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TRANSCRIPT

"LITIGATING SURVEILLANCE IN AMERICAN COURTS"

Interview with Jameel Jaffer

Interviewer: Lisa Magarrell

ANNOUNCER:

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LISA MAGARRELL:

I wanna welcome everybody to this-- brown bag. I'm Lisa Magarrell, if you don't know me. And-- I'm from the U.S. Programs National Security of Human Rights Campaign. And delighted to chair this brown bag with-- Jameel Jaffer, who's, as you know, here on-- a very short sabbatical, really-- as a fellow. But also directs the ACLU Center for Democracy.

I wanna-- give Jameel time to-- lay out his interesting (COUGH) work around the issues of surveillance. And particularly his work on the recent Supreme Court case in-- Amnesty Vs. Clapper. But I thought I'd start by-- mentioning something that happened to me a little while ago. I was-- I had an intern who-- was applying to work as a federal-- I think just a clerk in a court.

And so I had an F.B.I. interview. And they said, "So, you know, does he know anyone outside the United States? And, you know, who does he speak to?" And this is a person who worked with me at an international human rights group. And you think, you know, it's all about those connections. And of course he knows more than one or two people who live outside the United States.

And I think just sort of that flash of, you know, "What-- what are they getting at, you know? What do they expect to find?" When you think about the context that people have, whether they're journalists or-- or lawyers or just regular people-- engaged in a

much more interconnected society, you think about, "When does the U.S.-- care about what those communications are? And how does-- eavesdropping on those communications without notice or warrant affect-- people in the United States more broadly?"

So-- this is something that we obviously think about in terms of national security and human rights and the protection of civil liberties. And we work very closely with ACLU on a lotta these issues and turn to them for their expertise. And so it's really a pleasure to introduce Jameel to talk about-- this issue.

JAMEEL JAFFER:

Okay. Thanks, Lisa. And thanks-- to all of you for coming. Just on-- on-- on Lisa's story, you know, one of the fascinating things with these F.B.I. interviews-- there are many different reasons why I can't get a security clearance. (LAUGHTER) One of them is that-- I'm Canadian. But it doesn't stop the government from calling me up to ask me those kinds of questions about other people.

And I got this very unusual call just a few weeks ago. The guy who had argued-- the government lawyer who had argued-- one of the drone cases on the use of po-- opposing counsel. So we'd argued this Freedom of Information Act case together. And apparently he had been nominated or-- or-- or-- proposed for a position in the White House. I guess in the White House Counsel's office.

And I got a call from the F.B.I. asking me, "Is this is a guy we should trust?" (LAUGHTER) And I thought, "There's something very perverse about this (LAUGHTER) conversation." All right, so-- I'm gonna talk a little bit about litigating surveillance cases in American courts. And-- you know, I think that the topic is an important topic for-- a few different reasons. But one of them is that there's been this vast expansion of surveillance power-- over the l-- of government surveillance power over the last 30 or 40 years. And especially since 9/11.

And there are a few different reasons for that. One is that there has been this dramatic technological change. New technology allows the government to sweep up-- thousands of communications at a time. To analyze them in new ways, to retain them-- for a long time or forever. The government can-- cross reference one database against another now. It can determine who you were talking to, at what particular time and where you were when you were talking.

Can find out-- degrees of separation. You talk to one person, they talked to somebody else, they can build these maps that show-- networks. So it's very sophisticated technology now. And the technology allows the government to collect-- to retain, to analyze, to disseminate-- in new ways. So that's one-- one factor that has gone into this expansion of surveillance authority. Another is that perceived threats like the threat of terrorism or the threat of drug crime or the threat of illegal immigration, these threats have led Congress-- to-- expand the government's statutory authority.

So now we have all of these statutes that give the government much more power than it's ever had before-- to engage in various kinds of surveillance. Sometimes it's about surveilling the content of com-- communication. Sometimes it's about surveilling metadata. So, you know, who you are communicating with or at what times or-- in what locations.

There are all kinds of surveillance that these statutes permit. But the point is that the statutes give the government more authority than it's had before. The third factor is that there's been this weakening of the substantive constitutional principles that would otherwise limit the statutory authority.

So-- you know, in-- in the United States and nominally under the Fourth Amendment, the government has to get a warrant before-- conducting a search. Nominally, the government is prohibited from engaging in unreasonable searches and seizures. So those are that sort of, you know-- at a general level, those things are true. But then there are all these-- substantive doctrines that have limited-- the protection that the Fourth Amendment actually provides.

There's the third-party records doctrine. Which essentially holds that when you share information with a third party, you lose your privacy right in that information. There's something called the border search doctrine. Which gives the government sweeping power to search communications as they go back and forth across international borders. There's something called the incidental overhear doctrine.

Which-- (BANG) essentially holds that if you are overheard in connection with the government's surveillance of somebody else, you don't have the right to complain about the lawfulness of the surveillance. Then there's something called the special needs doctrine. Which holds that-- the government doesn't have to get-- a warrant based on probable cause if the search is motivated not by the desire to gather evidence of criminal activity.

But instead by the desire to gather information about threats to the country, for example. So there are all of these doctrines that-- significantly limit the protection that the Fourth Amendment with otherwise provide. So that's-- a third factor that has gone into this expansion of government surveillance power. The fourth factor is that there's been this-- corresponding (BANG) expansion of the procedural bars-- that prevent litigants from challenging government surveillance in court. One procedural bar is the state secrets doctrine, which the courts have held.

Allows the government to refuse to disclose the identities of its surveillance targets. At least in the national security context. And the other procedural bar-- has to do with standing. The right of any particular person to come to court. The courts have generally held that-- the only people who can challenge government surveillance are people who can show that their own communications have been monitored.

So those two doctrines-- sometimes acting together and I'll talk a little bit more about them. But those two doctrines have limited-- judicial challenges. So for all these reasons, government surveillance authority is much, much more expansive now-- than it was 30 or 40 years ago. And much-- more expansive now than it was even--

even 10 years ago. So with that background-- I thought I'd just talk a little bit about this case that-- we, at the ACLU, have litigated over the last four years, culminating in a Supreme Court decision.

A negative Supreme Court decision-- just a few weeks ago. The case is called Amnesty V. Clapper. And it was a challenge brought by the ACLU to the constitutionality of a 2008 statute called the FISA Amendments Act. FISA is the Foreign Intelligence Surveillance Act. FISA Amendments Act is an act that Congress passed in-- in-- in 2008 to amend that-- the surveillance authorities that FISA had originally granted.

The 2008 act that we challenged-- did-- did two big things. First, it immunized the telecoms, the telecommunications companies, that participated in the Bush administrations warrantless wire tapping program. (BANG) And second, it expanded the government's perspective authority to engage in surveillance of Americans' international phone calls and emails. (COUGH) So I'm gonna use that phrase international or that word international-- to mean communications that are one end domestic.

So-- you know, communications between people inside the United States and people outside the United States. And then I'll use the phrase foreign to foreign to refer to-- communications at both ends outside the United States. So the-- the 2008 statute was really about international communications. It was about these one end domestic communications. And the statute is pretty complicated.

But here's what-- you know, here-- here are the basics. The original FISA, the Foreign Intelligence Surveillance Act-- was enacted in 1978. And it generally required the government to obtain an individualized warrant based on probable cause before engaging in surveillance inside the United States. Including national security surveillance. FISA was about national security surveillance-- in particular. So when the government wanted to get-- wanted to monitor the communications of a suspected spy or a suspected terrorist inside the United States, the government would have to go to a specially (COUGH) constituted intelligence court called the FISA Court.

Apply for a warrant based on probable cause. And they would have to show that court that there was probable cause to believe-- that the person they were targeting was, in-- in fact, a foreign agent. A spy or a terrorist. And FISA, as originally enacted in 1978, was this-- this sort of marginal exception to the general rule. And it was used relatively rarely, I think just in-- in 150 or 170 cases in 1978. So 170 times, the government went to the FISA Court, proved that there was probable cause to believe that their target was a foreign agent.

And the court granted a warrant to allow the government to engage in surveillance. But over the subsequent quarter century, FISA became more and more important. And by the time we got to 2001, FISA was being used about 2,000 times a year. The government was getting more warrants under FISA than it was under the ordinary-- law enforcement authorities.

So when law students are taught in law school about probable cause and about -- the warrant requirement, they're usually talking about the law enforcement -- only about the law enforcement -- framework. The truth is that the national security framework, which nobody ever talks about -- is as important as the law enforcement -- framework in terms of the number of -- the number of -- investigations that are carried out by the government. The government carries out -- just as many under the -- the national security authorities as it does under the law enforcement authorities.

So that was original FISA. And that -- that framework was basically -- constant between 1978 and 2001. In 2001, the Bush administration essentially went -- evaded the framework through this warrantless wire tapping program. Told the National Security Agency that it could monitor -- phone calls without going to the court, without seeking probable cause warrants.

And the Bush administration's program operated until -- 2006. After it was exposed by the *New York Times* and challenged in court by -- a group of organizations, the Bush administration retired the warrantless wire tapping program. Went to Congress, asked for more statutory authority. And Congress granted that authority in 2008 due to the FISA Amendments Act. So (BANG) as I said, the FISA Amendments Act is a little bit -- a little bit complicated.

But -- but -- the basics are -- are fairly simple. The government no longer has to seek a warrant based on probable cause in order to monitor international communications. Again, one end domestic communications. Instead, it goes to the court and it -- is required to do two things. One is tell the court that its targets are outside the United States. And the second is tell the court that -- one purpose of its surveillance is to gather -- foreign intelligence information.

Information about threats to the country. If the government does those two things, then the government can sweep up international communications at will. Now, in defending the statute to an American audience, the -- the Bush administration and then the Obama administration emphasize that the targets of this surveillance are outside the United States. They are foreign citizens outside the United States. And that is true.

But even if you think of this in the most parochial way from -- from -- from the perspective of Americans' privacy rights only -- the -- the -- the government's surveillance of people outside the United States has implications for people inside the United States. Because the government is picking up communications between those people outside the United States and people inside the United States.

And because there is no probable cause requirement -- and, indeed, no individualized surve -- individualized suspicion requirement of any kind, there's nothing to stop the government from engaging in dragnet rather than individualized surveillance. And picking up -- not just this particular communication between this person and that person, but instead this collection of communications between this group of people inside the United States and this group of people outside the United States.

So just to take one hypothetical example, the government could, in theory -- under

this act, sweep up all communications between-- between New York City and Kabul. On the theory that the surveillance was targeted at people outside the United States. And one purpose of the surveillance was to gather information about threats to the country.

Now, I don't actually think that the government has engaged in that kind of dragnet surveillance. Mainly because they don't yet have the technological capacity-- to-- to process volumes of-- huge volumes of-- of information in that way. But I-- am pretty sure that they are engaged in other kinds of dragnet surveillance. For example, short-term dragnet surveillance between various cities inside and outside the United States. Or dragnet surveillance of particular groups of people outside the United States.

Political organizations-- media organizations that are based outside the United States. They have the power under this statute to-- surveil those kinds of communications-- en masse, not just, you know, individually. And there's no reason why they wouldn't do it. And I think it would be naïve to think that they're not doing it.

So that's-- you know, that's the act. And the case was a challenge brought by-- a group of media, labor, legal and human rights organizations-- to the constitutionality of the law. And-- there are-- there were two-- two constitutional arguments. The first was about the Fourth Amendment. It was an argument that-- the statute violated the Fourth Amendment by allowing the government to sweep up these communications-- without probable cause. And without individualized warrants. And the second argument was that the statute violated the First Amendment.

Because it unduly burdened the-- the freedoms of speech and association. So those were the two constitutional arguments. If we had reached the merits, if a court had actually considered those constitutional arguments-- it would've been a hard set of arguments for us-- for some of the reasons (DOOR) I mentioned earlier. We would've had to face the government's invocation of-- the incidental overhear doctrine.

We would've had to face the government's-- reliance on the border search doctrine. The government inevitably would've-- relied on the special needs doctrine as well. They have all sorts of-- substantive arguments-- at their disposal to defend surveillance of this kind. But we didn't actually get to the merits. No court considered the merits. Instead, the litigation focused on the right of our plaintiffs to be in court in the first place.

The standing of our plaintiffs. We had made two arguments. The first was that our plaintiffs-- were likely to be surveilled under the statute at some point in the future. We couldn't prove it. The government doesn't disclose the identities of its surveillance targets. And the government certainly wasn't gonna tell us whether our plaintiffs would be surveilled in the future.

But our plaintiffs included-- lawyers who represent-- people detained at Guantanamo-- journalists who report on foreign conflict zones, human rights researchers who look into, for example-- the C.I.A.'s black sites abroad. And-- our

theory was that at least some of these communications-- all of the communications fall within the scope of the statute.

There's no reason why the government, if it wanted to, couldn't sweep up all of 'em. But our theory was that some of those communications would, at some point in the future, likely fall-- within-- the collection of communications that the government was actually monitoring. Again, we didn't-- you know, we couldn't prove it and we didn't purport to have proof of it. It was a theory about what would likely happen in the future.

The second argument was-- that the plaintiffs-- had been forced by the statute to take measures to protect their communications against the possibility of surveillance. So they had already-- incurred costs-- because of the possibility of surveillance. And the lawyers, for example, had-- some of them had-- had stopped communicating by email-- with certain witnesses.

Because of the possibility that those emails would be-- monitored by the government. Some of the human rights researchers had traveled abroad to gather information that they might otherwise have gathered by phone or by email. And so we pointed to these present costs-- as well as a basis for standing. In a rational world, you would be able to go into court and-- and say-- "I think that the government is actually listening to my phone calls."

But-- the-- the-- the problem with that is, for good reasons and bad, the government doesn't-- as I said, it doesn't disclose the identities of its surveillance targets. And-- in fact, when the government is asked to disclose those-- those-- those identities, the government's response is always the same. Which is that that information is protected by the state secrets privilege.

So our reliance on these two other arguments was really a way of-- of-- of getting around the state secrets privilege. We knew that if we asked the government-- for confirmation, the government would invoke the state secrets privilege. So instead, we made the argument that while we don't need confirmation, we know that the communications are likely to be monitored at some point in the-- in the future. And we know that our plaintiffs have already suffered these injuries.

And that should be enough to allow us to challenge the-- the statute. We lost that argument in the district court. We won it in the second circuit-- before a three judge appeals court. But just a few weeks ago, the Supreme Court overturned that appeals court decision. And in a five to four decision, it held that our plaintiffs lacked standing.

So-- I guess this is not a surprise, but I think that the dissent got it right. The dissent-- basically points out that to hold that the only people who can challenge this kind of surveillance are the people who can show that their own communications have been monitored is to hold that the statute is beyond constitutional challenge. Because nobody is ever going to be able to present the evidence that the government says they have to present.

And for anyone who actually, you know, thinks that the surveillance might be--

unconstitutional, or-- or for anyone who thinks that-- this kind of surveillance should be subject to judicial challenge, that's obviously-- a troubling conclusion. Now, to be fair to the majority there-- Justice Alito did point out two contacts in which the statute might be subject to constitutional challenge.

One is that-- (SUBWAY) one context involves the telecoms who are asked to facilitate the surveillance. Because in order to carry out this kind of surveillance, the government has to go to AT&T or to Verizon or to Sprint and say, "Can you give us these communications? Or can you give us access to your cable so we can tap into these communications?" So in theory, it's possible that-- a telecom could walk into the FISA court-- and challenge the constitutionality of this kind of surveillance.

There are a few reasons why I think that that is-- both unlikely to happen and inadequate even if it does. Telecoms first don't have any incentive to protect the privacy rights of the people whose communications go through their systems. Walking into court to challenge the constitutionality of this stuff, for one thing, annoys the government. They need the government on their side-- because the government is their regul-- it regulates their-- their activities.

And it's also a very costly thing to do, to walk into court and challenge this kind of surveillance. It took, you-- you know, the-- the ACLU did this case, it took us-- I said three years, it was almost five years. Thousands of hours of lawyers' time. Dozens of briefs, dozens of oral arguments. And-- it's unlikely that any major telecom is gonna want to invest that kind of-- time and money into something that they don't really have any incentive to protect.

And to protect you something they don't really have any s-- incentive to protect. Even if they did, the litigation would take place before the FISA Court. The FISA Court's m-- the FISA Court meets in secret. Doesn't publish its decisions. So if the constitutionality of this kind of surveillance is tested at all, it'll be tested in that-- in that context. And we will never know-- the result of the test.

So it doesn't seem like an adequate-- an adequate substitute for ordinary judicial review to me. And it didn't to the four members of the dissent either. The other possibility that Justice Alito pointed to was-- the possibility that the government would introduce evidence derived from the FISA Amendments Act in a criminal prosecution. So it would walk into a criminal prosecution and say, "We are prosecuting this defendant on the basis of information derived from surveillance conducted under the FISA Amendments Act."

And it is conceivable that the government-- could do that. But it leaves to the government the decision-- whether the government surveillance should be challenged. Because it's always-- within the government's discretion to introduce as evidence or not introduce the evidence. If they-- if the government decides that we're not ever gonna introduce this kind of evidence in a criminal trial, then there will never be an opportunity to challenge the-- to challenge the surveillance.

And five years have passed since Congress enacted the statute. And the government has never introduced FISA derived evidence in a criminal-- FISA Amendments Act

derived evidence in a criminal trial. I think what's going on instead is the government-- obtains evidence through the FISA Amendments Act. They launder that evidence through FISA. So then they-- they-- they take that evidence and they use that evidence as the basis for requesting an ordinary FISA warrant.

And then they gather more evidence through the ordinary FISA warrant. And when they prosecute the defendant, what they tell the defendant is, (TRUCK) "You're being prosecuted on the basis of 1978 FISA." And the-- the defendant doesn't challenge the FISA Amendments Act because the defendant thinks that the only act at issue is the 1978 act. Which has been challenged many times and upheld.

So that's just a long way of saying that-- I think that probably the result of the-- the Supreme Court decision is that this very controversial surveillance statute will not be subject to any meaningful judicial review. And another consequence is it leaves-- leaves Americans' privacy rights to the mercy of the political branches. So-- I-- I'm running out of time. But-- but just a couple more-- a couple more points about that.

You know, may-- maybe-- there are judges, justices on Supreme Court who believe that it's okay for privacy to be left to the-- the political branches. But-- I don't think we should blind ourselves to the-- ineffectiveness of Congress on this set of-- this set of issues. Most members of Congress don't know the first thing about FISA. Those that-- know something about it and are interested in it-- don't have access to many of the key documents.

Only a handful of-- of legislators have access to-- any information at all about how the statute is actually being implemented. And most members of Congress don't have access to the legal-- Office of Legal Counsel memos, in which the government has interpret-- interpreted its authority. They don't have access to-- FISA Court opinions. In which the FISA Court interprets the government's authority.

And so-- it seems farfetched to me to think that Congress is going to be an effective check on the government's use of these powers. And the public has even less information than Congress does about the way that these powers are being used. And so-- it's hard for the public to hold the executive branch responsible or accountable for abuses that it doesn't know about.

And it's hard for the public to hold-- legislators accountable for failing to oversee the executive branch when they don't know what the oversight looks like and they don't know what the executive branch is doing. So-- I think that it's-- you know, in theory, you-- you might think that the political ban-- branches could be-- an adequate check here. That-- that-- that-- that Congress could be an adequate check. But-- but I don't think in practice that's actually going-- going to happen. Now, I don't wanna leave everybody with all of that negative. There-- there are two-- (LAUGH) two-- two sort of positive developments over the last year or so that I think are worth noting.

One is that there is now-- a kind of left/right coalition in Congress-- that does seem genuinely concerned. At least of a transparency-- around government surveillance. Ron Wyden-- Senator Udall, s-- on the left. Rand Paul on the right. There are probably 10 or 12 others that-- that are part of the same group. Have been pressing

the Obama administration to release more information.

So far, their efforts have been-- largely unsuccessful. But the fact that they're asking for this information is-- is itself-- you know, a step forward. And-- and-- and we'll see if maybe they're more successful in the future. The-- the other-- positive development is that in a case called U.S. Vs. Jones-- the Supreme Court held about a year ago that-- the Fourth Amendment is implicated by the government's-- use of location tracking technology.

So if the government tracks your location-- the government needs to justify that surveillance under the Fourth Amendment. And that was actually not-- many observers didn't think that the case would come out that way. And w-- at least one justice, Justice Sotomayor, signaled in that decision that-- she was ready to revisit the third-party records doctrine.

The doctrine that holds that if you give information to a third party-- you lose your privacy interests in it. And if the Supreme Court were to revisit that doctrine, that would be a pretty big deal. I don't know how big a deal it would be for surveillance conducted in the national security context. Because, you know, as I mentioned, there are a lot of other barriers to judicial consideration of-- national security surveillance.

But I think it could be a very big deal for surveillance that is not justified by national security. So two limited but-- but nonetheless-- significant developments-- that I think are-- more-- more positive. So I guess I'll-- I'll leave it there. But I'm happy to talk about any of that or about anything else. (LAUGHTER)

LISA MAGARRELL:

And-- we'll open it up for questions. I don't know, is there anyone on the phone? Good. Just checking. It doesn't sound like it. But I wanna lead off with just a couple of things. One is that-- this-- FISA Amendments Act was up for renewal because it had a timeframe, right-- last year. And-- it passed. And I was curious-- whether the-- it passed, right?

JAMEEL JAFFER:

Yeah, that's right.

LISA MAGARRELL:

Yeah. So-- if the-- the debate around it brought up any of this. And how much interest there was in sort of curbing it. Were there any changes introduced? And then-- I'm curious also to put out this question of, you know, there is so much giving up of privacy in the U.S. these days, you know? People are on the internet and they realize that all of their communications are being tracked for other uses.

You know, people are voluntarily giving up their privacy rights. And-- there's, you know, cameras everywhere. So what is really the-- the impact of this kind of surveillance? And-- and why should people really be caring about it? So those would be my two s-- questions to get us started. And I'm sure there'll be others.

JAMEEL JAFFER:

Well, the reauthorization, yes, it-- it-- it was reauthorized-- just a few months ago. I think December of 2012. And-- this left/right coalition that I mentioned was very active. In fact, I think it was sort of created around the reauthorization debate. And-- (BANG) they sent a number of letters.

The coalition sent a number of letters to the administration saying that, "We are-- we're-- we're not willing to vote for reauthorization-- until you release more-- more information." Some of them didn't vote for reauthorization. Most of them did. Even though the administration did not, in the end, release-- release more information.

The-- the-- the-- the-- the main point of contention was-- and this gives you a sense of, you know, sort of how limited-- how limited the disagreement is in-- in Congress. The main point of contention was-- was the government's refusal to release-- statistical information showing how many Americans-- how many communications relating to Americans-- had been obtained under the statute.

And the administration first said that they wouldn't release the information. After that, they said that they-- could not estimate that number. That it was just not-- not possible to do it. And after Senator Wyden pressed for a better explanation for why they couldn't do it, they said it would actually violate Americans' privacy rights for us to conduct the-- it's actually a remarkable letter.

It's (LAUGHTER) worth-- worth reading. That-- that-- that if we conducted the investigation necessary to collect the statistics, that itself would violate Americans' privacy rights. And, you know, Senator Wyden, to his credit, made-- made a lotta noise about the ridiculousness of that explanation. And-- and-- and-- and did press the administration to-- to release more information. But-- but he was-- he was ultimately unsuccessful. The-- I mean, I think part of what go-- goes on is that-- that-- you know, what the courts say is, the courts say the political branch, (HORN) the-- the right-- the right venue for this debate is-- is (HORN) in the political branches.

And-- the political branches feel like-- there's always a back stop. There's always judicial review, you know? If-- if they get it wrong, there's always a court at the end that can say that this is unconstitutional. But the truth is that neither of these-- neither of these systems is actually operating in the way that it-- that it should be.

The political branches-- are not actually-- engaged in meaningful debate about the-- the proper scope of government surveillance. Or the-- implications of giving the government all the surveillance-- authority. There's no serious debate being had because nobody has the information to-- to engage in the debate. And in the courts-- there is no-- there's no check being provided by the judiciary. Because nobody can

actually get to the point where judges consider the merits of these surveillance programs.

All of the fight in the courts (BANG) is about threshold. The right of litigants to be in court in the first place. The-- the-- the-- the fight is about the state secrets doctrine. Or it's about-- or it's about standing. And so-- you know, it's-- there's-- there's really no grownup at the-- at-- at the table. (LAUGH) And in fact, the state secrets-- this is just a little bit of a digression.

But the state secrets thing has got-- gotten so crazy that there is-- there's a case out in California in which the government inadvertently disclosed to-- to an isl-- to-- to a Muslim charity that it had been the target of warrantless wire tapping. And, you know, this is for-- for litigators challenging government surveillance, this is a holy grail, right? You've got proof (LAUGHTER) that the government did it. This is the thing that the government all along has said that you need.

But the government's argument in that case was that the state secrets doctrine foreclosed the litigants from relying on that document. Even though they-- there was no s-- there was no secret to the litigants. It was no secret to the charity. Because the government had given 'em the information.

But the government said, "Our inadvertent disclosure of the information to the-- to the litigants doesn't foreclose us from relying on the state sec-- secrets privilege. But it does foreclose them-- from relying on the document." And so-- (LAUGHTER) you know, it'd be hard to overstate the-- the extent to which these procedural doctrines have proved to be barriers to judicial review. Your second question about the-- you know, the implications of this-- this-- this surveillance.

You know, part of it has to do with-- pr-- privacy itself. You know, and the arguments-- the arguments against the surveillance are the arguments against total-- totalitarian government, you know? If you-- if you believe that there should be some space for individuals that the government can't interfere with, well-- then I think you need to be concerned about this kind of-- pervasive and-- an intrusive-- an-- an intrusive surveillance, you know?

If you-- even from a privacy perspective alone. But-- but then there are all sorts of free speech and free association, freedom of association implications to this kind of surveillance at well-- as well. You know, if-- if-- if people are concerned that the government may be tracking which websites they visit, they're not gonna visit controversial websites. Or if the government is listening to phone calls, they'll be less likely to have open political conversations over the phone.

And, you know, you can see this-- chill already at the margins. I mean, if you-- if you look at any of the many reports that have been written about the Muslim community in New York and the N.Y.P.D.-- or, you know, if you-- if you visit any mosque in New York City and try to have a political conversation, you'll very, very quickly see-- the-- the r-- you know, the-- the-- the very real results of-- of government surveillance.

Or the fear of government surveillance. But I think, you know, honestly, we don't know all of the implications of this kind of surveillance. Because we've never-- you

know, these kinds of powers were never available to governments before. You know, even the governments in the second half of the 20th century that were most interested in surveilling their citizens, you know, they didn't have access to this kind of technology.

It wasn't conceivable that they could collect every-- communication that-- their citizens were having. But that is-- you know, we're pretty close to that right now. Certainly, the government has the power to collect every-- every phone conversation or every email. It's a question of, you know, at what point will it be able to meaningfully analyze those-- those communications.

Or-- or-- or store them for long periods of time. But I don't think we're more than a few years off from the government having that kind of authority. And so I don't-- you know, I think we-- we really don't know what-- what-- what-- what a society will look like when a government has that kind of authority. It's the first time it's happened.

LISA MAGARRELL:

I'm gonna allow time first to this back row that I can't see otherwise. Yes, go ahead.

FEMALE VOICE:

I have a question about the technology. You've alluded to the government's capabilities and talked about how-- how their powers are limited by what-- by what they can and cannot (UNINTEL). Do you have any idea about-- advances in the field? Sort of-- data collection and writing. And when they will have the (UNINTEL) power.

JAMEEL JAFFER:

Yeah. I mean, I don't-- you know, I-- I'm not an expert on-- on data at all. I mean, I know that there-- you know, there is-- the National Security Agency is-- which has about 50,000 employees, by the way, which is-- more-- more than the C.I.A. And more than the F.B.I. They're-- they're now building in Utah this massive data center that-- in order to store-- the kinds of electronic communications that I've been talking about, in order to store emails, in order to store location tracking information.

And-- the-- the data center is big enough to store-- every single commu-- every single electric communica-- electronic communication that Americans engage in over, I think, it's a three year period of time. So it's a massive-- you know, there's no reason to have that kind of data center unless you-- are interested in collecting huge volumes of-- of information.

So that's a sign that-- that they believe that they will very soon have the capacity to analyze that volume of communication in some sort of meaningful way. If you're--

you know, if you're interested in the-- the details of the technology, the person who's, I think, written-- most clearly about it is Jim Bamford. Who wrote a book called-- well, he wrote one called *Body of Secrets*. And another-- called *The Puzzle Palace*. Both about the National Security Agency. And he talks about the evolution of their technology over the last 30 years. And he also writes for *Wired* right now. And he writes quite a bit about-- what it is that the NSA can or might be doing.

LISA MAGARRELL:

Yes. Go ahead.

MALE VOICE:

Is there any indication that evidence collected from the FISA Amendment Act has some sort of feed in to the drone program?

JAMEEL JAFFER:

Not that I know of. But I'm sure it-- I'm sure it does. I don't know exactly how it-- how it gets there. But the NSA is-- it's-- it's sometimes called a service agency. It-- it-- it-- it works for other agencies. So the NSA's-- is a component of the Defense Department. And so parts of the Defense Department will ask the NSA to gather information of a particular sort.

And the NSA will do that. Or the C.I.A. may ask the NSA to gather information of a particular sort. And the-- and the NSA will do that. And I assume that-- (TRUCK) when the C.I.A. justifies or when the DOD justifies its drone strikes by saying-- they're based on signals intelligence, what they're talking about is surveillance conducted under authorities, including the FISA Amendments Act.

You know, the-- the-- the government has always taken the position that the-- that FISA and the FISA Amendments Act-- govern surveillance that's conducted inside the United States. But that outside the United States, there is no statutory limit on what the government can do. And the government operates under an executive order. Something that was issued 20 years ago, but that has been up-- updated-- several times since.

And the executive order allows the government, in its view, to use-- satellites to gather-- communications. Including international communications. Americans' international communications without complying with even the watered down requires of the FISA Amendments Act. So they're really-- you know, they're-- I talked about two regimes. The-- the original FISA regime, the FISA (BANG) Amendments Act.

But there's a third regime, which is-- surveillance that takes place under the executive

order. And we know almost nothing about that surveillance. There's a clinic at Yale that has just filed-- Freedom of Information Act litigation to try to get more information about surveillance conducted under the executive order. But as far as I know, that's the first effort to actually unearth anything about that.

LISA MAGARRELL:

Go ahead.

FEMALE VOICE:

I had a question. When you were talking before about evidence being laundered through FISA and how the original information collected from surveillance would be used in criminal prosecutions, wouldn't the defendants theoretically be able to ask for information that contributed to the warrant for probable cause?

JAMEEL JAFFER:

You know, in-- in theory, there-- there is-- so the ACLU is involved sort of marginally in one criminal case in-- in Florida. In which-- so what happened was the-- the-- the government had been telling a lot of defendants that-- that it, the government, was relying on evidence obtained under FISA without referencing the FISA Amendments Act.

And given that five years had gone by and the government had never referenced the FISA Amendments Act, we began to suspect that in referencing FISA, the government meant to encompass both f-- the original FISA and amended FISA. And so we convinced a few criminal defense lawyers, who had been notified that their clients had been monitored under FISA, to file motions for clarification. Asking the government to clarify whether-- which particular provisions of FISA it was actually relying on.

And-- in this Florida case, the government responded initially by saying-- "We have already-- we have already-- responded. We have already-- fulfilled the requirement that the statute imposes on us by telling you that we surveilled the defendant under FISA." And it's very difficult to know what the government meant by that.

Whether they meant, "We've already told you that it was original FISA." Or whether they were saying, "We don't have to tell you any more than what we've told you already." And so the-- the defendant then-- asked the court to require the government to disclose more information. And the court-- issued a classified decision that was-- denied even to the defendant's counsel. And the defendant's counsel is now trying to get access to the classified decision. So I don't, you know-- in theory, a defendant should be able to get more information about what it is that the government is relying on. In practice, the defendants have not been able to do

that. It's only relatively recently that the defendants have s-- have started to ask for that kind of clarification. So maybe they will get somewhere eventually, but they haven't yet.

LISA MAGARRELL:

I wonder if you could address the implications of the standing decision? Because I think it's quite worrisome to think about-- the way sort of things are going underground. There's no way to challenge in court all of these secrecy-- state secrets and national-- f-- question-- security questions. All of these things that keep litigants out of court.

And-- and-- addressing the merits of-- of claims about-- these kinds of-- of-- problems with the way-- the legal regime. And some people talk about, sort of, this trend toward secret law. And so how does the standing decision of the Supreme Court have implications for the broader challenges to the kind of government-- secrecy that we're seeing?

JAMEEL JAFFER:

Yeah. Well, I mean, I think that it'll-- it'll make it very difficult to challenge government surveillance in the national security context. (TRUCK) Because it's in that context that-- the targets don't get noticed, right? It's in the national security context that targets are never told that they were the victims of the surveillance. And not just targets but people who are overheard are never told that they were overheard in the-- in the course of the government surveillance.

Outside the national security context, there is a constitutional requirement that the government notify the targets. If you are-- wire tapped in a law enforcement investigation, you're not told while the wire tapping is going on. You know, that would obviously defeat the-- you know, the government's-- ability to gather the-- the-- the information.

But-- 30 days after the surveillance is over, the government is required to notify you. And, in fact, you will get something in the mail. You'll get a letter in the mail saying, "This is-- a disclosure under Title III-- notifying you that between this date and this date-- the government monitored your phone calls at this particular number."

And-- that document-- you know, p-- creates the opportunity for accountability. Creates the possibility of accountability. 'Cause it creates the-- the possibility that somebody will walk into court and say, "This surveillance was-- unjustified." Or, "It was unconstitutional." Or, "It was-- it exceeded government's authority under-- under the statute." Or-- "It wasn't based on probable cause." Or, you know, they-- whatever.

You know, there are all sorts of possibilities that open up when-- the people who are surveilled are told about it. But in the national security context, the-- you know, I

talked about standing and the state secrets doctrine. These-- these would not be problems if there were a notice requirement. It's because there is no notice requirement that standing and state secrets become-- become a problem.

And so, you know, one of the things that we've been thinking about the ACLU, and I'm sure we're not the only ones out there thinking about this, is whether there is a way to directly challenge the-- the-- the lack of a notice requirement in some of these national security-- statutes. It's not an easy thing because you're gonna be faced with exactly the same standing problems in that-- you know, in that kind of challenge. But it's possible that somebody might be able to come up with a challenge on behalf of a friendly telecommunications provider, or something like that. And-- if we were able to create a notice requirement, than a lot of these other things would fall away.

LISA MAGARRELL:

Please.

MALE VOICE:

Just follow up on that real quick. So in the context-- in the law enforcement context then, if-- there's a g-- there's a requirement for notice. But does that-- does the overheard doctrine apply there as well? Since that's someone who may have been overheard but not the target of—

JAMEEL JAFFER:

Yeah.

MALE VOICE:

Right? So-- which seems like that would be a challenge, right? Because they've been-- presumably, in these instances, the people aren't themselves targets. They're being overheard.

JAMEEL JAFFER:

Well, so-- so-- in the law enforcement context, the incidental overhear doctrine has not been a huge problem. Because-- because they notify the targets. And the targets then have an incentive to challenge the surveillance if they think it was—

MALE VOICE:

Unlawful or something?

JAMEEL JAFFER:

--unlawful. In the national security context, especially with international communications, it becomes a much bigger problem. Because the government's position is that-- people, noncitizens outside the United States, do not have constitutional rights to assert. And so-- if-- if, you know, the only people who are targets don't have constitutional rights to assert, then the-- the-- the incidental overhear doctrine becomes a much bigger problem. Because the people who do have constitutional rights are subject to that doctrine. So-- you know, there's no-- there's no end to the obstacles-- to judicial review of national security surveillance.

Especially of international communications. I mean, it just-- you know, there're so many hurdles that-- espesh-- after Amnesty, it-- after Amnesty V. Clapper, it-- which was our-- the name of our case-- I think that it's-- something-- something pretty significant has to change in order for there to be-- judicial review on the merits of the national security surveillance authority.

MALE VOICE:

And is-- sorry. And real quick, also, I mean, you talked about how there's been some bipartisan sort of movement for transparency. And I wonder-- and particularly 'cause the-- the expansiveness-- of the state secrets privilege-- you know, as, I mean, in-- in this context and as other contexts as well, has become a real problem. And that's, you know, a relatively recent development, obviously. So I wonder, has there been any of that-- concern, you know, amongst these, you know-- you know, senators or other-- other individuals in Congress around that trend? In some way push it back there?

JAMEEL JAFFER:

Yeah. There is actually legislation that-- proposed legislations that have been floating around for several years now, that would reform the state secrets privilege. It would essentially-- give the courts a bigger role in determining whether the invocation of the state secrets privilege was justified or not.

In some versions of the proposed legislation, it would also allow courts to weigh the government's interest in preserving the secret-- against the public interest in the litigation proceeding. Which I think would be a very big deal. But the litig-- that legislation has never-- n-- never got-- you know, anything close to the support it would need in order to pass. (CREAK) So-- you know, there are senators out there

who care enough about it to be proposing the legislation. But not enough senators out there who care enough about it to pass it.

FEMALE VOICE:

I have a few observations regarding the implications. Which I always see in the families. Especially in the Muslim families because I belong to that community. So while-- being on the phone-- visiting any websites, particular websites and social networking, there's a constant kind of-- not fear, but kind of a pressure that you are under.

You know, you are being monitored. And especially-- so the-- while the family member is telling the other that, "Please-- be-- be cautious when on the phone." For example, my-- sister-in-law, she is from Iran. And whenever I have to make a call to her when she was visiting and her mom was sick, so everybody was, "Are you sure you are going to make that call to Iran and you will talk to her?"

And my daughter was-- working on some research paper. So my husband was telling, "Constantly on the same websites. They're good for you." So this is the kind of fear the household as well, which is-- being observed. And which we feel that it's not like your-- you don't have the freedom of the kind that you really need to have in order to have a conversation. Or-- being on the social network. And all these things. So it's a constant kind of a pressure.

LISA MAGARRELL:

Yeah?

MALE VOICE:

I'm thinkin' about this question, like-- from a social, political point of view. And this is a hypothetical question. If-- war on terror hadn't happened, 9/11 and-- because one of the reasons you mentioned-- the surveillance happens is because of advancement of technology. Would that happen? And if yes, how much? The same extent or say-- you know, thinkin' about it, it would be less. And the other question is whenever-- and if war on terror ends, will there be end of such thing? That draw down of-- and civil soci-- society will be able to do something? Or it's gone?

JAMEEL JAFFER:

Well on-- on the first part of your question, I-- I think it would've happened, but not to the same extent. And I think that the war on terror has been one of the big driving forces behind this-- this trend. And-- there are other forces, you know? I-- I think

that, you know, even before there was a war on terror, there was-- this constant demand for more surveillance authority because of the perceived threat of-- drug crime or illegal immigration.

And, you know, there-- there's always some threat out there that the government can point to to justify-- more surveillance power. But-- you know, there was-- there was more resistance to it before 9/11. And in fact, you know, a lotta people complained that the Patriot Act, which was the first major expansion of the government surveillance authority after 9/11 (BANG) was really a collection of-- requests that the government had made before 9/11 but that had been rejected.

That the government just had this wish list of surveillance authorities that it had wanted for a long time. And it just, you know, recycled them after 9/11. So that's, I think-- that suggests that things might've played out a little differently but for 9/11 and everything that's happened since 9/11. I think that your-- the second part of your question is actually more hypothetical than the first. (LAUGHTER)

This-- this-- this question, I mean, what will happen when the war on terror ends. You know, the-- the-- the-- I think a lot-- a lotta people thought that-- the-- sorry, the-- the killing of Bin Laden would be-- a critical turning point. An inflection point in this-- in-- in-- in-- in this particular war.

And that if anything was gonna justify-- winding down the war on terror, it would be that-- that event. (SIREN) But I don't think we've seen that-- that happen-- at all. The-- the-- the reauthorization debate took place after Bin Laden's killing. And-- you know, it had the same-- the same tone as it would've had a year before.

Some people are now hoping that the-- the drawdown of troops from Afghanistan will result in-- a wind down of the war on terror. I mean, I-- I'm one of the people who's hoping that too. But y-- you know, I think that the-- we haven't-- we haven't seen a whole lot of political courage from-- from Congress or from the executive branch on-- on-- on this-- on this issue. And there're a lot of private interests out there. Especially on the surveillance issue.

Private interests out there that-- that-- have a lot to gain from a continued expansion of the government surveillance authority. A lot of the people who built this surveillance authority, when they were in the Bush administration or the Obama ad-- administration, are now at places like-- Booz Allen. Or these big consulting companies that make most of their money or a lotta their money off-- working with the NSA.

And-- I don't-- you know, I don't see any dramatic reversal of it. Unless, again, you know, something-- something major-- something major changes. And-- and something major, I think, would have to be a reengagement from the Supreme Court-- with privacy rights and with-- or reconsideration by the Supreme Court of these threshold doctrines. I guess one, you know, in a way-- promising thing is that the Amnesty decision, while it was a loss, it was a five-four loss-- there are four justices on the Supreme Court who would've ruled that this statute should be subject to constitutional challenge. And-- you know, the five conservatives seem relatively

healthy. But, you know, (LAUGHTER) they're not gonna live forever. And-- and if the courts change, then, you know, that could-- that could have-- a pretty significant effect.

MALE VOICE:

So just one comment on what you've just said and then my question. But I actually think the drawdown in Afghanistan will actually fortify the application of FISA Amendment Act, for example. Because here you have boots on the ground currently to secure that part of the world. If you wanna call it that. But with the drawdown, we're-- we're increasingly in the U.S. conducting war by remote control. And I think the FISA Amendment Act allows (THROAT CLEARING) the U.S. to do that. That's where I was coming with my question about the drone program.

But my second question is actually in terms of functionality. Is the amendment-- what-- difference, if any, is there between the current status with the Amendment Act versus the illegal program that Bush had in place from 2001-2006? Is there any difference between those two regimes?

JAMEEL JAFFER:

Well, there-- there're two sets of differences. One-- one is-- you know, defenders of the Obama administration will say-- that it's very different because this is something authorized by Congress. That what the Bush administration was doing-- was-- disregarding a federal statute. And what the Obama administration is doing is following a federal statute.

And that's fair enough. But the statute that they're following is-- and defending in court-- is a statute that authorizes a much more expansive surveillance than the Bush administration was engaged in under the warrantless wire tapping program.

For all of its problems, the warrantless wire tapping program was-- directed at specific individuals who were thought to be-- themselves foreign agents. They were-- they were thought to be members (BANG) of terrorist organizations or affiliated with terrorist organizations. What the surveillance of the NSA is now engaged in-- is not directed in that way.

It's dragnet surveillance. They're picking up communications of people who have nothing to do with-- with terrorism or espionage. And the-- the statute gives them that authority. And so I think that the surveillance is much worse, you know? Whether-- even though it's procedurally stronger. Even-- even though that the-- even though the-- the statute, it's now a federal statute-- and one separation of powers problem has been cured-- the constitutional problems remain. And-- and are arguably greater than they were before.

FEMALE VOICE:

I have a question that's-- that's probably-- very simple. But-- I get stuck on the-- I know that some advocates have been pushing for information about the legal standards that the FISA Court uses. But those don't have anything to do with this surveillance because you don't go to a court for a warrant, right?

JAMEEL JAFFER:

Well, they still—

FEMALE VOICE:

Or—

JAMEEL JAFFER:

--go to a court. But they just don't go-- so-- so they still have to go to the FISA Court to engage in this kind of surveillance. (BANG) But they don't have to show probable cause. They don't have to show that-- that anyone in-- anyone whose communications they're monitoring is a foreign agent. They just have to go to the court and say, "Our targets are outside the United States. And one purpose of the surveillance is to gather foreign intelligence (BANG) information."

Foreign intelligence information is defined very broadly. So the court still has a rule. And the court still interprets the statute. They still tell the government, "You-- you know, here's the kind of surveillance you can or cannot do under the statute." And so-- we and many other people have been calling on-- the court. We actually filed--

(OFF-MIC CONVERSATION)

JAMEEL JAFFER:

So when-- when-- after the statute was-- was passed, we filed this Amnesty V. Clapper, which was the constitutional challenge to the statute. But we also went to the FISA Court. Amnesty was filed in an ordinary federal court. But we also went to the FISA Court and we filed-- a motion under the First Amendment, asking the court, saying that w-- that the public had a right of access to the court's legal opinions about the scope of the statute. So the l-- the-- the-- the court's legal interpretations of the statute.

And, you know, as many of you know, there is, in general, a First Amendment right of access to judicial opinions. And we just asserted that right in the FISA Court. And the government said-- "It's improper, they don't have a right to it's in this court. This

court is for the government only." But also that the proper venue for this kind of request is an ordinary federal court.

And the proper mechanism is the Freedom of Information Act. You shouldn't be asking the court to release this information. You should be going to an ordinary federal court and asking the court to order the government-- you know, essentially asking the government to release the information and then going to an ordinary court to enforce your request against the government.

And so we-- more recently did exactly what the government had recommended. And the Electronic Frontier Foundation did the same thing. We went, we filed a Freedom of Information Act request. Asking the government to release the FISA Court's decisions. And the government responded by saying no. (LAUGHTER) And we then went to court and tried to enforce the-- the-- the four year request.

And the government's response was, "The proper venue for this kind of request is the FISA Court." (LAUGHTER) And this issue is actually now before the Ninth Circuit now. The Electronic Frontier Foundation has a case that's before the Ninth Circuit. This question of-- the extent to which-- the government can be forced through the Freedom of-- inf-- of Information Act to-- release opinions written by the FISA Court. So it's-- you know, it's a very big deal.

And-- and when-- Lisa Monaco was-- nominated to be whatever she is in the Justice Department right now, I can't remember her title, she said at her confirmation hearing-- "One of the things that I'm committed to is more transparency around the FISA Court. And we are going to--"

LISA MAGARRELL:

She's the counterterrorism coordinator. Is that what she is?

JAMEEL JAFFER:

I don't know. Maybe, yeah. She-- no, she's gonna become the counter-- she's gonna become the--

(OVERTALK)

JAMEEL JAFFER:

No, I don't know what her position was in DOJ. But she had a high, you know, senior position in DOJ. But-- she said, "One of my-- one of my goals is to force more transparency around the FISA Court. And we are going to initiate an executive branch process to review all of the FISA Court opinions and determine what can be and what can't be released."

And Steven Aftergood, who is one of the most prominent transparency advocates--

on this set of issues-- recently-- called up his sources within the executive branch to find out, you know, what had happened with this initiative. And the short answer was nothing. The Obama administration went through these opinions and came to the conclusion that nothing could be segregated from the facts. The facts were too sensitive. And the law around the facts was too intertwined-- with factual discussion in order to give the public access to anything that the FISA Court had written. So the result is that we have nothing.

LISA MAGARRELL:

And I think one of the reasons that this comes up in the drone context as well is that it's sort of a simi-- it's a very parallel kind of process. You know, where we can't-- share the legal opinions about how we think, (BANG) you know, drone strikes are legal. Because they're wound up with the facts and you can't-- go to court and rule on this because this is all secret and behind closed doors.

So I think that's some of the concern the National Security and Human Rights Campaign is really, you know, worried about. Sort of this trend of everything becoming secret. And one of the proposals around the drone strikes was-- there should be a FISA-like court that decides in secret whether there, you know, is a grounds to go target somebody. And it may involve a lot of the same challenges that these-- that FISA also has. So I think that's an area of concern for us. Yeah?

MALE VOICE:

When you-- when you talked about whether companies have an incentive to turn to government-- it reminded me of the-- the-- discussions that we had with-- when Chris Soghoian was here. You know, the fellow whose work was around trying to create consumer demand for companies to respect privacy. So it occurs to-- and the issue of-- of whether companies are willing to resource that.

It strikes me that isn't there an option here for the ACLU to partner with a communications company and basically badger that company as saying, "This company is-- is gonna not share your communications data with any government." And if it's challenged by government and put under pressure to do so, ACLU will offer its services to defend it to the best of its ability. And that could be, you know—

JAMEEL JAFFER:

Right. Well, we've-- we've done that outside the—

MALE VOICE:

--(UNINTEL PHRASE).

JAMEEL JAFFER:

--the national security context. So-- so when it-- when it's public, s-- some companies are willing to do it. Because they do see an incentive to-- they-- they want to position themselves as the privacy friendly. Twitter has done it. Google just filed a case last week challenging national security letters in-- in California.

But they can do that publicly. There's no-- nothing prevents them from announcing that they have made those challenges. Actually, something does prevent Google from announcing that-- that it's challenged national security letters when somebody screwed up and filed something publicly on the docket that should've been filed under seal. And so for three hours-- there was a public doc-- and that was (COUGH) long enough for some reporter to get hold of the document.

That's how we know about the Google thing. (LAUGHTER) But Google and Twitter aren't regulated in the way that AT&T and Spring and Verizon are. They don't have the same relationship with the government. They are not as intertwined with the national security infrastructure. And I think that, you know, there is the possibility of-- if the government uses the FISA Amendments Act to get information from some-- from-- from Google or Twitter or-- or Silent Circle or any of these, you know, smaller-- smaller either internet service providers or electronic communication service providers, there is the possibility that-- they would challenge or we could convince one of them to challenge.

But most of the surveillance goes through-- the FISA Amendments Act surveillance goes through AT&T and Verizon and Sprint. And-- they don't have the same incentive structure at all. I-- I think that's-- you know, that's the main problem. There's also-- I mean, maybe this just a little bit-- inside baseball. But-- but the-- the-- the kind of challenge that they could bring would be an as applied challenge.

So if-- if AT&T were to challenge a particular request from the government for access to AT&T communications-- the challenge that AT&T would bring in the FISA Court would be an as applied challenge. It would be a challenge to that particular request. And w-- the challenge that we wanted to bring to the statute was a facial challenge.

And the reason we wanted to challenge the-- the validity of the statute on its face rather than any particular request was, well, 1) we didn't have any particular request. But 2) we were concerned about the chilling effect of this kind of surveillance. And the chill comes not from any particular request, but from the existence of the authority. And-- you know, that's something if-- I don't know if you guys read in today's *Times*. There was an article about these New York State legislators who have been-- indicted for--

LISA MAGARRELL:

(UNINTEL).

JAMEEL JAFFER:

--yeah, bribery. (LAUGHTER) And the article was about-- the phrase-- "Are you wearing a wire?" Because nobody wears a wire anymore. There's all sort-- you know, there're all sorts of other ways to gather information. (LAUGHTER) But there's a quote from some N.Y.P.D. official. And he says, "You know, I'm not gonna tell you exactly how we gathered this particular information, you know? We-- we don't talk about that kind of thing. And we're very happy when people think we have a lot of power, even if we don't." (LAUGHTER)

And-- you know, what he's talking about there is exactly what we're concerned about. It's the-- the-- the fear that the government has all this-- this power. And they may or they may not have this power. And they may and they may not use it. But the existence of the authority-- has all of these costs for civil liberties. You know, the ones that were described a little bit earlier, you know? It's the existence of the authority that forces people-- to think twice before going to a particular website.

Or to think twice before having a communication with somebody in Iran. Or to think twice before talking to their clients-- overseas. And so we wanted to challenge the facial validity and not just the-- the as applied. Not-- not just any particular request. So that's one-- you know, one difference.

LISA MAGARRELL:

And there's no way to determine if the kind of dragnet searching that's done in the narrowed down by discriminatory sort of searching within that kind of database. Like, for—

JAMEEL JAFFER:

No. You know—

LISA MAGARRELL:

--certain types of last names or certain countries with big Muslim populations and that kind of stuff.

JAMEEL JAFFER:

No-- no way to know. No way to know for sure. I mean, one of the things that Wyden was concerned about was the government would gather all of this information-- through surveillance directed at people outside the United States. And then it would conduct individualized searches within its database for-- information about U.S. people.

So, you know-- one thing we haven't talked about-- all of this is sort of premised on the idea that our concern should be about Americans' privacy only. Nobody cares that the (LAUGHTER) government is engaged in surveillance of people outside the United States. But-- you know, Senator Wyden is (HORN) concerned that the government collects huge volumes of international communications. And then evades the Fourth Amendment. Instead of going to a court asking for a warrant to engage in surveillance of some specific American, the c-- the government just then goes to its database and runs a search on that specific American.

Without any, you know, formal oversight or probable cause or warrant. It's just a search in the database for, you know, what communications has this particular person-- engaged in over the last few years. So that's one of the things that that group of senators has been asking about.

LISA MAGARRELL:

Unless there's a final burning question, I think we'll just thank Jameel and-- close. (APPLAUSE)

* * *END OF TRANSCRIPT* * *