Case Nos. 06-2095, 06-2140

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMERICAN CIVIL LIBERTIES UNION, ET AL.,

Plaintiffs-Appellees/Cross-Appellants,

v.

NATIONAL SECURITY AGENCY, ET AL.,

Defendants-Appellants/Cross-Appellees.

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

BRIEF AMICI CURIAE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, THE BAR ASSOCIATION OF SAN FRANCISCO, THE LOS ANGELES COUNTY BAR ASSOCIATION, THE BOSTON BAR ASSOCIATION AND THE BEVERLY HILLS BAR ASSOCIATION IN SUPPORT OF PLAINTIFFS-APPELLEES/CROSS-APPELLANTS AND URGING AFFIRMANCE

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I. STATEMENT OF INTEREST OF AMICI CURIAE.[1]

A. The Association of the Bar of the City of New York

Founded in 1870, the Association of the Bar of the City of New York (the "NYC Bar"), is a professional organization of more than 22,000 attorneys. Through its many standing committees, such as its Committee on Civil Rights, the NYC Bar educates the Bar and the public about legal issues relating to civil rights, including the right of access to the courts, the right to counsel and the right to remain free from unreasonable searches and seizures. The NYC Bar also seeks to promote effective assistance of counsel for everyone, including those suspected or accused of criminal wrongdoing, and is especially concerned with protecting the confidentiality of attorney-client communications as essential to such representation.

Over the past several years, the NYC Bar has attempted to demonstrate by various means—including through the filings of amicus curiae briefs—that individual liberties need not be subverted by governmental power during times of war and that national security can be achieved without prejudice to constitutional rights that are at the heart of our democracy. Of particular relevance here, the NYC Bar co-sponsored the resolution adopted by the House of Delegates

[1] This brief is filed with the consent of the parties, in accordance with Federal Rule of Appellate Procedure 29(a).

of the American Bar Association in February of 2006, urging the President to halt the surveillance program being conducted by the National Security Agency ("NSA") and instead, if necessary, work with Congress to amend the Foreign Intelligence Surveillance Act of 1978 ("FISA"). The NYC Bar also filed a brief as amicus curiae in the district court in this action.

B. The Bar Association of San Francisco

The Bar Association of San Francisco ("BASF") is a voluntary association of more than 8,000 attorneys. The majority of its members live and work in the City and County of San Francisco, California. Through its board of directors, its committees, and its volunteer programs, BASF has consistently worked for many years to protect against government abuses and to promote public accountability of law enforcement agencies. BASF has also actively worked to promote unfettered communications between lawyers and clients. BASF believes that the NSA surveillance program at issue in this case undermines public accountability and poses a substantial threat to lawyer-client relations because it bypasses the systems of restraint and accountability required by FISA and the United States Constitution.

C. The Los Angeles County Bar Association

The Los Angeles County Bar Association ("LACBA"), with more than 25,000 members, is the largest local voluntary bar association in the country.

For more than 125 years, LACBA has played an important role in the professional lives of lawyers, and in the lives of the people of Los Angeles County.

LACBA, through its Professional Responsibility and Ethics Committee and other avenues, has consistently supported the sanctity of attorney-client communications, especially against government intrusion. See, e.g, United States v. Legal Services for New York City, 249 F.3d 1077 (D.C. Cir. 2001) (in which LACBA and other bar associations opposed government attempts to subpoena information which could identify legal services clients by name and legal problems).

LACBA has also played an important role in educating the public about the importance of maintaining civil liberties in the fight against terrorism. For example, the Dialogues on Freedom program, held annually since September 11, 2002, facilitates high school students' discussion of American freedoms and constitutional rights and highlights differences from non-democratic governments.

As the practices of the NSA challenged here threaten the attorney-client relationship and basic civil liberties, LACBA joins its fellow bar associations in supporting the plaintiffs.[2]

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[2] LACBA receives many requests to participate in cases as an amicus curiae. Each request must first be submitted to LACBA's Amicus Briefs Committee, which consists of more than 20 lawyers with diverse practices. If the Amicus Briefs Committee decides that the matter is important to the profession and that LACBA should participate in the case, the request is then sent to LACBA's

D. The Beverly Hills Bar Association

The Beverly Hills Bar Association ("BHBA") has 4,000 members. For more than seventy years, the BHBA has dedicated itself to the advancement of the rule of law, civil rights, equal access to the courts, and judicial independence. This case presents crucial issues regarding the BHBA's historical concerns: Whether any branch of our federal government is unaccountable and above the rule of law? And, whether judicial review of executive actions can be unilaterally curtailed because of an undeclared "war on terrorism"?

E. The Boston Bar Association

The Boston Bar Association ("BBA") is the nation's oldest bar association, the direct successor to the earliest bar association in Boston founded by John Adams in 1761. The mission of the BBA is to advance the highest standards of excellence for the legal profession, facilitate access to justice, and serve the community at large. Throughout its history, the BBA has advocated for the preservation of the attorney-client privilege as an essential component of our adversarial system of justice. Allowing clients to communicate privately with their lawyers enables clients to secure meaningful access to the justice system. Legal representation is impaired if lawyers and their clients cannot communicate openly

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Executive Committee and, time permitting, to the Board of Trustees for final decision.

because of fear that the government may be listening. The BBA opposes any intrusions on the attorney-client privilege that would exceed the settled and narrow exceptions already established in American jurisprudence.

II. SUMMARY OF ARGUMENT.

Amici Curiae support the American Civil Liberties Union, et al. (collectively the "ACLU" or "plaintiffs")[3] in urging affirmance of an August 17, 2006 Order, in which the United States District Court for the Eastern District of Michigan permanently enjoined the NSA "from directly or indirectly utilizing the Terrorist Surveillance Program . . . in any way, including, but not limited to, conducting warrantless wiretaps of telephone and internet communications, in contravention of [FISA]". R.71 (J. & Permanent Inj. Order); see also Am. Civil Liberties Union v. NSA, 438 F. Supp. 2d 754 (E.D. Mich. 2006).[4]

Amici Curiae submit this brief to highlight the chilling impact that the NSA's Terrorist Surveillance Program (the "NSA Surveillance Program" or the "Program") has had and will continue to have on the relationship between lawyers and clients who are suspected of having ties to terrorist organizations. As set forth below, the NSA's admitted practice of wiretapping communications in the name of

[3] Jameel Jaffer, a member of the NYC Bar's Committee on Civil Rights, is counsel for plaintiffs but played no role in drafting this brief.

[4] Amici Curiae take no position in this brief on the datamining issue that is the subject of the ACLU's cross appeal.

national security—without a court order and pursuant to undisclosed standards that are never subjected to judicial scrutiny—chills a broad spectrum of constitutionally protected speech, including communications between attorneys and their clients. Since FISA provides a reasonable and comprehensive framework for the Executive Branch to protect the Nation's security—a framework that Congress has oftentimes amended and can further revise as necessary—Amici Curiae are concerned that fundamental rights, including the right to counsel are being impermissibly and unnecessarily undermined.

III. THE RELEVANT BACKGROUND.

In the wake of a newspaper article revealing that the NSA had been engaged in warrantless wiretapping of American citizens since 2001, see J. Risen & E. Lichtblau, Bush Lets U.S. Spy on Callers Without Courts, N.Y. Times, Dec. 16, 2005, at A1, the President informed the Nation that he had authorized and would continue to authorize such surveillance so long as the perceived threat posed by al Qaeda and other terrorist organizations continued.

Since that revelation, several public details have emerged concerning the NSA's program, which the district court in this case summarized as follows:

> "(1) the [NSA Surveillance Program] exists; (2) it operates without warrants; (3) it targets communications where one party to the communication is outside the United States, and the government has a reasonable basis to 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." ACLU, 438 F. Supp. 2d at 765.

In testimony before Congress, the Attorney General explained that, "like the police officer on the beat", NSA personnel unilaterally decide "what is reasonable" before proceeding with the wiretaps. Hearings Before the Sen. Judiciary Comm. (Feb. 7, 2006), transcript available at http://www.washingtonpost.com/wp-dyn/content/article/2006/02/06/AR2006020600931.html. The Department of Justice later elaborated that "decisions about what communications [the NSA] intercept[s] are made by professional intelligence officers at the NSA who are experts on al Qaeda and its tactics". See Department of Justice's Responses to Joint Questions from House Judiciary Comm. Minority Members ¶ 2, available at http://rawprint.com/pdfs/HJCrawstory2.pdf ("DOJ Responses").

It is uncontested that, to the extent that the procedures followed by NSA personnel to conduct the wiretaps are scrutinized at all, such oversight is only undertaken by other members of the Executive Branch. Thus, the Department of Justice says that individuals from the NSA's General Counsel and Inspector General offices review the program, with the participation of the Office of the Director of National Intelligence and Department of Justice. DOJ Responses ¶ 18. However, the standards purportedly being applied by NSA personnel in deciding to conduct wiretaps are undisclosed. (See Gov't Br. at 5.) Most importantly, the basis for that decision is never reviewed by a neutral, disinterested magistrate.

Recent developments also leave little doubt that the NSA's warrantless wiretaps reach communications between lawyers and their clients. Indeed, the Justice Department has affirmatively stated that "[a]lthough the Program does not specifically target the communications of attorneys . . . calls involving such persons would not be categorically excluded from interception if they met [the Program's] criteria". DOJ Responses ¶ 45; see also Privileged Conversations Said Not Excluded From Spying, N.Y. Times, March 25, 2006, at A10. Moreover, in a recent case challenging warrantless surveillance by the NSA, the United States Office of Foreign Asset Control inadvertently produced a "top secret" document that alerted the plaintiffs in that case, directors of a Saudi Arabian charity, that telephone conversations they had with their United States counsel "[had] been intercepted in the past". Al-Haramain Islamic Found., Inc. v. Bush, No. 06-274-KI, 2006 WL 2583425, at *7 (D. Or. Sept. 7, 2006) (ordering the United States to confirm or deny whether it had monitored the communications).

IV. THE NSA SURVEILLANCE PROGRAM IMPERMISSIBLY IMPEDES ATTORNEY-CLIENT COMMUNICATIONS.

The NSA surveillance program threatens to undermine a fundamental principle of a just legal system: That justice requires that persons accused by the government of wrongdoing have access to legal advice and that such legal advice can only be effective if lawyer-client communications are conducted in confidence

uninhibited by fears that government agents are listening in. One can characterize the impact of the Program in this case as a violation of the First Amendment, but it is even more fundamental than that. It subverts a vital element of the rule of law and due process.

A. Preserving the Confidentiality of Lawyer-Client Communications is Essential to the Effective Assistance of Counsel.

The principle that lawyer-client communications are entitled to confidentiality is deeply rooted in our legal system. The courts of this country long have recognized that disclosures made by clients to their attorneys to facilitate the rendering of legal advice are protected with a "seal of secrecy". See. e.g., Hunt v. Blackburn, 128 U.S. 464, 470 (1888) ("The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure."). Thus, "[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law". Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (citations omitted).

The purpose of such confidentiality "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice". Upjohn,

449 U.S. at 389; see also Fisher v. United States, 425 U.S. 391, 403 (1976) ("[I]f the client knows that damaging information could . . . be obtained from the attorney following disclosure . . . the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice."). As the Supreme Court has noted, the attorney-client privilege shields communications between lawyers and clients relating to legal advice in recognition of the basic principle "that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client". Upjohn, 449 U.S. at 389.[5]

FISA itself recognizes, in several ways, the importance of preserving the confidentiality of lawyer-client communications. First, FISA provides that "[n]o otherwise privileged communication[s] obtained in accordance with, or in violation of, the provisions of this subchapter shall lose [their] privileged character". 50 U.S.C. § 1806(a). Thus, to the extent that privileged communications between attorneys and clients (whether or not indicted) are wiretapped, they retain their privileged status and neither the privileged communications nor their fruit may be used in court.[6] This strict prohibition by

[5] Indeed, the district court in the present case remarked that "[t]he ability to communicate confidentially is an indispensable part of the attorney-client relationship". ACLU, 438 F. Supp. 2d at 768.

[6] Individuals must be given notice under FISA if the government intends to use the fruits of any such surveillance against a person in a criminal proceeding, and

itself deters the wiretapping of communications between attorneys and clients, since future prosecutions based on evidence obtained from illegal wiretaps could be compromised.

Second, prior to issuing a surveillance "order" (FISA's equivalent of a warrant),[7] a FISA court judge must find that the Government has adopted "minimization procedures", see 50 U.S.C. § 1805(a)(4), that are "reasonably designed . . . to minimize the acquisition and retention . . . of nonpublicly available information concerning unconsenting United States persons". Id. § 1801(h)(1). The NSA's current Legal Compliance and Minimization Procedures manual, which was last modified in 1993, specifically deals with the wiretapping of attorney-client communications and provides that:

> As soon as it becomes apparent that a communication is between a person who is known to be under criminal indictment and an attorney who represents that individual in the matter under indictment (or someone acting on behalf of the attorney), monitoring of that communication will cease and the communication shall be identified as an attorney-client communication in a log maintained for that purpose. The relevant portion of the tape containing that conversation will be placed under seal and the Department of Justice, Office of

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the criminal defendant then may move to suppress the evidence. See 18 U.S.C. § 2518(9)-(10); 50 U.S.C. § 1806(c) & (e); see generally United States v. Belfield, 692 F.2d 141, 144-46 (D.C. Cir. 1982).

[7] As "a recognition by both the Executive Branch and the [Legislative Branch] that the statutory rule of law must prevail in the area of foreign intelligence surveillance", S. Rep. No. 95-604, at 7 (1978), as reprinted in 1978 U.S.C.C.A.N. 3904, 3908 (hereinafter, "Legislative History"), FISA requires a judicial "order" for all electronic surveillance for foreign intelligence in the United States that may intercept communications of United States persons. 50 U.S.C. § 1805.

> Intelligence Policy and Review, shall be notified so that appropriate procedures may be established to protect such communications from review or use in any criminal prosecution, while preserving foreign intelligence contained therein.

Legal Compliance and Minimization Procedures, USSID 18 annex A, app. 1 § 4(b) (Jul. 27, 1993), available at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB23/07-01.htm (emphases added).

These minimization procedures include a recognition of the vital importance of confidentiality of lawyer client communications to the provision of effective assistance of counsel. The provisions, moreover, have been a part of FISA since its original enactment in 1978, and they remained unaltered after the tragedies of September 11, 2001, despite the fact that Congress enacted substantial amendments to FISA designed to enable the government to fight terrorism more effectively.[8]

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[8] In the months that followed AUMF, Congress amended FISA in an act titled "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism" (i.e., the USA PATRIOT Act of 2001). See Pub.L. No. 107-56, 115 Stat. 272. Among other things, the USA PATRIOT Act of 2001 increased the number of judges serving on the FISA court from seven to eleven. Pub. L. No. 107-56, § 208, 115 Stat. 272, 283. Within a few months of the USA PATRIOT Act of 2001, Congress amended FISA further, enlarging the window available to the Government retroactively to seek a warrant from 24 to 72 hours. Pub. L. No. 107-108, § 314(a)(2)(B), 115 Stat. 1394, 1402. Finally, FISA was last amended in 2004, as part of the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638, an act considered by the President to be "the most dramatic reform of our Nation's intelligence capabilities since President Harry S. Truman signed the National Security Act of 1947". See Press Release, White House, President Signs Intelligence Reform and Terrorism Prevention Act (Dec. 17, 2004), available at

B. Wiretapping Communications Between Lawyers and Their Clients Chills Communications Protected by the First Amendment.

The likelihood that the NSA has and will continue to wiretap communications between lawyers and their clients without a warrant, or equivalent FISA order, has impermissibly chilled[9] and will further chill constitutionally protected speech, in violation of the First Amendment. Before FISA was enacted, in United States v. United States District Court for the Eastern District of Michigan, 407 U.S. 297 (1972) (the "Keith" case), the Supreme Court noted—in the context of addressing warrantless wiretapping for domestic intelligence purposes but in words equally applicable to the NSA surveillance program—the degree to which warrantless surveillance is inconsistent with the guarantees of the First Amendment:

> History abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion

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http://www.whitehouse.gov/news/releases/2004/12/print/20041217-1.html. This last series of amendments added a new section to FISA, which imposes certain semi-annual reporting requirements on the Attorney General with respect to, among others, "electronic surveillance under section 1805". 50 U.S.C. § 1871.

[9] The district court in this action credited the submissions of various plaintiffs who, as practicing attorneys, had experienced the chilling effects of the NSA Surveillance Program on their communications with clients. According to these lawyers, the Program "has caused clients . . . to discontinue their communications with plaintiffs out of fear that their communications will be intercepted". ACLU, 438 F. Supp. 2d at 767. Lawyers also now bear an increased financial burden "in having to travel substantial distances to meet personally with their clients and others relevant to their cases". Id. In sum, the NSA Surveillance Program has "significantly crippled" lawyers in their ability to "competently and effectively represent their clients", id. at 769, and saddles clients (and lawyers who agree to represent clients on a pro bono basis) with extraordinary and unnecessary expenses.

> those who most fervently dispute its policies. . . . The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect "domestic security". Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent.

Id. at 314; see also ACLU, 438 F. Supp. 2d at 776 (quoting from Keith).

Keith also underscored the inherent danger of permitting the acts of the Executive to go unchecked:

> The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute. But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech. . . . [T]he Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised.

Id. at 317.[10]

The legislative history of FISA demonstrates that Congress shared the Keith Court's view that warrantless searches by an unchecked Executive raised the

[10] See also Scott, 436 U.S. at 137 ("The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.") (quoting Terry v. Ohio, 392 U.S. 1, 21-22 (1968)).

specter of abuse—especially given the documented history of abuse in this area[11]—and chilled protected speech:

> Also formidable—although incalculable—is the "chilling effect" which warrantless electronic surveillance may have on the Constitutional rights of those who were not targets of the surveillance, but who perceived themselves, whether reasonably or unreasonably, as potential targets. Our Bill of Rights is concerned not only with direct infringements on Constitutional rights, but also with government activities which effectively inhibit the exercise of these rights. The exercise of political freedom depends in large measure on citizens' understanding that they will be able to be publicly active and dissent from official policy, within lawful limits, without having to sacrifice the expectation of privacy that they rightfully hold. Arbitrary or uncontrolled use of warrantless electronic surveillance can violate that understanding and impair that public confidence so necessary to an uninhibited political life.

Legislative History at 8.

As one pre-FISA Court of Appeals described the chilling effect of warrantless foreign intelligence gathering: "To allow the Executive Branch to make its own determinations as to such matters invites abuse, and public

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[11] Following its investigation of past practices of the Executive Branch, Congress was informed that the "vague and elastic standards for wiretapping and bugging" the Executive Branch had been applying resulted in "electronic surveillances which, by any objective measure, were improper and seriously infringed the Fourth Amendment rights of both the targets and those with whom the targets communicated". Legislative History at 8. For instance, Congress was informed that past subjects of surveillance "ha[d] included a United States Congressman, congressional staff member, journalists and newsmen, and numerous individuals and groups who engaged in no criminal activity and who posed no genuine threat to the national security, such as two White House domestic affairs advisers and an anti-Vietnam war protest group". Id. Furthermore, claims of national security had sometimes been used to justify warrantless wiretapping of members of the Democratic Party, ostensibly because the Executive Branch had boundlessly defined the term "dissident group". United States v. Falvey, 540 F. Supp. 1306, 1309 (E.D.N.Y. 1982).

knowledge that such abuse is possible can exert a deathly pall over vigorous First Amendment debate on issues of foreign policy". Zweibon v. Mitchell, 516 F.2d 594, 635-36 (D.C. Cir. 1975).

The chilling effects of the NSA Surveillance Program are most troubling in the context of the relationship between an attorney and his client. The right of meaningful access to the courts is one aspect of the First Amendment right to petition the government, California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972),[12] and the right to assistance of counsel—which includes the right to confidential attorney-client communication—is an integral part of that right. See, e.g., Goodwin v. Oswald, 462 F.2d 1237, 1241 (2d Cir. 1972) (prison inmates, who have fewer First Amendment rights than non-incarcerated persons, possess the rights to access the courts, to have assistance of counsel, and to have "the opportunity for confidential communication between attorney and client"). The NSA Surveillance Program makes in-person communication virtually the only means by which attorneys and clients reasonably can be assured that their dialogue will remain confidential. As a practical reality, however, such in-person meetings between an attorney and a client abroad may become so burdensome, costly and ineffective that the Program might very well chill all effective communications

[12] "The right of access to the courts is indeed but one aspect of the right of petition." California Motor, 404 U.S. at 510.

between these attorneys and their clients, thus undermining the First Amendment right completely.

The Supreme Court has also held that, for groups that are forced to resort to the courts to redress disparate treatment at the hands of the government, the right to pursue litigation is protected by the First Amendment. NAACP v. Button, 371 U.S. 415, 428-30 (1963). The attorneys who represent these groups and thereby challenge what they believe to be unlawful government policies similarly engage in a form of protected political expression. Id.; see also In re Primus, 436 U.S. 412, 431-32 (1978) ("The First and Fourteenth Amendments require a measure of protection for 'advocating lawful means of vindicating legal rights,' including 'advising another that his legal rights have been infringed....") (internal citations omitted); Westchester Legal Servs., Inc. v. County of Westchester, 607 F. Supp. 1379, 1382 (S.D.N.Y. 1985) ("The First Amendment 'protects the right of associations to engage in advocacy on behalf of their members.'") (quoting Smith v. Arkansas State Highway Employees, 441 U.S. 463, 464 (1979)).

Many of those whom the NSA Surveillance Program has likely targeted have been accused by the United States of somehow having ties to terrorism, and are vigorously litigating their innocence against the Government. But "the efficacy of litigation as a means of advancing the cause of civil liberties

often depends on the ability to make legal assistance available to suitable litigants". Primus, 436 U.S. at 431. The NSA Surveillance Program seriously inhibits the ability of these accused persons effectively to litigate their position because it necessarily chills communications with their attorneys, as well as communications between their attorneys and witnesses and others who reside outside the United States. Moreover, the inability of the attorneys effectively to litigate against what they believe to be unlawful government conduct effectively chills the speech and expression of those attorneys as well. See Button, 371 U.S. at 428-30 (White, J., concurring in part and dissenting in part) (finding constitutionally protected the activities of NAACP staff lawyers in, among other things, "advising Negroes of their constitutional rights"); see also Primus, 436 U.S. at 431-32.

C. Wiretapping Communications Between Lawyers and Their Clients Inhibits the Effective Assistance of Counsel Guaranteed by the Sixth Amendment.

The privacy of lawyer-client communication is also recognized as critical to the effective assistance of counsel guaranteed by the Sixth Amendment.[13] See United States v. Chavez, 902 F.2d 259, 266 (4th Cir. 1990) ("[A] critical component of the Sixth Amendment's guarantee of effective assistance is the ability of counsel to maintain uninhibited communication with his

[13] "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

client and to build a 'relationship characterized by trust and confidence'." (quoting Morris v. Slappy, 461 U.S. 1, 21 (1983)) (emphasis added)); United States v. Rosner, 485 F.2d 1213, 1224 (2d Cir. 1973) ("[T]he essence of the Sixth Amendment right is, indeed, [the] privacy of communication with counsel." (citations omitted)) .

Thus, when the Government intrudes into that privacy, the intrusion often renders counsel's assistance ineffective and thereby violates the Sixth Amendment rights of the criminal defendant. See, e.g., Weatherford v. Bursey, 429 U.S. 545, 558 (1977) (government intrusion into attorney-client relationship violates the Sixth Amendment if the defendant is prejudiced by the intrusion); Bishop v. Rose, 701 F.2d 1150, 1157 (6th Cir. 1983) (holding that a Sixth Amendment violation occurred where the government obtained and used a document containing confidential communications between the defendant and his attorney and noting that the issue involved "a constitutional right which is at the heart of our adversary system of criminal justice); United States v. Irwin, 612 F.2d 1182, 1185 (9th Cir. 1980) ("It is clear that government interference with a defendant's relationship with his attorney may render counsel's assistance so ineffective as to violate his Sixth Amendment right to counsel".); Mastrian v. McManus, 554 F.2d 813, 820-21 (8th Cir. 1977) ("It is clear 'that an accused does not enjoy the effective aid of counsel if he is denied the right of private

consultation with him.'") (quoting Coplon v. United States, 191 F.2d 749, 757 (D.C. Cir. 1951)); United States v. Gartner, 518 F.2d 633, 637 (2d Cir. 1975) ("When conduct of a Government agent touches upon the relationship between a criminal defendant and his attorney, such conduct exposes the Government to the risk of fatal intrusion and must accordingly be carefully scrutinized."); Caldwell v. United States, 205 F.2d 879, 881 (D.C. Cir. 1953) ("[I]nterception of supposedly private telephone consultations between accused and counsel, before and during trial, denies the accused his constitutional right to effective assistance of counsel, under the Fifth and Sixth Amendments."); 24 C.A. Wright & K.W. Graham, Jr., Federal Practice and Procedure § 5489 (1986) ("[C]onfidential communications between a criminal defendant and his attorney are thought to be a right guaranteed by the Sixth Amendment . . . .").

Although the details of the NSA Surveillance Program are murky, it is clear that the Program is fundamentally at odds with the Sixth Amendment's deep respect for attorney-client confidentiality. The Department of Justice has admitted that the Program would allow monitoring of attorney-client communications if the persons under surveillance otherwise meet the standards for surveillance under the Program. DOJ Responses ¶ 45. By threatening the sanctity of the attorney-client

relationship,[14] the Program chills all communications between those who "perceive themselves, whether reasonably or unreasonably, as potential targets"[15] of surveillance and their attorneys. A client who worries that his communications with counsel could be subject to surveillance will understandably be "reluctant to confide in his lawyer", Fisher, 425 U.S. at 403, and will thus be unable to obtain fully informed advice. The NSA Program thus threatens to deny effective assistance of counsel, not only to clients who are criminal defendants, but to all those clients detained or accused as alleged members of organizations allegedly "affiliated" with or providing "support" to al Qaeda. Indeed, given the NSA's unfettered and unreviewable discretion in applying those vague terms, the Program is likely to chill the communications of lawyers with many other clients who may reasonably perceive themselves to be the targets of such wiretapping.

D. The NSA Surveillance Program Creates a Serious Ethical Dilemma for Lawyers.

The chilling effect caused by the NSA's unilateral, warrantless surveillance program creates a serious dilemma for lawyers representing clients outside of the United States accused of links to al Qaeda or organizations allegedly

[14] "The sanctity of the constitutional right of an accused privately to consult with counsel is generally recognized and zealously enforced by state as well as federal courts." Coplon, 191 F.2d at 758. In stark contrast to the NSA surveillance program, FISA shows considerable respect for the attorney-client relationship. See supra, for a discussion of FISA's minimization procedures.

[15] Legislative History at 8.

affiliated with or supporting al Qaeda, as well as lawyers with clients outside the United States who have reason to perceive themselves within the potentially broad scope of the program.

The Model Rules of Professional Conduct ("Model Rules") promulgated by the American Bar Association require an attorney to provide competent representation to his client, including the "thoroughness and preparation reasonably necessary for the representation". ABA Model Rule 1.1. Under Model Rule 1.4, an attorney also owes his client a duty of communication, pursuant to which he must "reasonably consult with the client about the means by which the client's objectives are to be accomplished". The Comment to Model Rule 1.4 emphasizes the importance of this communication to the lawyer-client relationship, explaining that "[r]easonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation".

The same standards of professional responsibility also require an attorney to maintain as confidential information that relates to the representation of a client. See id. 1.6. This ethical obligation is expansive and is substantially broader than the attorney-client privilege. See id. cmt. ¶ 3 ("The confidentiality rule . . . applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."). The lawyer's fundamental duty of confidentiality "contributes to the trust that is the

hallmark of the client-lawyer relationship" and encourages clients "to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter". Id. ¶ 2. The duty is therefore central to the functioning of the attorney-client relationship and to effective representation.

Attorneys whose obligations require them to communicate with potential targets of the Program residing abroad now confront a difficult and troubling ethical dilemma: either discontinue their telephonic and electronic communications with these clients and risk violating their obligations of competence and candor, or continue communicating with these clients at the risk of violating their professional obligation to take all reasonable steps to protect client confidences. In its decision below, the district court credited the declaration of legal ethics professor Leonard M. Niehoff, who elaborated on this dilemma as follows:

> "On one hand, proceeding with these electronic and telephonic communications would create a substantial risk of disclosure of information deemed confidential by the ethics rules. On the other hand, failing to proceed with these communications would create a substantial risk of noncompliance with duties of diligence, competence, zealous representation, and thorough preparation. An attorney may be able to avoid this conflict by traveling oversees and conducting in-person interviews of individuals who have relevant personal knowledge. Such an approach, however, may not always be possible, and, when possible, will burden the representation with gross inefficiencies, substantially increased costs, and significant logistical difficulties. In sum, 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 [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." R.47 Ex. M, Niehoff Decl. ¶ 19.

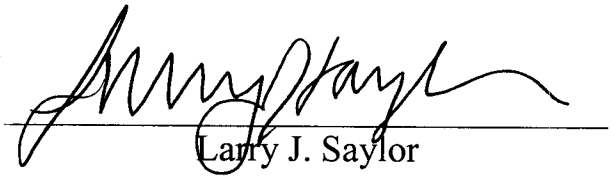
The NSA Surveillance Program thus raises serious and disturbing ethical concerns, as the district court properly found. See ACLU, 438 F. Supp. 2d at 768 (finding that the Program poses "'an overwhelming, if not insurmountable, obstacle to effective and ethical representation'" (quoting R.47 Ex. M, Niehoff Decl.)). Indeed, its pernicious effect may be even worse than is realized currently because of the potentially vast (and unknown) scope of attorney-client communications being monitored.

Conclusion

For the foregoing reasons, Amici Curiae respectfully request that this Court affirm the district court's August 17, 2006 Order permanently enjoining the NSA Surveillance Program.

November 17, 2006

MILLER, CANFIELD, PADDOCK AND STONE, PLC

by 
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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation provided in Fed.R.App.P.32(a)(7)(B). The foregoing brief contains 4,839 words of Times New Roman (14 point) proportional type. The word processing software used to prepare this brief was Microsoft-Word for Windows XP.

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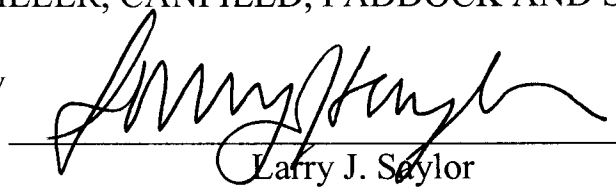
By 

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1. JEFFREY L. WIDEN, being first duly sworn, deposes and says that he is an employee of the law firm of Miller, Canfield, Paddock and Stone, PLC.

2. On the 17th day of November, 2006, he served copies of Brief Amici Curiae Of The Association Of The Bar Of The City Of New York, The Bar Association Of San Francisco, The Los Angeles County Bar Association, The Boston Bar Association And The Beverly Hills Bar Association In Support Of Plaintiffs-Appellees/Cross-Appellants And Urging Affirmance; and Notice of Appearance of Larry J. Saylor upon the following parties at the addresses so designated by them for said purpose:

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3. Said services were made by enclosing a true set of copies of the aforementioned documents, in a pre-paid, correctly addressed envelope and depositing said documents with the U.S. Post Office, in the State of Michigan.

Jeffrey L. Widen

Subscribed and sworn to before me
This 17th day of November 2006

Michelle M.. Lingenfelter, Notary Public
Wayne County, Michigan
My commission expires 5/27/2011

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