NATIONAL SECURITY PROJECT

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

February 4, 2009

Honorable John G. Koeltl
U.S. District Court for the
Southern District of New York
500 Pearl Street
New York, NY 10007

Re: *Amnesty, et al. v. Blair, et al.*, 08-cv-6259 (JGK)

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Dear Judge Koeltl,

Plaintiffs in the above-referenced action write in response to the government's letter of January 27, 2009, discussing *In re Directives [Redacted Text] Pursuant to Section 105B of Foreign Intelligence Surveillance Act*, --- F.3d ---, 2008 WL 5501436 (For. Int. Surv. Ct. Rev. August 22, 2008) (hereinafter "*In re Directives*"). The government misunderstands the relevance of this case to the issues before this Court.

As the Court is aware, plaintiffs in this case have challenged the facial validity of the FISA Amendments Act of 2008, Pub. L. No. 110-261 (2008) ("FAA"), a surveillance law that Congress enacted after the expiration of the Protect America Act, Pub. L. No. 110-55, 121 Stat. 552 ("PAA"). Plaintiffs have argued, among other things, that the FAA violates the Fourth Amendment's warrant clause and its reasonableness requirement by permitting the government to monitor the international communications of U.S. citizens and residents without prior court approval; without identifying the people or facilities to be monitored; without individualized suspicion of any kind; and without observing meaningful limitations on the retention, analysis, and dissemination of acquired communications. The government has argued that the statute is constitutionally sound because there is a broad foreign intelligence exception to the warrant requirement and because the statute's targeting and minimization requirements render the statute reasonable.

Notwithstanding the government's January 27 letter, the FISA Court of Review's decision in *In re Directives* does not support the sweeping arguments that the government has advanced in this litigation. For example, while the government is correct that the FISA Court of Review recognized a foreign intelligence exception to the warrant requirement, it held that this exception extends to "surveillance [that] is

conducted to obtain foreign intelligence for national security purposes and *is directed at foreign powers or agents of foreign powers* reasonably believed to be located outside the Untied States." *In re Directives*, 2008 WL 5501436, at *6 (emphasis added). The exception recognized by the FISA Court of Review, in other words, is far narrower than the one proposed by the government in this case. Here, the government has invoked the foreign intelligence exception not in defense of surveillance that is directed at "foreign powers or agents of foreign powers reasonably believed to be located outside the United States," but in defense of a statute that permits surveillance directed at *any* non-citizen located outside the United States, and indeed that permits dragnet surveillance – including dragnet surveillance of *Americans'* international communications – without reference to individualized suspicion or probable cause. Neither the FISA Court of Review nor any other court has recognized a foreign intelligence exception sweeping enough to encompass the kind of surveillance authorized by the FAA.[1]

Nor does *In re Directives* support the government's argument that the surveillance authorized by the FAA is reasonable. The government rightly notes that *In re Directives* "rejects the argument that, where the foreign intelligence exception applies, reasonableness requires protections *equivalent* to the three principal warrant requirements: prior judicial review, probable cause, and particularity." Gov't Ltr. at 2 (internal quotation marks omitted and emphasis added). But the argument that the Court of Review rejected is an argument that plaintiffs have never made. Rather, plaintiffs have argued that any analysis of the FAA's reasonableness must be *informed by*, among other things, the statute's failure to require individualized judicial review, failure to require probable cause (or individualized suspicion of any kind), and failure meaningfully to limit the duration of the surveillance or the communications that can be acquired. This argument – the argument that plaintiffs have actually made – is one that the FISA Court of Review expressly *endorses*. *In re Directives*, Slip Op. at 20 ("the more a set of procedures resembles those associated with the traditional warrant requirements, the more easily it can be determined that those procedures are within constitutional bounds").

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[1] To be clear, plaintiffs believe that the Court of Review was wrong to recognize *any* foreign intelligence exception to the warrant requirement. The important point here, however, is that even if such an exception exists, the exception is not broad enough to encompass the kind of dragnet, suspicionless surveillance permitted by the FAA. Pl. Reply Br. 20-23.

In fact, the FISA Court of Review's decision lends considerable support to plaintiffs' argument that surveillance permitted by the FAA is unreasonable. While the FISA Court of Review ultimately found that the challenged surveillance directives conformed to the Fourth Amendment's requirements, it reached this conclusion only after noting that the surveillance had been predicated on probable cause and a determination of necessity and had been limited in duration.[2] The FAA lacks the safeguards that the FISA Court of Review found crucial to the reasonableness analysis.

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The government's suggestion that *In re Directives* supports its arguments with respect to "incidental" and "inadvertent" interception, Gov't Ltr. at 3, misunderstands both plaintiffs' arguments and the Court of Review's decision. Plaintiffs do not take issue with the Court of Review's statement that "incidental collections occurring as a result of constitutionally permissible acquisitions do not render those acquisitions unlawful." Gov't Ltr. at 3 (quoting *In re Directives*, Slip Op. 26). But the acquisitions conducted under the FAA are not "constitutionally permissible acquisitions." The surveillance at issue in *In re Directives* was predicated on probable cause and limited in duration. Nothing in the Court of Review's decision suggests that the Constitution permits dragnet surveillance that is not predicated on individualized suspicion, not subject to meaningful duration requirements, and not subject to the other safeguards that are mandated by the Fourth Amendment.

Nor do plaintiffs take issue with the general proposition that a statute should not be invalidated on its face because of hypothetical concerns that government agents will implement the statute in bad faith. Plaintiffs' challenge to the FAA, however, does not rest at all on a concern that government agents will act in bad faith. Plaintiffs challenge the statute on its face, not as applied, and plaintiffs' concern is not that government agents will engage in surveillance that the statute forbids, but that they will exercise the authority that the statute actually invests in

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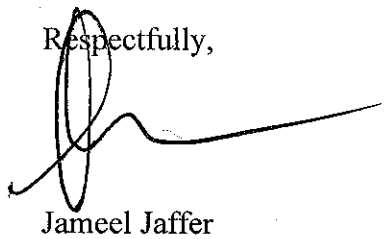
[2] While the PAA did not itself require individualized suspicion or particularity, the Court of Review's decision did not address the *facial* validity of the PAA; it addressed the constitutionality of surveillance directives that had been issued under the combination of the PAA, Executive Order 12333, and certain Defense Department regulations, which collectively required probable cause, necessity, and limited the duration of the surveillance.

them. The concern, in other words, is that the government will engage in precisely the kind of dragnet, suspicionless surveillance that the statute was intended to authorize.

Finally, plaintiffs note that while the FISA Court of Review's decision was issued on August 22, 2008, a redacted version was not released to the public until January 15, 2009, one day before the government filed its reply brief in this case. The long and thus-far unexplained delay between the time the decision was issued and the time it was released to the public raises the possibility that there have been developments in *In re Directives* since the FISA Court's decision was issued. (For example, the communications service provider that challenged the directives may have moved for rehearing or petitioned the Supreme Court for *certiorari*.) Because any such subsequent developments could be relevant to this litigation, plaintiffs respectfully request that the Court direct the government to state in a public filing whether there have been subsequent developments in *In re Directives*, and if there have been such developments, to describe those developments in its public filing in as much detail as possible. Plaintiffs also ask that the Court direct the government to make available to plaintiffs, the Court, and the public any judicial orders or opinions that may have been entered in *In re Directives*, and any legal briefs that may have been filed by the parties in that litigation, since August 22, 2008.[3] To the extent that information or materials relating to *In re Directives* is under seal, plaintiffs respectfully ask that the Court direct the government to seek relief from the seal or justify its refusal to do so in a public filing. Plaintiffs are today filing a Motion seeking the relief described in this paragraph.

Plaintiffs thank the Court for its consideration of these matters.

Respectfully,



Jameel Jaffer

[3] While some redactions may be necessary, the government should redact only information that cannot be disclosed without endangering national security.

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