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COURT WILL DECIDE WHETHER TO PERMIT CHALLENGE TO SURVEILLANCE LAW

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

The U.S. Supreme Court yesterday agreed to review an appeals court decision that reinstated 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 to grant review was a victory for the Washington Legal Foundation (WLF) and its clients – three former U.S. Attorneys General – who filed a brief urging the Court to hear the case. The WLF brief argued that allowing the case – filed by individuals and organizations that are not permissible surveillance targets – to proceed to trial threatens to interfere with efforts to protect national security.

The former Attorneys General who signed the brief were William P. Barr, Edwin Meese III, and Dick Thornburgh. The brief was filed in support of a certiorari petition filed in February by the Obama Administration, which sought Supreme Court review of a decision of the U.S. Court of Appeals for the Second Circuit in New York. WLF and its clients argued in their brief that the appeals court erred in concluding that the plaintiffs have suffered a cognizable injury and thus have standing to assert their claims.

Now that the Court has granted review, WLF and its clients will file another brief later this summer, urging reversal of the Second Circuit decision.

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 supplemental procedure whereby the Government could obtain judicial approval to engage in the sorts of overseas electronic surveillance undertaken pursuant to the TSP. On the day that the amendments were enacted, 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 are 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 three-judge 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*. The Supreme Court has now agreed to review the case.

In its brief urging the Court to grant review, WLF argued 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. WLF asserted that the Plaintiffs here have 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. WLF argued that a fear of future injury is insufficient to establish injury-in-fact for Article III standing purposes unless a plaintiff demonstrates that the injury is "imminent," and that the Plaintiffs have 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 that their conversations will be overheard (e.g., traveling overseas to speak directly to potential surveillance targets), WLF argued. WLF asserted that such expenditures do not constitute injury-in-fact unless the future injury that the plaintiffs sought to avoid was imminent.

WLF and its Attorney General clients also argued that merely allowing the case to proceed – and thereby requiring the federal government to defend itself by revealing details of its surveillance activities – threatens national security. The *amici* asserted that disclosure of such information could prove valuable for enemies of the United States who seek to prevent their electronic communications from being intercepted.

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 urge them to defer to the elected branches of government in national security matters.

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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.