IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 06-2095, 06-2140

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 OF CURTIS A. BRADLEY; DAVID COLE; RONALD DWORKIN; RICHARD A. EPSTEIN; HAROLD HONGJU KOH; PHILIP B. HEYMANN; MARTIN S. LEDERMAN; BETH NOLAN; WILLIAM S. SESSIONS; GEOFFREY R. STONE; LAURENCE H. TRIBE; WILLIAM W. VAN ALSTYNE; CAROLYN S. BRATT; REBECCA L. BROWN; MELVYN R. DURCHSLAG; DAVID GOLDBERGER; MADELINE KOCHEN; JOAN MAHONEY; SAMUEL A. MARCOSSON; CHRISTOPHER J. PETERS; CEDRIC MERLIN POWELL; ROBERT A. SEDLER; ENID TRUCIOS-HAYNES; AND JONATHAN WEINBERG AS *AMICI CURIAE* IN SUPPORT OF APPELLEES AND IN SUPPORT OF AFFIRMANCE

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November 17, 2006

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INTERESTS OF *AMICI CURIAE*

Amici are scholars of constitutional law and former government officials with extensive experience analyzing questions of statutory interpretation and separation of powers. While *Amici* have widely varying perspectives on many issues, *Amici* agree that basic statutory and constitutional principles counsel affirmance of the judgment below. A number of *Amici*[1] were among the scholars and former government officials

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[1] **Curtis A. Bradley** (Richard and Marcy Horvitz Professor of Law, Duke University; Former Counselor on International Law, Department of State, Office of the Legal Adviser, 2004); **David Cole** (Professor of Law, Georgetown University Law Center); **Ronald Dworkin** (Frank Henry Sommer Professor, New York University Law School); **Richard A. Epstein** (James Parker Hall Distinguished Service Professor, University of Chicago Law School; Peter and Kirsten Bedford Senior Fellow, Hoover Institution); **Harold Hongju Koh** (Dean and Gerard C. and Bernice Latrobe Smith Professor of International Law, Yale Law School; Former Assistant Secretary of State for Democracy, Human Rights and Labor 1998-2001; Former Attorney Advisor, Office of Legal Counsel, 1983-85); **Philip B. Heymann** (James Barr Ames Professor, Harvard Law School; Former Deputy Attorney General, 1993-94); **Martin S. Lederman** (Visiting Professor, Georgetown University Law Center; Former Attorney Advisor, Office of Legal Counsel, 1994-2002); **Beth Nolan** (Former Counsel to the President, 1999-2001; Deputy Assistant Attorney General, Office of Legal Counsel, 1996-1999; Associate Counsel to the President, 1993-1995; Attorney Advisor, Office of Legal Counsel, 1981-1985); **William S. Sessions** (Former Director, FBI, 1987-1993; Former United States District Judge, Western District of Texas, 1974-1987 (Chief Judge, 1981-1987)); **Geoffrey R. Stone** (Harry Kalven, Jr. Distinguished Service Professor of Law, University of Chicago; Former Dean of the University of Chicago Law School and Provost of the University of Chicago); **Laurence H. Tribe** (Carl M. Loeb University Professor and Professor of Constitutional Law, Harvard

who filed detailed letters to Congress on January 9, February 2, and July 11, 2006, concerning the legality of the NSA's electronic surveillance program.[2] Other *Amici*[3] are legal scholars who teach, write and practice at law schools in this Circuit. *Amici* respectfully submit this brief in their individual capacities; affiliations are listed for identification purposes only.

INTRODUCTION AND SUMMARY

At issue in this case is a program of warrantless electronic surveillance (the so-called Terrorist Surveillance Program or "TSP") that the

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Law School); **William W. Van Alstyne** (Lee Professor, William and Mary Law School; Former Attorney, Department of Justice, 1958).

[2] These letters, responding to Government arguments, are reprinted at http://www.law.stanford.edu/program/centers/conlaw/#constitutional_controversies. Lead counsel for *Amici* was also a signatory to these letters.

[3] **Carolyn S. Bratt** (W.L. Matthews Professor of Law, University of Kentucky College of Law); **Rebecca L. Brown** (Allen Professor of Law, Vanderbilt Law School; Attorney Advisor, Office of Legal Counsel, 1983-1985); **Melvyn R. Durchslag** (Professor of Law, Case Western Reserve University School of Law); **David Goldberger** (Isadore and Ida Topper Professor of Law, Ohio State University College of Law); **Madeline Kochen** (Assistant Professor of Law, University of Michigan Law School); **Joan Mahoney** (Professor of Law, Wayne State University Law School); **Samuel A. Marcosson** (Professor of Law, Louis D. Brandeis School of Law, University of Louisville); **Christopher J. Peters** (Associate Professor of Law, Wayne State University Law School); **Cedric Merlin Powell** (Professor of Law, Louis D. Brandeis School of Law, University of Louisville); **Robert A. Sedler** (Distinguished Professor of Law, Wayne State University); **Enid Trucios-Haynes** (Professor of Law, Louis D. Brandeis School of Law, University of Louisville); **Jonathan Weinberg** (Professor of Law, Wayne State University).

Executive Branch is conducting in violation of express provisions of the Foreign Intelligence Surveillance Act ("FISA"). To the extent that the Government discusses the merits of this issue—as opposed to arguing that it need not be reached for plaintiffs' want of standing or the Government's shield of privilege[4]—it argues that FISA's prohibitions of warrantless domestic spying are either superseded by Congress's Authorization for the Use of Military Force ("AUMF") or prohibited by Article II and the separation of powers as an incursion upon the inherent powers of the President. The Government thus asks this Court to sanction an exercise of Executive prerogative without check by either coordinate Branch.

The decision below rejected the Government's defense of the TSP, holding that the program violates "the APA; the Separation of Powers doctrine; the First and Fourth Amendments of the United States Constitution; and the statutory law." *ACLU v. NSA*, 438 F.Supp. 2d 754, 782 (E.D. Mich. 2006). *Amici* respectfully submit that the decision may be affirmed on narrower, strictly statutory grounds.

Those narrow grounds are straightforward and require no departure from existing practices of statutory construction or settled constitutional norms. The TSP violates the express prohibitions of FISA, and is exactly

[4] *Amici* express no position on the standing or state secret issues presented here.

the sort of program FISA was enacted to corral. *See* Part I. Nothing in the AUMF supersedes FISA with respect to domestic surveillance. *See* Part II. FISA and the AUMF are clear and unambiguous, but if any ambiguity remains, it should be resolved against the Government's construction. Whatever inherent powers the President might have under Article II, they do not include the power to conduct a warrantless domestic surveillance campaign, of indefinite duration and unlimited scope, where a duly enacted statute expressly prohibits such conduct. Thus, no separation of powers concern requires deference to the Government's implausible statutory construction. To the contrary, deference to the Government's position would itself cast doubt on the constitutionality of the statute. *See* Part III. The decision below should be affirmed.

ARGUMENT

I. FISA Was Enacted In Order To Regulate Electronic Surveillance Programs Like the TSP.

FISA provides that the Executive may not engage in electronic surveillance within the United States, or targeted at a U.S. person in the United States, even for foreign intelligence purposes, except in accord with the prescribed requirements of FISA (or other provisions of the federal criminal code not relevant here). Repealing a provision of Title III

of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III") that had allowed for the exemption of national security surveillance from requirements of warrants and probable cause, *see* 18 U.S.C. § 2511(3) (1977), FISA extended to spy operations certain constraints on electronic surveillance like those required in law enforcement. Where FISA applies, it requires *inter alia* that a neutral judge on the Foreign Intelligence Surveillance Court find probable cause to believe that the surveillance target is a foreign power or an agent of a foreign power. *See* 50 U.S.C. § 1805(a)(3).

The Government argues that FISA's general prohibition of warrantless domestic electronic surveillance should not apply to the TSP. This argument not only lacks a plausible textual basis, but also ignores the history that led to FISA's enactment three decades ago. The TSP, as it has been publicly described, is precisely the sort of program against which FISA was historically directed.

A. Historical Background of FISA.

FISA was enacted in 1978 in order to end decades of abuse of executive power through warrantless domestic surveillance. Senate Comm. On the Judiciary, Foreign Intelligence Service Act of 1977, S.Rep 95-

604(I), *reprinted in* 1978 U.S.C.C.A.N. 3904. As a contemporaneous Senate Judiciary Committee report noted, FISA was "a response to the revelations that warrantless electronic surveillance in the name of national security has been seriously abused," and was designed to ensure "that the abuses of the past will remain in the past." *Id.* at 7, 1978 U.S.C.C.A.N. at 3908.

Prior to FISA, the Executive's use of warrantless surveillance in pursuit of national security interests had been commonplace. Operation SHAMROCK, begun by the military during World War II to intercept international telegraph communications, persisted long after the war, with the National Security Agency ("NSA") assuming concealed control. *See The National Security Agency and Fourth Amendment Rights: Hearings Before the Select Comm. to Study Governmental Operations with Respect to Intelligence Activities*, 94th Cong, Vol. 5 (1975). The NSA also superintended project MINARET, conducting surveillance of many thousands of individuals engaged in domestic political activity involving "civil disturbances, anti-war movements, [or] demonstrations" before the project's termination in 1973. *Id.* at 150.

The FBI ran its own unsupervised surveillance program, COINTELPRO, monitoring domestic political and advocacy organizations

for many decades. *See Socialist Workers Party v. Attorney General*, 642 F.Supp. 1357 (S.D.N.Y. 1986). As with operations SHAMROCK and MINARET, the scope of surveillance expanded as the program progressed, from socialist groups in the 1940's, *see id.* at 1389, to the civil rights movement, black nationalist groups, and Students for a Democratic Society by the 1960's, *see id.* at 1383-85, 1393.

The CIA likewise pursued domestic counterintelligence initiatives. Operation CHAOS grew from pressure applied by the Johnson and Nixon Administrations during the war in Vietnam to find a link between the anti-war movement and overseas actors. *See* GEOFFREY STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 483-87 (2004). Under the program, the CIA placed more than 300,000 American citizens under surveillance, with an average of 1,000 individual reports per month flowing to the FBI and some information to the President. *See id.*; THE ROCKEFELLER COMM'N, REPORT TO THE PRESIDENT BY THE COMM'N ON CIA ACTIVITIES WITHIN THE UNITED STATES (1975).

The military also conducted its own warrantless domestic surveillance prior to FISA. Operation CONUS maintained files on more than 100,000 political activists and exchanged data among some 350 military posts. *See Laird v. Tatum*, 408 U.S. 1, 6-8 (1972); STONE, *supra*, at 487. The list of

targets included senators, congressional leaders, civil rights leaders, and civil liberties organizations. Drawing upon law enforcement databases and reports by army intelligence agents who attended associational meetings, the files discussed targets' political views, sex lives and financial conditions.

In 1972, the United States Supreme Court reviewed some of these exercises of claimed Executive power, holding that warrantless wiretapping by the Executive of domestic groups under the auspices of national security violated the Fourth Amendment. *United States v. United States District Court (Keith)*, 407 U.S. 297 (1972). As Justice Powell wrote for the Court, "Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch." *Id.* at 316-17.

After a series of prominent hearings conducted from 1973 to 1976, a Senate select committee chaired by Senator Frank Church concluded that, "[s]ince the 1930's, intelligence agencies have frequently wiretapped and bugged American citizens without the benefit of judicial warrant in the absence of any genuine threat to national security," and that "vast amounts of information—unrelated to any legitimate government interest—about the personal and political lives of American citizens" might be used "for partisan political and other improper ends by senior administration

officials." Senate Comm. On the Judiciary, Foreign Intelligence Service Act of 1977, S. REP. NO. 95-604, at 270, *reprinted at* 1978 U.S.C.C.A.N. 3904, 3909.

B. Enactment of FISA.

In response to these mounting public criticisms of executive abuses of domestic surveillance, FISA was enacted in 1978 with broad bipartisan support. Precisely in order to limit electronic surveillance undertaken under the President's Article II authority, FISA specifically provided that it (and specified criminal code provisions) supply "the *exclusive* means by which electronic surveillance . . . may be conducted," 18 U.S.C. § 2511(2)(f) (emphasis added), prohibiting domestic electronic surveillance "except as authorized by statute," 50 U.S.C. § 1809(a)(1).

FISA expressly contemplates operation of its restrictions upon the Executive even in times of war. Upon declaration of war by Congress, it authorizes electronic surveillance without court order for 15 days, *see* 50 U.S.C. § 1811, a period calculated to permit "consideration of any amendment to this Act that may be appropriate during a wartime emergency." H.R. Conf. Rep. 95-1720, 34, *reprinted at* 1978 U.S.C.C.A.N. 40488, 4063. Congress has never suspended the application of FISA in times of war or other armed conflict, nor altered this 15-day limit on

emergency wiretaps without court order, even though it has amended FISA to increase the Executive's authority in other ways, for example by permitting "roving" wiretaps and expanded use of pen register devices. *See* USA PATRIOT Act of 2001, P.L. 107-56 § 206, 214, *as amended by* Pub. L. 109-177 § 102, 108, 128 (2006), (codified as amended at 50 U.S.C. § 1805 and 18 U.S.C. § 1842). Indeed, the Attorney General acknowledged that explicit congressional authorization for a program like the TSP would "be difficult, if not impossible" to obtain. Press Briefing by Attorney General Alberto Gonzales (December 19, 2005), *available at* www.whitehouse.gov/news/releases/2005/12/20051219 -1.html.

FISA has not unduly constrained the Executive branch. While the Executive submitted an average of just over five hundred new warrant applications to the FISA Court annually between 1978 and 1995, the numbers increased to 1,228 in 2002 and 1,727 in 2003. Between 1979 and 2003, the FISC denied only three of the Executive's 16,450 applications for a warrant. *See* United States Department of Justice, *Foreign Intelligence Service Annual Report to Congress* for the years 1979-2003, *available at* http://fas.org/irp/agency/doj/fisa.

C. The TSP's Violation of FISA.

FISA requires a judicial determination, based upon a showing of probable cause, that a target is an "agent of a foreign power," before a "surveillance device" may be used to intercept, *e.g.*, (i) "any wire or radio communication" that is "sent by or intended to be received by a particular, known United States person who is in the United States," (ii) "any wire communication to or from a person in the United States," and (iii) any other communication as to which "a person has a reasonable expectation of privacy." 50 U.S.C. § 1801(f), § 1805(a).

Under publicly disclosed accounts of the TSP, the program plainly violates these provisions. The Department of Justice has conceded that the TSP involves "warrantless" "electronic surveillance" of "communications into and out of the United States." Letter from Assistant Attorney General William Moschella to Congress (Dec. 22, 2005), *available at* http://www.epic.org/privacy/terrorism/fisa/nsaletter122205.pdf. The Government has never suggested that surveillance under the TSP would satisfy the substantive showing required by FISA, nor made TSP subject to any judicial approval to ensure that FISA's substantive standards are satisfied.

The Government now seeks to retreat from its public concessions, suggesting for the first time that plaintiffs cannot prove, without classified

information shielded by the state secret privilege, "that the TSP implicates 'electronic surveillance' regulated by FISA." Govt. Br. at 42. This newly minted suggestion that the TSP might not have been covered by FISA in the first place cannot be reconciled with the Administration's prior public statements that "FISA could not have provided" the tools required to conduct the TSP and that the AUMF "allows electronic surveillance in the conflict with al Qaeda without complying with FISA." Letter from William Moschella, *supra*, at 4. The Administration's extended efforts to justify the TSP under the AUMF would have been wholly beside the point if the Government could have said all along that, "for reasons we can't publicly disclose, the TSP does not involve any electronic surveillance within the meaning of FISA."

Nor does invalidation of the TSP under FISA depend, as the Government's state secret argument incorrectly suggests, upon further discovery of any specific classified details of precisely how or why the Executive may be intercepting "domestic, wire, oral, and electronic communications." There simply can be *no* such interception outside of FISA. Congress has constituted FISA as the "exclusive means" by which a program like the TSP might lawfully proceed. 18 U.S.C. § 2511(2)(f).

For these reasons, FISA prohibits the TSP, irrespective of any further discovery in this case.

II The AUMF Does Not Implicitly Repeal Or Otherwise Displace FISA.

The Government argues that even if FISA might otherwise prohibit the TSP, Congress's Authorization for the Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001), supersedes FISA's prohibitions. *See* Govt. Br. 42-45. FISA makes warrantless surveillance unlawful "except as authorized by statute," 50 U.S.C. § 1809(a), and the Government argues that the AUMF satisfies this exception.

The Government's argument misreads this exception, for Congress apparently intended the phrase "authorized by statute" to refer to amendments "to FISA itself, rather than having a broader meaning." Congressional Research Service, *Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information*, at 40 (Jan. 5, 2006). But even if the Government's construction were plausible, construing the AUMF to provide the authorization required by §1809(a) would nonetheless violate standard canons of statutory construction and require stretching the AUMF beyond all recognition.

To begin with, FISA specifically and comprehensively addresses the use of domestic wiretaps, providing in 18 U.S.C. § 2511(2)(f) that its

procedures are "the *exclusive* means by which electronic surveillance . . . may be conducted." The AUMF's generic authorization of force does not affect §2511(2)(f), regardless of its impact on §1809(a). The Government's theory depends on the notion that the AUMF has implicitly *repealed* the "exclusive means" provision of §2511(2)(f). But "[r]epeals by implication are not favored," *Ex parte Yerger* 75 U.S. 85, 105 (1868), and may be found only "'when the earlier and later statutes are irreconcilable,'" *J.E.M. Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 141-42 (2001) (quoting *Morton v. Mancari*, 417 U.S. 535, 550 (1974)). The AUMF and FISA are readily reconciled; FISA limits the means by which the Executive may discharge his duties in the process of implementing the AUMF, just as FISA does with respect to any number of other statutes conferring general authorization upon the Executive.

Moreover, FISA expressly anticipates wartime usage, authorizing warrantless electronic surveillance to acquire foreign intelligence, but only "for a period not to exceed fifteen calendar days following a declaration of war by the Congress." 50 U.S.C. § 1811. A specific and "carefully drawn" statute prevails over a general statute when there is a conflict. *Morales v. TWA, Inc.* 504 U.S. 374, 384-85 (1992) (quoting *International Paper Co. v. Ouelette*, 479 U.S. 481, 494 (1987)). The AUMF's generic authorization of

force must yield to this more specific provision, especially as Congress has had multiple opportunities to amend FISA specifically to authorize the Government's program and has pointedly declined to do so.

Reading the AUMF as overriding FISA would render the 15-day provision mere surplusage. Every declaration of war is, as a matter of course, accompanied by authorization to use military force. Thus, were the Government's argument here correct, then FISA's prescription for wartime would have no practical operation; times of war would entail military authorization, which would suspend FISA irrespective of its 15-day window. The Government's statutory construction is foreclosed by the basic canon that courts should "give effect, if possible, to every clause and word of a statute." *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883).

If any doubt remained that the AUMF cannot be stretched to fit the Government's construction, the Supreme Court's decision in *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006), resolved it. *Hamdan* rejected a similar attempt by the Government to use the AUMF as *carte blanche* for evading existing statutory checks. Article 21 of the Uniform Code of Military Justice sets out the conditions under which the President may convene military commissions in place of courts-martial. 10 U.S.C. § 801 *et seq.* (2000). As the Court held, Hamdan was set to be tried in a military commission set up

by an Executive directive that transgressed the specific limitations imposed by Article 21—in particular, that such tribunals must comply with the international laws of war, including treaty obligations imposed by the Geneva Conventions. 126 S. Ct. at 2774, 2786, 2795-97; *see also id.* at 2799, 2802-04 (Kennedy, J., concurring). The Government argued that the Court could find in the AUMF "specific, overriding authorization" for the commission. *Hamdan*, 126 S. Ct. at 2774-75. But the Court concluded otherwise. It declined to read the AUMF as implicitly empowering the President to override the specific, governing statute: "there is 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.

The Government's argument here with respect to FISA fares no better. Here, as in *Hamdan*, "there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth" in FISA. Moreover, FISA's limitations on electronic surveillance are pellucid in comparison to the more ambiguous provisions of the UCMJ that the Court construed in *Hamdan*. If the AUMF could not be construed to authorize Executive conduct contrary to limits

implicit in the UCMJ, then surely it cannot be construed to authorize Executive conduct contrary to limits set forth explicitly in FISA.

Nor can warrantless surveillance inside the United States be properly characterized as the sort of "incident of war" within the compass of the AUMF that might supersede the specific restrictions of FISA. To be sure, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), held that the AUMF authorized the detention of enemy combatants captured on the battlefield in Afghanistan. *Id.* at 516 (plurality opinion). *Hamdi* made clear, however, that detention was authorized only in the "narrow circumstances considered here"—namely, the incapacitation of enemies who could otherwise return to the battlefield. *Id.* at 519. The Court declined to hold that the AUMF authorized detention for other purposes like interrogation. *Id.* at 521. And *Hamdi* did not stop the Court from upholding statutory limits on Executive power over trial of enemy combatants in *Hamdan*—even though, as *Hamdi* itself acknowledged, such trial is "'by universal agreement and practice'" an "'important incident of war,'" *id.* at 518 (quoting *Ex parte Quirin*, 317 U.S. 1, 28 (1942)).

Given that military detention and trial are far more closely incident to war than electronic surveillance, the inapplicability of the AUMF here follows *a fortiori* from *Hamdan*. Domestic surveillance is a far cry from the

capture of enemy combatants on a battlefield. If the AUMF could not be stretched from authorizing detention of enemy combatants to authorizing the procedures for trying them in derogation of existing statutory limits, then surely it cannot be stretched to spying on the electronic communications of persons within the United States who were never on the battlefield at all, in violation of FISA's specific restrictions.

For these reasons, the AUMF cannot plausibly be read to have implicitly repealed or otherwise amended FISA.

III. Canons of Constitutional Avoidance Favor Construing FISA to Prohibit the TSP, Not To Permit It.

For the reasons stated above, *Amici* respectfully submit that this case can and should be decided as a matter of straightforward statutory construction. The statutory scheme barring warrantless wiretapping except for a limited 15-day period on wartime is clear and unambiguous, and the statute specifically instructs that it provides the "exclusive means" of electronic surveillance. Congress has not amended these sections of FISA even while amending other sections since 9/11. There is no need, therefore, for this Court to invoke the canon that an ambiguous statute should be reasonably construed to avoid a serious constitutional question. *See DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988).

The Government nonetheless invokes this canon, suggesting that reading "the AUMF and FISA to foreclose the President's authority to authorize the TSP would present a grave constitutional question" concerning the scope of the President's Article II authority during armed conflicts. Govt. Br. at 45-46.

The Government, however, has it exactly backwards. Contrary to the Government's argument, construing FISA and the AUMF to prohibit unchecked warrantless domestic surveillance raises no serious constitutional questions under Article II or the structural separation of powers, but is entirely consistent with Congress's longstanding role in the Nation's defense under the many war powers (and other powers) conferred by Article I. In contrast, construing the AUMF to *permit* unchecked warrantless domestic surveillance would raise serious questions under the Fourth Amendment. Were the canon of constitutional avoidance implicated here, therefore, it would work against the President, not in his favor.

A. FISA's Limitations Are Wholly Consistent with Article II and the Separation of Powers.

The Government's brief reads as if the Nation's war powers centrally reside in Article II of the Constitution. But the Constitution in fact divides and blends powers between the branches even as to war, and Article I accords Congress explicit and significant roles in regulating the Nation's

military conduct. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (observing that the Constitution "enjoins upon its branches separateness but interdependence" and that the powers of the President "depend[] upon their disjunction or conjunction with those of Congress"). Thus the Government is incorrect to suggest that the President's war powers are not only inherent but also *exclusive.*

Specifically, Article I provides that "[t]he *Congress* shall have power":

- "[T]o. . . provide for the common defense." Sec. 8, Cl. 1.
- "To declare war. . . and make rules concerning captures on land and water." Cl. 11.
- "To raise and support armies. . . " Cl. 12.
- "To provide and maintain a navy." Cl. 13.
- "To make rules for the government and regulation of the land and naval forces." Cl. 14.
- "To. . . suppress insurrections and repel invasions". Cl. 15.
- "To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States." Cl. 16.
- "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Cl. 18

Thus, Congress is expressly empowered to make laws in the military and defense context, binding even upon the President. FISA is one such law.

Contemporaneous historical sources confirm the intent expressed in the Constitution's text to empower the Legislature to regulate the Executive's conduct of war. Alexander Hamilton emphasized that the Constitution would effectuate an important break from Great Britain, separating the Executive's powers to command the armies from the Legislature's ability to regulate them:

> The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the DECLARING of war and to the RAISING and REGULATING of fleets and armies -- all which, by the Constitution under consideration, would appertain to the legislature.

THE FEDERALIST NO. 69 (Hamilton).

The first Continental Congress noted and exercised its power to regulate the conduct of war. The commission granted to George Washington as Commander in Chief required that he conform his means of waging war to civilian, legislative control: "And you are to regulate your conduct in every respect by the rules and disciplines of war (as herewith given to you) and punctually to observe and follow such orders and

directions from time to time as you shall receive from this or a future Congress of the said United Colonies. . . ." 2 J. CONT. CONG. 96 (June 17, 1775).

In turn, Washington showed great deference to Congress. In a letter to Joseph Reed, he made clear that, "if the Congress [says] 'thus far and no farther you shall go,' I will promise not to offend whilst I continue in their service." 4 WRITINGS OF GEORGE WASHINGTON 367 (J. Fitzpatrick ed. 1931). Washington then demonstrated his solicitude for legislative control over the means of war when he sought Congress's approval before burning New York City. When Congress denied permission to leave scorched earth for the advancing British, Washington called the decision a "capital error[]," but dutifully obeyed. Bruce Stein, *The Framers' Intent and the Early Years of the Republic*, 11 HOFSTRA L.REV. 413, 445-47 (1982).

The Constitution subsequently gave the Executive the power of the veto, limiting Congress's control thereafter to statutory constraints. But that did not change the fundamental understanding that the President would be obliged to conform the prosecution of war to duly enacted law. In 1797, President Adams confronted a naval war between France and Britain that threatened to compromise the Nation's interests with one or both. He waited for Congress to suspend commercial relations with France and to establish

the rules by which American ships were to engage others at sea. In the face of Congressional action mandating open trade, Adams admitted that "it remains for Congress to prescribe such regulations as will enable our seafaring citizens to defend themselves against violations of the law of nations . . . ." 7 ANNALS OF CONG. 57 (1797) (Fifth Cong.).

Other contemporaneous commentators likewise recognized that Congress's power to regulate the armed forces was key to the constitutional structure: "In Great Britain, the king, in his capacity of generalissimo of the whole kingdom, has the sole power of regulating fleets and armies. . . The whole power is far more safe in the hands of congress, than of the executive." JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION § 1192 (1833). St. George Tucker, a Virginia law professor and district court judge, noted that "The power of declaring war, with *all its train of consequences, direct and indirect*, forms the next branch of the powers confided to congress." 1 WILLIAM BLACKSTONE, COMMENTARIES *269 (1803) (emphasis added).

An unbroken line of decisions by the Supreme Court confirms this text and history. These precedents confirm that Congress may impose a wide range of statutory restrictions on the President's conduct of war without raising constitutional difficulty, and that the President's role as

Commander in Chief does not negate congressional authority in the military sphere.

Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804), recognized that the President does not have authority to ignore acts of Congress during wartime. There, the Court held that a congressional directive authorizing the capture of ships traveling *to* French ports barred the Executive from capturing ships traveling *from* French ports pursuant to a claim of inherent authority. *See id.* at 177-78 ("[T]he legislature seem to have prescribed that the manner in which this law shall be carried into execution was to exclude a seizure of any vessel not bound to a French port.").

Ex parte Milligan, 71 U.S. (4 Wall) 2 (1866), likewise held presidential war powers subject to congressional check. The Court unanimously held that the Habeas Corpus Act of 1863 barred the Commander in Chief from denying habeas corpus rights to a detainee captured outside the area of active conflict. Congress had authorized President Lincoln's suspension of the Great Writ in 1863, but provided for a modified form of habeas corpus limiting the availability of military tribunals in areas in which civilian courts still functioned. Habeas Corpus Act of March 3, 1863, ch. 81, § 2, 12 Stat. 755. After Milligan was convicted by military tribunal and sentenced to death by hanging, he petitioned the

Supreme Court for a writ of habeas corpus, asserting that the Executive had acted outside the limitations imposed by Congress.

The Executive argued that the statute should be construed broadly, such that "[d]uring the war [the President's] powers [would] be without limit." 71 U.S. (4 Wall.) at 18. But the Court held that Congress had, by statute, given Milligan a right to petition for habeas corpus, contrary to the President's judgment that such a right would undermine the war effort. *See id.* at 133 (Chase, J., concurring) ("The constitutionality of this act has not been questioned and is not doubted," even though the act "limited this authority [of the President to suspend habeas] in important respects.").

The great *Steel Seizure* case, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), striking down President Truman's executive order seizing steel production facilities in order to avert a strike during the Korean Conflict, confirmed that the scope of the President's exclusive authority as Commander in Chief is narrow, and does not extend to regulating private domestic activities that are only indirectly connected to the actual conduct of war:

> The order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such cases need not concern us here. Even though 'theater of

> war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.

Id. at 587. Four of the Justices in the majority stressed that the President's conduct was inconsistent with Congress's prescribed means of addressing such a labor crisis. *Id.* at 639-40 (Jackson, J., concurring), *id.* at 656-60 (Burton, J., concurring); *id.* at 662-64 (Clark, J., concurring in the judgment) ("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 609 (Frankfurter, J., concurring) ("To find authority so explicitly withheld is. . . to disrespect the whole legislative process and the constitutional division of authority between President and Congress.").

Nothing in the terrible events of 9/11 altered the fundamental structural principles laid out in these cases. In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), which reversed on due process grounds the dismissal of a citizen enemy combatant's petition for habeas corpus, the Court cautioned that "we have long since made clear 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 (plurality opinion); *see id.* at 545 (Souter, J. concurring in part and dissenting in part) ("In a government of separated powers, deciding finally

on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security.").

Most recently, *Hamdan v. Rumsfeld* confirmed that the President lacks any power over the trial of enemy combatants that could override Congress's specific enactment of contrary procedures under the Uniform Code of Military Justice:

> Congress had simply preserved what power, under the Constitution and the common law of war, the President already had to convene military commissions—with the express condition that he and those under his command comply with the law of war.

126 S. Ct. at 2754. As the Court noted, even assuming the President has "independent power, absent congressional authorization, to convene military commissions," nevertheless "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 (citing *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)).

Thus the Government's argument that Article II or the separation of powers compels a lenient construction of FISA is misplaced. Even if the Government's construction were more plausible, it is in any event incapable of avoiding constitutional concerns. Any construction that resolved ambiguity by favoring the inherent powers of the President would raise

serious concerns about usurping the legislative powers of the Congress. The predictable upshot of the Government's constitutional avoidance argument would be to skew the balance of power in favor of the Executive *vis a vis* the Legislature.

Finally, the Government's attempt to bootstrap a constitutional defense from its assertion of state secret privilege is unavailing. The Government argues that "[t]he constitutionality of any limits placed on the President's authority to gather foreign intelligence against the enemy in wartime" requires factual knowledge the state secret privilege makes it impossible to obtain. Govt. Br. 47. But no further discovery of classified details is needed to dispense with the Government's constitutional defense. Whatever inherent power the President might have to take a particular discrete action in wartime, such as protecting the homeland by repelling a sudden attack, any such power clearly cannot sustain a systematic and premeditated *program* like TSP that defies an express statutory prohibition.

Thus, the Government's constitutional avoidance argument fails.

B. Construing FISA and the AUMF to Permit the TSP Would Raise Serious Fourth Amendment Questions.

As the preceding section shows, the construction urged by the Appellees is wholly consistent with Article I and raises no serious Article II

or separation of powers concerns. In contrast, construing FISA and the AUMF to allow unlimited warrantless wiretapping of communications to and from persons in the United States would raise serious constitutional questions under the Fourth Amendment. The TSP as publicly described lacks both crucial safeguards required by the Fourth Amendment: individualized probable cause and judicial warrant. The Supreme Court held unconstitutional under the Fourth Amendment similar domestic wiretaps, involving similar assertions of unbridled executive discretion, in *United States v. United States District Court (Keith)*, 407 U.S. at 321 (noting that national security concerns do not alter "customary Fourth Amendment requirement of judicial approval prior to initiation of a search or surveillance").

These concerns over the constitutionality of domestic electronic surveillance were one motivation behind FISA. *See* Part I.A *supra*. In enacting FISA, Congress legislated in the shadow of the Fourth Amendment, furnishing a "secure framework by which the executive branch may conduct legitimate electronic surveillance for foreign intelligence purposes within the context of this nation's commitment to privacy and individual rights." S. Rep. No. 95-604 at 15, *reprinted at* 1978 U.S.C.C.A.N. 3904, 3916.

Whether or not the TSP frontally violates the Fourth Amendment—as Appellees argue, *see* ACLU Br. at 42-52—the canon of constitutional

avoidance clearly counsels against construing FISA and the AUMF so as to test the Fourth Amendment's outer boundary.

For these reasons, the canons of constitutional avoidance, if reached, work against the Government, not in its favor.

CONCLUSION

The Executive's claim to unilateral, inherent and indefeasible authority—unanswerable to Congress and unreviewable by the Courts—would depart markedly from the basic constitutional premise that "[t]he accumulation of all powers. . . in the same hands. . . may justly be pronounced the very definition of tyranny." THE FEDERALIST No. 47 (James Madison). No such constitutional question, however, need be reached to decide this case. The judgment below can and should be affirmed on straightforward statutory grounds. Accordingly, if this Court reaches the merits of the judgment below, that judgment should be affirmed.

Respectfully submitted,

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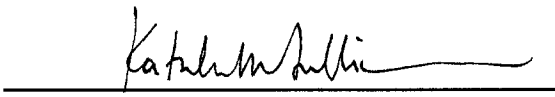
November 17, 2006

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29, Fed. R. App. P. 32(a)(7)(C), and this Court's Rule 32, I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as read in conjunction with Fed. R. App. P. 29. In reliance on the word count of the word-processing system used to prepare this brief, I hereby certify that the portions of this brief subject to the type-volume limitation contain 6,435 words.



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DATED: November 17, 2006

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief has been served this 17th day of November 2006 upon the following via FedEx delivery:

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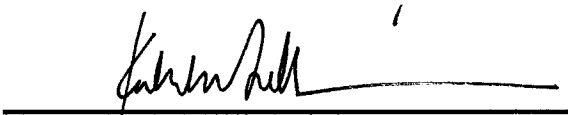

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