08-4726-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THOMAS WILNER, GITANJALI GUTIERREZ, MICHAEL J. STERNHELL, JONATHAN WELLS DIXON, JOSHUA COLANGELO-BRYAN, BRIAN J. NEFF, JOSEPH MARGULIES, SCOTT S. BARKER, ANNIE J. CASTLE, JAMES E. DORSEY, ASMAH TAREEN, RICHARD A. GRIGG, THOMAS R. JOHNSON, GEORGE BRENT MICKUM IV, STEPHEN M. TRUITT, JONATHAN HAFETZ, TINA M. FOSTER, ALISON SCLATER, MARC D. FALKOFF, DAVID H. REMES, H. CANDACE GORMAN, CHARLES CARPENTER, JOHN A. CHANDLER AND CLIVE STAFFORD SMITH,
Plaintiffs-Appellants,

v.

NATIONAL SECURITY AGENCY and DEPARTMENT OF JUSTICE,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

AMICUS CURIAE BRIEF OF NATIONAL SECURITY ARCHIVE IN SUPPORT OF APPELLANTS TO VACATE AND REMAND

MARK H. LYNCH
JENNIFER L. SAULINO
Covington & Burling LLP
1201 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 662-6000

MEREDITH FUCHS
National Security Archive
George Washington University
Gelman Library Suite 701
2130 H Street, N.W.
Washington, DC 20016
(202) 994-7000

Attorneys for Amicus Curiae, National Security Archive

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

FEDERAL CASES

FEDERAL STATUTES

INTEREST OF AMICUS CURIAE

The National Security Archive (the "Archive") is an independent, non-governmental research institute and library located at the George Washington University. The Archive collects and publishes declassified documents, concerning United States foreign policy and national security matters, obtained through the Freedom of Information Act. As part of its mission to broaden access to the historical record of the U.S. government, the Archive is a leading user of the FOIA. This *amicus* brief is filed with the consent of the parties.

SUMMARY OF ARGUMENT

Amicus submits this brief to demonstrate why the Court should focus on the narrow question of whether the government has carried its burden of demonstrating that it can neither confirm nor deny the sole fact that any of the plaintiffs -- all of whom are attorneys representing Guantanamo detainees -- was targeted for surveillance under the Terrorist Surveillance Program ("TSP"). Amicus further suggests that this core question does not include the questions of (1) whether any of the attorneys were overheard in surveillance targeted at other people in the TSP; or (2) whether the attorneys were overheard in surveillance lawfully authorized by the Foreign Intelligence Surveillance Court. Indeed, the core question does not even include the question of whether any particular intercepted message can be disclosed. This case was improperly stalled at the outset because of a government

refusal to confirm or deny whether these attorneys representing Guantanamo detainees had been targeted under the TSP, so all of the remaining questions have yet to be litigated and are not before this Court.

When the core question identified by amicus is brought into focus, it is clear that the government has not carried its burden of demonstrating that it can neither confirm nor deny whether any of the plaintiffs were targeted under the TSP. The district court's decision represents an unprecedented expansion of the circumstances in which the government may assert the "Glomar Response" to terminate a FOIA suit before it is even determined whether the requested records exist. The Glomar Response is a court-created enhancement to FOIA's enumerated exemptions, and is subject to abuse if not carefully cabined. This Court has never ruled on the Glomar Response, but courts that have allowed the Glomar Response have carefully adhered to the requirement that agencies disclose publicly in as much public detail as possible why the Glomar Response is necessary. As demonstrated below, the government justified its Glomar Response with generalized and abstract explanations that are insufficient to carry the government's burden of justifying its refusal to confirm or deny whether NSA targeted any of the plaintiffs under the TSP. In particular, the district court failed to adequately consider a salient aspect of this case: if the plaintiffs were targeted under the TSP, the government's actions were in clear violation of the Foreign

Intelligence Surveillance Act. The district court erred in ruling that FOIA exemptions can shield unlawful government activity from disclosure.

ARGUMENT

This Court should not allow the government to invoke the "Glomar Response" in this case because the government has not met its burden to prove that the Glomar Response is appropriate for the limited question of whether attorneys for Guantanamo detainees have been targeted for electronic surveillance under the Terrorist Surveillance Program.

I. The Glomar Response Is A Court-Created Doctrine That Depends On Careful Vigilance By The Courts To Prevent Agency Overreaching

FOIA is premised on full public disclosure with narrow, enumerated exemptions. The "Glomar Response" is a court-created extension of the FOIA exemptions. It has been allowed by courts only when the agency provides as much detail as possible in public affidavits so that the requester may challenge the agency's position.

A. Congress Created FOIA To Promote Government Accountability

In enacting FOIA, Congress sought to "promote honest and open government and to assure the existence of an informed citizenry [in order] to hold the governors accountable to the governed." *National Council of La Raza v. DOJ*, 411 F. 3d 350, 355 (2d Cir. 2005). Surely, there can be no higher use of FOIA than exposing illegal government actions.

FOIA requires federal agencies to disclose requested records unless they fall under one of the enumerated exemptions to FOIA. The goal of the FOIA is "broad disclosure." *DOJ v. Tax Analysts*, 492 U.S. 136, 151 (1989); *A. Michael's Piano, Inc. v. F.T.C.*, 18 F.3d 138, 143 (2d Cir. 1994), *cert. denied* 513 U.S. 1015 (1994) ("FOIA, as its name suggests, expresses a public policy in favor of disclosure so that the public might see what activities federal agencies are engaged in."). When an agency receives a request, "FOIA *mandates* disclosure of records held by [that] federal agency ... unless the documents fall within [FOIA's] enumerated exemptions" *Dep't of the Interior and Bur. of Indian Affairs v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7-8 (2001) (emphasis added). Despite the existence of nine enumerated exemptions, 5 U.S.C. § 552(b), "disclosure, not secrecy, is the dominant objective of the Act." *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976). "[T]hese exemptions have been consistently given a narrow compass," *DOJ v. Tax Analysts*, 492 U.S. 136, 151 (1989); *see also FBI v. Abramson*, 456 U.S. 615, 630 (1982) ("FOIA exemptions are to be narrowly construed.").

When an agency seeks to withhold requested records under one of the exemptions, courts require that the agency provide an affidavit ("*Vaughn* affidavit") with a detailed justification for each document claimed to be exempt from disclosure. *See Vaughn v. Rosen*, 484 F.2d 820 (1973), *cert. denied sub nom*,

415 U.S. 977 (1974). This requirement applies with full rigor in cases involving national security matters. *See Hayden v. NSA et al.,* 608 F.2d 1381, 1384 (D.C. Cir. 1979), *cert. denied* 446 U.S. 937 (1980); *Ray v. Turner*, 587 F.2d 1187, 1194-95, 1197-98 (D.C. Cir. 1978). In addition to requiring a sufficient *Vaughn* affidavit, courts may also inspect documents in camera if necessary. However, the government's justifications must be public to the greatest extent possible so that they may be meaningfully challenged by the requester in the adversary process. *See, e.g., Halpern v. FBI*, 181 F.3d 279, 290-92 (2d Cir. 1999). Courts have in this way harmonized national security interests with the FOIA requirement that the government segregate as carefully as possible information that must be kept secret from information that may be disclosed. 5 U.S.C. § 552(b) ("Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."); *Founding Church of Scientology v. NSA,* 610 F.2d 824, 830 n. 49 (D.C. Cir 1979) ("[E]very effort should be made to segregate for ultimate disclosure the aspects of the records that would not implicate legitimate intelligence operations, however embarrassing to the agency.").

B. Courts Allowing The Glomar Response Adhere To The FOIA Principle Favoring Disclosure

Unless carefully controlled, the Glomar Response strikes at the heart of FOIA. A Glomar Response to a FOIA request is a refusal by a government agency

to confirm or deny whether any records exist at all. It is not authorized by the FOIA statute, but is a court-created enhancement to the FOIA exemptions. *See, Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976). The Second Circuit has never addressed the applicability of the Glomar Response, and this case does not present the appropriate circumstances to sanction the Glomar Response for the first time. For the convenience of the court, we here review the history of the doctrine.

1. The Glomar Response Was Created By The D.C. Circuit As a Limited Extension of FOIA's Enumerated Exemptions

The government used the Glomar Response for the first time in a case concerning a ship called the Glomar Explorer. *Phillippi*, 546 F.2d at 10110-11 ["*Phillippi I*"]. The Glomar Explorer was listed publicly as a privately owned research vessel, but in 1975 a number of news organizations published stories suggesting that the Glomar Explorer was owned by the United States government and had been used by the CIA in a covert effort to recover a sunken Russian submarine. *Id.* at 1011. The news reports further claimed that the CIA, upon learning of leaks to the press about the ship, had tried to persuade news organizations not to publish stories about the ship's true ownership and purpose. *Id.*

The plaintiff in *Phillippi I* was a journalist who sought through FOIA records about the CIA's attempts to squelch news stories on the Glomar Explorer. In response to her FOIA request, the government asserted that "the fact of the

existence or non-existence of the records you request would relate to the information pertaining to intelligence sources or methods" and that if the records existed, they were covered by Exemptions 1 and 3 of FOIA. *Id.* The government therefore did not provide a *Vaughn* index of any documents. On that spare record, the district court dismissed the case.

Recognizing that this Glomar Response was a substantial expansion of FOIA's enumerated exemptions, the D.C. Circuit in *Phillippi I* created procedures to prevent agency overreaching. It noted the important function of the *Vaughn* index in typical national security cases. *Phillippi I*, 546 F.2d at 1013 ("[With a *Vaughn* affidavit] if in camera examination of the document is still necessary, the Court will at least have the benefit of being able to focus on the issues identified and clarified by the [public] adversary process."). The court accepted the concept of the Glomar Response but "adapt[ed] [the *Vaughn*] procedures" to "require the Agency to provide a public affidavit explaining *in as much detail as is possible* the basis for its claim that it can be required neither to confirm nor to deny the existence of the requested records." *Id.* (emphasis added). The court's presumption was that this procedure would allow the agency's position to be tested by the plaintiff, "who should be allowed to seek appropriate discovery when necessary to clarify the Agency's position or to identify the procedures by which

that position was established." *Id.* The court thus remanded the case for further consideration by the district court under this procedure.

As the result of the court requiring the CIA to justify specifically and publicly its Glomar Response, the Agency on remand disclosed much of the requested information. The Agency admitted that the Glomar Explorer was involved in a CIA operation and that Agency officials had attempted to persuade members of the press not to publish stories about it. *See Phillippi v. CIA*, 655 F.2d 1325, 1328 (D.C. Cir. 1981) [*Phillippi II*]. The CIA located 154 responsive documents and released portions of 150 of them. *Id.* The released documents included transcripts of telephone conversations between the Director of Central Intelligence and prominent investigative reporters. The journalist got much of what she wanted, and the CIA was able to protect limited and narrow categories of information. The lesson for the instant case is that by resisting the government's initial blanket refusal to confirm or deny the existence of requested records and requiring a more discriminating and particularized approach, the D.C. Circuit ensured that the purposes of FOIA were served and legitimate national security matters were protected. The same result should be achievable in this case.

2. Courts That Have Allowed The Glomar Response Have Continued To Guard Carefully Against Agency Overreaching

In addition to the national security exemptions, 5 U.S.C. § 552(b)(1) and (3), the Glomar Response has also been invoked in connection with the personal

privacy and law enforcement exemptions. 5 U.S.C. § 552(b)(6) and (7). The Glomar Response has arisen in roughly 80 federal court opinions since 1976. Roughly 60 of those cases have been decided since September 11, 2001, so the assertion of the Glomar Response by intelligence and law enforcement agencies has increased dramatically during the past seven years. Even so, the D.C. Circuit has recently demonstrated its continued commitment that courts must (1) require specific and detailed public explanations, to the fullest extent possible, from agencies seeking to invoke the Glomar Response, and (2) carefully examine those explanations to prevent agencies from overreaching.

For instance, in two cases just last year, the D.C. Circuit found the CIA's justification for the Glomar Response inadequate. In *Wolf v. C.I.A.*, the court found the CIA's Glomar Response deficient because evidence showed that the agency had already officially acknowledged the existence of some of the requested records: "Accordingly, the Agency's Glomar response does not suffice...." 473 F.3d 370, 379 (D.C. Cir. 2007). In *Morley v. C.I.A.*, the court found that the CIA had not provided enough explanation for its use of the Glomar Response and remanded. 508 F.3d 1108, 1126 (D.C. Cir. 2007). The *Morley* court explained that "the CIA asserted that '[a]n official acknowledgment of [clandestine activity] could jeopardize the [intelligence] source's career, family or even his life.'" *Id.*

But, said the court, this mere "allusion" was not specific enough. "On remand, the CIA must substantiate its Glomar response with 'reasonably specific detail.'" *Id.*

Only four other circuits have discussed the applicability of the Glomar Response, and all adhere to the principles laid out by the D.C. Circuit in *Phillippi I.*[1] Among them, only the Ninth Circuit has actually allowed the Glomar Response to be used by the government to avoid confirming or denying the existence of the requested information in a national security case.[2] The Eleventh Circuit, in *Ely v. FBI*, accepted that the Glomar Response might be used but strongly condemned the district court for failing to create a full public record or carefully examine the agency affidavits. 781 F.2d 1487, 1493-94 (11th Cir. 1986) (law enforcement

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[1] The First, Seventh, and Ninth Circuits have decided national security cases involving the Glomar Response. *Carpenter v. DOJ*, 470 F.3d 434, 437 n.4 (1st Cir. 2006) (despite the Glomar response, the lower court reviewed documents in camera, and the government referred to "emails" in its brief, so the court assumed that the requested documents had been confirmed to exist); *Bassiouni v. CIA*, 392 F.3d 244, 245 (7th Cir. 2004), *cert. denied* 545 U.S. 1129 (2005) (arguably not a true Glomar case because when the information was first requested, "[t]he agency replied that it had some [information] but would not reveal any details."); *Hunt v. CIA*, 981 F.2d 1116, 1119 (9th Cir. 1992) ("[T]he court upheld the Glomar response because the affidavits were as specific as possible given the nature of the information the CIA sought to protect.").

The D.C., Third, and Seventh Circuits have also allowed the Glomar Response under the FOIA law enforcement exemptions for personal privacy and for confidential informant identities. Those courts have adhered to the same requirements. *Jefferson v. DOJ, Office of Professional Responsibility*, 284 F.3d 172 (D.C. Cir. 2002) (remanding for lack of sufficient explanation to support Glomar Response); *Boyd v. Criminal Div. of DOJ*, 475 F.3d 381 (D.C. Cir. 2007), *cert. denied* 128 S.Ct. 511 (2007) (finding Glomar Response unavailable when confirmation of informant had already occurred); *Ely v. FBI*, 781 F.2d 1487 (11th Cir. 1986); *Lame v. DOJ*, 654 F.2d 917, 928-29 (3rd Cir. 1981).

[2] *Hunt*, 981 F.2d at 1117; *Minier v. CIA*, 88 F.3d 796, 801-02 (9th Cir. 1996); *Berman v. CIA*, 501 F.3d 1136 (9th Cir. 2007).

exemptions). According to the *Ely* court, the effect of the district court's failure to adhere to those safeguards "was to give the government an absolute, unchecked veto over what it would or would not divulge, in clear violation of the provisions of the statute. It diverted to the agency the court's obligation to decide these questions according to law." *Id.* at 1494; *see also Lame v. DOJ*, 654 F.2d 917, 928-29 (3rd Cir. 1981) (finding agency affidavits inadequate when they addressed only the set of documents as a whole and failed to provide specific reasons why each distinct form could not be confirmed or denied).

3. Courts In The Second Circuit Vigilantly Guard Against Conclusory Assertions Of Exemptions in FOIA Cases

The Second Circuit has not addressed the Glomar Response, but it has soundly rejected conclusory agency affidavits to support FOIA exemptions in national security cases. *See Halpern*, 181 F.3d at 294 (discussing sufficiency of *Vaughn* index). In the *Halpern* case, the agency affidavit made the assertion that the requested information "would automatically reveal ... United States intelligence-gathering capabilities." *Id.* at 393. (internal quotations omitted). This court rejected the affidavit because "[s]uch a conclusory statement completely fails to provide the kind of fact-specific justification that either (a) would permit appellant to contest the affidavit in adversarial fashion, or (b) would permit a reviewing court to engage in effective de novo review of the FBI's redactions." *Id.*

Explaining its reasoning, the court noted that "blind deference is precisely what Congress rejected when it amended FOIA...." *Id.*

District courts in this Circuit have similarly expressed unwillingness to accept broad, generalized agency justifications. *See, e.g., Lawyers Committee for Human Rights v. I.N.S.*, 721 F. Supp. 552, 567 (S.D.N.Y. 1989) ("The CIA has claimed that disclosure would present a great danger to national security in this case. However, the Court is unconvinced that the CIA has provided the most thorough public explanation possible."); *Navasky v. CIA*, 499 F.Supp. 269, 277-78 (S.D.N.Y. 1980) ("[A]s to the exemption 1 and 3 claims based on the 'intelligence sources and methods' language ... the Agency has not made a sufficient showing.").

One district court in this Circuit has specifically voiced concerns that the Glomar Response encourages agencies to "over-classify" information because the nature of the response itself makes it less susceptible to judicial review. *See American Civil Liberties Union v. DOD*, 389 F.Supp.2d 547, 561 (S.D.N.Y. 2005). ("The danger of Glomar responses is that they encourage an unfortunate tendency of government officials to over-classify information, frequently keeping secret that which the public already knows, or that which is more embarrassing than revelatory of intelligence sources or methods."). This decision recognizes that FOIA's purpose of broad disclosure requires courts to adhere vigilantly to the

requirement that agencies explain as specifically as possible why the Glomar Response is necessary.

II. The District Court Accepted The Government's Glomar Response In This Case Without Adequate Justification

The district court failed to follow the procedures courts have developed to guard against agency overreaching with the Glomar Response. The abstract, generalized assertions provided by agency officials did not adequately address whether the Glomar Response is appropriate on the facts of this case.

The United States government has ample authority to conduct electronic surveillance for foreign intelligence purposes under the Foreign Intelligence Surveillance Act (FISA). 50 U.S.C. § 1801 *et seq*. That statute represents a delicate and complex balancing of national security needs and the commands of the Fourth Amendment. Critically, FISA requires a warrant from a special court of federal judges before a United States citizen located in the United States can be targeted for electronic surveillance. It can be debated whether FISA strikes precisely the right balance between the competing demands of civil liberties and national security, but the fact remains that FISA is the balance Congress has struck. It is the law that the executive branch is required to follow.

In the TSP, however, the executive branch chose to ignore FISA and by-pass the Foreign Intelligence Surveillance Court. Rather than obtaining warrants from the judges of that court, shift supervisors at NSA were permitted to select United

States citizens as targets for electronic surveillance. "In order for communications to be intercepted under the TSP, there was a requirement to have a reasonable basis to conclude that one party to the communication was located outside the United States and that one party to the communication was a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda or terrorism." Brand Decl. ¶ 11, A-53.

Appellants are attorneys who represent Guantanamo detainees. Before they began their attorney-client relationship with the detainees, the Federal Bureau of Investigation conducted an extensive security clearance review of these lawyers. *See, e.g.*, Gutierrez Decl. ¶ 38, A-284; Neff Decl. ¶ 16, A-330; Barker Decl. ¶ 11, A-205-06; Chandler Decl. ¶ 8, A-220; Gorman Decl. ¶ 14, A-258-59; Grigg Decl. ¶ 8, A-267. Under those circumstances it is implausible that the attorneys themselves were suspected of terrorism, supporting terrorists, or engaging in hostile intelligence activity. If they were suspected of such activity, they would not have been cleared in the first place, or their clearances should have been revoked. If they were targets of electronic surveillance under the TSP, it was because they were deemed to be affiliated with al Qaeda by virtue of serving as attorneys for Guantanamo detainees.

The government's justifications for refusing to confirm or deny whether the members of this discrete group of lawyers were targeted for electronic surveillance

are at a level of generality and abstraction that fails to come to grips with the facts of this case. For example, the district court credited the assertion of Joseph J. Brand that "[a]cknowledging the existence or non-existence of those individuals or organizations subject to surveillance would provide our adversaries with critical information about the capabilities and limitations of the NSA, such as the types of communications that may be susceptible to NSA detection." Slip op. at 13. While that statement may (but not necessarily) have some force with respect to a specific communication intercepted by NSA, it does not explain why disclosure of a document listing one of the plaintiffs as a target of surveillance would reveal anything about "the capabilities or limitations of the NSA" or "the types of communications that may be susceptible to NSA detection."

Similarly, the district court credited the assertion of the Director of National Intelligence that even disclosure of "what appears to be the most innocuous information about the TSP" would harm the national security because it would enable our adversaries "to piece together sensitive information about how the program operated, the capabilities, scope and effectiveness of the program. . . ." Slip op. at 13. It is impossible to reconcile this assertion with public on-the-record statements about the TSP made by the President, the Vice President, the Attorney General, the Director of the NSA, and an Assistant Attorney General. *See* Appellants' Br. at 6-7.

Confirming or denying whether these attorneys were targeted would do nothing more than confirm or deny whether lawyers for Guantanamo detainees were targeted -- a targeting that is plainly and profoundly unlawful because it was conducted in defiance of FISA. The government's justifications might have force if this request sought to determine who is and who is not targeted under ***lawful*** electronic surveillance conducted in compliance with FISA. But that is not what this request seeks. Nor, at least at its most basic level, does this request reach the incidental overhearing of any of the plaintiffs in the course of electronic surveillance targeted at other individuals. If the plaintiffs' communications were overheard in the course of electronic surveillance directed at others, that category of records should be addressed separately from the question of whether there are records reflecting the targeting of plaintiffs. Furthermore, the question of which of the plaintiffs' specific conversations were intercepted as a result of electronic surveillance targeted at plaintiffs is separate from the question of whether plaintiffs were targeted at all. When the focus is on that narrow and limited question, it is plain that the government's justifications are not sufficiently specific to satisfy the requirements for properly invoking the Glomar Response.

III. The District Court Erred In Failing To Give Adequate Consideration To The Illegality Of The Government Activity That Is The Subject Of This FOIA Request

In evaluating the government's abstract and generalized justifications for its Glomar Response, the district court failed to give adequate weight to a critical aspect of this case -- the Terrorist Surveillance Program was a patently illegal activity because it was conducted in clear defiance of FISA.

No FOIA exemption allows agencies -- even national security agencies -- to withhold information related to illegal agency activity. This Court has explicitly stated that "unauthorized or illegal investigative tactics may not be shielded from the public by use of FOIA exemptions." *Kuzma v. IRS*, 775 F.2d 66, 69 (2d Cir. 1985). The district court erred in assuming that NSA may shield illegal activities under FOIA exemptions 1 and 3. This assumption resulted in its failure properly to examine the agency's affidavits supporting the Glomar Response.

FOIA Exemption 1 allows agencies to withhold documents that are "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" 5 U.S.C. § 552(b)(1). Illegal actions of agencies are not "specifically authorized" by any executive order. In fact, the relevant Executive Order specifies that security agencies may not use classification to shield illegal activity. Exec. Order No. 13,292 § 1.7(a)(1), 68 Fed.

Reg. 15,315, 15,318 (Mar. 28, 2003) ("In no case shall information be classified in order to ... conceal violations of law...").

FOIA Exemption 3 allows agencies to withhold documents that are "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3). The government invoked Section 6 of the National Security Agency Act of 1959, 50 U.S.C. § 402, which requires the non-disclosure of information concerning "the organization or any function of the National Security Agency." The district court read Section 6 to cover anything the National Security Agency does, including even illegal activities. This position has been squarely rejected by the D.C. Circuit.

In *Hayden v. NSA* -- a case that involved the same NSA statute at issue here -- the Court clearly stated that "[c]ertainly where the function or activity is authorized by statute and not otherwise unlawful, NSA materials integrally related to that function or activity fall within ... Exemption 3."). 608 F.2d at 1389. Here, the TSP was not authorized by statute; it was directly contrary to FISA and therefore cannot be protected by Exemption 3.[3] See *Founding Church of Scientology*, 610 F.2d at 830 n. 49 ("NSA would have no protectable interest in suppressing information simply because its release might uncloak an illegal

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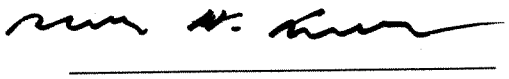
[3] Defendants and the district court relied heavily on *People for the American Way v. National Security Agency et al.*, 462 F.Supp.2d 21 (D. D.C. 2006), which held that Section 6 and Exemption 3 protect even illegal activity of the NSA. *Id.* at 29-30. Like the instant case, that case was wrongly decided because it failed to follow *Hayden*.

operation ..."); *Weissman v. CIA et al.*, 565 F.2d 692, 696 (D.C. Cir. 1977) ("Thus, the Agency's interpretation of the sources and methods proviso is misplaced. A full background check within the United States of a citizen who never had any relationship with the CIA *is not authorized, and the law-enforcement exemption is accordingly unavailable.*") (emphasis added). This Court should not depart from the bedrock principle that FOIA exemptions may not be invoked to shield illegal agency activity from disclosure.

CONCLUSION

For the foregoing reasons, as well as those stated in Appellants' brief, the judgment of the district court should be vacated and the case remanded to require defendants either (1) to confirm or deny whether any of the plaintiffs were targeted for electronic surveillance under the Terrorist Surveillance Program, or (2) to present sufficiently specific justifications for why they cannot do so.

Respectfully submitted,



Mark H. Lynch
Jennifer L. Saulino
Covington & Burling LLP
1201 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 662-6000

Meredith Fuchs
National Security Archive
George Washington University
Gelman Library Suite 701
2130 H Street, N.W.
Washington, DC 20016
(202) 994-7000

Attorneys for Amicus Curiae
National Security Archive

December 19, 2008

Federal Rules of Appellate Procedure Form 6. Certificate of Compliance With Rule 32(a)

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(s) _____

Attorney for National Security Archive

Dated: 12/19/2008

CERTIFICATE OF SERVICE

I hereby certify that two copies of the *Amicus Curiae* Brief of National Security Archive in Support of Appellants to Vacate and Remand; the Rule 26.1 Disclosure Statement; and the Anti-virus Certification Form have been served this 19th day of December, 2008, upon the following counsel by first class mail:

Thomas M. Bondy
Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Avenue, NW
Washington, DC 20530.

Counsel for Appellees

Shayana Kadidal
Emilou MacLean
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012

Kathryn A. Sabbeth
David C. Vladeck
Georgetown University Law Center
Institute for Public Representation
600 New Jersey Avenue, NW
Washington, DC 20001

James R. Rubin
Karen Borg
Mark A. Schwartz
Butler Rubin Saltarelli & Boyd LLP
70 West Madison Street, Suite 1800
Chicago, Illinois 60602

Counsel for Appellants

Ten copies of the *Amicus Curiae* Brief of National Security Archive in Support of Appellants to Vacate and Remand was also submitted to the Clerk of the Court by first class mail on this 19th day of December 2008.

Pursuant to Second Circuit Local Rule 32(a), a digital copy of the *Amicus Curiae* Brief of National Security Archive in Support of Appellants to Vacate and Remand, as a PDF email attachment, has been sent to counsel for Appellees at <Thomas.Bondy@usdoj.gov>; to counsel for Appellants at <LBradley@ccrjustice.org>, <emaclean@ccrjustice.org, <SKadidal@ccrjustice.org>,< ks455@law.georgetown.edu>, <vladeckd@law.georgetown.edu>, < mschwartz@butlerrubin.com>, <kborg@butlerrubin.com> and to the Clerk of the Court at <civilcases@ca2.uscourts.gov>.

Jennifer L. Saulino
COVINGTON & BURLING LLP
1201 Pennsylvania Ave, N.W.
Washington D.C. 20004-2401
Telephone: (202) 662-6000
Facsimile: (202) 778-6291
Email: jsaulino@cov.com