Note

Warrantless Wiretapping, Retroactive Immunity, and the Fifth Amendment

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Introduction

After twenty-two years of serving as a technician for telecommunications giant AT&T, Mark Klein figured he had seen it all.[1] Yet in early 2002, Klein was surprised to hear that agents with the National Security Agency ("NSA") had recently met with one of his colleagues about a "special job" and that a new "Secure Room" was being constructed in AT&T's San Francisco facility.[2] Although only the technician who had received NSA clearance was given a key to the Secure Room,[3] Klein and the other technicians received a memo instructing them to install a "splitter" device on the facility's fiber-optic cables for the purpose of diverting phone and Internet signals into the Secure Room.[4] Installation of a splitter, Klein knew, was no ordinary assign-

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1 *See* Declaration of Mark Klein in Support of Plaintiffs' Motion for Preliminary Injunction at 2, Hepting v. AT&T Corp., 439 F. Supp. 2d 974 (N.D. Cal. 2006) (No. C-06-0672).

2 *Id.* at 3–4.

3 *Id.*

4 *Id.* at 5 ("A fiber optic circuit can be split using splitting equipment to divide the light signal and to divert a portion of the signal into each of two fiber optic cables. While both signals

ment: "Effectively[,] the splitter copied the entire data stream of those Internet cables into this secret room. We're talking about phone conversations, email, web browsing, everything that goes across the Internet."[5] Moreover, the splitter was a "dumb device": rather than discriminating between different types of information, it simply copied everything, both foreign and domestic, and sent it straight to the Secure Room.[6] Piecing together these facts, Klein came to a startling conclusion: with the splitter in place, those inside the NSA-controlled Secure Room could engage in warrantless surveillance of the telephone and Internet content of millions of Americans. "My thought was," Klein said in a 2007 interview, "[this is] George Orwell's *1984*, and here I am being forced to connect the Big Brother machine."[7]

Although he could not have known it at the time, Klein's observations and subsequent decision to blow the whistle on his employer would soon make him the star witness in a class-action suit filed against AT&T for its role in the government's warrantless domestic surveillance program.[8] This action, brought pursuant to a federal statutory provision authorizing civil suits against any person who engages in warrantless wiretapping,[9] appeared poised to provide a measure of relief to those U.S. citizens subjected to such government surveillance. The FISA Amendments Act of 2008 ("FISAA"),[10] however, an unprecedented law granting retroactive immunity from civil suit to telecommunications providers like AT&T, effectively eliminates this claim and others like it.[11] This Note argues that Congress should amend FISAA to remove its retroactive grant of immunity because it unconstitutionally infringes on the rights guaranteed in the Fifth Amendment of the Consitution. First, FISAA violates the Fifth Amendment's Due Process Clause[12] because it retroactively abrogates

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will have a reduced signal strength, after the split both signals still contain the same information, effectively duplicating the communications that pass through the splitter.").

5 *Countdown with Keith Olbermann: AT&T Whistleblower Speaks Out Against Immunity for Telecoms* (MSNBC television broadcast Nov. 7, 2007), *available at* http://www.msnbc.msn.com/id/21690264/.

6 *Id.* ("The splitter device has no selective capability, [it] just copies everything. We are talking about domestic traffic, as well as international traffic.").

7 *Id.*

8 Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 979 (N.D. Cal. 2006).

9 50 U.S.C. § 1810 (2006).

10 Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (to be codified at 50 U.S.C. §§ 1801, 1803, 1805a–1805c, 1806, 1812, 1824–1825, 1881–1881g, 1885–1885c) [hereinafter FISAA].

11 *Id.* § 702(h)(3), 122 Stat. at 2441.

12 U.S. CONST. amend. V.

a right of action which had already accrued to a claimant. Second, FISAA contravenes the Fifth Amendment's Takings Clause[13] by eliminating accrued tort claims without providing just compensation.

In order to cure these defects, Congress should replace the retroactive grant of immunity to telecommunications providers with an alternative administrative fund that plaintiffs can opt into in exchange for dropping their cause of action. Such a solution, when coupled with a provision for ex parte, in camera review of all classified national security material at trial and a statutory cap on damages, avoids these Fifth Amendment problems by permitting suits against telecommunications providers to move forward while still protecting classified national security information and shielding telecommunications firms from undeserved liability.

Part I of this Note provides a brief overview of the Foreign Intelligence Surveillance Act of 1978 ("FISA"),[14] describes the role played by telecommunications providers in the NSA's Terrorist Surveillance Program ("TSP"), discusses the most publicized suit arising from this warrantless domestic surveillance, and explains the adoption of FISAA in July of 2008. Part II analyzes the retroactive immunity provision of FISAA and examines its constitutional deficiencies under the Due Process and Takings Clauses of the Fifth Amendment. Part III proposes several changes to FISAA that would ensure its constitutionality under the Fifth Amendment while still addressing the concerns that prompted its enactment. Finally, Part IV demonstrates that in addition to constitutional arguments, sound policy reasons also militate in favor of amending FISAA to incorporate the changes proposed here.

I. FISA, the TSP, Hepting v. AT&T*, and FISAA*

Before delving into the constitutional problems raised by FISAA, it is first necessary to gain a working familiarity with the statutes and actions that form the basis of the controversy over FISAA's retroactive immunity provision. To this end, this Part provides a brief overview of the limitations on domestic surveillance contained in FISA and explores how the NSA's warrantless surveillance program violated these provisions. These themes are then further explored through an examination of *Hepting v. AT&T Corp.*,[15] one of the most highly publicized lawsuits filed in response to the NSA's surveillance

13 *Id.*

14 Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783.

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

activities. Finally, this Part concludes by touching on the passage of FISAA of 2008 and analyzing its impact on existing claims. This background information provides the basis for the constitutional arguments explored later in the Note.

A. Foreign Intelligence Surveillance Act

In response to the Nixon Administration's abuse of domestic surveillance powers during the investigation of the Watergate break-ins,[16] Congress adopted the Foreign Intelligence Surveillance Act of 1978 ("FISA") as a "recognition . . . that the statutory rule of law must prevail in the area of foreign intelligence surveillance."[17] The main objective of FISA was to prohibit any electronic surveillance likely to result in the acquisition of communications to or from someone in the United States unless the government first obtained prior court authorization.[18] To achieve this goal, FISA created the Foreign Intelligence Surveillance Court ("FISC"), which presides over requests for surveillance warrants against suspected foreign agents within the United States.[19]

Subject to certain narrowly defined exceptions,[20] electronic government surveillance on U.S. soil is prohibited unless the FISC first determines that there is probable cause to believe that the target is an agent of a foreign power and that the place at which the surveillance is directed is being used by a foreign power or its agent.[21] If the government ignores this warrant requirement and engages in electronic domestic surveillance anyway, it will be found to have violated FISA.[22] In such a case, FISA creates a direct private cause of action for anyone "who has been subjected to . . . electronic surveillance" in violation of FISA.[23] Interestingly, FISA specifically contemplated the potential civil liability of private telecommunications providers assisting in government surveillance, but the Act made clear that such private carriers would be protected from civil suit only when they assisted the government "in accordance with the terms of a court or-

16 S. REP. NO. 95-604, pt. 1, at 7 (1977), *reprinted in* 1978 U.S.C.C.A.N. 3904, 3908.

17 *Id.*

18 *See generally* 50 U.S.C. § 1805 (2006).

19 *Id.* § 1803.

20 *See infra* note 27 and accompanying text.

21 50 U.S.C. § 1805(a).

22 *Id.* § 1809.

23 *Id*. § 1810.

der, statutory authorization, or certification" in writing from the Attorney General.[24]

In theory, FISA attempted to strike a balance between "adequate intelligence to guarantee our nation's security on the one hand, and the preservation of basic human rights on the other."[25] In practice, however, the FISC proved to be extraordinarily permissive in reviewing and approving requests for domestic surveillance under FISA.[26] Moreover, FISA already contained a number of express exceptions that permitted the government to engage in emergency domestic surveillance *without* obtaining a court order in the first place.[27] Yet even with these exceptions in place, in the aftermath of the September 11 attacks the NSA sought greater freedom to conduct electronic surveillance at home as well as abroad.

B. The Terrorist Surveillance Program ("TSP")

In December of 2005, the *New York Times* reported that "[u]nder a presidential order signed in 2002, the [NSA] [had] monitored the international telephone calls and international e-mail messages of hundreds, perhaps thousands, of people inside the United States without warrants over the past three years."[28] Confirming this report, President George W. Bush revealed that "shortly after the attacks of September 11, 2001, he [had] authorized the [NSA] to intercept international communications into and out of the United States of persons linked to al Qaeda or related terrorist organizations."[29] Although the

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24 *See* 18 U.S.C. § 2511(2)(a)(ii) (2006).

25 ELIZABETH B. BAZAN, CONG. RESEARCH SERV., THE FOREIGN INTELLIGENCE SURVEILLANCE ACT: AN OVERVIEW OF SELECTED ISSUES 5 (2008) (quoting *Foreign Intelligence Surveillance Act of 1977: Hearing on S. 1566 Before the Subcomm. on Criminal Laws and Procedures of the S. Comm. on the Judiciary*, 95th Cong. (1977) (statement of Griffin Bell, Attorney General)).

26 *See Record on Warrants for Spying Court*, N.Y. TIMES, May 1, 2008, at A21 (reporting that in 2007 alone, the FISC approved 2,370 applications for domestic surveillance while rejecting only four).

27 *See, e.g.*, 50 U.S.C. § 1802(a) (authorizing surveillance *without* a court order for up to one year when the Attorney General certifies that the targets are exclusively used by foreign governments and there is "no substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person is a party"); *id.* § 1805(f), *amended by* Pub. L. No. 110-261, § 105, 122 Stat. 2436, 2462 (2008) (permitting emergency domestic surveillance *without* a warrant for up to 72 hours while a court order is being sought); *id.* § 1811 (authorizing warrantless domestic surveillance for fifteen days following a declaration of war by Congress).

28 James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

29 U.S. DEPT. OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NA-

full extent of the surveillance operation is still largely unknown, the so-called "Terrorist Surveillance Program" ("TSP") appears to have operated from "shortly after September 11, 2001 to sometime in January of 2007."[30] In light of its size and scope, it seems almost certain that the program could not have succeeded without significant help from key domestic telecommunications providers. Indeed, the Bush Administration itself indicated that such a large-scale operation would have been impossible but for the critical role played by American telecommunications providers in facilitating the NSA's domestic surveillance.[31]

President Bush and Attorney General Alberto Gonzales asserted the legality of the TSP based on the President's "constitutional authority to conduct warrantless wartime electronic surveillance of the enemy."[32] Additionally, President Bush maintained that the TSP's domestic eavesdropping provision was "carefully reviewed approximately every 45 days to ensure it [was] being used properly."[33] Yet despite this apparent confidence in the legality of warrantless surveillance under the TSP, Attorney General Gonzales announced in January 2007 that "any electronic surveillance that was occurring as part of the Terrorist Surveillance Program would [henceforth] be conducted subject to the approval of the [FISC]."[34]

C. Hepting v. AT&T

Even assuming that the United States was at war and that the TSP was regularly reviewed every forty-five days, the length and extent of the warrantless surveillance still would have far exceeded that which was permissible under FISA's narrowly drawn statutory exceptions.[35] For this reason, the program "appeared to run afoul of the

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tional Security Agency Described by the President 1 (2006), *available at* http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf [hereinafter Legal Authorities].

30 Edward C. Liu, Cong. Research Serv., Retroactive Immunity Provided by the FISA Amendments Act of 2008, at 2 (2008), *available at* http://www.fas.org/sgp/crs/intel/RL34600.pdf.

31 Eric Lichtblau, *Role of Telecom Firms in Wiretaps Is Confirmed*, N.Y. Times, Aug. 24, 2007, at A13 (quoting Mike McConnell, the former Director of National Intelligence, as saying, "Under the [P]resident's program, the terrorist surveillance program, the private sector had assisted us, because if you're going to get access, you've got to have a partner.").

32 Legal Authorities, *supra* note 29, at 17.

33 President George W. Bush, Press Conference, Dec. 19, 2005, *available at* http://www.cnn.com/2005/POLITICS/12/19/bush.transcript/index.html.

34 Liu, *supra* note 30, at 2.

35 *See* 50 U.S.C. § 1805(f) (2006), *amended by* Pub. L. No. 110-261, § 105, 122 Stat. 2436, 2462 (2008) (permitting only 72 hours of emergency domestic surveillance without a warrant

general rule that electronic surveillance by the federal government is unlawful unless conducted pursuant to the Foreign Intelligence Surveillance Act (FISA)."[36] This apparent breach of federal law,[37] in conjunction with the Bush Administration's admission that telecommunications providers facilitated the government eavesdropping, provides the basis for dozens of suits currently pending in federal district court against telecommunications providers.

The first and most publicized of these suits against telecommunications providers was *Hepting v. AT&T Corp.*[38] In addition to alleging First and Fourth Amendment violations,[39] the plaintiffs in *Hepting* alleged that AT&T and other telecommunications providers, in facilitating domestic surveillance without court orders, violated the provisions of FISA and therefore were "liable under a statutory tort."[40]

After the plaintiffs filed suit, the government quickly intervened as a defendant and moved to dismiss the case pursuant to the state secrets privilege.[41] Additionally, AT&T moved to dismiss by arguing, *inter alia*, that the plaintiffs lacked standing because they could not allege a specific injury-in-fact[42] and that it was entitled to qualified immunity.[43] The district court, however, rejected each of these arguments in turn and allowed the suit to go forward.[44]

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while a court order is being sought); *id.* § 1811 (authorizing only fifteen days of warrantless domestic surveillance following a declaration of war by Congress).

36 LIU, *supra* note 30, at 1–2.

37 The Administration still contends that the TSP was legal. In short, its argument is that both the Constitution and the Authorization for Use of Military Force ("AUMF") passed by Congress in 2001 confer sufficient executive powers on the President to authorize such surveillance activities without judicial approval. *See* ELIZABETH B. BAZAN & JENNIFER K. ELSEA, CONG. RESEARCH SERV., PRESIDENTIAL AUTHORITY TO CONDUCT WARRANTLESS ELECTRONIC SURVEILLANCE TO GATHER FOREIGN INTELLIGENCE INFORMATION 1–3 (2006), *available at* http://www.fas.org/sgp/crs/intel/m010506.pdf.

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

39 Complaint at ¶ 66, *Hepting*, 439 F. Supp. 2d 974 (No. C-06-0672).

40 *See* Anthony J. Sebok, *Is It Constitutional for the Senate to Retroactively Immunize From Civil Liability the Telecoms That Provided the Government with Information About Customers' Communications?*, FINDLAW ONLINE, Jan. 29, 2008, *available at* http://writ.news.findlaw.com/sebok/20080129.html (referencing FISA's civil suit provision, 50 U.S.C. § 1810, which provides that any "aggrieved person . . . shall have a cause of action against any person who committed [a surveillance] violation [of FISA] and shall be entitled to recover" up to $1000 in actual damages); *see also* Complaint at 28, *Hepting*, 439 F. Supp. 2d 974 (No. C-06-0672).

41 *Hepting*, 439 F. Supp. 2d at 979.

42 *Id.* at 999.

43 *Id.* at 1006.

44 *Id.* at 1011.

In dismissing the government's assertion of the state secrets privilege, the court found that the "subject matter of this action is hardly a secret."[45] Moreover, the court refused to assume that the plaintiffs would be unable to mount a convincing case against AT&T and instead held that they were "entitled to at least some discovery" despite the government's state secrets assertion.[46]

Perhaps of greater note, though, was the district court's pointed rejection of AT&T's arguments based on standing and qualified immunity. First, it quickly dispatched AT&T's contention that the plaintiffs lacked standing unless they could show "that the named plaintiffs were themselves subject to surveillance."[47] The court stated that it "[could not] see how any one plaintiff will have failed to demonstrate injury-in-fact if that plaintiff effectively demonstrates that all class members have so suffered."[48] According to the court, "[a]s long as the named plaintiffs were . . . AT&T customers during the relevant time period, the alleged dragnet would have imparted a concrete injury on each of them."[49] The court then turned to AT&T's assertion of qualified immunity, which requires the defendant to show that it reasonably believed its conduct to be legal.[50] In emphatically dismissing this argument, the court declared:

> Because the alleged dragnet here encompasses the communications of "all or substantially all of the communications transmitted through [AT&T's] key domestic telecommunications facilities," it cannot reasonably be said that the program as alleged is limited to tracking foreign powers. Accordingly, . . . *AT&T cannot seriously contend that a reasonable entity in its position could have believed that the alleged domestic dragnet was legal*.[51]

With these words, the court allowed the suit to move forward and served notice to the telecommunications industry that the *Hepting* suit was not to be taken lightly.

In the wake of this encouraging opinion, the plaintiffs' case against AT&T seemed to be gaining momentum, and dozens of similar suits against telecommunications providers around the country

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45 *Id.* at 994.

46 *Id.*

47 *Id.* at 1000.

48 *Id.*

49 *Id.* (internal citations omitted).

50 *Id.* at 1006 (citing Saucier v. Katz, 533 U.S. 194, 202, 205 (2001)).

51 *Id.* at 1010 (emphasis added).

were consolidated along with *Hepting* in the same district court.[52] But even when things looked so promising for the plaintiffs, whispers about granting retroactive immunity for telecommunications giants like AT&T already had begun.

D. FISA Amendments Act of 2008

As the *Hepting* suit gained momentum and attracted increased attention, powerful interests in Washington, D.C. began to lobby for retroactive immunity for telecommunications providers. In support of this position, they relied upon a number of policy arguments.[53] First, despite the fact that the district court in *Hepting* had already ruled against the government's assertion of the state secrets privilege, they claimed that companies like AT&T would not be able to defend themselves in court without divulging national security secrets.[54] Second, supporters of retroactive immunity argued that if telecommunications providers were held liable here, then the next time the government needed assistance from the private sector in combating terrorism, private firms might hesitate to cooperate out of a fear of being held civilly liable.[55] Additionally, supporters of an immunity provision feared that civil suits would potentially bankrupt a vital industry.[56] And finally, as an equitable matter, proponents of retroactive immunity believed that it would be "patently unfair" to hold telecommunications providers civilly liable when the government had told them that the TSP was legal.[57]

On the basis of these arguments, the Senate first introduced a bill with a retroactive immunity provision in February of 2008, but the House swiftly responded by passing a different version of the bill that eliminated retroactive immunity for telecommunications providers.[58] Nevertheless, as lobbying efforts and pressure from the Senate increased, the House relented and passed a different bill, H.R. 6304, in June of 2008 that included retroactive immunity for telecommunica-

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52 *In re* NSA Telecomms. Records Litig., 444 F. Supp. 2d 1332, 1335 (J.P.M.L. 2006) (citing 28 U.S.C. § 1407 (2000)).

53 For a discussion of the flaws of these policy arguments, see *infra* Part IV.

54 Sen. John D. Rockefeller IV, Op-Ed., *Partners in the War on Terror*, WASH. POST, Oct. 31, 2007, at A19 ("As the operational details of the [TSP] remain highly classified, the companies are prevented from defending themselves in court.").

55 *Id.* ("[I]f we subject companies to lawsuits . . . we will forfeit industry as a crucial tool in our national defense.").

56 Lichtblau, *supra* note 31 (quoting former director of national intelligence Mike McConnell as saying that civil suits "would bankrupt these [telecom] companies").

57 Rockefeller, *supra* note 54.

58 LIU, *supra* note 30, at 1.

tions firms.[59] Finally, in July of 2008, after much political wrangling and intense lobbying efforts, the Senate approved the latest version of the bill,[60] and the FISA Amendments Act of 2008 was signed into law by President Bush.[61]

Under Title II of FISAA, suits against telecommunications providers are extinguished so long as (1) the Attorney General certifies that the defendant firm had been assured by the government that the TSP was legal and authorized by the President;[62] and (2) the district court agrees that the Attorney General's certification is supported by "substantial evidence."[63] Because it is undisputed that the NSA made representations about the legality of the TSP to telecommunications firms, the certain effect of this provision is to retroactively extinguish the claims of plaintiffs in dozens of pending lawsuits against telecommunications providers.[64] Moreover, as discussed in greater detail below in Part II.B.3, FISAA differs substantially from prior instances of legislative interference with pending claims because it makes no provision for an alternative method of recovery either against the government or through an administrative fund.[65] Instead, upon the passage of FISAA, *Hepting* was immediately remanded from the Ninth Circuit back to the district court where it will surely be dismissed barring a successful constitutional challenge.[66]

II. FISAA and the Fifth Amendment

Defying traditional accounts of American policy change as an incremental process,[67] FISAA represents a significant departure from previous instances in which legislation retroactively abrogated a tort

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59 *Id.*; *see also* H.R. 6304, 110th Cong. (2008).

60 Liu, *supra* note 30, at 1.

61 *Id.*

62 Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, § 802, 122 Stat. 2436, 2468–69 (2008) (to be codified at 18 U.S.C. § 1885a).

63 *Id.* § 802, 122 Stat. at 2469 (to be codified at 18 U.S.C. § 1885a).

64 Approximately forty of these suits are currently in the Northern District of California after being consolidated by the Judicial Panel on Multidistrict Litigation. *See* Bazan, *supra* note 25, at 16.

65 *Compare* FISAA § 802, 122 Stat. at 2468 (to be codified at 18 U.S.C. § 1885a) ("[A] civil action may not lie or be maintained in a Federal or State court."), *with* Air Transportation Safety and System Stabilization Act of 2001, Pub. L. No. 107-42 § 408(b)(1), 115 Stat. 230, 240–41 (2001) (codified at 49 U.S.C. §§ 40101, 44302–44306) ("There shall exist a Federal cause of action . . . [which] shall be the exclusive remedy for damages arising out of the hijacking and subsequent crashes of such flights.").

66 Hepting v. AT&T Corp., 539 F.3d 1157, 1158 (9th Cir. 2008).

67 *See generally* Michael Hayes, The Limits of Policy Change (2001); Charles Lindblom, The Policy-Making Process (1968).

action. After all, no previous legislative action has ever retroactively eliminated a cause of action involving such weighty interests without providing an alternative means of compensation for plaintiffs.[68] In light of this unprecedented move, FISAA's immunity provision raises serious concerns about its constitutionality under the Due Process and Takings Clauses of the Fifth Amendment. Senator Sheldon Whitehouse, a former U.S. Attorney and the former Attorney General of Rhode Island, summed up these Fifth Amendment concerns:

> Congress stepping in to pick winners and losers in ongoing litigation on constitutional rights not only raises separation of powers concerns but it veers near running afoul of the due process and takings clauses. . . . If I were a litigant, I would challenge the constitutionality of the immunity provisions of this statute, and I would expect a good chance of winning.[69]

This Part of the Note examines the troubling Fifth Amendment concerns created by the passage of FISAA. Part II.A reviews the guarantees of the Fifth Amendment's Due Process Clause, analyzes previous due process challenges to legislation that retroactively eliminated a cause of action, and evaluates the constitutionality of FISAA in light of this precedent. This exercise demonstrates that when determining the constitutionality of a law in the face of a due process challenge, courts look to both the law's retroactivity and the nature of the right it eliminates. Because FISAA retroactively eliminated vested causes of action based on long-standing and firmly established rights, a court is likely to find that FISAA violates the guarantees of the Due Process Clause.

Part II.B examines the constitutional difficulties created by FISAA under the Takings Clause of the Fifth Amendment. Given both the rapidly expanding application of the Takings Clause to substantive areas of law beyond real property and the value of the eliminated claims in light of their strong likelihood of success, FISAA likely runs afoul of the Takings Clause as well. Part II.B.3 then compares FISAA to previous legislative acts that eliminated or limited a vested cause of action and explains FISAA's unprecedented departure from the established quid pro quo formula of these other laws. In the end, this section finds that this failure to provide any sort of com-

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68 *See* 154 CONG. REC. S6409 (daily ed. July 8, 2008) (statement of Sen. Whitehouse) ("Article II of [FISAA] is the most extreme measure Congress . . . has ever taken to interfere in ongoing litigation. Congress usually provides at least a figleaf of an alternative remedy when it takes away the judicial one.").

69 *Id.*

pensation or quid pro quo further supports the conclusion that FISAA violates the guarantees of the Fifth Amendment's Takings Clause.

A. Due Process Clause

The Due Process Clause of the Fifth Amendment provides, "No person shall be . . . deprived of life, liberty, or property without due process of law."[70] Its protections, however, "apply only if the legal interest at issue qualifies as a 'life, liberty, or property' interest."[71] Accordingly, a due process challenge to FISAA depends on the plaintiffs' ability to demonstrate that their causes of action against telecommunications providers are rightly considered "property" within the meaning of the Fifth Amendment.

The Supreme Court's jurisprudence identifies two considerations central to the question of whether a cause of action constitutes protectable property under the Due Process Clause: (1) the timing of the legislative abrogation of the claim; and (2) the nature of the plaintiff's right at issue. An analysis of the Court's decisions in this area shows that it is likely to protect causes of action that (1) were eliminated retroactively after they had vested or accrued, and (2) involved rights that were firmly grounded in the common law or settled statutes. Analysis of FISAA in light of these factors demonstrates that FISAA's retroactive elimination of well-established rights of privacy constitutes a violation of the Fifth Amendment's Due Process Clause.

1. Retroactivity and Vested Rights

As an initial matter, it is well-settled under the Supreme Court's jurisprudence that "a cause of action is a species of property protected by the . . . Due Process Clause."[72] This is especially true when rights of action have already vested and therefore would be retroactively

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70 U.S. CONST. amend. V.

71 Olivia A. Radin, *Rights as Property*, 104 COLUM. L. REV. 1315, 1316–17 (2004); *see also* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 570–71 (1972) ("[T]o determine whether due process requirements apply in the first place, we must look . . . to the *nature* of the interest at stake. We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property."); Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 886–88 & nn.1–9 (2000).

72 Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982); *see also* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 311 (1950) (finding a deprivation of property where a law eliminated the cause of action "which beneficiaries would otherwise have against the trust company . . . for improper management of the common trust fund"); Gibbes v. Zimmerman, 290 U.S. 326, 332 (1933) ("[A] vested cause of action is property and is protected from arbitrary interference.").

altered by proposed legislation.[73] So long as a right has yet to accrue, any legislation limiting that right operates prospectively and implicates no due process concerns.[74] But once a right of action accrues, it is undisputed that "a vested right of action is property in the same sense in which tangible things are property, and . . . it is not competent for the legislature to take it away."[75] Generally speaking, tort claims accrue at the time of injury.[76]

Sound policy reasons underpin both the Supreme Court's long-held suspicion of retroactive legislation and its tendency to look to due process protections to mitigate the ill effects of retroactive laws. Chief among these reasons is the destructive effect of retroactive legislation on reliance interests.[77] Additionally, in light of its seeming arbitrariness, the Court has also criticized retroactive legislation as compromising the integrity of the justice system.[78] And finally, the Court has warned that retroactive legislation has the potential to jeopardize protections for political minorities.[79] These weighty concerns provide ample justification for the "presumption against retroactive legislation that is deeply rooted in [the Court's] jurisprudence."[80]

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73 Radin, *supra* note 71, at 1327–28 ("Retroactivity is temporal in nature: [t]here is a point on the timeline at which an effect switches from operating prospectively to operating retroactively. For legal rights, this point occurs when a right has accrued.").

74 Silver v. Silver, 280 U.S. 117, 122 (1929) ("[T]he Constitution does not forbid the creation of new rights or the abolition of old ones . . . .").

75 Pritchard v. Norton, 106 U.S. 124, 132 (1882); *see also* Gibbes v. Zimmerman, 290 U.S. 326, 332 (1933) ("[A] vested cause of action is property and is protected from arbitrary interference.").

76 *See, e.g.*, Miller v. Phila. Geriatric Ctr., 463 F.3d 266, 271 (3d Cir. 2006) ("Normally, a tort claim accrues at the time of injury."); Foisy v. Royal Maccabees Life Ins. Co., 356 F.3d 141, 146 (1st Cir. 2004) ("[T]ort claims accrue at the time of injury."); United States v. Limbs, 524 F.2d 799, 802 (9th Cir. 1975) ("[A] tort cause of action would first accrue at the time of injury."); *see also* Radin, *supra* note 71, at 1321 ("Rights and defenses accrue when the events that give rise to a given legal dispute occur.").

77 *See* Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994) (asserting that "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted").

78 *See* E. Enters. v. Apfel, 524 U.S. 498, 549 (1997) (Kennedy, J., concurring in the judgment and dissenting in part) (recognizing that "confidence in the constitutional system . . . [is] secured by due process restrictions against severe retroactive legislation").

79 *See id.* at 548 ("[R]etroactive lawmaking is a particular concern for the courts because of the legislative 'temptation to use retroactive legislation as a means of retribution against unpopular groups or individuals.'") (quoting *Landgraf*, 511 U.S. at 266).

80 Hughes Aircraft Co. v. United States *ex rel* Schumer, 520 U.S. 939, 946 (1997) (quoting *Landgraf*, 511 U.S. at 265).

The Supreme Court's discomfort with retroactive legislation is evidenced by *Richmond Screw Anchor Co. v. United States*,[81] in which the Court invalidated a challenged law because it would have retroactively eliminated the plaintiff's accrued right of action.[82] In that case, a government contractor had been sued for using a patented i-beam design without permission of the patent assignee.[83] Congress, however, subsequently passed an amendment that retroactively eliminated direct suits against contractors and made a suit against the United States the exclusive remedy for patent infringement.[84] But another law, section 3477, abrogated any infringement claims against the government for actions occurring prior to the assignment of the patent.[85] As a result, the patent assignee was unable to file an infringement suit even though he had a vested right of action (because the patent had been issued and the infringement had occurred *prior to* the enactment of the immunizing legislation).

In response to the patent assignee's due process challenge to the 1918 amendment, Chief Justice (and former President) Taft held that section 3477 could not constitutionally apply in this context.[86] Otherwise, the retroactive elimination of the assignee's vested right of action would "raise a serious question as to the constitutionality of the Act of 1918 under the Fifth Amendment to the Federal Constitution."[87] In so holding, the Court served notice that it would treat with suspicion those laws that "attempt[ed] to take away from a private citizen his lawful claim for damage to his property by another private person."[88]

The Court reached a similar conclusion in *Ettor v. City of Tacoma*.[89] In that case, a statute authorizing a municipal street grading project provided that the city would reimburse property owners for any damages the construction caused.[90] But after a city resident sued for compensation, the reimbursement provision of the act was repealed retroactively and the city contended that it was no longer liable

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81 Richmond Screw Anchor Co. v. United States, 275 U.S. 331 (1928).

82 *See id.* at 345.

83 *Id.* at 337–39

84 *Id.* at 343.

85 *Id.* at 339–40.

86 *Id.* at 346.

87 *Id.* at 345.

88 *Id.*

89 Ettor v. City of Tacoma, 228 U.S. 148 (1913).

90 *Id.* at 149–50.

for damages.[91] Although the state court accepted the city's argument,[92] the Supreme Court reversed on due process grounds. The Court found that the owner had a vested right to compensation once damage to his property occurred, and so his cause of action "was in every sense a property right" that could not "be defeated by subsequent legislation."[93] Accordingly, the Court held that the statute's retroactive elimination of the plaintiff's claim for compensation violated the guarantees of the Due Process Clause.

Both *Richmond Screw* and *Ettor* illustrate the unconstitutionality of laws that retroactively eliminate a vested right of action.[94] Yet this is not to say that any legislative abrogation of a cause of action automatically violates the Due Process Clause. Courts have previously upheld legislation eliminating or limiting pending claims in the face of due process challenges in several instances,[95] yet these cases are readily distinguishable from the scenario presented by FISAA.

In *Ducharme v. Merrill-National Laboratories*,[96] for example, the Fifth Circuit rejected a due process challenge to the Swine Flu Act.[97] There, in the midst of a potential flu outbreak, Congress was faced with a shortage of drug manufacturers willing to produce vaccinations due to fears of mass tort liability in the event of injurious side-effects.[98] In order to secure the participation of vaccine manufacturers, the Swine Flu Act immunized them from civil suit and provided a cause of action against the federal government as the exclusive remedy for any injury arising from the vaccine.[99] The plaintiffs, seeking to bring a tort action against a vaccine manufacturer, challenged the Swine Flu Act's immunity provision by arguing that the Due Process Clause prevented Congress from "divest[ing] a private litigant of a civil cause of action."[100] The Fifth Circuit quickly disposed of this ar-

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91 *Id.* at 150.

92 Ettor v. City of Tacoma, 106 P. 478, 481 (Wash. 1910).

93 *Ettor*, 228 U.S. at 156.

94 Although *Richard Screw* and *Ettor* are not recent decisions, they have never been overruled and still constitute binding precedent. Indeed, even in 2009, federal courts continue to cite *Richmond Screw* favorably. *See* Zoltek Corp. v. United States, 85 Fed. Cl. 409, 416 (2009) (relying on the analysis in *Richmond Screw* to interpret provisions of 28 U.S.C. § 1498, a patent infringement statute).

95 *See, e.g.*, Ducharme v. Merrill-Nat'l Labs., 574 F.2d 1307 (5th Cir. 1978); Carr v. United States, 422 F.2d 1007 (4th Cir. 1970).

96 Ducharme v. Merrill-Nat'l Labs., 574 F.2d 1307 (5th Cir. 1978).

97 42 U.S.C. § 247b (2006).

98 *Ducharme*, 574 F.2d at 1310–11.

99 *Id.* at 1309.

100 *Id.* at 1310.

gument, however, because unlike *Richmond Screw* and *Ettor*, the "[p]laintiffs' cause of action . . . did not arise until *after* the passage of the Swine Flu Act."[101] As a result, the plaintiffs "had no prior vested right in a cause of action," and the court held that the *prospective* application of the immunity provision violated no due process requirement.[102]

Carr v. United States,[103] another case rejecting a due process challenge to a law immunizing a defendant from tort liability, is likewise unpersuasive because it too involved a case in which the *prospective* elimination of a cause of action. The plaintiff in *Carr*, a federal employee, was injured in a car accident due to the driving of his colleague, also a federal employee, in 1965.[104] The plaintiff initiated a civil suit against his co-worker, but the Federal Drivers' Act of 1961 abrogated any civil suits against federal employees acting within the scope of their employment and substituted the United States in their place.[105] The plaintiff challenged the abrogation of his cause of action as a violation of the Fifth Amendment's Due Process Clause, but the Fourth Circuit rejected this argument: "[T]he accident occurred over four years *after* the enactment of the Drivers Act. Therefore, . . . [the plaintiff] had no interest entitled to constitutional protection."[106] Just as in *Ducharme*, due process concerns were not implicated because the plaintiff's cause of action, which accrued *after* the adoption of the immunity provision, was abrogated prospectively by statute. This distinction is crucial to understanding why the laws were upheld in *Ducharme* and *Carr* but not in *Ettor* or *Richmond Screw*.

In light of this precedent, the importance of determining whether FISAA acts retroactively or prospectively is plain. If the causes of action eliminated by FISAA had accrued prior to its passage, then FISAA would operate retroactively and the plaintiffs' property would be eligible for due process protections. Because tort actions generally accrue at the time of injury,[107] the cause of action in the suits abrogated by FISAA accrued when the NSA, with the help of AT&T and other telecommunications firms, began improperly monitoring the plaintiffs' telephone and Internet lines soon after the September 11

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101 *Id.* (emphasis added).

102 *Id.* at 1310, 1311.

103 Carr v. United States, 422 F.2d 1007 (4th Cir. 1970).

104 *Id.* at 1009.

105 *See id.* at 1009–10 (quoting 28 U.S.C. § 2679(b)).

106 *Id.* at 1011 (emphasis added).

107 *See supra* note 76 and accompanying text.

attacks.[108] Thus, as Professor Anthony Sebok explains, by the time Congress passed FISAA several years later, the plaintiffs' claims had already vested:

> [The plaintiffs] had a private right to privacy that was established by a federal statute that was in force between 2001 and 2006. Allegedly, during that time, the private right was violated. It would seem . . . that at the moment the violation occurred, their right to compensation vested and was accrued.[109]

In sum, because a vested cause of action is a property right within the meaning of the Fifth Amendment and because tort claims vest at the time of the injury, then the causes of action eliminated by FISAA must be considered property subject to Fifth Amendment protections.[110]

2. Nature of the Right at Stake

Although a retroactively eliminated cause of action might be *eligible* for protection under the Due Process Clause, courts also look closely at the nature of the right being asserted to establish whether a cause of action *should* be treated as protectable property under the Due Process Clause.[111] In making this determination, courts are likely to find that the Due Process Clause protects a cause of action if it involves a right recognized at common law or by long-standing statutes.[112] If, however, the right being asserted lacks such a "historical pedigree,"[113] then courts will be much more deferential to laws mandating its retroactive elimination. This distinction follows from the recognition that the deprivation of less well-defined rights is not as

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108 *See* LEGAL AUTHORITIES, *supra* note 29.

109 Sebok, *supra* note 40.

110 *Cf.* Erin G. Holt, Note, *The September 11 Victim Compensation Fund: Legislative Justice* Sui Generis, 59 N.Y.U. ANN. SURV. AM. L. 513, 540 (2004) (arguing that for the victims of the September 11 attacks, "the benefit of the . . . right to sue in tort for compensatory damages after sustaining property loss is certainly a property interest that should not be arbitrarily undermined").

111 *See* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 570–71 (1972) ("[T]o determine whether due process requirements apply in the first place, we must look . . . to the *nature* of the interest at stake.").

112 Ample scholarship exists to support this distinction. *See e.g.*, Merrill, *supra* note 71, at 897–98 (suggesting that "long-established common law rules are central to the identification of 'true' property interests"); Radin, *supra* note 71, at 1333 ("The case law shows that property exists only when accrued legal rights are 'firmly embedded in the common law' or settled statutes.").

113 Phillips v. Wash. Legal Found., 524 U.S. 156, 168 (1998).

harmful as the elimination firmly established rights on which litigants are justified in relying.[114]

The Sixth Circuit's decision in *Fisch v. General Motors Corp.*[115] is instructive on this point. In that case, the court upheld the passage of the "Portal to Portal" Act of 1947 ("PPA"),[116] which retroactively eliminated thousands of lawsuits that had been filed under the Fair Labor Standards Act ("FLSA").[117] Just two years prior to the decision in *Fisch*, the Supreme Court had held that the FLSA required employers to pay factory employees for "walking time," or the time it took workers to travel from the entrance of their factories to their work stations.[118] After finding that these "wholly unexpected liabilities" would "bring about financial ruin" if allowed to stand, Congress passed the PPA to help employers cope with the flood of lawsuits seeking back-pay for walking time.[119] The PPA statutorily eliminated the pending back-pay suits of employees, effective retroactively, without providing any other compensation or means of recovery.[120] In the face of the plaintiffs' subsequent due process challenge, the Sixth Circuit held that the "plaintiffs' rights were not 'vested rights'" and thus were not subject to Fifth Amendment protections.[121]

Analogous district court decisions, such as *Ileto v. Glock*,[122] have recently produced similar results. The plaintiffs in *Ileto*, who had all been injured by guns manufactured by the defendants, initiated a public nuisance lawsuit against the firearms manufacturers on the theory that the manufacturers "market, distribute, promote, and sell firearms . . . with reckless disregard for human life and for the peace, tranquility, and economic well being of the public."[123] While the suit was pending, however, Congress passed the Protection of Lawful Commerce in Arms Act of 2005[124] ("PLCAA"), a statute which "provides

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114 Radin, *supra* note 71, at 1334.

115 Fisch v. Gen. Motors Corp., 169 F.2d 266 (6th Cir. 1948).

116 29 U.S.C. §§ 251–262 (2006).

117 *Id.* §§ 201–219.

118 *See* Anderson v. Mount Clemens Pottery Co., 328 U.S. 680, 690–91 (1946).

119 29 U.S.C. § 251(a).

120 *Id*. § 252.

121 *Fisch*, 169 F.2d at 270. When the Third Circuit considered an identical due process challenge to the PPA one year later, it relied expressly on the Sixth Circuit's reasoning in *Fisch* in reaching the same conclusion. Thomas v. Carnegie-Illinois Steel Corp., 174 F.2d 711, 713 (3d Cir. 1949). For the reasons set forth below, however, this case, like *Fisch*, is inapposite to the due process challenge to FISAA.

122 Ileto v. Glock, Inc., 421 F. Supp. 2d 1274 (C.D. Cal. 2006).

123 *Id.* at 1279–80, 1282.

124 15 U.S.C. §§ 7901–7903 (2006).

immunity to firearms manufacturers and dealers from any lawsuit, pending or otherwise, fitting the Act's definition."[125] The plaintiffs raised a due process challenge to PLCAA's retroactive abrogation of their claims, but the district court, in holding that the plaintiffs did not have a vested interest in their claims because they had not received a final favorable judgment, rejected this argument.[126]

At first glance, *Fisch* and *Ileto* might seem to support the argument that the rights of the plaintiffs in the suits against telecommunications firms had yet to accrue, but a close reading of these decisions reveals a much different conclusion. In *Fisch*, the Sixth Circuit's holding that the plaintiffs' rights had not vested was expressly premised on the fact that the right to "walking time" pay was a brand new, purely statutory creation that had no basis in common law (and indeed did not even exist two years earlier).[127] For this reason, the court held that the plaintiffs "could not expect that their status or rights would remain unchanged" and instead "could reasonably anticipate changes in the law."[128] Essentially, the court's holding assumed that the newly-established right to "walking time" pay "lack[ed] the imprimatur of a congressional desire for permanence."[129] As a result, the plaintiffs were on notice that this right could change in the future, and they could not be said to have had a vested right on such an unstable basis.

Likewise, the public nuisance claim asserted against the gun manufacturers in *Ileto* is exactly the kind of fluctuating, newly-established right that courts will *not* treat as property protected by the Due Process Clause,[130] and the district court's opinion must be read in this light. Although suits for public nuisance have a lengthy common law history, the action in *Ileto*, a civil claim brought by private plaintiffs, can hardly be said to have any connection to the common law understanding of a public nuisance action, a criminal remedy brought on behalf of the general public.[131] In addition to the lack of historical pedigree, the right asserted by the *Ileto* plaintiffs has been roundly rejected by most courts.[132] Indeed, it was not until 2001 that a court

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125 *Ileto*, 421 F. Supp. 2d at 1283.

126 *Id.* at 1299–300.

127 *See* Fisch v. Gen. Motors Corp., 169 F.2d 266, 270–71 (6th Cir. 1948).

128 *Id.* at 271.

129 Radin, *supra* note 71, at 1334.

130 *See supra* notes 127–29 and accompanying text.

131 Lisa M. Ivey, *Losing the Battles, Winning the War: Public Nuisance as a Theory of Gun Manufacturer Liability in Tort*, 34 CUMB. L. REV. 231, 234–35 (2003).

132 *See, e.g.*, *id.* at 238 ("Most courts that have considered public nuisance claims against the gun industry have dismissed the claims."); Jean Macchiaroli Eggen & John G. Culhane, *Public*

for the first time recognized the possibility that a public nuisance claim could be brought against a gun manufacturer,[133] and even then, such claims remained, at best, "the subject of heated debate among legal scholars."[134] In light of the brand-new nature and highly questionable legal basis for their right of action, the plaintiffs in *Ileto*, like those in *Fisch*, had little reason to expect that their legal status would remain unchanged.[135] Accordingly, judicial deference to the legislature's retroactive abrogation of a cause of action was appropriate in both cases.

In contrast to the circumstances in *Fisch* and *Ileto*, the plaintiffs whose rights were eliminated by FISAA based their claims on a stable and venerable body of law that sets strict limitations on the surveillance of U.S. citizens. FISA of 1978, a long-standing and well-established federal law, had always made explicitly clear that U.S. citizens had a right to be free from long-term warrantless eavesdropping.[136] Moreover, Congress did not create FISA *ex nihilo*; rather, as Professor Sebok notes, FISA's prohibitions on domestic surveillance were grounded on notions of privacy as a "tort interest recognized by almost every state's common law."[137] In this sense, the nature of the plaintiffs' rights in suits like *Hepting* is easily distinguishable from the type of rights lacking any historical basis asserted in *Fisch* and *Ileto*. Thus, notwithstanding *Fisch* and *Ileto*, the plaintiffs suing under FISA have a vested right of action protected by the Fifth Amendment's Due Process Clause.

B. Takings Clause

In addition to the Fifth Amendment's due process protections, its Takings Clause further declares, "[N]or shall private property be taken for public use, without just compensation."[138] Although the Takings Clause, like the Due Process Clause, requires a plaintiff to make a threshold showing that a property interest was harmed by gov-

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Nuisance Claims Against Gun Sellers: New Insights and Challenges, 38 U. MICH. J.L. REFORM 1, 3–4 (2004) ("[P]erhaps the most criticized claim brought [against the gun industry] has been the public nuisance claim."); Eric L. Kinter, *Bad Apples and Smoking Barrels: Private Actions for Public Nuisance Against the Gun Industry*, 90 IOWA L. REV. 1163, 1165 (2005) ("Public nuisance actions against the gun industry are relatively new and remain controversial.").

133 Young v. Bryco Arms, 765 N.E.2d 1, 15, 20 (Ill. App. 2001), *rev'd*, 821 N.E.2d (Ill. 2004).

134 Eggen & Culhane, *supra* note 132, at 4.

135 Fisch v. Gen. Motors Corp., 169 F.2d 266, 271 (6th Cir. 1948).

136 *See* 50 U.S.C. § 1805 (2006).

137 Sebok, *supra* note 40.

138 U.S. CONST. amend. V.

ernment action, the Supreme Court has made clear that even if property is not physically taken, a takings claim will still lie if a regulation causes the "total deprivation" of a property's value[139] or "if the regulation goes too far" in regulating property.[140] Under this analysis, if the elimination of the plaintiffs' claims against AT&T and other telecommunications providers constituted a taking of private property, then the Takings Clause would require the government to reimburse the plaintiffs for the value of their claim.[141]

This Section begins by asking whether the actions abrogated by FISAA constitute property within the meaning of the Takings Clause.[142] After considering arguments related to both the traditional application of the Takings Clause and the value of the plaintiffs' claims against telecommunications providers, this question is answered in the affirmative. Additionally, by highlighting the differences between FISAA and other instances of legislative elimination of tort claims, this section explains how FISAA runs afoul of the Takings Clause.

1. Applicability of the Takings Clause

A close analysis of the Supreme Court's takings jurisprudence demonstrates that the legislative destruction of a valuable cause of action falls well within the ambit of the Takings Clause.[143] For al-

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139 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1017 (1992).

140 Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

141 *Cf.* Radin, *supra* note 71, at 1319 (discussing the statute limiting civil suits against airlines following the 9/11 attacks and noting that "if . . . the court found that this extinguishment constituted a taking of private property without compensation, the Takings Clause would require that the government pay the plaintiff for the value of his claim").

142 Although the question of whether the eliminated claims constitute "property" in the context of the Due Process Clause was addressed in Part II.A, *supra*, further examination of the definition of "property" under the Takings Clause is warranted here. The Supreme Court has never expressly held that the two clauses contemplate different notions of property, but its recent decisions strongly suggest that conceptions of property under the Due Process and Takings Clauses are not necessarily identical. *See* E. Enters. v. Apfel, 524 U.S. 498, 557 (1998) (Breyer, J., dissenting) ("Nor does application of the Due Process Clause automatically trigger the Takings Clause, just because the word 'property' appears in both. That word appears in the midst of different phrases with somewhat different objectives, thereby permitting differences in the way in which the term is interpreted."). Scholars and commentators, moreover, have also picked up on this distinction. *See e.g.*, Merrill, *supra* note 71, at 893 (arguing for separate definitions of property under the Due Process and Takings Clauses); Radin, *supra* note 71, at 1319 ("Private property for purposes of the Takings Clause is not necessarily congruent with property for purposes of the Due Process Clause.").

143 In *Duke Power Co. v. Carolina Environmental Study Group*, the Supreme Court expressly left open the possibility that the legislative limitation of a plaintiff's ability to recover tort damages could constitute a taking for the purposes of the Fifth Amendment. Duke Power Co. v.

though courts have traditionally been hesitant to "treat legal rights as private property for purposes of the Takings Clause,"[144] there is nothing new about the idea that government must provide compensation when its regulations entirely eliminate the economic value of property—even if no physical taking has occurred.[145] Moreover, recent trends in both Supreme Court jurisprudence and legal scholarship indicate a willingness to expand the protections afforded by the Takings Clause to more diverse substantive areas.[146]

For example, in *Armstrong v. United States*,[147] the Court recognized that a lien was a compensable property interest and was thereby protected by the Takings Clause. Under the Maine statute at issue in that case, a supplier of materials to a shipbuilder retains a lien on the ship until he is paid for his materials.[148] But the shipbuilder in *Armstrong* defaulted on his contract with the U.S. Navy, allowing the government to automatically take title of the ship. Unfortunately for the supplier, this transfer of title made its liens on the ship unenforceable due to the government's sovereign immunity.[149] The government

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Carolina Envtl. Study Group, 438 U.S. 59, 94 n.39 (1978) (holding that where Congress imposed a statutory cap on the damages recoverable from a nuclear disaster, the "question of whether a taking claim could be established under the Fifth Amendment is a matter appropriately left for another day"). *But see* Holt, *supra* note 110, at 540 (suggesting that a law "limiting the right [of 9/11 victims] to sue [airlines] retroactively cannot amount to a taking under the Supreme Court's Takings Clause jurisprudence" because the law neither affects a physical taking nor completely voids an economic interest). The specifics of the 9/11 law's provisions are discussed in greater detail below. *See infra* notes 166–69 and accompanying text. For now, it is important to note that unlike the legislation affecting the claims of 9/11 victims, FISAA does not propose to "limit" the right to file suit, but rather extinguish it entirely.

144 Radin, *supra* note 71, at 1319.

145 *See, e.g.*, *Mahon*, 260 U.S. at 414–16 (finding a government taking where a state law prevented plaintiff coal company from exercising its contractual rights to engage in subterranean mining on a piece of land).

146 *See* Ronald J. Krotoszynski, *Expropriatory Intent: Defining the Proper Boundaries of Substantive Due Process and the Takings Clause*, 80 N.C. L. Rev. 713, 714–15 (2002) ("Over the past two decades, the Justices have defined the scope of the Takings Clause in ever-broader terms, effectively transforming a protection against uncompensated eminent domain actions into a general-purpose guarantor of any and all private property rights."); *see also* Patricia Foster, *Good Guns (And Good Business Practices) Provide All the Protection They Need: Why Legislation to Immunize the Gun Industry From Civil Liability Is Unconstitutional*, 72 U. Cin. L. Rev. 1739, 1757 (2004) (contending that because the Arms Act would have required the immediate dismissal of pending actions against gun manufacturers, it "subjugates a compensable property interest and, therefore, effects an unconstitutional taking"); Kaimipono David Wenger, *Slavery as a Takings Clause Violation*, 53 Am. U. L. Rev. 191, 192 (2003) (arguing that slavery was a violation of the Takings Clause because "[s]laves, like all people, possessed a property right of self-ownership" of which they were deprived).

147 Armstrong v. United States, 364 U.S. 40 (1960).

148 *Id.* at 44.

149 *Id.* at 46–47.

claimed that the inability of the supplier to enforce its liens due to its immunity was *not* a taking, but the Court was not persuaded.[150] Despite the fact that the liens were not real property in the physical sense, the Court held that "[t]he total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment 'taking.'"[151] This holding exemplifies the expanding application of the Takings Clause beyond mere instances of real property. In light of this trend, a strong argument exists that the Takings Clause should apply to the taking of a vested right of action as well.

2. Plaintiffs' Probability of Success

One potential counterargument to the above analysis is that the uncertain economic value of the plaintiffs' claims in suits like *Hepting* prevents the elimination of their suit from fitting within the framework of a takings argument. Based on the assumption that the value of a claim is directly related to its probability of success,[152] a skeptic might assert that because the plaintiffs cannot show that their causes of action against AT&T and other companies are valid or likely to succeed, FISAA's elimination of their suit takes nothing of value. Such reasoning, though, can be rebutted on a number of levels.

First, the progress made by the *Hepting* plaintiffs prior to the enactment of FISAA indicates that the suits filed against telecommunications providers had a strong likelihood of success. The plaintiffs in *Hepting* had already faced and survived a motion to dismiss.[153] Although, of course, this fact alone does not prove that the plaintiffs' action would have ultimately been successful, it does speak to the basic legitimacy of the suit. After all, "[a] plaintiff who has survived a motion to dismiss has staked a potential claim upon the assets of the defendant,"[154] and in this sense the plaintiffs' interest in *Hepting* is not unlike the lien which was held to be a compensable property interest in *Armstrong*.[155]

Furthermore, on appeal from the decision to deny the defendants' motion to dismiss, the Ninth Circuit heard oral argument on

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150 *Id.* at 47.

151 *Id.* at 48.

152 *See* Radin, *supra* note 71, at 1319 n.24 ("The expected value of the claim must account for the plaintiff's probability of success.").

153 *See* Hepting v. AT&T Corp., 439 F. Supp. 2d 974 (N.D. Cal. 2006). *See generally supra* Part I.C.

154 Foster, *supra* note 146, at 1759.

155 *See* Armstrong v. United States, 364 U.S. 40, 48 (1960).

both *Hepting* and a closely analogous case, *Al-Haramain Islamic Foundation v. Bush*.[156] Once again, the court "appeared skeptical of and sometimes hostile to the Bush administration's central argument,"[157] and "[a]ll three judges indicated that they were inclined to allow one or both cases to go forward."[158] Though the passage of FISAA has since stalled the *Hepting* suit, the *Al-Haramain* litigation continues to move forward promisingly in the district court.[159] One can only imagine that *Hepting*, dealing with substantially similar legal issues before the same judge in the same court, would be in a comparably advantageous position were it not for the passage of FISAA.

Additionally, it has become increasingly clear that AT&T violated the law by facilitating the NSA's domestic warrantless wiretapping, a fact which serves as another indication of the likelihood of the *Hepting* plaintiffs' success. As mentioned above, the district court declared that "AT&T cannot seriously contend that a reasonable entity in its position could have believed that the alleged domestic dragnet was legal."[160] Moreover, other telecommunications providers have stated that although they were approached by the NSA to assist in warrantless domestic wiretapping, they refused to cooperate due to concerns about the legality of the NSA's request.[161] For example, a statement issued by an attorney for Joseph P. Nacchio, the former CEO of Qwest, the nation's fourth-largest phone company, illustrates Qwest's misgivings about the NSA's wiretapping activities:

> In the Fall of 2001 . . . Qwest was approached to permit the government access to the private telephone records of Qwest customers. Mr. Nacchio made inquiry as to whether a warrant or other legal process had been secured in support of

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156 Al-Haramain Islamic Found. v. Bush, 507 F.3d 1190 (9th Cir. 2007). *Al-Haramain* and *Hepting* shared such similar legal questions that the Ninth Circuit initially ordered that they be consolidated (although they were later severed). *See* Hepting v. AT&T, 508 F.3d 898, 899 (9th Cir. 2007).

157 Adam Liptak, *U.S. Defends Surveillance Before 3 Skeptical Judges*, N.Y. TIMES, Aug. 16, 2007, at A13.

158 *Id.*

159 The Honorable Vaughn Walker, Chief Judge for the Northern District of California, is currently presiding over both *Hepting* and *Al-Haramain*. Judge Walker recently issued a January 5, 2009 opinion reaffirming that the *Al-Haramain* suit can proceed to trial despite the government's invocation of the state secrets privilege. *See* Bob Egelko, *Illegal Wire-Tapping Suit Now in Obama's Court*, S.F. CHRONICLE, Jan. 19, 2009, at A1. Because the government is the defendant in *Al-Haramain*, FISAA's immunity provision, which applies only to telecommunications providers, does not foreclose the continued pursuit of the suit.

160 Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 1010 (N.D. Cal. 2006).

161 John Markoff, *Questions Raised for Phone Giants in Spy Data Furor*, N.Y. TIMES, May 13, 2006, at A1.

> that request. When he learned that no such authority had been granted, and that there was a disinclination on the part of the authorities to use any legal process, . . . [Mr. Nacchio] issued instructions to refuse to comply with these requests.[162]

This statement adds to the mounting evidence of AT&T's unlawful actions and, along with the promising developments in the *Hepting* litigation prior to the enactment of FISAA, demonstrates the validity and value of the *Hepting* plaintiffs' claim. Congress's elimination of such a strong claim therefore constitutes the destruction of valuable property, which would require the government to pay "just compensation" to the plaintiffs under the Fifth Amendment. Given the absence of such compensation, FISAA appears to violate the Takings Clause.

3. FISAA's Departures from Prior Statutes

Given the widening scope of protection under the Takings Clause in recent years,[163] the argument that causes of action like those eliminated by FISAA are deserving of protection under the Takings Clause has never been stronger. It might seem curious, then, that several previous statutes eliminating causes of action were not found to be unconstitutional under a Takings Clause analysis. Yet closer examination of these prior laws reveals a crucial difference between their provisions and the retroactive immunity granted to telecommunications providers by FISAA that explains why they were able to pass constitutional muster: whereas the immunity grants and liability caps in prior legislative responses to mass torts were accompanied by some kind of administrative compensation or quid pro quo arrangement, the plaintiffs whose claims were abrogated by FISAA received nothing in return.[164]

In September 2001, for example, Congress feared that the nation's airline industry, already reeling from the attacks of September 11, might be swamped by a bankruptcy-inducing wave of litigation in the aftermath of the attacks.[165] Determining that immediate legislative action was necessary to avert this economic disaster, Congress hurriedly passed the Air Transportation Safety and System Stabilization Act ("ATSSSA").[166] Notably, the ATSSSA did *not* immunize the

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162 *Id.*

163 *See supra* Part II.B.1.

164 *See supra* note 65 and accompanying text.

165 *See* Holt, *supra* note 110, at 513–14.

166 Air Transportation Safety and System Stabilization Act of 2001, Pub. L. No. 107-42, 115 Stat. 230 (2001) (codified at 49 U.S.C. §§ 40101, 44302–44306) [hereinafter ATSSSA].

airline industry from civil suit, nor did it abrogate any cause of action already pending against the airlines. Instead, the ATSSSA sought to strike a balance between protecting industry and protecting victims, and so it created a strict cap on air carrier liability and instituted limitations on the jurisdictional and choice of law rules for any civil suit filed against the airlines.[167]

Yet even though the plaintiffs suing the airlines saw their potential tort awards capped by the new law, they were compensated for this potential loss in property value by payments from the Victims' Compensation Fund ("VCF").[168] In part, the VCF was designed as a disincentive to litigation: victims were required to waive their right to file a civil suit for damages in order to become eligible for the fund.[169] The VCF, however, also represents a recognition that because the government capped the potential damages recoverable by plaintiffs, it owed the plaintiffs some sort of compensation for this loss in property. In short, in exchange for limiting rights of action against the airline industry, the statute provided victims with a sort of quid pro quo in the form of an administrative compensation fund.

Two other compensatory schemes follow a similar structure. When Congress passed the Black Lung Benefits Act ("BLBA"),[170] a statute protecting coal companies from the onslaught of suits filed by miners who had contracted pneumoconiosis (commonly referred to as "black lung disease"), it also set up a fund to compensate the injured miners for their loss of property in the suits.[171] Similarly, the passage of the Price-Anderson Act[172] illustrated Congress's desire to protect the nuclear power industry while also providing fair compensation to victims of nuclear power accidents. The Act granted immunity to nuclear power plants in the event of a future catastrophic incident.[173] In exchange, Congress provided that parties injured in a nuclear disaster could bring suit against the United States and recover up to the amount specified by the soft damages cap.[174]

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167 *See id.* § 408(a), (b)(1)–(3).

168 Holt, *supra* note 110, at 513–14 (noting that the VCF provided "compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001").

169 *Id.*

170 Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150.

171 26 U.S.C. § 9501 (2006).

172 42 U.S.C. § 2210 (2006).

173 *Id.* § 2210(c).

174 *Id.* § 2210(e) (capping the maximum recoverable damages at $560 million but allowing that Congress may "take whatever action is determined to be necessary (including approval of appropriate compensation plans and appropriation of funds) to provide full and prompt com-

In each of the three arrangements described above (the ATSSSA's 9/11 Victims' Compensation Fund, the Black Lung Benefits Act, and the Price-Anderson Act), the elimination of a cause of action was linked to some other sort of compensation or quid pro quo. This framework of compensation makes perfect sense because, as discussed above, vested rights of action constitute property for Fifth Amendment purposes,[175] and the Takings Clause forbids the elimination of such property unless just compensation is provided.[176] Although Congress undoubtedly wanted to help victims of the 9/11 attacks or black lung disease, the funds that they created were not merely altruistic—they were constitutionally necessary if Congress wanted to eliminate causes of action in tort.[177] Yet the retroactive immunity provision of FISAA eliminates the plaintiffs' cause of action against AT&T without providing them with anything in return. Such an action contravenes the just compensation requirement of the Takings Clause and thus fails to pass constitutional muster under the Fifth Amendment.

As the discussion above demonstrates, FISAA contravenes two constitutional doctrines. By retroactively eliminating a right that is firmly embedded in well-settled statutes, the Act fails the test of the Due Process Clause. Moreover, by destroying a valuable right of action without providing any alternative means of recovery, FISAA likewise violates the Takings Clause. In light of these twin constitutional shortcomings, the need for an alternative proposal is plain.

III. Striking the Proper Balance: An Effective (and Constitutional) Alternative

By retroactively eliminating an entire class of claims and failing to provide an alternative manner of recovery or compensation, FISAA runs afoul of both the Due Process and Takings Clauses of the Fifth Amendment. In light of these concerns, Congress must act quickly to cure the constitutional deficiencies of FISAA. This Note proposes a three step remedial process: first, Congress must repeal the retroactive grant of immunity to telecommunications providers and si-

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pensation to the public" if a nuclear incident gives rise to damages in excess of the amount specified by the statutory cap).

175 *See supra* Part II.

176 U.S. CONST. amend. V.

177 *See* Sebok, *supra* note 40 ("The reason for creating the [Victims' Compensation Fund] was not just that [Congress] wanted to help the families of the heroes who died on [September 11] . . . . It was also that they would have kicked up a firestorm of litigation had they tried to cut off the right to sue without offering any compensation in exchange.").

multaneously establish a compensatory administrative fund providing an alternative means of recovery; second, Congress should specifically provide for secure ex parte, in camera review of all classified national security material at trial; and third, Congress should place a fair, but firm, cap on potential damages for claims against telecommunications providers arising from domestic warrantless surveillance.

The first change Congress should make is to repeal FISAA's retroactive grant of immunity to telecommunications providers so that the suits already pending against telecommunications firms can move forward. Such a step would immediately place FISAA on firmer constitutional ground by avoiding the due process and takings concerns triggered by the retroactive abrogation of accrued rights of action.[178] In place of the current absolute ban on suits against telecommunications providers, Congress should instead follow the lead of the ATSSSA and establish an administrative fund that offers compensation to those plaintiffs who waive their right to file suit.[179] The results of the ATSSSA provide a powerful reason to believe that such a fund would serve as a strong disincentive to litigation.[180] As the likely effect of an administrative fund would be to significantly reduce the number of claims filed against companies like AT&T, this Note's proposal serves the same purpose, albeit less completely, as FISAA's retroactive immunity provision—but without offending the provisions of the Fifth Amendment.

Additionally, recognizing that some plaintiffs might still choose to litigate their claim, Congress should also include explicit provisions ensuring that any classified national security material will not be exposed during trial. One of the reasons for Congress's decision to grant immunity to telecommunications firms in the first place was the fear that a trial would expose classified material and jeopardize the government's national security efforts.[181] Indeed, Mike McConnell, the

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178 *See supra* Part II.

179 Like both the ATSSSA and the BLBA, this Note proposes that the administrative fund be funded by tax revenue. A tax-based fund is preferable for two reasons: (1) it avoids saddling private industry with the entire economic burden of the fund and thus encourages continued private sector cooperation in future antiterrorism efforts; and (2) it increases accountability of elected officials because taxpayers can hold elected representatives accountable at the polls for any abuses of power on their watch that give rise to the creation of taxpayer-funded administrative funds.

180 *See* Holt, *supra* note 110, at 524 (noting that out of the thousands of people killed in the attacks of September 11, just ninety-six plaintiff representatives had opted for the litigation alternative as of March 26, 2003).

181 This concern also formed the basis of the government's assertion of the state secrets privilege. Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 986 (N.D. Cal. 2006).

former Director of National Intelligence, maintained that even seemingly innocuous discussion of the already-public basics of the NSA's surveillance program would tip off terrorists and ultimately "mean[ ] that some Americans are going to die."[182] Although the validity of this logic may be disputed,[183] guaranteeing the confidentiality of classified national security information also addresses the concern that defendant telecommunications providers would be unable to mount an effective defense to the suit.[184] With adequate procedures in place to ensure the secrecy of sensitive information used at trial, companies like AT&T would be assured the chance to present classified evidence in an appropriately secure setting in the course of defending against civil suits. To this end, Congress should clarify and reinforce existing regulations to provide further assurances of a confidential forum. This will avoid the problem of airing classified national security matters in open court but will still provide an avenue for plaintiffs to pursue their vested causes of action.

Finally, Congress should consider capping damages paid to successful plaintiffs who opt out of the compensation fund described above. A cap on damages is important for two reasons. First, it reinforces the incentive for plaintiffs to pursue a remedy through the administrative compensatory fund and thus furthers the government's goal of reducing suits against telecommunications providers.[185] Second, in light of the concerns that civil suits "would bankrupt these telecommunications companies,"[186] a cap on damages would ensure that even if plaintiffs did pursue a civil suit, telecommunications defendants would not be subject to financially crippling liability. This change, along with the two described above, finds a balance between the competing goals of preserving national security and respecting the privacy and property rights of Americans. And perhaps most importantly, these modifications put FISAA back on solid constitutional ground.

IV. Relevant Policy Considerations

Part II's analysis demonstrates the need to overhaul FISAA in order to ensure its constitutionality under the Fifth Amendment, and

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182 Lichtblau, *supra* note 31.

183 *See Hepting*, 439 F. Supp. 2d at 994 (rejecting the government's assertion of the state secrets privilege).

184 *See* Rockefeller, *supra* note 54 and accompanying text.

185 *See supra* Part I.D.

186 Lichtblau, *supra* note 31.

Part III's proposal responds to these constitutional concerns by setting forth a workable and most importantly, legal, alternative to FISAA's existing provisions. Yet complex constitutional arguments are not the only considerations militating in favor of amending FISAA. Indeed, even setting aside the constitutional analysis in Part II, basic policy considerations provide abundant support for adopting the changes discussed above. This section explains why the suggested changes to FISAA discussed in Part III strike an appropriate balance between encouraging future participation from the private sector and respecting the privacy and property of U.S. citizens.

First, this Note's proposal recognizes the importance of holding corporate actors accountable for bad actions. As enacted, FISAA permits telecommunications providers to violate the clear letter of the law without suffering adverse consequences.[187] Such a permissive approach, as noted by Senator Russ Feingold, only invites further abuses: "[I]f we want [telecommunications providers] to follow the law in the future, retroactive immunity sets a terrible precedent."[188] In contrast, by permitting lawsuits against telecommunications providers to move forward, the proposed changes to FISAA detailed above would send a clear message that statutory procedures are to be strictly adhered to, and consequences will follow when they are not.

The above proposal balances this emphasis on accountability by recognizing the need to ensure continued cooperation from the private sector in combating the ever-present threat of terrorism. Far from discouraging future cooperation, at the core of this Note's proposal is an incentive *not* to sue telecommunications providers—namely, an alternative administrative remedy and accompanying cap on corporate liability. Through these provisions, Congress would dramatically decrease corporate liability and thereby alleviate the concern that the private sector might be hesitant to cooperate with the government in the future. And of course, telecommunications companies need not ever again fear liability for assisting the government so

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187 *See* 50 U.S.C. § 1805(a) (2006) (imposing a statutory requirement that law enforcement agents obtain a warrant based on probable cause from the FISC before engaging in domestic surveillance). Although telecommunications giants like AT&T flouted this rule by facilitating the NSA's warrantless surveillance program, FISAA would allow these companies to avoid any consequences for this violation.

188 *See* Sen. Russ Feingold, Letter to the Editor, *Wiretapping and the Telecoms*, N.Y. TIMES, Nov. 6, 2007, at A28; *see also* Juan P. Valdivieso, *Protect America Act of 2007*, 45 HARV. J. ON LEGIS. 581, 594 (2008) ("Granting retroactive immunity will provide a disincentive for companies to challenge unlawful directives in the future.").

long as they abide by the simple warrant requirement that has always been a part of FISA.[189]

In addition to corporate accountability and continued public-private cooperation, the maintenance of the U.S.'s telecommunications infrastructure, and the industry that supports it, also plays an important part in informing the amendments suggested here. Just as the importance of the airline industry underscored the need for a liability cap under ATSSSA, the above proposal recognizes that the continued vitality of the telecommunications industry is of enormous importance to the United States. As already mentioned, the administrative compensation alternative and cap on tort damages suggested here would significantly decrease the ultimate liability of telecommunications providers. As such, these provisions ensure that the telecommunications industry would not be bankrupted even if the currently pending suits are successful.

Finally, this proposal is also supported by normative notions of fairness. On one hand, the companies accused of violating the law in these suits are highly sophisticated, multi-national corporations with expert in-house legal teams, so it hardly seems unfair to expect that they know the law and abide by its dictates.[190] In this light, the argument by supporters of retroactive immunity that it is "patently unfair"[191] to hold telecommunications firms accountable for violating the law rings especially hollow. On the other hand, real injustice does occur when U.S. citizens, harmed by the willingness of these same telecommunications giants to facilitate the warrantless invasion of their private lives, are suddenly left without a way to vindicate their rights. The proposal detailed above recognizes this risk and presents an alternative that is far more evenhanded than FISAA's blanket grant of retroactive immunity.

More than academic constitutional arguments undergird the changes proposed here, and the above discussion reveals the variety of competing interests that are at work in any policy decision. By promoting accountability and fairness while also recognizing the crucial role played by telecommunications providers in protecting our civil

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189 *See* Feingold, *supra* note 188 ("Telecom companies that cooperate with a government wiretap request are already immune from lawsuits, as long as they get a court order or a certification from the attorney general that the wiretap follows all applicable statutes.").

190 Indeed, it strains credulity to think that telecommunications providers had no idea that they were breaking the law just because the NSA said so. This conclusion is supported by the fact that some firms, like Qwest, refused to participate in the TSP because they knew that it was illegal. *See* Markoff, *supra* note 161.

191 *See* Rockefeller, *supra* note 54.

society, this Note's proposal seeks to establish a middle ground between privacy and corporate interests that is both constitutional and thoroughly sound as a matter of public policy.

Conclusion

FISAA's retroactive grant of immunity to telecommunications providers runs afoul of both the Due Process and Takings Clauses of the Fifth Amendment. Because the plaintiffs' rights of action had already accrued, and because these rights were firmly embedded in well-settled statutes, FISAA does not pass muster under the Due Process Clause. Furthermore, by completely eliminating a valuable right of action without providing any alternative means of recovery or quid pro quo, FISAA likewise violates the precepts of the Takings Clause.

In light of these constitutional flaws, this Note proposes a workable and constitutional alternative to FISAA. First, Congress must repeal the retroactive grant of immunity to telecommunications providers and simultaneously establish a compensatory administrative fund that will incentivize plaintiffs to opt out of litigation. Second, Congress should provide for secure ex parte, in camera review of all classified national security material at trial so that litigants can be assured of a confidential forum. And third, Congress should protect vital private sector industries by capping potential damages for claims against telecommunications providers arising from domestic warrantless surveillance. This proposal would not only remedy the constitutional flaws of FISAA, but would also address the weighty policy concerns at the heart of the debate over retroactive immunity. By recognizing both the significance of the telecommunications industry and the importance of civil rights, the proposed changes attempt to chart a middle course between corporate interests and individual rights while still abiding by the dictates of the Fifth Amendment.