09-4112-cv

United States Court of Appeals
for the
Second Circuit

AMNESTY INTERNATIONAL USA, GLOBAL FUND FOR WOMEN, GLOBAL RIGHTS, HUMAN RIGHTS WATCH, INTERNATIONAL CRIMINAL DEFENCE ATTORNEYS ASSOCIATION, THE NATION MAGAZINE, PEN AMERICAN CENTER, SERVICE EMPLOYEES INTERNATIONAL UNION, WASHINGTON OFFICE ON LATIN AMERICA, DANIEL N. ARSHACK, DAVID NEVIN, SCOTT MCKAY, and SYLVIA ROYCE,

Plaintiffs-Appellants,

v.

DENNIS C. BLAIR, in his official capacity as Director of National Intelligence, LT. GEN. KEITH B. ALEXANDER, in his official capacity as Director of the National Security Agency and Chief of the Central Security Service, ERIC H. HOLDER, in his official capacity as Attorney General of the United States,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, THE HONORABLE JOHN G. KOELTL

BRIEF OF *AMICUS CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF PLAINTIFFS-APPELLANTS

Lucy A. Dalglish
Gregg P. Leslie
1101 Wilson Boulevard, Suite 1100
Arlington, VA 22209
Tel: (703) 807-2100
Counsel for The Reporters Committee for Freedom of the Press

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

STATEMENT OF INTEREST

The Reporters Committee for Freedom of the Press ("Reporters Committee") is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and freedom of information litigation in state and federal courts since 1970.

The interest of *Amicus* in this case is in ensuring that the First Amendment rights of journalists to interview international sources are upheld. The FISA Amendments Act of 2008 ("FAA") violates those rights. The FAA amended the Foreign Intelligence Surveillance Act ("FISA") to change the procedure for the government's interception and acquisition of telephone and e-mail communications between U.S. citizens and people abroad. The new law allows the Attorney General and the Director of National Intelligence to immediately intercept communications without seeking court approval or showing cause or suspicion, as long the communication is "important to the national security of the United States" and may be lost if not collected immediately. FAA §702 (c)(2), codified at 50 U.S.C. §1881a (c)(2) (2008) ("1881a"). The law requires that the government submit a certification to the Foreign Intelligence Surveillance Court ("FISC") within seven days after monitoring the communication, but that

certification does not have to state who, where, or why the government is monitoring. §1881a (g)(1)(B),(g)(4). If the FISC rejects the government's certification, the government may still continue intercepting communications while an appeal of the FISC decision is pending. §1881a (i)(4)(B). Essentially, the FAA gives the government broad authority to listen to communications between U.S. citizens and people abroad, putting a large number of journalists who frequently conduct interviews with international sources at risk of interception. In fact, former employees of the National Security Agency have alleged that they witnessed eavesdropping of aid workers' and journalists' conversations that were wholly unrelated to terrorism. Jonathan S. Landay, *Did U.S. government snoop on Americans' phone calls?* Knight Ridder Washington Bureau, October 9, 2008. By authorizing interception without requiring judicial review, the FISC may never know if and when the government is using its powers under the FAA to monitor journalists' communications.

The FAA undermines the constitutionally protected role of the press in its supervisory role regarding government action and eliminates the ability of journalists to make good-faith promises of confidentiality to international sources. The government's ability to conduct wiretapping with no suspicion or warrant, facilitated by the FAA, has disastrous results for the news media and, by extension, for the public. By hampering the formation of confidential relationships between

journalists and their sources, the law prevents journalists who cover foreign and national security issues from breaking fast-moving news stories and investigating deeper issues crucial to the public. The FAA runs afoul of the constitution and severely harms journalists' performance of their duties to gather and disseminate news to benefit the public.

SOURCE OF AUTHORITY TO FILE

Pursuant to Fed. R. App. P. 29, all parties consent to the filing of this brief.

ARGUMENT

I. The FISA Amendments Act of 2008 undermines the well-established First Amendment role of the press as an independent check on government power.

A free press is vital in a democracy, keeping the public informed of officials' activities in all branches of government. Courts have long recognized that the press has constitutional protection to perform this function. When the government has legal authority to conduct secret investigations, the press's duty to expose illegal corruption and wrongdoing becomes increasingly more important. But the FAA undermines the press's constitutionally protected role, obstructing journalists' ability to unearth information crucial to the public interest.

Throughout history, the independent role of the press has been constitutionally recognized. As Justice Black acknowledged in *New York Times v. United States* (the "Pentagon Papers" case):

> In the First Amendment, the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government.

403 U.S. 713, 717 (1971). From the early days of pamphleteers to today's multi-national media corporations, the press has long been considered vital to the system of checks and balances in a democracy. "[T]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve." *Mills v. Alabama*, 384 U.S. 214, 219 (1966). Justice Potter Stewart wrote about the importance of the press in a free society. "The primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the Government as an additional check on the three official branches." Potter Stewart, *Or of the Press*, 26 Hastings L.J. 631, 634 (1975).

Nor is this ability restricted to journalists within this country's borders. In a recent war tribunal prosecution in The Hague, the International Criminal Tribunal for the Former Yugoslavia recognized the important role of the news media when it adopted a qualified reporter's privilege for war correspondents. *Prosecutor v. Brdjanin*, Case No.: IT-99-36-AR73.9, Decision on Interlocutory Appeal (Dec. 11, 2002). During the prosecution of former Bosnian Serb Deputy Prime Minister Radoslav Brdjanin, the prosecutor sought the testimony of a former *Washington Post* reporter, Jonathan Randal, who had interviewed Brdjanin for a 1993 story. The tribunal held that compelling Randal to testify would damage the ability of war correspondents to gather news, recognizing the vital role that war correspondents play in keeping the public informed about events in conflict zones. "In war zones, accurate information is often difficult to obtain and may be difficult to distribute or disseminate as well. The transmission of that information is essential to keeping the international public informed about matters of life and death." *Id.* at ¶36. In order to bring this information to the public, the court wrote that: "[w]ar correspondents must be perceived as independent observers rather than as potential witnesses for the Prosecution. Otherwise, they may face more frequent and grievous threats to their safety and to the safety of their sources." *Id.* at ¶42.

Likewise, journalists working in today's interconnected world — where wars and international conflicts continue — play the same essential role that the

International Criminal Tribunal recognized for war correspondents. The ability of the public to learn about the broadest possible range of information about matters that affect the safety of the United States is paramount. To properly act as a reliable source of information for the public, journalists who cover international issues including terrorist threats, counter-terrorism measures, and U.S. wars abroad, must be able to act independently. "Protecting the free flow of information and countering undue government secrecy are essential underpinnings, not only of individual freedom, but also of our whole government system of checks and balances. A free press that has access to, and the right to publish information about Executive Branch policies, is a critical pillar of both congressional oversight and judicial review." Nadine Strossen, *Constitutional Overview of Post-9/11 Barriers to Free Speech and a Free Press*, 57 Am. U. Law. Rev. 1204, 1209 (2007).

The FAA intrudes upon the constitutionally protected role of the news media and makes it nearly impossible for the press to perform its constitutional duty. By granting the government the power to monitor conversations between journalists and sources without any meaningful judicial supervision, the FAA allows the government to utilize the press as an investigatory arm. Without the journalists' or sources' knowledge, government investigators can tap into journalists' conversations and electronic mail, listen to or read their interviews, and use everything the journalists may learn in any terrorism investigation. And in fact,

former government officials have come forward with allegations that during at least a six-year window, journalists were among those wiretapped without a warrant. An ABC broadcast showed the former NSA employees discussing the agency's policy of "routinely record[ing] calls to homes and offices by hundreds of American military officers, journalists and aid workers who were posted in the Middle East between 2001 and 2007." Jonathan S. Landay, *Did U.S. government snoop on Americans' phone calls?* Knight Ridder Washington Bureau, October 9, 2008. This is alarming because, as this Court noted in *New York Times v. Gonzalez*: "Without question, the telephone is an essential tool of modern journalism and plays an integral role in the collection of information by reporters." 459 F.3d 160, 168 (2d Cir. 2006).

The government's engagement in warrantless wiretapping signals to the public that the government does not acknowledge the news media's role as an independent check, but instead sees it as an investigatory tool and, thus, as a *de facto* agent of the government. This damages the credibility of the press with the public, which in turn chills the speech of international sources who speak under the condition of anonymity, and prevents them from speaking to reporters whose promises of confidentiality are compromised. The FAA has essentially destroyed a journalist's ability to be autonomous by gathering news beyond the reach of government interference.

II. The FISA Amendments Act of 2008 violates the constitutional rights of journalists to gather news by using protected source relationships.

The relationship between a journalist and a source is of fundamental importance. Journalists and sources work cooperatively in unearthing vital information that the public would otherwise not learn. The FAA puts that relationship in constant jeopardy, rendering nearly impossible journalists' ability to make good-faith promises of confidentiality to international sources. This limits news reporting and violates journalists' First Amendment right to freedom of association.

A. The FISA Amendments Act of 2008 directly interferes with reporter-source relations by eliminating the ability of journalists to promise confidentiality, despite constitutional recognition for that relationship.

Some of the most flagrant examples of government misconduct in history, not to mention more routine matters of wasteful spending and corruption, have become public because of investigative journalists who relied on confidential sources. Indeed, the revelation of the National Security Agency's ("NSA") then illegal secret wiretapping program, the pre-cursor to the FAA, occurred in 2005 because *The New York Times* used confidential sources in its reporting. James Risen and Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, at A16.

More recently, the media's coverage of war abroad has provided the public with accurate accounts of the government's involvement in the Middle East. U.S. newspapers frequently publish stories regarding risks for Americans abroad, war spending, and terrorism that likely would not be investigated and reported without the ability to promise confidentiality. Earlier this year, a reporter in Kabul, Afghanistan, used confidential international sources to report that the U.S. Agency for International Development was investigating allegations that its funds for road and bridge construction in the country were making their way to the Taliban through a racketeering scheme. Jean MacKenzie, *Charge Probed That U.S. Aid Helps Fund Taliban Contractors*, The Star-Ledger (Newark, N.J.), Sept. 5, 2009, at 30. Also, anonymous senior U.S. and Pakistani officials confirmed important details of this year's Taliban abduction of reporters — information potentially crucial to any Americans abroad, including soldiers. Keith B. Richburg, *U.S., Afghan Reporters Escape Taliban Captors*, The Washington Post, June 21, 2009 at A1. Furthermore, anonymous international sources helped report that troops in Afghanistan intercepted an Iranian arms shipment en route to the Taliban, signifying that the two former enemies were now trading weapons. Robin Wright, *Iranian Arms Destined for Taliban Seized in Afghanistan, Officials Say; 'Large' Shipment Said to Include Armor-Piercing Bombs*, The Washington Post, Sept. 16, 2007, at A19. These types of stories are of utmost importance in today's world and

illustrate the reality that if not for the news media's role and ability to promise confidentiality, the public is deprived of a wealth of information that it is entitled to, and needs in order to engage in democratic decision making.

The FAA lacks the appropriate safeguards for these First Amendment concerns. Under the NSA's prior warrantless wiretapping program, implemented shortly after the 2001 terrorist attacks, former President George W. Bush and other officials said the agency intercepted only calls of people believed to be linked to Al Qaeda. Scott Shane, *Panel to Study Military Eavesdropping*, N.Y. Times, Oct. 9, 2008, at A18. But under the FAA, any interest "important" to national security precludes the setting of limits on material which the government may intercept. Thus, many journalists covering national security issues will inevitably be monitored when they speak with international sources.

Journalists in the United States consider the ability to keep a source's identity confidential a fundamental tenet of the profession. The FAA makes it nearly impossible for a journalist to make a good-faith promise of confidentiality to a source, impinging upon how a journalist conducts his or her job. Under this law, when an international source asks a U.S. journalist to protect his or her identity while the two are having a phone or electronic conversation, the journalist cannot honestly guarantee the privacy of their communication.

Indeed, throughout history, journalists have gone to great lengths to safeguard the ability of sources to speak confidentially, free from government interference. American journalist John Peter Zenger went to jail for eight months in 1735 on seditious libel charges after he refused to identify the author of an article that criticized the governor of New York. *See* Garrett Epps, *An American Cato Defends Criticism of the Government*, in The First Amendment Freedom of the Press: Its Constitutional History and Contemporary Debate 46, 47 (2008). During the 1960s and 70s, several reporters covering the emerging drug culture and tense race relations were held in contempt when they refused to reveal confidential sources.[1] And since 1984, at least 17 journalists have been jailed when they refused to reveal sources or newsgathering materials. The Reporters Committee for Freedom of the Press, *Paying the Price: A recent census of reporters jailed or fined for refusing to testify*, http://www.rcfp.org/jail.html/ (2009). The enactment of the FAA eviscerates the historically rooted ability of a journalist to protect sources identities and places an unconscionable amount of power with the U.S. government.

Because of the secrecy underlying the FAA, there is no way to know who may eventually obtain the details in an intercepted communication. For many sources, the decision to speak to the news media poses serious risks. Many foreign

[1] Three of these cases were decided by the U.S. Supreme Court as *Branzburg v. Hayes*, 408 U.S. 665 (1972).

governments are not as protective of dissident speech as the U.S. government has traditionally been. Sources and journalists in countries with speech-restrictive laws have a legitimate fear of speaking. If other countries' governments were to learn of a dissident speaking to the American media, the ramifications on the speaker could be serious, to say the least. Under the Iraqi criminal code, anyone "who publicly insults" a government official, government program or the armed forces can be sent to jail for seven years." Iraqi Penal Code, 3rd ed. Ch. 3 §1:225-226 (last verified as of 2006). Speaking against any foreign government or a corporation with an Iraq office carries a penalty of a two-year jail sentence. *See also*, Paul von Zielbauer, *Iraq Journalists Add Laws to List of Dangers*, N.Y. Times, Sept. 29, 2006, at A12. Likewise, Algeria and Egypt also have laws that mandate a prison sentence for defaming government officials. *See* British Broadcasting Corporation, Country Profiles, http://news.bbc.co.uk/2/hi/country_profiles/default.stm (Dec. 2009). Criticism of government officials is banned in Saudi Arabia, Syria and Bahrain. *Id.* According to the Committee to Protect Journalists, 125 journalists worldwide were imprisoned and 42 were killed in 2008 alone, highlighting the dangers associated with reporting in many regions of the world. Committee to Protect Journalists, *Annual Prison Census*, Dec. 1, 2008, http://www.cpj.org/imprisoned/2008.php; *Journalists Killed in 2008: 42 Confirmed*, Dec. 14, 2008, http://www.cpj.org/deadly/2008.php.

For sources, the chance that their identities will be revealed is often the deciding factor against coming forward with important information. For U.S.-based journalists, the realities of having to interview by phone or by e-mail severely limit the amount of information they can obtain through sources. The FAA creates an untenable situation for both parties because it blocks open communication between journalists and sources. This inability of a journalist to promise confidentiality and the source's fear of government surveillance chills speech protected by the First Amendment.

B. Courts have noted that the First Amendment recognizes the judicial branch's role in determining whether confidential material is protected under a qualified reporter's privilege and the FISA Amendments Act of 2008 circumvents this protection.

The FAA has had the unfortunate effect of gutting U.S. courts' power to protect the reporter-source relationship. Because of the constitutional issues at stake, nearly every state provides a reporter's privilege, either by statute or common law, to allow reporters to keep secret the identities of their confidential sources. The Reporters Committee for Freedom of the Press, *Reporter's Privilege Compendium*, http://www.rcfp.org/privilege/ (last updated 2008). Most federal circuits, including this Court, recognize a qualified reporter's privilege that

protects confidential sources and information.[2] The privilege "reflect[s] a paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters, an interest which has always been a principal concern of the First Amendment." *Baker v. F & F Invest.*, 470 F.2d 778, 782 (2d Cir. 1972) (holding that a reporter did not have to testify about his confidential sources in a civil rights action). "The damage caused by the required revelation of confidential information is obvious: if sources fear that their identities will be readily subject to exposure, they will be less likely to provide information to journalists and the press's ability to perform its constitutionally protected function will be compromised." *Lonegan v. Hasty*, No. 04 Civ. 2743, 2008 WL 41445, at 2 (E.D.N.Y. Jan. 1, 2008) (citations omitted).

Courts play an essential role in protecting the reporter-source relationship. Many of the federal circuits, including this Court, recognize a reporter's privilege subject to a balancing test. Courts do not always find that the balancing test favors confidentiality. But even in such cases — for example, the recent high-profile case involving a subpoena to *The New York Times* reporter Judith Miller — courts have recognized the vital role the judiciary plays in balancing the interests at stake. "The

[2] The test applied in this Court is that the party seeking the evidence must show that the information is "highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources." *New York Times v. Gonzales*, 458 F.3d at 176 (citing *In re Petroleum Prods. Antitrust Litigation*, 680 F.2d 5, 7 (2d Cir. 1982).

executive branch possesses no special expertise that would justify judicial deference to prosecutors' judgments about the relative magnitude of First Amendment interests. Assessing those interests traditionally falls within the competence of courts." *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1175 (D.C. Cir. 2006). In *New York Times v. Gonzales*, this Court held that the reporter's privilege to protect confidential sources extends to a reporter's telephone records in possession of a third-party telephone provider. 459 F.3d 160 (2d Cir. 2006). In that case, the government subpoenaed phone companies for telephone records of two *Times* reporters who interviewed people from organizations under investigation for allegedly funding terrorism. On the specific facts of that case, the court held that the government had met its burden to overcome the qualified privilege, but the dissenting judge pointed out that the central issue in the case was not whether a privilege exists — indeed, the majority agreed that it does — but "which branch of government decides whether, when, and how any such protection is overcome." 459 F.3d 160, 175 (Sack, J., dissenting). All the judges agreed that the judiciary, and not the Attorney General, must determine whether the privilege applies, but disagreed whether the government met its burden on the specific facts of that case.

Recently, this Court reiterated the importance of judicial scrutiny of government action in the name of national security that implicates First

Amendment rights. In *Doe v. Mukasey*, the Court assessed the constitutionality of a statute that allowed the FBI to forbid national security letter recipients from publicly discussing FBI records demands and narrowly limited judicial review of those gag orders. *See John Doe, Inc., et al., v. Mukasey, et al.*, 549 F.3d 861 (2d Cir. 2008). In holding the statute violated the First Amendment, Court acknowledged that when it comes to speech, it is the judicial branch, and not the executive, that must ultimately decide whether the government's actions were justified. "The fiat of a government official, though senior in rank and doubtless honorable in the execution of official duties, cannot displace the judicial obligation to enforce constitutional requirements." *Id.* at 882-83.

The FAA, however, allows the executive branch to intercept communications between a journalist and international source without a court's initial determination whether a need exists for protection of the source's identity. Because the government never has to specify who, where, or why it is monitoring communications, the FISC may never know when conversations between a journalist and an international source are intercepted, thus denying it the opportunity to weigh the First Amendment rights at stake. The role of the courts is to ensure protection of constitutional rights. When it comes to upholding the fundamental rights of freedom of speech and of the press, it is exceptionally important that the judicial branch balance the interests at stake. The FAA,

however, allows the government to constrain journalists' constitutional rights without any judicial oversight.

C. The FISA Amendments Act of 2008 violates the First Amendment freedom of association by forcing disclosure of journalists' sources.

The U.S. Supreme Court has made clear that freedom of association is a fundamental right protected by the First Amendment and requiring disclosure of one's associations violates that right. In *NAACP v. Alabama*, the Court held unconstitutional a court order that required the NAACP to disclose its membership list. 357 U.S. 449 (1958) (holding that laws which require a group to disclose members of its association must meet strict scrutiny). The Court acknowledged that the revelation of the identity of NAACP members in the past "has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Id*. at 462. In recognizing this, the Court held that to require disclosure of the group members' identities would prevent the members from continuing to express their beliefs, and would dissuade potential members from joining the NAACP. "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty'." *Id*. at 460.

Journalists, like all U.S. citizens, have a First Amendment right to associate with others. Included in this right is the freedom not to disclose those associations

to the government. “This Court has recognized the vital relationship between freedom to associate and privacy in one's associations.” *Id.* at 462. Just as the order in *NAACP* forced the disclosure of people who believe in NAACP ideals, the FAA forces disclosure of the sources and of the journalists with whom they associate because of their discussion of topics potentially related to national security or terrorism.

In a similar line of cases dealing with anonymous speech, the Supreme Court relied on *NAACP* to strike down on First Amendment grounds ordinances that required the disclosure of speakers’ identities based on their viewpoints. In *Tally v. California*, the court held unconstitutional a statute requiring that handbills bear the name of the person responsible for their distribution. The Court upheld *NAACP* and stated that “identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance.” *Tally v. California*, 362 U.S. 60, 65 (1960). More recently, the Court struck down a statute prohibiting the distribution of anonymous campaign materials, *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995) and a statute requiring door-to-door solicitors to wear identification badges, *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999). These cases make clear that the First Amendment right of association encompasses the right to communicate confidentially about issues of public importance. Journalists communicating with sources share this right, and

laws which force the disclosure of those with whom the journalist is speaking violate the freedom to association.

More specifically, warrantless surveillance has been held to violate the First Amendment right of association. In *Zweibon v. Mitchell*, the federal government intercepted telephone communications made by members of the Jewish Defense League in New York without first obtaining judicial approval. 516 F.2d 594 (D.C. Cir. 1975). The government alleged that it was investigating the group's criminal activities. The D.C. Circuit Court held that conducting the surveillance without judicial review violated the First Amendment right of association of members of the Jewish Defense League.

> Prior judicial review is important not only to protect the privacy interests of those whose conversations the Government seeks to overhear, but also to protect free and robust exercise of the First Amendment rights of speech and association by those who might otherwise be chilled by the fear of unsupervised and unlimited Executive power to institute electronic surveillances.

Id. at 633.

Journalists covering international issues, particularly related to national security, are subject to surveillance under the FAA by the very nature of the discussions they may have with their sources and by the location of their sources abroad. This is true notwithstanding that many of the sources are not subjects of governmental investigations. The law sweeps within its reach a large number of

conversations that journalists covering international issues and national security have with sources. The journalists on these "beats" often write about matters of the utmost public interest — stories that touch on the government's involvement in Iraq or Afghanistan, stories involving the U.S. military's treatment of detainees, stories about the reach of executive power during wartime. Stories like these lie at the heart of what is protected by the First Amendment. A journalist has a First Amendment right of association to communicate about these topics without having to disclose the identities of those with whom they are communicating.

By allowing governmental interception of these communications, the FAA risks the disclosure, without proper procedural safeguards, of the sources with whom journalists are communicating, thus violating the journalists' First Amendment right to freedom of association. Like in *NAACP*, the disclosure of the sources with whom the journalists are communicating could subject both the journalist and the source to "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility" because of the risks involved with speaking about such controversial topics. 357 U.S. at 462. Additionally, as in *Zweibon*, government surveillance violates the right of association by requiring the disclosure of the sources with whom a journalist speaks.

CONCLUSION

The wide reach of the FAA is contrary to the country's democratic commitment to freedom of the press. The law violates the First Amendment rights of journalists by destroying a journalist's ability to meaningfully promise confidentiality to international sources and to freely associate with those sources. Additionally, the law undermines the news media's constitutionally protected role as an independent check on government action by allowing the government to use information obtained by the press in its international investigations. The law has severe ramifications on the public interest and on the press, as it prevents journalists from gathering news and reporting important stories regarding international issues.

For each and all the foregoing reasons, *amicus curiae* urges this court to hold that Plaintiffs-Appellees have standing to redress their injuries caused by the FISA Amendments Act of 2008, and to hold that the Act is unconstitutional.

Dated: December 23, 2009

Respectfully Submitted,

By:_____

Lucy A. Dalglish
Gregg P. Leslie
1101 Wilson Boulevard, Suite 1100
Arlington, VA 22209
Tel: (703) 807-2100
Counsel for The Reporters Committee for Freedom of the Press

CERTIFICATES OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4665 words, excluding the parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B)(iii).

The PDF version of this Brief of Amici Curiae in Support of Appellees has been sent by electronic mail to the Court and counsel, and has been scanned for viruses using AVG Anti-Virus, version 8.5.430 and no viruses were detected.

_____

Lucy A. Dalglish
Counsel for The Reporters Committee for Freedom of the Press