Nos. 06-2095, 06-2140

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMERICAN CIVIL LIBERTIES UNION, et al.,
Plaintiffs - Appellees/Cross-Appellants,

v.

NATIONAL SECURITY AGENCY, et al.,
Defendants - Appellants/Cross-Appellees

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

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, JAPANESE AMERICAN CITIZENS LEAGUE, THE LEAGUE OF UNITED LATIN AMERICAN CITIZENS, UNITED FOR PEACE AND JUSTICE, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AND ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF PLAINTIFFS-APPELLEES/CROSS APPELLANTS

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INTEREST OF *AMICI CURIAE*[1]

The National Association for the Advancement of Colored People ("NAACP") is a non-profit membership corporation originally chartered by the State of New York in 1909. The Nation's oldest and largest civil rights organization, the NAACP has more than 500,000 members and 2,200 units in the United States and overseas.

The American-Arab Anti-Discrimination Committee ("ADC") is a non-profit, non-partisan civil rights organization committed to defending the rights of people of Arab descent and promoting their rich cultural heritage. Founded in 1980, ADC is the largest Arab-American grassroots civil rights organization in the United States, with 38 chapters nationwide and members in all 50 States.

The Asian American Legal Defense and Education Fund ("AALDEF"), founded in 1974, is a non-profit organization based in New York City devoted to defending the civil rights of Asian Americans. AALDEF is concerned that the government's reliance on vague and unchecked war powers is the same purported basis that led to the unlawful internment of Japanese Americans during World War II.

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[1] *Amici* file this brief with the consent of the parties.

The Japanese American Citizens League ("JACL") was founded in 1929. JACL is the nation's oldest and largest Asian American non-profit, non-partisan organization, and is committed to upholding the civil rights of Americans of Japanese ancestry.

The League of United Latin American Citizens ("LULAC"), a non-profit membership organization chartered originally by the State of Texas in 1929, is the oldest and largest Latino civil rights organization in the United States. LULAC advances the economic condition, educational attainment, political influence, health, and civil rights of Hispanic Americans through community based programs operating at more than 700 LULAC councils nationwide.

United for Peace and Justice, with more than 1,400 member groups, is the nation's largest antiwar coalition coordinating efforts in opposition to the U.S. war on Iraq. Since October 2002, United for Peace and Justice has supported hundreds of local protests and the three largest protests against the war: at the United Nations in New York City on February 15, 2003; on the eve of the Republican Convention on August 29, 2004; and in Washington, DC, on September 24, 2005.

The American Association of University Professors ("AAUP") is an organization of approximately 45,000 faculty members and research scholars

in all academic disciplines. Founded in 1915, the Association joins this brief to highlight the danger that unrestricted government surveillance of Americans' communications poses to academic freedom and, by extension, the constitutionally protected free flow of ideas.

The Electronic Frontier Foundation ("EFF") is a non-profit public interest group with more than 12,000 members, dedicated to protecting civil liberties in the digital world. Currently, EFF represents customers of telecommunications giant AT&T in a case alleging that AT&T is unlawfully helping the National Security Agency ("NSA") conduct warrantless communications of Americans' domestic communications and their communications records. *See Hepting et al. v. AT&T*, 439 F. Supp. 2d 974 (N.D. Cal.), *interlocutory appeal pending* (06-17137).

Amici civil rights organizations have long devoted considerable effort and resources to public advocacy on issues of concern to their members, often at odds with official government position. Their First Amendment activities, however, have historically been the target of clandestine surveillance by the NSA, among other Executive branch agencies. This corrosive and unconstitutional intrusion on civil rights organizations and others who expressed then-unpopular views has stifled important voices in our Nation's struggle for Equal Justice Under Law. Such intrusion on protected speech and

advocacy prompted Congress to enact the Foreign Intelligence Surveillance Act ("FISA").

Amici's experience with the dangers of unchecked domestic surveillance, and the tangible harm it causes Americans' First Amendment rights, is this brief's focus. This history properly informs both the Court's analysis of FISA's rule against warrantless domestic surveillance, and also its standing analysis. *See American Civil Liberties Union v. National Security Agency*, 438 F. Supp. 2d 754, 776 (E.D. Mich. 2006) ("*ACLU*").

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1978 Congress enacted FISA, Pub. L. 95-511, Title I, 92 Stat. 1796 (Oct. 25, 1978), the principal statute at issue in this case. Congress enacted FISA in response to revelations in 1976 of the federal government's widespread abuse of surveillance and intelligence powers against Americans during the Cold War. These revelations resulted from the investigation and report of the United States Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities ("the Church Committee"). The Church Committee documented how the NSA and other intelligence agencies had spied on Americans in violation of basic constitutional freedoms. It also described government officials' tendency to view wholly legitimate civil rights activity through the lens of national security, targeting even those

now viewed as national heroes. In many instances, the Church Committee's revelations concerned *amici* here who struggled to improve the lot of racial minorities in the Civil Rights Movement. As the Church Committee showed, the absence of ex ante legal boundaries or ex post accountability mechanisms allowed the nation's intelligence agencies, including the NSA, to intrude upon domestic dissidents' exercise of First Amendment rights. Without legislative and judicial oversight, intelligence agencies wielded their tremendous powers in ways that jeopardized Americans' political freedoms for decades.

Enacted against this backdrop of unchecked executive spying, FISA prohibited any electronic surveillance of Americans for national security purposes except pursuant to carefully calibrated statutory protections. FISA thereby ended the lawless use of intelligence powers that can cause such grave harm to American citizens' privacy and free speech rights.

In 2001, President Bush authorized a new classified NSA program to intercept international telephone and Internet communications by American citizens and residents without a warrant or other judicial sign-off. *See, e.g.*, Plaintiffs' Statement of Undisputed Facts ("SUF") 1A, 11B, 2A, 3A. Administration officials have publicly acknowledged that "electronic surveillance," as defined by FISA, has been conducted under the current NSA program. Indeed, according to one official, this program was used "in lieu" of

FISA. SUF 10A. The President has reauthorized this program more than 30 times, and has stated that he intends to continue reauthorizing it as long as he deems it necessary. SUF 5A

Holding the NSA's classified program to be in violation of FISA and the Constitution, the District Court noted the "numerous political abuses" that historically attend warrantless wiretapping by the Executive. *ACLU*, 438 F. Supp. 2d at 772. Like lawless domestic surveillance of the Cold War era, today's classified NSA domestic surveillance trenches on Plaintiffs' constitutionally protected privacy and speech rights. By interfering with Plaintiffs' communication, advocacy, research, and academic freedom, the NSA program chills the First Amendment-protected activity essential to civil rights work and meaningful public debate. Unlike much Cold War surveillance, today's NSA program also clearly violates federal law: FISA. The executive branch cannot, consistent with the Framers' system of checks-and-balances, set aside laws duly enacted by Congress. As the Cold War history documented by the Church Committee reveals, this kind of unchecked power inexorably leads to abuses of our treasured civil liberties and Constitution's separation of powers.

ARGUMENT

I. THE CHURCH COMMITTEE'S FINDING THAT DECADES OF WARRANTLESS ELECTRONIC SURVEILLANCE ERODED

AMERICANS' CONSTITUTIONAL FREEDOMS SHOWED THE NEED FOR LEGISLATION TO PREVENT FURTHER ABUSES.

A. For Decades, Intelligence Agencies Spied On Law-Abiding Americans In The Name Of National Security And Without Legal Constraints.

The risk of abusive deployment of surveillance powers in the absence of clear legal limits is nothing new. In 1924, then-Attorney General, and future Supreme Court Justice, Harlan Fiske Stone expressed grave concerns about federal agencies overstepping their bounds by investigating political and other opinions, rather than unlawful conduct.

> When a police system passes beyond these limits, it is dangerous to the proper administration of justice and to human liberty, which it should be our first concern to cherish. . . . There is always a possibility that a secret police may become a menace to free government and free institutions because it carries with it the possibility of abuses of power which are not always quickly apprehended or understood.

Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, Intelligence Activities and the Rights of Americans (Book II), S. Rep. No. 94-755, at 3 (1976) ("Church Committee Book II"). Regrettably, Stone's warning was long ignored, with precisely the consequences he foretold.

From the 1930s to the 1970s, Democratic and Republican administrations wiretapped and bugged American citizens without warrants or

judicial authorization. *Id.* at 12. Most alarmingly, this surveillance often targeted individuals engaged in constitutionally protected political speech, including wholly-legitimate political dissent and civil rights activities. *Id.* at 213-14; Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans (Book III), S. Rep. No. 94-755, at 4-5 (1976) ("Church Committee Book III").

Congress, even then, had attempted to place restraints on the Executive's ability to intrude on private communications. But, as with the current administration, the Executive often evaded the law to spy on Americans. Although the Federal Communication Act of 1934 made it unlawful to intercept and divulge communications, 47 U.S.C. § 605(a), the Attorney General (and his successors) interpreted the act to permit wiretapping as long as no information was passed outside the government. Church Committee Book II, *supra*, at 36; *cf. Nardone v. United States*, 308 U.S. 338 (1939) (interpreting the Communication Act of 1934 to bar both direct and indirect use of telephonic intercept evidence). This interpretation eliminated any external check on the Executive branch's power to eavesdrop on even the most private conversations, dispensing with the requirement that the government justify its suspicions. *See, e.g., Berger v. New York*, 388 U.S.

41, 63 (1967) ("Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices.").

Most surveillance focused initially on the potential agents of foreign, totalitarian powers. Church Committee Book II, *supra*, at 21. Yet, over time there was a "steady increase in the government's capability and willingness to pry into, and even disrupt, the political activities and personal lives of the people." *Id.* Before long, intelligence activity targeted domestic groups advocating change in America, including civil rights organizations that sought to improve the plight of racial minorities and groups that protested against the war in Vietnam. *Id.* at 22; *see also id.* at 21 (describing "relentless expansion of domestic intelligence activity"). "The breadth of the FBI's investigation of 'subversive infiltration' continued to produce intelligence reports and massive files on lawful groups and law-abiding citizens who happened to associate, even unwittingly, with Communists or with socialists unconnected with the Soviet Union . . . . [and] expanded to cover civil rights protest activity as well as violent 'Klan-type' and 'hate' groups, vocal anticommunists, and prominent opponents of racial integration." *Id.* at 39.

Civil rights organizations became targets "without regard for the consequences to American liberties." *Id.* at 22. *Amicus* NAACP, for example, was investigated for more than twenty-five years because it might

have "had connections with" the Communist Party – despite the fact that nothing was ever found to rebut a report from the very first year of the investigation that the NAACP had a "strong tendency" to "steer clear of Communist activities." *Id.* at 8. During that time, the government gathered extensive inside information about NAACP lobbying and advocacy efforts through electronic surveillance, *id.* at 232, while the FBI's extensive reports on the NAACP were shared with military intelligence, *id.* at 81 n.350.

Warrantless surveillance prompted the government to take actions that undermined the NAACP and its work. For example, an FBI memo submitted to President Dwight D. Eisenhower containing misstatements about communist influence on the NAACP "reinforced the President's inclination to passivity on civil rights legislation." *Id.* at 251 n.151a (internal quotation marks omitted). Other targets of FBI or army intelligence collection included the Southern Christian Leadership Conference, the Congress on Racial Equality, the Student Nonviolent Coordinating Committee, the Urban League, and the Anti-Defamation League of B'nai B'irth. *Id.* at 105, 167; *see also, e.g., Martin Luther King, Jr. Movement v. City of Chicago*, 435 F. Supp. 1289, 1291 (N.D. Ill. 1977) (describing allegations that City of Chicago engaged in program of police surveillance, harassment and intimidation of civil rights organizations). "FBI Field Offices were directed to report the 'general

programs' of *all* 'civil rights organizations' and 'readily available personal background data' on leaders and individuals in the 'civil rights movement.'" Church Committee Book II, *supra*, at 173. (emphasis in original). In addition, the FBI opened intelligence investigations on "every Black Student Union and similar group *regardless of their past or present involvement in disorders*." *Id.* at 177 (emphasis in original). In total, the government maintained files on nearly 100,000 Americans, including civil rights leaders such as Dr. Martin Luther King, Jr.; Coretta King; Julian Bond; and James Farmer. *Id.* at 81, 174.

Perhaps most notoriously, the FBI targeted Dr. Martin Luther King, Jr. to "neutralize" him as an effective civil rights leader. Church Committee Book II, *supra*, at 11. After Dr. King's speech at the August 1963 March on Washington, the FBI described him as the "most dangerous and effective Negro leader in the country" and decided to "take him off his pedestal." *Id.* The Bureau employed "nearly every intelligence-gathering technique at [its] disposal," including electronic surveillance, to obtain information about the "private activities of Dr. King and his advisors" in order to "completely discredit" them. *Id.* For example, the FBI mailed Dr. King a recording from microphones hidden in his hotel rooms made in an effort to destroy Dr. King's marriage; the recording was accompanied by a note which Dr. King and his

advisors interpreted as threatening to release the tape recording unless Dr. King committed suicide. *Id.*

Warrantless surveillance also targeted countless other Americans on both the political left and right, from the women's liberation movement to conservative Christian groups. *Id.* at 7. Intelligence agencies unjustifiably invaded the private communications of individuals who "engaged in no criminal activity and who posed no genuine threat to the national security." *Id.* at 12. Student groups, such as Students for a Democratic Society, were wiretapped due to their opposition to the Vietnam War. *Id.* at 105. Members of the Socialist Workers Party were investigated and wiretapped for decades by Democratic and Republican administrations that disliked the Party's position on the Vietnam War, food prices, racial matters, and other issues. *Id.* at 8. Journalists were often spied on, as were Executive branch officials and their relatives. *Id.* at 106-07, 121. Even the entire congregation of the Unitarian Society of Cleveland was targeted after several churchgoers circulated a petition calling for the dissolution of the House Un-American Activities Committee. *Id.* at 214 n.14. Warrantless surveillance also continued for decades after any justification for it had expired, as intelligence agencies continued to target groups based upon mere suspicion, "despite the fact that those groups did not engage in unlawful activity." *Id.* at 5.

Moreover, as the scope of surveillance grew, intelligence agencies' activities became "purely political" in aim. *Id.* at 118. The Executive spied on "citizens on the basis of their political beliefs, even when those beliefs posed no threat of violence or illegal acts on behalf of a hostile foreign power." *Id.* at 5. Federal agents, for example, conducted widespread electronic surveillance around the 1964 Democratic National Convention in Atlantic City, New Jersey. They wiretapped Dr. King's hotel room and the headquarters of the Student Nonviolent Coordinating Committee, a leading civil rights organization. *Id.* at 117. The surveillance yielded "the most intimate details" about the Mississippi Freedom Democratic Party and its potential challenge to President Johnson at the Convention, which the Johnson administration could exploit for political purposes unrelated to the possibility of violent demonstrations. *Id.* at 118.

Further, without clear legal boundaries, intelligence personnel erred on the side of excess – spying on those they saw as hostile to American interests. This led to ever-widening surveillance of wholly legitimate civil rights activity, such as the struggle for racial equality, which Democratic and Republican administrations alike mistakenly viewed in Cold War terms. During the Civil Rights Movement, for example, the government claimed that surveillance of Dr. King and members of *amicus* NAACP was necessary to

thwart communist subversion. *See* Mark Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1931-1961*, at 295 (1994).

In explaining the causes of "mission creep" from justified to unconstitutional surveillance, the Church Committee honed in on the careless use by executive agencies of broad and amorphous labels such as "national security" and "subversion" in identifying targets:

> The application of vague and elastic standards for wiretapping and bugging has resulted in electronic surveillances which, by any objective measure, were improper and seriously infringed the Fourth Amendment rights of both the targets and those with whom the targets communicated. . . The inherently intrusive nature of electronic surveillance . . . enabled the Government to generate vast amounts of information – unrelated to any legitimate governmental interest – about the personal and political lives of American citizens. The collection of this type of information has, in turn, raised the danger of its use for partisan political and other improper ends by senior administration officials.

Church Committee Book III, *supra*, at 332. This was not a new insight. Reflecting on his World War II experience – including the Japanese internments – Attorney General Francis Biddle noted with regret "the power of suggestion which a mystic cliché like 'military necessity' can exercise on human beings." Francis Biddle, *In Brief Authority* 226 (1962).

As history shows, violations of privacy and speech interests flow directly from the absence of a clear statutory or supervisory framework to limit domestic surveillance powers. Without independent supervision from

Congress or the federal courts, intelligence agencies exploited ill-defined mandates to justify surveillance of those they disagreed with, as well as those whose speech raised real security concerns. Justice David Souter recently explained how this happens:

> For reasons of inescapable human nature, the branch of government asked to counter a serious threat is not the branch on which to rest the Nation's entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises. A reasonable balance is more likely to be reached by a different branch ....

Hamdi v. Rumsfeld, 542 U.S. 507, 544 (2004) (concurring opinion of Souter, J.).

The Church Committee's expansive catalogue of abuses demonstrates the tendency of unchecked, warrantless spying – precisely the type the current President claims as a prerogative – to target wholly-innocent and constitutionally-protected political expression. The Executive has long justified such surveillance by evoking the terms "national security," "domestic security," "subversive activities," and "foreign intelligence." Church Committee Book II, *supra*, at 205, 208. But, as the Church Committee noted, "the imprecision and manipulation of the[se] and similar labels, coupled with the absence of any outside scrutiny, has led to [their] improper use against American citizens who posed no criminal or national security threat to the

country." *Id.* Unchecked surveillance activity, the Committee concluded, inevitably "exceed[s] the restraints on the exercise of governmental power which are imposed by our country's Constitution, laws, and traditions." *Id.* at 2.

B. The NSA's History Highlights The Dangers Of Warrantless Surveillance.

Nowhere were the dangers of unchecked surveillance more acute during the Cold War than in the NSA. President Truman created the NSA within the Department of Defense by secret directive in October 1952 to marshal the Nation's electronic surveillance resources for the Cold War. Church Committee Book III, *supra*, at 736. The NSA's primary task involved collecting signals intelligence, which include communications between two parties. Mark M. Lowenthal, *Intelligence: From Secrets to Policy* 64 (2000). Until 1992, the agency operated without any legislative charter, *cf.* Intelligence Authorization Act for FY1993, Pub. L. No. 102-496, § 705, and, until 1981, no publicly available executive order limited the NSA's power or set forth its responsibilities, *cf.* Exec. Order No. 12,333, § 1.12(b), *reprinted in* 50 U.S.C. § 401; Lawrence D. Sloan, *Echelon and the Legal Restraints on Signals Intelligence: A Need for Reevaluation*, 50 Duke L.J. 1467, 1497-99 (2001) (describing E.O. 12,333).

Through most of the Cold War, therefore, the NSA's surveillance apparatus operated entirely without statutory regulation. Unchecked by the legislative or judicial branches, the NSA grew "into a vast mechanical octopus, reaching sensitive tentacles into every continent in search of information on the intentions and capabilities of other nations." Loch K. Johnson, *America's Secret Power: The CIA in a Democratic Society* 52 (1989).

For decades, the NSA conducted sweeping, indiscriminate surveillance of electronic communications of law-abiding American citizens and organizations. It then disseminated its yield among government agencies, including the FBI, CIA, Secret Service, Defense Department, and narcotics bureaus. Church Committee Book III, *supra*, at 735.

Two programs of the NSA trenched deeply on First and Fourth Amendment rights. First, "Operation Shamrock" involved blanket surveillance of all cables coming in and out of the United States. Second, the NSA maintained a "watch-list" of suspect Americans – including many civil rights advocates – targeted due to their First Amendment-protected speech.

In Shamrock, the NSA "received copies of millions of international telegrams sent to, from, or transiting the United States" in "the largest governmental interception program affecting Americans" of the Cold War era,

dwarfing the CIA's mail opening program by comparison. Church Committee Book III, *supra*, at 740. Shamrock initially siphoned out only "encyphered telegrams of certain foreign targets," but, in the absence of legislative limits and judicial oversight, spun out of control until *every* international cable was being intercepted. *Id.* Indeed, the "daily rush" of indiscriminate information swept up by the NSA was compared to a "firehose." Johnson, *America's Secret Power*, *supra*, at 64, *cf.* Lowell Bergman et al., *Spy Agency Data After Sept. 11 Led F.B.I. to Dead Ends*, N.Y. Times, at A1. (Jan. 17, 2006) (reporting that after September 11, NSA sent "a flood" of telephone numbers, e-mail addresses and names to the FBI in search of terrorists, "requiring hundreds of agents to check out thousands of tips a month," virtually all of which "led to dead ends or innocent Americans"). Not only were there no external constraints, but the Executive branch's command-and-control structure was so poor that the massive Shamrock program was run by "only one lower-level manager" without monitoring from senior officials within the agency, James Bamford, *Body of Secrets: Anatomy of the Ultra-Secret National Security Agency* 437 (2002), a startling lack of internal agency supervision replicated by the current NSA program, *see* Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005), *at*

<http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html> (disclosing that a "shift supervisor" has final authority to approve surveillance under the current NSA program).

The second, even more intrusive, facet of NSA surveillance involved "watch-lists" of suspect Americans. "From the early 1960s until 1973, NSA intercepted and disseminated international communications of selected American citizens and groups on the basis of lists of names supplied by other Government agencies," lists that included individuals and groups "involved in domestic antiwar and civil rights activities." Church Committee Book III, *supra*, at 739. No judicial warrants were sought, Church Committee Book II, *supra*, at 202, and senior Justice Department officials were often left in the dark, *id.* at 189.

Surveillance was justified by targets' First Amendment activities. FBI Director J. Edgar Hoover, for example, explained his need for open-ended surveillance to the NSA Director by speculating about foreign influence over domestic speech, including the First Amendment-protected speech of civil rights advocates. According to Hoover, "New Leftists" might be engaged in "international cooperation," and "black racial extremists" were "natural allies of foreign enemies of the United States." Church Committee Book III, *supra*, at 751 (emphasis omitted); *see also* Church Committee Book II, *supra*, at 108

(Army Chief of Staff for Intelligence requesting NSA surveillance of U.S. "peace groups" and "'Black Power' organizations"); David Cunningham, *There's Something Happening Here: The New Left, The Klan, and FBI Counterintelligence* 192-93 (2004) (describing NSA surveillance of left-wing groups). As discussed *supra*, this was precisely the logic used to justify the extensive surveillance – and worse – of Dr. King. *See supra* at 8-10; *see also* Church Committee Book II, *supra*, at 71 (describing FBI's belief that Dr. King might "abandon his supposed 'obedience' to 'white, liberal doctrines' (nonviolence) and embrace black nationalism"). Quakers too were collectively targeted by the NSA based on Hoover's suspicions of the group's political activities. James Bamford, *The Puzzle Palace: Inside the National Security Agency, America's Most Secret Intelligence Organization* 322 (1982).

The Church Committee pinpointed a "multiplier effect" embedded in the NSA's logic:

> [I]f an organization is targeted, all its member's [sic] communications may be intercepted; if an individual is on the watch list, all communications to, from, or mentioning that individual may be intercepted. . . .For example, a communication mentioning the wife of a U.S. Senator was intercepted by NSA, as were communications discussing a peace concert, a correspondent's report from Southeast Asia to his magazine in New York, and a pro-Vietnam war activist's invitation to speakers for a rally.

Church Committee Book III, *supra*, at 750.[2] NSA surveillance was not restricted to specified targets but extended indiscriminately to the tens if not hundreds of thousands of law-abiding Americans who came into contact with them in the course of protected First Amendment activity. The history of NSA surveillance thus underscores the dangers that unregulated surveillance poses to basic constitutional freedoms of civil rights advocates and other Americans.

C. Warrantless NSA Surveillance Directly Harmed American Citizens And Violated Constitutionally Protected Speech and Privacy Interests.

Warrantless surveillance and other unconstitutional intelligence activities caused real harm to *amici* and other groups and citizens being spied

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[2] Accounts of today's NSA warrantless domestic spying program suggest a similar dynamic at play:

> The CIA turned those names, addresses, and numbers over to the NSA, which then began monitoring those numbers, as well as the numbers of anyone in communication with them, and so on outward in an expanding network of phone numbers and Internet addresses, both in the United States and overseas.... [T]he NSA is using the Program to conduct surveillance on the telephone and e-mail correspondence of about seven thousand people overseas. ... NSA is targeting the communications of about five hundred people inside the United States.

James Risen, *State of War: The Secret History of the CIA and the Bush Administration* 52-54 (2006). If experience is any guide, therefore, the public picture of the scope of present NSA domestic spying is only the tip of the iceberg.

upon. Intelligence agencies misused information gained by such surveillance to "discredit the ideas" and "'neutralize' the actions" of Americans engaged in First Amendment-protected speech and advocacy, further distorting the political marketplace of ideas, a marketplace in which the American values of civil rights have historically triumphed. Church Committee Book II, *supra*, at 3. The FBI's counter-intelligence program known as COINTELPRO, for instance, sought to expose, disrupt, misdirect, discredit or otherwise neutralize African-American organizations and their leadership, spokesmen, members, and supporters. *Id.* at 87. After gathering intelligence, the FBI resorted to a range of repressive tactics, including: anonymously attacking targets' political beliefs to induce their employers to fire them; provoking IRS tax investigations to deter targets' political activity; anonymously mailing letters to the spouses of intelligence targets to destroy their marriages; and anonymously and falsely labeling targets as government informants to expose them to expulsion or physical attack. *Id.* at 10-11; *see also* Paul Wolf, COINTELPRO: The Untold American Story, Report Presented to U.N. High Commissioner for Human Rights Mary Robinson at the World Conference Against Racism in Durban, South Africa by members of the Congressional Black Caucus, September 1, 2001, *at* <http//www.icdc.com/~paulwolf/cointelpro/coinwcar3.htm> (describing

COINTELPRO tactics of repeatedly arresting activists on false pretences until they could no longer make bail and utilizing paid informants to present false testimony).

The NSA's secret program has precisely the chilling effect on civil rights advocacy and other First Amendment freedoms that FISA was designed to prevent. S. Rep. No. 95-604(I) at 8, 1978 U.S.C.C.A.N. at 3909-10 (FISA intended to counter the "formidable" chilling effect that warrantless surveillance had on those who "were not targets of the surveillance, but who perceived themselves, whether reasonably or unreasonably, as potential targets"). *See also ACLU*, 438 F. Supp. 2d at 776 (noting chilling effect of government intrusion into organizations). Indeed, the NSA program, whose existence was first divulged only recently, has already interfered with the ability of attorneys to communicate confidentially with their clients, witnesses, potential experts, and others in the Middle East, Plaintiffs' Motion for Partial Summary Judgment ("Pls.' SJ Mot."), Exs. J, at 6-9 & L, at 3-6, and journalists to communicate with sources, *id.*, Ex. K, at 3-5. The program also harms First Amendment-protected academic freedom. *See, e.g., Board of Regents of Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217 (2000).[3] For

[3] *See also* Report of the AAUP's Special Committee on Academic Freedom and National Security in a Time of Crisis, November 2003, *at* http://www.aaup.org/AAUP/About/committees/committee+repts/crisistime.ht

example, as Professor Larry Diamond has stated, the program has constrained faculty and graduate students from fully pursuing their research or scholarship while traveling abroad because of the legitimate fear that they or their sources will be subject to reprisal. Pls.' SJ Mot., Ex. I, at 5-7.

Surveillance, moreover, was *never* an end in itself, but a step to further erosions of fundamental freedoms. The FBI's indexing of national security information gained from warrantless surveillance, for example, provided a foundation for the Emergency Detention Act of 1950, which authorized the preventive detention of anyone suspected of having the potential for espionage or sabotage – a measure similar to that which permitted the internment of more than 120,000 Japanese Americans during World War II. Pub. L. No. 83-831, Title II, §§ 101-16, 64 Stat. 987, 1019 (Sept. 23, 1950) (codified as amended in scattered sections of 50 U.S.C.), *repealed by* Act of Sept. 25, 1971, Pub. No. 92-128, § 2, 85 Stat. 347, 348. While the act's detention provision was never used, at least 26,000 people were designated to be rounded up in case of a "national emergency." Church Committee Book II, *supra*, at 7.

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m ("[F]reedom of inquiry and the open exchange of ideas are crucial to the nation's security, and ... the nation's security and, ultimately, its well-being are damaged by practices that discourage or impair freedom.").

The FBI's intelligence activities also led it to work closely with the Immigration and Naturalization Service to round up thousands of residents, even though few were ever found to be "subversives." Ellen Schrecker, *Immigration and Internal Security: Political Deportations During the McCarthy Era*, 60 Science and Society 393, 399, 412 (1996-1997). In fact, in some instances the goal was not to deport unlawful immigrants but, rather, to harass and instill fear among immigrant communities. *Id.* at 408-09 n.9.

As the history of Executive branch spying shows, and as *amici* are well aware, preventing the chilling of these core speech and expression rights requires subjecting electronic surveillance to judicial review. *Cf. NAACP v. Button*, 371 U.S. 415, 434 (1963) (restriction on legal advocacy presents "gravest danger of smothering all discussion looking to the eventual institution of litigation on behalf of the rights of members of an unpopular minority"); *NAACP v. Alabama ex. rel Patterson*, 357 U.S. 449, 462-63 (1958) (disclosure of membership lists could "induce members [of the organization] to withdraw" and "dissuade others from joining"). The solution, as the Church Committee made clear, was a carefully calibrated statutory framework that imposed checks on intelligence surveillance to strike a balance between liberty and security.

II. FISA WAS ENACTED TO ELIMINATE WARRANTLESS SURVEILLANCE BY THE NSA AND OTHER INTELLIGENCE AGENCIES AND TO PREVENT FURTHER ABUSES.

A. FISA Requires All Electronic Surveillance To Be Conducted Pursuant To Its Terms Or Those Of Title III.

Based upon its lengthy and thorough investigation, the Church Committee concluded that "[t]he Constitutional system of checks and balances ha[d] not adequately controlled intelligence activities." Church Committee Book II, *supra*, at 6. Congress, it explained, had "failed to exercise sufficient oversight," while the courts had been reluctant to grapple with the few cases that came before them. *Id.*; *see also id.* at 15 (describing "clear and sustained failure . . . to control the intelligence community and to ensure its accountability"). The Church Committee's message could not have been starker or its warning clearer: if "new and tighter controls" were not established, "domestic intelligence agencies threaten[ed] to undermine our democratic society and fundamentally alter its nature." *Id.* at 1.

The Committee accordingly urged Congress to enact legislation restricting surveillance by the NSA and other intelligence agencies to prevent renewed intrusions on Americans' privacy and speech rights, intrusions that jeopardized constitutionally protected civil rights activity and meaningful public debate. Specifically, the Committee recommended that the NSA be limited by "a precisely drawn legislative charter" to prohibit the agency from

"select[ing] for monitoring any communication to, from, or about an American" unless "a warrant approving such monitoring is obtained in accordance with procedures similar to those contained [under the federal wiretapping statute]." *Id.* at 309.

In 1978, Congress enacted FISA in response to the Church Committee's "revelations that warrantless electronic surveillance in the name of national security ha[d] been seriously abused." S. Rep. No. 95-604 (I), at 7-8, *reprinted in* 1978 U.S.C.C.A.N. 3904, 3908-09. Congress intended FISA to restore and preserve Americans' confidence in their ability to engage in the "public activ[ity]" and "dissent from official policy" at the heart of civil rights advocacy and meaningful public debate. *Id.* at 8, 1978 U.S.C.C.A.N. at 3909-10. FISA embodies "a recognition by both the Executive Branch and the Congress that the statutory rule of law must prevail in the area of foreign intelligence surveillance." *Id.* at 6, 1978 U.S.C.C.A.N. at 3908.

Specifically, FISA requires that the Executive obtain a warrant based upon probable cause for electronic surveillance of a foreign power or agent of a foreign power. 50 U.S.C. § 1805(a)(3); *accord* S. Rep. No. 95-604 (I), at 6, 1978 U.S.C.C.A.N. at 3908. With Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"), it provides "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).[4]

To deter warrantless surveillance, FISA and Title III impose severe civil and criminal sanctions upon those who conduct such surveillance without statutory authority. *Id.* §§ 1809, 1810; *see also id.* §§ 2511, 2520. FISA hence "curb[s] the practice by which the Executive Branch may conduct warrantless electronic surveillance on its own unilateral determination that national security justifies it." S. Rep. No. 95-604(I), at 8-9, 1978 U.S.C.C.A.N. at 3910.[5]

If the executive branch believes new surveillance powers are needed, the constitutional course is to ask Congress to grant them. FISA has been amended numerous times since it was enacted in 1978, including after September 2001. *See, e.g.*, USA PATRIOT Act, Pub. L. No. 107-56, § 218, 115 Stat. 272, 291 (2001) (amending 50 U.S.C. § 1804(a)(7)(B)) (amending

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[4] Pub. L. No. 90-351, 82 Stat 211 (codified as amended at 18 U.S.C. §§ 2510 *et seq.*). Title III allows the government to conduct electronic surveillance in investigations of certain enumerated criminal offenses, 18 U.S.C. § 2516, if it obtains prior judicial approval, *id.* § 2518.

[5] While Congress authorized warrantless electronic surveillance in FISA as an emergency wartime measure, it expressly limited such surveillance to the first fifteen days after a formal declaration of war. 50 U.S.C. § 1811. Further, Congress specifically rejected a proposal that would have allowed for warrantless surveillance for periods of up to one year after a formal declaration of war. H.R. Conf. Rep. No. 95-1720, at 34 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4048, 4063.

FISA's warrant requirement so that only "a significant purpose," rather than "a primary purpose," of electronic surveillance must be to obtain foreign intelligence information). Instead, here, the executive circumvented FISA, "tak[ing] measures incompatible with the expressed . . . will of Congress" and undermining "the equilibrium established by our constitutional system." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 609, 637-38 (1952) (Jackson, J., concurring); *accord Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2774 n.23 (2006).

B. The President Does Not Have "Inherent Authority" To Set Aside FISA.

The government (Br. at 45) proposes that this Court endorse "the President's inherent constitutional authority to intercept the international communications of those affiliated with al Qaeda." The Constitution, however, contains no unwritten reserve of authority that permits the executive branch to set aside long-standing laws in order to engage in free-wheeling spying on citizens. Ours is, and always has been, a government of limited powers that operates under the rule of law. *See, e.g., The Federalist* No. 47, at 301 (James Madison) at (Clinton Rossiter, ed., 1961) (The Framers feared "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands"). This principle has long been accepted and enforced by the courts. Referring to the British monarch's long-rejected power to "dispense"

with laws of the realm at his or her whim, the Court explained that a "dispensing power ... has no countenance for its support in any part of the constitution." *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 608 (1838); *see generally* Curtis S. Bradley and Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 Mich. L. Rev. 545, 574-75 (2004) (collecting early case law on this same point).

The history of Cold War domestic intelligence abuses, recounted in this brief, provides telling proof of the Framers' wisdom. To ensure the wise use of power, the checks and balances of substantive constitutional government are required. In their absence, intelligence powers inevitably turn from foreign foes toward domestic political opponents, from real enemies of the nation onto those whose views the executive branch disdains. Men and women have grown no wiser in the two centuries since the Founding – let alone in the short decades since Cold War domestic spying ended. There is no cause to believe that the Framers' wisdom, embodied in the Constitution's checks and balances, is any less applicable or necessary today.[6]

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[6] On the contrary, anecdotal evidence suggests that the executive branch, and especially the military, have already lapsed into old habits of targeting speech that it dislikes, rather than speech that poses any credible or substantial risk to the nation. *See, e.g.,* Walter Pincus, *Pentagon Will Review Database on U.S. Citizens*, Wash. Post, Dec. 15, 2005, at A1 (describing spying on citizens by military agencies within the United States); Robert Block and Gary Field, *Is Military Creeping Into Domestic Spying and Enforcement?* Wall Street J.,

In sum, FISA was enacted to reestablish that balance and to rectify the harms caused by decades of warrantless surveillance to groups like *amici* and other Americans. The secret program of NSA surveillance at issue here, however, circumvents FISA's requirements. If there is a need to strike a fresh balance today, it is for Congress to do so, within constitutionally permissible limits, not for the Executive to change it of its own accord.

Mar. 9, 2004 (describing monitoring of University lectures on the Middle East).

CONCLUSION

For the reasons described above, this Court should affirm insofar as the district court invalidated the wiretapping program and reverse insofar as the district court dismissed Plaintiffs-Appellees'/Cross Appellants' claims against the data mining program.

Respectfully submitted,

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Dated: November 17, 2006

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation provided in Fed.R.App.P.32(a)(7)(B). The foregoing brief contains 6,128 words of Times New Roman (14 point) proportional type. The word processing software used to prepare this brief was Microsoft-Word for Windows XP.

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AFFIDAVIT OF SERVICE

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

2. On the 17th day of November, 2006, he served copies of Brief Of *Amici Curiae* National Association For The Advancement Of Colored People, American-Arab Anti-Discrimination Committee, Asian American Legal Defense And Education Fund, Japanese American Citizens League, The League Of United Latin American Citizens, United For Peace And Justice, American Association Of University Professors, And Electronic Frontier Foundation In Support Of Plaintiffs-Appellees/Cross Appellants; and Notice of Appearance of Saul A. Green upon the following parties at the addresses so designated by them for said purpose:

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

4. Also, on November 17, 2006, a true set of the aforementioned documents were scanned and converted into Adobe Acrobat (.pdf) format and e-mailed to the following parties:

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

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

DELIB:2786038.1\047265-00032