07-0981-CR

07-1101-CR(con); 07-11259(con)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

YASSIN MUHIDDIN AREF and MOHAMMED MOSHARREF HOSSAIN,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF OF AMICI CURIAE THE AMERICAN CIVIL LIBERTIES UNION and THE NEW YORK CIVIL LIBERTIES UNION

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New York, NY

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INTRODUCTION AND INTEREST OF *AMICI*

This criminal appeal challenges, among other things, a district court's denial of a motion to suppress evidence that may have been derived from warrantless surveillance by the National Security Agency ("NSA"). In August of 2004, the government charged Yassin Aref and Mohammed Hossain with money laundering and providing material support to terrorism. The indictment arose from a sting operation involving a confidential informant's proposal to launder money purportedly used to purchase weapons for use in a fictitious assassination attempt on a Pakistani diplomat at the United Nations. *United States v. Aref*, No. 04-CR-402, 2007 WL 603508 (N.D.N.Y. Feb. 22, 2007).

In response to news reports that government officials singled out this prosecution as one emerging directly from the controversial warrantless NSA surveillance program (hereinafter, "NSA Program"), defendants filed a motion to suppress evidence and dismiss the indictment as fruit of the poisonous tree of illegal surveillance. *See* Motion to Reconsider (Jan. 20, 2006) (A-92). The district court denied that motion in a sealed, *ex parte* opinion based on a sealed, *ex parte* submission by the government. *See* Notice of Submission of *In Camera, Ex Parte* Classified Memorandum (March 10, 2006) (A-111); Order Denying Defendants' Motion for Reconsideration (March 10, 2006) (A-112). Defendants, *amici* and the

public do not know the basis for either the government's opposition to or the district court's denial of the motion.

Defendants have appealed the denial of this suppression motion; thus, the issue of the legality of the NSA Program is before this Court. *Amici* are the American Civil Liberties Union ("ACLU") and its New York state affiliate, the New York Civil Liberties Union ("NYCLU"). As stated in the accompanying Motion for Leave to Participate as *Amici Curiae*, *amici* and their many thousands of members have a strong interest in the issue of the legality of the NSA Program and are deeply concerned that it may be tainting criminal prosecutions such as this one.

FACTUAL BACKGROUND

In the fall of 2001, President George W. Bush secretly authorized the NSA to initiate a program of warrantless electronic surveillance of telephone calls and emails in the United States.[1] Government officials have acknowledged that the NSA Program intercepted communications without warrants or judicial approval,[2]

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[1] *See, e.g.,* James Risen and Eric Lichtblau, *Bush Let U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005.

[2] *See, e.g.,* President's Radio Address, 41 WEEKLY COMP. PRES. DOC. 1880 (Dec. 17, 2005); *Wartime Executive Power and the NSA's Surveillance Authority: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (hereinafter "Senate Judiciary Hearing"); Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Dec. 19, 2005, *available at*
(footnote continued next page)

and without criminal or foreign-intelligence probable cause.[3] Surveillance was initiated by an NSA "shift supervisor"[4] when, in the shift supervisor's judgment, there was a "reasonable basis to conclude that one party to the communication [was] a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda."[5] The Program operated in plain violation of the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. § 1801-1871, and Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"), 18 U.S.C. § 2510-2522.

A national controversy ensued from disclosure of the NSA Program. In response, the government engaged in an aggressive public relations campaign to convince the American public of the NSA Program's legality, necessity, and

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http://www.whitehouse.gov/news/releases/2005/12/print/20051219-1.html (hereinafter "Gonzalez and Hayden Dec. 19 Press Briefing").

[3] *See, e.g.,* Gonzales and Hayden Dec. 19 Press Briefing; Address to the National Press Club by General Michael Hayden, Jan. 23, 2006, *available at* http://www.dni.gov/speeches/20060123_speech.htm (hereinafter "Hayden Jan. 23 Press Briefing"); Senate Judiciary Hearing.

[4] *See* Gonzales and Hayden Dec. 19 Press Briefing (statement of Gen. Hayden).

[5] *Id.* (statement of Attorney General Gonzales).

efficacy.[6] The NSA's possible surveillance of defendants came to light because of that campaign. On January 17, 2006, the *New York Times* reported that FBI agents were critical of the NSA Program because it produced an overwhelming and largely useless set of data for the FBI to analyze.[7] In response to assertions by FBI agents and prosecutors that the NSA Program was "pointless," the article quoted unnamed government sources who countered that information gathered from the Program had led to the investigation and prosecution of, among others, defendants in this case.[8]

Upon reading the reported government acknowledgment that they had been the objects of warrantless NSA surveillance, defendants filed their motion to suppress. *See* Motion to Reconsider (Jan. 20, 2006) (A-92). Defendants believed, and continue to argue before this Court in their direct appeal, that the January 17, 2006, *New York Times* article and other evidence emerging from discovery and at

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[6] *See, e.g.*, Dep't of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan. 19, 2006) (*available at* http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf). Government officials also have publicly testified before Congress about the legality of the NSA surveillance program and the purported need to ignore FISA on multiple occasions.

[7] Lowell Bergman and Eric Lichtblau, *Spy Agency Data after Sept. 11 Led FBI to Dead Ends*, N.Y. TIMES, Jan. 17, 2006.

[8] *Id.*

trial show that unlawful NSA surveillance improperly led to their conviction.

The government submitted a sealed, *ex parte* opposition to the suppression motion. *See* Notice of Submission of *In Camera, Ex Parte* Classified Memorandum (March 10, 2006) (A-111). The district court denied the motion in a four-sentence order indicating that a sealed, *ex parte* opinion and order regarding the motion had been lodged with the Clerk of Court. *See* Order Denying Defendants' Motion for Reconsideration (March 10, 2006) (A-112).

The possibility that the investigation and prosecution of defendants was tainted by illegal NSA surveillance raises concerns that merit this Court's serious consideration. Judicial review of whether defendants were the victims of illegal surveillance here would also serve the broader public interest. The NSA Program has been challenged in nearly 50 different civil suits.[9] In each of these cases, the government has made a concerted effort to shield its actions from judicial scrutiny by moving to dismiss on the basis of the state secrets privilege – claiming the legality of the NSA Program is too sensitive for judicial resolution – and on

[9] With the exception of the ACLU's suit, these have been consolidated as Multi-District Litigation in the Northern District of California. Joint Case Management Statement, *In re National Sec. Agency Telecommunications Records Litigation,* No. 06-1791 (J.P.M.L. Nov. 17, 2006) (hereinafter "Case Management Statement").

standing grounds because plaintiffs cannot prove with certainty they have been wiretapped.[10] In the only case as yet to reach the Court of Appeals, this strategy has been effective. *See ACLU v. NSA*, 2007 WL 1952370 (dismissing on standing grounds). If the lawfulness of NSA Program is not adjudicated in this context, it is possible that it will not be adjudicated at all.

SUMMARY OF ARGUMENT

If the NSA intercepted defendant-appellants' communications in the course of its judicially unsupervised electronic surveillance program, then defendants were victims of illegal and unconstitutional surveillance that may have tainted their prosecution. The NSA Program unquestionably violated FISA and Title III. The President's role as Commander-in-Chief of the military does not imbue him with inherent authority to choose which laws, duly enacted by Congress in a valid exercise of its Constitutional powers, he may disregard and which he must follow. Thus, because the NSA Program involved surveillance that Congress had expressly

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[10] *See* Case Management Statement at 6, 26 (discussing the government's state secrets and standing arguments); *ACLU v. NSA*, --- F.3d --- 2007 WL 1952370 (6th Cir. July 6, 2007) (dismissing on standing grounds). The state secrets and standing questions in two of the cases that are part of the MDL, *Hepting v. AT&T Corp.*, 439 F. Supp.2d 974 (N.D. Cal. 2006) and *Al-Haramain Islamic Foundation v. Bush*, 451 F. Supp.2d 1215 (D. Or. 2006), are currently pending on appeal before the Ninth Circuit.

prohibited in a valid exercise of its power it was unlawful. Furthermore, the NSA Program violated the Fourth Amendment, as no exception to the warrant requirement is applicable and the government's disregard of FISA's procedure for judicial approval – a process that has proved workable for almost thirty years – was manifestly unreasonable. Because the NSA Program was illegal and unconstitutional at the time of the potential intercept of defendants' communications, remand is required to ensure that illegal surveillance did not taint the defendants' indictment and conviction.

ARGUMENT

I. Warrantless NSA Surveillance of Defendants' Communications Was Illegal and Unconstitutional.

A. The NSA Program Violated FISA and Title III.

FISA and Title III provide the "exclusive means" by which the executive branch can lawfully engage in electronic surveillance within this country's borders. 18 U.S.C. § 2511(2)(f).[11] Title III governs electronic surveillance for criminal law

[11] When Congress enacted FISA, it intended that FISA and Title III would regulate *all* electronic surveillance within the nation's borders. Prior to the enactment of FISA, Title III included a provision explaining that it did not reach national security surveillance. 18 U.S.C. § 2511(3) (1977). In FISA, Congress repealed that provision, replacing it with a statement that FISA and Title III were to provide "the *exclusive means* by which electronic surveillance . . . and the interception of domestic wire, oral, and electronic communications may be
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enforcement purposes and FISA governs electronic surveillance for foreign intelligence-gathering purposes. Both statutes require prior judicial approval and a showing of some form of probable cause. 18 U.S.C. § 2518(3); 50 U.S.C. § 1805.[12] At the time defendants' communications were potentially intercepted by the NSA, the NSA was indisputably conducting electronic surveillance in direct violation of FISA and Title III.

Congress enacted Title III in response to the Supreme Court's holding in *Katz v. United States*, 389 U.S. 347 (1967), that individuals have a constitutionally protected privacy interest in the content of their telephone calls. During the 1970's, extensive congressional investigation by the Church and Pike Committees revealed that the executive branch had engaged in widespread warrantless electronic surveillance of people in the United States, claiming that such surveillance was justified to protect the nation's security. This included surveillance of numerous United States citizens – including journalists, activists, and members of Congress –

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conducted." 18 U.S.C. § 2511(2)(f) (emphasis added). In addition, Congress expressly prohibited electronic surveillance "except as authorized by statute." 50 U.S.C. § 1809(a)(1).

[12] Under FISA, court orders may be obtained from the Foreign Intelligence Surveillance Court ("FISC") when the government can demonstrate, among other things, probable cause to believe that "the target of the electronic surveillance is a foreign power or an agent of a foreign power," which is defined to include those
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"who engaged in no criminal activity and who posed no genuine threat to the national security." S. Rep. No. 95-604(I), at 6 (1977), reprinted in 1978 U.S.C.C.A.N. 3904, 3909 (quoting Church Committee Report, Book II, 12). Congress enacted FISA to remedy these rampant warrantless surveillance abuses, and in response to a Supreme Court decision, *United States v. United States District Court*, 407 U.S. 297 (1972) ("*Keith*"), holding that even intelligence-related surveillance requires judicial oversight.

Through FISA, Congress granted the government wide latitude to monitor the communications of people thought to be terrorists or spies, but included important safeguards to protect the privacy rights of U.S. citizens and residents. As the Senate Judiciary Committee explained, the act was meant to "spell out that the executive cannot engage in electronic surveillance within the United States without a prior Judicial warrant." S. Rep. No. 95-604(I), 1978 U.S.C.C.A.N. at 3908. *See also id.* at 3910 (FISA was designed "to curb the practice by which the Executive branch may conduct warrantless electronic surveillance on its own unilateral determination that national security justifies it.").

Notably, Congress intended that FISA would govern even during emergencies and times of war. The act permits 72 hours of warrantless surveillance

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engaged in terrorism. 50 U.S.C. § 1805(a)(3).

during true emergencies, 50 U.S.C. § 1805(f), and 15 days of warrantless surveillance after a congressional declaration of war. 50 U.S.C. § 1811. Congress recognized that, in such times, the President should seek amendments to FISA, not ignore it. *See* H.R. Conf. Rep. No. 95-1720, at 34 (1978), reprinted in 1978 U.S.C.C.A.N. 4048, 4063 (Congress provided 15 day period to "allow time for consideration of any amendment to [FISA] that may be appropriate during a wartime emergency.").

There is no serious question that the NSA Program operated in complete disregard of FISA and Title III's requirements. Government officials have admitted as much. For example, at a December 2005 news conference, Attorney General Alberto Gonzales acknowledged that "the Foreign Intelligence Surveillance Act . . . requires a court order before engaging *in this kind of surveillance* . . . unless otherwise authorized by statute or by Congress." Gonzales and Hayden Dec. 19 Press Briefing (emphasis added). At the same news conference, General Michael Hayden, Principal Deputy Director for National Intelligence, admitted that the Program had been used "in lieu of" the procedures specified under FISA. *Id.* As the only appellate judge to have examined the merits of the legal challenge to the NSA Program noted, "the government has publicly admitted that the TSP has operated outside of the FISA and Title III statutory framework, and that the TSP

engages in 'electronic surveillance.'" *ACLU v. NSA,* 2007 WL 1952370 at *58 (Gilman, J., dissenting).

Senior administration officials have made numerous other statements establishing that the Program operates entirely without judicial supervision or probable cause. In fact, the entire purpose of the Program appears to have been to engage in electronic surveillance that would not have been permitted under FISA. *See, e.g.*, Gonzales and Hayden Dec. 19 Press Briefing (General Hayden describing the Program as "a more . . . 'aggressive' program than would be traditionally available under FISA."); Hayden Jan. 23 Press Briefing (explaining that the Program's "trigger is quicker and a bit softer than it is for a FISA warrant").

Notably, the only two judges to have considered the merits of the legal challenge to the NSA Program have both found it illegal. In *amicus* ACLU's civil challenge, the district court held that the NSA's warrantless interception of communications and emails violated FISA, Title III, as well as the Fourth and First Amendments. *ACLU v. NSA,* 438 F. Supp.2d 754, 775-6, 778, 781 (E.D. Mich. 2006). Although that ruling recently was vacated on standing grounds by two judges of a three-judge panel of the Sixth Circuit, neither of the two judges in the majority ruled on the legality of the NSA Program. *ACLU v. NSA*, 2007 WL 1952370. In fact, the only reference to the merits in either of the majority-judge's

opinions was Judge Batchelder's comment that the appeal presented "a number of serious issues," *id.* at *2, and "a cascade of serious questions," *id.* at *2 n.5. Dissenting Judge Gilman reached the merits and concluded that the NSA Program unquestionably violated FISA and Title III and that the President lacked the inherent authority to violate those statutes. In Judge Gilman's view:

> The closest question in this case, in my opinion, is whether the plaintiffs have the standing to sue. Once past that hurdle, however, the rest gets progressively easier. . . . . [W]hen faced with the clear wording of FISA and Title III that these statutes provide the "exclusive means" for the government to engage in electronic surveillance within the United States for foreign intelligence purposes, the conclusion becomes inescapable that the TSP was unlawful.

Id. at *68.

The government has argued that Congress authorized warrantless surveillance inside the United States when it passed the Authorization for Use of Military Force ("AUMF"), Public Law 107-40, 115 Stat. 224 (2001), but to accept this argument would require a wholesale rewriting of the AUMF. The AUMF authorizes military action against the Taliban and al Qaeda; it does not mention electronic surveillance and it certainly does not mention warrantless surveillance inside the nation's borders. Moreover, to accept the government's position would require the Court to conclude not only that the AUMF's general language authorized a program of judicially unsupervised electronic surveillance within this

nation's borders but also that the same general language implicitly *repealed* FISA's "exclusive means" provision. Repeals by implication are rarely recognized and can be established only by "overwhelming evidence" that Congress intended the repeal. *J.E.M. Ag. Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 137 (2001). There is no such evidence here. *See* Senate Judiciary Hearing at 186 (Senator Lindsey Graham (R-SC)) ("I will be the first to say when I voted for it, I never envisioned that I was giving to this President or any other President the ability to go around FISA carte blanche."); *id.* (Senator Arlen Specter (R-PA)) ("I do not think that any fair, realistic reading of the September 14 resolution gives [the President] the power to conduct electronic surveillance.").

The government itself has clearly acknowledged that the NSA was operating in violation of FISA (and by extension, Title III), and there is no serious argument that the AUMF constitutes congressional authorization for the NSA to engage in warrantless surveillance in violation of FISA. Thus, to the extent that defendants' communications were intercepted by the NSA, that surveillance plainly violated those laws.

B. The NSA Program Violated the Constitutional Principle of Separation of Powers.

The government has asserted that the President has inherent authority to

authorize the NSA to ignore FISA. This is incorrect. The President does not have authority to disregard a law that Congress has enacted in proper exercise of its own constitutional authority.

Having suffered the reign of King George III, the Framers of the U.S. Constitution believed that "[t]he accumulation of powers, legislative, executive, and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny." *The Federalist No. 47* (James Madison). *See also* Declaration of Independence, para. 14 (U.S. 1776) (citing as evidence of King George's tyrannical power that "[h]e has affected to render the Military independent of and superior to the Civil Power"). The Framers therefore "built in to the tripartite Federal Government . . . a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Clinton v. Jones*, 520 U.S. 681, 699 (1997) (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976)). Because the Framers feared concentration of power in one branch, the Constitution "diffuses power[,] the better to secure liberty." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

One corollary of separation of powers – perhaps the corollary most vital to American democracy – is that the President is not "above the law." *United States v. Nixon*, 418 U.S. 683, 715 (1974). Legislative power is vested in Congress, U.S.

Const., Art. I § 1, and it is the President's role to "take Care that the Laws be faithfully executed." U.S Const., Art. II § 3. Accordingly, where Congress has enacted a law within the scope of its constitutionally provided authority, the President lacks authority to disregard it. If the President could disregard duly enacted statutes, "it would render the execution of the laws dependent on his will and pleasure." *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806). As Justice Kennedy recently cautioned, "[c]oncentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution's three-part system is designed to avoid." *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2800 (2006) (Kennedy, J., concurring).

Congress' authority to legislate with respect to the conduct of domestic criminal investigations, and to enact Title III, is manifest. Congress' authority to legislate with respect to foreign-intelligence gathering on domestic soil in an effort to safeguard the constitutional rights of people in the United States is also clear. The Constitution vests Congress with broad authority in the fields of commerce, foreign intelligence, foreign affairs, and war;[13] with the power "to deal with foreign

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[13] *See* U.S. Const., Art. I, § 8, cl. 1; "declare War," *id.* cl. 11; "grant Letters of Marque and Reprisal," *id.*; "make Rules concerning Captures on Land and Water," *id.*; "raise and support Armies," *id.* cl. 12; "provide and maintain a Navy," *id.* cl. 13; "make Rules for the Government and Regulation of the land and naval

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affairs," *Afroyim v. Rusk*, 387 U.S. 253, 256 (1967); and "to legislate to protect civil and individual liberties," *Shelton v. United States*, 404 F.2d 1292, 1298 n.17 (D.C. Cir. 1968).

That the President possesses authority in some of these fields as well does not mean that he can act in disregard of a duly enacted federal statute. The Supreme Court addressed precisely this issue in *Youngstown*, 343 U.S. 579 (1952), a case that involved President Truman's attempted seizure of the nation's steel mills during the Korean War. The government argued that the seizures were a permissible exercise of the President's authority as Commander in Chief and his "inherent" authority to respond to emergencies. The Supreme Court rejected this argument, finding that the President could not constitutionally disregard a statute that implicitly prohibited the seizures. The Court held that "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad." *Id.* at 587. As the Supreme Court held years earlier, the President's powers are not unbounded, even in times of war. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120-21

Forces," *id.* cl. 14; and "make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested . . . in the Government of the
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(1866) ("The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.").

The Supreme Court recently reaffirmed *Youngstown* and *Milligan* in *Hamdan v. Rumsfeld*, finding that military commissions set up by the President to try prisoners held at Guantanamo Bay did not comply with the Uniform Code of Military Justice, a statute enacted by Congress in exercise of its constitutional war powers. 126 S. Ct. 2749 (2006). Justice Stevens, writing for the Court, wrote that "[w]hether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers." *Id.* at 2774 n.23. Justice Kennedy expanded on the same point in concurrence: "This is not a case . . . where the Executive can assert some unilateral authority to fill a void left by congressional inaction. It is a case where Congress, in the proper exercise of its powers as an independent branch of government, and as part of a long tradition of legislative involvement in matters of military justice, has

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United States," *id.* cl. 18.

considered the subject of military tribunals and set limits on the President's authority." *Id.* at 2799. Justice Kennedy continued: "Respect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment." *Id.*

The application of the *Milligan-Youngstown-Hamdan* framework to the present context is straightforward. The executive branch does not have the authority to disregard FISA any more than it had the authority to disregard the Uniform Code of Military Justice in *Hamdan* or the Labor Management Relations Act in *Youngstown*. Like the statutes that were at issue in those cases, FISA was the result of "a deliberative and reflective process engaging both of the political branches," *id.*, and was fully supported by the President, the Attorney General, and the directors of the FBI, CIA, and NSA. To use Justice Kennedy's phrase, FISA was a law "derived from the customary operation of the Executive and Legislative Branches." *Hamdan*, 126 S. Ct. at 2799.

In public statements, the President has suggested that he inaugurated the NSA Program because FISA was outdated, inefficient, or burdensome. The President's doubts about a law's efficiency or wisdom, however, do not give him

the authority to disregard it. If the President believed FISA was unwise, the President ought to have made his case to Congress to amend the law, as indeed he has done in recent weeks. It was not open to the President simply to ignore the law.[14]

In legal papers and public comments, the administration has turned the separation-of-powers doctrine on its head, arguing that if the NSA Program violates FISA then FISA is an unconstitutional encroachment on the President's constitutional authority to defend the nation against attack. But if the NSA Program conflicts with FISA (as the government has conceded that it does), then it, not FISA, is unconstitutional. That is the clear import of *Youngstown* and *Hamdan.* The President might have constitutional authority to engage in warrantless foreign intelligence surveillance in the context of Congressional silence; some courts reached this conclusion before FISA was enacted. *See infra* note 15 (citing cases). But in FISA, Congress permissibly acted in a field of shared constitutional authority to regulate the exercise of the President's power. The *Milligan-Youngstown-*

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[14] *See, e.g., Hamdan*, 126 S. Ct. at 2774 n.23; *Youngstown*, 343 U.S. at 644 (stating that the President "has no monopoly of 'war powers,' whatever they are"); *id.* at 662 (Clark, J., concurring) (stating that "where Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis"); *id.* at 633 (Douglas, J., concurring); *id.* at 603-04 (Frankfurter, J., concurring).

Hamdan line of cases makes clear that the President cannot simply ignore limitations that Congress has, in proper exercise of its own authority, placed on his authority.

The government's argument is especially troubling because the NSA Program involves activity that takes place not on a far-away battlefield but inside the nation's borders, as the NSA's possible interception of defendants' communications amply demonstrates. The President's war powers, even broadly construed, cannot supply a basis for unchecked intrusion into the communications of American citizens and residents. As the Supreme Court wrote presciently in *Youngstown*, "[e]ven though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief [has the authority to seize property inside the United States]. This is a job for the Nation's lawmakers, not for its military authorities." 343 U.S. at 587 (Jackson, J., concurring).

For these reasons, both judges to have addressed the question have concluded that the President lacked the inherent authority to authorize the NSA to conduct electronic surveillance in violation of FISA. *ACLU v. NSA*, 2007 WL 1952370 at *60 (Gilman, J., dissenting) (concluding that "the President does not have the inherent authority to act in disregard of [FISA and Title III]"); *id.* at *65-67

(analyzing inherent authority claim); *id.* at *68 (calling inherent authority argument "weak in light of existing precedent"); *ACLU v. NSA*, 438 F. Supp.2d at 777-779 (finding the NSA Program violated the separation of powers); *id.* at 780-781 (rejecting inherent authority claim). If the NSA intercepted defendants' communications, the surveillance clearly violated FISA, Title III, and the principle of separation of powers, and the surveillance was illegal.

C. The NSA Program Violated the Fourth Amendment.

The fact that the NSA Program violated validly enacted law should end the inquiry. But even assuming *arguendo* that the President does have sweeping inherent authority to violate Congressional enactments, such authority is nonetheless cabined by the Fourth Amendment, and the NSA Program violated that constitutional provision. The framers drafted the Fourth Amendment in large part to prevent the executive branch from engaging in the kind of general searches used by King George to harass and invade the privacy of the colonists. *See Berger v. New York*, 388 U.S. 41, 58 (1967). It has been settled law for almost forty years that the Fourth Amendment requires the government to obtain a warrant before intercepting the content of a telephone call. *Katz v. United States*, 389 U.S. 347, 352 (1967); *Berger*, 388 U.S. at 51.

Any search conducted without a warrant is presumptively unreasonable.

"Over and again this Court has emphasized that the mandate of the Fourth Amendment requires adherence to judicial processes, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions." *Katz*, 389 U.S. at 357 (citation, internal punctuation, and footnotes omitted). *See also United States v. Karo*, 468 U.S. 705, 717 (1984); *Payton v. New York*, 445 U.S. 573, 586 (1980); *Chimel v. California*, 395 U.S. 752, 762-63 (1969). The warrant requirement is no mere "formalit[y]" – it is a crucial safeguard against abuses by executive officers. *McDonald v. United States*, 335 U.S. 451, 455 (1948). "The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals." *McDonald*, 335 U.S. at 455-56.

No exception to the warrant requirement exists for the purpose of gathering evidence to be used in a criminal terrorism-related prosecution. Indeed, the Supreme Court has never recognized an exception to the warrant requirement even for intelligence-gathering purposes. In *Keith*, the Supreme Court unequivocally declared Fourth Amendment protections applicable to surveillance conducted for security purposes. Indeed, it observed that "[s]ecurity surveillances are especially sensitive because of the inherent vagueness of the domestic security concept, the

necessarily broad and continuing nature of intelligence gathering, and the temptation to utilize such surveillances to oversee political dissent." 407 U.S. at 320.

While *Keith* concerned surveillance relating to domestic security threats, its reasoning applies with equal force to surveillance conducted *in this country* relating to foreign security threats. Plainly, a neutral intermediary between citizens and executive officers is no less necessary because the threat comes from foreign sources rather than domestic ones.[15] Here, of course, defendants were American citizens facing criminal prosecution on domestic soil, and the NSA's possible surveillance of their communications may very well have been for domestic law enforcement purposes – where a warrant is plainly required – instead of, or in addition to, foreign intelligence-gathering purposes.

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[15] In legal papers and other documents, the government has cited a number of cases that recognized a foreign intelligence exception to the warrant requirement. *See, e.g., United States v. Truong Dinh Hung*, 629 F.2d 908, 912-5 (4th Cir. 1980); *United States v. Buck*, 548 F.2d 871, 875 (9th Cir. 1977); *United States v. Butenko*, 494 F.2d 593, 604-05 (3d Cir. 1974) (en banc); *United States v. Brown*, 484 F.2d 418, 426 (5th Cir. 1973). Virtually all of those cases, however, were decided before Congress enacted FISA, and none of them articulates a persuasive basis for distinguishing *Keith*. The only post-FISA case cited by the government in this context is *In re Sealed Case*, in which the Foreign Intelligence Surveillance Act Court of Review suggested the existence of a foreign intelligence exception in dicta, without analysis, and referencing only pre-FISA cases. *In re Sealed Case*, 310 F.3d 717, 742 (For. Int. Surv. Ct. Rev. 2002).

Surveillance under the NSA Program was conducted not only without a warrant, but, as discussed above, without probable cause. The Supreme Court's Fourth Amendment cases clearly indicate that even "a search that may be performed without a warrant must be based, as a general matter, on probable cause." *Skinner v. Ry. Labor Executives' Ass'n,* 489 U.S. 602, 624 (1989). *See also Kirk v. Louisiana*, 536 U.S. 635, 638 (2002) (per curiam) (probable cause required even where exigent circumstances justify warrantless search of home); *Almeida-Sanchez v. United States,* 413 U.S. 266, 269 (1973) (probable cause required for warrantless searches of automobiles). The kinds of searches permitted upon a lesser quantum of suspicion, such as *Terry* stops, involve minimally intrusive searches that are quite different from the highly intrusive interception of private communications.

The "special needs" doctrine does not exempt the NSA Program from the warrant and probable cause requirements. That doctrine balances three factors: "(1) the nature of the privacy interest allegedly compromised by the challenged governmental conduct, (2) the character of the intrusion imposed by the challenged conduct, and (3) the nature and immediacy of the state's concerns and the efficacy of the governmental conduct in meeting them." *Palmieri v. Lynch*, 392 F.3d 73, 81 (2d Cir. 2004) (internal citations omitted). *See also MacWade v. Kelly*, 460 F.3d 260, 269 (2d Cir. 2006) (special needs test balances "the weight and immediacy of

the government interest . . . the nature of the privacy interest allegedly compromised by the search . . . the character of the intrusion imposed by the search, and . . . the efficacy of the search in advancing the government interest") (internal citations omitted). All of these factors weigh against application of the special needs exception to the warrant and probable cause requirements in this case.

With regard to the first two factors, the Supreme Court's decision in *Katz* establishes that individuals have the greatest expectation of privacy in the content of his or her phone calls and emails, and the character of the governmental intrusion by the NSA Program – eavesdropping on and recording the content of private communications – is severe. As to the third factor, weighing the state's concerns, it is notable that the special needs exception has been applied only where "the warrant and probable-cause requirement [are] impracticable." *O'Conner v. Ortega*, 480 U.S. 709, 720, 725 (1987) (plurality opinion). In contrast to, for example, the infeasibility of obtaining warrants to search the bags of the many millions of New York City subway passengers, which was at issue in this Court's recent decision in *MacWade*, almost 30 years of judicial experience supervising foreign intelligence surveillance under FISA makes clear that the warrant and probable cause requirements were workable. The FISC has denied only a handful of applications out of over 20,000 since its inception in 1978, belying argument to the contrary.

See FISA Annual Reports to Congress 1979-2004, *available at* http://www.fas.org/irp/agency/doj/fisa/#rept. Thus, such a broad and intrusive program is not necessary to address the government's concerns, and the special needs doctrine ought not apply.

In sum, because the NSA Program is plainly illegal under FISA and Title III, and unconstitutional according to principles of separation of powers and the Fourth Amendment, any NSA surveillance of the defendants in this case was unlawful.

II. The Unlawfulness of NSA Surveillance in this Case Requires Remand to the District Court.

Defendants have presented some evidence that their communications were intercepted by the NSA Program. If that is in fact the case, defendants were the victims of illegal and unconstitutional surveillance. It may be that information obtained from NSA surveillance was used as evidence in this prosecution; that illegally obtained NSA intercepts served as the basis for the government's FISA warrants or other warrants in this case; or that the trigger for the sting operation that led to defendants' arrest was information obtained from illegal NSA surveillance. All of these possibilities require serious consideration.

Because of the secrecy surrounding the government's submission and the district court's opinion, *amici* are handicapped in their ability to advocate for a

particular course of action. However, under almost any scenario, remand to the district court follows from a conclusion that the NSA Program is illegal.

The first possible scenario is that the district court denied the suppression motion on the grounds that the NSA Program is not illegal. If so, the district court was wrong as a matter of law. This Court should find the NSA Program illegal and unconstitutional and remand to the district court with instructions to apply the Fourth Amendment exclusionary rule and FISA's statutory exclusion provision, 50 U.S.C. § 1806(e) and (g), in a manner appropriately tailored to the role NSA surveillance played in defendants' indictment and/or conviction.

A second possible scenario is that the district court denied the suppression motion based on an *ex parte* representation that no NSA surveillance occurred in this case, contrary to the reported statements of other government officials in the press. In that instance, the issue of the legality of the NSA Program is not before this Court at this time. Defendants argue on appeal that the district court violated due process and the right to a fair trial by denying them discovery regarding whether NSA surveillance occurred in this case and by adjudicating that disputed factual question on an *ex parte* basis. *See, e.g.*, Appellant Aref's Brief at 147; 18 U.S.C. § 3504(a)(1) ("Upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was

obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act"). *Amici* similarly urge the Court to remand for a determination of whether the failure to allow such discovery prejudiced defendants' ability to mount a full and fair defense.

A final possible scenario is that the district court denied the suppression motion on the grounds that, although there was NSA surveillance of defendants, it did not taint the government's case. In this case, the Court should remand to the district court for an adversarial evidentiary hearing on the issue of taint. In cases where this Court has upheld the denial of a suppression motion based on lack of taint, it has done so only after a hearing, in which the government bears the burden of demonstrating that the exclusionary rule should not apply. *See, e.g., United States v. Cole*, 463 F.2d 163, 171-174 (2d Cir. 1972) (rejecting the argument that unlawful surveillance triggered the investigation that led to the defendants' indictment only after conducting a "[c]areful review of the record" from the evidentiary hearing below and finding that the government met its burden of showing, "by a preponderance of the evidence that it would have launched the . . . investigation which developed the evidence leading to . . . conviction even if no information had been received from illegal electronic surveillance . . . ."); *United States v. Schipani*, 414 F.2d 1262, 1264 (2d Cir. 1969) (upholding finding that

electronic surveillance only tainted some of the evidence leading to indictment, after a "full evidentiary hearing [that] continued for five days.").

This hearing must be an adversarial one – not *ex parte*. In *Alderman v. United States*, 394 U.S. 165, 182 (1969), the Supreme Court held that a defendant is entitled to disclosure, without prior *in camera* review, of all records of illegal surveillance, for the purpose of determining whether taint exists. The Supreme Court acknowledged that the disclosure of surveillance records might "compel the Government to dismiss some prosecutions in deference to national security or third-party interests," but concluded that the requirement was nevertheless necessary to guard "against the possibility that the trial judge, through lack of time or unfamiliarity with the information contained in and suggested by the materials, will be unable to provide the scrutiny which the Fourth Amendment exclusionary rule demands." *Id.* at 184; *see also Kolod v. United States*, 390 U.S. 136, 137-38 (1968) (courts may not accept government's unilateral assertion that illegal electronic surveillance did not taint prosecution; adversarial hearing required); *United States v. Apple*, 915 F.2d 899, 910 (4th Cir. 1990) (remanding to district court where lower court found no taint from illegal electronic surveillance without providing for an adversarial hearing).

Under any of these scenarios, the fact that illegal NSA surveillance may be

involved in this case makes it imperative that the Court consider these issues carefully. Here, and elsewhere, the government has attempted to insulate the NSA's controversial and illegal program from judicial review. *See supra* note 9. Issues of illegal domestic surveillance and abuse of executive power should not be shielded from judicial scrutiny and the Court should ensure that they are properly addressed here.

CONCLUSION

The NSA's warrantless surveillance program is illegal and unconstitutional. There is a possibility that the communications of the defendants in this case were intercepted under that unlawful program. The district court either did not give the issue of illegal NSA surveillance serious consideration, or if it did, it did so *ex parte* and in secret, shielding the government's arguments and the court's conclusions from both the adversarial process and public scrutiny. If the former, this Court should remand to the district court for full and fair consideration of defendants' allegations that NSA surveillance tainted their prosecution. If the latter, this Court should carefully review the sealed, *ex parte* record and the district court's determination regarding defendants' suppression motion, find that any NSA surveillance in this case was illegal and unconstitutional, and remand to the district court with instructions to apply the Fourth Amendment's exclusionary rule in a

manner appropriately tailored to the role NSA surveillance played in this case.

Respectfully submitted,

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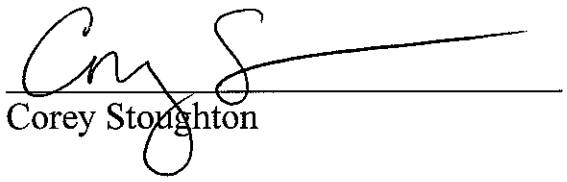
CERTIFICATE OF COMPLIANCE

I hereby certify that this brief, according to the word-processing program with which it was prepared, complies with Rules 29(d) and 32(a)(7) of the Federal Rules of Appellate Procedure in that it contains a total of 6,961 words.



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CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2007, I caused to be served two copies of the attached Amicus Brief of the ACLU and NYCLU by United States First Class Mail on the following counsel of record:

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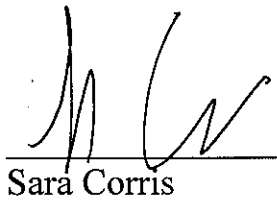

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