ORAL ARGUMENT HEARD ON DECEMBER 4, 2008

No. 07-5080

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SCOTT TOOLEY,

Appellant,

v.

JANET NAPOLITANO, HOMELAND SECURITY SECRETARY,
IN HER OFFICIAL CAPACITY, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PETITION FOR REHEARING OR REHEARING *EN BANC*

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. R. 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici. Plaintiff-appellant in this civil action is Scott Tooley. His suit initially named as defendants George W. Bush, President; Richard B. Cheney, Vice President; Alberto Gonzales, Attorney General; Michael Chertoff, Homeland Security Secretary; Kip Hawley, Administrator of the Transportation Security Administration; Michael Hayden, Lieutenant General, Director, National Security Agency; and Michael B. Mukasey, Attorney General. On appeal, the only remaining defendants are Janet Napolitano, in her official capacity as Secretary of Homeland Security; Gale Rossides, in her official capacity as Acting Administrator of the Transportation Security Administration, and Eric D. Holder, in his official capacity as Attorney General of the United States.

This court has appointed Cassandra S. Bernstein to serve as amicus curiae counsel to plaintiff-appellant Tooley for purposes of this appeal.

B. Ruling Under Review. The ruling under review is the panel opinion filed on February 20, 2009.

C. Related Cases. Counsel is not aware of any pending related cases.

TEAL LUTHY MILLER
Attorney

GLOSSARY

FOIA	Freedom of Information Act
NSA	National Security Administration
RFIT	Radio Frequency Identification Tags
TSP	Terrorist Surveillance Program
TSA	Transportation Security Administration

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INTRODUCTION

Plaintiff alleges – on the basis of little more than clicking noises that he hears on his phone, a Ford Crown Victoria that sat outside his home for a two-week period, and airport searches – that defendants have subjected him and his extended family to physical surveillance and wiretapping, and that his name has been placed on government terrorist watchlists. At issue in this appeal is whether plaintiff's inferential allegations – on information and belief – that the government has targeted him have sufficient plausibility to establish that he has an injury-in-fact fairly traceable to government action giving rise to standing to sue. The practical consequences of this question are serious. Allowing this and other, similarly fanciful suits to go forward can subject the government to burdensome and ultimately pointless discovery in a sensitive area of national security, with perhaps an ultimate need to assert the state secrets privilege, even when the complaint offers no plausible basis for believing that the government had any connection with purported surveillance of the plaintiff.

In reversing the district court judgment dismissing plaintiff's complaint, a divided panel of this Court acknowledged a conflict among the courts of appeals regarding pleading standards in the wake of *Bell Atlantic Corp.* v. *Twombly*, 127 S.Ct. 1965, 1966 (2007). The panel concluded, however, that, because *Aktieselskabet AF 21. November 2001* v. *Fame Jeans*, 525 F.3d 8, 15 (D.C. Cir. 2008), held that

Twombly "leaves the longstanding fundamentals of notice pleading intact," plaintiff's inferential allegations were adequate to establish standing on a motion to dismiss.

1. In *Pacific Bell Telephone Co.* v. *Linkline Communications, Inc.*, 129 S. Ct. 1109, 1123 (2009) – a case decided after the panel's decision – the Supreme Court held that, because the district court had applied the "no set of facts" standard in assessing the amended complaint, the case should be remanded for consideration whether the complaint stated a claim "in light of the new pleading standard we articulated in *Twombly*." *Id.* (emphasis added). Although *Fame Jeans* recognized that "it has never been literally true, as *Twombly* noted, that a complaint is adequate unless 'no set of facts' consistent with the complaint could support a claim," 525 F.3d at 17 n.4, both *Fame Jeans* and the panel here nevertheless treated pleading standards as "notoriously loose." *Tooley* v. *Napolitano*, 556 F.3d 836, 840 (D.C. Cir. 2009). *Linkline Communications,* by confirming that *Twombly* announced a "new pleading standard," suggests that the panel erred by following *Fame Jeans*'s lead and concluding that *Twombly* left pleading standards intact. Rehearing is warranted because the panel's decision conflicts with *Twombly.*

Moreover, the Supreme Court heard argument in December 2008, in *Ashcroft* v. *Iqbal*, No. 07-1015, in which petitioners argue that the respondents' allegations fail to satisfy Fed.R.Civ.P. 8(a)'s plausibility threshold as articulated in *Twombly.* The

decision in *Iqbal* is thus likely to further define the new pleading standard articulated in *Twombly*. If it does, its decision will inform this Court's analysis of this case. For this reason, we respectfully suggest that this Court hold this petition pending the Supreme Court's decision in *Iqbal*.

2. Rehearing is also warranted because the decision here conflicts with prior cases concluding that surveillance allegations similar to plaintiff's did not establish standing to sue. *See United Presbyterian Church* v. *Reagan*, 738 F.2d 1375 (D.C. Cir. 1984) (Scalia, J.); *Laird* v. *Tatum*, 408 U.S. 1 (1972). Also, as the dissent recognized, the panel's decision appears to ignore the line of cases holding that some allegations are so lacking in foundation that they are too insubstantial to establish jurisdiction. *See, e.g., Neitzke* v. *Williams*, 490 U.S. 319, 327 n. 6. (1989).

3. Finally, rehearing is warranted in light of the importance of the issue. The United States and its agencies frequently face claims of surveillance, and as the panel recognized, defending against even frivolous claims of this type implicates national security interests, because a "pattern of government answers (denying specific conduct in some cases, refusing to answer on national security grounds in others) would constitute a de facto disclosure." *Tooley*, 556 F.3d at 841. Although the panel majority suggests that the government could deal with this problem by invoking the state secrets privilege, *id.*, that privilege cannot be lightly invoked.

STATEMENT

1. Plaintiff Scott Tooley alleges that defendants have subjected him and his extended family to physical surveillance and a pervasive, multi-year program of roving wiretaps. He also alleges that his name has been improperly placed on one or more government terrorist watchlists. Tooley seeks an injunction ordering the Attorney General, the Secretary of Homeland Security, and the Administrator of the Transportation Security Administration (TSA) to cease wiretapping and surveillance activities against him and to remove his name from any watchlists. App. 22.[1]

Tooley's allegations are based on a telephone conversation he had with Southwest Airlines in the spring of 2002. App. 12-13 (Compl. ¶ 18). According to his complaint, during a call to purchase tickets, he was asked whether he had any comments. App. 13 (Compl. ¶ 18). Tooley responded that he believed that the airline should "screen 100 percent of everything that went into the airline" to protect against the possibility that "those who wish to harm American citizens could put a bomb on a plane." App. 13 (Compl. ¶¶ 19-20). The ticketing agent reacted to his comment

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[1] Before he brought suit, Tooley submitted broad FOIA requests to the Department of Justice, the Department of Homeland Security, and TSA. App. 14 (Compl. ¶¶ 26-27). These agencies either found no responsive documents, or indicated that they needed additional information to respond to Tooley's request, which he then failed to provide. The district court granted summary judgment for the government on Tooley's FOIA claim, App. 188-89, and Tooley did not appeal.

with alarm and put him on hold, and Tooley waited for someone to come back on the line for twenty minutes. When no one did, he hung up. App 141-142 (Aff. ¶¶ 3-7).

Tooley contends that this conversation prompted the government to subject him and his extended family to a pervasive program of surveillance. Specifically, Tooley alleges that (1) more than a year after his conversation with Southwest, he began to notice "problematic phone connections, including telltale intermittent clicking noises," App. 13 (Compl. ¶ 21); (2) some unidentified person placed tracking devices on his car and his wife's car (although no additional facts are alleged to support this allegation, including how he knows that the devices were placed on the cars, or when and by whom they were placed), App. 14 (Compl. ¶ 23); (3) in March 2005 (*i.e.*, three years after the conversation with Southwest) an "officer" of an unidentified entity sat in a Ford Crown Victoria across the street from his home for six hours a day for a two-week period that coincided with a presidential visit to his area, App. 144 (Tooley Aff. ¶ 19); and (4) he is stopped and searched at airports whenever he flies, including one "degrading and unreasonable search" in July 2004, App. 143 (Tooley Aff. ¶ 14).

On the basis of these specific allegations, Tooley infers "[u]pon information and belief" that the clicking noises are caused by roving wiretaps placed in response to his comments to Southwest on "his residential landline phone; his landline phone at his former Virginia Beach residence; his cellular phone; his wife's cellular phone;

his father's phone; his brother's phone; his sister's phone; his in-laws' phone; and his family's home phone in Lincoln, Nebraska." App. 13-14 (Compl. ¶¶ 21-22).[2] He also alleges that he is "on one or more terrorist watch lists." App. 14 (Compl. ¶ 25).

2. The district court granted defendants' motion to dismiss Tooley's claims, which he brought under the First and Fourth Amendments and the constitutional right to privacy. The court concluded that Tooley lacked standing to seek an injunction ordering defendants to cease wiretapping and physical surveillance because his allegations failed to establish injury, causation, or redressibility. App. 207-216.

3. A divided panel of this court reversed. The panel acknowledged a conflict among the courts of appeals regarding pleading standards in the wake of *Bell Atlantic Corp.* v. *Twombly*, 127 S.Ct. 1965 (2007). *See Tooley* v. *Napolitano*, 556 F.3d 836, 839 (D.C. Cir. 2009). It held, however, that in light of the conclusion in *Aktieselskabet AF 21. November 2001* v. *Fame Jeans*, 525 F.3d 8, 15 (D.C. Cir. 2008), that *Twombly* "leaves the longstanding fundamentals of notice pleading intact," Tooley's inferential allegations were adequate to establish standing at the pleading stage, even though the panel "share[d] many of our dissenting colleague's

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[2] The complaint focuses (App. 16-18) on a theory that Tooley is "one of the victims of" the NSA's Terrorist Surveillance Program, but the supplemental brief filed by *amicus curiae* (which Tooley adopted) characterizes these allegations as "background" intended to "lend[] credibility" to his complaint. Br. at 39, 45.

concerns over the ultimate plausibility of Tooley's claims." *Tooley*, 556 F.3d at 839, 840.[3]

4. Judge Sentelle would have affirmed the district court's decision. In his view, plaintiffs' allegations were so implausible that they failed to "'possess enough heft'" to satisfy the Fed. R. Civ.P. 8's pleading requirements. *Tooley*, 556 F.3d at 843, quoting *Twombly*, 127 S.Ct. at 1966.

REASONS FOR GRANTING REHEARING OR REHEARING EN BANC

I. THE DECISION CONFLICTS WITH *TWOMBLY*

A. *Bell Atlantic Corp.* v. *Twombly*, 127 S. Ct. 1965, 1955 (2007), demands that a plaintiff provide more than speculation to survive dismissal. It holds that inferential allegations in a complaint must be based on sufficient "factual matter" to "raise a right to relief above the speculative level" and to "raise a reasonable expectation that discovery will reveal evidence" supporting the plaintiffs' contentions. *Id.* at 1965. In other words, the facts alleged must "not merely [be] consistent with" the inference

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[3] The district court had treated Tooley's watchlist claims as limited to TSA watchlists and held that it lacked jurisdiction over those claims because TSA watchlists are "incorporated into Security Directives issued by TSA pursuant to 49 U.S.C. § 114(l)(2)(A)" and that "Congress has vested exclusive jurisdiction to review such directives in the Court of Appeals." App. 217-18 (citing 49 U.S.C. §§ 46110(a) and 46110(c)). The panel "assume[d] . . . that the district court was correct insofar as TSA watchlists are concerned," but concluded that Tooley adequately alleged that his name was placed on other watchlists and remanded these other watchlist claims for further consideration. *Tooley*, 556 F.3d at 841.

that the government has wiretapped and surveilled Tooley, they must push that inference across "the line between possibility and plausibility." *Id.* at 1966.

Tooley fails to meet this standard, and his allegations are not sufficiently plausible to justify subjecting the government to discovery in this sensitive national security area. As Judge Sentelle observed, Tooley's inferential allegations reflect beliefs that are "fanciful, paranoid, or irrational" and based on "nothing more than [his] internal belief structure." *Tooley*, 556 F.3d at 843. The clicking noises he hears on his phone do not make it plausible that defendants are "unlawful[ly] wiretapping [his] entire extended family, including at least nine separate phone lines"; the "presence of a black Crown Victoria in the vicinity of his home in the time surrounding a presidential visit in the same geographic area" is not sufficient to make it plausible that these defendants have subjected him to physical surveillance simply because "Crown Victorias are often used by law enforcement"; and "his allegations concerning airport searches and his conclusion concerning 'watch lists' based on such searches add nothing to the sufficiency of this complaint," because "[s]tripped of his conclusory adjectives and adverbs, his allegations say that he has been searched or detained at airports," and it is "unlikely that anyone who flies with any frequency has not." *Id.* at 843-44. If "there is anything unconstitutional about any particular search . . . then he should allege the facts that demonstrate its unconstitutionality." *Tooley*,

556 F.3d at 84 (Sentelle, J., dissenting).[4]

The panel majority shared Judge Sentelle's concerns about the "ultimate plausibility" of these allegations, but nevertheless held that Tooley could proceed under what it called "the federal rules' notoriously loose pleading criteria." *Tooley*, 556 F.3d at 840. In reaching this conclusion, the panel relied on *Aktieselskabet AF 21. November 2001* v. *Fame Jeans Inc.*, 525 F.3d 8, 15 (D.C. Cir. 2008), which held that *Twombly* "leaves the longstanding fundamentals of notice pleading intact."

Pacific Bell Telephone Co. v. *Linkline Communications, Inc.*, 129 S. Ct. 1109, 1123 (2009) – decided shortly after the panel's decision – states that *Twombly* announced a "new pleading standard." *Linkline Communications* thus suggests that both the panel majority here and the panel in *Fame Jeans* erred insofar as they interpreted *Twombly* as reaffirming the old, "notoriously loose" pleading standards.

Twombly emphasizes that pleading requirements should be firmly applied. 127 S. Ct. at 1966. It concluded that plaintiffs' inferential allegation (on information and belief) that defendants had engaged in an antitrust conspiracy was too speculative to withstand a motion to dismiss because "stating such a claim requires a complaint with

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[4] Because the propriety of the FOIA search that provided no support for his allegations is a judicially established fact and because Tooley's standing was at issue, this Court can consider the failure of Tooley's FOIA request to produce information confirming his inferences. *See Haase* v. *Sessions*, 835 F.2d 902 (D.C. Cir. 1987) (court can investigate facts relevant to determining standing on a motion to dismiss).

enough factual matter (taken as true) to suggest that an agreement was made"; while no particular factual allegations are required, the facts pled must provide "plausible grounds to infer an agreement." 127 S.Ct. at 1966. *Twombly* thus teaches that, when a complaint depends on allegations made on information and belief, the "set of factual allegations" that it includes must be adequate to support that belief. *Id.*

This case should be reheard because the panel majority failed to recognize and apply the "new pleading standard" announced in *Twombly*. *Linkline Communications,* 129 S. Ct. at 1123. Under that standard, the factual matter in Tooley's complaint fails to give rise to a reasonable expectation that he has suffered any injury fairly traceable to the federal defendants. Because his specific factual allegations fail to support the inferences he draws, the district court properly dismissed his complaint for lack of standing.

B. The courts of appeals "have disagreed about the import of *Twombly*." *Fame Jeans*, 525 F.3d at 15 & n. 3 (collecting cases). The panel majority's decision is in considerable tension with the courts that hold that *Twombly* announced a new pleading standard. It warrants rehearing for this reason as well.

C. The Supreme Court recently heard argument in *Ashcroft* v. *Iqbal*, No. 07-1015. Petitioners in *Iqbal* argue that the plaintiffs' allegations fail to satisfy *Twombly*'s plausibility threshold. The decision in *Iqbal* is thus likely to further

define pleading standards, and we respectfully suggest that this petition should be held for *Iqbal*, with further briefing as this Court deems appropriate.

II. THE DECISION CONFLICTS WITH *UNITED PRESBYTERIAN CHURCH*, *LAIRD* AND OTHER PRECEDENTS

A. The panel's distinctions of both *United Presbyterian Church* v. *Reagan*, 738 F.2d 1375 (D.C. Cir. 1984) (Scalia, J.), and *Laird* v. *Tatum*, 408 U.S. 1 (1972), are unconvincing. The ultimate conclusion in those cases is consistent with that in *Twombly*: when a plaintiff fails to include factual matter in the complaint that makes the inferential claim that he is subject to government surveillance plausible, he cannot establish that he was injured such that he has standing to sue.

The plaintiffs in *United Presbyterian Church* attempted to establish standing to challenge alleged government surveillance based on their belief that the government had subjected them or was subjecting them to surveillance. 738 F.2d at 1380. One plaintiff organization alleged that mail it sent was not delivered, and others alleged that they or their members had reason to believe that they had been subject to surveillance for a long time. *Id.* at 1380 & n.2. This Court concluded that they lacked standing to sue because their allegations were "too generalized and nonspecific." *Id.* at 1380; *see also Hasse* v. *Sessions*, 835 F.2d 902 (D.C. Cir. 1987).

The panel distinguished *United Presbyterian Church* on the ground that

Tooley's allegations are "more specific than the mere loss of mail." *Tooley*, 556 F.3d at 840.[5] But there is no meaningful distinction in plausibility between an inference that clicking noises equal wiretapping and an inference that intercepted mail equals surveillance. As Tooley has conceded (Amicus Br. at 38), an allegation of "strange noises and clicking sounds" on a phone line, standing alone, is not a credible allegation of wiretapping. *See also In re Grand Jury Proceedings*, 525 F. Supp. 831, 834 (D.S.C. 1981); *Sedwick* v. *West*, 92 F.Supp. 2d 813, 817, 822 (S.D. Ind. 2000). And contrary to the panel, Tooley's clicking allegations are not more plausible when "taken in combination" with his other allegations. *Tooley*, 556 F.3d at 840. Implausible inferences do not become plausible because they come in sets.[6]

Laird holds that, to establish standing to bring a First Amendment claim like

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[5] The panel acknowledged that Tooley's inference that his conversation with Southwest caused defendants to surveil him stretched plausibility "nearly to the breaking point" because of the substantial gap in time between the conversation and the point at which he first noticed clicking noises on his phone, but observed that the plaintiffs in *United Presbyterian Church* had even more trouble with causation, as they complained about surveillance that began before the program they sought to enjoin. *Tooley*, 556 F.3d at 840. The significant point, however, is that the causation gap in both cases undermines the plausibility of the claim of injury.

[6] Tooley's wiretapping and surveillance allegations are not made more credible by his allegation that he is stopped and searched in airports. Even if the airport search allegation makes his claim that he is on a TSA watchlist more plausible, it does not make his other claims more plausible, because "the presence of one's name on a watchlist cannot be presumed to establish that interceptions of one's communications have occurred." *Halkin* v. *Helms*, 690 F.2d 977, 997-98 (D.C. Cir. 1982).

Tooley's, the plaintiff cannot depend on self-imposed injury (subjective chill) to establish standing and must show that he is actually subject to a regulatory, proscriptive, or compulsory exercise of government power. *See United Presbyterian Church*, 738 F.2d at 1378, citing *Laird*. A plaintiff has standing only when such government action directly causes a "concrete harm . . . apart from the 'chill' itself." *See id.* (citing examples). Tooley's allegation that he has discontinued expressive activity is precisely the kind of "subjective chill" that *Laird* held to be insufficient to establish standing. While the panel majority distinguished *Laird* on the ground that Tooley "alleges harm from specific events," Tooley's inferential allegations of surveillance are insufficient to constitute such events under *Twombly*.

B. As Judge Sentelle recognized, the district court's judgment also should have been affirmed under the line of cases holding that some allegations are so lacking in foundation that they are too insubstantial to establish jurisdiction. *Best* v. *Kelly*, 39 F.3d 328, 330-31 (D.C. Cir. 1994), for example, recognized that fanciful allegations can properly be dismissed even if, taken as true, they would establish an injury. *See also Neitzke* v. *Williams*, 490 U.S. 319, 327 n. 6 (1989) (holding that a "patently insubstantial complaint" may be dismissed for want of subject-matter jurisdiction). The panel should have concluded that Tooley's allegations that the government is tracking his car and his wife's car and wiretapping not only Tooley but his wife, his

parents, his in-laws, and his brother and sister are patently insubstantial. *Cf. Richards* v. *Duke University*, 480 F.Supp. 2d 222, 233 (D.D.C. 2007) (allegations of "roving surveillance" that are so unlikely that they are "patently insubstantial.").

III. THE DECISION IS OF SUBSTANTIAL PRACTICAL IMPORTANCE

Twombly teaches that "'a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.'" 127 S.Ct. at 1967. As Judge Sentelle notes, a similar concern "animates the need for the ability of the district court to reject an implausible claim against the United States in, for example, the constitutional rights and national security area such as the case before us." *Tooley*, 556 F.3d at 843. Requiring the government to submit to discovery on highly dubious claims of wiretapping or surveillance will demand considerable government resources in an area of great sensitivity, *cf. Tooley*, 556 F.3d at 841, even though discovery is not justified by anything suggesting that the government has actually targeted the plaintiff.

While the panel majority suggests that the district court and the government could employ different strategies to limit discovery, *id.*, *Twombly* specifically rejected the argument that "a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through 'careful case management,'" explaining that "the success of judicial supervision in checking

discovery abuse has been on the modest side." 127 S. Ct. at 1967. Also, the panel's suggestion that the government could assert the state secrets privilege fails to take into account the cost of forcing the Executive Branch to take such significant action based on fanciful allegations. Asserting the privilege imposes a significant burden on high level officials, as it requires a "formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *United States* v. *Reynolds*, 345 U.S. 1, 7-8 (1953) (footnotes omitted). The case merits rehearing for these reasons as well.[7]

CONCLUSION

This case should be reheard by the panel or by the Court *en banc*. Because the Supreme Court's decision in *Iqbal* is likely to inform this Court's analysis, we respectfully suggest that the petition should be held pending that decision.

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[7] The panel assumed that the district court's conclusion that it lacked jurisdiction under 49 U.S.C. § 46110 to hear Tooley's TSA watchlist claim was correct, but remanded his other watchlist claims for consideration in the first instance. Several circuits have held that section 46110 "mandates review by a court of appeals" of claims that are "inescapably intertwined with a review of" a TSA order. *Green* v. *Brantley*, 981 F.2d 514, 521 (11th Cir. 1993); *Merritt* v. *Shuttle, Inc.*, 187 F.3d 263, 271 (2d Cir. 1999); *Crist* v. *Leippe*, 138 F.3d 801, 803 (9th Cir. 1998); *but see Ibrahim* v. *Department of Homeland Security*, 538 F.3d 1250 (9th Cir. 2008). Although the issue does not warrant rehearing on its own, if this Court concludes that Tooley has adequately alleged an injury establishing standing to pursue a non-TSA watchlist claim, it should make clear that the district court is free to hold that Tooley's non-TSA watchlist claims are inextricably intertwined with TSA orders such that they belong in the court of appeals in the first instance.

Respectfully submitted,

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APRIL 2009

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of April, 2009, I caused copies of the foregoing petition to be filed with the Court by hand delivery, and served upon the petitioner and counsel appointed by this court to serve as amicus curiae by overnight delivery at the following addresses:

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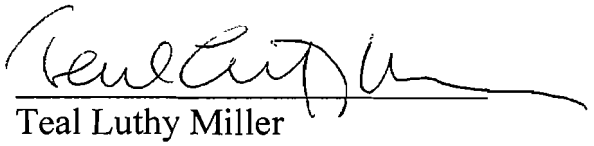

Teal Luthy Miller

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United States Court of Appeals,
District of Columbia Circuit.
Scott **TOOLEY**, Appellant
v.
Janet NAPOLITANO, Homeland Security Secretary, In Her Official Capacity, et al., Appellees.
No. 07-5080.

Argued Dec. 4, 2008.
Decided Feb. 20, 2009.

Background: Plaintiff brought action against government officials, alleging officials conducted illegal surveillance in violation of his constitutional rights. The United States District Court for the District of Columbia, 2006 WL 3783142, entered order dismissing plaintiff's action, and he appealed.

Holding: The Court of Appeals, Williams, Senior Circuit Judge, held that plaintiff's allegations were sufficient to confer standing.

Reversed and remanded.

Sentelle, Chief Judge, filed dissenting opinion.

West Headnotes

[1] Federal Civil Procedure 170A 103.2

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing
170Ak103.2 k. In General; Injury or Interest. Most Cited Cases

Federal Civil Procedure 170A 103.3

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing
170Ak103.3 k. Causation; Redressability. Most Cited Cases
To establish constitutional standing, a plaintiff must show an injury in fact that is fairly traceable to the challenged conduct and that will likely be redressed by a favorable decision on the merits.

[2] Federal Civil Procedure 170A 103.2

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing
170Ak103.2 k. In General; Injury or Interest. Most Cited Cases
The burden on the plaintiff to show each element of constitutional standing grows increasingly stringent at each successive stage of the litigation.

[3] Federal Civil Procedure 170A 103.5

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing
170Ak103.5 k. Pleading. Most Cited Cases
At the pleading stage, a plaintiff is required only to proffer a short and plain statement of the claim showing that he is entitled to relief in order to establish constitutional standing, from which it follows that general factual allegations of injury resulting from the defendant's conduct may suffice. Fed.Rules Civ.Proc.Rule 8(a), 28 U.S.C.A.

[4] Federal Civil Procedure 170A 1772

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)3 Pleading, Defects In, in General
170Ak1772 k. Insufficiency in General. Most Cited Cases
A well-pleaded complaint requires a court to deny a

motion to dismiss even if it strikes a savvy judge that recovery is very remote and unlikely. Fed.Rules Civ.Proc.Rule 8(a), 28 U.S.C.A.

[5] Constitutional Law 92 ⇦ 699

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(A) Persons Entitled to Raise Constitutional Questions; Standing
92VI(A)3 Particular Questions or Grounds of Attack in General
92k698 Criminal Law
92k699 k. In General. Most Cited Cases

Plaintiff's allegations that he heard "telltale" clicking noises on his residential and mobile telephones, that an officer sat outside his home during a Presidential visit, that he was subjected to searches every time he traveled, and that he was placed on terrorist watch lists were sufficient to demonstrate a redressable concrete injury attributable to government officials, as required to confer standing in plaintiff's action against officials alleging governmental wiretapping and physical surveillance violated his constitutional rights. Fed.Rules Civ.Proc.Rule 8(a), 28 U.S.C.A.

***836** Appeal from the United States District Court for the District of Columbia (No. 06cv00306). Cassandra S. Bernstein, appointed by the court, argued the cause for amicus curiae in support of appellant. With her on the briefs were Richard P. Bress and Gabriel K. Bell.

Scott Tooley, appearing pro se, was on the brief for appellant.

Teal Luthy Miller, Attorney, U.S. Department of Justice, argued the cause for appellees. With him on the brief were Gregory G. Katsas, Assistant Attorney General, and Douglas.

Letter, Litigation Counsel. Anthony A. Yang, Attorney, entered an appearance.

***837** Before: SENTELLE, Chief Judge, and TATEL, Circuit Judge, and WILLIAMS, Senior Circuit Judge.

Opinion for the Court filed by Senior Circuit Judge WILLIAMS.

Dissenting opinion filed by Chief Judge SENTELLE.

WILLIAMS, Senior Circuit Judge:

According to Scott Tooley's complaint, he phoned Southwest Airlines in the spring of 2002 to buy tickets to fly to Nebraska to visit his family. At the end of the call, after Tooley had provided Southwest with his name and contact information, the airline representative asked Tooley if he had any "comments, questions, or suggestions." Compl. ¶ 18. Tooley responded that, in the wake of the September 11 attacks, Southwest should screen 100 percent of "everything," and that without "proper security" Tooley and other members of the traveling public were "less safe due to the potential that those who wish to harm American citizens could put a bomb on a plane." Compl. ¶¶ 19-20. The Southwest representative responded with alarm and declared "you said the 'b' word, you said the 'b' word." Tooley Aff. ¶ 7. Tooley attempted to explain to the representative that she had not understood him correctly, but she nevertheless placed him on hold. After 20 minutes, Tooley finally hung up. *Id.*

According to Tooley, the ticket agent's seeming paranoia was not the end of the matter. Other events followed, which he ascribes to various government officials; those remaining in the suit, after a partial dismissal by Tooley, are the United States Attorney General, the Secretary of the Department of Homeland Security, and the Administrator of the Transportation Security Administration, all sued solely in their official capacities (collectively, the "government"). See *Tooley v. Bush,* No. 06-306,

2006 WL 3783142, at *1 (D.D.C.2006) (detailing the defendants initially included in Tooley's complaint and his later dismissals).

Tooley claims that in the fall of 2003, more than a year after the call to Southwest, he began to notice problematic phone connections, including "telltale" intermittent clicking noises. Compl. ¶ 21. He alleges, "[u]pon information and belief," that his telephone problems were caused by illegal wiretaps placed on his residential landline phone, his landline phone at his former residence, his cellular phone, his wife's cellular phone, the phones of his father, brother, sister, and in-laws, and his family's phone in Lincoln, Nebraska, where relatives from "France made calls from France to the home, where Mr. Tooley was visiting his mother for the week." *Id.* ¶ 22. Tooley claims that these alleged wiretaps were placed in response to the comments he had made to Southwest's representative.

In addition, he alleges that the government has placed him on "one or more terrorist watch lists" and that as a result he is "being illegally monitored by Defendants." *Id.* ¶ 25. This illegal monitoring has allegedly taken various forms, including the placement of permanent "Radio Frequency Identification Tags" on Tooley's vehicle and improper detentions and searches at airports. *Id.*¶¶ 23-24. Tooley also claims, in an affidavit submitted to the district court, that in March of 2005, when then-President George W. Bush visited Louisville, Kentucky, where Tooley currently resides, "an officer in a Ford Crown Victoria sat out in front of [Tooley's] home for approximately six (6) hours a day" during the week leading up to and the week of President Bush's visit. Tooley Aff. ¶ 19.

In order to obtain more information regarding this allegedly illegal surveillance, Tooley submitted several requests under ***838** the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. See *Tooley,* 2006 WL 3783142, at *3-8 (detailing the various FOIA requests). After the requests failed to yield any information confirming his suspicions, Tooley filed the present case in the district court. Counts I and II charge Fourth Amendment and constitutional right to privacy violations, respectively; Count III claims a First Amendment violation on the theory that the government's illegal surveillance had caused him to curtail his speech. Count IV sought declaratory relief under FOIA.

The district court granted the government's motion for summary judgment on the FOIA count, *Tooley,* 2006 WL 3783142, at *21, and Tooley does not challenge that decision. As to Counts I through III, the government moved to dismiss under Federal Rule of Civil Procedure 12(b)(1) on the ground that Tooley lacked Article III standing. The district court addressed the standing arguments by dividing Tooley's allegations into three categories based on the character of the government's alleged unlawful behavior-wiretapping; physical surveillance (including the claim that Defendants unlawfully placed a Radio Frequency Identification Tag on Tooley's vehicle); and the unlawful placement of Tooley's name on a terrorist watch list. *Tooley,* 2006 WL 3783142, at *22.

The court held that Tooley lacked Article III standing for both the wiretapping claims and physical surveillance claims. It reasoned that "it is altogether possible" that Tooley was the subject of "entirely lawful wiretaps placed by state or local law enforcement agencies" and that Tooley could not show that it was a federal agent responsible for any of his alleged physical surveillance. *Id.* at *23, 25.

As to Tooley's being placed on terrorist watch lists, the court found Article III standing, but nonetheless dismissed Tooley's claim on the basis of another subject matter jurisdiction problem. *Tooley,* 2006 WL 3783142, at *26. Focusing solely on the Transportation Security Administration ("TSA") watch lists, the court found, in reliance on 49 U.S.C. §§ 46110(a), (c), that such lists "are incorporated into Security Directives issued by TSA ... and Congress has vested exclusive jurisdiction to review such directives in the Court of Appeals." *Id.*

Tooley now appeals the district court's dismissals

of Counts I through III, arguing that the district court improperly applied the "liberal requirements of notice pleading" and rested its conclusions "on a basic misreading of the Complaint." Petr. Br. 2. Thin as Tooley's claims appear, we agree and therefore reverse and remand the case.

* * *

[1][2][3] To establish constitutional standing a plaintiff must show an injury in fact that is fairly traceable to the challenged conduct and that will likely be redressed by a favorable decision on the merits. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The burden on the plaintiff to show each element grows increasingly stringent at each successive stage of the litigation. *Id.* at 561, 112 S.Ct. 2130. At the pleading stage, Federal Rule of Civil Procedure 8(a) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," from which it follows that "general factual allegations of injury resulting from the defendant's conduct may suffice." *Lujan,* 504 U.S. at 561, 112 S.Ct. 2130. At the summary judgment stage, by contrast, "the plaintiff can no longer rest on ... mere allegations" but must set forth specific facts by affidavit or other evidence. *Id.* (internal quotations omitted). In the absence***839** of district court resolution of disputed issues of material fact, we review a dismissal for lack of standing de novo. *Muir v. Navy Fed. Credit Union,* 529 F.3d 1100, 1105 (D.C.Cir.2008).

[4] The Supreme Court's decision in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), has produced some uncertainty as to exactly what is required of a plaintiff at the pleading stage. See *Aktieselskabet AF 21. November 2001 v. Fame Jeans,* 525 F.3d 8, 15 & n. 3 (D.C.Cir.2008) (gathering cases suggesting that courts "have disagreed about the import of *Twombly* "). In *Fame Jeans,* however, we concluded that " *Twombly* leaves the longstanding fundamentals of notice pleading intact." *Id.* at 15. Thus, we "must assume all the allegations of the complaint are true ... and ... must give the plaintiff the benefit of all reasonable inferences derived from the facts alleged." *Id.* at 17 (internal citations and quotations omitted). This liberal pleading standard requires a court to deny a motion to dismiss "even if it strikes a savvy judge that ... recovery is very remote and unlikely." *Twombly,* 127 S.Ct. at 1965. So long as the pleadings suggest a "plausible" scenario to "sho[w] that the pleader is entitled to relief," a court may not dismiss. *Id.* at 1966.

[5] In finding that Tooley lacked standing, the district court delved into an examination of the merits of Tooley's claim and found them wanting. For example, in evaluating Tooley's wiretapping claim, the district court surmised that "Plaintiff has been the subject of entirely lawful wiretaps placed by state or local law enforcement agencies." *Tooley,* 2006 WL 3783142, at *23. Injunctive relief, it reasoned, would be "ineffective if in fact, Plaintiff is the subject of wiretaps placed by someone other than federal officials or if there are actually no wiretaps." *Id.* at *24. Similarly, in evaluating Tooley's physical surveillance claims, the district court questioned whether the person Tooley alleged was sitting in front of his house was a federal officer and whether the officer was there as a consequence of his phone conversation with Southwest. *Id.* at *23-24.

But at this stage of the litigation standing "in no way depends on the merits of the plaintiff's contention that particular conduct is illegal." *Warth v. Seldin,* 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). A plaintiff does not need to "*prove* that the agency action it attacks is unlawful"; otherwise "every unsuccessful plaintiff will have lacked standing in the first place." *Louisiana Energy & Power Auth. v. FERC,* 141 F.3d 364, 368 (D.C.Cir.1998) (internal quotations omitted). Under our system's undemanding pleading rules, the district court was required to accept Tooley's factual allegations as true.

On appeal the government makes little attempt to defend the hypothetical scenarios that led the district court to conclude that Tooley's alleged injuries may not have been caused by the defendants. Instead, the government argues that, even accepting Tooley's factual allegations as true, they are "so insubstantial ... that they fail to 'raise a right to relief above the speculative level.' " Appellees' Br. 30 (quoting *Twombly,* 127 S.Ct. at 1965).

Specifically, the government argues that Tooley's allegations are "no more substantial than the allegations this Court found inadequate to establish standing in *United Presbyterian Church in the U.S.A. v. Reagan,* 738 F.2d 1375 (D.C.Cir.1984)." Appellees' Br. 34. In *United Presbyterian* the plaintiffs challenged an executive order governing foreign intelligence and counterintelligence activities. *United Presbyterian,* 738 F.2d at 1377. We affirmed the dismissal of the claims because the plaintiffs ***840** could not satisfy the injury-in-fact standing requirement. The plaintiffs had asserted that they were "currently subjected to unlawful surveillance" as evidenced by factual allegations that one plaintiff suffered from interrupted mail service and another from disruption of speaking engagements; but we found that "[m]ost, if not all, of the allegations on that score are in any event too generalized and nonspecific to support a complaint." *Id.* at 1380.

While we share many of our dissenting colleague's concerns over the ultimate plausibility of Tooley's claims, his allegations are somewhat less generalized and self-contradictory than those of *United Presbyterian.* Especially when taken in combination, Tooley's claims-to have seen an officer sitting outside his home during a Presidential visit, to have heard supposed "telltale" phone clicks, and to be subject to searches every time he travels-create links to government surveillance that are more specific than the mere loss of mail. Further, although the temporal link between the precipitating event and the alleged surveillance may in Tooley's case appear stretched nearly to the breaking point, in *United Presbyterian* time would have had to run backwards: "[M]any of the appellants allege unlawful activities directed against them *before* this executive order or either of its predecessors existed." *Id.* at 1381 n. 3 (emphasis added). Thus, we think the two cases are distinguishable and that Tooley's standing allegations meet the federal rules' notoriously loose pleading criteria.

As to Tooley's claim that the alleged surveillance "chilled" his speech in violation of the First Amendment, the government points to *Laird v. Tatum,* 408 U.S. 1, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972). There the Supreme Court held that the plaintiffs had not adequately presented a justiciable controversy because their decision to curtail their speech was based on a "subjective 'chill,' " and not a claim of "specific present objective harm or a threat of specific future harm." *Id.* at 13-14, 92 S.Ct. 2318. But in *Laird* the plaintiffs' alleged self-censorship was "caused, not by any specific action of the Army against them, [but] only [by] the existence and operation of the intelligence gathering and distributing system." *Id.* at 3, 92 S.Ct. 2318 (internal quotations omitted). Tooley, in contrast, alleges harm from specific events, arguably linked to government conduct, that he says caused the chilling effect. Whether or not Tooley's alleged harms amount to a First Amendment claim remains an open question, one which was not before the district court.

Finally, we turn to Tooley's claim that he has been wrongfully placed on terrorist watch lists. The Complaint alleges that following Tooley's conversation with Southwest in the spring of 2002, he has been "improperly detained and subjected to a strict search without any probable cause." Compl. ¶ 24. His affidavit provides further details about these detentions and searches, which he claims occurred every time he traveled before filing this suit. Tooley Aff. ¶ 15. Specifically, Tooley alleges that in July 2004, he was subjected to a "degrading and unreasonable search" at Omaha's Eppley Airfield. The district court concluded, and we affirm, that Tooley has established Article III standing on his

watch list claims. *Tooley,* 2006 WL 3783142, at *26.

But the district court's conclusion that it lacked subject matter jurisdiction over the entirety of Tooley's watch list claims was based on a misreading of the complaint. When analyzing Tooley's claim that he was placed on "one or more terrorist watch lists," Compl. ¶ 25, the district court focused only on TSA watch lists. It concluded that TSA watch lists are incorporated into security directives issued by TSA pursuant ***841** to 49 U.S.C. § 114(*l*) (2)(A) and that therefore the federal courts of appeals have exclusive jurisdiction over such watch lists pursuant to 49 U.S.C. §§ 46110(a), (c).[FN1]

> FN1. The district court mistakenly cited to *48* U.S.C. § 46110, see *Tooley,* 2006 WL 3783142, at *26, though clearly referring to 49 U.S.C. § 46110.

We may assume for our purposes that the district court was correct insofar as TSA watch lists are concerned. But Tooley's complaint did not focus solely on watch lists maintained by the TSA. Though he mentions TSA watch lists numerous times in his pleadings, he also alleges that he has been placed on numerous watch lists and sought an injunction requiring "Defendants to remove his name from *any and all* watch lists that may indicate Plaintiff is associated with any terrorist activities or organizations." Compl. 15 (emphasis added). As Tooley's complaint should be liberally construed and the possibility exists that several government agencies apart from the TSA maintain watch lists, see Peter M. Shane, *The Bureaucratic Due Process of Government Watch Lists,* 75 Geo. Wash L.Rev. 804, 811 (2007) (discussing at least 12 terrorist or criminal watch lists maintained by the federal government), the district court erred in treating Tooley's claim as if it had been confined to TSA watch lists.

* * *

We must therefore reverse. In regard to further proceedings, we note that once a plaintiff has overcome a standing challenge under our famously liberal pleading rules he is not automatically entitled to unlimited discovery. Federal Rule of Civil Procedure 26(b)(2) dictates that "the court must limit the frequency or extent of discovery ... if it determines that ... the burden or expense of the proposed discovery outweighs its likely benefit considering ... the importance of the issues at stake in the action." Additionally, Federal Rule of Civil Procedure 56(f) states that where the party opposing a motion for summary judgment claims inability to "present facts essential to justify its opposition," "the court may" order a continuance to permit discovery to occur, a highly discretionary power. See *Donofrio v. Camp,* 470 F.2d 428, 431-32 (D.C.Cir.1972) ("The rules governing discovery, including Fed.R.Civ.P. 56(f), are to be construed liberally to prevent injustice, but they do not require a trial judge to countenance repeated abuses of the discovery process or to let discovery go on indefinitely in a groundless suit."). Moreover, discovery relating to national security may present exceptional problems, as in some contexts a pattern of government answers (denying specific conduct in some cases, refusing to answer on national security grounds in others) would constitute a de facto disclosure of information not formally disclosed. Cf. *Bassiouni v. C.I.A,* 392 F.3d 244, 246 (7th Cir.2004) ("When a pattern of responses itself reveals classified information, the only way to keep secrets is to maintain silence uniformly."). And finally we observe that "[i]n most cases," an assertion by the government that disclosure of "communications collections and analysis capabilities" would jeopardize the "intelligence collection mission" may be sufficient to foreclose discovery and sustain a claim of privilege. *Halkin v. Helms,* 598 F.2d 1, 9 (D.C.Cir.1978) (internal quotations omitted) (upholding, after an in camera examination, an assertion of the state secrets privilege with respect to the mere fact of interception of plaintiff's foreign communications).

For the reasons stated above the judgment of the district court on Counts I, II, and III is reversed and the case is

Remanded.

***842** SENTELLE, Chief Judge, dissenting:
While the majority's opinion correctly describes the case before us and correctly identifies the controlling authorities, in my view the controlling authorities lead in the opposite direction than that taken by the majority. In other words, I would reach the same conclusion as the district court and therefore must respectfully dissent.

As the majority correctly notes, the Supreme Court's most recent pronouncement relevant to the sufficiency of a complaint to meet the notice standard of pleading required by Rule 8 of the Federal Rules of Civil Procedure is *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). In *Twombly,* the Court addressed the sufficiency of the complaint alleging liability under § 1 of the Sherman Act, 15 U.S.C. § 1, which "requires a 'contract, combination ..., in restraint of trade or commerce.' " *Twombly,* 550 U.S. at 544, 127 S.Ct. at 1961. In that case, the Supreme Court considered specifically "whether a § 1 complaint can survive a motion to dismiss when it alleges that major telecommunications providers engaged in certain parallel conduct unfavorable to competition, absent some factual context suggesting agreement, as distinct from identical, independent action." *Id.* The Court "h[e]ld that such a complaint should be dismissed." *Id.*

The immediate question concerning the application of *Twombly* to the case before us is one posed by the *Twombly* dissent:

> Whether the Court's actions [in *Twombly*] will benefit only defendants in antitrust treble-damages cases, or whether its test for the sufficiency of a complaint will inure to the benefit of all civil defendants, is a question that the future will answer.

Id. at 1988 (Stevens, J., dissenting).

As the majority seems to agree, nothing in the reasoning of the Court in *Twombly* suggests that its applicability is limited to antitrust litigation. Justice Souter for the Court engages in an analysis of Civil Rules jurisprudence that seems to apply to all litigation under the Rules, without limitation to the specific sort of litigation then before the Court. The gist of the Court's view is illuminated in a footnote to the majority's opinion responsive to the dissent.

> The dissent greatly oversimplifies matters by suggesting that the Federal Rules somehow dispensed with the pleading of facts altogether. While, for most types of cases, the Federal Rules eliminated the cumbersome requirement that a claimant "set out *in detail* the facts upon which he bases his claim,"Rule 8(a)(2) still requires a "showing," rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only "fair notice" of the nature of the claim, but also "grounds" on which the claim rests. [The Rule] "contemplate[s] the statement of circumstances, occurrences, and events in support of the claim presented" and does not authorize a pleader's "bare averment that he wants relief and is entitled to it."

Id. at 1965 n. 3 (citations omitted) (quoting *Conley v. Gibson,* 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) (emphasis added by *Twombly*), and 5 WRIGHT & MILLER § 1202, at 94). This analysis is not limited by the Court to one type of litigation subject to the Rules, but would appear to apply to all such litigation.

Rule 8(a) expressly establishes the following general rules of pleading:

> Claim for Relief. A pleading that states a claim for relief must contain:
>
> (1) a short and plain statement of the grounds for

the court's jurisdiction, unless the court already has jurisdiction ***843** and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

The *Twombly* Court goes on to note "[t]he need at the pleading stage for allegations plausibly suggesting" the elements of the underlying theory of relief. 127 S.Ct. at 1966. This plausibility standard applied by the Court "reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.' " *Id.* The applicability of this plausibility standard to litigation outside the Sherman Act context is established by the *Twombly* Court's further analysis in its reference to the "practical significance of the Rule 8 entitlement requirement." *Id.* The Court relies upon *Dura Pharmaceuticals, Inc. v. Broudo,* 544 U.S. 336, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005), wherein it had explained "that something beyond the mere possibility of loss causation must be alleged, lest a plaintiff with 'a largely groundless claim' be allowed to 'take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.' " *Twombly,* 127 S.Ct. at 1966 (quoting *Dura Pharmaceuticals,* 544 U.S. at 347, 125 S.Ct. 1627) (other citations omitted). That said, the Court concluded that " 'a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.' " *Twombly,* 127 S.Ct. at 1967 (quoting *Associated Gen. Contractors of Cal., Inc. v. Carpenters,* 459 U.S. 519, 528 n. 17, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983)). That same concern, in my view, animates the need for the ability of the district court to reject an implausible claim against the United States in, for example, the constitutional rights and national security area such as the case before us. Therefore, *Twombly* commands, I think sensibly, that the district court should be permitted to dismiss a complaint resting on implausible expressions of information and belief such as the one before us today as not stating a justiciable controversy, or otherwise put, a claim for relief.

I recognize, as the majority correctly notes, that we analyzed *Twombly* in *Aktieselskabet AF 21. November 2001 v. Fame Jeans, Inc.,* 525 F.3d 8 (D.C.Cir.2008). Therein we held that " *Twombly* leaves the long-standing fundamentals of notice pleading intact." *Id.* at 15. I must agree that *Twombly* does not set some new standard of pleading, but I do believe that it reiterates a longstanding plausibility doctrine. Even before *Twombly,* courts could dismiss cases for lack of jurisdiction if the cases are "patently insubstantial." *Neitzke v. Williams,* 490 U.S. 319, 327 n. 6, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989); *see also Hagans v. Lavine,* 415 U.S. 528, 536, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974). Likewise, the court could enter such dismissal when the case is "obviously frivolous," *Hannis Distilling Co. v. Baltimore,* 216 U.S. 285, 288, 30 S.Ct. 326, 54 L.Ed. 482 (1910). I further recognize that complaints can be based on "information and belief." I do not, however, think that in light of *Twombly* and the other cited authorities that "information and belief" can be a fanciful, paranoid, or irrational belief based on nothing more than the plaintiff's internal belief structure and still be sufficient to subject a defendant, or in this case the taxpayers, to the costs and burdens of litigation. Tooley's allegations are of this sort.

Tooley would have us hold that he has adequately alleged unlawful wiretapping of an entire extended family, including at least nine separate phone lines based on ***844** no apparent source of belief other than "problematic phone connections, including telltale intermittent clicking noises." I note in passing that there is no reason to believe that wiretaps even cause problematic connections or intermittent clicking sounds. Indeed, if this were the case, wiretaps would hardly have proved to be the useful tool they have in both criminal law enforce-

ment investigations under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, §§ 2510-2520, Pub.L. No. 90-351, or national security under the Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-1862. However, even if plaintiff were correct in that supposition, he offers no basis for his "belief" that the taps, even if they occurred, were done illegally by the defendants named in the complaint.

The rest of his allegations are based on similar fanciful beliefs. As the majority notes, he interprets the presence of a black Crown Victoria in the vicinity of his home in the time surrounding a presidential visit in the same geographic area to mean that he is under an unlawful surveillance. While I readily concur that black Crown Victorias are often used by law enforcement, I cannot conclude that Tooley's alleging (by affidavit rather than in the complaint) that one such vehicle was in the vicinity of his residence is a plausible allegation that an unlawful surveillance of him by the defendants has occurred.

Plaintiff's allegations concerning airport searches and his conclusion concerning "watch lists" based on such searches add nothing to the sufficiency of this complaint. Stripped of his conclusory adjectives and adverbs, his allegations say that he has been searched or detained at airports. It is unlikely that anyone who flies with any frequency has not. If there is anything unconstitutional about any particular search to which he has been subjected, then he should allege the facts that demonstrate its unconstitutionality. On the face of the complaint, he has not done so. If his allegations concerning airport searches were sufficient, I venture to say that many members of this court could file a similarly sufficient complaint.

In short, I would apply the plausibility doctrine illuminated by the Supreme Court's opinion in *Twombly* and conclude that the district court correctly dismissed the complaint. I would affirm, and therefore I must respectfully dissent.

C.A.D.C.,2009.
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