**Nos. 06-2095, 06-2140**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

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

**v.**

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

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

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# BRIEF OF AMICUS CURIAE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF DEFENDANTS–APPELLANTS/CROSS-APPELLEES URGING REVERSAL

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## INTERESTS OF AMICUS CURIAE

The Washington Legal Foundation (WLF) is a national, non-profit public interest law and policy center, based in Washington, D.C., with supporters nationwide. WLF devotes substantial resources to promoting a strong national security and defense, and has appeared as amicus curiae in a number of cases raising those issues. *See, e.g.*, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006); *Rasul v. Bush*, 542 U.S. 466 (2004); *MacWade v. Kelly*, 460 F.3d 260 (2d Cir. 2006). WLF also filed an amicus brief in this case in the district court. While WLF supports the government's argument that its assertion of the state secrets privilege warrants dismissal of this case, WLF will focus its brief on the separation of powers issue as it did below.

This brief is filed with the consent of the parties. Fed. R. App. Proc. 29(a).

## INTRODUCTION

In the interests of judicial economy, WLF adopts by reference the Statements of the Case and Facts as presented in the Government's brief. In brief, the plaintiffs challenge the legality of the Terrorist Surveillance Program (TSP), launched after the terrorist attack on the United States on September 11, 2001. TSP is designed to intercept only international communications into or

out of the United States where at least one party to the communication is linked to al Qaeda or related terrorist organizations. While the district court held that the state secrets privilege was properly invoked, it nonetheless ruled on the merits, holding that TSP violates the plaintiffs' rights under the First and Fourth Amendments, the separation of powers, and the Foreign Intelligence Surveillance Act (FISA) of 1978, 50 U.S.C. §§ 1801-62, to the extent there is electronic surveillance of international electronic communications for foreign intelligence purposes without a prior or subsequent approval by the special FISA court.

## ARGUMENT

### I. TO THE EXTENT FISA IMPAIRS THE PRESIDENT'S ABILITY TO CONDUCT ELECTRONIC SURVEILLANCE OF INTERNATIONAL COMMUNICATIONS FROM SUSPECTED TERRORISTS TO OR FROM THE UNITED STATES TO PROTECT THE COUNTRY FROM ATTACK, IT VIOLATES THE SEPARATION OF POWERS DOCTRINE

Plaintiffs argued below, and the district court agreed, that, because the National Security Agency (NSA) reportedly is engaged in electronic surveillance activities in a manner that Congress did not authorize when it enacted FISA in 1978, the TSP violates FISA, and consequently, the separation of powers. *ACLU v. National Security Agency*, 438 F. Supp. 2d 754, 778 (E.D. Mich. 2006). The

plaintiffs and the district court have it exactly backwards. To the extent that FISA is interpreted as impairing the President's ability to gather timely intelligence under the precise facts and circumstances of the TSP, specifically, international electronic communications to or from suspected al Qaeda members, it is FISA, as applied, that violates the separation of powers by impairing the President's well-established, core constitutional responsibilities and authorities to collect foreign intelligence to protect the United States and its citizens from attack.

As amicus will demonstrate, under Article II of the Constitution, the President has substantial and plenary authorities in foreign affairs and, particularly, in gathering foreign intelligence. Those substantial powers are further enhanced by the President's related Commander-in-Chief authorities. All of these powers must, and are, currently being exercised in our ongoing war with al Qaeda, a deadly enemy against whom Congress has authorized the President to use "all necessary and appropriate force." Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001), § 2(a).

### A. The District Court Erred by Ignoring Supreme Court and Other Precedent Consistently Recognizing the President's Plenary Authority in Foreign Affairs

Over the last 150 years, the United States Supreme Court has had

numerous opportunities to expound on the scope and nature of the President's inherent and exclusive powers to conduct foreign affairs under Article II of the Constitution. In 1852, for example, the Court referred to the executive branch as "that department of our government *exclusively* which is charged with our foreign relations." *Kennett v. Chambers*, 55 U.S. 38, 51 (1852) (emphasis added). In *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304 (1936), the Court emphatically recognized "[the] *delicate, plenary and exclusive power* of the President as the sole organ of the federal government in the field of international relations--*a power which does not require as a basis for its exercise an act of Congress* . . . ." *Id*. at 320 (emphasis added). As Justice Sutherland further explained:

> It will contribute to the elucidation of the question if we first consider the differences between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs. That there are differences between them, and that these differences are fundamental, may not be doubted.
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> * * * *
>
> [Congress] must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.

*Id.* at 315, 320.

Even Justice Robert Jackson, writing for the Court in *Johnson v. Eistentrager*, 339 U.S. 763 (1950), acknowledged that the President was

"exclusively responsible" for the "conduct of diplomatic and foreign affairs." *Id*. at 789. Far more recently, in the so-called "Pentagon Papers" case, Justice Stewart, in his concurring opinion joined by Justice White, noted that:

> In the governmental structure created by our Constitution, the Executive is endowed with enormous power in the two related areas of national defense and international relations. This power, *largely unchecked by the Legislative and Judicial branches*, has been pressed to the very hilt since the advent of the nuclear missile age. For better or for worse, the simple fact is that *a President of the United States possesses vastly greater constitutional independence in these two vital areas of power than does, say, a prime minister of a country with a parliamentary form of government*.

*New York Times Co. v. United States*, 403 U.S. 713, 727-28 (1971) (footnotes omitted) (emphasis added). *See also id*. at 741 (Marshall, J., concurring) ("[I]t is beyond cavil that the President has broad powers by virtue of his primary responsibility for the conduct of our foreign affairs and his position as Commander in Chief."); *id*. at 756, (Blackmun, J., dissenting) ("It is plain . . . that the scope of the judicial function in passing upon the activities of the Executive Branch of the Government in the field of foreign affairs is very narrowly restricted. This view is, I think, dictated by the concept of separation of powers upon which our constitutional system rests."). Finally, in *Dep't of the Navy v. Egan,* 484 U.S. 518 (1988), Justice Blackmun, writing for the majority, reiterated, more than three decades after *Youngstown*, that the "Court has also

recognized 'the generally accepted view that foreign policy was the province and responsibility of the Executive.'" *Id*. at 529.

While it is true that the Congress has certain enumerated powers under Article I, to declare war, to raise and support an Army, provide for a Navy, and the like, it is the President who -- in addition to his express powers to make treaties, appoint and receive ambassadors, and serve as Commander-in-Chief -- has the plenary and exclusive power to conduct foreign affairs, as intended by our Nation's Founders.[1] Accordingly, it is the President, not the Congress, who

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[1] For an excellent historical discussion supporting the President's central responsibility for the conduct of foreign affairs compared with the powers of Congress, see H. Jefferson Powell, *The Founders and the President's Authority Over Foreign Affairs*, 40 Wm. & Mary L. Rev. 1471 (1999).

Moreover, the Vesting Clause provides that "[t]he executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1. In sharp contrast, Article I, Section 1 states only that: "All legislative Powers *herein granted* shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." (emphasis added) The Supreme Court has found this difference important:

> The difference between the grant of legislative power under article 1 to Congress which is limited to powers therein enumerated, and the more general grant of the executive power to the President under article 2, is significant. . . .[T]he executive power is given in general terms strengthened by specific terms where emphasis is appropriate, and limited by direct expressions where limitation is needed.
> * * * *
> [A]rticle 2 grants to the President the executive power of the government . . . [and] the provisions of the second section of article 2, which blend

has constitutional primacy in foreign affairs.

### B. Foreign Intelligence Collection Operations Lie at the Core of the President's Plenary Foreign Affairs Powers

As firmly established is the President's plenary constitutional position in foreign affairs generally, it is even stronger in the conduct of foreign intelligence operations.[2] Our courts have strongly and repeatedly linked the President's inherent foreign affairs authorities, his duty and power to protect national security, and his Commander-in-Chief authorities, to his authority over foreign intelligence collection operations, including electronic surveillance for foreign intelligence purposes.

In 1875, the Supreme Court held that President Lincoln "was undoubtedly authorized during the war, as commander-in-chief of the armies of the United States, *to employ secret agents* to enter the rebel lines *and obtain information*

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> action by the legislative branch, or by part of it, in the work of the executive, are limitations to be strictly construed, and not to be extended by implication. . . .

*Myers v. United States*, 272 U.S. 52, 128, 163-64 (1926).

[2] As the Congress recognized in the preamble to the AUMF,"the President has authority under the Constitution to deter and prevent acts of international terrorism against the United States." Clearly, in order to deter and prevent such acts effectively, that authority must necessarily include the timely collection of foreign intelligence. *See, e.g.*, *United States v. United States District Court* (*Keith*), 407 U.S. 297, 310 (1972).

*respecting the strength, resources, and movements of the enemy*." *Totten v. United States*, 92 U.S. 105, 106 (1875) (emphasis added). No authorizing legislation by the Congress was required to enable the President to spy on the "enemy" -- inside the United States -- who had taken up arms against the Union.

The Supreme Court later recognized the inextricable link between the President's foreign affairs and foreign intelligence authorities, and the strong link between them and the President's Commander-in-Chief authorities. In *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948), for example, the Court stated:

> [t]he President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.

*Id*. at 111. More recently, in *Haig v. Agee*, 453 U.S. 280 (1981), the Court reiterated that: "Protection of the foreign policy of the United States is a governmental interest of great importance, since foreign policy and national security considerations cannot neatly be compartmentalized." *Id*. at 307.

Put succinctly, as Justice O'Connor stated in 1988: "The functions performed by the Central Intelligence Agency and the Director of Central Intelligence lie at the *core* of `the very delicate, plenary and exclusive power of

the President as the sole organ of the federal government in the field of international relations.'" *Webster v. Doe*, 486 U.S. 592, 605-06 (1988) (O'Connor, J., concurring in part, dissenting in part) (emphasis added).

Numerous federal appeals courts which have ruled on the President's authority to conduct foreign intelligence electronic surveillance operations similarly have recognized the President's considerable constitutional powers to collect foreign intelligence to protect our national security. Notably, these decisions, none of which are discussed in the district court's opinion, though they directly address warrantless electronic surveillance for foreign intelligence purposes, stress the fundamental difference between *primarily domestic* cases and those involving collecting intelligence regarding foreign threats to our nation's security (such as the instant case), and have looked with disfavor on legislative restrictions on the latter.

Two decades after *Youngstown Sheet & Tube v. Sawyer,* 343 U.S. 579 (1952), the court in *United States v. Brown*, 484 F.2d 418 (5th Cir. 1973), upheld the President's inherent constitutional authority to authorize warrantless wiretaps for foreign intelligence purposes. The Fifth Circuit, echoing our Nation's Founders, explained its holding as follows:

[B]ecause of the President's constitutional duty to act for the United States

> in the field of foreign relations, and his inherent power to protect national security in the context of foreign affairs, *we reaffirm. . . that the President may constitutionally authorize warrantless wiretaps for the purpose of gathering foreign intelligence. Restrictions upon the President's power which are appropriate in cases of domestic security become artificial in the context of the international sphere.* Our holding . . . is buttressed by a thread which runs through the Federalist Papers: that the President must take care to safeguard the nation from possible foreign encroachment, whether in its existence as a nation or in its intercourse with other nations. See e.g., The Federalist No. 64, at 434-36 (Jay); The Federalist No. 70, at 471 (Hamilton); The Federalist No. 74 at 500 (Hamilton) (J. Cooke ed. 1961).

*Id*. at 426 (emphasis added) (citations omitted).[3]

In reaffirming the legality of warrantless foreign intelligence electronic surveillance, the *Butenko* court further noted:

> [F]oreign intelligence gathering is a clandestine and highly unstructured activity, and the need for electronic surveillance often cannot be anticipated in advance. Certainly occasions arise when officers, acting under the President's authority, are seeking foreign intelligence information, *where exigent circumstances would excuse a warrant*. To demand that such officers be so sensitive to the nuances of complex situations that they must interrupt their activities and rush to the nearest available magistrate to seek a warrant would seriously fetter the Executive in the performance of his foreign affairs duties.

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[3] *Accord United States v. Butenko*, 494 F.2d 593, 603 (3d Cir. 1974) (noting that while the "Constitution contains no express provision authorizing the President to conduct surveillance . . . it would appear that such power is . . . implied from his duty to conduct the nation's foreign affairs."). Though FISA is admittedly an expression of Congress' will in this area, its enactment, and the nearly 30 years since, in no way undermine the reasoning of the *Brown* court, and other authorities cited herein, as to the constitutional and practical support for presidential primacy in this area.

*Id*. at 605 (emphasis added).

Also directly relevant is the Fourth Circuit's decision in *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980). Although adjudicating a pre-FISA fact pattern, the *Truong* court was well aware of FISA's passage as it discussed the important constitutional and policy considerations in deciding separation-of-powers questions regarding congressional restrictions on the President's foreign intelligence gathering authorities:

> Perhaps most crucially, the executive branch not only has superior expertise in the area of foreign intelligence, it is also constitutionally designated as the pre-eminent authority in foreign affairs . . . . Just as the separation of powers in *Keith* forced the executive to recognize a judicial role when the President conducts domestic surveillance, so the separation of powers requires us to acknowledge the *principal responsibility of the President for foreign affairs and concomitantly for foreign intelligence surveillance*.

*Id*. at 913-14 (emphasis added) (citations omitted).[4]

Finally, it is instructive that the Foreign Intelligence Court of Review,

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[4] The Supreme Court in *Keith*, a decision cited by the district court, emphasized that the case before it "involve[d] only the domestic aspects of national security. We have not addressed, *and express no opinion* as to the issues which may be involved with respect to activities of foreign powers or their agents." 407 U.S. at 321-22 (footnote omitted, citing to authority for the proposition that "warrantless surveillance, though impermissible in domestic security cases, may be constitutional where foreign powers are involved.") (emphasis added).

created specifically to acquire expertise in, and review, FISA issues, recognized in a post-FISA, post-September 11, 2001 case, that:

> [t]he *Truong* court, as did all the other courts to have decided the issue, held that the President did have the inherent authority to conduct warrantless searches to obtain foreign intelligence information. . . . We take for granted that the President does have that authority and, assuming that is so, *FISA could not encroach on the President's constitutional power*.

*In re Sealed Case, No. 02-001*, 310 F.3d 717, 745 (FISA Ct. Rev. 2002) (emphasis added).

Ignoring these and multiple other appellate court decisions affirming the President's constitutional authority to conduct warrantless electronic surveillance for foreign intelligence purposes, the district court could cite only a single case for the opposite proposition, *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1983). The plurality opinion in *Zweibon* suggests that all electronic surveillance, even for foreign intelligence involving an overseas connection, may require prior warrants. That suggestion, however, clearly was *dicta*, and no court, before or since, except the district court below, has so held.

The principal case cited by the district court for the proposition that "FISA did not intrude upon the President's undisputed right to conduct foreign affairs," was *In re Falvey*, 540 F. Supp. 1306 (E.D.N.Y. 1982). 438 F. Supp. 2d at 773. *Falvey* held no such thing. Indeed, *Falvey* also recognized that: "When,

therefore, the President . . . [is collecting] . . . foreign intelligence information, his exercise of Article II power to conduct foreign affairs *is not constitutionally hamstrung by the need to obtain prior judicial approval before engaging in wiretapping*." 540 F. Supp. at 1312. (emphasis added).

For the foregoing reasons, the President's constitutional authority to conduct warrantless electronic foreign intelligence surveillance under circumstances such as the TSP is well established.

### C. The District Court Fundamentally Misinterpreted Justice Jackson's Concurring Opinion in *Youngstown*

Both the plaintiffs and the district court relied heavily on Justice Jackson's oft-cited concurring opinion in *Youngstown Sheet & Tube*, 343 U.S. 579, 592 (1952), to support the proposition that the TSP violates the separation of powers by allegedly violating FISA's requirements. Assuming, *arguendo*, that the terms of FISA even apply to the TSP,[5] any reliance on *Youngstown* is misplaced and, in

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[5] *See* Andrew C. McCarthy, David B. Rivkin, Lee A. Casey, *NSA's Warrantless Surveillance Program: Legal, Constitutional, and Necessary*, *reprinted in* Federalist Society Monograph, TERRORIST SURVEILLANCE AND THE CONSTITUTION (May 2006), *available at* http://www.fed-soc.org/pdf/terroristsurveillance.pdf, at 54-60 (concluding that FISA need not be invalidated in order to uphold the TSP inasmuch as a parsing of the FISA provisions themselves -- both with respect to who is covered and what electronic communications are covered -- are rather narrow, particularly those provisions that incorporate a "reasonable expectation of privacy" standard, because, arguably, it is not "reasonable" to expect international electronic

any event, not dispositive of the instant case.

### 1. Justice Jackson's *Youngstown* Concurrence Does Not Undermine the Government's Position that the TSP is Constitutional

In *Youngstown,* the Court reviewed a challenge to President Truman's order to have the federal government take control of the Nation's steel mills during the Korean conflict. In his attempt to ensure a reliable supply of steel for the war effort in light of a looming labor strike, President Truman chose not to invoke certain statutes that dealt with seizure of property and the settlement of labor disputes. *Id*. at 582-83.

Justice Jackson assayed the constitutional powers of the President as follows: In the so-called Zone 1, where a President acts pursuant to an express or implied authorization by Congress, the President's power is at its "maximum" or zenith because he exercises not only his own constitutional powers, but "all that Congress can delegate." *Id*. at 635. In Zone 2, where Congress has not spoken in a particular area, the President is in a "zone of twilight" and must rely upon his constitutional powers alone. *Id*. at 637. Finally, in "Zone 3," where the President's actions are "incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own

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communications to be private).

constitutional powers minus any constitutional powers of Congress over the matter." *Id*.

Plaintiffs assert, and the district court appears to have found, that the TSP must fall into Zone 3, based on: (1) their reading of FISA's exclusivity provision; and (2) their rejection of the Government's argument that the AUMF *is* a statutory augmentation of the President's own constitutional powers in the area of foreign intelligence electronic surveillance. Even if the TSP falls under Zone 3, however, the President's authority in this case must be sustained based upon a proper application of the *Youngstown* opinion and subsequent separation-of-powers cases.

### 2. Even if the President's Power is in Zone 3, It is Not Extinguished

Even if the President is exercising powers that are incompatible with "the expressed or implied will of Congress," that does not mean he has acted unlawfully. According to Justice Jackson, the President may still rely "upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id*. This part of the opinion would make no sense unless Justice Jackson contemplated circumstances in which powers that are exercised, even at this `lowest ebb," were still sufficiently robust to sustain the constitutionality of

the President's action despite legislation to the contrary.

More importantly, even if Congress has some constitutional powers with respect to foreign affairs, a proper balancing of the respective authorities of the President and Congress must recognize the primacy of presidential power over congressional power in foreign affairs. If it were otherwise, Congress could, for example, by virtue of its power to ratify treaties, control negotiations with foreign governments;[6] or, by virtue of its authority to declare war, prevent a President from using military force to respond to an overseas attack on Americans.[7] In both of these circumstances, judiciary and/or executive branch legal opinions have wisely rejected, as unconstitutional, exercises of Congress's power that impair the President's ability to carry out his constitutionally assigned

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[6] *See, e.g.*, *Earth Island Inst. v. Christopher*, 6 F.3d 648, 652 (9th Cir. 1993) ("The district court correctly ruled that the section 609(a) claims relate to `the foreign affairs function, which rests within the exclusive province of the Executive Branch under Article II, section 2 of the United States Constitution.' The statute's requirement that the Executive initiate discussions with foreign nations violates the separation of powers, and this court cannot enforce it").

[7] With respect to the War Powers Resolution, 50 U.S.C. § 1541(c), the Executive Branch has taken the position that "the President's power to deploy armed forces into situations of actual or indicated hostilities is not restricted to the three categories specifically marked out by the [War Powers] Resolution." Proposed Deployment of United States Armed Forces Into Bosnia, 19 Op. Off. Legal Counsel OLC 327 (1995) (citing Overview of the War Powers Resolution, 8 Op. Off. Legal Counsel 271, 274-75 (1984)).

responsibilities, even though Congress clearly had some articulable constitutional authority in the areas at issue. So too must be the case here, and even more so, for as Justice O'Connor observed, the President's authority over foreign intelligence collection operations, such as the TSP, lies at the "core" of his foreign affairs authorities. *Webster v. Doe*, 486 U.S. 592, 605-06 (1988).

Taken to its logical extreme, the plaintiffs' position, if adopted, would fundamentally alter the system of separation of powers and checks and balances created by our Constitution, transforming our governmental system into one in which Congress alone reigns supreme in virtually all spheres of the exercise of governmental power.[8]

### 3. *Youngstown* Is Further Distinguishable Because It Was Principally a Domestic Case, Whereas the TSP is Principally a Foreign Affairs Activity

Even a cursory reading of *Youngstown* makes clear that, although the executive-congressional conflict at issue in that case unfolded against the backdrop of the Korean War, the legal and factual issues at stake were far more

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[8] The problem, as Professor Powell notes based on exhaustive legal and historical research, for those espousing the "congressional primacy" view of constitutional foreign affairs authority apparently underlying both the plaintiffs' and the district court's analysis, is that, to do so requires one to "repudiate or distinguish away most of what the Supreme Court appears to have said on the subject." *The President's Authority Over Foreign Affairs: An Executive Branch Perspective,* 67 Geo. Wash. L. Rev. 527 (1999).

"domestic" in nature than those raised by the TSP. As noted, *Youngstown* involved President Truman's order to take control of private U.S. steel mills after the failure of the industry and unions to reach a collective bargaining agreement. 343 U.S. at 582-84. In striking down President Truman's attempted seizure of the steel mills by executive order, rather than following legislation dealing with emergencies, the *Youngstown* Court enumerated the relevant powers of Congress as follows: "It can authorize the taking of private property for public use. It can make laws regulating the relationships between employers and employees, prescribing rules designed to settle labor disputes, and fixing wages and working conditions in certain fields of our economy." *Id*. at 588.

Justice Jackson explicitly recognized the primarily "domestic" nature of the case, when he cautioned:

> We should not use this occasion to circumscribe, much less to contract, the lawful role of the President as Commander-in-Chief. *I should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world* for the security of our society. But, when it is turned inward, not because of rebellion *but because of a lawful economic struggle between industry and labor*, it should have no such indulgence.

*Id.* at 645 (emphasis added).

Accordingly, courts have long recognized -- both before and after *Youngstown* -- that separation-of-powers conflicts between the Congress and the

President raising primarily foreign affairs and national security issues must be analyzed differently than cases like *Youngstown*, which principally involved a domestic issue, but having only indirect or incidental implications for the exercise of the President's foreign affairs and Commander-in-Chief powers.[9]

As previously noted in *United States v. Brown*, the Fifth Circuit, in upholding the President's inherent constitutional authority to order warrantless foreign intelligence wiretaps, recognized that "[r]estrictions upon the President's power which are appropriate in cases of domestic security become artificial in the context of the international sphere." 484 F.2d at 426. As Chief Justice Warren Burger stated in *Goldwater v. Carter*, 444 U.S. 996 (1979):

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[9] Unlike the relatively long time delay involved in the production of steel before it can be put to military use, such as manufacturing a military vehicle or ship, the interception of vital and useful foreign intelligence to detect and prevent a terrorist attack often requires rapid and immediate action. Indeed, the action required in many cases likely will be more rapid and immediate than FISA can accommodate. Since the TSP was disclosed, experts have suggested numerous examples of the incompatibility of FISA's procedural strictures with the reality of the post-September 11, 2001 world. *See, e.g.*, K. A. Taipale, *Whispering Wires and Warrantless Wiretaps: Data Mining and Foreign Intelligence,* N.Y.U. Rev. of L. & Sec., No. VII Suppl. Bull. on L. & Sec. (Spring 2006) (FISA is "inadequate to address recent technology developments, including: the transition from circuit-based to packet-based communications; the globalization of communications infrastructure; and the development of automated monitoring techniques, including data mining and traffic analysis.") *citing* Richard A. Posner, *Commentary: A New Surveillance Act*, Wall St. J. A16 (Feb. 15, 2006).

> The present case [challenging the authority of the President to unilaterally terminate a mutual defense treaty] differs in several important respects from *Youngstown* . . . cited by petitioners as authority both for reaching the merits of this dispute and for reversing the Court of Appeals. In *Youngstown*, private litigants brought a suit contesting the President's authority under his war powers to seize the Nation's steel industry, *an action of profound and demonstrable domestic impact*. . . . Moreover, as in *Curtiss-Wright* the effect of this action, as far as we can tell, is "entirely external to the United States, and [falls] within the category of foreign affairs."

*Id*. at 1004-05 (Burger, C.J., concurring) (emphasis added) (citations omitted).[10]

By failing to take into account this fundamental difference between the powers asserted in *Youngstown* and the TSP, as well as the different lines of constitutional reasoning applicable to the different situations, and by ignoring the numerous directly relevant appellate court decisions, the district court fatally erred. As a result, the district court reached a separation-of-powers result precisely opposite of the one mandated by all relevant precedent, including *Youngstown*, properly applied.[11]

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[10] *Accord Atlee v. Laird*, 347 F.Supp. 689, 701-02 (E.D. Pa. 1972), *aff'd*, 411 U.S. 911 (1973) ("Contrasting [*Youngstown*] with *Curtiss-Wright* . . . clearly reveals the different set of considerations raised by foreign relations cases.").

[11] Though not addressed by the court below, plaintiffs relied on *Little v. Barreme*, 6 U.S. 170 (1804), and likely will do so again in this Court, for the proposition that the Supreme Court has rejected the President's power to act where his actions (in that case, seizing boats sailing *from* French ports where Congress authorized only the seizure of boats sailing *to* French ports) were unauthorized or prohibited by Congress. For at least three reasons, *Barreme*

### D. FISA, if Applied to The TSP, Likely Would Violate Separation of Powers by Impairing the President's Ability to Carry Out His Core Constitutional Responsibilities

Even if Congress has attempted to occupy the field for intercepting international communications through FISA as the "exclusive means," and the President's constitutional authority in this area is at its "lowest ebb," if FISA impermissibly impairs the proper execution of the President's own authorities

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provides no support for plaintiffs' position. First, it appears clear that the Executive Branch in *Barreme* was attempting to *comply with the Act*, but made a mistake by including supplemental instructions to seize ships sailing *to* French ports. 6 U.S. at 178. This is reinforced by the fact that a copy of the act was transmitted by the secretary of the navy to the captains of armed vessels, *"who were ordered to consider* [the Act] *as a part of their instructions*." *Id*. (emphasis added)

Second, much like the situation in *Youngstown*, the congressional limitations in *Barreme* dealt with activities primarily committed to Congress in the text of the Constitution itself. These include the powers to: "regulate commerce with foreign nations, and among the several states, and with the Indian tribes," Art. I, § 8, cl. 3; "define and punish piracies and felonies committed on the high seas, and offenses against the law of nations," Art. I, ' 8, cl. 10; and "declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water," Art. I, § 8, cl. 11. No such explicit textual authorities exist for Congress in the realm of foreign intelligence collection.

Finally, the fact that there are *exceptions* to the President's general constitutional primacy in foreign affairs -- which are explicitly spelled out in the Constitution itself and are to be narrowly construed -- only proves the rule of the President's general primacy. Thus, *Barreme* is irrelevant to a separation-of-powers assessment of the TSP which amicus has demonstrated lies at the "core" of the President's constitutional authorities, and not within any constitutional authorities of Congress.

and responsibilities as Chief Executive, Commander-in-Chief, and "sole organ" of foreign relations (an issue that this Court cannot resolve as a factual matter due to the invocation of the state and military secrets privilege), FISA is unconstitutional as applied. Rather than the simplistic, bright-line approach used by the district court to decide the separation-of-powers issue,[12] the Supreme Court, post-*Youngstown*, has repeatedly made clear that a balancing-of-powers approach must be used.[13]

For example, in *Nixon v. Adm'r of General Services*, 433 U.S. 425 (1977), the Court held that "in determining whether [a legislative] Act disrupts the proper balance [of power] between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the executive from accomplishing its constitutionally assigned functions." *Id*. at 443.

In *Public Citizen v. United States*, 491 U.S. 440 (1989), the Supreme Court was faced with the issue of whether the Federal Advisory Committee Act (FACA), which established procedures by which the Executive branch may

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[12] According to the district court, since TSP violates a statute (FISA), "presidential power, therefore, was exercised at its lowest ebb and cannot be sustained." 438 F. Supp. 2d at 778.

[13] Justice Jackson himself acknowledged that his tripartite categorization of presidential powers was "somewhat oversimplified." *Youngstown*, 343 U.S. at 635.

utilize private advisory committees, was constitutional as applied to a putative private advisory committee formed by the American Bar Association (ABA) to advise the President on the qualifications of potential federal judicial nominees. Under Article II, the President has the power to appoint judges, but the Senate also has a clear and important advise and consent power. Concurring in the *Public Citizen* majority's result (that FACA did not apply to the ABA Committee) Justice Kennedy, joined by then-Chief Justice Rehnquist and Justice O'Connor, stated that applying FACA to the manner in which the President obtains advice on potential nominees would violate the separation of powers:

> In some of our more recent cases involving the powers and prerogatives of the President, we have employed something of a balancing approach, asking whether the statute at issue prevents the President "from accomplishing [his] constitutionally assigned functions" . . . . and whether the extent of the intrusion on the President's powers "is justified by an overriding need to promote objectives within the constitutional authority of Congress."

*Id*. at 484 (1989) (citing *Nixon v. Adm'r of General Services*).

Applying FACA to the appointments process surely would not prevent the President from nominating whomever he wanted to be a federal judge. Nevertheless, Justice Kennedy recognized that FACA's impairment of the exercise of even a small part of that presidential power -- namely, the ability to receive unfettered advice from the private sector in the aid of his appointments

power -- was sufficient to disable the legislative branch from regulating the exercise of that power. *Id.* at 482-88. In the instant case, it cannot be seriously doubted that applying FISA to preclude the TSP would impair the execution of a core constitutional duty of the President to a much greater degree than would be the case of applying FACA to the ABA advisory committee.

Similarly, in *Clinton v. Jones*, 520 U.S. 681 (1997), the Supreme Court reiterated that a violation of the separation of powers is measured by determining whether the action rises "to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions." *Id*. at 702.

The constitutional power of the President to gather and share intelligence information also has been recognized by the prior Administration as constitutionally overriding Congress's will with regard to a statutory preclusion on the sharing of intelligence information gleaned from a Title III criminal wiretap, even when our Nation was *not*, at the time, at war.[14] As aptly summarized in a 2000 Office of Legal Counsel Opinion:

> [T]he Constitution vests the President with responsibility over all matters within the executive branch that bear on national defense and foreign

[14] Precisely like FISA, Title III prescribes criminal penalties for violating its provisions. 18 U.S.C. § 2511.

> affairs, including, where necessary, the collection and dissemination of national security information. Because "[i]t is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation, ". . . the President has a powerful claim, under the Constitution, to receive information critical to the national security or foreign relations and to authorize its disclosure to the intelligence community. *Where the President's authority concerning national security or foreign relations is in tension with a statutory rather than a constitutional rule, the statute cannot displace the President's constitutional authority and should be read to be "subject to an implied exception in deference to such presidential powers." Rainbow Navigation, Inc. v. Department of the Navy*, 783 F.2d 1072, 1078 (D.C. Cir. 1986) (Scalia, J.). We believe that, if Title III limited the access of the President and his aides to information critical to national security or foreign relations, *it would be unconstitutional as applied in those circumstances.*

*Sharing Title III Electronic Surveillance Material With the Intelligence Community*, Op. Off. Legal Counsel, 2000 WL 33716983 at 9 (Oct. 17, 2000) (emphasis added) (internal citations omitted). Further, the legislative history of FISA itself indicates that Congress recognized that its "exclusive" procedural mechanism for foreign electronic surveillance "does not foreclose a different decision by the Supreme Court." H.R. Conf. Rep. No. 95-1720, at 35, reprinted in U.S.C.C.A.N. 4048, 4064.

While the facts of the TSP remain classified, precluding any judgment on the merits at this time, it is not difficult to imagine scenarios where FISA, as written, would make it impossible to collect foreign intelligence to protect our Nation from terrorist attack. While many such scenarios are based upon

technical details of the massive changes since FISA was enacted nearly 30 years ago in how information is moved electronically around the world,[15] others are far more straightforward.

For example, the district court appeared to base its injunction of the TSP, in part, on what it believes to be a lack of "practical justification" for the TSP. The district court based this questionable conclusion on its finding, reached without hearing any evidence, that: "Defendants' need for speed and agility is . . . weightless." 436 F. Supp. 2d at 782. To support this finding, the court offers, the observation that "both Title III and FISA permit delayed applications for warrants, *after surveillance has begun*." *Id*. at 781 (emphasis added). It is true that FISA contains a so-called "emergency" interception provision whereby the Attorney General may authorize electronic surveillance without a FISA Court order for up to 72 hours. 50 U.S.C. § 1805(f). No electronic surveillance can even begin, however, under FISA as written, unless and until the Attorney General certifies *in advance of any electronic surveillance* that an emergency situation exists *and* that "*the factual basis for issuance of an order under this title to approve such surveillance exists.*" *Id*. (emphasis added). As a practical matter, in many hypothetical situations, this requirement to demonstrate all of the

[15] *See supra* n.9.

substantive and procedural elements of FISA to the Attorney General's satisfaction before *any surveillance can begin*, would fatally impair the President's ability to carry out his constitutional responsibility to collect foreign intelligence to protect our Nation from attack.

Assume, for example, the United States Government is conducting electronic surveillance, pursuant to a FISA order, on a telephone call from Osama bin Laden to a U.S. person, John Doe, inside the United States. Assume further that the government hears bin Laden informing John Doe that a chemical, biological, or nuclear device hidden in a U.S. city is armed, and that the device will be detonated by another U.S. person in the United States, David Roe, upon receiving instructions two minutes later from a previously unknown al Qaeda operative outside the United States who will then disclose the location and detonation method for the weapon.

Obviously, under even the most favorable conditions, it would be literally impossible to gather and present to the Attorney General the required information to meet all of FISA's procedural and substantive requirements, within two minutes, in order to intercept the upcoming international call from the al Qaeda operative to David Roe, including those FISA elements that must be demonstrated by probable cause, in order to invoke FISA's "emergency"

authority to begin conducting the surveillance. In short, the second triggering call could literally never be collected under FISA as currently written.

It simply cannot be that our Constitution requires a President – any President – to comply with FISA's procedures as written and allow thousands to be killed when intelligence information can be obtained to prevent that attack. As Justice Jackson himself warned, the courts should not "convert the constitutional Bill of Rights into a suicide pact." *Terminiello v. Chicago*, 337 U.S. 1, 36 (1949) (Jackson, J., dissenting).

## CONCLUSION

While amicus agrees with the Government that the district court judgment should be reversed due to the impossibility of deciding the merits without disclosing state secrets, to the extent that the substantive and procedural requirements of FISA interfere with the President's authority to gather foreign intelligence through electronic surveillance of terrorism-related international electronic communications to protect this country from another terrorist attack, FISA violates the separation of powers.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d), the attached brief is proportionally spaced, has a typeface of 14 points or more and contains 6,727 words.

Dated: October 25, 2006

/s/
PAUL D. KAMENAR

## CERTIFICATE OF SERVICE

I, Paul D. Kamenar, hereby certify that two (2) copies of the foregoing brief of amicus curiae Washington Legal Foundation were served, this 25th day of October, 2006, by first-class mail, postage pre-paid, as well as by sending an electronic copy, to the following parties:

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