08-4726-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THOMAS WILNER, GITANJALI GUTIERREZ, MICHAEL J. STERNHELL, JONATHAN WELLS DIXON, JOSHUA COLANGELO-BRYAN, BRIAN J. NEFF, JOSEPH MARGULIES, SCOTT S. BARKER, ANNE J. CASTLE, JAMES E. DORSEY, ASMAH TAREEN, RICHARD A. GRIGG, THOMAS R. JOHNSON, GEORGE BRENT MICKUM IV, STEPHEN M. TRUITT, JONATHAN HAFETZ, TINA M. FOSTER, ALISON SCLATER, MARC D. FALKOFF, DAVID H. REMES, H. CANDACE GORMAN, CHARLES CARPENTER, JOHN A. CHANDLER AND CLIVE STAFFORD SMITH,
Appellants,

v.

NATIONAL SECURITY AGENCY and DEPARTMENT OF JUSTICE,
Appellees.

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. TARGETING LAWYERS FOR WARRANTLESS SURVEILLANCE IS PLAINLY ILLEGAL AND THUS FOIA DOES NOT AUTHORIZE WITHHOLDING THE REQUESTED RECORDS 4

II. NONE OF THE EXEMPTIONS THE NSA CITES JUSTIFIES CONCEALING RECORDS OF WARRANTLESS SURVEILLANCE 8

A. Exemption 3 8

1. The List Would Not Reveal Intelligence Sources or Methods 9

2. The List Would Say Nothing About NSA Functions or Activities 9

B. Exemption 1 11

C. The Agency Declarations Do Not Support The Government's Exemption Claims 12

III. THE DISTRICT COURT'S RULING EXPANDS GLOMAR AND UNDERMINES FOIA AND FISA 14

A. The District Court's Ruling Undermines FOIA 15

B. The District Court's Ruling Undermines FISA 19

CONCLUSION 22

CERTIFICATE OF COMPLIANCE

ANTI-VIRUS CERTIFICATE

TABLE OF AUTHORITIES

Cases: **Page**

A. Michael's Piano, Inc. v. FTC, 18 F.3d 138 (2d Cir. 1994) 12, 13

ACLU v. Dep't of Defense, 389 F. Supp. 2d 547 (S.D.N.Y. 2005), *aff'd*, 543 F.3d 59 (2d Cir. 2008) 11, 12, 13, 15, 16

ACLU v. NSA, 493 F.3d 644 (6th Cir. 2007) 18

Adem v. Bush, 425 F. Supp. 2d 7 (D.D.C. 2006) 17

Al Odah v. United States, 346 F. Supp. 2d 1 (D.D.C. 2004) 17

Assoc. Press v. Dep't of Defense, No. 05-53532-cv, 2009 WL 18727 (2d Cir. Jan.5, 2009) . . . 15

Bismullah v. Gates, 501 F.3d 178 (D.C. Cir. 2007), *reh'g en banc denied*, 514 F.3d 1291 (D.C. Cir. 2008) 17

Boumediene v. Bush, 128 S. Ct. 2229 (2008) 16

Department of the Air Force v. Rose, 426 U.S. 352 (1976) 15

Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989) . . . 15

EPA v. Mink, 410 U.S. 73 (1973) 16

Founding Church of Scientology v. NSA, 610 F.2d 824 (D.C. Cir. 1979) 7, 10-11

Halpern v. FBI, 181 F.3d 279 (2d Cir. 1999) 12

Haman v. Rumsfeld, 548 U.S. 557 (2006) 16

Hamdi v. Rumsfeld, 542 U.S. 507 (2004) 17

Hayden v. NSA, 608 F.2d 1381 (D.C. Cir. 1979) 7, 10

In re Guantánamo Detainee Cases, 344 F. Supp. 2d 1174 (D.D.C. 2004) 17

In re Primus, 436 U.S. 412 (1978) 5

In re NSA Telecommunications Litig., 546 F. Supp. 2d 1109 (N.D. Cal. 2008) 18, 19

Kuzma v. IRS, 777 F.2d 66 (2d Cir. 1985) 8

NAACP v. Button, 371 U.S. 417 (1963) 5

Nat'l Council of La Raza v. Dep't of Justice, 411 F.3d 350 (2d Cir. 2005) 15

NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978) 15, 16

People for the American Way Found. v. NSA, 462 F. Supp. 2d 21 (D.D.C. 2006) 2, 6, 7

Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976) ("*Glomar*") . . . . . *passim*

Rasul v. Bush, 542 U.S. 466 (2004) 16-17

Terkel v. AT&T Corp., 441 F. Supp. 2d 899 (N.D. Ill. 2006) 11

United States v. U.S. Dist. Court, 407 U.S. 297 (1972) 10

Constitutional Provisions:

U.S. Const. amend. I 20, 21

U.S. Const. amend. IV 12

Statutes:

5 U.S.C. § 552(a)(4)(B) 12, 16, 17

5 U.S.C. § 552(b)(1) 1, 3, 8, 11

5 U.S.C. § 552(b)(3) 1, 7, 8, 9, 10

18 U.S.C. § 2510 *et seq.* 21

18 U.S.C. § 2511(2)(f) 4, 10

50 U.S.C. § 401 21

50 U.S.C. § 403-1(i)(1) 9

50 U.S.C. § 1804(a)(2)(A) 5

50 U.S.C. § 1804(a)(3)(A) 5

50 U.S.C. § 1804(a)(4)(A) 5

50 U.S.C. § 1805(a)(1) - (5) 5

50 U.S.C. § 1812 . . . . . 4, 21

An Act to Amend Section 552 of Title 5, United States Code, Known as the Freedom of Information Act, Pub. L. 93-502, 88 Stat. 1561 (1974) 16-17

Intelligence Authorization Act for Fiscal Year 1993, Pub. L. 102-496, 106 Stat. 3180, 3186 (1992) 21

Foreign Intelligence Surveillance Act of 1978, Pub. L. 95-511, 92 Stat. 1783 (1978) 20

National Security Agency Act of 1959, Pub. L. 86-36, 76 Stat. 63 (1959) 10-11

Miscellaneous:

Exec. Order No. 13,292, 68 Fed. Reg. 15,315 (2003) 3, 11-12

Exec. Order No. 12,958, 60 Fed. Reg. 19,825 (1995) 2

Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (1981) 21

President George W. Bush, *Radio Address* (Dec. 17, 2005) 2, 7

Assistant Attorney General William E. Moschella, *Responses to Joint Questions from the House Judiciary Comm. Minority Members* (Mar. 24, 2006) 1, 7, 9

General Michael V. Hayden, *What American Intelligence & Especially the NSA Have Been Doing to Defend the Nation*, Address to the National Press Club (Jan. 23, 2006) 5

Patrick Radden Keefe, *State Secrets: A Government Misstep in a Wiretapping Case*, The New Yorker, Apr. 28, 2008 . . . . . 2, 7

Philip Shenon, *Lawyers Fear Monitoring in Cases on Terrorism*, N.Y. Times, Apr. 28, 2008 . . . . . 2, 7

James Bamford, *The Puzzle Palace: Inside the National Security Agency, America's Most Secret Intelligence Organization* (1982) 20

David Luban, *Lawfare and Legal Ethics in Guantánamo*, 60 Stan. L. Rev 1981 (2008) 19

S. Select Comm. to Study Governmental Operations with Respect to Intelligence Activities ("Church Comm."), Book II: *Intelligence Committees and the Rights of Americans*, S. Rep. No. 94-755 (1976) 19-20

S. Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, S. Rep. No. 95-604(I) (1976) 21

The National Security Agency and Fourth Amendment Rights: Hearing on S. Res. 21 Before the Select Comm. to Study Governmental Operations with Respect to Intelligence Agencies, 94th Cong. (1975) 20

INTRODUCTION AND SUMMARY OF ARGUMENT

The most significant feature of the government's brief is what it omits — nowhere does the government defend the legality of warrantless surveillance of lawyers for detainees. Nor does the government even acknowledge that senior government officials said Guantánamo lawyers are fair game for surveillance under the TSP program.[1] Only by evading these points can the government maintain that Glomar authorizes it to refuse to confirm or deny the existence of the requested records, or that Exemption 1 and Exemption 3 would justify withholding the records if they exist. Yet all of these arguments depend on this Court assuming either that warrantless surveillance of Guantánamo lawyers would be legal, or that its legality is irrelevant. There are three reasons why the Court should reject the government's claim and vacate the judgment below: **First:** The government's brief depends on the Alice-in-Wonderland fiction that there may be reason to believe that warrantless surveillance of the lawyer-plaintiffs would be lawful. But this case is not a fairy-tale. Warrantless surveillance of lawyers representing Guantánamo detainees would violate FISA, the Fourth Amendment rights of the lawyers, and other constitutional guarantees running to both the lawyers and their clients. This Court should not simply assume away this illegality, as the government urges. Instead, the question for the Court is whether the district court erred in concluding that illegality is *irrelevant* because the FOIA exemptions invoked by the government apply *even if* the surveillance was illegal. Slip op.

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

at 15, SA-18.[2] As Appellants' opening brief explained, the answer to that question is "no," and the government offers no response.

Nor does the government's reliance on *People for the American Way v. NSA*, 462 F. Supp. 2d 21 (D.D.C. 2006), help its cause. There, the court refused to be drawn into deciding what was, in essence, a facial challenge to the warrantless surveillance program. This case instead is an effort by lawyers representing Guantánamo detainees to determine whether they were subject to warrantless surveillance that, if it occurred, is indisputably unlawful, and the only question is whether Glomar and FOIA permit the government to cover up wrongdoing. Moreover, again in contrast to *People For*, here it is the government that threw down the gauntlet by claiming it has the right and technical ability to eavesdrop on them,[3] and did, in fact, eavesdrop on some of them.[4] The government's eavesdropping threat, empty or not, has had and continues to have a deeply corrosive effect on the lawyers' ability to represent their clients.

Second: The government's argument, that FOIA exemptions shield these records even if they reflect illegal NSA surveillance, is hollow. With respect to the NSA statutes on which the government relies, nowhere does the government respond to, let alone rebut, appellants' arguments that these statutes do *not* permit the withholding of records reflecting NSA activities — like warrantless eavesdropping on Guantánamo lawyers — that are unauthorized by statute

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[2] References to the Special Appendix will be noted as "SA__," references to the Joint Appendix will be noted as "JA__".

[3] *See* Moschella Responses, *supra* note 1; Philip Shenon, *Lawyers Fear Monitoring in Cases on Terrorism*, N.Y. Times, at. 28, Apr. 28, 2008, at A14; President George W. Bush, Radio Address (Dec. 17, 2005) ("Bush Radio Address") transcript available at http://nytimes.com/2005/12/17/politics/17text-bush.html.

[4] *See, e.g.*, Wilner Decl. ¶ 5, JA-362; Patrick Radden Keefe, *State Secrets: A Government Misstep in a Wiretapping Case*, THE NEW YORKER, April 28, 2008, at 28 ("Keefe, *State Secrets*").

and illegal. The same is true of the government's misplaced reliance on Exemption 1, for which the governing order says explicitly that "in no case shall information be classified in order to . . . conceal violations of law." Exec. Order 13,292, § 1.7(a)(1), 68 Fed. Reg. 15,315, 15,318 (Mar. 25, 2003); *see* Exec. Order 12,958, § 1.8(a)(1), 60 Fed. Reg. 19,825, 19,829 (April. 17, 1995) (same). The government's suggestion that the Appellants must show that the classification here was done *for the purpose* of concealing violations of the law is, in this case, bizarre, since, as is clear, engaging in warrantless surveillance of Guantánamo lawyers was a violation of law *ab initio*. Classifying records of an illegal activity is, by definition, classification to "conceal violations of law." Finally, the government's declarations only confirm that no concrete harm could result from making the government come clean about its threat to eavesdrop on the Guantánamo lawyers. The declarations contain nothing but "bureaucratic double-talk" and provide no answer to the central question in this case: how would the disclosure of a piece of paper listing one or more of the plaintiffs as a target of surveillance do anything more than expose the NSA's illegal conduct?

Third: The government's effort to expand Glomar to cover records that reflect illegal conduct should be rejected for two reasons, in addition to those discussed above. First, expanding Glomar to reach this case would run counter to Congress' goal in FOIA, which was to enable the American people to know what their government is "up to," especially when government is up to no good. This point takes on special force with respect to the Guantánamo detainees: Without vigorous judicial oversight, the Executive Branch's repeated efforts to deny the detainees access to counsel and access to courts might well have succeeded. Threatening to engage in warrantless surveillance of the detainees' lawyers is part of the Executive Branch's pattern of systemic interference with the detainees and their counsel, and the district court was wrong to rely on

Glomar to avoid the searching, *de novo* review FOIA demands. Second, permitting the government to refuse to admit or deny eavesdropping on counsel would also undermine Congress' decision in FISA to end, once and for all, rogue, warrantless surveillance of United States citizens by the NSA and CIA. FISA was enacted to rein in the intelligence agencies and ensure that FISA was the "exclusive means" for gathering foreign intelligence. Permitting the NSA to bypass FISA, without meaningful judicial review, would turn FISA on its head.

I. Targeting Lawyers for Warrantless Surveillance is Plainly Illegal and Thus FOIA Does Not Authorize Withholding the Requested Records.

Appellants' opening brief explains in detail why if the government engaged in warrantless surveillance of the Guantánamo lawyers that surveillance was unconstitutional and a clearcut violation of the Foreign Intelligence Surveillance Act (FISA), the statute that defines "the exclusive means by which electronic surveillance may be conducted" for foreign intelligence. 50 U.S.C. § 1812; *see* 18 U.S.C. § 2511(2)(f); *see* Appellants' Br. at 30-44. The language of FISA is plain, the warrant requirement is settled, and the First Amendment protects association for advocacy on behalf of unpopular persons. Yet the government offers not one word of explanation or justification. Why? Because if the NSA targeted the Guantánamo lawyers for warrantless surveillance, the agency would have no excuse.

At minimum, FISA requires that an agency seek an order from the FISA Court prior to electronic surveillance. But the NSA admits it did not obey FISA, presumably because it recognized that the FISA Court would not have allowed it to eavesdrop on the lawyers' communications. As General Michael Hayden admitted, the warrantless surveillance program

was designed to intercept communications when the evidentiary basis is "a bit softer than it is for a FISA warrant."[5]

The NSA was right to recognize that the FISA Court would not have authorized blanket wiretapping of Appellants, and this is for a multitude of reasons. *See* Appellants' Br. at 34. At the threshold, the NSA would have failed to meet the probable cause, minimization, and procedural hurdles the statute imposes. 50 U.S.C. § 1805(a)(1)-(5). Nor could the NSA target individuals because none is "a foreign power," or "an agent of a foreign power." *See* § 1804(a)(3)(A), 1805(a)(2)(A). This is clear from the statutory definitions of the terms, § 1801(a), (b), and from the fact that the FBI scrutinized the lawyers' individual backgrounds and found they posed no security risk. *See, e.g.*, Gutierrez Decl. ¶ 39, JA-284; Neff Decl. ¶ 16, JA-330; Barker Decl. ¶ 11, JA-205 – JA-206; Chandler Decl. ¶ 8, JA-220; Gorman Decl. ¶ 14, JA-258 – JA-259; Grigg Decl. ¶ 8, JA-267. If the lawyers had connections to a foreign power, the FBI would not have cleared them to visit Guantánamo. And an NSA warrant application would have collided with FISA's injunction that "no United States person may be considered a foreign power or an agent of a foreign power solely upon the basis of activities protected by the first amendment to the Constitution of the United States." 50 U.S.C. § 1805(a)(2)(A).[6] Association for the purposes of advocacy on behalf of "unpopular persons" is "core" First Amendment activity. *See, e.g.*, *In re Primus*, 436 U.S. 412, 427-28, 432-33 (1978); *NAACP v. Button*, 371 U.S. 417, 430-31 (1963).

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[5] Michael V. Hayden, Address to the National Press Club: What American Intelligence and Especially the NSA Have Been Doing to Defend the Nation (Jan. 23, 2006), available at http://www.fas.org/irp/news/2006/01/hayden012306.html.

[6] Congress included this express statement to prevent a repeat of intelligence agencies' history of targeting American citizens for their political activities. *See infra* at 19-21.

Perhaps the easiest way to understand the fundamental flaws in the government's position is to suppose that instead of engaging in warrantless *electronic* surveillance, the NSA had engaged in warrantless *physical* surveillance, breaking into Sherman and Sterling's office and photocopying Tom Wilner's files. Now suppose the NSA announced it *might* break into the Guantánamo lawyers' offices and copy their files without leaving a trace, and that it had the legal authority and technical ability to do so. That is, in essence, this case. The looming threat of electronic monitoring chills the lawyers' communications, and frustrates their efforts to consult with witnesses and experts, advise clients, and gather evidence for presentation to courts. This impinges on not only Mr. Wilner's (and his partners') rights, but also those of his clients.[7]

To avoid conceding illegality, the government makes two arguments, neither of which is sound. First, relying on *People For*, 462 F. Supp. 2d 21, the government claims that Glomar permits it to refuse "to confirm or deny the existence of records concerning whether particular individuals have been subject to surveillance," even if the surveillance was illegal. Appellees' Br. 15, 35. Apart from the fact that *People For* is not controlling here, it is also not relevant. There, the court did not want to be drawn into deciding what was, in essence, a facial challenge to the warrantless surveillance program. This case instead is an effort by lawyers representing Guantánamo detainees to determine whether they were subject to warrantless surveillance that, if it occurred, is indisputably unlawful: the only question is whether Glomar and FOIA permit the government to cover up wrongdoing. Moreover, again in contrast to *People For*, here it is the government that threw down the gauntlet by claiming a right and technical ability to eavesdrop

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[7] The government's claim about the irrelevance of Appellants' "identity" misses the point. *See* Appellees' Br. at 36-37. Appellants do not argue for a special right of access based on their status as lawyers; on the contrary, the records they seek should be available to any person, or even the New York Times, because these records are not exempt under FOIA.

on the lawyers, and that it did, in fact, eavesdrop on some of them.[8] The government's eavesdropping threat, empty or not, has had and continues to have a deeply corrosive effect on the lawyers' ability to represent their clients.

Second, again relying on *People For*, the government argues that, even if the surveillance was illegal, the NSA statutes at issue (the same ones at issue in *People For*) nonetheless protect illegal activity of the NSA. This argument is fully addressed in Point II, but it bears noting that the conclusion of the *People For* court was in error, and was based on a demonstrably incorrect reading of the one case it relied on: *Hayden v. NSA*, 608 F.2d 1381 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980). *People For* cites *Hayden* for the proposition that the NSA statutes categorically protect information relating to the NSA's functions and activities, even if those activities are unauthorized or unlawful. But *People For* overlooks the *Hayden* court's caveat: "*Certainly where the function or activity is authorized by statute and not otherwise unlawful*, NSA materials *integrally related* to that function or activity fall within . . . Exemption 3." 608 F.2d at 1389 (emphasis added). And the district court in this case duplicated the error. Slip op. at 14, SA-17 (quoting *Hayden*, 608 F.2d at 1389). Only by ignoring the D.C. Circuit's crucial limiting language can the government argue here that the NSA statutes shield records relating to the warrantless surveillance of the lawyer-appellants, since that surveillance is not authorized by statute, is barred by the Constitution and FISA, and is not otherwise lawful. *See also Founding Church of Scientology v. NSA*, 610 F.2d 824, 830 n.49 (D.C. Cir. 1979) ("NSA would have no protectable interest in suppressing information simply because its release might uncloak an illegal operation").

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[8] *See supra* notes 3, 4.

II. None of the Exemptions the NSA Cites Justifies Concealing Records of Warrantless Surveillance.

To understand the flaws in the government's claim that the FOIA exemptions it invokes would justifying withholding responsive records *even if* the NSA's surveillance was unlawful, it is helpful to use a concrete illustration. Assume that the NSA has one piece of paper with a list of those lawyers targeted under the TSP and some of the lawyer-plaintiffs in this case are on that list.[9] The list does not contain any information about the nature of the communication, with whom the lawyer was communicating, nor how the NSA intercepted the communication. Only the lawyers' names are on the list. That is the record the plaintiffs filed this suit to obtain. For convenience, that record will be referred to as "the list." The government insists that the list would be exempt from disclosure, even if the NSA's surveillance was unlawful. Appellees' Br. at 32. That argument is wrong, for the reasons explained in detail in Appellants' Opening Brief at 24-29; *see also Kuzma v. IRS*, 777 F.2d 66, 69 (2d Cir. 1985) ("unauthorized or illegal investigative tactics may not be shielded from the public by use of FOIA exemptions."). Below we amplify those reasons in a few respects, starting with the government's Exemption 3 arguments, and then turning to its Exemption 1 claim.

A. Exemption 3

The NSA relies mainly on two NSA statutes to argue that they categorically require the withholding of NSA sources and methods of intelligence, and, more broadly, any information about the NSA's intelligence functions and activities. Neither of those statutes applies here.

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[9] No other names would be on the list, because the FOIA request at issue sought only information relating to the plaintiffs. Slip op. at 4, SA-7 (quoting FOIA Request No. 1). Thus, any other names on the list would be redacted.

1. The List Would Not Reveal Intelligence Sources Or Methods.

Confirming or denying whether the list exists would not reveal any "sources or methods" of intelligence. *See* 50 U.S.C. 403-1(i)(1). Because the appellants do not seek information about *how* the NSA intercepted their communications, the list would not reveal intelligence "methods," and thus that prong of the statute cannot apply. Nor does the list contain the identity of anyone but the lawyer-plaintiffs.

Accordingly, the NSA must be contending that the lawyers themselves were, or could be, the secret intelligence "sources," and that the NSA can withhold the list for that reason. But the NSA has not made that argument explicitly, and for good reason. That argument would be premised on the submission that lawyers representing Guantánamo detainees in adversarial proceedings against the government may lawfully be conscripted by the NSA to serve — involuntarily and unwittingly — as sources of intelligence that might be used against their own clients. That submission would be a clear affront to well-settled rules of attorney-client privilege, protection of work product, and ethical obligations of confidentiality, as well as a concession of blatant violations of FISA and the U.S. Constitution. But unless the NSA is claiming that the lawyers are or could be intelligence sources, then the agency's argument is hard to fathom.

2. The List Would Say Nothing About NSA Functions Or Activities.

Perhaps understanding the weakness of its sources and methods argument, the NSA falls back on Section 6 of the National Security Agency Act of 1959, which states that "nothing in this Act or any other law . . . shall be construed to require the disclosure of the organization of any function of the National Security Agency, or any information with respect to the activities thereof . . . ." Pub. L. 86-36, 73 Stat. 63, 64, *reprinted at* 50 U.S.C. § 402 note. The district court interpreted this provision to mean that any information regarding the NSA's lawful or unlawful

interception of Appellants' communications must be withheld "since any information about an intercepted communication concerns an NSA activity." Slip. op. at 14, SA-17 (quoting *Hayden* 608 F.2d at 1389). But the district court misinterpreted the D.C. Circuit decision on which it relied. In the sentence immediately following the one quoted, the D.C. Circuit explained, "Certainly where the *function or activity is authorized by statute and not otherwise unlawful*, NSA materials *integrally related* to that function or activity fall within Exemption 3." *Hayden*, 608 F.2d at 1389 (emphasis added).

The NSA's warrantless surveillance of the lawyer-appellants was not authorized by any statute. Not only does the National Security Agency Act not authorize the agency to violate the Constitution, but it also must be read in conjunction with FISA, which implements the Fourth Amendment by regulating *all* electronic surveillance conducted for foreign intelligence purposes and sets out "the *exclusive* means by which electronic surveillance" may be conducted. 18 U.S.C. § 2511(2)(f) (emphasis added). NSA surveillance here, conducted without a FISA warrant, was neither authorized nor lawful, and it is thus unprotected by Section 6.

Making matters worse, the position advanced by the NSA and accepted by the district court has no limiting principle. By its logic, the NSA could deliberately and knowingly violate the constitutional rights of American citizens, and could obstruct justice by invoking Section 6 to shield records reflecting these violations. To use our earlier illustration, even if the NSA were regularly breaking into Sherman and Sterling's office, the district court's reading of Section 6 would protect information regarding that unlawful activity. This cannot be the case. *See United States v. U.S. Dist. Court*, 407 U.S. 297, 313 (1972) (national security creates no exception to First or Fourth Amendment); *see also Founding Church*, 610 F.2d at 830 n. 49 ("NSA would have no protectable interest in suppressing information simply because its release might uncloak

an illegal operation."); *ACLU v. Dep't of Defense* ("*ACLU v. DoD*"), 389 F. Supp. 2d 547, 564-65 (S.D.N.Y. 2005), *aff'd*, 543 F.3d 59 (2d Cir. 2008). To read Section 6 that broadly, as the government urges, would give intelligence agencies license "to conceal information regarding blatantly illegal or unconstitutional activities simply by assigning these activities to the NSA or claiming they implicated information about the NSA's functions." *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899, 905 (N.D. Ill. 2006). Congress never intended Section 6 to serve as an instrument for concealment of gross violations of law.

B. Exemption 1

As a last-ditch argument, the NSA claims that Exemption 1 permits it to refuse to admit or deny the existence of the list. This argument fails as well. Exemption 1's key requirement is that the agency must show that the records at issue "*are in fact properly classified* pursuant to [the relevant] Executive order." 5 U.S.C. § 552(b)(1) (emphasis added). That showing cannot be made because, as the Executive Order governing classification makes clear, "*In no case shall information be classified in order to . . . conceal violations of law. . . .*" Exec. Order 13292 § 1.7(a)(1), 68 Fed. Reg. 15,315, 15,318 (Marc. 25, 2003) (emphasis added). But the list would have been classified for no other reason, since eavesdropping on the Guantánamo lawyers would have been illegal from the inception.

In an effort to circumvent this clear limitation on classification authority, the NSA argues that the lawyer-plaintiffs bear a burden of providing *evidence* that the records were classified for the *purpose* of concealing illegal activity. Appellees' Br. at 33. But this is a Catch-22 argument, because FOIA requesters would rarely, if ever, be in a position to make this showing. Not surprisingly, the NSA's proposed motive-based inquiry has no basis in existing law. *See* 5 U.S.C. § 552(a)(4)(B) ("[t]he burden is on the agency to sustain its action"); *A. Michael's Piano,*

Inc. v. FTC, 18 F.3d 138, 143 (2d Cir. 1994); *see also ACLU v. DoD*, 389 F. Supp. 2d at 552 (denying summary judgment to government when it failed to provide sufficient information for court to determine de novo whether documents were improperly classified to conceal violations of law). Nor is there any hint in the text or history of FOIA — a statute aimed at rooting out government misconduct — that Congress contemplated an intent-based evidentiary hurdle for members of the public to meet before they could employ FOIA to uncover that misconduct.

In any event, the motive-based argument in this case is a red herring. This is not a situation in which an intelligence agency initiated a lawful program and an activity conducted under that program was later found to be unlawful. In such a scenario, the government's motive-based test might have merit. But that is not this case. In light of FISA's history, the history of overreaching by national security agencies that prompted FISA's passage, *see infra* at19-21, and settled First and Fourth Amendment law, no one could plausibly suggest that a decision to target the Guantánamo lawyers for warrantless surveillance was not made with full knowledge that such surveillance would be unlawful. Thus, any question of motive is irrelevant here. A decision to initiate warrantless eavesdropping on lawyers was "born" illegal, and, by definition, a decision to classify illegally obtained information is made to "conceal violations of law." For that reason, the list, if it exists, could not be "properly classified".

C. The Agency Declarations Do Not Support The Government's Exemption Claims.

The government's declarations only confirm that no concrete harm could result from making the government come clean about whether it carried out its threat to eavesdrop on the Guantánamo lawyers. The declarations are nothing but abstractions and generalities untethered to the facts of this case. The government's evidence is nothing more than the "bureaucratic double-talk" this Court has condemned. *See Halpern v. FBI*, 181 F.3d 279, 293 (2d Cir. 1999)

(collecting cases of other circuits rejecting "similarly vague and conclusory affidavits"); *see also ACLU v. DoD*, 543 F.3d at 73 (rejecting exemption claim where defendants provided "diffuse and vague" explanation of risks of disclosure); *cf. A. Michael's Piano, Inc.*, 18 F.3d at 143 ("the burden of proof . . . rests with the agency asserting the exemption, with doubts resolved in favor of disclosure"). This problem is especially common in Glomar cases, where, as here, the declarations too often set forth vague allegations that contain serious threats unconnected to actual facts.

The government claims, for example, "that to identify targets under the TSP is to offer official confirmation that such persons have been identified as, or linked to, a potential threat. Any disclosure of this information would obviously and immediately affect the ability of NSA to fulfill the primary purpose of the TSP . . . to detect and prevent the next terrorist attack against the United States." Appellees' Br. at 24 (internal punctuation and citation omitted) (quoting Brand Decl. ¶ 21, JA-57-58). Everyone agrees that preventing attacks against our country is an interest of the highest importance. The problem is that the connection between preventing terrorist attacks and refusing to admit whether the lawyer-appellants have been targeted for warrrantless surveillance is far from "obvious". Indeed, we see no connection whatsoever.

The same is true with identifying "targets" of the terrorist surveillance program. We agree that the NSA generally has no obligation to "identify" those people who have been "linked to" "potential threats." But it is already a matter of public record that the Appellants are "linked to" Guantánamo detainees by virtue of representing them; this "link" is no secret. Admitting or denying that the lawyers have been monitored would provide no new information about their identities or links.

The government also asserts that it "cannot respond to each case in isolation . . . . This compilation of information, if disclosed [w]ould . . . provid[e] our adversaries a road map, instructing them which communications modes and personnel remain safe." Appellees' Br. at 27 (quoting Brand Decl. ¶ 23, JA-59). Apart from the indeterminacy of the reference to a "compilation of information," this cryptic assertion appears to imply that the lawyers might seem to foreign agents to be "safe" "communications modes" or "personnel", and therefore the NSA should not disturb that perception. But the lawyer-appellants cannot be "communications" "personnel" for the same reasons they cannot be intelligence "sources." *See supra* at 9. The NSA has no business conscripting Guantánamo lawyers to serve as unwitting carriers of communications that might harm their clients, and, aside from these veiled references, the NSA does not make the argument that it could lawfully do so. Yet the NSA's assertion depends on assuming that it could.

As is evident, the NSA's justifications might have some force if the FOIA request at issue sought to determine who was targeted under a *lawful* secret surveillance program conducted in compliance with FISA. But that is not this case. The declarations submitted by the government therefore do not and cannot establish that the list, if it exists, would be exempt from disclosure under FOIA, providing yet another reason why the judgment below should be reversed.

III. The District Court's Ruling Expands Glomar and Undermines FOIA and FISA.

At its core, this case is about the limits of Glomar and the utility of FOIA and FISA in deterring illegal surveillance by the NSA: that is, does Glomar permit the government to refuse to admit or deny that it has records that, if they exist, would show that the government targeted Guantánamo lawyers for illegal, warrantless surveillance? The answer to that question is clearly

"no," for two reasons in addition to those already discussed. First, such a ruling would turn FOIA into a toothless tiger, a statute easily evaded by vague and general national security claims, and second, it would run counter to Congress's effort in FISA to end, once and for all, rogue surveillance activities by the nation's intelligence agencies.

A. The District Court's Ruling Undermines FOIA.

FOIA was enacted to shine a spotlight on the actions of federal agencies, or, as the Supreme Court put it, to enable citizens to know what their government is "up to." *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) (citation omitted). A key role of FOIA is to empower citizens to unearth illegal conduct exactly like that which may have occurred here. *See ACLU v DoD*, 543 F.3d 59, 66 (2d Cir. 2008) (citing *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)); *National Council of La Raza v. DOJ*, 411 F.3d 350, 355 (2d Cir. 2005). As this Court recently emphasized, "the law accords" "special importance" "to information revealing government misconduct. . . . The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *ACLU v. DoD*, 543 F.3d at 87 (internal citation omitted)*; see also Assoc. Press v. DoD*, 06-53532-cv, 2009 WL 18727, at *4 (2d Cir. Jan.5, 2009) (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976)) ("FOIA "was designed 'to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.'"). In ruling that the legality of the NSA's conduct was irrelevant to FOIA analysis, the district court impermissibly shortchanged FOIA's goal of accountability.

One manifestation of Congress' judgment that FOIA should serve this accountability function was Congress' decision to mandate *de novo* judicial review of exemptions claims. 5 U.S.C. § 552(b)(4)(B); *see ACLU v. DoD*, 389 F. Supp. 2d at 552, *aff'd*, 543 F.3d 59. And

national security matters are no exception. On the contrary, Congress imposed the statutory *de novo* requirement in reaction to the Supreme Court's ruling in *EPA v. Mink*, 410 U.S. 73 (1973), where the Court upheld the EPA's withholding of documents relating to atmospheric testing of nuclear weapons because it thought it was required to defer to the agency's national security claims. *See, e.g., id.* at 95 (Stewart, J., concurring) (judiciary has "no means to question any Executive decision to stamp a document 'secret,' however cynical, myopic, or even corrupt that decision might have been."). Disagreeing with the Court, Congress amended FOIA to require *de novo* judicial review for all FOIA cases, including ones involving national security claims. *See* An Act to Amend Section 552 of Title 5, United States Code, Known as the Freedom of Information Act, Pub L. 93-502, 88 Stat. 1561 (1974) (codified as amended at 5 U.S.C. § 552(b)(4)(B)); *see also ACLU v DoD*, 543 F.3d at 75-77 (describing history of 1974 amendments). Recent history demonstrates the wisdom of Congress' judgment and the need for vigorous judicial review of Executive Branch decisions in the name of national security.

Indeed, this case is the latest in a series of cases in which the Executive Branch has sought to deny Guantánamo detainees access to counsel or to judicial review. The courts have routinely found that the Executive's efforts exceeded constitutional or statutory limits. *See, e.g.*, *Boumediene v. Bush*, 128 S. Ct. 2229, 2258, 2269 (2008) (highlighting "troubling separation of powers concerns" with Executive attempts to limits scope and effectiveness of writ of habeas corpus, and emphasizing "the writ must be effective [for Guantánamo detainees]"); *id*. at 2269 (ruling that Guantánamo detainees retain privilege of habeas corpus and detention by Executive Order may warrant even more stringent review than normal habeas); *Haman v. Rumsfeld*, 548 U.S. 557, 574, 575-76 (2006) (Executive argued, unsuccessfully, that Supreme Court lacked jurisdiction of habeas petitions pending when Detainee Treatment Act was enacted); *Rasul v.*

Bush, 542 U.S. 466, 471-72, 483-84, 487-88 (2004) (Executive argued, unsuccessfully, that federal courts lack authority to hear habeas corpus petitions of Guantánamo detainees); *Hamdi v. Rumsfeld*, 542 U.S. 507, 527, 533 (2004) (Executive argued, unsuccessfully, that "the limited institutional capabilities of courts . . . ought to eliminate any individual process" of fact-finding as to enemy combatant status).

After its loss in *Rasul*, the Executive Branch proposed procedures sharply limiting detainees' access to counsel. *See Adem v. Bush*, 425 F. Supp. 2d 7, 11-12 (D.D.C. 2006) (mem. op.) ("The Government took the position that detainees' access to counsel existed solely at the pleasure of the Government, with restrictions to be imposed as it saw fit.") (citing *Al Odah v. United States*, 346 F. Supp. 2d 1, 3 (D.D.C. 2004)). The courts responded with orders that protected "'full and frank communication' between a detainee and his counsel" and "helped] counsel present the detainee's case to the court." *Bismullah v. Gates*, 501 F.3d 178, 189 (D.C. Cir. 2007), *reh'g en banc denied*, 514 F.3d 1291, 1293; *see also Al Odah*, 346 F. Supp. 2d at 8-9 (rejecting warrantless audio and video monitoring of meetings between counsel and detainees); *In re Guantánamo Detainee Cases*, 344 F. Supp. 2d 174, 186-91 (D.D.C. 2004) (preserving zone of privacy for attorney-client communications).

The formal Executive efforts to limit detainees' access to counsel and courts were also supplemented by less visible, less formal means of undermining the availability and effectiveness of counsel.[10] As the declaration of legal ethics expert Professor David Luban recounts, agency

[10] This approach even extended to a Defense Department effort to persuade corporate clients to boycott the law firms representing detainees. *See* Interview by Jane Norris with Charles Stimson, Deputy Assistant Secretary of Defense for Detainee Affairs, in Washington, D.C. (Jan. 11, 2007), *audio available at* http://www.federalnewsradio.com/index.php?sid=1029698&nid=250 (last visited May 4, 2008), *transcript of relevant portions available at* http://www.democracynow.org/2007/1/17/top_pentagon_official_calls_for_boycott (last visited

officials told lawyers that their clients did not wish to see them, while telling the clients that the lawyers were agency interrogators; agency officials punished detainees who sought access to counsel by leaving them in isolation for days on end, without bathroom facilities; agency investigators posed as attorneys; and agency officials told detainees that their lawyers were homosexual or Jewish (when neither was the case). Luban Decl. ¶¶ 5, 6, 8, 9, JA-297–JA-299; *see also* David Luban, *Lawfare and Legal Ethics in Guantánamo*, 60 Stan. L. Rev 1981 (2008). Threatening the lawyers with warrantless surveillance appears to be part and parcel of these efforts.

The government argues that this Court should do nothing, and that Appellants should seek redress elsewhere. Appellees' Br. at 36-37. But that argument is simply an effort to induce this Court to pass this issue along to another forum, where the government will make the same non-reviewability, non-justiciability arguments, although perhaps dressed up with different labels. *See, e.g.*, *ACLU v. NSA*, 493 F.3d 644, 695-96 (6th Cir. 2007) (Gilman, J, dissenting) (government alleges that targets of TSP have no standing without proof of surveillance); *In Re NSA Telecommunications Litig*., 564 F. Supp. 2d 1109, 1111-15 (N.D. Cal. 2008) (describing history of litigation challenging NSA surveillance on basis of documentary proof inadvertently released to plaintiffs, where government claimed state secrets and lack of standing). FOIA is not a toothless tiger. It provides a broad right of access to non-exempt information, and Congress has not given the NSA the blanket shield from FOIA that the agency claims. As we have shown, none of the NSA statutes cited by the government justifies withholding these records.

Feb. 11, 2009); *see* Luban Decl. ¶ 4, JA-296–JA-297.

B. The District Court's Ruling Undermines FISA.

Meaningful judicial review is especially important here, where the claim is that one of our nation's intelligence agencies has exceeded its authority and engaged in illegal domestic surveillance. Congress has recognized that the NSA and CIA have a history of this activity when not checked by judicial oversight. FISA was enacted in response to such abuses, and to put an end, once and for all, to unauthorized surveillance by the NSA and CIA. The ruling below runs directly counter to Congress' judgment on that score.

To summarize a complicated history, in 1976 Congress released the Church Committee Report detailing "a massive record of intelligence abuses" by the NSA and other intelligence agencies. *In Re NSA Telecommunications Litig.*, 564 F. Supp. 2d at 1115-17 (citing S. Select Comm. to Study Governmental Operations with Respect to Intelligence Activities ("Church Comm. Rep."), Book II: Intelligence Committees and the Rights of Americans, S. Rep. No. 94-755 ("Book II"), at 290). The Report revealed that, using "intrusive techniques–ranging from simple theft to sophisticated electronic surveillance–the Government ha[d] collected, and then used improperly, huge amounts of information about the private lives, political beliefs and associations of numerous Americans." *Id.* The NSA and other agencies had spied on Americans in the name of national security with no judicial oversight. Book II at 21; *see also The National Security Agency and Fourth Amendment Rights*: Hearing on S. Res. 21 Before the Select Comm. to Study Governmental Operations with Respect to Intelligence Agencies, 94th Cong. (1975).

Two examples of NSA operations that went too far should suffice. In "Operation Shamrock," "the largest governmental interception program affecting Americans" in the Cold War, the NSA intercepted *all* international telegrams sent to or from the United States. Church Comm. Book III at 740. Later on, in the 1960s and 70s, the NSA intercepted communications of

individuals and groups put on "watch lists" for "involve[ment] in antiwar and civil rights activities." *Id*. at 739. The agency was not just undeterred by its wholesale violation of the targets' First Amendment rights; on the contrary, the exercise of such rights were cited as a justification for surveillance. James Bamford, *The Puzzle Palace: Inside the National Security Agency, America's Most Secret Intelligence Organization* 322 (1983).

To guard against the abuses identified by the Church Committee, Congress stepped in and enacted the Foreign Intelligence Surveillance Act in 1978. *See* 95th Cong., Pub L. 95-511, 92 Stat. 1783 (1978). Congress saw FISA as putting a stop to "the practice by which the Executive Branch may conduct warrantless electronic surveillance on its own unilateral determination that national security justifies it." S. Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, S. Rep. No. 95-604 (I) (1976), at 7-8, *reprinted at* 1978 U.S.C.C.A.N. 3904, 3910; *see id* at 3908 ("This legislation is in large measure a response to the "revelations that warrantless electronic surveillance in the name of national security has been seriously abused"). Congress aimed to counter the "formidable" chilling effect that warrantless surveillance created for Americans' perceptions of themselves as potential targets of surveillance, and to encourage the American people to engage freely in First Amendment pursuits of "public activity" and "dissent from official policy." *Id*. This goals was made operational by Congress's determination that the FISA procedures, along with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, would be "*the exclusive* means by which electronic surveillance" may be conducted. 50 U.S.C. § 1812; 18 U.S.C. § 2511(2)(f); *see* 18 U.S.C. § 2510 *et seq*. By announcing that the lawyers fit the definition of those targeted under the NSA's warrantless surveillance program, stating that the Executive believes it has the right to target the lawyers, and refusing to confirm or

deny whether in fact these lawyers have been targeted, the NSA contravene's FISA's purpose and perpetuates the very fear that Congress hoped to end.[11]

The Guantánamo lawyers have good reason to fear the same constitutional violations are occurring once again. FOIA was designed to open government abuse to the light of day, and while Glomar permits shielding legitimate secret programs, there is no basis for refusing to admit or deny whether the lawyers have been caught in the NSA's publicly-acknowledged and illegal net of warrantless surveillance.

[11] President Truman created the NSA by secret directive in 1952 to engage in electronic surveillance during the Cold War. Church Committee Book III, at 736. Throughout most of the Cold War, the NSA operated without any statutory control; until 1992, it had no legislative charter, and, until 1981, no publicly available Executive Order defined its responsibilities or limited its power. Intelligence Authorization Act for Fiscal Year 1993, Pub. L.102-496, 106 Stat. 3180, 3186 (1992); Exec. Order No. 12,333, 46 Fed. Reg. 59,941, 59,947 § 1.12(b) (Dec. 4, 1981), *reprinted at* 50 U.S.C. § 401 *note*. The NSA could therefore engage in vast, sweeping, indiscriminate surveillance beyond that authorized for the regulated intelligence agencies. Book III, at 735.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C), Fed. R. App. P., I hereby certify that the foregoing brief is in compliance with the word limitations set forth in Rule 32(a)(7)(B) inasmuch as the brief contains fewer than 7,000 words, when measured by Word Perfect 12, the word processing program used to prepare the brief (which counted 6,631 words).

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ANTI-VIRUS CERTIFICATE

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

No. 08-4726-cv

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

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Signed: /s/ *Kathryn Sabbeth*

Dated: 2/13/09