Nos. 06-2095, 06-2140

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMERICAN CIVIL LIBERTIES UNION, et al.,
Plaintiffs—Appellees/Cross-Appellants,

v.

NATIONAL SECURITY AGENCY, et al.,
Defendants—Appellants/Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF FOR *AMICI CURIAE* CENTER FOR NATIONAL SECURITY STUDIES AND THE CONSTITUTION PROJECT

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The Constitution Project is a bipartisan nonprofit organization that seeks to build consensus on and develop solutions to contemporary legal and constitutional issues through a combination of scholarship and public education. After September 11, 2001, the Project created its Liberty and Security Initiative, a bipartisan, blue-ribbon committee of prominent Americans, to address the importance of preserving civil liberties even as we work to enhance our Nation's security. The Initiative develops policy recommendations on such issues as the use of military commissions and governmental surveillance policies, which emphasize the need for all three branches of government to play a role in safeguarding constitutional rights. In December 2005, the Initiative released a statement criticizing the recently disclosed domestic surveillance program of the National Security Agency ("NSA"). In addition, the Project's Courts Initiative conducts public education on the importance of an independent judiciary and cautions against legislation or executive branch practices that would limit the substantive jurisdiction of courts. The Project's bipartisan blue-ribbon War Powers Initiative also released a report in June 2005 entitled "Deciding to Use Force Abroad: War Powers in a System of Checks and Balances," which makes recommendations regarding the respective war powers of all three branches of government.

The Center for National Security Studies is a nonpartisan civil liberties organization that was founded in 1974 to ensure that civil liberties are not eroded in the name of national security. The Center seeks solutions to national security problems that protect both the civil liberties of individuals and the legitimate national security interests of the government. For more than thirty years, the Center has worked to protect the Fourth Amendment rights of individuals to be free of unreasonable searches and seizures, especially when conducted in the name of national security. Over the years, the Center has filed briefs and lawsuits concerning the lawfulness of surveillance.

Amici have a direct interest in the substantive issues this case presents. *Amici* will not address the threshold questions of whether the plaintiffs in this case have standing or whether the "state secrets" privilege applies, except to state that *amici* believe this Court has both the authority and ability to address the substantive constitutional challenges plaintiffs present to the NSA's warrantless surveillance activities. The parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a challenge to the recently revealed program of the NSA, first authorized by the President in the fall of 2001, to conduct systematic warrantless electronic surveillance of persons in the United States, in direct violation of the Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-1871 ("FISA"). Through FISA and its criminal law enforcement counterparts, Congress has established the "*exclusive* means by which electronic surveillance . . . may be conducted" in the United States. 18 U.S.C. § 2511(2)(f) (emphasis added). Congress did so to ensure that civil liberties are protected when the government carries out the vital task of combating terrorists and other foreign enemies. To that end, FISA expressly prohibits the President, except in certain narrowly defined circumstances, from authorizing domestic electronic surveillance for foreign intelligence purposes unless the Attorney General applies for, and the Foreign Intelligence Surveillance Court ("FISC") (which FISA established expressly for this purpose) approves, a warrant application. *See id.*; 50 U.S.C. §§ 1802, 1804, 1811. The Attorney General has made no such application and obtained no such approval for the NSA's surveillance activities. Those activities are thus flatly unlawful.

The NSA's asserted justifications for disregarding FISA lack merit. Congress has never authorized the President to engage in warrantless electronic

surveillance in the United States. The Authorization for the Use of Military Force ("AUMF") enacted by Congress in the wake of the attacks on September 11, 2001, *see* Pub. L. No. 107-40, 115 Stat. 224 (2001), neither explicitly nor implicitly supersedes FISA's warrant requirements. FISA itself conclusively refutes this contention by providing that the statutorily mandated warrant requirements are the "exclusive" means for conducting such electronic surveillance, 18 U.S.C. § 2511(2)(f), and by making clear that even a formal declaration of war would not authorize the President to abrogate the statute, 50 U.S.C. § 1811. Moreover, because the Fourth Amendment requires a warrant for such surveillance and FISA establishes a special court with both the competence and the ability to rule expeditiously, there is no basis for invoking any exception to the warrant requirement here.

By flouting the statutory directives of Congress as well as the Fourth Amendment, the President's actions raise grave separation of powers concerns, for they "serve[ ] only to *condense* power into a single branch of government." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion) (emphasis in original). This effort is particularly dangerous because it comes at the expense of both Congress's and the judiciary's powers to defend the individual liberties of Americans. "[A] state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. Whatever power the United States Constitution envisions

for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for *all three branches* when individual liberties are at stake." *Id.* (emphasis added; internal citations omitted).

The issue is not whether the President has the ability to protect the public from terrorists by secretly surveilling them and their agents—for that is exactly what FISA allows. Indeed, FISA was directed at precisely the individuals allegedly targeted under this program: international terrorists. *See* 50 U.S.C. § 1801(b)(2)(C) (international terrorists are "agents . . . of a foreign power" whose communications are subject to FISA). It provides ample authority for the Executive to act swiftly and secretly to obtain information about those terrorists, even in wartime. *See, e.g.*, 50 U.S.C. § 1811 (limited exemption for declared war). Rather, the issue is whether the President may disregard an Act of Congress that safeguards the civil liberties of Americans on American soil.

Congress plainly has the authority to protect the civil liberties of Americans by requiring that the Executive seek a warrant when engaging in electronic surveillance of persons in the United States. In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Supreme Court established that Congress can, even during time of war, regulate the "inherent power" of the President through duly enacted legislation. *Id.* at 584. That is precisely what FISA does. In authorizing warrantless electronic surveillance in direct violation of FISA, the

President is acting not only with power that is at its "lowest ebb," *see id.* at 637 (Jackson, J., concurring), he is acting in violation of his constitutional duty to enforce the law as enacted by Congress, *see id.* at 633 ("the power to execute the laws starts and ends with the laws Congress has enacted"), as well as the Fourth Amendment's warrant requirement.

Thus, the district court should be affirmed.

ARGUMENT

I. WARRANTLESS ELECTRONIC SURVEILLANCE VIOLATES FISA.

A. FISA Is The "Exclusive" Means By Which The United States Government Can Engage In Electronic Surveillance In The United States For Foreign Intelligence Purposes.

The text of FISA could hardly be more clear. Section 201(b) of FISA amended Title III of the Omnibus Crime and Control and Safe Streets Act, 18 U.S.C. §§ 2510 *et seq.* ("Title III"), which generally prohibits electronic surveillance in the United States except pursuant to a warrant issued on probable cause to suspect criminal activity. *See* 18 U.S.C. §§ 2511(1), 2516. FISA amended Title III to explicitly except acquisition of international communications utilizing a means other than electronic surveillance. *See* Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, § 201(b), 92 Stat. 1783 ("FISA") (codified at 18 U.S.C. § 2511(2)(f)). The amendment further provides that, along

with Title III and the Stored Communications Act ("SCA"),[1] the "Foreign Intelligence Surveillance Act of 1978 *shall be the exclusive means by which electronic surveillance*, as defined in section 101 of such Act, and the interception of domestic wire, oral and electronic communications *may be conducted.*" 18 U.S.C. § 2511(2)(f) (emphases added).

The statute thus forbids, in the clearest possible terms, electronic surveillance of persons in the United States, except that the Government may engage in such surveillance for foreign intelligence purposes if a warrant is obtained under FISA. Further underscoring the clarity of this prohibition, FISA repealed 18 U.S.C. § 2511(3), which previously had provided that "nothing . . . shall limit the constitutional power of the President . . . to obtain foreign intelligence information." Act of June 19, 1968, Pub. L. No. 90-351, § 2511, 82 Stat. 197, 214; s*ee also* FISA, Pub. L. No. 95-511, § 201(c). The Supreme Court previously read § 2511(3) to "provide[ ] that the Act shall not be interpreted to limit or disturb such power as the President may have under the Constitution [to engage in electronic surveillance]." *United States v. United States District Court*, 407 U.S. 297, 303 (1972) ("*Keith*").

[1] The SCA, codified in Chapter 121 of Title 18 of the U.S. Code, was part of the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848.

FISA's legislative history provides further confirmation that Congress's dual purpose in enacting FISA was (1) to "provide a legislative authorization for . . . electronic surveillance conducted within the United States for foreign intelligence purposes," and (2) to "moot the debate over the existence or non-existence" of "any Presidential power to authorize warrantless surveillances in the United States." H.R. Rep. No. 95-1283, pt. I, at 24 (1978); *see also* S. Rep. No. 95-604, pt. I, at 6-7 (1997), *as reprinted in* 1978 U.S.C.C.A.N. 3904, 3908. Thus, it is hardly surprising that every court to have considered the question has held that "the Foreign Intelligence Surveillance Act is intended to be exclusive in its domain." *United States v. Torres*, 751 F.2d 875, 881 (7th Cir. 1984); *accord United States v. Andonian*, 735 F. Supp. 1469, 1474 (C.D. Cal. 1990), *aff'd*, 29 F.3d 634 (9th Cir. 1994) (unpublished table decision) (emphasis added).

B. FISA Provides Flexible Tools For Obtaining Foreign Intelligence To Prevent And Combat Terrorism, Even In Wartime.

NSA asserts that the exigencies of combating terrorism and a state of war justify its disregard of FISA. That argument fails. FISA contemplates precisely such scenarios and provides the Executive with flexible tools to fight terrorism and conduct wartime actions effectively.

FISA expressly provides for "emergency situation[s]" where intelligence officials would not have time to seek a FISA warrant before engaging in certain electronic surveillance. *See* 50 U.S.C. § 1805(f)(1). It empowers the Attorney

General to authorize such surveillance prior to requesting or obtaining a warrant from the FISC, as long as a request for such warrant was made within 72 hours of any such authorization. *See* 50 U.S.C. § 1805(f)(2). In fact, in response to the Administration's request after the September 11, 2001 attacks, Congress increased the time allotted the Attorney General for submitting a warrant application from 24 to 72 hours in order to provide greater flexibility in combating terrorists. *See* Intelligence Authorization Act of 2002, Pub. L. No. 107-108, § 314(a)(2)(B), 115 Stat. 1402 (2001). Similarly, FISA provides that the Attorney General may authorize warrantless electronic surveillance for up to 15 days following a declaration of war. *See* 50 U.S.C. § 1811. This provision "allow[s] time for consideration of any amendment to this act that may be appropriate during a wartime emergency." H.R. Conf. Rep. No. 95-1720, at 34 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 4048, 4063.

Although the AUMF likely did not trigger this provision because it was not a formal declaration of war, the Administration still had the opportunity to seek any necessary amendments to FISA. Indeed, not long after the President first authorized the NSA's surveillance, the Administration sought amendments to FISA in the USA PATRIOT Act, and Congress responded by substantially revising the statute in the wake of the September 11, 2001 attacks, *see* USA PATRIOT Act of 2001, Pub. L. No. 107-56, §§ 206-208, 214-218, 115 Stat. 272; and did so again

in the Intelligence Authorization Act. The President could have made additional requests to Congress for amendments to FISA at any time in the last four years. The President simply chose to defy FISA instead.

II. CONGRESS DID NOT AUTHORIZE WARRANTLESS ELECTRONIC SURVEILLANCE BY THE PRESIDENT.

In the face of this exceptionally clear statute, the NSA contends that Congress authorized warrantless surveillance of persons in the United States when it enacted the AUMF. That contention is meritless.

The authorization in the AUMF provides, in full,

> [t]hat the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorists attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future act of international terrorism against the United States by such nations, organizations or persons.

AUMF, Pub. L. No. 107-40, § 2.

This language contains no reference to FISA, much less an express repeal of FISA's warrant requirement. Nor is the AUMF an implied repeal or amendment. "The cardinal rule is that repeals by implication are not favored." *Posadas v. National City Bank of N.Y.*, 296 U.S. 497, 503 (1936). An implied repeal will "only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is *clearly*

intended as a substitute.'" *Branch v. Smith*, 538 U.S. 254, 273 (2003) (emphasis added; citation omitted). Repeals by implication can be established only by "overwhelming evidence" of such an irreconcilable conflict. *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 137 (2001).

FISA and the AUMF are not in conflict, much less irreconcilably so. FISA requires the President to obtain a warrant when engaging in domestic electronic surveillance. The AUMF simply does not address that issue. It cannot reasonably be suggested that Congress *clearly expressed* with its *silence* in the AUMF the intention to repeal FISA. To the contrary, Congress has made perfectly clear its intention that FISA be *amended* in the event a future Congress desired to alter the statute's restrictions. As Justice Frankfurter noted in *Youngstown*, "[i]t is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem . . . to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld." 343 U.S. at 609 (Frankfurter, J., concurring).

The Supreme Court's recent decision in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), powerfully reinforces this point. There, the Court considered the propriety of the military commission convened by President Bush to try Hamdan,

an enemy combatant detained at Guantanamo Bay. *Id.* at 2759. Hamdan contended that the President's actions violated the Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. § 801, which sets forth the governing principles for military courts and conditions the President's authority to use military commissions. *Id.* at 2786. In particular, Article 21 of the UCMJ requires that the President comply with the American common law of war as well as "with the 'rules and precepts of the law of nations,'" including the Geneva Conventions. *Id.* (quoting *Ex Parte Quirin*, 317 U.S. 1, 28 (1947)).

Although the Government argued that the AUMF authorized the President to invoke military commissions as he deems appropriate, the *Hamdan* Court disagreed, holding that "the military commission convened to try Hamdan lacks the power to proceed because its structure and procedures violate both the UCMJ and the Geneva Conventions." *Id.* at 2759. The Court found "nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ." *Id.* at 2775. Whether or not the AUMF activated the President's war powers, it did not implicitly amend or repeal the UCMJ to authorize military commissions that would otherwise violate the UCMJ. *Id.* In the same way, nothing in the AUMF speaks to FISA. Accordingly, the AUMF does not authorize the President to engage in warrantless domestic electronic surveillance contrary to FISA.

Hamdi v. Rumsfeld, 542 U.S. 507 (2004), is not to the contrary. In *Hamdi*, the Supreme Court considered whether the Government could detain as an enemy combatant an American citizen who was captured in a "foreign combat zone" in light of 18 U.S.C. § 4001(a), which provides that "no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." *Hamdi*, 542 U.S. at 542. The Court concluded that the AUMF was one such "Act of Congress" because it authorized the detention of individuals who are "part of or supporting forces hostile to the United States or coalition partners *in Afghanistan* and who engaged in armed conflict against the United States *there*." *Id.* at 516 (emphasis added; quotation marks omitted). But it did so based on the reasoning that "detention of individuals falling into the limited category we are considering . . . is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate' force Congress has authorized the President to use." *Id.* at 518.

The Court was careful, however, to limit its ruling to "the narrow circumstances considered here," *id.* at 519, namely, when an American citizen enemy combatant is detained in a "foreign battlefield," *id.* at 522 n.1, or a "*foreign* combat zone," *id.* at 523 (emphasis in original). *Hamdi* contains no suggestion that Congress had authorized the Executive to engage in comparable activities on domestic soil where domestic law applies. To the contrary, the Court stressed that

"a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." *Id.* at 536.

Thus, there is no basis for concluding that the AUMF authorizes the NSA surveillance program at issue here.

III. THE CONSTITUTION DOES NOT AUTHORIZE THE PRESIDENT TO DISREGARD FISA.

Similarly meritless is the NSA's contention that FISA would be unconstitutional if construed to limit the President's authority to order warrantless surveillance of persons in the United States. In fact, the opposite is true. To the extent the NSA's program conflicts with FISA, it is the program that violates the Constitution.

In the Declaration of Independence, the Founders announced their determination to break from a tyrant king who "ha[d] affected to render the Military independent of and superior to the Civil power." The Declaration of Independence para. 14 (U.S. 1776). Our Constitution was established to end—not enshrine—this kind of executive overreaching. *See Youngtown*, 343 U.S. at 641 (Jackson, J., concurring) ("The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image."). Indeed, by separating "governmental powers into three coordinate[d] Branches," the Framers

designed a framework they considered "essential to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380 (1989). The NSA surveillance program upends the balance among the three branches of government, and thereby threatens bedrock liberties the Constitution and the Bill of Rights are designed to protect.

That the President has unilaterally declared his actions to be in aid of the national defense is no excuse. In *Youngstown*, the Supreme Court explicitly rejected the notion that the President can rely on a national emergency or his position as Commander-in-Chief to ignore reasonable congressional restrictions on his exercise of power in the United States. The question in that case was "whether the President was acting within his constitutional power" when he directed the seizure of most of the Nation's steel mills. 343 U.S. at 582. The President asserted that he had "inherent authority" to do so and that "his action was necessary to avert a national catastrophe which would inevitably result from a stoppage of steel production, and that in meeting this grave emergency the President was acting within the aggregate of his constitutional powers as the Nation's Chief Executive and the Commander in Chief." *Id.* at 582. When the President issued his order, the steel industry was in the midst of a nationwide labor dispute and the country was at war in Korea. *Id.* at 582-83. The President could not "rely on statutory authorization for this seizure" because the requirements for

seizing property under any potentially applicable statute were not met, and because the very "use of the seizure technique to solve labor disputes" had been rejected by Congress. *Id.* at 585-86.

The Court held that the President violated the Constitution by seeking to exercise the Commander-in-Chief power in violation of a valid congressional enactment. As the Court explained, "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Id.* at 587. Justice Jackson, in his now famous concurrence, further clarified the limitations on executive authority announced by the Court. Noting the "relativity" of the President's powers, Justice Jackson outlined the "legal consequences" of three separate exercises of executive authority: (1) "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate"; (2) "When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain"; (3) "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id.* at 635-37 (Jackson, J.,

concurring); *see Dames & Moore v. Regan*, 453 U.S. 654, 668-69 (1981) (endorsing Jackson framework).

Analyzed in these terms, the President's power is at its lowest ebb here. In *Youngstown*, Congress had simply declined to enact an amendment that would have granted the President the power to seize the steel mills in a time of national emergency. 343 U.S. at 586. Here, Congress has *explicitly denied* the President the authority to engage in warrantless electronic surveillance of persons in the United States, even in a time of emergency, except pursuant to FISA's procedures. The Constitution provides, in mandatory language, that the President "*shall* take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3 (emphasis added). Thus, where, as here, the President is acting with power at its "lowest ebb," courts "can sustain exclusive Presidential control . . . only by *disabling the Congress from acting upon the subject.*" *Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring) (emphasis added).

The Supreme Court's recent *Hamdan* decision powerfully reaffirmed these principles in holding that the President had no authority to create military tribunals that violate statutory limitations Congress had imposed in the UCMJ. 126 S. Ct. at 2786. The Court noted 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 [his] own war

powers, placed on his powers." *Id.* at 2774 n.23 (citing *Youngstown*, 343 U.S. at 637). That holding reinforced the limits on presidential power set forth in *Youngstown*. Indeed, the "[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." *Id.* at 2800 (Kennedy, J. concurring).

In the present case, there are two related reasons why the Constitution does not disable the Congress from acting to safeguard the privacy rights and civil liberties of Americans and others in the United States. *First*, Congress has acted in an area squarely within its constitutionally assigned sphere—the protection of persons within the United States. *Second*, Congress has acted to ensure that the judiciary is able to carry out its constitutionally assigned responsibility under the Fourth Amendment.

A. The Constitution Does Not Disable Congress From Acting To Protect The Civil Liberties Of Americans In The United States.

Congress plainly has the authority to safeguard the rights of persons within the United States against arbitrary executive action. To be sure, foreign intelligence surveillance involves both domestic and international aspects, and applies in both peacetime and wartime. But the mere fact that a law with a domestic focus also relates to international relations or the military does not grant the President a right unilaterally to abrogate the law. In order for Congress to be "disabled" from acting, the asserted authority of the President must be *exclusive*.

Even in the areas of foreign affairs and the military, executive power is not absolute. Indeed, Congress's authority to enact FISA is especially clear because FISA's focus is on the protection of the privacy and civil liberties of Americans in the United States—where legislative power is at its zenith. As the Supreme Court recently held, "[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, *it most assuredly envisions a role for all three branches when individual liberties are at stake*." *Hamdi*, 542 U.S. at 536 (emphasis added). Implementation of the constitutional protection against unreasonable searches and seizures, even in wartime, is likewise well within Congress's authority.

To grant the President the power to act outside of FISA, except in the rarest of circumstances, would be extremely dangerous. It would permit the President and the military to ignore *any* statute enacted to protect individual rights simply by asserting that such action is necessary to pursue al Qaeda, another terrorist group, or another foreign enemy. The authority is potentially infinite because there is no foreseeable end to the present campaign against terrorism. And it is limitless in scope. Although the Administration has asserted that it has limited the secret NSA program only to communications where one party is abroad, and only where there is a basis to believe there is a link to a particular terrorist group (al Qaeda), its claimed "inherent authority" is not so limited. Because it depends on the

President's unreviewable assertion that a duly-enacted statute impedes efforts to combat international terrorism—even where the statute seeks to protect Americans in this country—the authority would permit him to conduct surveillance of domestic communications based merely on an NSA operative's determination that the communication has some link (however indirect) with terrorism (however the President defines it). Our Constitution does not permit such a disregard for the roles of the other two branches of our government.

B. The Executive Cannot Disregard The Warrant Procedure Established By Congress to Implement Americans' Fourth Amendment Rights.

Contrary to NSA's contention, the doctrine of "constitutional avoidance" counsels in favor of, not against, upholding FISA. That is because the Fourth Amendment independently prohibits the Executive from disregarding the warrant requirement as implemented by statute to protect the right of Americans to be free from intrusive and potentially arbitrary searches and seizures. FISA "embodies a legislative judgment that court orders and other procedural safeguards are necessary to insure that electronic surveillance by the U.S. Government within this country conforms to the fundamental principles of the fourth amendment." S. Rep. No. 95-701, at 13 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 3973, 3982. Congress's creation of the FISC overcomes any perceived lack of judicial competence, swiftness, and secrecy that might have previously deterred some

courts from enforcing the Fourth Amendment's warrant requirement in the area of foreign intelligence surveillance. Because of FISA and the judicial process it creates, there is no cause to recognize an exception to that warrant requirement for the NSA program, and the Fourth Amendment provides yet another basis to uphold Congress's power to protect the privacy rights of Americans and others in this country.

The NSA contends that the "state secrets" privilege prevents this Court from determining whether the NSA surveillance program violates the Fourth Amendment. That is incorrect. The Government has already disclosed sufficient facts about the NSA program for this Court to determine that it violates the Fourth Amendment, even if the state secrets privilege otherwise applies. Specifically, the Government has admitted that the NSA conducts warrantless electronic surveillance of persons within the United States covered by the requirements of FISA. Because (as will be shown) none of the narrow exceptions to the Fourth Amendment's warrant requirement applies here, the publicly available facts are sufficient to establish that the NSA program violates the Fourth Amendment.

"The basic purpose of th[e] [Fourth] Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasion by governmental officials." *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). It thus forbids "unreasonable searches and seizures," and provides that "no Warrants shall issue,

but upon probable cause." U.S. Const. amend IV. The warrant requirement is a separate restriction, in addition to the requirement that all searches must be reasonable. *See Keith*, 407 U.S. at 315. Electronic surveillance is presumptively subject to that warrant requirement. With only a few exceptions, such surveillance "conducted outside the judicial process, without prior approval by judge or magistrate [is] *per se unreasonable*." *Katz v. United States*, 389 U.S. 347, 357 (1967) (emphasis added). Before FISA, the Court had not decided whether there should be an exception to the warrant requirement for foreign intelligence (as opposed to domestic) electronic surveillance. But the Court made clear that such surveillance, while a necessary tool, is not "a welcome development—even when employed with restraint and under judicial supervision" because "[t]here is, understandably, a deep-seated uneasiness and apprehension that this capability will be used to intrude upon cherished privacy of law-abiding citizens." *Keith*, 407 U.S. at 312. Thus, "the broad and unsuspected governmental incursions into conversational privacy which electronic surveillance entails necessitate the application of Fourth Amendment safeguards." *Id.* at 313 (footnote omitted) "Official surveillance, whether its purpose be criminal investigation or ongoing intelligence gathering, risks infringement of constitutionally protected privacy ..." *Id.* at 320.

Through the warrant requirement, "the Constitution requires that the deliberate, impartial judgment of a judicial officer . . . be interposed" between the citizen and the government. *Katz*, 389 U.S. at 357 (internal quotation marks omitted; alteration in original). The Warrant Clause "is not an inconvenience to be somehow weighed against the claims of police efficiency." *Keith*, 407 U.S. at 315. Rather, it is "an important working part of our machinery of government, operating as a matter of course to check the 'well-intentioned but mistakenly over-zealous executive officers.'" *Id.* at 316 (citation omitted). The central protection of the Fourth Amendment is the "'neutral and detached magistrate.'" *Id.* (citation omitted). The Fourth Amendment thus "contemplates a prior *judicial* judgment, not the risk that executive discretion may be reasonably exercised." *Id.* at 317 (emphasis added; footnote omitted).

The Supreme Court has recognized certain limited and specifically enumerated exceptions to the warrant requirement. *Katz*, 389 U.S. at 356-57. In *Keith*, however, the Court expressly rejected "the Government's argument that internal security matters are too subtle and complex for judicial evaluation" or that "prior judicial approval will fracture the secrecy essential to official intelligence gathering." 407 U.S. at 320. Rather, the Court held that the President's constitutional role in ensuring domestic security "must be exercised in a manner compatible with the Fourth Amendment," which "requires an appropriate prior

warrant procedure." *Id.* The Court was concerned that "unreviewed executive discretion may yield too readily to pressures to obtain [intelligence information] and overlook potential invasions of privacy and protected speech." *Id.* at 317. As the Court explained, "[s]ecurity surveillances are especially sensitive because of the inherent vagueness of the domestic security concept, the necessarily broad and continuing nature of the intelligence gathering, and the temptation to utilize such surveillances to oversee political dissent." *Id.* at 320.

To be sure, *Keith* left open whether there might be a basis for an exception to the warrant requirement where electronic surveillance is conducted of foreign powers or their agents for *foreign* intelligence purposes. Since then, the Supreme Court has not taken up the issue, and the lower courts divided on the question. Courts directly addressing the question recognized such an exception in limited circumstances. *See United States v. Truong*, 629 F.2d 908, 916 (4th Cir. 1980); *United States v. Butenko*, 494 F.2d 593 (3d Cir. 1974) (en banc); *United States v. Brown*, 484 F.2d 418 (5th Cir. 1973). But in *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975) (en banc), a plurality of the D.C. Circuit rejected the notion that electronic surveillance for foreign intelligence purposes can be conducted without a warrant.

The very existence of FISA, and the judicial procedures it establishes, "moot the debate," H.R. Rep. No. 95-1283, pt. I, at 24, by demonstrating conclusively

that there is no basis for an exception to the warrant requirement in these circumstances, and therefore no inherent authority in the Executive to disregard Congress's warrant procedures. Any exception may be justified only by "compelling" reasons, *Mincey v. Arizona*, 437 U.S. 385, 394 (1978), and no such reasons exist after FISA. The pre-FISA cases finding an exception are simply inapplicable in a post-FISA world. Those cases balanced the President's interest in protecting the national security from foreign threats against the impediment of seeking prior judicial approval for electronic surveillance from a district court unfamiliar with and possibly unsuited to foreign intelligence issues. *See, e.g.*, *Truong*, 629 F.2d at 912-916; *Butenko*, 494 F.2d at 605. But because these cases involved surveillance conducted *before* FISA, they did not weigh the requirement that the Executive go to a specialized court with streamlined procedures, and strict secrecy, to seek a warrant before engaging in such electronic surveillance. In fact, Congress eliminated the very concerns the pre-FISA courts cited to justify excusing the President from having to seek prior judicial authorization for foreign intelligence surveillance were addressed and eliminated by Congress when it created the FISC.

Indeed, the need to apply the warrant requirement to the electronic surveillance involved in the NSA program is particularly pronounced, because the targets of secret foreign intelligence surveillance will seldom, if ever, become

aware of the surveillance unless they are subsequently indicted for a criminal offense. Thus, judicial review of the surveillance will rarely occur. In the domestic criminal context, the target must be given notice of the search upon the expiration of an order authorizing electronic surveillance. *See* 18 U.S.C. § 2518(8)(d). As the Supreme Court has noted, these notice procedures "satisfy constitutional requirements." *See United States v. Donovan*, 429 U.S. 413, 429 n.19 (1977) (citing, *inter alia, Katz*, 389 U.S. at 355-56). In contrast, the only privacy protections that targets of secret foreign surveillance are afforded from executive overreaching are FISA's minimization procedures and the judicial guardianship of the FISC. *See* 50 U.S.C. § 1805(a)(4); 50 U.S.C. § 1801(h); *United States v. Belfield*, 692 F.2d 141, 148 (D.C. Cir. 1982) ("In FISA the privacy rights of individuals are ensured not through mandatory disclosure [of surveillance logs], but through its provisions for in-depth oversight of FISA surveillance by all three branches of government and by a statutory scheme that to a large degree centers on an expanded conception of minimization that differs from that which governs law-enforcement surveillance"). The NSA's program eliminates both of these safeguards and, instead, substitutes the discretion of NSA operatives. It is therefore critical that such secret surveillance be subject to a warrant requirement so that a court can assure the existence of probable cause, the reasonableness of these searches, and that minimization safeguards are implemented. Moreover, the

disclosure that under the NSA program surveillance may be initiated without a judicial finding of probable cause further demonstrates that, irrespective of the state secrets privilege, sufficient facts are available to determine that the program violates the Fourth Amendment.

Additionally, the fact that, absent a criminal prosecution, foreign intelligence searches are permanently secret makes them different from the "special needs" cases cited by NSA as support for warrantless searches. In "special needs situations the person who is searched knows that he has been searched and knows the information that may have been disclosed. *See, e.g., Vernonia School District 47J v. Acton*, 515 U.S. 646, 664-65 (1995) (upholding drug-testing for students participating in school athletics program); *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 449-55 (1990) (upholding checkpoint to screen for drunk drivers). The person, therefore, has the ability to challenge the search and vindicate his Fourth Amendment rights. *See United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976) (finding that "[r]outine checkpoint stops" were reasonable because "a claim that a particular exercise of discretion in locating or operating a checkpoint is unreasonable is subject to post-stop judicial review.").

Furthermore, individuals subjected to "special needs" searches may use other methods to remedy negative consequences of the search, such as seeking to expunge or clarify the seized information. Individuals subjected to secret

electronic surveillance have no such opportunity, *see* 5 U.S.C. § 552a(k)(1) (exempting properly classified material from disclosure under the Privacy Act of 1974), even though electronic surveillance reveals significantly more personal information than special needs searches, and that information may be retained in various government files and used to the detriment of the person searched in various ways.

In considering whether there is an *exception* to the presumptive warrant requirement, it is proper for this Court to look to Congress's judgment to determine that current circumstances compel no such exception. *Cf. United States v. Watson*, 423 U.S. 411, 415 (1976). Indeed, the Supreme Court encouraged Congress to impose procedures for obtaining a warrant for electronic surveillance for domestic security threats. *See Keith*, 407 U.S. at 324 (requiring "prior judicial approval . . . of domestic security surveillance . . . as the Congress may prescribe").

Thus, all the factors potentially counseling against requiring the President to seek prior judicial approval for foreign intelligence surveillance by a federal district court are absent when the President can seek such approval from the FISC. By contrast, the concern that the Executive can and will infringe, even inadvertently, on the privacy and free speech rights of Americans is ever constant. The potential for abuse of civil liberties is particularly acute in the realm of foreign intelligence gathering because the perceived stakes are higher, the Executive acts

with the utmost secrecy, and foreign intelligence officers are less accustomed than law enforcement officers to the privacy concerns presented by the Fourth Amendment. The warrant requirement exists precisely so that neutral and detached magistrates will ensure that executive officers in fact possess probable cause for a contemplated search and that the search is appropriately limited. The NSA's secret, warrantless program lacks these critical protections. And because of the secrecy of the program, there is no way for anyone to know if probable cause exists and the search is reasonable.

Not only are the very persons who may be impinging on the privacy rights of Americans unilaterally judging the reasonableness of their own actions, they have, until recently, done so without any public knowledge or scrutiny of their activities. But even assuming for the sake of argument that these intelligence officers are safeguarding personal liberties with the greatest of care, the Constitution still requires prior review of their judgments by a disinterested magistrate. *See Katz*, 389 U.S. at 356 ("It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer."). "[A] governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizens' private . . . conversation[s]." *Keith*, 407

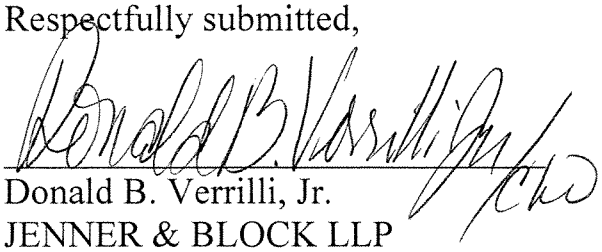
U.S. at 316. When the disinterested judgment of the neutral magistrate is eliminated, all that is left is "unreviewed executive discretion." *Id.* at 317.

The Fourth Amendment thus undergirds and reinforces FISA's requirement that the government obtain a warrant in order to engage in foreign intelligence surveillance of persons in the United States. Any concerns potentially counseling against enforcing the warrant requirement in the foreign intelligence realm have been absent for the better part of thirty years, and the threat to individual liberties by an unchecked Executive is, if anything, magnified in the current environment. Accordingly, there is no basis for determining that the President has inherent authority to disregard the warrant requirement enacted by Congress to safeguard the Fourth Amendment rights of persons in the United States.

CONCLUSION

The district court should be affirmed.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE WITH
FED. R. APP. P. 32(a)(7)(C) AND 6th CIRCUIT RULE 32(a)

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and 6th Circuit Rule 32(a), that the foregoing brief is proportionally spaced, has a typeface of Times New Roman 14 point and contains 6,829 words (which does not exceed the applicable 7,000 word limit).

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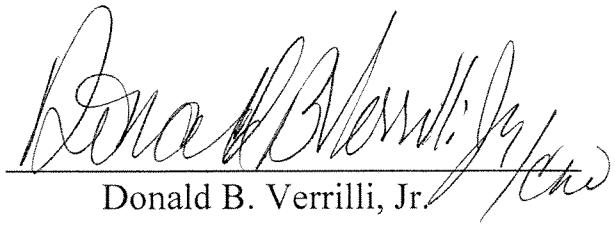

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