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SUPREME COURT DISMISSES CHALLENGE TO FOREIGN SURVEILLANCE STATUTE

(*Clapper v. Amnesty International USA*, No. 11-1025)

The U.S. Supreme Court today threw out a lawsuit challenging the constitutionality of a 2008 federal statute that expanded the authority of federal officials to engage in overseas electronic surveillance. The decision was a victory for the Washington Legal Foundation and a bipartisan group of six former Attorneys General that it represented in the case. In response to the decision, WLF Chief Counsel Richard Samp stated:

> Because the plaintiffs are U.S. citizens, the challenged statute prohibits them from being targeted for surveillance, and they have produced no evidence that any of their communications have been intercepted. We agree that the federal courts should not pass judgment on the constitutionality of federal legislation when the plaintiffs, as is true here, cannot demonstrate that they have suffered an injury directly traceable to the legislation they challenge. Courts should be particularly reluctant to hear such challenges when, as here, the legislation at issue has been deemed vital to the national defense by the other branches of government and any airing of the relevant facts in a federal courtroom poses risks to national security.

The Court ruled 5-4 that the plaintiffs lacked standing to maintain the suit because they failed to demonstrate either that they had been subject to government surveillance or that such surveillance was "certainly impending." It agreed with WLF that in the absence of such a showing, the plaintiffs could not demonstrate that they had suffered the level of injury necessary to maintain a suit. Justice Breyer's dissent argued that the Court should adopt a less demanding standard – a "high probability" of future injury – for demonstrating standing.

The former Attorneys General who signed WLF's brief were John D. Ashcroft, William P. Barr, Benjamin Civiletti, Edwin Meese III, Michael B. Mukasey, and Dick Thornburgh. The brief was filed in support of the Obama Administration, which asked the Supreme Court to overturn a decision of the U.S. Court of Appeals for the Second Circuit reinstating the suit. WLF's brief was written with the substantial *pro bono* assistance of Megan Brown, Claire Evans, and Matthew Dowd of Washington, D.C.'s Wiley Rein LLP. The brief argued that allowing the case – filed by individuals and organizations that are not permissible surveillance targets – to proceed to trial threatened to interfere with efforts to protect national security.

The Foreign Intelligence Surveillance Act (FISA), adopted by Congress in 1978, governs the conduct of "electronic surveillance" for national security purposes. In 2005, the New York Times revealed that the federal government had adopted a Terrorist Surveillance Program (TSP), under which the overseas communications of suspected terrorists were being monitored. Some critics charged that the TSP violated the requirements of FISA. In response, Congress amended

FISA in 2008 to establish a procedure whereby the Government could obtain judicial approval to engage in the sorts of overseas surveillance undertaken pursuant to the TSP. Several organizations and individuals (represented by the ACLU) filed a lawsuit seeking an injunction against the conduct of surveillance pursuant to the new law (the FISA Amendments Act, or "FAA"). They alleged that the FAA violated the First and Fourth Amendments as well as separation-of-powers principles. Named as defendants were several senior Obama Administration officials, including Attorney General Eric Holder (whose authorization is required before any surveillance may be undertaken under the FAA).

A federal district court granted summary judgment to the defendants and dismissed the lawsuit, concluding that the plaintiffs lacked standing to challenge the FAA. A panel of the Second Circuit reversed and remanded the case to the district court for trial. By a 6-6 tie vote, the full Second Circuit denied the Government's petition for rehearing *en banc*. Today's Supreme Court decision reverses the appeals court and dismisses the suit.

The Court's decision noted that that Article III of the Constitution prohibits federal courts from hearing a case unless the plaintiff can show that he has suffered an injury directly traceable to the challenged conduct. The Court concluded that the Plaintiffs made no such showing. It noted that all the Plaintiffs are U.S. citizens, and that the FAA prohibits the targeting of U.S. citizens for surveillance. The Plaintiffs fear that overseas individuals with whom they regularly communicate will be targeted and thus that their communications with those individuals will be intercepted. The Court held that a fear of future injury is insufficient to establish injury-in-fact for Article III standing purposes unless a plaintiff shows that the injury is "imminent," and that the Plaintiffs made no such showing here. Nor can the Plaintiffs create their own injury-in-fact by pointing to funds they expended to diminish the possibility of surveillance (e.g., traveling overseas to speak directly to potential surveillance targets), the Court said. It held that such expenditures do not constitute injury-in-fact unless the future injury that the plaintiffs sought to avoid was imminent.

WLF is a public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, and a limited and accountable government. To that end, WLF has frequently appeared in the federal courts to strengthen federal court "standing" requirements.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF's brief is posted on its web site, www.wlf.org.