UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

| AMERICAN CIVIL LIBERTIES UNION, et al. |) | |
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| Plaintiffs, |) | Case No. 2:06-CV-10204 Hon. Anna Diggs Taylor |
| v. |) | |
| NATIONAL SECURITY AGENCY, et al. |) | |
| Defendants. |) | |

DEFENDANTS' REPLY IN SUPPORT OF A STAY PENDING APPEAL

<u>INTRODUCTION</u>

This case presents the paradigmatic example of an injunction that should be stayed pending appeal. In the judgment of the President and the nation's senior intelligence officials, the Terrorist Surveillance Program ("TSP") is a crucial tool in an ongoing armed conflict for detecting and preventing potentially catastrophic terrorist attacks on the U.S. homeland. At a minimum, this judgment is entitled to great respect by the courts. If not stayed while the Court of Appeals considers the extraordinarily serious legal questions presented by the Government's appeal, the Court's injunction of the TSP presents a grave risk of harm to the national security, and thus to the public at large. Indeed, the Court's decision represents the first time in the nation's history that a court has held unlawful and enjoined a foreign intelligence surveillance program authorized by the President in order to protect the nation from attack. At the very least, there can be no dispute that this appeal presents serious legal questions.

Plaintiffs' Opposition to Defendants' Motion for a Stay Pending Appeal ("Pls. Opp.") ignores the significant harm posed by the injunction and similarly disregards the fact that the Court of Appeals may (and, we submit, should) decide the significant legal questions at issue in

the Government's favor. Plaintiffs argue that the Foreign Intelligence Surveillance Act suffices to protect national security and, therefore, should trump the judgment of the President as to the need for the TSP. But that, of course, is among the matters at issue in this case. In the meantime, the harm posed to the Government's interests is irreparable and heavily outweighs any harm to Plaintiffs.

Moreover, Plaintiffs' attempt to argue that this appeal does not present serious legal questions is not credible. This case raises legal issues of the gravest order in our constitutional system. Substantial and long-standing caselaw establishes that the President has constitutional authority to authorize foreign intelligence surveillance targeted at agents of a foreign power; indeed, even the cases on which Plaintiffs rely specifically reserve that question. Moreover, apart from the ultimate merits, the case raises substantial questions about whether wellestablished doctrines concerning state secrets will permit this lawsuit to proceed. Although the court rejected dismissal of these claims on state secrets grounds, this issue is clearly of substantial significance.

Granting a stay pending appeal is the only reasonable and prudent course here.¹

<u>ARGUMENT</u>

I. THE COURT'S INJUNCTION WILL IMPOSE IRREPARABLE HARM ON THE GOVERNMENT THAT FAR OUTWEIGHS ANY HARM TO PLAINTIFFS.

As the Sixth Circuit has stressed, the threshold question in deciding a stay pending appeal is "whether *Appellants* would be irreparably harmed if this court fails to *stay* the injunction."

At a minimum, should the Court decline to stay its injunction pending the entire appeal, Defendants respectfully request that it at least grant an interim administrative stay so that Defendants may seek such a stay from the Court of Appeals. Plaintiffs have advised that they take no position on whether the Court should enter an interim stay.

Family Trust Foundation of Kentucky v. Kentucky Judicial Conduct, 388 F.3d 224, 228 (6th Cir. 2004) (original emphasis). Plaintiffs' sole contention on this point is to assert that the Government would suffer no harm if this Court's decision invalidating the TSP is given immediate effect and the Foreign Intelligence Surveillance Act governs the intercept of all al Qaeda communications. See Pls. Opp. at 2, 6, 13. But this posits no more than that the Plaintiffs' position is correct. That argument conflates two distinct prongs of the stay inquiry. The irreparable injury inquiry cannot be bypassed on the assumption that the party seeking a stay has no chance of success on the merits. Here, the irreparable injury prong alone warrants a stay.

The potential irreparable injury is unparalleled. The Terrorist Surveillance Program was authorized by the President precisely because he determined that existing surveillance mechanisms under the FISA were not sufficient to meet the al Qaeda terrorist threat. Thus, it is simply no answer to say that the FISA remains available. If enjoined, the important additional coverage provide by the TSP would be eliminated, and a corresponding gap in the nation's surveillance protection re-opened. In the judgment of the President and his senior intelligence and military advisors, FISA cannot fill that gap; given the potentially catastrophic stakes, the concomitant risk should not be permitted during the expedited period in which the Court of Appeals reviews the serious legal questions presented by this case. Plaintiffs are wrong to suggest that this harm is speculative. See Pls. Opp. at 6. While Defendants could not possibly know whether the Court's injunction will lead to a undetected terrorist attack, the actual and present harm of an injunction is that this risk would be incurred immediately. The high profile nature of this case virtually ensures that al Qaeda and its affiliates will learn that the TSP has

been shut down in the event that no stay is entered. The Court is referred to the *In Camera*, *Ex*Parte Declaration of General Alexander for a further discussion of the impact of its injunction.²

The harm to national security at issue here greatly outweighs any harm to Plaintiffs from a stay. In the face of an injunction that halts an intelligence gathering mechanism directed at the al Qaeda terrorist threat, Plaintiffs' allegations of self-induced harm, based on their own speculation as to how the TSP impacts them, cannot outweigh the Government's interests here. Moreover, the duration of this stay would be limited because the Sixth Circuit has already set an expedited schedule for briefing this appeal. Thus, even if Plaintiffs' claims of a chilling effect were well-founded in fact, any such harm to a small number of communicants speaking with possible al Qaeda associates who might be targeted under the TSP would not outweigh the

The cases on which Plaintiffs' rely are quite clearly distinguishable. In *Baker v. Adams County/Ohio Valley Sch. Bd.*, 310 F.3d 927, 930-31 (6th Cir. 2002), the Court of Appeals declined to stay an order to remove a monument of the Ten Commandments held to violate the Establishment Clause because the sole potential harm identified was monetary. Similarly, in *Americans United for Separation of Church and State v City of Grand Rapids*, 784 F. Supp. 415 (W.D. Mich. 1991), the Court declined to stay an injunction barring the display of a Menorah on public property. The interests at stake in those case are not remotely comparable to the national security interests at stake here.

Indeed, Plaintiffs' claimed harms are still mere allegations because they were not—and could not be—adjudicated properly. The Court upheld the Government's assertion of privilege, *See ACLU v. NSA*, 438 F. Supp 2d 754, 764 (E.D. Mich. 2006)(appeal pending), which covered facts concerning whether or not Plaintiffs' communications were being monitored and the scope of the TSP. Thus, the Court's conclusion that the Defendants purportedly engaged in "illegal monitoring of [Plaintiffs] telephone conversations and email communications," and that the alleged harm to Plaintiffs' professional responsibilities "stems directly from the TSP. . . and can unequivocally be traced to the TSP," *see id.* at 770, present questions of fact that Defendants could not address without explaining the classified scope and operations of the TSP.

damage to national security immediately risked by the Court's injunction for the short period of time in which an expedited appeal is pending.⁴

II. PLAINTIFFS' ASSERTION THAT NO SERIOUS QUESTIONS ARE RAISED BY THIS CASE IS NOT CREDIBLE.

Plaintiffs' assertion that Defendants have not raised serious legal questions going to the merits, *see* Pls. Opp. at 6, is not credible.⁵ Plaintiffs do nothing more than recite why they think the Court's decision was correct. *See id.* at 6-13.⁶ Plaintiffs argue that a stay is not warranted where "the injunction merely requires defendants to comply with the law," *see* Pls. Opp. at 3,

In particular, Plaintiffs' assertion that their First Amendment rights would be injured by a stay pending appeal, *see* Pls. Opp. at 4, is meritless since no showing has been made that the TSP in any way regulates speech or inhibits First Amendment rights. *See* Defs. Stay Mem. at 15. Plaintiffs' reliance on *Elrod v. Burns*, 427 U.S. 347 (1976), is therefore misplaced. In that case the Supreme Court upheld a preliminary injunction where plaintiffs demonstrated they were actually threatened with the loss of jobs for not affiliating with a political party. *See* 427 U.S. at 351. Similarly, in *Tucker v. City of Fairfield, Ohio*, 398 F.3d 457, 460 (6th Cir.), *cert. denied*, 126 S. Ct. 399 (2005), and *Chabad of Southern Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F. 3d 427 (6th Cir. 2004), the court affirmed preliminary injunctions barring enforcement of ordinances that abridged First Amendment rights where there was no doubt these requirements applied to the plaintiffs' activities.

Indeed, two other courts that declined to dismiss similar challenges to the Terrorist Surveillance Program on state secrets grounds both certified their decisions for immediate appellate review under 28 U.S.C. § 1292(b) on the ground that a controlling question of law was presented as to which there are substantial grounds for a difference of opinion. *See Hepting v. AT & T Corp.* 439 F. Supp. 2d 974, 1011 (N.D. Cal. 2006) and *Al-Haramain Islamic Foundation, Inc. v. Bush*, ___F. Supp. 2d ____, 2006 WL 2583425, *17 (D. Oregon 2006).

Plaintiffs first incorrectly contend that the Court "properly rejected" the Government's state secrets claims. See Pls. Opp. at 6. The Court upheld the Government's assertion of the state secrets privilege, see ACLU v. NSA, 438 F. Supp. 2d at 764 (after reviewing ex parte classified in camera submissions "the court is convinced that the privilege applies" because a reasonable danger exists that disclosure of information would harm national security), but found that the privileged information was not needed to decide the case, see id. at 766. The key issue on appeal is whether this conclusion was correct, and it presents a serious question because, as we will submit on appeal, the lawfulness of a current foreign intelligence program cannot be fairly adjudicated without facts describing the scope, operation, and need for that program.

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and that the only law that matters is the Foreign Intelligence Surveillance Act, see id. at 8-9. But this simply assumes Plaintiffs' view of the case. Whatever else is true about the ultimate disposition of the appeal, the legal issues are more complex than Plaintiffs attempt to make them. This case also raises the issue of whether Congress has authorized the TSP through the Authorization for the Use of Military Force and, even if not, whether or to what extent Congress could, through the FISA, constitutionally preclude the President from authorizing the TSP. Plaintiffs' assertion that there is no serious question as to the matter disregards the long line of authority establishing that the President has constitutional authority to conduct warrantless searches to obtain foreign intelligence information. Congress's enactment of the FISA did not negate that power but, instead, has now led to the "serious question of law" presented by this case—whether and to what extent Congress can, consistent with the Constitution, limit the President's power to authorize foreign intelligence surveillance in the precise circumstances implicated here. Moreover, the facts relevant to that question cannot be disclosed without

See United States v. Truong Dinh Hung, 629 F.2d 908, 913 (4th Cir. 1980); United States v. Buck, 548 F.2d 871, 875 (9th Cir.), cert. denied, 434 U.S. 890 (1977); United States v. Butenko, 494 F.2d 593, 605 (3d Cir.) (en banc), cert. denied sub nom., Ivanov v. United States, 419 U.S. 881 (1974); United States v. Brown, 484 F.2d 418, 426 (5th Cir. 1973), cert. denied, 415 U.S. 960 (1974). Even the cases on which Plaintiffs rely leave open whether a warrant is required for foreign intelligence surveillance of agents of a foreign power. See United States v. United States District Court, 407 U.S. at 308 ("the instant case requires no judgment on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country."). While a four-judge plurality in Zweibon v. Mitchell, 516 F.2d 594, 651 (D.C. Cir. 1975) (en banc plurality), suggested that foreign intelligence surveillance authorized by the President would likely be subject to the Fourth Amendment's warrant requirement absent exigent circumstances, the D.C. Circuit has since indicated that this "suggest[ion]" was merely "dicta." See United States v. Belfield, 692 F.2d 141, 145 n.15 (D.C. Cir. 1982). Moreover, the Zweibon plurality carefully limited its holding to require a warrant only where "a wiretap is installed on a domestic organization that is neither the agent of nor acting in collaboration with a foreign power." 516 F.2d at 614. The TSP is clearly directed at agents of a foreign power—the al Qaeda terrorist network.

revealing sensitive intelligence sources and methods. Again, there can be no doubt that these are weighty and substantial issues.

The Supreme Court's decisions in Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952) and, more recently, in Hamdan v. Rumsfeld, __ U.S. __, 2006 WL 1764793 (June 29, 2006), do not remotely demonstrate that the questions presented by this case have been resolved. See Pls. Opp. at 9. Those cases did not involve challenges to intelligence gathering programs or implicate the FISA. And where the line between presidential and congressional powers may be drawn in this case cannot be "resolved" by simplistic references to separation of powers issues arising in markedly distinct contexts. Nothing in *Youngstown* remotely suggests that Congress may without limitation intrude on a core Presidential power under Article II. See Youngstown, 343 U.S. at 637-38 (Jackson, J. concurring) (even where the President's actions are incompatible with the expressed or implied will of Congress, "he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter"). Indeed, the mere existence of this category of analysis makes clear that there is a zone of executive authority granted in the Constitution that Congress cannot invade. Moreover, fifty years after Youngstown, the FISA Court of Review "[took] for granted" that the President did have inherent authority with respect to foreign intelligence surveillance. See In re Sealed Case, 310 F.3d 717, 742 (FISA Ct. of Rev. 2002). Thus, this case, unlike *Youngstown* or *Hamdan*, concerns the impact of a statutory enactment on the President's long-recognized authority with respect to

foreign intelligence surveillance, and cannot be resolved without a careful consideration of the particular circumstances presented.8

Likewise, whether the Court adjudicated the Plaintiffs' Fourth Amendment claims properly, including by doing so without information protected by the state secrets privilege, is a serious question for further review. It is well established that courts have not only recognized an exception to the warrant requirement both in cases involving foreign intelligence, see supra, but, more generally, that special law enforcement needs may justify acting without a warrant. See e.g. MacWade v. Kelly, ____ F.3d ____, 2006 WL 2328723 at *6-*13 (2d Cir. 2006) (applying "special needs" doctrine to uphold warrantless and suspicionless searches of containers in New York City subway to help prevent terrorist attack). Whether and to what extent a warrant is required turns on particular facts demonstrating the foreign intelligence focus of the challenged surveillance or the demonstrated need to proceed without a warrant; beyond this, whether and to what extent a search is reasonable under the Fourth Amendment turns on the particular facts governing the searches being challenged. See Halkin v. Helms, 690 F.2d 977, 1003 & n.96 (D.C. Cir. 1982) (Fourth Amendment challenge to alleged unlawful surveillance cannot be resolved where state secrets concerning the existence and manner of surveillance cannot be disclosed). This authority demonstrates that Defendants' position is well founded in precedent and deserving of further review before a sweeping injunction takes effect.

Hamdan did not even address, let alone resolve, a constitutional question concerning whether the President's authority may supersede the requirements of statutory law. See Hamdan at *21 n.23 (noting that the "Government does not argue" that the President may disregard limitations that Congress has, in the proper exercise of its own war powers, placed on his powers."). Hamdan concerned a specific issue of statutory construction: was the use of a military commission to try Hamdan consistent with the requirements of the Uniform Code of Military Justice.

III. THE OVERBROAD SCOPE OF THE COURT'S INJUNCTION PRESENTS A SERIOUS QUESTIONS FOR REVIEW.

Plaintiffs' final contention that the scope of the Court's injunction presents no serious question of law is also meritless; indeed, the injunction entered by the Court is substantially overbroad. It is fundamental that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." Califano v. Yamasaki, 442 U.S. 682, 702 (1979). The key factor in deciding whether injunctive relief may benefit parties not before the Court is whether such relief is incidentally necessary to give the named parties a complete remedy. This well-settled rule has been applied in Sixth Circuit and other circuits. See, e.g., Sharpe v. Cureton, 319 F.3d 259, 273 (6th Cir.) (rejecting as "overly broad" an injunction that extended to non-parties where unnecessary to provide relief to the named plaintiffs), cert. denied, 540 U.S. 876 (2003), (citing Aluminum Workers Int'l Union Local Union No. 215 v. Consol. Aluminum Corp. 696 F.2d 437, 446 (6th Cir.1982) (because equitable relief is an extraordinary remedy, its scope should be strictly tailored to what the situation specifically requires). See also Virginia Society for Human Life, Inc. v. Federal Election Comm'n, 263 F.3d 379, 393 (4th Cir. 2001) and Meinhold v. United States Dep't of Defense, 34 F.3d 1469, 1480 (9th Cir. 1994) (reversing as overbroad nationwide injunctions where relief could otherwise be afforded to the plaintiffs).9

The authority on which Plaintiffs rely is once again inapposite. In *Bresgal v. Brock*, 843 F.2d 1163, 1170-1171 (9th Cir. 1987), the district court ordered the Secretary of Labor to change certain migrant labor regulations to cover forestry workers. The court found that the regulation itself had to be changed, even if this incidentally benefitted nonparties, since no relief could have been provided to the plaintiffs otherwise. *See Bresgal*, 843 F.2d at 1171. In *Forchner Group v. Arrow Trading Co.*, 124 F.3d 402 (2d Cir. 1997), no issue of a nationwide injunction was presented; the court enjoined solely the party before the Court. In *Bano v. Union Carbide Corp.*, (continued...)

Here, it is clearly not necessary to enjoin the Terrorist Surveillance Program in all applications as to all people in order to grant Plaintiffs relief. Any actual injury suffered by the Plaintiffs would be fully remedied by an injunction of the TSP as to them alone. 10 The scope of the Court's injunction therefore also presents a serious question of law on appeal.

CONCLUSION

For the foregoing reasons, the Court should issue a stay pending appeal of the Judgment and Permanent Injunction Order entered in this case on August 17, 2006.

Respectfully submitted,

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⁹(...continued)

³⁶¹ F.3d 696, 716 (2d Cir. 2004), the court declined to extend its injunction to a third party. The injunction at issue in *Doe v. Rumsfeld*, 341 F. Supp. 2d 1, 17-18 (D. D.C. 2004), remanded, 172 Fed. Appx. 327 (D.C. Cir. 2006), was dissolved on its own terms as moot while an appeal was pending when an applicable regulation was modified. See 172 Fed. Appx. at 327-28.

Of course Defendants submit that affording any relief to the Plaintiffs is not warranted for the reasons set forth in our prior submissions, but limiting such relief solely to the Plaintiffs would have avoided an improperly overbroad injunction.

CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2006, I electronically filed the foregoing Defendants' Reply in Support of a Stay Pending Appeal using the Court's ECF system, which will send an electronic notification of such filing to plaintiffs' counsel of record, including Ann Beeson (annb@aclu.org) and Jameel Jaffer (jjaffer@aclu.org) of the American Civil Liberties Union.

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