

09-4112-CV

IN THE
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.

JOHN M. MCCONNELL, 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; AND MICHAEL B. MUKASEY, 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

**BRIEF AMICUS CURIAE OF THE NEW YORK CITY BAR
ASSOCIATION IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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December 23, 2009

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
I. STATEMENT OF INTEREST OF AMICUS CURIAE.....	1
II. INTRODUCTION AND SUMMARY OF ARGUMENT.....	2
III. RELEVANT BACKGROUND	3
IV. ARGUMENT.....	6
A. The FAA Creates an Immediate Ethical Dilemma for Attorneys.	6
B. The Monitoring and Wiretapping of Communications Between Lawyers and Their Clients Chills Communications Protected by the First Amendment.....	11
C. Wiretapping Communications Between Lawyers and Their Clients Inhibits the Effective Assistance of Counsel Guaranteed by the Sixth Amendment.	17
V. CONCLUSION.....	20

TABLE OF AUTHORITIES

	<u>Pages(s)</u>
Cases	
<u>Bittaker v. Woodford</u> , 331 F.3d 715 (9th Cir. 2003).....	17
<u>California Motor Transport Co. v. Trucking Unlimited</u> , 404 U.S. 508 (1972).....	14
<u>Coplon v. United States</u> , 191 F.2d 749 (D.C. Cir. 1951).....	18
<u>Fisher v. United States</u> , 425 U.S. 391 (1976).....	19
<u>Goodwin v. Oswald</u> , 462 F.2d 1237 (2d Cir. 1972).....	15
<u>In re Primus</u> , 436 U.S. 412 (1978).....	15, 16, 17
<u>Morris v. Slappy</u> , 461 U.S. 1 (1983).....	17
<u>NAACP v. Button</u> , 371 U.S. 415 (1963).....	15, 17
<u>Scott v. United States</u> , 436 U.S. 128 (1978).....	12
<u>Smith v. Arkansas State Highway Empls.</u> , 441 U.S. 463 (1979).....	16
<u>Terry v. Ohio</u> , 392 U.S. 1 (1968).....	12
<u>United States v. Chavez</u> , 902 F.2d 259 (4th Cir. 1990).....	17
<u>United States v. Falvey</u> , 540 F. Supp. 1306 (E.D.N.Y. 1982).....	13
<u>United States v. Gartner</u> , 518 F.2d 633 (2d Cir. 1975).....	18
<u>United States v. United States District Court for the Eastern District of Michigan</u> , 407 U.S. 297 (1972).....	11, 12
<u>Weatherford v. Bursey</u> , 429 U.S. 545 (1977).....	18
<u>Westchester Legal Servs., Inc. v. County of Westchester</u> , 607 F. Supp. 1379 (S.D.N.Y. 1985).....	16
<u>Zweibon v. Mitchell</u> , 516 F.2d 594 (D.C. Cir. 1975).....	14

Statutes & Rules

ABA Model Rule 1.18

ABA Model Rule 1.48

ABA Model Rule 1.68, 9

ABA Model Rule 1.6 cmt. ¶ 38, 9

ABA Model Rule 1.6, cmts. ¶¶ 16, 178

FAA § 702(a)18, 19

U.S. Const. amend. Ipassim

U.S. Const. amend. IV12, 13

U.S. Const. amend. VI2, 17, 18, 19

Other Authorities

ABA Opinion 99-4138

Dep’t of Justice Responses to Joint Questions from House Judiciary
Comm. Minority Members ¶ 45, available at
<http://rawprint.com/pdfs/HJCrawstory2.pdf>4

Hearings Before the Sen. Comm. on the Judiciary (Feb. 7, 2006),
transcript available at [http://www.washingtonpost.com/
wp-dyn/content/article/2006/02/06/AR2006020600931.html](http://www.washingtonpost.com/wp-dyn/content/article/2006/02/06/AR2006020600931.html)4

J. Risen & E. Lichtblau, Bush Lets U.S. Spy on Callers Without
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Press Briefing by Attorney General Alberto Gonzales & General
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Privileged Conversations Said Not Excluded From Spying, N.Y.
Times, Mar. 25, 2006.....4

S. Rep. No. 95-604 (1978), as reprinted in 1978 U.S.C.C.A.N. 3904,
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I. STATEMENT OF INTEREST OF AMICUS CURIAE¹

Founded in 1870, the New York City Bar Association (the “Association”), is a professional organization of more than 23,000 attorneys. Through its many standing committees, such as its Committee on Civil Rights, the Association educates the Bar and the public about legal issues relating to civil rights, including the right of access to the courts, the right to counsel and the right to remain free from unreasonable searches and seizures. The Association also seeks to promote effective assistance of counsel for everyone, including those suspected or accused of criminal wrongdoing, and is especially concerned with protecting the confidentiality of attorney-client communications as essential to such representation.

Over the past several years, the Association has attempted to demonstrate by various means—including through the filing of amicus curiae briefs—that individual liberties need not be subverted by governmental interests during times of war and that national security can be achieved without prejudice to the constitutional rights that are at the heart of our democracy.

¹ The parties have consented to this filing.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus Curiae submits this brief in support of Plaintiffs-Appellants and urges reversal of the District Court's August 20, 2009 Opinion and Order dismissing the Complaint on the basis that Plaintiffs-Appellants lack standing to challenge the FISA Amendments Act ("FAA").

In this brief, the Association highlights the FAA's severe impact on the day-to-day activities of lawyers who, because of well-founded fears of surveillance under the Act's dragnet acquisition scheme, either are chilled from providing their clients the effective assistance of counsel that is guaranteed by the Sixth Amendment and is required by ethical rules, or are forced to incur great economic expense in traveling to meet with clients and witnesses in hard to reach parts of the world to avoid violating client confidences. So long as the FAA is on the books and lawyers fear that their communications might be swept up in the mass eavesdropping authorized under the Act, the Association is concerned that the FAA will undermine a fundamental principle of the First Amendment, the Sixth Amendment right to counsel and indeed of any just legal system: that persons caught within the broad sweep of government investigation have access to legal advice and that such legal advice be effective and uninhibited by fears that government agents are listening in.

III. RELEVANT BACKGROUND

In December 2005, news reports revealed that President Bush had authorized the National Security Agency (“NSA”) to engage in a program of warrantless electronic surveillance of American citizens (the “Program”). See J. Risen & E. Lichtblau, Bush Lets U.S. Spy on Callers Without Courts, N.Y. Times, Dec. 16, 2005, at A1. The President reauthorized the Program repeatedly between 2001 and 2007.

According to public statements made by senior government officials, the Program involved the interception of emails and telephone calls that originated or terminated inside the United States. As opposed to the standards that generally accompany surveillance activities, these interceptions did not require probable cause, judicial warrants, or any other form of judicial authorization. Instead, then-Attorney General Alberto Gonzales explained that the NSA would wiretap conversations once it had “a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda.” Press Briefing by Attorney General Alberto Gonzales & General Michael Hayden, Principal Deputy Director for National Intelligence, Dec. 19, 2005 (“Gonzales Press Briefing”), available at <http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html>. The Attorney General testified before Congress that, “like the police officer on the

beat”, NSA personnel unilaterally decide “what is reasonable” before proceeding with the wiretaps. Hearings Before the Sen. Comm. on the Judiciary (Feb. 7, 2006), transcript available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/06/AR2006020600931.html>.

Later revelations by the Department of Justice left no doubt that the NSA’s warrantless wiretaps reached communications between lawyers and their clients. Indeed, the Justice Department affirmatively stated that “[a]lthough the Program does not specifically target the communications of attorneys . . . calls involving such persons would not be categorically excluded from interception if they met [the Program’s] criteria.” Dep’t of Justice Responses to Joint Questions from House Judiciary Comm. Minority Members ¶ 45, available at <http://rawprint.com/pdfs/HJCrawstory2.pdf> (“DOJ Responses”); see also Privileged Conversations Said Not Excluded From Spying, N.Y. Times, Mar. 25, 2006, at A10.

In January 2007, the Foreign Intelligence Court (“FISC”) reportedly issued a classified order narrowing the ability of the Executive Branch to conduct foreign surveillance outside the confines of FISA. Congress responded by passing the Protect America Act, a stop-gap legislative measure expanding the Executive’s authority to proceed with the Program. After the “sunset” of the Protect America Act, President Bush signed into law the FISA Amendments Act (the “FAA”) on

July 10, 2008. The FAA allows for the mass acquisition by the Executive Branch of Americans' international telephone and email communications without particularized warrants or meaningful judicial oversight. Although there is no need to provide here a detailed description of the Act's provisions, we list below several of the provisions most relevant to the interests of the Association:

- The Attorney General may obtain a mass acquisition order from the FISC without even identifying its surveillance targets, much less demonstrating that such targets are foreign agents, engaged in criminal activity or at all connected to terrorism.
- The Act permits the acquisition of purely domestic communications as long as there is uncertainty about the location of one party to the communications.
- The Act does not prescribe any specific minimization procedures, does not give the FISC any authority to oversee the implementation of minimization procedures and specifically allows the government to retain and disseminate information—including information relating to U.S. citizens—if the government concludes that it is “foreign intelligence information”.

IV. ARGUMENT

The chilling effect caused by the sweeping, dragnet “acquisition orders” authorized under the FAA creates concrete and immediate injury to attorneys with clients who have reason to perceive themselves within the broad reach of government surveillance. Due to the risk of attorney-client communications being intercepted, attorneys are placed in an untenable ethical dilemma: they must choose to violate either their professional obligations of zealous advocacy, competence and candor, on one hand, or their obligation of client confidentiality on the other. The only alternative to this dilemma is to undertake the costly and burdensome measure of traveling to meet with clients and witnesses in hard to reach parts of the world in order to avoid telephone and email communication. Thus, as further set forth below, the mere existence of the FAA undermines attorneys’ professional and ethical obligations to their clients; impedes their First Amendment rights; compromises the rights of clients to receive effective assistance of counsel; and causes attorneys to incur exorbitant travel costs to travel overseas in attempts to avoid violating client confidences.

A. The FAA Creates an Immediate Ethical Dilemma for Attorneys.

The chilling effect resulting from the FAA’s sweeping surveillance authorization is perhaps felt most significantly by attorneys, particularly those working with clients or third-parties located in countries at the focus of the

government's counterterrorism efforts. As explained above, the FAA was an attempt to legitimize a warrantless wiretapping program that President Bush had authorized in the wake of September 11, with the stated purpose of monitoring communications involving Al Qaeda and its affiliates. Since then, the "War on Terror" has taken on many shapes, resulting in the drafting of various policies, referenda, legislation and jurisprudence implicating the areas of national security, human rights, criminal justice and civil liberties. The legal community has been involved at every step of this evolving dialogue, from prosecuting and defending suspected terrorists to investigating abuses by contractors in the Middle East.

Whether or not these lawyers in fact are the subject of surveillance, the mere risk of sweeping, non-particularized eavesdropping authorized under the FAA results in concrete day-to-day consequences. First, and most practically, the very existence of the FAA creates a serious professional and ethical dilemma for lawyers—especially for those needing to communicate with clients, witnesses, experts and others abroad who, because of their geographic location, their affiliation or the nature of their communications, are likely targets under the broad sweep of the FAA. As explained below, these lawyers must choose between the professional obligation to provide zealous representation or the ethical obligation to safeguard her clients' confidential communications. Significantly, this Hobson's choice is presented whether or not these communications are ever

actually intercepted, as it is the *reasonable risk of surveillance* that directly compromises the attorney's ethical and professional obligations to his client.

The Model Rules of Professional Conduct ("Model Rules") promulgated by the American Bar Association require an attorney to provide competent representation to clients, including the "thoroughness and preparation reasonably necessary for the representation." ABA Model Rule 1.1. Under Model Rule 1.4, an attorney also owes his or her client a duty of communication, pursuant to which the attorney must "reasonably consult with the client about the means by which the client's objectives are to be accomplished." The Comment to Model Rule 1.4 emphasizes the importance of this communication to the lawyer-client relationship, explaining that "[r]easonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation."

The same standards of professional responsibility also require an attorney to "safeguard information relating to the representation of a client," taking "reasonable precautions to prevent the information from coming into the hands of unintended recipients." See Model Rule 1.6, cmts. ¶¶ 16, 17. The effect of Model Rule 1.6 is that a lawyer may not divulge any information to the client if he or she does not have "a reasonable expectation of privacy". ABA Opinion 99-413. This ethical obligation is expansive and is substantially broader than the attorney-client privilege. See Model Rule 1.6 cmt. ¶ 3 ("The confidentiality rule . . . applies not

only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.”). The lawyer’s fundamental duty of confidentiality “contributes to the trust that is the hallmark of the client-lawyer relationship” and encourages clients “to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter”. Id. ¶ 2. The duty is therefore central to the functioning of the attorney-client relationship and to effective representation.

Given the threat of sweeping, non-particularized surveillance authorized under the FAA, lawyers who communicate by telephone and email with individuals outside of the U.S. (including clients, their families, witnesses, journalists, human rights organizations, experts, investigators, and foreign government officials) can no longer believe that they have a “reasonable expectation of privacy” within the meaning of Model Rule 1.6. This is particularly true where the client, third party, or witnesses reside in geographic areas at the focus of U.S. counterterrorism efforts. Accordingly, many attorneys now must confront a troubling ethical and professional dilemma: either discontinue their telephonic and electronic communications with these individuals and risk violating their obligations of providing zealous representation to their client, or continue communicating with these clients at the risk of violating their professional obligation to take all reasonable steps to protect client confidences. And this

dilemma is present whether or not the communications actually are being intercepted—the attorney’s professional and ethical duties are directly impacted by the real risk of interception, not by interception itself.

As the only reasonable alternative to the ethical dilemma described above, many attorneys already have been forced to undertake costly and burdensome measures to protect the confidentiality of client communications. Some attorneys, for example, have been forced to travel great distances to conduct interviews and investigations that might otherwise have been accomplished through telephone and email. That approach, of course, is not always possible, especially where clients and witnesses are located abroad. And, even when possible, it burdens the representation with inefficiencies, substantially increased costs and significant logistical difficulties.

Finally, in addition to compromising client communications, the risk created by the FAA hampers lawyers’ ability to cultivate sources and gather information. Cognizant of the possibility of surveillance, third parties likely will refuse to share information that might prove vital to the attorney’s case. In turn, the lawyers must struggle to make their case by locating alternative sources of information or by forgoing the essential information entirely. These real and immediate consequences are present so long as the FAA remains the law.

B. The Monitoring and Wiretapping of Communications Between Lawyers and Their Clients Chills Communications Protected by the First Amendment.

The wiretapping of communications between lawyers and clients allowed under the FAA—without individualized warrants or minimization procedures—also has the effect of chilling constitutionally protected speech in violation of the Constitution. Before FISA was enacted, in United States v. United States District Court for the Eastern District of Michigan, 407 U.S. 297 (1972) (“Keith”), the Supreme Court noted the degree to which warrantless surveillance is inconsistent with the guarantees of the Constitution:

History abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies. . . . The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect “domestic security.” Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent.

Id. at 314.

Keith also underscored the inherent danger of permitting the acts of the Executive to go unchecked by judicial oversight:

The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute. But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating

evidence and overlook potential invasions of privacy and protected speech. . . . [T]he Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised.

Id. at 317.²

FISA was enacted in 1978 after Senator Frank Church’s congressional committee uncovered widespread warrantless surveillance of U.S. citizens. The legislative history of FISA demonstrates that Congress shared the Keith Court’s view that warrantless searches by an unchecked Executive raised the specter of abuse³—especially given the documented history of abuse in this area⁴—and chilled protected speech:

² See also Scott v. United States, 436 U.S. 128, 137 (1978) (“The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.”) (quoting Terry v. Ohio, 392 U.S. 1, 21-22 (1968)).

³ Indeed, the disclosures of the FBI’s misuse of National Security Letters provide another dramatic example that executive officers cannot be trusted to safeguard privacy and protected speech in the exercise of their law enforcement duties. National Security Letters allow the FBI to demand customer records from credit bureaus, banks, phone companies, Internet service providers, and other organizations without judicial oversight simply upon a finding by the FBI that the information sought is “relevant to an authorized investigation” of international terrorism or foreign intelligence. Not surprisingly—and just as the Court in Keith anticipated—the Letters have been grossly misused. See U.S. Dep’t Justice Office of the Inspector General, A Review of the Federal Bureau of Investigation’s Use of National Security Letters, March 2007, available at <http://www.usdoj.gov/oig/special/s0703b/final.pdf>.

Also formidable—although incalculable—is the “chilling effect” which warrantless electronic surveillance may have on the Constitutional rights of those who were not targets of the surveillance, but who perceived themselves, whether reasonably or unreasonably, as potential targets. Our Bill of Rights is concerned not only with direct infringements on Constitutional rights, but also with government activities which effectively inhibit the exercise of these rights. The exercise of political freedom depends in large measure on citizens’ understanding that they will be able to be publicly active and dissent from official policy, within lawful limits, without having to sacrifice the expectation of privacy that they rightfully hold. Arbitrary or uncontrolled use of warrantless electronic surveillance can violate that understanding and impair that public confidence so necessary to an uninhibited political life.

S. Rep. No. 95-604, at 8 (1978), as reprinted in 1978 U.S.C.C.A.N. 3904, 3909.

As one pre-FISA Court of Appeals described the chilling effect of warrantless foreign intelligence gathering: “To allow the Executive Branch to make its own determinations as to such matters invites abuse, and public

⁴ Following its investigation of past practices of the Executive Branch, Congress was informed that the “vague and elastic standards for wiretapping and bugging” the Executive Branch had been applying resulted in “electronic surveillances which, by any objective measure, were improper and seriously infringed the Fourth Amendment rights of both the targets and those with whom the targets communicated”. Legislative History at 8. For instance, Congress was informed that past subjects of surveillance “ha[d] included a United States Congressman, congressional staff member, journalists and newsmen, and numerous individuals and groups who engaged in no criminal activity and who posed no genuine threat to the national security, such as two White House domestic affairs advisers and an anti-Vietnam war protest group”. *Id.* Furthermore, claims of national security had sometimes been used to justify warrantless wiretapping of members of the Democratic Party, ostensibly because the Executive Branch had boundlessly defined the term “dissident group”. United States v. Falvey, 540 F. Supp. 1306, 1309 (E.D.N.Y. 1982).

knowledge that such abuse is possible can exert a deathly pall over vigorous First Amendment debate on issues of foreign policy”. Zweibon v. Mitchell, 516 F.2d 594, 635-36 (D.C. Cir. 1975).

The chilling effect of the FAA is most troubling in the context of the relationship between attorneys and their clients. The right of meaningful access to the courts is one aspect of the First Amendment right to petition the government, California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972),⁵ and the right to assistance of counsel—which includes the right to confidential attorney-client communication—is an integral part of that right. See, e.g., Goodwin v. Oswald, 462 F.2d 1237, 1241 (2d Cir. 1972) (prison inmates, who have fewer First Amendment rights than non-incarcerated persons, possess the rights to access the courts, to have assistance of counsel, and to have “the opportunity for confidential communication between attorney and client”). The Act’s authorization of massive surveillance of U.S. citizens’ and residents’ international telephone and email communications makes in-person communication virtually the only means by which attorneys and clients reasonably can be assured that their dialogue with overseas clients, witnesses and experts will remain confidential. As a practical reality, however, such in-person meetings

⁵ “The right of access to the courts is indeed but one aspect of the right of petition.” California Motor, 404 U.S. at 510.

between an attorney and a client abroad may become so burdensome, costly and ineffective that the Act might very well chill all effective communications, thus undermining the First Amendment right completely.

The Supreme Court has also held that, for groups that are forced to resort to the courts to redress disparate treatment at the hands of the government, the right to pursue litigation is protected by the First Amendment. NAACP v. Button, 371 U.S. 415, 428-30 (1963). The attorneys who represent these groups and thereby challenge what they believe to be unlawful government policies similarly engage in a form of protected political expression. Id.; see also In re Primus, 436 U.S. 412, 431-32 (1978) (“The First and Fourteenth Amendments require a measure of protection for ‘advocating lawful means of vindicating legal rights,’ including ‘advising another that his legal rights have been infringed’”) (internal citations omitted); Westchester Legal Servs., Inc. v. County of Westchester, 607 F. Supp. 1379, 1382 (S.D.N.Y. 1985) (“The First Amendment ‘protects the right of associations to engage in advocacy on behalf of their members.’”) (quoting Smith v. Arkansas State Highway Empls., 441 U.S. 463, 464 (1979)).

Under the FAA, the government—without a particularized warrant and with little judicial oversight—would be free, for example, to intercept all communications between American lawyers and overseas clients accused by the

United States of somehow having ties to terrorism, or even communications between American and European attorneys working on behalf of prisoners held at Guantánamo Bay. Many of these potential “targets” are vigorously litigating their innocence against the Government. But “the efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants”. Primus, 436 U.S. at 431. The dragnet surveillance authorized by the FAA seriously inhibits the ability of these accused persons effectively to petition the courts because it necessarily chills communications with their attorneys, as well as communications between their attorneys and witnesses and others who reside outside the United States. Moreover, the inability of the attorneys to litigate effectively against what they believe to be unlawful government conduct chills the speech and expression of those attorneys as well. See Button, 371 U.S. at 428-30 (White, J., concurring in part and dissenting in part) (finding constitutionally protected the activities of NAACP staff lawyers in, among other things, “advising Negroes of their constitutional rights”); see also Primus, 436 U.S. at 431-32.

C. Wiretapping Communications Between Lawyers and Their Clients Inhibits the Effective Assistance of Counsel Guaranteed by the Sixth Amendment.

The privacy of lawyer-client communication is also recognized as critical to the effective assistance of counsel guaranteed by the Sixth Amendment.⁶ See United States v. Chavez, 902 F.2d 259, 266 (4th Cir. 1990) (“[A] critical component of the Sixth Amendment’s guarantee of effective assistance is the ability of counsel to maintain uninhibited communication with his client and to build a ‘relationship characterized by trust and confidence’.” (quoting Morris v. Slappy, 461 U.S. 1, 21 (1983))); Bittaker v. Woodford, 331 F.3d 715, 723 n.7 (9th Cir. 2003) (“[T]he essence of the Sixth Amendment right is, indeed, privacy of communication with counsel.” (citations and internal quotations omitted)).

Thus, when the Government intrudes into that privacy, the intrusion often renders counsel’s assistance ineffective and thereby violates the Sixth Amendment rights of the criminal defendant. See, e.g., Weatherford v. Bursey, 429 U.S. 545, 558 (1977) (government intrusion into attorney-client relationship violates the Sixth Amendment if the defendant is prejudiced by the intrusion); United States v. Gartner, 518 F.2d 633, 637 (2d Cir. 1975) (“When conduct of a Government agent touches upon the relationship between a criminal defendant and

⁶ “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. Const. amend. VI.

his attorney, such conduct exposes the Government to the risk of fatal intrusion and must accordingly be carefully scrutinized.”).

It is clear that the FAA is fundamentally at odds with the Sixth Amendment’s deep respect for attorney-client confidentiality.

Under the Act, the Attorney General and the Director of National Intelligence can authorize jointly “the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information.” FAA § 702(a). Such surveillance activities authorized by the Act threaten the sanctity of the attorney-client relationship,⁷ by chilling all communications between those who “perceive themselves, whether reasonably or unreasonably, as potential targets”⁸ of surveillance and their attorneys. A client who worries that any communications with counsel could be subject to surveillance will understandably be “reluctant to confide in his lawyer”, Fisher v. United States, 425 U.S. 391, 403 (1976), and will thus be unable to obtain fully informed advice.

⁷ “The sanctity of the constitutional right of an accused privately to consult with counsel is generally recognized and zealously enforced by state as well as federal courts.” Coplon v. United States, 191 F.2d 749, 758 (D.C. Cir. 1951). In stark contrast to the FAA, the unamended FISA procedures showed considerable respect for the attorney-client relationship. See supra for a discussion of FISA’s minimization procedures.

⁸ Legislative History at 8.

The Act does not require the government to demonstrate to the FISC that its surveillance targets are foreign agents, engaged in criminal activity, or connected even remotely with terrorism. The only requirement set forth by the Act is that the target be “reasonably believed to be located outside the United States.” FAA § 702(a). This open-ended, amorphous standard effectively exposes all lawyer communications with overseas clients to government intrusion and therefore subverts of the right to counsel guaranteed by the Sixth Amendment.

V. CONCLUSION

For the foregoing reasons, the Association respectfully requests that this Court reverse and remand.

December 23, 2009

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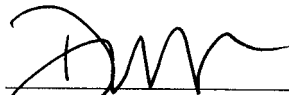
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,646 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word in 14-point Times New Roman.

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