system of adversary justice. The reason the government did not seriously contest these injuries—and has not done so in any of the similar surveillance cases brought since December 2005—is that every sensible, similarly-situated lawyer would do the same thing these public-interest attorneys have done. Affirming the judgment of the court of appeals would therefore vindicate the system of judicial review in which both the courts and these amici play a vital part.

Dated: September 24, 2012

Respectfully submitted,

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APPENDIX: LIST OF AMICI CURIAE

The **Center for Constitutional Rights** ("CCR") is a national not-for-profit legal, educational, and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966 by attorneys who represented civil rights movements and activists in the South, CCR has over the last four decades litigated many significant cases in the areas of constitutional and human rights. Among these is the landmark warrantless wiretapping case *United States v. United States District Court (Keith)*, 407 U.S. 297 (1972).

The Center has twice litigated Guantánamo detainee cases to this Court, in *Rasul v. Bush*, 542 U.S. 466 (2004) and *Boumediene v. Bush*, 553 U.S. 723 (2008), and since *Rasul* has coordinated the work of the hundreds of outside counsel working on individual detainees' cases. CCR also represents a number of other clients whose rights have been violated by detention and intelligence gathering practices instituted in the wake of the terrorist attacks of September 11, 2001, including, among others, representatives of a potential class of hundreds of Muslim foreign nationals detained in the wake of September 11 and labeled as "of interest" to the investigation of the attacks without cause, and Maher Arar, a Canadian citizen stopped while changing planes at JFK Airport in New York while on his way home to Canada, and instead rendered to Syria, where he was tortured and detained without charges for nearly a year, *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006), *aff'd*, 585 F.3d 559 (2d Cir. 2009) (en banc), *cert. denied*, 130 S. Ct. 3409 (2010). The clients in all of these cases are individuals, now located overseas, who have been alleged by the government at some point to have had some association—

however attenuated or unsubstantiated by evidence—with terrorism.

CCR and a number of its legal staff are plaintiffs in a challenge to the NSA warrantless wiretapping program first disclosed by the *New York Times* in December 2005, *Center for Constitutional Rights v. Bush*, No. 06-cv-313 (S.D.N.Y., filed Jan. 17, 2006), subsequently transferred to San Francisco by the Multidistrict Litigation Panel as No. 3:07-cv-1115 (N.D. Cal.) and currently on appeal to the Ninth Circuit (No. 11-15956). The Center also litigated a FOIA action seeking records of NSA surveillance of habeas attorneys for Guantánamo detainees, *Wilner v. NSA*, 2008 WL 2567765 (S.D.N.Y. 2008) (dismissing), *aff'd*, 592 F.3d 60 (2d. Cir. 2009), *cert denied*, 131 S. Ct. 387 (2010).

Tina Monshipour Foster is a New York-based human and civil rights attorney. She is the founder and Executive Director of the International Justice Network, a not-for-profit organization which helps victims of human rights abuses and their communities access legal assistance through a global network of leading human rights attorneys, academics, advocates, NGOs, and grassroots organizations. The majority of her clients are indigent Arab and Muslims who she represents on a *pro bono* basis. A large number of these individuals are current or former prisoners held without charge in United States custody overseas, at Guantánamo Bay, Cuba or Bagram Airfield in Afghanistan.

Ms. Foster previously was a staff attorney at the Center for Constitutional Rights and held a part-time position at Yale Law School working with the National Litigation Project of the Allard K. Lowenstein International Human Rights Clinic under the leadership of Harold Hongju Koh (former Dean of the law school and current Legal Advisor to the Department of State), where

she provided strategic advice and financial assistance to other attorneys and advocates collaborating on such cases around the country. Attorneys at both organizations have directly represented or served as amicus counsel on dozens of cases on behalf of current or former detainees held at Guantánamo and other U.S. military prisons. At CCR she appeared on, assisted with, and coordinated many of the first petitions filed on behalf of detainees at Guantánamo in the wake of this Court's decision in *Rasul v. Bush*.

Ramzi Kassem is Associate Professor of Law at the City University of New York School of Law. He directs the Immigrant & Non-Citizen Rights Clinic. Through that program, with his students, Professor Kassem represents prisoners of various nationalities presently or formerly held at American facilities at Guantánamo Bay, Cuba, at Bagram Air Base, Afghanistan, at so-called "Black Sites," and at other detention sites worldwide. In connection with these cases, Professor Kassem and his students have appeared before U.S. federal district and appellate courts, as well as before the military commissions at Guantánamo.

Professor Kassem also supervises the Creating Law Enforcement Accountability & Responsibility project (CLEAR), which primarily aims to address the legal needs of Muslim, Arab, South Asian, and other communities in the New York City area that are particularly affected by national security and counterterrorism policies and practices. CLEAR has represented or advised over 50 clients since its inception, partnered with over 20 community-based coalitions on various initiatives, and facilitated over 60 know-your-rights workshops at 35 different mosques, community centers and student associations across the region.

Before joining the CUNY law faculty in 2009, Professor Kassem was a Robert M. Cover Teaching Fellow and Lecturer in Law at Yale Law School, where he taught in the Civil Liberties & National Security Clinic as well as the Worker & Immigrant Rights & Advocacy Clinic. Professor Kassem also previously was Adjunct Professor of Law at Fordham University School of Law, where he taught in the International Justice Clinic.

H. Candace Gorman is the principal in the law firm of H. Candace Gorman located in Chicago, Illinois. She comes from a family of attorneys and has herself been an attorney for thirty years. She graduated from the University of Wisconsin with a B.A. in Philosophy in 1976 and from John Marshall Law School with a J.D. in January 1983. She argued and won a unanimous decision before this Court in *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004) (applying four-year federal statute of limitations to Section 1981 cases).

Ms. Gorman has served on the Board of Directors and as President of the Women's Bar Association of Illinois; the Board of Directors for the Federal Bar Association in the Northern District of Illinois; the Merit Selection Panel for United States Magistrates; and the Task Force Planning Committee for the Illinois Supreme Court's Study of Gender Bias in the Courtroom. She was the Legislative Chair and Commissioner on the Chicago Commission on Women, and a member of the National Employment Lawyers Association where she sat on the Board of Directors for the Illinois Division from approximately 1992-99. She has also lectured widely on the subject of human rights and civil rights, having represented two detainees at Guantánamo in habeas corpus proceedings, Abdul Hamid Al-Ghizzawi and Abdal Razak Ali.

Thomas H. Nelson is an attorney based in Welches, Oregon. After graduating with a B.A. from the University of Washington in 1966, he spent four years as a Peace Corps volunteer in Iran, first teaching and then, following the Khorrassan earthquake of 1968, working in relief and reconstruction activities. After he returned to the United States he attended Valparaiso Law School, receiving a J.D. with High Distinction in 1973; he then received a Sterling Fellowship to study at Yale Law School, earning an L.L.M. in 1974. After four years as a law professor at Connecticut and Valparaiso, he entered private practice in Portland, Oregon, working primarily on utilities regulation for the next decade. Starting around 2000, he became more active in civil and human rights activities on behalf of Native Americans and Palestinians.

In March 2004 he represented a local attorney and Muslim, Brandon Mayfield, who was falsely accused of participation in the Madrid train bombing of that year. As a result of the national attention given to that case, Mr. Nelson was contacted by attorneys for the Al-Haramain Islamic Foundation of Ashland, Oregon and asked to represent the charity in a number of matters stemming from the freezing of its assets in Oregon by the Department of the Treasury, and since then has been the primary attorney for the Oregon charity and the main liaison both to its personnel in Riyadh, Saudi Arabia and its attorneys in the United States.