08-4726-cv

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, ANNE 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,
Appellants,

v.

NATIONAL SECURITY AGENCY and DEPARTMENT OF JUSTICE,
Appellees.

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

BRIEF OF APPELLANTS

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PRELIMINARY AND JURISDICTIONAL STATEMENT

This appeal is from an order issued by the Honorable Denise Cote granting defendants' motion for partial summary judgment. The jurisdiction of the district court rested on 5 U.S.C. § 552(a)(4)(B). The jurisdiction of this Court rests on 28 U.S.C. § 1291. The district court granted defendants' motion for partial summary judgment by Order entered on June 25, 2008. *Wilner v. NSA*, 2008 WL 2567765 (S.D.N.Y. June 25, 2008). Slip op., SPA-4 – SPA-24 (Special Appendix). That order disposed of one of two claims for relief sought by plaintiffs. On July 31, 2008, the district court granted plaintiffs' unopposed motion under Rule 54(b), Fed. R. Civ. P., to direct entry of final judgment on that claim. 2008 WL 2949325 (S.D.N.Y. July 31, 2008). Order, SPA-25 – SPA-27. Judgment was entered on July 31, 2008. SPA-28. Plaintiffs filed the Notice of Appeal on September 24, 2008. Notice of Appeal, A-410 (Joint Appendix).

INTRODUCTION

Thomas B. Wilner, Esq., managing partner at Shearman and Sterling LLP, and twenty-three other lawyers representing Guantánamo detainees brought this Freedom of Information Act ("FOIA") case to obtain records showing whether the National Security Agency ("NSA") has engaged in warrantless surveillance of their electronic communications.[1] The possibility that the NSA has targeted the lawyers for surveillance has made them reluctant and, in some cases, unable to engage in communications via telephone, e-mail, and facsimile. The threat of surveillance has obstructed the lawyers' access to witnesses and other sources of evidence, and

[1] A list of the lawyers-appellants appears in an Addendum to this brief.

undermined their representation of their clients.

The lawyers' fear of surveillance is well-grounded. High-level Administration officials have acknowledged that the NSA engaged in warrantless interception of electronic communications of individuals alleged to have connections to terrorist organizations *and* that the Guantánamo detainees' lawyers may have been targeted; Appellant Thomas Wilner has been told by government officials that he is "probably the subject of government surveillance and should be careful in [his] electronic communications;" the NSA and the Department of Justice ("DOJ") have argued that the zone of privacy that ordinarily safeguards the attorney-client relationship does not apply to Guantánamo detainees and their lawyers; and the Executive Branch continues to maintain that it has a legal right to eavesdrop on lawyers without judicial oversight.

The Guantánamo lawyers brought this case to determine whether the warning signs of warrantless government surveillance are real. Instead of resolving whether the lawyers have been subject to surveillance, the NSA claims that it is free to keep them guessing. The district court agreed.

In so ruling, the district court relied on the *Glomar* doctrine — a narrow, court-created exception to FOIA's disclosure mandate. *See Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976). Courts have accepted *Glomar* claims permitting agencies to refuse to confirm or deny the existence of records when, but only when, three conditions have been met: (1) the records relate to a secret program the existence of which is properly classified pursuant to an Executive Order, or to the NSA's intelligence-gathering activities or intelligence sources or methods; (2) FOIA's national security exemptions are found to apply to the withheld records — assuming that they exist — so the court is assured that application of *Glomar* will not authorize the withholding of non-exempt records; and (3) the government is not invoking *Glomar* to conceal activities that

violate the Constitution or are otherwise illegal. The district court's acceptance of the agencies' *Glomar* claim in this case exceeded these limits.

First, never before has *Glomar* been invoked to keep secret the details of a program that has been officially acknowledged by the President of the United States, the Attorney General, and the National Security Advisor. Senior Executive Branch officials have confirmed not only the program's existence, but also details about the program, including the criteria used to target individuals for surveillance. Requiring the NSA and DOJ to disclose whether the lawyers have been targeted cannot jeopardize this publicly-acknowledged and since-terminated program.

Second, if records of surveillance of the lawyers exist, neither of the FOIA exemptions claimed will justify their concealment, as Exemptions 1 and 3 may not be invoked to hide illegal conduct. *See* Exec. Order No. 13,292 § 1.7(a)(1), 68 Fed. Reg. 15318 (Mar. 28, 2003) ("In no case shall information be classified in order to . . . conceal violations of law. . ."); *Founding Church of Scientology v. NSA*, 610 F.2d 824, 830 n.49 (D.C. Cir. 1979); *Hayden v. NSA/Cent. Sec. Serv.*, 608 F.2d 1381, 1389 (D.C. Cir. 1979). The district court's ruling that the NSA may withhold records *even if* they reveal illegal conduct cannot be reconciled with precedent or harmonized with the Foreign Intelligence Surveillance Act ("FISA"), which explicitly forbids the targeting of lawyers without judicial oversight.

Finally, the district court failed to grapple with the lawyers' main argument — that *Glomar* may not be invoked to conceal unconstitutional conduct. If the NSA targeted the Guantánamo lawyers for warrantless surveillance as potential "sources" of intelligence, the constitutional intrusions would be so grave and pervasive that they would be difficult even to catalogue. Suffice it to say that such warrantless eavesdropping would not only violate the Fourth

Amendment, but it would also infringe on the lawyers' First and Fifth Amendment rights, as well as the detainees' due process rights and habeas corpus privilege.

Warrantless eavesdropping on the Guantánamo lawyers would also constitute an affront to the judiciary. Targeting counsel for surveillance — indeed, just the threat of targeting them — chills their communications, significantly impeding the gathering of evidence and presentation of arguments to courts. Interference with lawyers' representation undermines the adversarial process, subverts fundamental notions of separation of powers, and cripples the ability of the judiciary to fulfill its constitutional mandate. *See Legal Services Corp. v. Velazquez*, 531 U.S. 533, 545 (2001) (citing *Marbury v. Madison*, 1 Cranch 137, 177 (1803)). *Glomar* may not be invoked as a shield to conceal records demonstrating violations of the U.S. Constitution.

The district court failed to recognize that *Glomar* — a judicially-created exemption to FOIA — must be narrowly construed and sparingly applied, lest it become a catch-all "Tenth Exemption" for intelligence records. In this case, the district court applied *Glomar* in a manner inconsistent with the doctrine and at odds with the pro-disclosure mandate of FOIA. For these reasons, the judgment below should be reversed and this case should be remanded to the district court for further proceedings as to the validity of the underlying exemption claims.

RELEVANT AUTHORITIES

Authorities significant to the resolution of this appeal are set forth in Appellants' Special Appendix.

QUESTION PRESENTED

In an action seeking agency records under the Freedom of Information Act, may a court uphold an agency's invocation of the "*Glomar*" doctrine — permitting the agency to avoid confirming or denying the existence of records in order to keep secret details of an agency

program —where the Executive Branch has officially acknowledged the existence and contours of the program, and where records, if they exist, evidence agency conduct that exceeds the agency's statutory authority, conflicts with FISA, violates the constitutional rights of lawyers and their clients, and undermines the constitutional separation of powers?

STATEMENT OF THE CASE

A. Factual Background.

This case traces its origins to the treacherous terrorist attacks on the United States on September 11, 2001. In the aftermath of these attacks, as many as 700 men were detained by the Department of Defense and the Central Intelligence Agency ("CIA") at the U.S. Naval Base in Guantánamo Bay, Cuba. Five hundred detainees have since been released or transferred without being formally charged. Many of the remaining detainees have filed writs of habeas corpus challenging their detention. The United States District Court for the District of Columbia has begun conducting habeas proceedings and recently ordered that 22 detainees be released. William Glaberson, *Judge Declares Five Detainees Held Illegally*, N.Y. TIMES, Nov. 21, 2008, at A1; *Boumediene v. Bush*, No. 04-1166 (RJL), 2008 WL 4949128 (D.D.C. Nov. 20, 2008). [2]

Appellants represent Guantánamo detainees in habeas challenges. These lawyers are partners and associates at prominent law firms, law professors, and attorneys for established non-profit organizations who also represent individual and corporate clients with no relation to Guantánamo. The lawyers began representing detainees only after the Federal Bureau of Investigation ("FBI") conducted an extensive security clearance review of the lawyers and deemed them to pose no threat to national security. *See, e.g.,* Gutierrez Decl. ¶ 39, A-284; Neff

[2] Transcript of Oral Ruling, *Kiyemba v. Bush*, No. 05-1509 (D.D.C. Oct. 7, 2008), *available at* http://www.scotusblog.com/wp/wp-content/uploads/2008/10/urbina-transcript-10-7-08.pdf (last visited Dec. 9, 2008).

Decl. ¶ 16, A-330; Barker Decl. ¶ 11, A-205 – A-206; Chandler Decl. ¶ 8, A-220; Gorman Decl. ¶ 14, A-258 – A-259; Grigg Decl. ¶ 8, A-267.

The Executive Branch has insisted, however, that it has the right to engage in the warrantless and surreptitious interception of the lawyers' electronic communications because of their representation of Guantánamo detainees. Philip Shenon, *Lawyers Fear Monitoring in Cases on Terrorism*, N.Y. TIMES, Apr. 28, 2008, at A14. The lawyers want to know whether their communications have actually been intercepted.

On December 17, 2005, after extensive disclosures in the media, President Bush confirmed that he had approved a warrantless surveillance program, the Terrorist Surveillance Program ("TSP"), conducted by the NSA in the wake of September 11th.[3] Notwithstanding the explicit command of the Fourth Amendment, and Congress's enactment of FISA, the NSA did not seek judicial approval for its surveillance activities under the TSP,[4] and, from 2001 to 2007, President Bush reauthorized the TSP more than 30 times.[5] Once the President acknowledged the TSP's existence, the Executive Branch engaged in an extensive media campaign to describe the program's scope and to defend its legitimacy.[6] NSA Director General Michael V. Hayden,

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[3] President George W. Bush, Radio Address (Dec. 17, 2005) ("Bush Radio Address") transcript available at http://www.whitehouse.gov/news/releases/2005/12/20051217.html (last visited December 6, 2008).

[4] *Id.*

[5] President George W. Bush, News Conference (Dec. 19, 2005) ("*Bush Press Conference*") *transcript available at* http://www.whitehouse.gov/news/releases/2005/12/20051219-2.html (last visited December 9, 2008). Attorney General Gonzales announced the suspension of the program in 2007, while President maintained the continued threat of surveillance by reserving the right to reinstitute it without notice. Attorney General Gonzales Ltr. to Senate Committee on Judiciary (Jan. 17, 2007) ("*Gonzales Ltr.*"), *available at* http://www.fas.org/irp/agency/doj/fisa/ag011707.pdf (last visited Dec. 9, 2008); Brand Decl. at 2 n.1, A-50.

[6] President George W. Bush, *Remarks on the War on Terror* (Sept. 5, 2006) *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/09/05/AR2006090500656.html (last visited Dec. 3, 2008); Vice President Richard Cheney, *Commencement Address at the*

(continued...)

Attorney General Alberto Gonzales, and many other senior Administration officials publicly described and defended the program.[7]

Senior officials conceded that the standards the NSA employed for approval of surveillance under the TSP were less rigorous than the procedures required by FISA. Under FISA, the NSA must obtain judicial approval for any and all electronic surveillance for foreign intelligence and must employ mitigation procedures when the intercept might involve U.S. persons and privileged information.[8] Under the TSP, however, an NSA shift supervisor selected and approved the individuals whose communications were intercepted; neither the President nor the Attorney General, nor anyone in DOJ reviewed the specific target selections or the nature of the communications to be intercepted.[9]

Official announcements made clear that the TSP likely included the surveillance of Guantánamo lawyers. As described by senior members of the Bush Administration, the TSP

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[6](...continued)
United States Naval Academy (May 26, 2006) *available at* http://www.whitehouse.gov/news/releases/2006/05/20060526-4.html (last visited Dec. 3, 2008); Attorney General Alberto Gonzales, *Ask the White House* (Jan. 25, 2006) ("*Gonzales Ask the White House*") *available at* http://www.whitehouse.gov/ask/20060125.html (last visited Dec. 3, 2008); Transcript of Attorney General Alberto Gonzales' Morning Show Interviews (Dec. 19, 2005), *available at* http://www.usdoj.gov/ag/readingroom/surveillance2.pdf (last visited Dec. 9, 2008).

[7] General Michael V. Hayden, Press Briefing by Attorney General Alberto Gonzales and General Michael V. Hayden (Dec. 19, 2005) ("*Gonzales/Hayden Press Briefing*"), *available at* http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html (last visited Dec. 9, 2008); *see also* U.S. Department of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan. 19, 2006) ("*DOJ White Paper*") *available at* http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf (last visited Dec. 9, 2008).

[8] General Michael V. Hayden, *What American Intelligence & Especially the NSA Have Been Doing To Defend the Nation*, Address to the National Press Club (Jan. 23, 2006) ("*Hayden Address to the Nat'l Press Club*"), *available at* http://www.dni.gov/speeches/20060123_speech.htm (last visited Dec. 9, 2008); *see also Gonzales/Hayden Press Briefing*, *supra* note 7.

[9] *Gonzales/Hayden Press Briefing*, supra note 7.

allows monitoring of any electronic communications when one party is outside the United States and one party is suspected of being "link[ed]" to or "associated" with al Qaeda or "related terrorist organizations."[10] Under that definition, lawyers representing individuals detained on allegations of terrorist activity fall squarely within TSP's sights.

The possibility of surveillance is not idle speculation. The Executive Branch has acknowledged that Guantánamo lawyers may be subject to TSP surveillance,[11] and has argued that it has a right to target them. Shenon, *supra*, at A14. Although Executive agencies refuse to confirm whether they have actually eavesdropped on lawyers, Transcript of Proceedings, *Al-Haramain Islamic Found., Inc. v. United States Dep't of the Treasury*, CV-07-1155, at 31 (D. Or. Apr. 14, 2008) ("*Al-Haramain* Transcript"), A-194 – A-197, some officials admit that surveillance has occurred.

Government officials have twice informed Thomas Wilner that he is "probably the subject of government surveillance." Wilner Decl. ¶ 5, A-362. A military official at Guantánamo referred to undisclosed personal information about the Appellant H. Candace Gorman, raising the question of how such information was obtained. Gorman Decl. ¶ 15, A-259. In the *Al-Haramain* case, the Treasury Department inadvertently sent an attorney summaries of phone calls between her law firm's attorneys and their client, a charity in Saudi Arabia, demonstrating that these attorney-client conversations had been intercepted and recorded. Patrick Radden Keefe, *State Secrets: A Government Misstep in a Wiretapping Case*, THE NEW YORKER, April 28, 2008, at 28.

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[10] *Bush Press Conference*, *supra* note 5; *Gonzales Ask the White House*, *supra* note 6.

[11] Assistant Attorney General William E. Moschella, *Responses to Joint Questions from House Judiciary Committee Minority Members* (Mar. 24, 2006) ("*Moschella Ltr.*"), ¶ 45, *available at* http://www.fas.org/irp/agency/doj/fisa/doj032406.pdf (last visited Dec. 9, 2008).

The looming possibility of surveillance chills the Guantánamo lawyers' communications and hobbles their representation of clients. The likelihood of NSA interception of the Guantánamo lawyers' telephone calls, e-mails, and facsimile transmissions undermines the lawyers' ability to engage in candid communications necessary to obtain evidence and investigate their clients' cases. *E.g.*, Chandler Decl. ¶ 5, A-217 – A-218; Dixon Decl. ¶ 20, A-237; Gutierrez Decl. ¶¶ 24-25, A-280 – A-281; Wilner Decl. ¶ 8, A-363 – A-364. Official announcements of the TSP have put persons outside the U.S. on notice that conversations with Guantánamo lawyers may be recorded by the NSA. Many reasonably fear that intercepted information could be used against their detained family members. As a result, the lawyers have struggled to obtain information from witnesses who no longer speak freely, and some witnesses are no longer willing to speak with the lawyers at all. *E.g.*, Chandler Decl. ¶ 5, A-217 – A-218; Foster Decl. ¶ 20, A-248; Gutierrez Decl. ¶ 24, A-280; Neff Decl. ¶ 26, A-332.

The threat of surveillance also has interfered with the lawyers' representation of their non-detainee clients: individuals, governments, and entities wholly unrelated to Guantánamo. Lawyers typically rely on electronic channels to communicate with foreign clients, but, as Thomas Wilner explains, "No one in good conscience can freely identify or discuss possible plans for a case while the other side may be listening in. Because of the possibility that the government is monitoring my communications, I regularly refrain from discussing in my phone calls and e-mails with my foreign clients issues that should be discussed to protect their interests." Wilner Decl. ¶ 5, A-362. Because she could not ensure that her communications were confidential, H. Candace Gorman first stopped accepting new clients and eventually took a leave of absence from her litigation practice. Gorman Decl. ¶¶ 18, 20, 22, A-261 – A-263.

The lawyers seek to know whether their communications have in fact been monitored under the NSA surveillance program. The lawyers submitted FOIA requests to the NSA and DOJ, asking for records reflecting such surveillance and for details of the surveillance program. The NSA and DOJ invoked the *Glomar* doctrine and refused to confirm or deny the existence of responsive records**.**

B. Procedural Background.

Thomas Wilner and twenty-three other lawyers filed a complaint against both the NSA and the DOJ in the United States District Court for the Southern District of New York on May 17, 2007. With the agreement of the parties, the district court bifurcated the case into two separate tracks. The first track concerned the NSA and DOJ's *Glomar* response to the lawyers' request for records reflecting whether they had been subject to surveillance under the TSP. The second track, not at issue in this appeal, addressed the NSA and DOJ's assertion of FOIA exemptions in response to the lawyers' other requests. After the bifurcation of the *Glomar* and non-*Glomar* issues, the NSA and DOJ filed a Motion for Partial Summary Judgment on the *Glomar* issue, which the lawyers opposed.[12] The district court granted the Motion for Partial Summary Judgment on the *Glomar* issue on June 25, 2008. Slip op., SPA-4 – SPA-24.

In its ruling, the court began by accepting the *Glomar* framework and noting that the "[d]efendants need only proffer one legitimate basis for invoking the Glomar Response in order to succeed on their motion for summary judgment." Slip op. at 10, SPA-13. Although the NSA and DOJ had argued that responsive records, if they existed, would be subject to withholding under both Exemption 1 and Exemption 3, the district court focused only on Exemption 3. The

[12] The NSA and DOJ also filed a motion for partial summary judgment on the non-*Glomar* issues. The district court dismissed the motion without prejudice pending the resolution of related litigation. *See* A-378 – A379.

claim was based on section 6 of the National Security Agency Act of 1959 ("NSAA"), which shields from public disclosure "any function" or "information with respect to the activities" of the National Security Agency, *see* 50 U.S.C. § 402, and the Act's direction that the agency "protect intelligence sources and methods from unauthorized disclosure." *See* 50 U.S.C. § 403-1(i)(1). Slip op. at 10-12, SPA-13 – SPA-15.

Relying on declarations submitted by the NSA and DOJ, the court ruled that the disclosure of the records sought by the lawyers might disclose NSA's intelligence-gathering capabilities and intelligence sources. Although the court acknowledged the lawyers' argument that FOIA cannot be invoked to conceal illegal activity and that the TSP is unconstitutional and violates FISA, the court determined that it "need not address plaintiffs' substantive arguments concerning the TSP's legality because the language of Exemption 3 and Section 6 of the NSAA makes clear that the defendants may permissibly refuse to disclose the information requested by the plaintiffs." Slip op. at 15, SPA-18. In so ruling, the court did not mention, let alone address, the lawyers' main argument that warrantless surveillance of *lawyers* raises legal questions separate and apart from the more general questions about the TSP's legality. Nor did the court address the consequence of a ruling that gives the NSA free rein to conceal evidence of its own illegal or unconstitutional conduct.

STANDARD OF REVIEW

"This Court reviews *de novo* a district court's grant of summary judgment in FOIA litigation." *Tigue v. Dep't of Justice*, 312 F.3d 70, 75 (2d Cir. 2002).

SUMMARY OF ARGUMENT

The district court's decision sustaining the NSA and DOJ's invocation of *Glomar* should be reversed, and the case should be remanded to the district court for consideration of the agencies' exemption claims.

As demonstrated in Point I of this brief, the district court misapplied *Glomar*. *Glomar* is a court-created exception to FOIA, which permits an agency to refuse to acknowledge whether records exist when, but only when, three conditions are met. None of these conditions is met here.

First, *Glomar* may be invoked only to preserve the secrecy of a covert intelligence program or secret intelligence sources and methods. There is nothing secret about the TSP, or, for that matter, the criteria the NSA employed to target individuals for surveillance. Nor has the Executive Branch disclaimed its interest in targeting the Guantánamo lawyers for surveillance. Given the fact that the government has already claimed that it has the right to eavesdrop on the lawyers *and* the technical capacity to do so, confirming or denying that the lawyers were subject to surveillance cannot possibly harm NSA's intelligence-gathering functions or reveal covert intelligence sources.

Second, *Glomar* may be invoked only if one of FOIA's national security exemptions would shield the records, if they exist, from disclosure. The district court ruled that provisions of the National Security Agency Act and the Intelligence Reform and Terrorism Prevention Act that safeguard information about the NSA's "functions" and "activities," and "intelligence sources and methods" require withholding records that reflect whether the lawyers were targeted for surveillance, *even if* warrantless surveillance of the lawyers exceeds the scope of the NSA's authority or is illegal or unconstitutional. That ruling cannot be squared with ordinary rules of

statutory construction, which require statutes to be read in a manner that is consistent with Congress's delegation of authority and to avoid constitutional entanglements.

Third, *Glomar* may not be invoked to conceal activities that violate the law or the Constitution. In this respect, the district court's ruling departs from consistent authority holding that FOIA Exemptions 1 and 3 may *not* be invoked to conceal an intelligence-gathering activity that is illegal or unconstitutional. To rule otherwise, as one district court put it, would give intelligence agencies license "to conceal information regarding blatantly illegal or unconstitutional activities simply by assigning these activities to the NSA or claiming they implicated information about the NSA's functions." *Terkel v. AT & T Corp.*, 441 F. Supp. 2d 899, 905 (N.D. Ill. 2006).

As demonstrated in Point II of this brief, the district court erred in failing to grapple with the lawyers' main claim – that *Glomar* may not be invoked to conceal unconstitutional acts, and that warrantless surveillance of the Guantánamo lawyers' electronic communications would be unconstitutional. Indeed, the constitutional violations arising from the TSP would be serious and pervasive.

To start with, warrantless surveillance would violate rights guaranteed to the lawyers by the Fourth Amendment and codified in FISA. Warrantless surveillance of lawyers would also violate their First Amendment rights to present all the reasonable and well-grounded arguments necessary for proper resolution of a case. The threat of surveillance stifles the lawyers' ability to gather evidence and to formulate legal and factual arguments, seriously undermining the ability of the lawyers to present their clients' cases to the courts. And the threat of warrantless surveillance has burdened the ability of the lawyers to practice law, in violation of their Fifth Amendment rights. The possibility of warrantless surveillance — and the resulting inability to guarantee

witnesses, experts, and clients confidentiality — has driven at least one of the lawyers out of practice altogether, and seriously compromised the ability of others to practice law.

The threat of warrantless surveillance also violates the rights of the Guantánamo detainees. The Supreme Court has made clear that detainees are entitled to a "meaningful opportunity" to contest their detention. But that guarantee is rendered an empty promise where the government obstructs their lawyers' ability to gather evidence.

Finally, the threat of warrantless surveillance violates constitutional separation of powers. The Constitution requires *courts* to oversee Executive Branch surveillance and to issue carefully-tailored warrants based on probable cause. The Executive Branch cannot unilaterally decide to dispense with this requirement. Nor can it obstruct the ability of lawyers to present evidence needed to enable the courts to fairly resolve the detainees' claims. Just last Term, the Court emphasized that Executive Branch limitations on the scope and effectiveness of the writ of habeas corpus raise "troubling separation-of-powers concerns." *Boumediene v. Bush*, 128 S. Ct. 2229, 2258 (2008). Interfering with the Guantánamo lawyers' ability to gather evidence and advocate effectively on behalf of their clients is just the sort of "troubling separation-of-powers" concern the Court condemned in *Boumediene*. This Court should find that the threat of warrantless surveillance of the lawyers infringes their constitutional rights and the constitutional rights of their clients. Accordingly, the Court should reverse the judgment below and remand this case so that the district court may examine the exemption claims raised by NSA and DOJ.

ARGUMENT

I. THE DISTRICT COURT IMPERMISSIBLY EXPANDED *GLOMAR* TO AUTHORIZE WITHHOLDING OF RECORDS THAT ARE NEITHER EXEMPT UNDER FOIA NOR RELATED TO SECRET INTELLIGENCE ACTIVITIES OR SOURCES.

The first defect in the district court's ruling was its failure to observe the strict limits on the use of *Glomar*. *Glomar* carves out a narrow exception to FOIA that may be invoked by the courts when, but only when, it is imperative to permit intelligence and law enforcement agencies to refuse to confirm or deny the existence of records relating to secret intelligence activities or sources of intelligence. Courts have been careful *not* to apply *Glomar* outside of its narrow confines for two reasons. First, *Glomar* is a non-statutory exception to FOIA's rule that agencies bear the burden of proving that each withheld record *is* exempt. 5 U.S.C. § 552(a)(4)(B). Under *Glomar*, an agency needs to show that records, if they exist, would *likely* fall into one of FOIA's exemptions and that the claims "are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Miller v. Casey*, 730 F.2d 773, 776 (D.C. Cir. 1984) (quoting *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981)); *see also Phillippi*, 546 F.2d at 1012-13. An unchecked *Glomar* doctrine is a breeding ground for abuse. *See ACLU v. Dep't of Defense* ("*ACLU v. DoD*"), 389 F. Supp. 2d 547, 562 (S.D.N.Y. 2005) ("The practice of secrecy . . . makes it difficult to hold executives accountable and compromises the basics of a free and open democratic society. It also creates a dangerous tendency to withhold information from those outside the insular group . . ."), *aff'd*, No. 06-3140, 2008 WL 4287823 (2d Cir. Sept. 22, 2008).

Second, the plain language of FOIA commands that the statute "does not authorize the withholding of information or limit the availability of records to the public, *except as specifically*

stated in this section." 5 U.S.C. § 552(d) (emphasis added); *see also Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) ("These exemptions [to FOIA] are specifically made exclusive") (quoting *EPA v. Mink*, 410 U.S. 73, 79 (1973)). *Glomar* is thus a non-statutory exception to a statute that forbids non-statutory exceptions.[13]

For these reasons, courts have found that *Glomar* is a narrow doctrine that must be carefully confined; otherwise it will become a default government response to FOIA requests implicating national security matters. As developed by the courts, *Glomar* may be invoked only when:

(1) the agency demonstrates that the requested records relate to a secret program the existence of which is properly classified pursuant to an Executive Order, or to intelligence-gathering activities or intelligence sources or methods protected by statutes governing the NSA and the CIA, *see, e.g., Phillippi*, 546 F.2d at 1014-1015; *Earth Pledge Found. v. CIA*, 988 F. Supp. 623 (S.D.N.Y. 1996) (upholding *Glomar* claim to prevent the CIA from having to confirm or deny existence of a secret installation in the Dominican Republic), *aff'd*, 128 F.3d 788 (2d Cir. 1997); *Miller*, 730 F.2d at 776-77 (holding that the CIA could refuse to admit or deny the existence of responsive records when acknowledgement would disclose existence of a secret operation); *see also* Exec. Order 13,292 § 3.6(a), 68 Fed. Reg. 15315, 15324;

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[13] Congress amended FOIA in 1986 to codify *Glomar* in part. *See* Pub. L. 99-570, § 1802(b), 100 Stat 3207 (1986). Under the 1986 amendments, federal law enforcement agencies are allowed to respond to a request for records without confirming the existence of the records when the request concerns: (1) information that is exempt because disclosure could reasonably interfere with an active law enforcement investigation involving a possible violation of criminal law; (2) informant records maintained by a criminal law enforcement agency under the informant's name or identifier unless the informant's status has been officially confirmed; and (3) classified records maintained by the Federal Bureau of Investigation that pertain to foreign intelligence, counterintelligence, or international terrorism. *See* 5 U.S.C. §§ 552(c)(1)-(3). It bears noting that Congress did not extend the same authority to the intelligence agencies.

(2) the agency shows that one or more of FOIA's national security exemptions apply to the withheld records — assuming that they exist — so the court is assured that applying *Glomar* would not authorize the withholding of non-exempt records, *see ACLU v. DoD*, 389 F.Supp. 2d at 565-66 (holding that memo from DOJ to CIA interpreting an international torture treaty did not implicate intelligence sources or methods, so *Glomar* response was improper); and

(3) *Glomar* is not being invoked to conceal actions taken by intelligence agencies that violate the Constitution or are otherwise illegal. *Id.* at 564 (concluding that *Glomar* may be appropriate when there is no indication that the government is attempting to "conceal 'violations of law' or 'inefficiency, or administrative order' or to mask embarrassment.").

The district court's ruling departs from each of these requirements. The TSP and the criteria the NSA used to target individuals are matters of public record; the records sought by the Guantánamo lawyers could not all lawfully be withheld under either Exemption 3, as the court ruled, or under Exemption 1, as the agencies also claimed; and, as shown in Section II of this brief, warrantless surveillance of the Guantánamo lawyers would violate the constitutional rights of the lawyers and their clients, and subvert the separation of powers. No court has ever held that *Glomar* could be invoked to cover up intelligence activities that violate the U.S. Constitution, yet the district court's decision does just that.

A. The TSP Is Not Secret.

As far as Appellants can tell, never before has a court accepted a *Glomar* claim where the intelligence-gathering program is not secret, where many of the operational details about the program have been officially disclosed, and where the government invokes *Glomar* to avoid acknowledging that it took action — eavesdropping on the Guantánamo lawyers — it claims it has the legal authority to take and the technical capacity to carry out. The Ninth Circuit has ruled

that the government cannot claim that the warrantless surveillance program is a state secret because "government officials have made voluntary disclosure after voluntary disclosure about the TSP." *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1198 (9th Cir. 2007). The government waived its right to assert a *Glomar* response when it "officially acknowledged" the information at issue. *See Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990); *Hudson River Sloop Clearwater, Inc. v. Dep't of Navy*, 891 F.2d 414, 421-22 (2d Cir. 1989). The rationale behind the well-settled "official acknowledgement" rule is that there is no national security interest in refusing to disclose information the government itself has already placed in the public domain. *Founding Church of Scientology*, 610 F.2d at 831-32; *Lamont v. Dep't of Justice*, 475 F. Supp. 761, 772 (S.D.N.Y. 1979); *Wash. Post Co. v. Dep't of Def.*, 766 F. Supp. 1, 8 (D.D.C. 1991).

Official acknowledgement occurs when there is "direct acknowledgement[] by an authoritative government source," *Schlesinger v. CIA*, 591 F. Supp. 60, 66 (D.D.C. 1984), and particularly "when the agency responsible for protecting the information discloses it." *Wilson v. McConnell*, 501 F. Supp. 2d 545, 559 (S.D.N.Y. 2007). Testimony before a Congressional subcommittee and an "off-the-record" press briefing are just two examples of disclosures found to constitute official acknowledgements. *Wolf v. CIA*, 473 F.3d 370, 379 (D.C. Cir. 2007); *Lawyers Comm. for Human Rights v. INS*, 721 F. Supp. 552, 569 (S.D.N.Y. 1989). Here, the Administration has acknowledged the program, and many of details about it, in official statements to Congress, the courts, and the press.

The NSA's surveillance program has been officially acknowledged and discussed extensively by *all* the key members of the Executive Branch: President George W. Bush; then-Attorney General Alberto R. Gonzales; Director of the Central Intelligence Agency General

Michael V. Hayden, formerly Director of the NSA and Principal Deputy Director for National Intelligence; and William E. Moschella, then-Assistant Attorney General for the Department of Justice Office of Legislative Affairs and currently Principal Associate Deputy Attorney General. On December 17, 2005, President Bush announced during a radio address that, "[i]n the weeks following" September 11, 2001, he had authorized the NSA to "intercept the international communications of people with known links to al Qaeda and related terrorist organizations."[14] Shortly thereafter, Gonzales, Hayden, and Moschella also acknowledged the surveillance program.[15] Director of National Intelligence Mike McConnell, as well as Gonzales and Hayden, officially acknowledged the profile of targeted individuals — any United States person engaged in international, electronic communications where one person to the communications is suspected to be affiliated with al Qaeda or a related terrorist organization[16] — as well as the process of selecting individuals for surveillance,[17] and the approximate number of people monitored.[18]

Attorney General Gonzales acknowledged that surveillance under the TSP occurred without a warrant from a FISA court,[19] and CIA Director Hayden admitted that the program allows interception even when the evidentiary basis for the surveillance is "a bit softer than it is for a FISA warrant."[20] Hayden also acknowledged that, although the NSA surveillance program

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[14] *Bush Radio Address*, *supra* note 3.
[15] *Id.*; *Gonzales/Hayden Press Briefing*, *supra* note 7; *Moschella Ltr.*, *supra* note 11.
[16] *Gonzales/Hayden Press Briefing*, *supra* note 7; *Gonzales Ask the White House*, *supra* note 6.
[17] *Wartime Executive Power and the NSA's Surveillance Authority Before the Senate Judiciary Committee*, 109th Cong. (Feb. 6, 2006), transcript available at http://www.washingtonpost.com/wp-dyn/content/article/2006/02/06/AR2006020600931.html (last visited Dec. 9, 2008).
[18] Chris Roberts, Transcript: Debate on the Foreign Intelligence Surveillance Act, El Paso Times, Aug. 22, 2007, *available at* http://www.elpasotimes.com/ci_6685679?source=most_viewed (last visited Dec. 9, 2008).
[19] *Gonzales/Hayden Press Briefing*, *supra* note 7.
[20] *Hayden Address to the Nat'l Press Club*, *supra* note 8.

targets communications where one party is outside the United States, if a purely domestic call were intercepted, that "incident . . . would be recorded and reported."[21]

DOJ confirmed the details of the NSA surveillance program in a 42-page White Paper, issued on January 19, 2006, which attempted to justify the program's legality.[22] As the Ninth Circuit explained in *Al Haramain*, "That the Department of Justice even thought it necessary to explain to the public 'in an unclassified form, the legal basis for the NSA activities described by the President,' . . . suggests that the government both knew that details of the surveillance program were in the public sphere and recognized that the Surveillance Program was already the subject of significant public discussion and interest." 507 F.3d at 1199-1200 (quoting *DOJ White Paper*, *supra* at 1). Attorney General Gonzales announced the suspension of the NSA surveillance program in January 2007.[23] But the President has reserved the right to reinstitute it at any time without notice to American citizens. Brand Decl. at 2 n.1, A-50.

The Administration has also made clear that it views the Guantánamo lawyers as legitimate targets for warrantless wiretapping. DOJ official Moschella acknowledged that attorneys might be monitored.[24] Published opinions from federal courts have adverted to the possibility that attorneys were subject to surveillance. *See, e.g.*, *Al Haramain*, 507 F.3d at 1193. And there is no doubt that the lawyers for the Guantánamo detainees fit the profile of those subject to surveillance under the TSP. The Administration announced that the program targeted people "with known links to al Qaeda and related terrorist organizations,"[25] and the lawyers

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[21] *Id.*
[22] *DOJ White Paper*, *supra* note 7.
[23] *See Gonzales Ltr.*, supra note 5.
[24] *Moschella Ltr.*, *supra* note 11.
[25] *See Bush Radio Address*, *supra* note 3.

represent the Guantánamo detainees whom the government describes as suspected "terrorists" and "enemy combatants."[26]

The widespread official acknowledgement that Guantánamo attorneys are possible targets of surveillance has caused "many prominent criminal defense lawyers [to] say [there] is a well-founded fear that all of their contacts are being monitored by the United States government." Shenon, *supra*, at A14. Instead of quelling attorneys' concerns, the Executive Branch fueled the perception that the concerns are grounded in fact. According to *The New York Times*, "The Justice Department does not deny that the government has monitored phone calls and e-mail exchanges between lawyers and their clients as part of its terrorism investigations in the United States and overseas." *Id.*; *see Al-Haramain* Transcript. The *Times* reports that two senior Department of Justice officials admitted that "they knew of . . . a handful of terrorism cases . . . in which the government might have monitored lawyer-client conversations." Shenon, *supra*, at A14.

The only information the Guantánamo lawyers seek that is not in the public domain is whether the NSA has in fact targeted them for surveillance under the TSP. Confirming or denying whether the NSA has conducted warrantless surveillance of these lawyers would not require the NSA to disclose any legitimate, non-public surveillance sources or methods or reveal anything about the agency's intelligence-gathering capabilities. On the contrary, if the answer is

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[26] Memorandum for Distribution from Sec'y of the Navy Gordon England, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantánamo Bay Naval Base, Cuba* (July 29, 2004), *available at* http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf (last visited Dec. 9, 2008); Sgnt. Doug Sample, *Rumsfeld Says Media Show Only 'Negative' Side of Iraq War*, American Forces Press Svcs. (June 28, 2005), *available at* http://www.defenselink.mil/news/Jun2005/20050628_1889.html (last visited Dec. 9, 2008) (citing Donald Rumsfeld, Radio Address, June 27, 2005).

"no," the NSA would simply deny the lawyers' FOIA request on the ground that there are no responsive records. It is difficult to imagine any tangible harm flowing to NSA's functions by acknowledging that it did not eavesdrop on lawyers. If the answer is "yes," that answer would also not disclose anything about the NSA's surveillance capabilities and lawful intelligence-gathering functions, the individuals (aside from the lawyers) who were targeted for surveillance, or any other information relating to intelligence sources and methods. Indeed, given the fact that the government has already claimed the right to eavesdrop on the lawyers *and* that it has the technical capacity to do so, *see* Brand Decl. ¶¶ 4-10, A-50 – A-53, disclosure of the fact that the lawyers were subject to surveillance could not possibly harm the NSA's intelligence-gathering function.

To be sure, there may be *records* responsive to the lawyers' request that contain sensitive information. But rejecting a *Glomar* defense simply sets the stage for normal FOIA litigation to proceed. On remand, the agencies would have to set forth their exemption claims and submit declarations to the district court (*in camera*, if necessary) establishing that the records are properly withheld. *See* 5 U.S.C. § 552(a)(4)(B); *see also Patterson v. FBI*, 893 F.2d 595, 599 (3d Cir. 1990) (concluding *sua sponte* that *in camera* inspection of certain documents was necessary to ascertain whether the FBI conducted its investigation in good faith, complied with all relevant government regulations, and engaged in illegal conduct). The agencies will claim, as they have throughout, that the records are exempt under Exemption 1 and Exemption 3. The district court will then consider the merits of those claims. As we now show, it is doubtful that the agencies could sustain either of their exemption claims for all of the withheld records. Targeting the Guantánamo lawyers for surveillance would be illegal, and thus, while records relating to NSA's surveillance capabilities and targeting decisions apart from the lawyers might be properly

withheld under Exemption 1 or Exemption 3, records relating to whether the lawyers were targeted are not exempt.

B. The District Court Erred in Concluding That Responsive Records, If They Exist, Are Shielded From Disclosure Under Exemptions 1 and 3.

A *Glomar* response is permitted only where admitting or denying the existence of records would implicate legitimate national security interests protected by FOIA. *See Phillippi v. CIA*, 546 F.2d at 1014-1015; *see also* Exec. Order No. 13,292 § 3.6(a), 68 Fed. Reg. 15315, 15324. As demonstrated below in Part II, any warrantless surveillance of the Guantánamo lawyers would have been unconstitutional. Here we demonstrate that the district court's uncritical acceptance of the NSA and DOJ's Exemption 3 claims was in error, as was the government's reliance on Exemption 1. When the government responds to a FOIA request, "every effort should be made to segregate for ultimate disclosure aspects of the record that would not implicate *legitimate* intelligence operations." *Founding Church of Scientology v. NSA*, 610 F.2d at 830 n.49 (emphasis added).

But neither the NSA nor DOJ demonstrated that records responsive to the lawyers' FOIA request would be properly withheld under either Exemption 1 or Exemption 3. Congress did not intend for the FOIA exemptions to enable intelligence agencies to conceal illegal activity. "FOIA was enacted in order 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.'" *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 355 (2d Cir. 2005) (alteration in original) (quoting *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999)); *see also NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). The interests behind FOIA Exemptions 1 and 3 are not served by hiding illegal activities. To the contrary, allowing intelligence agencies to

invoke a blanket *Glomar* response would give them license "to conceal information regarding blatantly illegal or unconstitutional activities simply by assigning these activities to the NSA or claiming they implicated information about the NSA's functions." *Terkel,* 441 F. Supp. 2d at 905.

That prediction is borne out in this case. The district court held that records relating to warrantless eavesdropping of the Guantánamo lawyers could be withheld *even if* the records revealed that the NSA broke the law or violated the Constitution. Slip op. at 15, SPA-18. That result, the court said, was compelled by the "clear language of the statutes at issue," which it read to require withholding categorically, without regard to whether the records were evidence of illegal or even unconstitutional acts. *Id.* In so ruling, the district court relied mainly on Section 6 of the NSAA, which provides that "nothing in this Act or any other law . . . shall be construed to require the disclosure of . . . any function of the National Security Agency, of any information with respect to the activities thereof," 50 U.S.C. § 402, but also cited Section 102(A)(i)(1) of the Intelligence Reform and Terrorism Prevention Act of 2004, which requires the Director of National Intelligence to "protect intelligence sources and methods from unauthorized disclosure." *Id*. § 403-1(i)(1). This ruling is wrong for three related reasons.

First, the district court's reading of the NSAA cannot be reconciled with the Act's text. Properly read, Section 6 directs non-disclosure only of information relating to the "functions" and "activities" of the agency *authorized* by the Act. An agency has no authority to act outside of the scope of the powers delegated to it by Congress. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125-26 (2000) (explaining that an agency may not exercise its authority "in a manner that is inconsistent with the administrative structure that Congress enacted into law.") (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)). Thus, to read the statute

to protect information relating to NSA functions and activities that are *unauthorized* by Congress is to rewrite the statute, which is not a judicial task. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002) ("[p]arties should not seek to amend [a] statute by appeal to the Judicial Branch.").

The same is true with respect to the NSA's duty to protect "intelligence sources and methods." Properly read, that provision safeguards "intelligence sources and methods" obtained in a manner consistent with the Constitution and laws of the United States. The district court's reading would instead rewrite the statute to say "intelligence sources and methods, *even if the intelligence was obtained by means that are unauthorized, illegal or unconstitutional*." That reading cannot be sustained. Although the Court in *CIA v. Sims*, 471 U.S. 159 (1985), read the term "intelligence sources and methods" broadly, the Court nowhere suggested that Congress authorized (or could authorize) the NSA to dispense with the Fourth Amendment in gathering intelligence from "sources" or "methods." Indeed, any such contention would collide with the rule of "constitutional doubt," which requires courts to interpret statutes in a way that avoids conflict with the Constitution. *See, e.g., Almendarez-Torres v. United States*, 523 U.S. 224, 237-38 (1998) (discussing, but declining to apply, "constitutional doubt" rule that holds that "[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score") (quotation omitted); *see also id.* at 250 (Scalia, J., dissenting) (arguing in favor of applying constitutional doubt rule).

Moreover, the district court's ruling has no limiting principle. No matter how grave or deliberate the NSA's illegal or unconstitutional conduct, the NSA could not be required to reveal information, so long as the agency could make a plausible claim that the information related to its "function," "activities" or "intelligence sources or methods." The district court offers no reason

why Congress would have authorized the intelligence agencies to conceal illegal acts.

Second, the district court's reading also places the NSAA in direct conflict with FISA. 50 U.S.C. §§ 1801 *et seq*. FISA implements the Fourth Amendment by regulating all electronic surveillance conducted for foreign intelligence purposes and sets out "the *exclusive* means by which electronic surveillance . . . and the interception of domestic wire, oral, and electronic communications may be conducted." 18 U.S.C. § 2511(2)(f) (emphasis added).[27] FISA would prevent the NSA from targeting the lawyers' communications unless the NSA procured a warrant under judicial supervision and followed minimization procedures to protect attorney-client privilege. *See* 50 U.S.C. §§ 1801(h), 1804, 1805. Under FISA, the Executive may not target a "United States person" unless he or she is a "foreign power" or an "agent of a foreign power." § 1804(a)(3)(A). However, "[n]o United States person may be considered a foreign power or an agent of a foreign power *solely upon* the basis of activities protected by the first amendment to the Constitution of the United States." 50 U.S.C. § 1805(a)(2)(A) (emphasis added). Representing Guantánamo detainees is a lawful activity clearly protected by the First Amendment and cannot form the basis for surveillance under FISA. *See, e.g.*, *In re Primus*, 436 U.S. 412, 427-28 (1978); *NAACP v. Button*, 371 U.S. 417, 430-31 (1963); *NAACP v. Alabama, ex rel. Patterson*, 357 U.S. 449, 460 (1958). Moreover, each of these lawyers was cleared by the FBI and found not to pose a threat to national security, which further undermines any suggestion that the lawyers themselves could be legitimate targets for surveillance. *See, e.g.,* Gutierrez Decl. ¶ 39, A-284; Neff Decl. ¶

[27] Congress recognized that the TSP flouted the requirements of FISA and acted to prevent future circumvention. In the Foreign Intelligence Surveillance Act Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (2008) ("2008 FISA Amendments"), Congress reaffirmed, in no uncertain terms, that FISA is the exclusive means for all electronic foreign intelligence surveillance activities. 2008 FISA Amendments §102(a). Notably, the 2008 FISA Amendments did not retroactively authorize the warrantless surveillance conducted under the TSP, and thus the amendments provide no defense to the NSA or DOJ in this case.

16, A-330; Barker Decl. ¶ 11, A-205 – A-206; Chandler Decl. ¶ 8, A-220; Gorman Decl. ¶ 14, A-258 – A-59; Grigg Decl. ¶ 8, A-267.

The district court did not consider the lawyers' argument that warrantless surveillance of their communications would violate FISA. Had the court done so, it could not have concluded that the activities under the NSAA and the Intelligence Reform and Terrorism Prevention Act impliedly repealed FISA (and, for that matter, the Fourth Amendment). Rather, it would have read the NSA's statutes to authorize intelligence gathering provided that NSA also complied with FISA. That reading is compelled by both the rule of constitutional doubt and the separate requirement that courts try to harmonize statutes to give effect to them both. *See, e.g., Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.").

Third, the district court's ruling is unprecedented. Courts have not approved the invocation of FOIA Exemption 3 to conceal illegal or unconstitutional activities. *See Founding Church of Scientology*, 610 F.2d at 830 n.49; *Hayden*, 608 F.2d at 1389; *Terkel*, 441 F. Supp. 2d at 905; *ACLU v. DoD*, 389 F. Supp. 2d at 564-65; *cf. People for the American Way Found. v. NSA* ("*PFAWF*"), 462 F. Supp. 2d 21, 30-31, 33 (D.D.C. 2006); *Navasky v. CIA*, 499 F. Supp. 269, 272-74 (S.D.N.Y. 1980). Exemption 3 shields documents "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3). "[W]here [an NSA] function or activity is authorized by statute *and not otherwise unlawful*, NSA materials integrally related to that function or activity fall within . . . Exemption 3." *Hayden*, 608 F.2d at 1389 (emphasis added). However, "NSA would have no protectable interest in suppressing information [under Exemption

3] simply because its release might uncloak an illegal operation . . . ." *Founding Church of Scientology*, 610 F. 2d at 830 n.49. The district court's Exemption 3 ruling should be reversed.

The NSA and DOJ argued that Exemption 1 also would shield records responsive to the lawyers' request from disclosure. But that argument, too, misses the mark. Exemption 1 protects only those documents that are "(A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (B) *are in fact properly classified* pursuant to such Executive order." 5 U.S.C. § 552(b)(1) (emphasis added). The Executive Order governing classification explicitly provides that "*[i]n no case shall information be classified in order to . . . conceal violations of law*. . . ." Exec. Order No. 13,292 § 1.7(a)(1), 68 Fed. Reg. 15318 (emphasis added). Because the government could not lawfully engage in warrantless surveillance of the Guantánamo lawyers, records of such activity could not properly be classified, and the government cannot rely on FOIA Exemption 1 to shield every record that might be responsive to the lawyers' FOIA request.

"FOIA places a heavy responsibility on the judge to determine '*de novo*' if documents withheld by an agency are properly withheld . . . ." *ACLU v. DoD*, 389 F. Supp. 2d at 552. In evaluating a *Glomar* claim under Exemption 1, a court must determine *de novo* whether the documents are improperly classified to "conceal violations of law." *Id*. at 564 (quotation omitted). Where the government has not provided sufficient information for a court to make this *de novo* determination, the court should deny the government summary judgment. *Id*. at 564-65; *see Wiener v. FBI*, 943 F.2d 972, 988 (9th Cir. 1991). In *Wiener*, the Ninth Circuit reversed a district court's award of summary judgment to the government and remanded for consideration of, *inter alia*, plaintiff's allegation that the requested information was improperly withheld under Exemption 1 to conceal unlawful government operations. 943 F.2d at 988. Particularly where a

FOIA request seeks records on a controversial topic (like the illegality of monitoring attorney-client communications), and that topic has already been addressed in the media, the invocation of *Glomar* can "raise concern" that "the purpose of the [agency's *Glomar* defense] is less to protect intelligence activities, sources or methods than to conceal possible violations of law . . . ." *ACLU v. DoD*, 389 F. Supp. 2d at 564-65 (quotations altered). For these reasons, the government's Exemption 1 claim would fail.[28]

Finally, the narrowness of the question before the Court bears particular emphasis. As discussed above, the government has publicly disclosed the existence of, and many of the details of, its warrantless surveillance program. The *only* additional information sought by the lawyers is whether the government has illegally intercepted *their* communications. Admitting or denying this would not reveal the identities of parties to the communications other than their own. Nor would it reveal sources or methods. The attorneys simply want to know whether the NSA has been eavesdropping on their communications. Nothing in *Glomar*, or the policies behind it, authorizes the government to conceal that information.

[28] No court has ever approved the use of *Glomar* as a defense to conceal unconstitutional activity. *People For*, 462 F. Supp. 2d 21, and *Navasky*, 499 F. Supp. 269, provide no exception: in neither case did the court address a constitutional challenge to the government conduct at issue. To be sure, the plaintiffs in *People For* brought what was, in essence, a facial challenge to the NSA surveillance program that the court rejected because plaintiff had not shown that the records were classified to conceal illegality. *See* 462 F. Supp. 2d at 29 ("Even if the TSP were ultimately determined to be illegal, it does not follow that the NSA's decision regarding the classification of materials relating to the TSP was made 'in order to . . . conceal violations of law.'"). Here, of course, any decision to target the lawyers' communications, made in furtherance of their clients' representation, and without a warrant, would have been illegal from the start. Thus, by definition, classification would have been made to conceal illegal and unconstitutional actions, or put another way, as applied to lawyers, the TSP program was "born" illegal and unconstitutional.

II. WARRANTLESS INTERCEPTION OF THE GUANTÁNMO LAWYERS' COMMUNICATIONS WOULD BE UNCONSTITUTIONAL.

The Executive Branch may not invoke *Glomar* to conceal activities that violate the Constitution. *See Founding Church of Scientology*, 610 F.2d at 830 n.49; *Hayden*, 608 F.2d at 1389. Warrantless surveillance under the TSP would violate the constitutional rights of the lawyers and their clients. Communications by attorneys made in the course of representation enjoy heightened constitutional and statutory protections. The possibility of warrantless surveillance has chilled these communications and infringed on the lawyers' ability to represent clients and present arguments to the courts. TSP surveillance is particularly harrowing because the Executive Branch conducted it without any judicial review. The result of such warrantless surveillance of lawyers would be an arrogation of Executive power at the expense of the judicial and legislative branches, posing a threat to the constitutional system of separation of powers. The Executive Branch cannot use *Glomar* to shield these serious constitutional violations from judicial review.

A. The Constitution Protects Lawyers from Warrantless Surveillance.

Warrantless surveillance of the lawyers' electronic communications would be unconstitutional. Both the Fourth Amendment and FISA place strict limits on the ability of the Executive to monitor the electronic communications of lawyers. Engaging in warrantless surveillance of lawyers because they represent Guantánamo detainees would transgress these limits. The possibility of surveillance also infringes on the lawyers' First Amendment rights and the related ability to raise all reasonable arguments on their clients' behalf, *Velazquez*, 531 U.S. at 544-45, and unreasonably interferes with the lawyers' Fifth Amendment liberty right to pursue their chosen occupation as attorneys. *See United States v. Robel*, 389 U.S. 258, 265 n.11 (1967)

(citing *Greene v. McElroy*, 360 U.S. 474, 492 (1959)).

1. Lawyers' Communications are Protected Under the Fourth Amendment.

Warrantless surveillance of the lawyers' electronic communications would violate the Fourth Amendment. It is well-established that the Executive Branch may not engage in electronic monitoring of persons within the United States without prior judicial authorization by warrant. U.S. CONST. amend. IV; *Katz v. United States*, 389 U.S. 347, 359 (1967). The Constitution places a special demand on the government when it engages in surveillance of attorney communications made in the course of client representation. *See Nat'l City Trading Corp. v. United States*, 635 F.2d 1020, 1025-26 (2d Cir. 1980); *DeMassa v. Nunez*, 770 F.2d 1505, 1506 (9th Cir. 1985). The danger to the lawyers' constitutional protections is particularly acute when the Executive Branch circumvents judicial oversight by invoking national security concerns.[29] *See United States v. U.S. Dist. Court*, 407 U.S. 297, 312-14 (1972).

Attorney communications in the course of representation are unique and demand heightened Fourth Amendment protection. *See Nat'l City Trading Corp.*, 635 F.2d at 1025-26; *DeMassa*, 770 F.2d at 1506 (finding clients have a legitimate expectation of privacy which protects confidential communications with their attorneys). The Supreme Court has repeatedly emphasized the importance of attorney-client and work-product privileges in our legal system; policing the zone of privacy in which lawyers' work is essential to protecting the integrity of that system. *See, e.g.*, *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Hickman v. Taylor*,

[29] This Court recently held that the Fourth Amendment's reasonableness requirement, not the warrant requirement, governs foreign intelligence searches conducted by U.S. agents abroad. *In re Terrorist Bombings of U.S. Embassies (Fourth Amendment Challenges)*, No. 01-1535-cr(L), 2008 WL 4967686, at *8 (2d Cir. Nov. 24, 2008). The court was careful to distinguish extraterritorial searches from domestic searches and justified the suspension of the warrant requirement to extraterritorial searches because of the legal and practical barriers to obtaining warrants abroad. *Id.* at *10-12.

329 U.S. 495, 510-12 (1947). Thus, what might constitute a reasonable search under the Fourth Amendment with respect to other members of the public may be unconstitutional as applied to attorneys. *See Roaden v. Kentucky*, 413 U.S. 496, 501 (1973) (A "seizure reasonable as to one type of materials in one setting may be unreasonable in a different setting or with respect to another type of material."). The importance of preserving confidentiality is present even where the government can demonstrate probable cause that justifies issuance of a search warrant. *See Nat'l City Trading Corp.*, 635 F.2d at 1025-26; *Klitzman, Klitzman and Gallagher v. Krut*, 744 F.2d 955, 961-62 (3d Cir.1984) (finding execution of warrant overbroad and establishing corrective procedures). Even when warrants are judicially authorized, this Court has warned that "a law office search should be executed with special care to avoid unnecessary intrusion on attorney-client communications," *especially* when the search may encompass files of clients who are unrelated to the suspicious activity. *Nat'l City Trading Corp.*, 635 F.2d at 1026; *see also United States v. Mittelman*, 999 F.2d 440, 445 (9th Cir. 1993); *United States v. Stewart*, No. 02 CR 396, 2002 WL 1300059, at *7 (S.D.N.Y. June 11, 2002). Because most of the Guantánamo lawyers also represent foreign clients in unrelated matters, the possibility that the TSP did not follow minimization requirements for attorney communications poses grave concerns for the unrelated clients whose rights may also have been compromised.

National security concerns create no exception to the long-standing protections accorded to attorney communications. *Lonegan v. Hasty*, 436 F. Supp. 2d 419, 436 (E.D.N.Y. 2006) (ruling that government monitoring of attorneys' communications with clients suspected of terrorist activity violated the Fourth Amendment); *see also United States Dist. Court*, 407 U.S. at 312-14 (reaffirming that constitutional protections apply even when national security is involved). Courts have repeatedly rejected efforts by the Executive Branch to interfere with the attorney-

detainee communications on the basis that lawyers must perform representational functions without government intrusion.

The most glaring examples of misguided Executive Branch intrusion have arisen in the cases of Guantánamo detainees. The courts have been instrumental in policing the Executive's aggressive and improper attempts to interfere with attorney-detainee communications. In *Al Odah v. United States*, 346 F. Supp. 2d 1, 8-9 (D.D.C. 2004), the United States District Court for the District of Columbia rejected the Executive's assertion that it could conduct warrantless audio and video monitoring of in-person meetings between habeas counsel and Guantánamo detainees. In *In re Guantánamo Detainee Cases*, 344 F. Supp. 2d 174, 186-91 (D.D.C. 2004), the court preserved a zone of privacy for attorney-client communications when the Executive asserted the need to scrutinize interactions between attorneys and detainees. And in *Bismullah v. Gates*, 501 F.3d 178, 189 (D.C. Cir. 2007), *reh'g en banc denied*, 514 F.3d 1291, 1293, the Executive, without a warrant or other judicial oversight, intercepted attorney-detainee correspondence, prompting the D.C. Circuit to establish procedures to safeguard "'full and frank communication' between a detainee and his counsel" to "help counsel present the detainee's case to the court." (Quotation omitted).

The surveillance at issue here is far more problematic than the proposed monitoring in *Al Odah*, *In re Guantánamo Detainee Cases*, and *Bismullah* because here, if eavesdropping occurred, the Executive Branch unilaterally obstructed the attorney-client relationship with no judicial oversight. Nothing could be more destructive of the attorney-client relationship than surreptitious monitoring of attorneys' communications in the course of representation without any judicial review.

As noted above, warrantless surveillance of the lawyers would also violate FISA. FISA

implements the safeguards of the Fourth Amendment for electronic surveillance conducted for foreign intelligence purposes, and sets out "the *exclusive* means by which electronic surveillance . . . and the interception of domestic wire, oral, and electronic communications may be conducted." 18 U.S.C. § 2511(2)(f) (emphasis added). In the highly unlikely circumstance that the NSA could properly target the lawyers for surveillance, FISA would require the NSA to implement two significant procedures, *inter alia*, before monitoring the lawyers' communications. First, the NSA would be required to demonstrate probable cause and obtain a warrant from the Foreign Intelligence Surveillance Court. 50 U.S.C. §§ 1804, 1805. This congressional mandate cannot be avoided by alleging difficulties in obtaining judicial clearance, as the Executive Branch did when ignoring FISA to implement the TSP.[30] Second, the NSA would be required to follow FISA's minimization procedures designed to protect the attorney-client privilege. §§ 1801(h); 1806(a). FISA provides that "[n]o otherwise privileged communication obtained in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character." § 1806(a).

Despite the clarity with which Congress acted to preserve the Fourth Amendment's safeguards and protect the attorney-client privilege in national security cases, the Executive has not suggested that it respected those limits when it engaged in eavesdropping under the TSP.[31] Given that the Executive Branch claims special authority to bypass both the Constitution and FISA, the lawyers have reason to believe that, if the NSA has actually engaged in warrantless electronic surveillance of their communications, it has done so without taking any of the precautions Congress required under FISA.[32] The Executive's public position, that it has the right to eavesdrop on lawyers without judicial review, gives the Guantánamo lawyers no choice but to

[30] *Gonzales/Hayden Press Briefing*, *supra* note 7.
[31] *Id*.
[32] *See id*.

assume that their communications have been intercepted.

2. The Government's Claim That It Has the Right To Intercept Attorneys' Communications Violates the First Amendment.

The First Amendment protects lawyers' ability to "present all the reasonable and well-grounded arguments necessary for proper resolution of [a] case." *Velazquez*, 531 U.S. at 545. "Restricting . . . attorneys in advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys." *Id.* at 544; *see also In re Primus*, 436 U.S. at 427-28; *Button*, 371 U.S. at 430-31; *ex rel. Patterson,* 357 U.S. at 460. Interference by other government branches with "speech and expression upon which courts must depend" is unconstitutional. *Velazquez*, 531 U.S. at 545.

The publicly announced, and still not disavowed, threat of surveillance by the NSA combined with evidence that the Administration has in fact eavesdropped on at least some of the lawyers, has stifled the Guantánamo attorneys' ability to gather evidence, formulate theories, and fully present their clients' cases to the judiciary. *Cf. Nagel v. U.S. Dep't of Health, Educ. & Welfare*, 725 F.2d 1438, 1441 (D.C. Cir. 1984) ("The mere compilation by the government of records describing the exercise of First Amendment freedoms creates the possibility that those records will be used to the speaker's detriment, and hence has a chilling effect on such exercise."). The possibility that the NSA is recording the lawyers' communications impedes conversations with witnesses, investigators, and co-counsel, and truncates arguments presented to courts. The inability to guarantee the confidentiality of communications jeopardizes the Guantánamo lawyers' ability to represent any of their clients — both detainees and unrelated foreign clients. *E.g.*, Gorman Decl. ¶ 18, A-261; Gutierrez Decl. ¶¶ 24-25, A-280. Even in representing non-Guantánamo clients, Appellants George Brent Mickum IV and Thomas Wilner,

for example, have found it difficult to engage in their international law practices because they and their clients are wary of possible NSA surveillance. Mickum Decl. ¶ 19, A-322; Wilner Decl. ¶ 8, A-363 – A-364.

By interfering with the lawyers' ability to represent their clients, the government is exploiting the very fear that the attorney-client and work-product privileges were designed to protect against. *E.g.*, Chandler Decl. ¶ 5, A-217 – A-218; Dixon Decl. ¶¶ 20-21, A-237 – A-238; Gorman Decl. ¶ 16, A-260; Wilner Decl. ¶ 8, A-363 – A-364. "[T]he purpose of the work-product immunity has been to avoid chilling attorneys in developing materials to aid them in giving legal advice and in preparing a case for trial. The fear of disclosure to adversaries of normal work-product would severely affect performance of the lawyer's role . . . ." *In re John Doe Corp.*, 675 F.2d 482, 492 (2d Cir. 1982). Preserving the privacy of an attorney's work product and communications is "essential to an orderly working of our system of legal procedure." *Hickman*, 329 U.S. at 512. "The interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case." *United States v. Nobles*, 422 U.S. 225, 238 (1975). In detainee status proceedings, "[c]ounsel simply cannot argue, nor can the court determine, whether a preponderance of the evidence supports [an enemy combatant] status determination without seeing all the evidence." *Bismullah*, 501 F.3d at 187; *see also Boumediene*, 128 S. Ct. 2229, 2269-70. Therefore, by impairing the lawyers' ability to speak freely in the course of representation, the Executive Branch has imposed a "serious and fundamental restriction on advocacy of attorneys and the functioning of the judiciary" in violation of the First Amendment. *See Velazquez*, 531 U.S. at 544.

3. The Fifth Amendment Protects the Ability of Lawyers to Practice Law.

The threat of government interference with the lawyers' communications unduly burdens their Fifth Amendment right to pursue their chosen occupation. *See Robel*, 389 U.S. at 264-265; *Greene*, 360 U.S. at 492; *Schware v. Board of Bar Exam.*, 353 U.S. 232, 247 (1957). "[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment." *Greene*, 360 U.S. at 492. Moreover, the right of lawyers to practice law is a "fundamental right" entitled to the highest level of constitutional protection. *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 281 (1985). Protecting the right to practice law, especially for the "the lawyer who champions unpopular causes," is important to the "well-being of the Union." *Id.* (quoting *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371, 388 (1978)). "The interest these lawyers seek to vindicate is not merely the pecuniary goal that motivates every individual's attempt to pursue his calling. It is the profession's interest in discharging its responsibility for the fair administration of justice in our adversary system." *Leis v. Flynt,* 439 U.S. 438, 452-53 (1979) (Stevens, J., dissenting); *see also In re Primus*, 436 U.S. at 427-28 (ruling that lawyers' engaged in litigation on behalf of "unpopular causes and unpopular defendants" and not for pecuniary gain receive heightened constitutional protection).

The possibility of government surveillance, however, disrupts the lawyers' practice and prevents the fair administration of justice. Every attorney has a professional duty to preserve client confidences; an attorney should not discuss such confidences when a third party —especially the client's adversary — might be listening. *See, e.g.*, N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.19. As legal ethics expert Professor David Luban explains, "By leaving

open the possibility of warrantless surveillance of the [lawyers'] communications, the government forces them into an ethical quandary pitting competence and zealous advocacy against confidentiality. This chills their ability to serve their function as advocates in accordance with the most basic principles of the profession." Luban Decl. ¶ 20, A-303.

The ethical dilemma posed by the NSA's threat of surveillance has impaired the lawyers' ability to practice. Like many of the Guantánamo lawyers, Appellants J. Wells Dixon and Clive A. Stafford Smith have been forced to censor their own communications to ensure important information remains privileged and confidential. *E.g.*, Dixon Decl. ¶ 21, A-237 – A-238; Smith Decl. ¶ 42, A-344. Appellant Joseph Margulies forgoes certain telephone and e-mail communications, even though in-person meetings are expensive and sometimes impossible. Margulies Decl. ¶ 18, A-311 – A-312. H. Candace Gorman took a leave of absence from her private practice due to "concern[s] about upholding [her] ethical and fiduciary duties to clients when their confidential communications may be intercepted." Gorman Decl. ¶¶ 18, 20, 22, A-261 – A-263. By interfering with the lawyers' ability to practice law and represent clients in accordance with the ethical standards of the profession, the government has violated the Fifth Amendment.

B. The Threat of Monitoring Violates the Constitutional Rights of the Guantánamo Detainees.

The interference of the Executive Branch with the lawyers' ability to gather evidence, and otherwise represent their clients, deprives the detainees of due process and meaningful access to courts. *E.g.*, Dixon Decl. ¶ 20, A-237. "[D]enial of due process is the failure to observe that fundamental fairness essential to the very concept of justice." *Lisenba v. California*, 314 U.S.

219, 236 (1941); *Dunnigan v. Keane*, 137 F.3d 117, 125 (2d Cir. 1998); s*ee Brady v. Maryland*, 373 U.S. 83, 87 (1963).

The Supreme Court has devoted careful attention to defining the process due to detained persons. Every detainee is entitled to a "meaningful opportunity to contest the factual bases for th[e] detention," *Hamdi v. Rumsfeld*, 542 U.S. 507, 509, 518 (2004), and "to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." *Boumediene*, 128 S. Ct. at 2266. Yet the detainees' ability to rebut the government's assertions and challenge the bases for their classifications as enemy combatants has been thwarted by the official announcements that the NSA may be monitoring their lawyers' conversations. The threat of surveillance has created obstacles to gathering evidence from potential fact witnesses and experts. Chandler Decl. ¶ 5, A-217 – A-218; Foster Decl. ¶ 20, A-248; Margulies Decl. ¶ 18, A-311 – A-312; Mickum Decl. ¶ 18, A-321 – A-322. These government-created barriers to the full development of a record stymie any meaningful process. *See Hamdi*, 542 U.S. at 533.

The impairments of the Guantánamo lawyers' representational capacities endanger the fairness of currently pending habeas proceedings and contravene the Supreme Court's recent *Boumediene* ruling. In *Boumediene*, the Court held not only that the Guantánamo detainees maintain the privilege of habeas corpus, but also that the unique context of detention by Executive Order may warrant *even more stringent habeas procedures* than provided in normal habeas review because detainees are not afforded the procedural protections of criminal trials. 128 S. Ct. at 2269. While habeas procedures for detainee cases need not include all the elements of a criminal trial, the Court emphasized that "the writ must be effective." *Id.* The writ necessarily requires procedures and adversarial mechanisms to ensure that a detainee is not limited in his ability to rebut the government's evidence. *See id.* at 2260, 2269.

Because the Executive Branch asserts that enemy combatants may be held indefinitely, the habeas proceedings challenging enemy status designations are almost certainly detainees' only chance at freedom. Detainees must rely on their lawyers' ability to gather evidence and piece together the facts, as most allegations are classified and may not be communicated to the detainees. *See id.* at 2240. The possibility of surreptitious monitoring, however, has made it difficult for the lawyers to conduct these investigations in any meaningful way. *E.g.*, Neff Decl. ¶ 27, A-332. For instance, Gitanjali Gutierrez explains that for almost a year she was unable to obtain information critical to her client's enemy combatant status determination because she could not assure herself or her client's family that their telephone or e-mail communications would be confidential. Gutierrez Decl. ¶ 24, A-280; *see also* Dixon Decl. ¶ 20, A-237. When the government interferes with the collection of evidence in support of detainees' habeas corpus petitions, the writ fails to function effectively. *Cf. Boumediene*, 128 S. Ct. 2269-70.

Restricting the Guantánamo lawyers' ability to provide representation also infringes on the detainees' meaningful access to courts. "Prisoners have a constitutional right of access to the courts" that must be "adequate, effective, and meaningful." *Bounds v. Smith*, 430 U.S. 817, 822 (1977); *see Ross v. Moffitt*, 417 U.S. 600, 616 (1974). This right of access "assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974).

Meaningful court access requires "a reasonable opportunity to seek and receive the assistance of attorneys." *Procunier v. Martinez,* 416 U.S. 396, 419 (1974), *overruled on other grounds by Thornburgh v. Abbott,* 490 U.S. 401, 413-14 (1989). While habeas petitioners do not necessarily enjoy a right to counsel, they do possess a right to be free from interference with counsel. *See Lewis v. Casey*, 518 U.S. 343, 367-68, 78 (1996) (Thomas, J., concurring)

(distinguishing prohibition on state interference with habeas from affirmative obligation of state support for petition). In *Procunier v. Martinez*, the Supreme Court invalidated a state regulation barring law students and paraprofessionals, employed by lawyers representing prisoners, from seeing inmate clients. 416 U.S. at 419-20. The Court held, "[r]egulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid." *Id*. at 419 (citing *Ex parte Hull*, 312 U.S. 546, 549 (1941)).

The threat of NSA monitoring of Guantánamo lawyers obstructs their ability to provide professional representation to the detainees. The detainees' meaningful access to courts depends on the confidentiality of their lawyers' communications in the course of investigation and analysis. *See Bounds*, 430 U.S. 817; *Hicks v. Bush*, 452 F. Supp. 2d 88, 99-100 (D.D.C. 2006). "Since the basic purpose of the [habeas] writ is to enable those unlawfully incarcerated to obtain their freedom, it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed." *Wolff*, 418 U.S. at 578. The looming possibility of warrantless monitoring denies and obstructs such access.

C. Warrantless Surveillance Infringes on the Province of the Judiciary and Violates Separation of Powers.

The Executive Branch's repeated attempts to circumvent judicial review of the TSP and its detention policies have upset the constitutional separation of powers. The possibility that the lawyers were subject to warrantless surveillance under the TSP raises serious concerns because the TSP lacked any judicial oversight or procedures to protect privileged information. The threat of surveillance has chilled communications between the lawyers and witnesses, resulting in evidence and arguments being withheld from the judiciary and preventing full and fair review of detention issues. As Appellant Michael J. Sternhell details, "The risk of revealing client

confidences and my own work product inhibits my ability to gather information, advise my clients and fully develop the complete spectrum of factual and legal options to present to the courts adjudicating their claims." Sternhell Decl. ¶ 15, A-352; *see also* Mickum Decl. ¶ 18, A-321 – A-322; Smith Decl. ¶ 45, A-344 – A-345; Hafetz Decl. ¶ 16, A-292 – A-293. The Executive Branch invokes *Glomar* to shield the possible warrantless surveillance of the lawyers from judicial review.

The Court should reject the Executive's argument because warrantless surveillance of the lawyers by the Executive Branch would usurp the powers expressly vested in the judiciary by the Fourth Amendment and FISA. Under the Fourth Amendment, the Judiciary has the constitutional obligation to oversee executive surveillance and issue carefully-tailored warrants based on probable cause. U.S. Const., Amendment IV ("The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . . ."). The Executive is not free to dispense with this constitutional requirement. *See, e.g., Nixon v. Adm'r of Gen. Servs.,* 433 U.S. 425, 430 (1977). Even when national security is at stake, FISA requires that the Executive show probable cause and obtain a warrant from the judges on the FISA court. 50 U.S.C. §§ 1804, 1805. Interposing the deliberate and impartial judgment of a judicial officer between the Executive Branch and citizens operates "to check the well-intentioned but mistakenly over-zealous executive officers' who are a party of any system of law enforcement." *United States v. U. S. Dist. Court*, 407 U.S. at 316 (internal quotations omitted). "This judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation

of powers and division of functions among the different branches and levels of Government." *Id.* at 317.[33]

The government's refusal to confirm or deny surveillance of the lawyers alters the lawyers' traditional role of "present[ing] all the reasonable and well-grounded arguments necessary for proper resolution of the case." *See Velazquez*, 531 U.S. at 545. Restricting the lawyers' ability to advise clients and present arguments and analyses to the courts threatens "severe impairment of the judicial function." *Id.* at 534, 546. The threat of surveillance has chilled witnesses from providing even the most rudimentary information; it has impaired the attorneys' ability to develop legal theories with co-counsel; and it has prevented the attorneys from marshaling evidence and discovering information necessary to a meaningful defense. *E.g.*, Margulies Decl. ¶ 18, A-311 – A-312; Barker Decl. ¶ 14, A-206 – A-207; Mickum Decl. ¶ 18, A-321 – A-322; Sternhell Decl. ¶ 15, A-352. The government's bases for detaining persons as enemy combatants may not be insulated from judicial review in this way.

"[T]he Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining th[e] delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions." *Hamdi*, 542 U.S. at 536. Executive limitations on the scope and effectiveness of the writ raise "troubling separation-of-powers

[33] As Justice Powell pointed out in his concurrence in *INS v. Chadha*, 462 U.S. 919, 963 (1983), "the [separation of powers] doctrine may be violated in two ways. One branch may interfere impermissibly with the other's performance of its constitutionally assigned function. *See Nixon v. Administrator of General Services*, 433 U.S. at 433; *United States v. Nixon*, 418 U.S. 683 (1974). Alternatively, the doctrine may be violated when one branch assumes a function that more properly is entrusted to another. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952); *Springer v. Philippine Islands*, 277 U.S. 189, 203 (1928)." By disregarding the requirements of the Fourth Amendment and FISA, the Executive Branch has both impermissibly interfered with the judiciary's "performance of its constitutionally assigned function" to superintend the issuance of warrants and assumed a function the Constitution assigns to the judiciary.

concerns." *Boumediene*, 128 S. Ct. at 2258. Preserving the effectiveness of the writ of habeas corpus is especially important in cases involving Guantánamo detainees. As the Supreme Court has explained, "The gravity of the separation-of-powers issues raised by these cases and the fact that these detainees have been denied meaningful access to a judicial forum for a period of years render these cases exceptional." *Id.* at 2263. Because the detainees' lawyers have been chilled from adequately engaging in factual and legal development, detainees may not mount "meaningful" challenges to their designations as enemy combatants. The Executive Branch thereby dilutes the effectiveness of habeas corpus and prevents meaningful judicial review of Executive actions. *See id*. at 2259, 2269; *Hamdi*, 542 U.S. at 536.

The exercise of judicial power to prevent Executive overreaching is necessary even in times of war. *Hamdi*, 542 U.S. at 536. When the Executive Branch acts in contravention of checks and balances established by Congress and the Judiciary, it threatens the equilibrium established by our constitutional system. *See Youngstown*, 343 U.S. at 638 (Jackson, J. concurring). Here, the Executive Branch has prevented judicial oversight of a program that, when applied to lawyers, would be illegal, unconstitutional, and corrosive of our adversary system of justice. This Court should not allow the government to hide behind *Glomar* to, yet again, prevent judicial review of the TSP.

CONCLUSION

For the reasons set forth above, the judgment of the district court should be vacated and this case remanded to permit the NSA and the DOJ to identify records responsive to the lawyers' FOIA request and to interpose objections to the release of any record that is exempt from disclosure under FOIA.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C), Fed. R. App. P., I hereby certify that the foregoing brief is in compliance with the word limitations set forth in Rule 32(a)(7)(B) inasmuch as the brief contains fewer than 14,000 words, when measured by Word Perfect 12, the word processing program used to prepare the brief (which counted 13, 771 words).

/s/
Kathryn A. Sabbeth

ANTI-VIRUS CERTIFICATE

WILNER, et al. v. NATIONAL SECURITY AGENCY, et al.,

No. 08-4726-cv

I, Kathryn A. Sabbeth, certify that I have scanned for viruses the PDF version of Appellants' Brief that was submitted in this case as an email attachment to <civilcases@ca2.uscourts.gov> and that no viruses were detected.

Software Used: Symantec AntiVirus 9.0.1.100

Signed: /s/

Dated: 12/11/08

ADDENDUM

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