U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street, Third Floor
New York, New York 10007

April 28, 2009

BY HAND

Hon. John G. Koeltl
United States District Judge
Southern District of New York
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street
New York, NY 10007

Re: *Amnesty International USA, et al., v. Blair, et al.*,
No. 08 Civ. 6259 (JGK)

Dear Judge Koeltl:

I write on behalf of defendants in response to plaintiffs' letter dated April 22, 2009, which purportedly relates to the cross-motions for summary judgment that have been briefed.

The letter, and the newspaper article that it attaches, rely on or constitute hearsay that may not be considered in connection with the pending summary judgment motions. *See* Fed. R. Civ. P. 56(e)(1) ("[a] supporting or opposing affidavit must be made on personal knowledge and set out facts that would be admissible in evidence"); *id.* 56(e)(2) (response of party opposing summary judgment "must – by affidavits or as otherwise provided in this rule – set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party."); *see also Raskin v. Wyatt Co.*, 125 F.3d 55, 66 (2d Cir. 1997) ("[O]nly admissible evidence need be considered by trial court in ruling on [a] motion for summary judgment"); *United States v. Difeaux*, 163 F.3d 725, 729 (2d Cir. 1998) (newspaper articles were impermissible hearsay); *Molinari v. Bloomberg*, 596 F. Supp. 2d 546, 580 (E.D.N.Y. 2009) ("Plaintiffs cite various newspaper articles, which do not meet the requirements of Federal Rules of Civil Procedure 56 regarding admissible evidence that can form a basis of a summary judgment motion"); *Allen v. City of New York*, 480 F. Supp. 2d 689, 720 (S.D.N.Y. 2007) ("The Court, however, cannot consider this article in assessing Allen's opposition to summary judgment. Such evidence constitutes inadmissible hearsay, which is 'unusable to defeat summary judgment.'") (*quoting Gonzalez v. City of New York*, 354 F. Supp.2d 327, 347 n. 29 (S.D.N.Y. 2005) ("newspaper articles are inadmissible hearsay and unusable to defeat summary judgment")) (internal quotation marks and citations omitted).

Moreover, while the Government cannot confirm or deny information concerning alleged intelligence matters, even if the Court were to consider the plaintiffs' letter or the article, nothing in either speaks to the facial constitutionality of the statute plaintiffs challenge. With respect to

any intelligence activity occurring under authority of Title I of the FISA Act Amendments of 2008, we have previously explained that the Act vests significant oversight responsibilities in the Foreign Intelligence Surveillance Court ("FISC"). *See* Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendants' Cross-Motion for Summary Judgement ("Def. Mem."), (Dkt. No. 10), at 49-52. This includes not only FISC review of targeting and minimization procedures, but also involves specific reports to the FISC, including as to incidents of non-compliance. *See id.*; *see also* 50 U.S.C. § 1881a(1). The FISC's role provides a reasonable safeguard under the Fourth Amendment for addressing any compliance incidents, *see* Def. Mem. at 51, and this Court should not review (nor need to review) the FISC's supervision of any activities that are ongoing under Title I in order to uphold the facial validity of the Act.

I respectfully request that this letter be docketed. Thank you for your consideration.

Respectfully,

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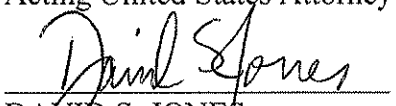
U.S. Department of Justice

LEV L. DASSIN
Acting United States Attorney

By: 
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