**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

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| AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION FOUNDATION; AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN; COUNCIL ON AMERICAN-ISLAMIC RELATIONS; COUNCIL ON AMERICAN-ISLAMIC RELATIONS MICHIGAN; GREENPEACE, INC.; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; JAMES BAMFORD; LARRY DIAMOND; CHRISTOPHER HITCHENS; TARA MCKELVEY; and BARNETT R. RUBIN,<br><br>Plaintiffs,<br><br>v.<br><br>NATIONAL SECURITY AGENCY / CENTRAL SECURITY SERVICE; and LIEUTENANT GENERAL KEITH B. ALEXANDER, in his official capacity as Director of the National Security Agency and Chief of the Central Security Service,<br><br>Defendants. | Case No. 2:06cv10204<br><br>Hon. Anna Diggs Taylor |

**PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

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As discussed fully in plaintiffs' opening brief, plaintiffs are entitled to partial summary judgment as a matter of law on their claims that targeted wiretapping by the NSA (hereinafter "the Program") violates the Administrative Procedures Act because it is expressly prohibited by FISA and Title III; violates the principle of separation of powers; and violates the First and Fourth Amendments to the United States Constitution. Plaintiffs have standing to challenge the Program because it is causing concrete harm to their ability to carry out their professional responsibilities. Administration officials have publicly conceded all of the facts necessary to decide plaintiffs' claims. Despite the government's suggestions to the contrary, there are no additional facts that could transform the Program into one that is legal and constitutional. Under the Constitution, the President has no power to ignore the law, even in times of war or emergency.[1]

## I. PLAINTIFFS HAVE STANDING TO CHALLENGE THE PROGRAM BECAUSE IT IS COMPROMISING THEIR ABILITY TO CARRY OUT THEIR PROFESSIONAL RESPONSIBILITIES.

Plaintiffs have standing because their injury is concrete and particularized, "fairly traceable to the challenged action of the defendant," and "likely" to be redressed by a favorable decision. *Friends of the Earth v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-81 (2000).

### A. Plaintiffs Are Sustaining Concrete Injury As A Result Of The Program.

Plaintiffs plainly satisfy the injury in fact requirement. As described in more detail in plaintiffs' opening brief, the Program has interfered with plaintiffs' ability to carry out their

[1] As the Court noted in its Order of June 2, 2006, the government has not filed a substantive opposition to plaintiffs' motion for partial summary judgment; instead, it has petitioned the Court to stay consideration of plaintiffs' motion until the Court has considered the government's motion to dismiss. *See* Memorandum of Points and Authorities in Support of the United States' Assertion of the Military and State Secrets Privilege; Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment; and Defendants' Motion to Stay Consideration of Plaintiffs' Motion for Summary Judgment (filed May 26, 2006) (hereinafter "Govt. Brief"). Plaintiffs nonetheless file this Reply to address arguments that the government raised in its papers and that plaintiffs expect the government to press in oral argument on June 12.

professional responsibilities in a variety of ways. *See* Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment at 4-6 (filed Mar. 9, 2006) (hereinafter "Pls. Opening Br."). Because of the nature of their work, scholars and journalists such as plaintiffs Tara McKelvey, Larry Diamond, and Barnett Rubin must conduct extensive research in the Middle East, Africa, and Asia, and must communicate with individuals abroad whom the United States government believes to be terrorist suspects or to be associated with terrorist organizations.[2] The Program has caused some of these individuals, who provide information necessary to plaintiffs' work, to stop communicating with plaintiffs out of fear that their communications will be intercepted.[3]

Attorneys Nancy Hollander, William Swor, Joshua Dratel, Mohammed Abdrabboh, and Nabih Ayad must likewise communicate with individuals abroad whom the United States government believes to be terrorist suspects or to be associated with terrorist organizations,[4] and must discuss confidential information over the telephone and email with their international clients.[5] The Program has caused these attorneys to cease engaging in such communications because they can no longer trust that these privileged conversations will not be intercepted.[6] Instead, these attorneys now must travel long distances – at substantial cost – to meet personally with their clients and with other individuals relevant to their cases, or, if they are not able to spend the time and money to make such trips, to incur an equally harmful injury: impairment of

[2] Plaintiffs' Statement of Undisputed Facts (hereinafter "SUF") SUF 15B (Exh. I, Diamond Decl. ¶9; Exh. K, McKelvey Decl. ¶8-10).
[3] SUF 15 (Exh. K, McKelvey Decl. ¶15; Exh. I, Diamond Decl. ¶12); Exh. N, ¶15 (Rubin Decl.).
[4] SUF 15B (Exh. J, Hollander Decl. ¶¶12-14, 17-24; Exh. L, Swor Decl. ¶¶5-7, 10); Exh. M, ¶¶5-6 (Dratel Decl.); Exh. Q, ¶¶3-4 (Abdrabboh Decl.); Exh. R, ¶¶ 5, 7-9 (Ayad Decl.).
[5] SUF 15 (Exh. J, Hollander Decl. ¶¶12, 16, 25; Exh. L, Swor Decl. ¶¶9, 11-12, 14-16); Exh. P, ¶¶5-6 (Dratel Decl.); Exh. Q, ¶¶3-4 (Abdrabboh Decl.); Exh. R ¶¶ 6-7 (Ayad Decl.).
[6] SUF 15 (Exh. J, Hollander Decl. ¶¶12, 16, 25; Exh. L, Swor Decl. ¶¶9, 11-12, 14-16); Exh. P, ¶¶9-11 (Dratel Decl.); Exh. Q, ¶¶7-8 (Abdrabboh Decl.); Exh. R. ¶¶ 4, 6-8 (Ayad. Decl.).

their ability to represent their clients effectively.[7] The Program has also erected an additional obstacle to effective representation: a number of potential witnesses, other sources of information, and colleagues in other countries, all fearing the interception of their communications under the Program, have become reluctant or even unwilling to communicate with plaintiff attorneys by phone or email, thus hampering plaintiffs' ability to speak with individuals necessary to the representation of their clients.[8]

The seriousness of plaintiffs' injuries cannot be overstated. The loss of a journalist's sources, for example, cripples the journalist's ability to report the news. Indeed, the Supreme Court has recognized that, even in the domestic context, reporters "rely a great deal on confidential sources," some of whom "are particularly sensitive to the threat of exposure." *Branzburg v. Hayes*, 408 U.S. 665, 693 (1972).

The Program's obstruction of attorneys' ability to communicate confidentially with their clients also has a severe and concrete effect on these attorneys' ability to fulfill their professional obligations. As University of Michigan legal ethics professor Leonard Niehoff explains, because attorney-client confidentiality fosters trust, prevents indiscreet use of information, and protects attorney work product, it is "central to the functioning of the attorney-client relationship and to effective representation."[9] Recognizing the importance of confidentiality to the attorney-client relationship, the court in another recent national security case, confronted with an Inspector General's report of widespread monitoring of attorney-client visits at the detention facility at which plaintiffs in that case were held, compelled the government to inform the plaintiffs whether it had intercepted attorney-client communications. *See Turkmen v. Ashcroft*, No. 02-

[7] SUF 15 (Exh. J, Hollander Decl. ¶¶20, 23-25; Exh. L, Swor Decl. ¶¶13-14); Exh. P, ¶¶9-11 (Dratel Decl.); Exh. Q, ¶¶7-8 (Abdrabboh Decl.); Exh. R, ¶¶ 6-8 (Ayad Decl.).
[8] Exh. P, ¶10 (Dratel Decl.); Exh. Q, ¶¶7-8 (Abdrabboh Decl.); Exh. R, ¶6 (Ayad Decl.).
[9] Exh. M, ¶12 (Niehoff Decl.).

CV-2307 (E.D.N.Y. May 30, 2006). The court found that plaintiffs' counsel were entitled "to attain some degree of comfort that they and their clients may communicate without the chilling specter of government eavesdropping. The significance of the attorney-client privilege and its goal of frank and candid communication between a represented party and his counsel is too well-settled to require lengthy citation." *Id.*, slip op., at 6 (citations omitted).

The substantial burden on plaintiffs' professional activities constitutes an injury sufficient to support standing. *See, e.g., Craig v. Boren*, 429 U.S. 190, 194 (1976); *Singleton v. Wulff*, 428 U.S. 106, 113 (1976); *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 281 (6th Cir. 1997). Indeed, numerous courts have so held in the context of challenges to government surveillance. For example, the D.C. Circuit found that a worker had standing to sue his government employer for triggering an FBI investigation into the worker's political associations where the investigation had cost the worker employment opportunities. *Clark v. Library of Cong.,* 750 F.2d 89, 93 (D.C. Cir. 1984). Likewise, the Third Circuit held that a high school student had standing to seek expungement of an FBI file linking her with "subversive material" because of the mere potential that the file would harm the plaintiff's future educational and employment opportunities. *Paton v. La Prade*, 524 F.2d 862, 868 (3d Cir. 1975). And this Court held that an attorney had standing to sue to enjoin unlawful FBI and NSA surveillance because the investigation had deterred others from associating with him and caused "injury to his reputation and legal business." *Jabara v. Kelley*, 476 F. Supp. 561, 568 (E.D. Mich. 1979), *vac'd on other grounds sub nom. Jabara v. Webster*, 691 F.2d 272 (6th Cir. 1982).

The government's attack on plaintiffs' standing ignores the specific and concrete harms the Program is causing to plaintiffs' abilities to carry out their professional responsibilities.[10]

[10] Moreover, plaintiffs would satisfy the standing requirements even if they had not suffered concrete injury, because traditional standing rules are relaxed when First Amendment rights are at stake. The well-

Instead, defendants misconstrue plaintiffs' complaint as alleging no more than a nebulous "chilling effect," Govt. Br. at 18-20, relying on *Laird v. Tatum*, 408 U.S. 1 (1972). But *Laird* holds only that a plaintiff lacks standing where he "alleges that the exercise of his First Amendment rights is being chilled by the mere existence, without more, of a governmental investigative and data-gathering activity." *Laird*, 408 U.S. at 10. As Justice (then Judge) Breyer has observed, "[t]he problem for the government with *Laird* . . . lies in the key words 'without more.'" *Ozonoff v. Berzak*, 744 F.2d 224, 229 (1st Cir. 1984). Plaintiffs' standing here does not rest on the Program's "mere existence, without more." Rather, plaintiffs' standing rests on serious and concrete injuries to their abilities to carry out professional responsibilities. Courts have repeatedly held that this type of injury is sufficient to confer standing and have sharply distinguished *Laird* in cases involving concrete profession-related injuries of the type sustained by plaintiffs here. *See Clark,* 750 F.2d at 92-93; *Paton*, 524 F.2d at 868; *Jabara*, 476 F. Supp. at 567-69; *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144, 150-51 (1976). Additionally, whereas the *Laird* plaintiffs provided "no evidence of illegal or unlawful surveillance activities," 408 U.S. at 9 (citation and internal quotation marks omitted), the surveillance program at issue here is both unlawful and unconstitutional.

The government is also misguided in characterizing plaintiffs' injuries as "subjective," *see, e.g.*, Govt. Br. at 21, a characterization presumably meant to suggest that plaintiffs' injuries are self-inflicted or otherwise unreasonable. First, many of plaintiffs' injuries have nothing to do with their own conduct. One of the professional injuries to plaintiff scholars and journalists is that other individuals – sources and other professional contacts vital to their work – no longer

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established First Amendment exception to normal standing rules is necessary because free expression is "of transcendent value to all society, and not merely to those exercising their rights." *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965); *see also, e.g., Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 392-393 (1988); *Sec'y of State of Md. v. Joseph H. Munson Co.,* 467 U.S. 947, 956-57 (1984).

provide plaintiffs with the information they need to do their jobs. Some of the attorney plaintiffs have suffered similar injury. Plaintiffs have not chosen to cut off communications on account of their own fears; rather, it is the sources that have chosen to stop communicating with plaintiffs. The Ninth Circuit addressed a similar issue in *Presbyterian Church v. United States*, 870 F.2d 518 (9th Cir. 1989), a case in which plaintiff churches alleged that the government's practice of recording church services had caused congregants to diminish their participation in church activities. The court distinguished *Laird* as follows:

> The churches in this case are not claiming simply that the INS surveillance has "chilled" them from holding worship services. Rather, they claim that the INS surveillance has chilled *individual congregants* from attending worship services, and that this effect on the congregants has in turn interfered with the churches' ability to carry out their ministries. The alleged effect on the *churches* is not a mere subjective chill on their worship activities; it is a concrete, demonstrable decrease in attendance at those worship activities. The injury to the churches is distinct and palpable.

*Id.* at 522 (citation and internal quotation marks omitted) (emphasis in original). As in *Presbyterian Church*, plaintiffs' injuries here – the losses of information vital to their professional duties – are "distinct and palpable." That some of the injuries result from the effect of the Program on third parties is irrelevant. *See also Meese v. Keene*, 481 U.S. 465, 475 (1987) (politician had standing to challenge government's classification of films as "political propaganda" where effect of classification was such that politician's constituents would be "influenced against him" if he screened the films); *Jabara*, 476 F. Supp. at 568 (FBI investigation caused injury because "others have been deterred from associating with him").

Second, the additional harms that arise from plaintiffs' own actions (for example, attorneys' traveling to meet with clients in person), are not only reasonable but in fact *inevitable* given plaintiffs' professional obligations. As ethics expert Professor Niehoff explains, the NSA's Program "creates an overwhelming, if not insurmountable, obstacle to effective and

ethical representation."[11] Having reviewed the declarations of attorneys Hollander, Swor, Dratel, and Abdrabboh, Professor Niehoff concludes that the Program

> requires the attorneys to cease – immediately – all electronic and telephonic communications relating to the representation that they have good faith reason to believe will be intercepted. And the Interception Program requires the attorneys to resort – immediately – to alternative means for gathering information that, at best, will work clumsily and inefficiently and, at worst, will not work at all.[12]

In spite of these prophylactic measures, the Program continues to cause "substantial and ongoing harm to the attorney-client relationships and legal representations described in the attorney declarations."[13]

A plaintiff's injuries do not lose their concreteness simply because they result from a plaintiff's own change in behavior in response to defendant's challenged action. For example, the Supreme Court held that a politician had standing to challenge the government's labeling of certain films as "political propaganda" where that politically charged label forced the plaintiff to abandon his intent to exhibit the films out of concern for an adverse affect on his reputation and political prospects. *Keene*, 481 U.S. at 472-77. Likewise, the Supreme Court held that environmental groups had standing to sue a polluter under the Clean Water Act because the environmental damage caused by the defendant had deterred members of the plaintiff organizations from using and enjoying certain lands and rivers. *Friends of the Earth*, 528 U.S. at 181-83. And the First Circuit found justiciable a challenge to an executive order requiring applicants for jobs at the World Health Organization (WHO) to undergo a "loyalty check" that included an investigation into the applicants' associations; the court explained that "the likely 'chilling effect' of an apparent speech-related job qualification constitutes a real injury" to the plaintiff. *Ozonoff*, 744 F.2d at 228-30 (Breyer, J.).

[11] Exh. M, ¶19 (Niehoff Decl.).
[12] *Id.*
[13] Exh. M, ¶20 (Niehoff Decl.).

Finally, the government places great weight on plaintiffs' inability to show that they themselves were wiretapped. *See, e.g.*, Govt. Br. at 25; *id.* at 27. This question is a red herring. The concrete injuries to plaintiffs' abilities to carry out their professional duties exist entirely independently of whether plaintiffs are being wiretapped. Whether or not plaintiffs are being wiretapped, they are being harmed by the Program and have standing to challenge it.[14]

### B. Plaintiffs' Injuries Are Caused By The Program And Would Be Redressed If The Program Were Enjoined.

The causation and redressability requirements are also easily satisfied. If the Program did not exist, attorneys would not need to avoid discussing sensitive information over the telephone and via email, and would not have to travel great distances to speak with their clients and locate witnesses. Likewise, if the Program did not exist, the professional contacts of journalists and scholars would not have stopped speaking to them. Plaintiffs' injuries would also be redressed by a favorable decision here. If the Program were enjoined, plaintiffs could resume their use of the telephone and of email to discuss sensitive information, and plaintiffs' sources and contacts would no longer avoid communicating electronically with plaintiffs for fear of eavesdropping by defendants.

Defendants contest the redressability element, arguing that because plaintiffs' communications "could be subject to surveillance by other means or entities," plaintiffs would "'always run the risk' that those communications are monitored" even absent the challenged Program. Govt. Br. at 24. With respect to some of plaintiffs' injuries, this argument misses the

[14] Given the people with whom they communicate – including individuals the government itself has identified as terrorism suspects, *see* SUF 15 (Exh. J, Hollander Decl ¶¶13, 18, 21); Exh. P, ¶5 (Dratel Decl.); Exh. O, ¶¶2-4 (Hassan Decl.) – plaintiffs themselves *are* in fact likely to be wiretapped. *See* Pls. Opening Br. at 4. This likelihood supplies a second – and distinct – injury in fact sufficient to confer standing. *See, e.g.*, *Halkin v. Helms*, 690 F.2d 977, 999 (D.C. Cir. 1982) (declaring "there can be little doubt" that "interception of plaintiffs' private communications" would constitute an injury in fact); *Jabara*, 476 F. Supp. at 568-69 (finding justiciable a challenge to the FBI's "system of independently unlawful intrusions into [plaintiff's] life").

mark entirely: as discussed above, it is plaintiffs' professional contacts who have made the choice to stop communicating with plaintiffs. It is irrelevant that plaintiffs' communications with these contacts might otherwise be intercepted by other, lawful means: it is the challenged Program that has undermined plaintiffs' ability to fulfill their professional duties by depriving them of their sources' and contacts' cooperation.[15]

With respect to the attorney plaintiffs, the Program introduces a degree of risk to privileged communications that is different both in degree and in kind from the risk presented under the former regime. Before the advent of defendants' warrantless wiretapping program, attorneys faced a much lower risk of interception because all interceptions were subject to judicial oversight. *See* Pls. Opening Br. 12-13. The requirement that the executive branch justify to a neutral judiciary any encroachments on the reasonable expectations of privacy minimizes both the targeting of innocent people and the frequency of surveillance. Even more importantly, under the former regime attorneys could trust (and assure their clients) that their privileged communications would remain confidential because any information intercepted under the standard lawful procedures was subject to "minimization procedures required" to protect privileged information.[16] Now that the Executive has begun to operate a clandestine program beyond all judicial scrutiny, there is no such guarantee; in fact, government officials

[15] As the Supreme Court has explained, "a plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury." *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) (emphasis in original); *see also Keene*, 481 U.S. at 476 (finding standing where requested injunction "would at least partially redress" plaintiff's injury). The Court has additionally rejected as "draconic" the proposition that a particular outcome must be "certain" to follow from a favorable decision for a plaintiff to have standing. *Larson*, 456 U.S. at 243 n.15. Plaintiffs have standing because it is "likely, as opposed to merely speculative," *Friends of the Earth*, 528 U.S. at 187, that enjoining the program "would at least partially redress" plaintiffs' injuries. *Keene*, 481 U.S. at 476.

[16] *See* 50 U.S.C. § 1806(a) (stating that "[n]o otherwise privileged communication obtained in accordance with, or in violation of, the provisions of this subchapter shall lose its privileged character"); *id*. § 1801(h) (defining required "minimization" procedures).

have admitted that the Program does not distinguish attorney-client communications from other communications it intercepts.[17] Plaintiff attorneys such as Joshua Dratel have changed their behavior accordingly, to the detriment of their representation of their clients.[18] As Professor Niehoff explains, the magnitude of the increased risk both that organizations members' privileged communications will be intercepted and that the content of those conversations will actually be examined by those outside of the attorney-client relationship, *forces* attorneys to cease the use of at-risk electronic communications with at-risk clients to fulfill their ethical responsibility as attorneys.[19]

## II. THE PROGRAM VIOLATES THE LAW AND THE CONSTITUTION.

### A. Defendants Have Conceded Sufficient Facts To Establish That The Program Is Illegal And Unconstitutional.

The facts of the Program are well known. Approved by President Bush in the fall of 2001, the Program entails the interception, without a warrant or any other type of judicial authorization, of the electronic communications of people inside the United States.[20] The interceptions are approved by an NSA "shift supervisor,"[21] without probable cause to believe that the surveillance targets have committed or are about to commit any crime, and without probable cause to believe that the surveillance targets are foreign agents.[22] Rather, the NSA intercepts communications when the agency has, in its own judgment, merely a "*reasonable basis to*

[17] Exh. P, ¶14 (Dratel Decl.).
[18] Exh. P, ¶¶17-20 (Dratel Decl.).
[19] Exh. M, ¶¶15-20 (Niehoff Decl.).
[20] SUF 1A (Exh. A at 1881); SUF 1B (Exh. B); SUF 11A (Exh. H); SUF 11B (Exh. B); SUF 11C (Exh. C); SUF 11D (Exh. B); SUF 2A (Exh. C); SUF 2B (Exh. D at 1889); SUF 2C (Exh. F); SUF 3A (Exh E); SUF 3B (Exh. F); SUF 3C (Exh. B); *see also Hearing on the Nomination of General Michael V. Hayden to be the Director of the Central Intelligence Agency Before the S. Select Comm. on Intelligence,* 109th Cong., at 72 (2006). (Gen. Michael Hayden, describing an interception under the Program: "[W]e have bumped into the privacy rights of a protected person, okay? And no warrant is involved, okay? We -- we don't go to a court.").
[21] SUF 13A (Exh. B); *see also* SUF 13B (Exh. H).
[22] SUF 6J (Exh. H); *see also* SUF 11C (Exh. C).

*conclude* that one party to the communication is 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."[23] Although the communications intercepted under the Program are subject to the requirements of FISA,[24] the Program does not comply with those requirements, as government officials have admitted publicly,[25] and as defendants again concede in their brief, *see* Govt. Br. at 38. These facts are sufficient to entitle the plaintiffs to judgment as a matter of law.

### B. The Program Violates The Administrative Procedures Act And Separation Of Powers Principles Because It Involves Surveillance That Congress Has Expressly Prohibited.

The government has conceded that the Program authorizes warrantless electronic surveillance of Americans that is expressly prohibited by FISA. Though defendants have failed to offer any formal defense to their violation of the law, they have advanced two defenses in their state secrets brief and elsewhere: First, defendants argue, despite clear language establishing FISA and Title III as the *exclusive means* by which the Executive can engage in electronic surveillance of Americans, that the Program was authorized by Congress when it passed the Authorization to Use Military Force ("AUMF") against al Qaeda. *See* Authorization for Use of Military Force, Pub. L. No. 107-40 §2, 115 Stat. 224 (2001). Second, they argue that to the extent that the Program violates FISA, FISA is unconstitutional because it encroaches on the President's "inherent" authority. As discussed below, these defenses require no additional facts and fail as a matter of law.

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[23] SUF 6G (Exh. B) (emphasis added); *see also* SUF 6A (Exh. C); SUF 6I (Exh. C); SUF 6B (Exh. D at 1885); SUF 6C (Exh. A at 1881); SUF 6D (Exh. E); SUF 6E (Exh. F); SUF 6F (Exh. G); SUF 6H (Exh. C).
[24] SUF 9 (Exh. B).
[25] SUF 10A (Exh. B); *see also* SUF 10B (Exh. C); SUF 10E (Exh. B); SUF 10F (Exh. C); SUF 10G (Exh. F).

As to the first of these defenses, the question of whether the AUMF can be read to authorize the Program is one of pure statutory interpretation, as the government's own white paper suggests.[26] The AUMF is broad and general, authorizes only "use of the United States Armed Forces," and nowhere mentions electronic surveillance. In contrast, FISA's prohibition is specific and unequivocal. Well-accepted rules of statutory interpretation favor specific provisions over general ones in cases of conflict. *See, e.g.*, *Morales v. TWA, Inc.*, 504 U.S. 374, 384-85 (1992). Congress clearly expressed its intent for FISA and Title III to apply to electronic surveillance even in times of war and emergency, *see* 50 U.S.C. §§ 1811 & 1805(f), 18 U.S.C. § 2518, and the AUMF cannot be read to repeal these provisions implicitly absent "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. In fact, the government asked Congress to apply the AUMF to domestic as well as foreign actions by seeking to add the words "in the United States" after the words "appropriate force," and Congress flatly rejected the request. *See* Tom Daschle, "Power We Didn't Grant," WASH. POST, Dec. 23, 2005, at A21. As Senate Judiciary Chairman Arlen Specter (R-PA) has stated, "I do not think that any fair, realistic reading of the September 14 resolution gives [the President] the power to conduct electronic surveillance."[27]

Defendants argue that further factual development would demonstrate that the Program is "well within the rubric of an accepted incident of war" and thus within the authority granted by the AUMF. But no tenable reading of the AUMF's "necessary and appropriate force" language

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[26] Dept. of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* 10 (Jan. 19, 2006) (*available at* http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf).

[27] *Wartime Executive Power and the NSA's Surveillance Authority (Part I): Hearing before the Senate Judiciary Committee,* 109th Cong., at 186 (2006); *see also id.* (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.").

would render lawful the massive domestic surveillance program at issue here. The Supreme Court decision in *Hamdi v. Rumsfeld*, 542 U.S. 507, 508 (2004), rather than supporting the government's expansive interpretation of the AUMF, holds only that the AUMF authorizes detention on the battlefield. In that case, the Court explained that "[t]here can be no doubt that individuals who fought against the United States in Afghanistan . . . are individuals Congress sought to target in passing the AUMF." *Hamdi*, 542 U.S. at 518 (plurality opinion).[28] Obviously, Americans inside the United States who make or receive international phone calls and emails – even assuming defendants' narrow definition of the Program targets – are not enemy combatants on the battlefield, and they are plainly far removed from the zone of "individuals Congress sought to target in passing the AUMF." *Id* at 578. There is simply no set of facts, real or hypothetical, that could bring warrantless wiretapping on American soil within the scope of the AUMF. *See also* Mem. of Law of Certain Members of Congress in Support of Pls. Motion for Partial Summary Judgment, at 10-13 (filed May 10, 2006) (denying intention of Congress to authorize warrantless surveillance through AUMF).

The second of the government's defenses – that the Program is not illegal because the President has "inherent" authority to ignore FISA and to engage in warrantless wiretapping on American soil, *see e.g.* Govt. Br. at 31, 34 – is equally misguided. As an initial matter, defendants wrongly assume that the President *has* powers not expressly delegated to him by the Constitution or by statute. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646-47 (1952) (Jackson, J., concurring) (noting the President's "[l]oose and irresponsible use of adjectives" such as "inherent" and "incidental" in an effort to take on unenumerated powers). In fact, the framers intended to prohibit the President from exercising any unspecified and

[28] Even as to detention on the battlefield, the Court held that the AUMF did not authorize indefinite detention for the purpose of interrogation. *See id.* at 521.

unchecked powers.[29] As the Court explained in *Youngstown*, "The President's power, if any . . . must stem either from an act of Congress or from the Constitution itself." 343 U.S. at 585. Where Congress and the President share power under the Constitution, the President is obligated to follow the law. "Even where the President's authority is clear and perhaps primary, for purposes of domestic law his acts will bow before Congressional legislation that is within its constitutional authority." Henkin, *Foreign Affairs and the U.S. Constitution* 95-96.[30]

Under the express language of the Constitution, there can be no question that Congress and the President share authority over war powers and foreign affairs. *See* Pls. Opening Br. at 18. Pursuant to those shared powers, Congress may set limits on the President's power to conduct domestic electronic surveillance. The President's "command power … is subject to limitations consistent with a constitutional Republic whose law and policy-making branch is a representative Congress." *Youngstown,* 343 U.S. at 645-46 (Jackson, J., concurring). When Congress passed FISA, it did not disable the President from exercising any authority granted to him under the Constitution; it merely regulated the President's power *consistent with its shared role*. As the Supreme Court has explained, "in determining whether [an] Act disrupts the proper

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[29] *See* Louis Henkin, *Foreign Affairs and the U.S. Constitution,* 27-28 (Clarendon Press 2d ed. 1996) ("The Framers were hardly ready to replace the representative inefficiency of many with an efficient monarchy, and unhappy memories of royal prerogative, fear of tyranny, and reluctance to repose trust in any one person kept the Framers from giving the new President too much head."); *see also Youngstown*, 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.").

[30] The government's reliance on three pre-FISA cases is completely off the mark because those cases analyzed the President's authority *in the absence of congressional action*. Govt. Brief at 34 (citing *In re Sealed Case*, 310 F.3d 717, 742 (Foreign Intel. Surv. Ct. of Rev. 2002); *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980); *United States v. Butenko*, 494 F.2d 593 (3rd Cir. 1974) (en banc); and *United States v. Brown*, 484 F.2d 418 (5th Cir. 1973)). The government's reliance on *In re Sealed Case*, which they concede is dictum, *see* Govt. Brief at 40 (citing *In re Sealed Case*, 310 F.3d at 742), is equally unpersuasive. Ironically, in that case the Executive was not attempting to justify acts *in defiance of FISA*, but rather was seeking an interpretation of FISA to justify its view of executive authority under the statute.

balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the executive Branch from accomplishing its constitutionally assigned functions." *Nixon v. Adm'r of Gen. Servs.,* 433 U.S. 425, 443 (1977). In accord with this principle, when enacting FISA the Senate Judiciary Committee explained

> that even if the President [h]as an 'inherent' Constitutional power to authorize warrantless surveillance for foreign intelligence purposes, Congress has the power to regulate the exercise of this authority by legislating a reasonable warrant procedure governing foreign intelligence surveillance.

S. REP. NO. 95-604(I); *see also id.* at 3965. In fact, the notion that FISA in any way disrupts the President's authority is directly contradicted by the fact that the executive branch has successfully relied on FISA procedures to conduct electronic surveillance for over twenty-five years, including during the Gulf War and other military actions.

Defendants incorrectly argue that the Court needs more details about the precise contours of the Program and the scope of the al Qaeda threat to decide whether FISA encroaches on the President's authority. Regarding Program details, the government misreads *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), to suggest that the separation of powers issue turns on the particular details of *how* – rather than the basic question of *whether* – the President broke the law. In fact, in *Little*, the Supreme Court simply asked whether the President had exceeded his authority under a law that allowed him to seize ships going *to* France when he ordered seizure of a ship coming *from* France. The answer was yes. *Id.* Similarly, here the question before the Court is whether the President authorized electronic surveillance of Americans without a warrant in violation of FISA. Again, the answer is yes. More details about exactly how the President directed the NSA to break the law are irrelevant.

The government is likewise wrong in contending that this Court needs to know more about the exigencies that motivated the President to break the law in order to decide whether

FISA violates the separation of powers. The President simply has no power under the Constitution to ignore the law, even in times of war or emergency. "[The framers] made no express provision for exercise of extraordinary authority because of a crisis." *Youngstown,* 343 U.S. at 650 (Jackson, J., concurring); *id.* at 652 ("[E]mergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them."); *see also Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120-21 (1866). The proper process for granting the Executive expanded powers in times of emergency is to seek those powers through the legislative process, not to ignore existing law.[31] "Under this procedure we retain Government by law.… The public may know the extent and limitations of the powers that can be asserted, and persons affected may be informed from the statute of their rights and duties." *Youngstown* 343 U.S. at 652-53 (Jackson, J. concurring).

An executive arrogation of power in the area of domestic wiretapping is particularly egregious because Congress clearly and specifically expressed its intent for FISA to govern *even during times of war or emergency*, thereby providing the Executive with sufficient flexibility to meet an emergency. *See* 50 U.S.C. §§ 1811 & 1805(f). "No power was ever vested in the President to repeal an act of Congress." *The Confiscation Cases,* 87 U.S. (20 Wall.) 92, 112-13 (1873). As the Supreme Court held in *Youngstown,* "[W]here congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those

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[31] Fourteen constitutional scholars, including former FBI Director William Sessions, examined the Administration's public arguments in support of the Program and concluded:

> If the Administration felt that FISA was insufficient, the proper course was to seek legislative amendment…. One of the crucial features of a constitutional democracy is that it is always open to the President – or anyone else – to seek to change the law. But it is also beyond dispute that, in such a democracy, *the President cannot simply violate criminal laws behind closed doors because he deems them obsolete or impracticable.*

Curtis A. Bradley, et al., Letter to Members of Congress (Jan. 9, 2006), *available at* http://www.fas.org/irp/agency/doj/fisa/doj-response.pdf (last visited May 31, 2006) (emphasis added).

procedures in meeting the crisis." 343 U.S. at 662 (Clark, J., concurring); *see also id.* at 655 (Jackson, J., concurring) ("The executive action we have here originates in the individual will of the President and represents an exercise of authority without law."); *id.* at 659 (Burton, J., concurring) ("Congress authorized a procedure which the President declined to follow."); *id.* at 659 (Frankfurter, J., concurring) ("Congress has expressed its will to withhold this power from the President . . . ."); *see also Myers v. United States,* 272 U.S. 52, 295 (1926) ("The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power.").

Even if the President had the power to ignore the law in an emergency – and clearly he does not, for the reasons stated above – such a loophole would have to be limited to immediate emergencies to avoid permanent disruption of "the equilibrium established by our constitutional system." *Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring). Although the President authorized the Program shortly after the September 11 attacks, he has continued to authorize it numerous times for *over four years.*[32] Even if the Program was justified initially by the September 11 emergency, separation of powers principles clearly required the President to obtain congressional approval to continue the Program indefinitely. *See Youngstown*, 343 U.S. at 597 (Frankfurter, J., concurring) ("We must therefore put to one side consideration of what powers the President would have had. . . if the seizure had been only for a short, explicitly temporary period, to be terminated automatically unless Congressional approval were given.").

While Congress has authority under separation of powers principles to regulate the President's authority to conduct electronic surveillance, allowing the President to ignore FISA would violate separation of powers because it would disable completely Congress's express powers. *See Youngstown*, 343 U.S. at 637-38 (Jackson J., concurring). Notably, the Supreme

[32] SUF 1A (Exh. A at 1881); SUF 4 (Exh. D at 1885).

Court flatly rejected the disabling of Congress's powers in *Youngstown* during the Korean War, 343 U.S. at 645, and in at least five other cases, all of which arose during wars or military actions.[33] Yet Congress's intent to regulate shared authority is far more clearly expressed in FISA than it was in the statute at issue in *Youngstown*. The Supreme Court has not hesitated to hold unlawful actions that "accrete to a single Branch powers more appropriately diffused among separate Branches." *Mistretta v. United States,* 488 U.S. 361, 382 (1989). Courts must remain vigilant to ensure that power is never "condense[d] … into a single branch of government." *Hamdi,* 542 U.S. at 536 (plurality opinion). As the Court recently warned, "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). "It remains one of the most vital functions of this Court to police with care the separation of the governing powers . . . . When structure fails, liberty is always in peril." *Public Citizen v. U.S. Dept. of Justice,* 491 U.S. 440, 468 (1989) (Kennedy, J., concurring).

To disable Congress from legislating regulations for electronic surveillance would be a particularly serious violation of separation of powers principles because FISA regulates electronic surveillance *on American soil*. While the government continues to emphasize the foreign end of the phone line, there is no dispute that the other end of the phone line is inside the United States. Congress clearly has authority to regulate domestic electronic surveillance; by contrast, the President's powers as Commander in Chief are at their constitutional minimum in the domestic context. Where Congress and the President share authority and there is a conflict, "Congress should prevail, particularly when Congress acts under its explicit authority to legislate

[33] *See Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804); *Rasul v. Bush*, 542 U.S. 466, 485 (2004) (holding that habeas statute confers jurisdiction on district courts to hear petitions of detainees at Guantanamo Bay); *Duncan v. Kahanamoku*, 327 U.S. 304, 322-24 (1946) (convictions of civilians by military tribunals reversed where there was no congressional authorization for such trials); *Ex parte Endo*, 323 U.S. 283, 300-02 (1944) (continued detention of admittedly loyal Japanese-American citizen pursuant to Executive Order unlawful; release ordered).

for matters within the United States." Henkin, *Foreign Affairs and the U.S. Constitution* 96. As Justice Jackson wrote, "Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy." *Youngstown*, 343 U.S. at 644; *see id.* at 632 (Douglas, J., concurring) ("[O]ur history and tradition rebel at the thought that the grant of military power carries with it authority over civilian affairs.").

The government's broad view of executive power violates separation of powers principles not only because it encroaches on Congress' power to legislate, but also because it encroaches on the role of the judiciary. The courts are assigned the task of determining what the law is and whether it has been followed. If the President is free to ignore the law, it is impossible for the courts to exercise their role in enforcing the law. The government's proposed system of unchecked authority for the Executive intrudes on the Court's role "to determine whether [the President] has acted within the law." *Clinton v. Jones,* 520 U.S. 681, 703 (1997). "[O]urs is a government of laws, not of men, and . . . we submit ourselves to rulers only if under rules." *Youngstown*, 343 U.S. at 646 (Jackson, J., concurring).

### C. The Program Violates The Fourth Amendment.

As described by the government in multiple public statements, the Program involves the warrantless interception of email and phone calls originating or terminating inside the United States. Under the Program, executive officers initiate surveillance at their own discretion, without judicial oversight of any kind. The Program plainly violates the Fourth Amendment. As plaintiffs noted in their opening brief, Pls. Opening Br. at 25-27, it has been settled for almost forty years that the Fourth Amendment protects against warrantless wiretapping. *See Katz v. United States*, 389 U.S. 347, 352 (1967); *Blake v. Wright*, 179 F.3d 1003, 1008 (6th Cir. 1999). Because wiretapping constitutes a search within the meaning of the Fourth Amendment, *Katz*,

389 U.S. at 352, warrantless wiretapping is presumptively unconstitutional. *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). As the Supreme Court has written, it is a cardinal principle "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.

None of these "specifically established and well-delineated exceptions" applies here. Although the government envisions an exception to the warrant requirement for foreign intelligence surveillance, this is not an exception that has ever been recognized by the Supreme Court. In fact, the only Supreme Court case that the government cites in support of its proposal is *United States v. United States District Court*, 407 U.S. 297 (1972) ("*Keith*"), which *rejected* an exception to the warrant requirement for domestic intelligence surveillance. Moreover, the arguments that led the Court to reject a warrant exception for domestic intelligence surveillance apply with equal force in the context of foreign intelligence surveillance inside the United States.

The judiciary is plainly competent to deal with the complicated issues arising from foreign intelligence surveillance, as a quarter century of experience with FISA shows. The judiciary can also protect the confidentiality of sensitive foreign intelligence information in the same way that it protects information concerning domestic intelligence. Applications for warrants can be submitted *ex parte* and, as in the domestic intelligence context, "[w]hatever security dangers clerical and secretarial personnel may pose can be minimized by proper administrative measures." *Id*. at 321. Finally, the Fourth Amendment's warrant requirement is sufficiently flexible to allow for the exigencies of emergency situations, *see Warden v. Hayden*, 387 U.S. 294, 298-300 (1967), and any statutory warrant requirement can be made similarly

flexible, *see, e.g.,* 50 U.S.C. § 1805(f) (allowing for surveillance in "emergency situation[s]" without prior judicial authorization, on condition that Attorney General submits application to court of competent jurisdiction within 72 hours).

While the government points to pre-FISA cases that recognized a foreign intelligence exception, Govt. Br. at 40, none of the courts that have deviated from *Keith*'s reasoning in the foreign intelligence context have articulated a persuasive basis for distinguishing *Keith*. Even more importantly, lower courts' fears of intolerable delay, security leaks, and judicial incompetence have simply not been borne out by the nation's experience under the FISA regime, which has demonstrated that the warrant requirement does not "unduly frustrate the efforts of Government to protect itself from acts of subversion and overthrow directed against it." *Keith*, 407 U.S. at 315.

The government's gesture towards the "special needs" exception is unpersuasive for similar reasons. The special needs exception has been applied only in narrow circumstances where "the warrant and probable cause requirement [are] impracticable." *O'Connor v. Ortega*, 480 U.S. 709, 720, 725 (1987) (plurality opinion). Given the existence of FISA, however, it is plain that the warrant and probable cause requirements are workable here. Indeed, if the FISA framework is to be criticized, it should be criticized not because it is overly restrictive but because it is insufficiently so. Since 1978, the FISA Court has considered some 20,000 surveillance applications; of those applications, it has rejected only four. Pls. Opening Br. at 15.

The government argues that adjudication of plaintiffs' Fourth Amendment claim requires further facts, anticipating, of course, that the state secrets doctrine will preclude plaintiffs from obtaining those facts. Govt. Br. at 42. But there is no factual dispute here. The government itself has acknowledged that the Program involves warrantless electronic surveillance inside the

United States. In light of this acknowledgement, the necessary Fourth Amendment analysis is purely legal. Determining whether there is an exception to the warrant requirement for foreign intelligence surveillance inside the United States does not require this Court to delve into the details of the Program any more than determining whether there was a domestic intelligence exception required the Supreme Court, in *Keith*, to delve into the specifics of the Executive's domestic intelligence efforts. In that case, as here, the critical fact was that the Executive was engaged in intrusive surveillance without judicial oversight. In *Keith*, as here, that critical fact gave rise to the question – the purely legal question – whether such surveillance is permitted by the Fourth Amendment.

The government's contention that the "special needs" analysis requires further facts is equally specious. Given that FISA has provided a workable framework for foreign intelligence surveillance for over a quarter of a century, no additional facts are required to determine that the special needs exception is inapplicable. The government insists that additional facts are required to determine whether the Program is "reasonable," but, given the existence of a congressionally enacted framework for foreign intelligence surveillance, *no* set of additional facts could render reasonable a parallel surveillance program of this kind. In any event, the proper inquiry is whether there is an applicable exception to the warrant requirement, not whether the Program is reasonable in some free-floating sense of the word. The Supreme Court made precisely that point in *Keith*. *See Keith*, 407 U.S. at 317 ("It may well be that, in the instant case, the Government's surveillance . . . was a reasonable one which readily would have gained prior judicial approval. But . . . the Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised. . . . Prior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights.").

### D. The Program Violates The First Amendment.

Plaintiffs are entitled to summary judgment on their First Amendment claim for reasons similar to those discussed above. Because the Program impinges on the First Amendment rights of plaintiffs and others, the government can justify the Program only if it can demonstrate that it is the least restrictive means of achieving a compelling state interest. *See, e.g., Gibson v. Fla. Legislative Investigative Comm*., 372 U.S. 539, 546 (1963); *see also Brown v. Socialist Workers '74 Campaign Comm*., 459 U.S. 87, 91-92 (1982); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). There is no doubt, of course, that the Executive has a compelling interest in gathering intelligence about foreign threats to the country. Indeed, Congress implicitly accepted this proposition by enacting FISA. But the same statute that supports the Executive's contention that it has a compelling interest in gathering foreign intelligence makes clear that the Program is not narrowly tailored to that interest.

The Supreme Court has emphasized in multiple contexts that government action is not "narrowly tailored" for First Amendment purposes unless the action is "the least restrictive means among available, effective alternatives." *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004); *see also Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 755 (1996); *Sable Communications of Cal., Inc. v. FCC*., 492 U.S. 115, 126 (1989). But the Program is clearly not the least restrictive means of accommodating the Executive's interest in gathering foreign intelligence. As discussed above, FISA makes clear that the Executive's interest can be accommodated without abandoning constitutional safeguards, including the requirement of prior judicial oversight. Given that FISA has proved workable for over a quarter of a century, there is no serious argument that the Program – a program that contemplates unfettered executive discretion to effect the most intrusive kinds of surveillance – is the least restrictive means of

accommodating the Executive's interest. To the contrary, it is a means that accords the constitutional rights of citizens literally no weight at all.

For the foregoing reasons, plaintiffs are entitled to judgment as a matter of law and plaintiffs' motion for partial summary judgment should be granted.

Respectfully submitted,

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June 5, 2006

**CERTIFICATE OF SERVICE**

I hereby certify that on June 5, 2006, I electronically filed the following documents using the ECF system, which will send notification of such filing to Anthony J. Coppolino, Department of Justice and Andrew Tannenbaum, Department of Justice:

1) Plaintiffs' Reply Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment
2) Index of Exhibits to Plaintiffs' Reply Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment
3) Exhibits to Plaintiffs' Reply Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment

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