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January 27, 2009

BY HAND
The Honorable John G. Koeltl
United States District Judge
Daniel Patrick Moynihan
United States Courthouse
500 Pearl Street, Room 1030
New York, New York 10007

Re: *Amnesty Int'l USA, et al. v. McConnell, et al.*, 08 Civ. 6259 (JGK)

Dear Judge Koeltl:

We represent defendants (collectively, "the Government") in the above-referenced action, in which plaintiffs seek to challenge the constitutionality of the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801, *et seq*. ("FISA"), as amended by the Foreign Intelligence Surveillance Act Amendments Act of 2008 ("FAA"), codified in relevant part at 50 U.S.C. § 1881a ("§ 1881a"). We write to bring to the Court's attention the FISA Court of Review's recently released unclassified version of its opinion in *In re Directives Pursuant to Section 105B of the Foreign Intelligence Surveillance Act*, No. 08-01, __ F.3d __ (FISA Review Ct. Aug. 22, 2008) (copy enclosed), which is of significant relevance to this litigation.[1]

In re Directives concerns an as-applied challenge to the constitutionality of the Protect America Act of 2007 ("PAA"), Pub. L. No. 110-55, 121 Stat. 552 – the predecessor to the FAA. The challenge was brought by a private party that had been directed by the Government to assist in effectuating surveillance under the statute. The case was heard initially by the Foreign Intelligence Surveillance Court ("FISC"), which upheld the PAA against the petitioner's challenge; on appeal, the FISA Court of Review affirmed. The Court of Review concluded that the surveillance at issue fell within the foreign intelligence exception to the warrant requirement and was otherwise reasonable under the Fourth Amendment.

[1] The Government was unable to incorporate an analysis of the opinion into its recently filed cross-reply because the opinion was released in unclassified form only a day before the cross-reply was due.

It should be noted that the PAA was not identical to, and in certain respects was broader than, the provision of the FAA at issue here, *viz.*, § 1881a. Most notably, the PAA authorized surveillance of "persons reasonably believed to be outside the United States" *without distinguishing* between U.S.- and non-U.S. persons, *see* slip op. at 4, whereas § 1881a authorizes only surveillance of non-U.S. persons outside the United States. Moreover, the petitioner in *In re Directives* limited its claims to alleged injuries to U.S. persons. *See id.* at 11. Thus, the analysis in *In re Directives* addresses certain issues specific to foreign intelligence surveillance targeted at U.S. persons abroad, which are not relevant here.[2]

The bulk of the opinion in *In re Directives*, however, addresses issues that directly parallel those raised in this litigation. Indeed, in upholding the constitutionality of warrantless foreign intelligence surveillance of overseas targets, notwithstanding the concomitant risk of incidentally or inadvertently collecting the communications of non-targeted U.S. persons, the opinion squarely rejects many of the arguments plaintiffs make here in challenging § 1881a. Specifically, the opinion:

- rejects the argument that the foreign intelligence exception to the Fourth Amendment's warrant clause is limited to surveillance whose "primary purpose" is intelligence collection as distinct from criminal investigation, slip op. at 15-17;
- 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," explaining that this view of reasonableness would effectively "reincorporate . . . the same warrant requirements that we already have held inapplicable," *id.* at 20;
- rejects "concerns about potential abuse of executive discretion," finding them to constitute "little more than a lament about the risk that government officials will not operate in good faith" – a risk that "exists even when a warrant is required," *id.* at 24;

[2] In particular, the Court of Review upheld the PAA based in part on the fact that any surveillance of U.S. persons under the statute was subject to § 2.5 of Executive Order 12333, which requires the Attorney General to find probable cause that a U.S. person abroad is an agent of a foreign power before subjecting the person to surveillance that would require a warrant if undertaken for law enforcement purposes. *See* slip op. 22-23. (The FAA codified the requirements of § 2.5 of Executive Order 12333, in provisions separate from § 1881a. *See* FAA §§ 703, 704 (codified at 50 U.S.C. §§ 1881b, 1881c)). Here, by contrast, plaintiffs argue that reasonableness requires probable cause for surveillance targeted at *non*-U.S. persons abroad – which was *not* required under either the PAA or Executive Order 12333 and, as we have argued, is not required by the Fourth Amendment.

- rejects concerns about incidental collection of U.S. persons' communications as "overblown," given that "[i]t is settled beyond peradventure that incidental collections occurring as a result of constitutionally permissible acquisitions do not render those acquisitions unlawful," *id*. at 26; and

- rejects concerns about inadvertent surveillance of U.S. persons, given that the Government's targeting procedures included provisions designed to prevent errors and were subject to semi-annual compliance reviews, *id.* at 26, and moreover, to the extent that errors might nonetheless occur, minimization procedures would mitigate their impact, *id*. at 25.[3]

The Government submits that the FISA Court of Review's analysis is persuasive on all of these points. As our summary judgment papers explain in full, this Court should reach the same holdings in rejecting plaintiffs' challenge to the constitutionality of § 1881a.

We thank the Court for its consideration of this submission.

Respectfully,

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[3] The opinion also rejects concerns over the PAA's lack of a particularity requirement, finding that certain pre-surveillance procedures used by the Government were sufficient to satisfy particularity concerns. *Id.* at 22. Analogously, the Government has argued here that plaintiffs have no basis to presume that indiscriminate targeting procedures will be used by the Government in conducting § 1881a acquisitions. *See* Gov't Br. 36.